Migration and Central Europe

Challenges and Legal Responses

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Edited by
Anikó Raisz

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Foreword

Anikó Raisz

A dolgok nemcsak önmagukban vannak: perspektívájuk is van. Ezért soha ne mondjad egy tüneményről: "ilyen vagy olyan" – csak ezt mondjad: "ebből és ebből a távlatból ilyennek látszik."

Márai Sándor

Things do not exist on their own: they have perspectives as well. Therefore, never say about a phenomenon that it is "like this" or "like that" – just say: "from this and this perspective it looks like this".

Sándor Márai

Law is art, and art reflects the people: both those who create it and those who accept it (the 'consumers'). Thus, to understand a legal phenomenon, particularly that which influences the lives of people in so many ways, it is necessary to focus on the circumstances in which a legal norm is developed and implemented. Migration has been the single most controversial phenomenon in Europe over the past fifteen years. Rooted in both unavoidable and avoidable circumstances, understanding the events requires a close examination of the attitudes in Eastern Central Europe.

This volume comprises chapters written by Eastern Central European authors. They assess the issue of terminology, as a significant challenge is to ensure the use of appropriate terms in appropriate contexts. The volume repeatedly indicates that it is not always self-evident, although it is of utmost importance that we do not confuse the categories. Several chapters address the international framework, directing our attention to the United Nations as well as the regional frameworks: the Council of Europe and the European Union. We included a chapter on the practices of constitutional courts within national systems of the region. Related issues, such as border controls, the Schengen area, the Dublin system and the EU-Turkey deal, are addressed in separate chapters. Additionally, the overall impact of migration on local societies including mass migration, is addressed in this volume.

It is clear that the institutions and instruments concerning migration have had to respond to unforeseen challenges. The conventions adopted in the framework of the United Nations are – as multilateral conventions are in general – often vague and adopted by many countries worldwide, hence, appropriate for a wider range of

situations, including the most important safeguards, without too many details. In the Council of Europe, migration issues are considered within the scope of human rights, hence, individual human rights are prioritised over large-scale applicability. Nevertheless, the applicability of the norms is crucial. Therefore, this volume analyses many aspects of the more detailed European Union rules in this regard, indicating solutions which may, or may not, contribute to effective management of the modern phenomenon of migration.

This volume uses the philosophy that the application of the law must consider the society in which it is applied. Societies of the states which did not participate in colonisation, and, as such, have not faced migration in the present scale before, react differently. These societies are ready to take responsibility if refugees arrive, see the responses of Poland, Hungary, Slovakia, Romania and the others to the influx of refugees from Ukraine in the past two years. However, they are more reserved about large-scale migration – in 2015, Hungary witnessed an influx of approximately 400.000 people — equivalent to the population of the second largest city in Hungary. Clearly, such scales would not correspond to the sovereign decision of any state about an actual component of statehood, population. As more states recognise this, important achievements such as the Schengen area have become jeopardised.

Overall, the issue of migration should be assessed from different perspectives. This volume contributes to this understanding, by addressing all relevant aspects of this significant challenge.

CHAPTER I

Beyond Borders: A Comparative Analysis of "Migrant" and "Refugee" Protections in International and EU Law

Marcin Wielec

Abstract

This chapter presents a comparative analysis of the terms "refugee" and "migrant" and the forms of protection they are granted under international and European Union (EU) laws. The text also includes information and insights into the Serbian, Croatian, Slovenian, Romanian, Czech, Slovak, Hungarian, and Polish legal frameworks. First, the chapter begins with a concise introduction, outlining the general subject and scope of the study. Second, the manner in which globalisation is the basis for migration and refugees is analysed and presented. Third, the levels of regulation and types of legislation defining the migration and refugee processes were addressed. Fourth, a review of the EU legislation on migration, including asylum laws, is presented. Fifth, the legal stages of the migrant and refugee concepts were examined. Sixth, general considerations of the concepts of migrants and refugees are presented. Seventh, a legal and comparative account of migration and refugee terms is discussed. Eighth, definitions of migration and refugees in international and EU laws are presented. The focus on international and EU law should not be taken as an indication of the author's position regarding the nature of EU law as either an autonomous branch or a part of international law; the distinction is made solely to aid in clarity. The chapter concludes with a concise summary of the overall conclusions, which are presented at 10 key points. Finally, the author's main thesis on this topic is presented.

Keywords: migrant, refugee, comparative analysis, international law, EU law.

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1. Introduction

In recent years, broadly defined migration and refugee issues have come to the forefront. Undoubtedly, migration and refugeeism – generally speaking, phenomena in which people move from one place to another – bring together many interesting and controversial issues. Constructing the causes and aspects of a person's change in location and residence has interesting consequences. There are many scientific approaches to this issue in domains other than law, and it is clearly a multidisciplinary problem.[1]

Within the scope of the concepts of migration and refugeeism, a variety of issues can be recognised, some of which have significant impacts. There is no doubt that migration and refugees are linked to issues related to State security, the social structure of a State, and cultural and worldview issues, all of which imply further issues related to the development of State economies, the preservation of traditions, national unity, and even the history of States. Each of these areas comprises knotty issues connected with the proper functioning of individual States.

This article delineates the conceptual underpinnings of "migrant" and "refugee" statuses as defined by pivotal legal instruments such as the 1951 Refugee Convention and its 1967 Protocol, alongside relevant EU directives and national legislation. Through a meticulous analysis of these legal texts, this study reveals the complexities and nuances involved in categorising individuals facing adverse conditions, highlighting the necessity of legal frameworks to adapt to the dynamic nature of global migration. Engaging with contemporary issues, this manuscript underscores the impact of globalisation, climate change, and the COVID-19 pandemic on migration patterns, advocating legal and policy responses that are sensitive to the evolving geopolitical context of the second decade of the 21st century. Through this analysis, this article contributes to the scholarly discourse on migration and refugee law by offering insights into potential directions for future legal and policy developments. This study aims to inform and influence policymakers, legal scholars, and practitioners by providing a nuanced understanding of the legal categorisations of migrants and refugees and encouraging a more empathetic and informed approach to addressing the challenges they face.

1 See, for example: Vourc'h, De Rudder and Tripier, 1999, cited in Wrench, Rea and Ouali, 1999, pp. 72–92; Vlachopoulos et al., 2016, cited in Munyangeyo, Webb and Rabadán-Gómez, 2016, pp. 213–234; Sandoz, 2019, pp. 53–93; Hoffmeyer-Zlotnik, 2003, cited in Alba, Schmidt and Wasmer, 2003, pp. 255–268; Lodzinski, 1999, cited in Iglicka and Sword, 1999, pp. 66–89; Jahn, 2015, pp. 75–90; Heitmeyer, 1993, cited in Björgo and Witte, 1993, pp. 17–28; Münz and Ulrich, 2003, cited in Alba, Schmidt and Wasmer, 2003, pp. 19–43; D'Amato, 2015, cited in Burchardt and Michalowski, 2015, pp. 285–301; Wasmer and Koch, 2003, cited in Alba, Schmidt and Wasmer, 2003, pp. 95–118; Guiraudon, 1998, cited in Rothstein and Steinmo, 1998, pp. 129–156; Kajita, 1998, cited in Weiner and Hanami, 1998, pp. 120–147.

2. Globalisation as a basis for migration and refugees

There is no doubt that both migration and refugeeism have a global dimension and thus go well beyond any single entity or direction of movement; they are deeply influenced by geopolitical factors such as conflicts, economic instability, and political tensions, which continue to force individuals to seek refuge outside their home countries. Globalism is a unique feature of modern times. The concept of globalism and, by extension, globalisation, has, in the first instance, strict economic connotations; however, the term has also been applied to other areas, including social relations. The situation is further complicated by the role of climate change in exacerbating the migration and refugee crises and the recent global disruptions caused by the COVID-19 pandemic. A general feature of global phenomena is their rapid dynamics in different areas as well as their interpenetration or interdependence. This leads to increased interconnectedness and interdependence among the world's economies, societies, and cultures, which significantly influences migration patterns. For example, the markets for goods, services, production, industry, technology,[2] and knowledge are subject to globalisation; this also applies to patterns of consumption and mass culture as well as the directions of development of entire communities.[3] It has been argued that 'at the core of the globalisation process lies not only the market economy, but also a civilisation and cultural system, derived from the broader civilisation of Europe'.[4]

It is precisely the civilisation of Europe that has grown and achieved considerable economic success and has become a crucial area and key target of human transfer processes. Due to the pandemic, Europe is now faced with the challenges of ensuring robust health and safety protocols, equitable access to healthcare, and the inclusion of migrant and refugee populations in national and international response strategies. There is a lot of truth in the view that 'at the same time globalisation is becoming a very controversial phenomenon, especially from the point of view of income redistribution, the economic sovereignty of countries, or the availability of raw materials'.[5] Elsewhere, it is pointed out that while globalisation involves the integration of countries and people in order to facilitate movement and relationships by overcoming barriers, it also contributes to the displacement of populations by intensifying economic disparity, conflict, and environmental degradation. The author absolutely agrees that 'one of the negative phenomena that globalisation is associated with is ever-widening social inequalities'.[6]

The determinants of the decision to emigrate or become a refugee include social policies, standards of living, security, and increased certainty about one's future life.

2 For new technology law, see, e.g., Oręziak, 2020, pp. 187–194; Karski and Oręziak, 2021, pp. 242–261; Oręziak and Świerczyński, 2019, pp. 257–275; Karski and Oręziak, 2021, pp. 55–69.
3 Maśloch, 2005, p. 18.
4 Kleer, 2008, p. 38.
5 Ciborowski, 2003, p. 163.
6 Iwaszczuk, Łamasz and Orłowska-Puzio, 2016, p. 161.

This complexity emphasises the need for a broader perspective on the current era, particularly focusing on the globalisation impact of globalisation on these issues. The globalisation we discuss here undoubtedly motivates and shapes the forms of both migration and refugeeism in a fundamental way.

3. Levels of regulation and types of legislation in defining migration and refugee processes

Having pointed out that migration and refugees have a global character, it is now worth considering the power that may prevail over these two phenomena–that is, the legal treatment of these two concepts. Importantly, although both phenomena may benefits to individual States, they may also pose threats. Therefore, it is necessary to develop precise mechanisms to control migration and refugee processes so that they are kept under strict control and conducted in a predictable and safe manner. A central point here is that a person who decides to migrate or become a refugee should be aware of his or her position, which is completely transformed by such a decision. Such decisions result in new responsibilities and rights. Clarity regarding the position of migrants and refugees must be provided elsewhere. The only effective tool here is, of course, the law, which is understood as a set of rules of conduct and orders and sets the boundaries of these two social processes. Transparency and control over migration and refugeeism can be introduced through legal regulations.

The terms migration/migrant and refugee were ambiguous. Clearly, there are substantial differences between the reasons and prerequisites for the decision to migrate and become a refugee. This is why legal regulations are so important and should be the exact instructions for the migration or refugee model.

The first level of regulation that defines these two phenomena is the domestic law. This is the first source area and perhaps the most important from the perspective of the State's interests. Domestic law should benefit the communities in a State. Domestic law must synchronise the needs and requirements of communities within a State with the requirements and future challenges faced by the State's authorities. Any legislation regarding the process of migration or refugeeism must take into account this synchronisation. Migration and refugee processes are ever-present; these processes have been, are, and will continue to be active. Therefore, it is imperative to create a workable legal mechanism that allows for the positive use of migration or refugeeism for the common good of a country's communities. Therefore, national law determines specific solutions for migration and refugee processes by considering the country's specificities, traditions, and needs. Accordingly, national migration and refugee legislation must determine the rationale, course, and components of these processes as well as the conditions for the assimilation of migrants and refugees.

The second level of regulation is international law. This is also an inevitable area because, as indicated in the Introduction, both the migration and refugee processes have a global scope, necessitating international regulations. International cooperation is essential and laws must provide reciprocal rules underpinning such cooperation. Notably, international cooperation is much more important for refugees who are not primarily driven by individual needs, as in the case of migration. Migration generally has a volitional basis; it depends on the needs and goals of the migrating individual, and the migrant is rarely forced to make such a decision. In the case of becoming a refugee, there are large-scale factors often influence the decision to migrate when becoming a refugee. For example, warfare, the initiation and conduct of which are not under the control of the individual – would clearly influences the decision to become a refugee. Hence, the role of international legislation is very important in this regard.

The third area is European Union (EU) legislation. The EU is a union of States in which legislation plays an important role. The law must be created on the basis of a series of consensuses and compromises reached among the EU Member States. As a result, the EU has only the competencies conferred on it by Treaties (the principle of conferral). According to this principle, the EU can only act within the limits of the competencies granted to it by EU countries under the Treaties to achieve the objectives contained therein. Competencies not conferred on the EU by the Treaties are the responsibilities of individual EU countries. The EU has only those competences conferred on it by the Treaties and cannot increase, limit, or modify its competences by its own power, which are decided by its Member States. Changes to the scope of competences conferred on the EU in the Treaties can only take place through the ordinary procedure for amending the Treaties, as provided for in Art.s 48(2) to (5) of the Treaty of the European Union (TEU).[7] Amendments are enforced after they are ratified by all Member States, in accordance with their respective constitutional requirements. This process is generally based on so-called strategic priorities, including the so-called policies of the EU, one of which is *the migration policy*.[8] The European Council plays a large role, which develops courses of action based on these and provides a mandate for negotiations with third countries. Hence, the European Union has adopted many large-scale legal regulations related to the management and control of migration processes (procedures for processing asylum applications and procedures for returning illegal migrants).

7 Consolidated versions of the TEU and the Treaty on the Functioning of the European Union (TFEU) Consolidated version of the Treaty on European Union Consolidated version of the Treaty on the Functioning of the European Union Protocols Annexes to the Treaty on the Functioning of the European Union Declarations annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007 Tables of equivalences (OJ C 202, 7.6.2016, p. 1-388).

8 See, e.g., Stalker, 2002, pp. 151–179; Niemann and Natascha, 2023, pp. 2965–2985; Straubhaar and Zimmermann, 1993, pp. 225–241.

It is also worth noting that within these two areas of national and international law, there are particular types of rules, namely, substantive and formal. The former are categorised as substantive laws, that is, laws that determine the basis of a given regulation or institution. The second type constitutes formal law, that is, the regulation of how these regulations or institutions are applied. Substantive law is a set of legal norms directly defining the relations between individuals; it specifies the prerequisites for the emergence, change, or termination of these relations. Accordingly, legal norms that regulate certain obligations, prohibitions, orders, and sanctions are sometimes envisaged for non-compliance to these regulations. Formal law, on the other hand, is the designation of the body of legal norms regulating the principles and manner of conduct (procedure) of a specific body in deciding matters.[9] Formal law, often referred to as procedural law, aims to implement substantive laws. Since substantive law contains definitions, formal law already contains rules on how to apply such definitions by determining, for example, how to acquire refugee status.

For example, in Poland, migration issues are closely related to the definition of foreigners. While there is no law in the Polish legal system regulating issues such as immigration, the Act of 12 December 2013 provides the basis for defining foreigners.[10] According to this Act (based on Art. 3), foreigners are any person who does not have Polish citizenship. This is an example of a substantive law provision as it defines the relationship between the State and the individual. In this particular State, this relationship is regulated in the legal system by recognising who is a foreigner and who is not. As a result, anyone who does not have Polish citizenship is considered a foreigner in legal terms in Poland and thus also a stateless person.[11] This is an example of substantive law. Furthermore, the procedures for acquiring and losing Polish citizenship are regulated by the Act of 2 April 2009 [12] which contains many formal provisions related to the commencement, course, and completion of the process of acquiring or losing Polish citizenship.

In light of the background discussed above, two vast blocks of legal regulations have emerged, which can be accurately referred to as migration law and refugee law; both blocks contain legal regulations. In general, both blocks are areas of international law and EU law, but, above all, are national laws. A fundamental issue is the scope of regulations, which differs between migrants and refugees. While migrants move for private purposes, refugees, driven by circumstances completely beyond their control, flee from war, persecution, or general ill treatment. In addition, it may be noted that the law, as a reflection of values, presupposes the realisation of different values at various levels of regulation. That is, owing to their distinct definitions, different values underlie the regulations related to migrants and refugees.

9 Available at: https://encyklopedia.pwn.pl/haslo/prawo-formalne;3961851.html (Accessed: 5 November 2023).

10 Consolidated text: Journal of Laws from 2023 items 519, 185, 547.

11 See, e.g., Kerber, 2007, pp. 1–34; Berkeley, 2009, pp. 3–15; Kane, Gezy and Miho, 2023, pp. 261–278.

12 Consolidated text: Journal of Laws from 2023, item 1989.

4. Review of EU legislation on migration law, including asylum law

By referring in detail to areas of EU law, it can be seen that a common asylum policy is an integral part of the EU's objective of establishing and systematically enlarging an area which is open to all those whose circumstances force them to seek legal protection. Nevertheless, asylum law issues are generally only a part of migration law in general. Therefore, given the current level of migration in Europe,[13] it seems justified to present an overview of EU legislation on migration laws to fully illustrate the scope of the issue under discussion. All such activities, both now and in the past, have focused on increasing the degree and sophistication of legal protection for migrants in the EU.[14] The effect of such activities is ultimately to harmonise the protection standards found in the various Member States, which are served by EU secondary law. Nevertheless, relevant provisions can also be found in EU primary law, more specifically, in the Treaty on the Functioning of the European Union (TFEU).[15]

Art. 20 of the TFEU establishes EU citizenship. An EU citizen is one who holds the nationality of an EU member. This adds to, but does not replace, national citizenship. EU citizens enjoy these rights and are subject to obligations stipulated by primary law. This means that they have, inter alia, the right 1) to move and reside freely within the territory of the Member States; 2) to vote and stand as candidates in elections to the European Parliament and in municipal elections in their Member State of residence, under the same conditions as nationals of that State; 3) to enjoy, in the territory of a third country in which the Member State of which they are nationals is not represented, the protection of the diplomatic and consular authorities of any other Member State, on the same conditions as the nationals of that State; and 4) to petition the European Parliament, to apply to the European Ombudsman, and to address the institutions and advisory bodies of the Union in any of the Treaty languages and to obtain a reply in the same language.

These rights are exercised in accordance with the conditions and limits laid down by primary and secondary EU law. In turn, under Art. 21 of the TFEU, every EU citizen has the right to move and reside freely within the territory of Member States, subject to the limitations and conditions laid down by primary or secondary EU law. Conversely, if attaining this objective requires EU action and the EU primary law does

13 Also called the migration crisis: Szymańska, 2017, p. 164; Korczak, 2017, cited in Pasamonik and Markowska-Manista, 2017, p. 69; Zygadlewicz, 2016, p. 17.

14 Some EU legislation no longer in force is also included.

15 Consolidated versions of the TEU and the TFEU Consolidated version of the Treaty on European Union Consolidated version of the Treaty on the Functioning of the European Union Protocols Annexes to the Treaty on the Functioning of the European Union Declarations annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007 Tables of equivalences (OJ C 202, 7.6.2016, p. 1-388).

not provide the necessary powers, the European Parliament and Council of the European Union, acting in accordance with ordinary legislative procedures, may adopt provisions to facilitate the exercise of these rights. In addition, for exactly the same purposes, and where primary law does not provide for powers to act, the Council of the European Union, acting in accordance with a special legislative procedure, may adopt measures concerning social security or social protection. In such cases, the Council of the European Union acts unanimously after consulting the European Parliament. In contrast, in light of Art. 78 of the TFEU, the EU shall develop a common policy on asylum, subsidiary protection, and temporary protection with a view to granting appropriate status to any third-country national requiring international protection and with a view to ensuring compliance with the principle of non-refoulement. This policy must be in line with the Geneva Convention of 28 July 1951[16] and the Protocol of 31 January 1967 relating to the Status of Refugees,[17] as well as with other relevant Treaties. For this purpose, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures for a Common European Asylum System comprising 1) a uniform status of asylum for third-country nationals, valid throughout the Union; 2) a uniform status of subsidiary protection for third-country nationals who, without obtaining European asylum, are in need of international protection; 3) a common system of temporary protection for displaced persons in the event of a massive inflow; 4) common procedures for the granting and withdrawing of uniform asylum or subsidiary protection status; 5) criteria and mechanisms for determining which Member State is responsible for considering an application for asylum or subsidiary protection; 6) standards concerning the conditions for the reception of applicants for asylum or subsidiary protection; and 7) partnership and cooperation with third countries for the purpose of managing inflows of people applying for asylum or subsidiary or temporary protection.

In the event of one or more Member States being confronted by an emergency characterised by a sudden inflow of third-country nationals, the Council, on a proposal from the Commission, may adopt provisional measures for the benefit of the Member State(s) concerned. In this case, the Council acts after consulting the European Parliament. In turn, in accordance with Art. 79 of the TFEU, the EU shall develop a common immigration policy aimed at ensuring, at all stages, the effective management of migration flows, fair treatment of third-country nationals legally residing in Member States, and the prevention and enhanced fight against illegal immigration and human trafficking. To achieve this, the European Parliament and the Council of the European Union, acting in accordance with the ordinary legislative procedure, shall adopt measures in the following areas: 1) conditions of entry and residence and standards on the issue of long-term visas and residence permits by Member States, including those for the purpose of family reunification; 2) the definition of the rights of third-country nationals residing legally in a Member State,

16 Journal of Laws from 1991 no. 119, item 515.
17 Journal of Laws from 1991 no. 119, item 517.

including the conditions governing freedom of movement and residence in other Member States; 3) illegal immigration and unauthorised residence, including removal and repatriation of persons residing without authorisation; and 4) combating human trafficking, in particular of women and children. The EU may also conclude agreements with third countries for the readmission of third-country nationals who do not fulfil the conditions for entry, presence, or residence in the territory of one Member State to their countries of origin or arrival.

In addition, the European Parliament and Council, acting in accordance with ordinary legislative procedure, may establish measures to encourage and support the action of Member States taken to promote the integration of third-country nationals residing legally in their territories, excluding any harmonisation of the laws and regulations of the Member States. It is worth stressing, however, that Art. 79 of the TFEU is not prejudiced to the right of Member States to determine the volume of admission of third-country nationals entering their territory in search of employment or self-employment.

Several pieces of EU secondary legislation were intended to harmonise Member States' national migration laws, including asylum or refugee laws, as detailed below.

Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 established the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one Member State by a third-country national or stateless person (Dublin III Regulation),[18] which aims to establish criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one Member State by a third-country national or stateless person.

Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers,[19] which establish standards for the reception of applicants for international protection in EU Member States. This Directive was repealed by Directive 2013/33/EU of the European Parliament and Council on 26 June 2013 which laid down standards for the reception of applicants for international protection.

Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification,[20] which aims to define the conditions for exercising the right to family reunification of third-country nationals residing lawfully in the territories of Member States.

Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents,[21] the purpose of which is to lay down a) the conditions for granting and withdrawing long-term resident status by a Member State to third-country nationals legally residing within its territory, as well

18 OJ L 180, 29.6.2013, pp. 31–59.
19 OJ L 31, 6.2.2003, pp. 18–25.
20 OJ L 251, 3.10.2003, pp. 12–18.
21 OJ L 16, 23.1.2004, pp. 44–53.

as the rights attached to that status; and b) the conditions of residence in Member States other than the one which granted long-term resident status to third-country nationals enjoying that status.

Council Directive 2003/110/EC on 25 November 2003 on assistance in cases of transit for the purposes of removal by air,[22] the purpose of which is to define measures concerning assistance which may be taken by competent authorities at airports of transit in Member States with regard to escorted and unescorted removals by air.

Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the rights of citizens of the Union and their family members to move and reside freely within the territory of the Member States,[23] which aims to establish a) the conditions governing the exercise of the right of free movement and residence within the territories of the Member States by Union citizens and their family members; b) the right of permanent residence in the territories of the Member States for Union citizens and their family members; and c) the limits placed on the rights set out in (a) and (b) on the grounds of public policy, public security, or public health.

Council Directive 2004/81/EC on 29 April 2004 on the residence permit issued to third-country nationals who are victims of human trafficking or who have been the subject of an action to facilitate illegal immigration, who cooperate with competent authorities;[24] this aims to define the conditions for granting temporary residence permits (the duration of which is linked to the length of the relevant national proceedings) to third-country nationals who cooperate in the fight against human trafficking or the facilitation of illegal immigration.

Council Directive 2004/82/EC of 29 April 2004 on the obligation of carriers to communicate passenger data[25] aimed at combating illegal immigration and improving border controls through the transmission of advance passenger data by carriers to competent national authorities.

Council Directive 2004/83/EC on 29 April 2004 on minimum standards for the qualification and status of third-country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted,[26] which aims to define the minimum standards for the qualification of third-country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted. This Directive was repealed by 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, which sought a uniform status for refugees or for persons eligible for subsidiary protection and for the content of the protection granted.

22 OJ L 321, 6.12.2003, pp. 26–31.
23 OJ L 158, 30.4.2004, pp. 77–123.
24 OJ L 261, 6.8.2004, pp. 19–23.
25 OJ L 261, 6.8.2004, pp. 24–27.
26 OJ L 304, 30.9.2004, pp. 12–23.

Council Directive 2005/85/EC on 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status,[27] which aims to define minimum standards on procedures in Member States for granting and withdrawing refugee status. This Directive was repealed by Directive 2013/32/EU of the European Parliament and the Council on 26 June 2013 on common procedures for granting and withdrawing international protection.

Council Directive 2004/114/EC on 13 December 2004 on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training, or voluntary service,[28] which aimed to lay down: a) the conditions of admission of third-country nationals to the territory of the Member States for a period exceeding three months for the purposes of studies, pupil exchange, unremunerated training, or voluntary service; and b) the rules concerning the procedures for admitting third-country nationals to the territory. This Directive was repealed by Directive (EU) 2016/801 of the European Parliament and the Council on 11 May 2016 on the conditions of entry and residence of third-country nationals for the purposes of research, studies, training, voluntary service, pupil exchange schemes or educational projects, and au pairing.

Council Directive 2005/71/EC on 12 October 2005 on a specific procedure for admitting third-country nationals for the purposes of scientific research,[29] aims to lay down the conditions for the admission of third-country researchers in Member States for more than three months to carry out a research project based on a hosting agreement with a research institution. This Directive was repealed by Directive (EU) 2016/801 of the European Parliament and the Council on 11 May 2016 on the conditions of entry and residence of third-country nationals for the purposes of research, studies, training, voluntary service, pupil exchange schemes or educational projects, and au pairing.

Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States to return illegally staying third-country nationals,[30] which aims to define common standards and procedures to be applied in Member States to return illegally staying third-country nationals in accordance with fundamental rights as general principles of community law and international law, including refugee protection and human rights obligations.

Council Directive 2009/50/EC on 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment,[31] which aims to define a) the conditions of entry and residence of third-country nationals and EU Blue Card holders in the territory of Member States for more than three months for the purposes of highly qualified employment as well as the conditions of entry and residence of their family members; and b) the conditions of entry

27 OJ L 326, 13.12.2005, pp. 13–34.
28 OJ L 375, 23.12.2004, pp. 12–18.
29 OJ L 289, 3.11.2005, pp. 15–22.
30 OJ L 348, 24.12.2008, pp. 98–107.
31 OJ L 155, 18.6.2009, pp. 17–29.

and residence of third-country nationals and their family members referred to above in the territory of Member States other than the first Member State.

Directive 2009/52/EC of the European Parliament and the Council of 18 June 2009 provided minimum standards on sanctions and measures against employers of illegally staying third-country nationals,[32] which aims to prohibit the employment of illegally staying third-country nationals to combat illegal immigration. To this end, it lays down common minimum standards on sanctions and measures to be applied in Member States against employers who infringe upon this prohibition.

Directive 2011/95/EU of the European Parliament and Council on 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,[33] aims to define 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.

Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State,[34] which aims to establish: a) a single application procedure for issuing a single permit for third-country nationals to reside for the purpose of work in the territory of a Member State, in order to simplify the procedures for their admission and to facilitate the control of their status; and b) a common set of rights to third-country workers legally residing in a Member State, irrespective of the purposes for which they were initially admitted to the territory of that Member State, based on equal treatment with nationals of that Member State.

Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection,[35] which aims to establish common procedures for granting and withdrawing international protection under Directive 2011/95/EU.

Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection,[36] which aims to establish standards for the reception of applicants for international protection in Member States.

Directive 2014/36/EU of the European Parliament and of the Council of 26 February 2014 on the conditions of entry and stay of third-country nationals for the

32 OJ L 168, 30.6.2009, pp. 24–32.
33 OJ L 337, 20.12.2011, pp. 9–26.
34 OJ L 343, 23.12.2011, pp. 1–9.
35 OJ L 180, 29.6.2013, pp. 60–95.
36 OJ L 180, 29.6.2013, pp. 96–116.

purpose of employment as seasonal workers,[37] which aims to define the conditions of entry and residence as well as the rights of third-country nationals for the purposes of seasonal employment.

Directive 2014/54/EU of the European Parliament and of the Council of 16 April 2014 on measures facilitating the exercise of rights conferred on workers in the context of workers' freedom of movement,[38] which aims to facilitate the uniform application and enforcement of the rights conferred under Art. 45 TFEU (Freedom of movement for workers) and Art. 1-10 of Regulation (EU) No 492/2011 of the European Parliament and of the Council on 5 April 2011 on freedom of movement for workers within the union.[39] This Directive applies to EU citizens exercising these rights, as well as their family members.

Directive 2014/66/EU of the European Parliament and of the Council of 15 May 2014 on the conditions of entry and residence of third-country nationals in the framework of an intracorporate transfer,[40] which aims to define: a) the conditions of entry to and residence for more than 90 days within the territory of Member States of third-country nationals and of their family members in the framework of an intracorporate transfer, as well as their rights; b) the conditions of entry and residence, and the rights of third-country nationals, referred to in point (a), in Member States other than the Member State which first grants the third-country national intracorporate transferee permit on the basis of the Directive.

Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services,[41] which aims to ensure that an adequate level of protection of the rights of workers posted for the cross-border provision of services is respected; in particular, the enforcement of the terms and conditions of employment applicable in the Member State where the service is to be provided, in accordance with Art. 3 of Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning[42] the posting of workers in the framework of the provision of services. This facilitates the exercise of freedom by service providers to provide services and seeks to promote fair competition between service providers, thereby supporting the functioning of the internal market.

Directive (EU) 2016/801 of the European Parliament and of the Council of 11 May 2016 on the conditions of entry and residence of third-country nationals for the purposes of research, studies, training, voluntary service, pupil exchange schemes or educational projects and au pairing,[43] which aims to define: a) the conditions of entry to and residence for a period exceeding 90 days within the territory of the Member States

37 OJ L 94, 28.3.2014, pp. 375–390.
38 OJ L 128, 30.4.2014, pp. 8–14.
39 OJ L 141, 27.5.2011, pp. 1–12.
40 OJ L 157, 27.5.2014, pp. 1–22.
41 OJ L 159, 28.5.2014, pp. 11–31.
42 OJ L 18, 21.1.1997, pp. 1–6.
43 OJ L 132, 21.5.2016, pp. 21–57.

of third-country nationals, and where applicable their family members, for the purpose of research, studies, training, or voluntary service in the European Voluntary Service, and where Member States so decide, pupil exchange schemes or educational projects, voluntary service other than the European Voluntary Service, or au pairing (as well as the rights of such third-country nationals); and b) the conditions of entry and residence, and the rights, of researchers, and where applicable their family members, and students, referred to in point (a), in Member States other than the Member State which first grants the third-country national an authorisation on the basis of the Directive.

The general overview above focuses on EU legislation in terms of migration laws, which is the matrix for a specific section of asylum or refugee laws. It follows that the core of asylum law, which is an integral part of the EU's goal of establishing and systematically enlarging the space open to all those whose circumstances compel them to seek legal protection in the EU, currently consists of: Art. 79 TFEU; 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; Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection; and Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection. This approach reveals the EU's steadfast commitment to fostering an inclusive environment for individuals compelled to seek refuge because of adverse circumstances. This legislative landscape, which is intricately woven with the principles of solidarity and protection, is manifested through a harmonious blend of primary and secondary EU laws. These rules demonstrate the EU's comprehensive approach to managing migration and providing asylum by outlining not just the rights of EU citizens but also offering protection to people of third countries who need such protection.

5. Legal stages of the migrant and refugee concepts

The levels of legal regulations relating to migrants and refugees, particularly in the area of EU law discussed in detail above, have specific components. It has three components: qualification, reception, and procedures.

Qualification refers to the criteria for recognising whether a person can be legally recognised as a refugee or migrant (qualifying conditions, e.g. whether someone is fleeing war, looking for work, or an EU citizen). Reception refers to the description of rules for the treatment of persons undergoing migration or the refugee process. In other words, it defines the rules for receiving foreigners when they arrive in a country (reception conditions).

Both qualification and reception are largely norms of substantive law, which require the norms of formal law to be activated, realised, and applied. Hence, the third component precisely comprises the procedure (formal law), that is, the legal norms providing for a procedural model related to the granting or receiving of refugee status and the realisation of migrant status, as well as the norms providing for international protection (refugees) or rules of temporary residence (migrants).

The proposed distinction among qualification, reception, and procedures is derived from legal regulations on international protection. An example of qualification is the regulations of Directive 2011/95/EU of the European Parliament and of the Council on 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 (recast). An example of reception can be found in the regulations of Directive 2013/33/EU of the European Parliament and the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast). Finally, an example of the procedure is the regulations of Directive 2013/32/EU of the European Parliament and Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast).

In summary, this section meticulously delineates the essential legal processes – qualification, reception, and procedures – that frame the EU's approach to managing migrants and refugees. Through the lens of significant directives, it outlines the criteria for recognising refugees or migrants, standards for their treatment, and procedural guidelines for granting these statuses. This examination prompted vital consideration regarding the adequacy of these stages in addressing the complexities of migration and asylum. As we proceed to a general discussion of the concepts of "migrant" and "refugee", it becomes imperative to reflect on how these legal frameworks align with the broader dynamics of global migration. This progress invites a deeper enquiry into the efficacy and adaptability of existing legal norms in the face of evolving global challenges, establishing a foundation for the comprehensive exploration of migration and refugee issues from a wider perspective.

6. The concepts of migrant and refugee: a general perspective

Starting with the term refugees, it should be pointed out that this concept is universally defined. Specifically, this notion is taken from the system of international law as defined in the 1951 Geneva Refugee Convention and the 1967 New York Protocol. Based on these international legal acts, a refugee is a person who resides outside his or her country of origin, of which he or she is a national or in which he or she has had his or her permanent residence, who has a well-founded

fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion, and because of this fear is unable or unwilling to avail himself or herself of the protection of his or her country of origin, and no exclusion clauses apply to him or her.[44]

As a result of the above-mentioned legal acts, foreigners are granted *refugee status* if, due to a well-founded fear of persecution in the country of origin on any of the grounds listed above, they cannot or do not wish to avail themselves of the protection of that country. In addition, foreigners may be granted *subsidiary protection* where the return to their country of origin may expose them to a) a real risk of suffering serious harm through capital punishment or execution, torture, inhumane and degrading treatment, or punishment; or b) a serious and individualised threat to life or health resulting from the widespread use of violence against the civilian population in a situation of international or internal armed conflict. Due to this risk, they cannot or do not wish to enjoy the protection of their country of origin.[45] In this light, the terms migration/migrant and refugee are distinct. Thus far, the only commonality is that both refugees and migrants have left their place of residence in their country of origin; however, they have done so for different reasons. In the context of analysing the term "refugee", it is also worth mentioning the Universal Declaration of Human Rights,[46] which in Art. 14(1.1) unambiguously indicates that every human being has the right to seek and enjoy asylum in another country in the event of persecution. In Poland, the comprehensive process of granting international protection is based on the Act of 13 June 2003 on granting protection to foreigners in the territory of the Republic of Poland.[47]

Conversely, it is difficult to find a definition of the term "migrant" in the legal order. Accordingly, one may come to the conclusion that in the Polish legal system the word that mostly aptly describes both refugees and migrants is "foreigner". As discussed above, the basis for defining foreigners in Poland is the Act of 12 December 2013,[48] according to which a foreigners as any person who does not have Polish citizenship (Art. 3). According to Art. 56(1) of the Constitution of the Republic of Poland,[49] foreigners may benefit from the right of asylum in the Republic of Poland based on the principles set out in the Act. In turn, pursuant to Art. 56(2) of the Constitution of the Republic of Poland, foreigners who seek protection from persecution in the Republic of Poland may be granted the status of refugees in accordance with international agreements binding on the Republic of Poland.

44 Wierzbicki, 1993, p. 9; Pluta, 2008, cited in Czerniejewska and Main, 2008, p. 35.

45 For more information, see: https://www.gov.pl/web/udsc/prawa-i-obowiazki--wnioskodawca (Accessed: 14 December 2023).

46 The Universal Declaration of Human Rights, 1948.

47 Journal of Laws from 2023, item 1504.

48 Journal of Laws from 2023, items 519, 185, 547.

49 Journal of Laws from 1997 no. 78, item 483, from 2001 no. 28, item 319, from 2006 no 200, item 1471, from 2009, no. 114, item 946.

The word migrant is certainly directly related to the process of migration, that is, the movement of people from one place to another, most often caused by the search for better, more stable, and secure living conditions.[50] Migration as a process has various aspects, namely, its purpose (improvement of living conditions), its course (choice of place of movement), and the factors causing the decision to move.[51] In this sense, migration takes the form of both emigration, leaving one's place of residence and moving elsewhere, and immigration, arriving at a new place of residence. In national territories, migration may take the form of internal or external migration. The former describes movement within a given national territory, while the latter describes movement beyond the borders of the country of origin and therefore has an international dimension. The factors driving these movements are very difficult to fully catalogue; economic or environmental issues are frequently cited, although these are the only examples, and each individual story may be different.

Against this background, the term "migrant" appears as an inevitable component of the migration process, though it does not have a single, universal definition.[52] Among these definitions, for statistical purposes, Poland defines the term migrant as a person who goes abroad and comes to a country to reside either permanently or temporarily.[53] The definition of migrants and refugees developed by the United Nations Department of Economic and Social Affairs (UN DESA) can also be used.[54] According to this organisation, although the terms "refugee" and "migrant" are often used interchangeably by the general public, they are fundamentally different. Refugees are people who are outside their country of origin because of fear of persecution, conflict, generalised violence, or other circumstances that have seriously disturbed the public order in their country of origin; as a result, they require international protection. Definitions of refugees can be found in the 1951 Convention and regional refugee instruments, as well as the UNHCR's Statute. The term "migrant", on the other hand, is more complicated. While there is no formal legal definition of an international migrant, most experts agree that an international migrant is someone who changes his or her country of residence, irrespective of the reason for migration or legal status. Generally, a distinction is made between short-term or temporary migration, covering movements lasting between three and 12 months, and long-term or permanent migration, referring to a change in the country of residence for a duration of one year or more. Based on this definition, it can be concluded that a migrant is a person who changes the country in which he or she resides, or in which he or she will reside, for a specified period of time or permanently.

50 Pilich, 2022, pp. 11–42.
51 Eisenstadt, 1953, p. 1.
52 Staniszewski, 2023, p. 9.
53 For more information, see: https://stat.gov.pl/metainformacje/slownik-pojec/pojecia-stosowane-w-statystyce-publicznej/213,pojecie.html (Accessed: 23 November 2023).
54 For more information, see: https://refugeesmigrants.un.org/definitions (Accessed: 23 November 2023).

In contrast, according to the Convention Governing the Specific Aspects of Refugee Problems in Africa, adopted by the Assembly of Heads of State and Government at its sixth ordinary session in Addis Ababa on 10 September 1969 the term "refugee" shall mean every person who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country, or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it. The term "refugee" shall also apply to every person who, owing to external aggression, occupation, foreign domination, or events seriously disturbing the public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality. In the case of a person who has several nationalities, the term "a country of which he is a national" shall mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of which he is a national if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national.[55]

In conclusion, this section has delineated the distinct legal frameworks surrounding "migrants" and "refugees", which are rooted in international conventions. While refugees are defined by their need for protection from persecution, migrants are characterised by their pursuit of improved living conditions; they do not necessarily face direct threats. This differentiation prompted us to consider the adequacy of current global policies in addressing the complex realities of migration and asylum. How do these definitions influence the rights and protections of individuals navigating cross-border challenges? The following section expands on this discussion by exploring how these concepts are uniquely interpreted and applied within the Central European legal landscape.

7. A legal and comparative account of migration and refugee terms

It is also appropriate to briefly present a comparative legal treatment of migration- and refugee-related terms. This provides a broader view of the issue at hand and enriches our conclusions. This analysis encompasses a detailed examination of legal provisions regarding migration and refugees across seven countries: Serbia, Croatia, Slovenia, Slovakia, the Czech Republic, Romania, and Hungary. Each nation

55 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, 1969.

represents a unique perspective within the Central European context, providing a diverse spectrum of legal interpretations and applications of migration and refugee terms. All of the observations made in this subsection and the information presented are drawn from materials made available by members of the research group "Migration Challenges – Legal Responses" as part of the activities of the Central European Professors' Network coordinated by the Central European Academy. This collaborative effort enabled a comprehensive compilation and analysis of relevant legal frameworks, offering insights into the differences and similarities in how migration and refugee issues are addressed within these jurisdictions. Through this comparative lens, we aim to shed light on the complexities of migration laws in Central Europe, contributing to a deeper understanding of the region's legal landscape in relation to global migration and asylum challenges.

7.1. Serbia

In Serbia, the Law on Migration Management contains many definitions of migration or refugees.

First, "migration" is defined as the voluntary or forced departure from the country of origin or residence, for the purpose of temporary or permanent residence in the Republic of Serbia, as well as the voluntary or forced leaving of the Republic of Serbia, for the purpose of temporary or permanent residence in another country (external migration). It also refers to changing the place of permanent residence within the territory of the Republic of Serbia or changing the place of temporary residence within the territory of the Republic of Serbia if the change occurred forcibly (internal migration).

Second, "immigration" refers to external migration into the Republic of Serbia, which lasts or is expected to exceed 12 months.

Third, "emigration" refers to external migration from the Republic of Serbia, which lasts or is expected to exceed 12 months.

Fourth, "migration management" refers to the collection, analysis, processing, organising, exchange, storage, and protecting of data relevant to migration management, the determination of indicators and data relevant to migration management, the establishing of a unified system and other mechanisms for the sharing of operational migration data, defining and proposing objectives and priorities for migration policy, proposing and taking measures for the implementation of migration policy, and coordinating the authorities performing activities related to migration management. All of this contributes to the operation of other migration management mechanisms established by law.

Fifth, a "unified system" is a system of collecting, analysing, processing, organising, exchanging, storing, and protecting data obtained from information data subsystems (databases) that authorities are competent in relation to particular areas of migration collection, processing, use, protection, and development in the field of migration management, in accordance with the law.

Sixth, "returnee under readmission agreement" is a citizen of the Republic of Serbia for whom the competent authority gave its consent for return on the basis of readmission agreement concluded by the Republic of Serbia.

In addition to this Act, Serbia also has a Law on Foreigners which contains relevant definitions. Among the most pertinent, "foreigner" means any person who does not have citizenship of the Republic of Serbia. "Stateless person" means a person who is not considered a national by any country's legislation. "Vulnerable persons" include people with disabilities; the elderly; pregnant women; single parents with minor children; victims of torture, rape, or other severe forms of violence (including domestic violence and intimate partner violence related to sex, gender, sexual orientation, and gender identity); victims of human trafficking; persons faced with the threat of torture, inhumane and degrading treatment, or punishment in their country of origin because of their sexual orientation or gender identity; minors; and unaccompanied minors.

In addition to the acts presented above, the Law on Asylum and Temporary Protection is also in force in Serbia; it states, inter alia, that: "asylum" shall be understood to mean the right to residence and protection accorded to a foreigner who has been granted refuge or subsidiary protection, on the basis of a decision by the competent authority; a "foreigner" shall be understood to mean any person who is not a citizen of the Republic of Serbia, irrespective of whether he/she is a foreign national or a stateless person; an "asylum seeker" shall be understood to mean a foreigner who has filed an application for asylum in the territory of the Republic of Serbia, and where no final decision has yet been taken; a "refugee" shall be understood to mean a foreigner who, owing to a well-founded fear of being persecuted for reasons of race, sex, language, religion, nationality, membership of a particular social group, or political opinion, is outside the country of his/her origin, and is unable or, owing to such fear, is unwilling to avail himself/herself of the protection of that country, as well as a stateless person who is outside the country of his/her habitual residence, and who is unable or, owing to such fear, unwilling to return to that country; "subsidiary protection" shall be understood to mean a form of protection granted by the Republic of Serbia to a foreigner who would be, if returned to the country of his/her origin or habitual residence, subjected to serious harm, and who is unable or unwilling to avail himself/herself of the protection of that country; and "temporary protection" shall be understood to mean a form of protection granted by a decision of the Government of the Republic of Serbia in the case of a mass influx of displaced persons who cannot be returned to their countries of origin or habitual residence.

7.2. Croatia

Croatia has established the Aliens Act, which, among other things, regulates that: "stateless person" shall mean a person who is not considered a national by any State's national legislation; "alien" shall mean a person who does not hold Croatian citizenship; "seasonal worker" shall mean a third-country national who retains his

permanent residence in a third country while staying legally and temporarily in the Republic of Croatia to carry out an activity dependent on the passing of the seasons, under one or more fixed-term contracts of employment concluded directly with an employer established in the Republic of Croatia; "return" shall mean voluntary departure or forcible removal of a third-country national staying illegally in the Republic of Croatia to a third country; and "international protection" shall mean protection granted to a third-country national or a stateless person, which includes asylum and subsidiary protection in line with the legislation governing international protection.

7.3. Slovenia

In Slovenia, the Temporary Protection of Displaced Persons Act, the International Protection Act, and Foreigners Act are in force.

According to the Temporary Protection of Displaced Persons Act, inter alia: "temporary protection" shall mean an exceptional procedure, in the event of a current or imminent mass influx of displaced persons from third countries who are unable to return to their countries of origin, for the provision of immediate temporary protection to such persons, in particular if there is also a risk that the asylum system will be unable to process this influx without adverse effects to the efficiency of its operation, in the interests of the persons concerned and other persons requesting protection. "Mass influx" refers to the arrival of a large number of displaced persons from a specific third country or region, regardless of whether their arrival in the Republic of Slovenia is spontaneous or organised. "Vulnerable groups of persons" shall mean people with special needs, in particular unaccompanied minors, persons with disabilities, elderly persons, pregnant women, unaccompanied women, single parents with minor children, victims of sexual abuse, and victims of torture or organised violence.

According to the International Protection Act, among other things: "international protection" shall mean refugee status and subsidiary protection status; "refugee" shall mean a third-country national or a stateless person who has been granted protection; "stateless person" shall mean a person who is not considered a citizen by any country's legislation; "vulnerable person" with special needs shall mean, in particular, a minor, an unaccompanied minor, a disabled person, an elderly person, a pregnant woman, a single parent with a minor child, a victim of human trafficking, a person with a mental health disorder or mental health problems, or a victim of rape, torture, or other severe forms of psychological, physical, and sexual abuse.

According to the Foreigners Act, inter alia: "foreigner" shall mean a person who is not a citizen of the Republic of Slovenia and "stateless person" shall mean a foreigner who is not considered a citizen by any country under its legal acts.

7.4. Romania

In Romania, two pieces of legislation relate to the present analysis: the Law on the Regime of Aliens and the Law on Asylums.

According to the former, among others: an "alien" is a person who does not have Romanian citizenship, citizenship of another Member State of the EU or of the European Economic Space, or citizenship of the Swiss Confederation and a "stateless person" is an alien who does not have citizenship of any State.

According to the latter, among others: "alien" is a foreign citizen or stateless person; "refugee status" is a form of protection recognised by the Romanian State for foreign citizens or stateless persons who fulfil the conditions stipulated in the Convention relating to the Status of Refugees, signed in Geneva on 28 July 1951, as well as to the Protocol on Status of Refugees; "subsidiary protection" is form of protection granted by the Romanian State to a foreign citizen or a stateless person for reasons other than those named in the Geneva Convention; and "temporary protection" is an exceptional procedure meant to ensure, in the case of a current or imminent massive influx of persons displaced from third countries who cannot return to their country of origin, immediate and temporary protection for such persons, especially if there is a risk that the asylum system cannot process this influx without negative side effects to its efficient operation, in the interest of the aforementioned persons and of other persons in need of protection.

7.5. Czech Republic

The Czech Republic has two pieces of legislation on migration and asylum: the Act on the Residence of Foreign Nationals in the Territory of the Czech Republic and the Act on Asylum.

According to the former, among other things, a "foreign national" means a natural person who is not a citizen of the Czech Republic (including citizens of the EU).

Under the latter, among other things: "international protection" means protection provided to foreign nationals within the territory in the form of asylum or subsidiary protection; a "vulnerable person" means especially an unaccompanied minor, a parent or family with a minor child or a parent or family with a minor child with a medical disability, a person over 65 years of age, a person with a medical disability or a serious illness, a pregnant woman, a victim of human trafficking, or a person that has suffered torture or rape or been subjected to serious forms of mental, physical, or sexual violence; a "recognised refugee" means a foreign national who has been granted asylum under Chechia law; and a "person enjoying subsidiary protection" means a foreign national who has been granted subsidiary protection, for the term of validity of the decision to grant or extend subsidiary protection. The latter term also refers to foreign nationals who, while the decision to grant or extend subsidiary protection was valid, made an application for extension of subsidiary

protection; this shall apply until the Ministry's decision on such an application gains a legal effect.

7.6. Slovakia

In Slovakia, there is the Act on Residence of Foreigners and Amendment and Supplementation of Certain Acts, according to which, inter alia: a "foreigner" shall be understood as anybody who is not a State citizen of the Slovak Republic; a "vulnerable person" is especially a minor, a disabled person, a victim of human trafficking, an older person (typically older than 65 years, though in justified cases even a person younger than 65 years), a pregnant woman, a single parent with an underage child, or a person subjected to torture, rape, or other serious forms of psychical, physical, or sexual violence. Slovakia also has an Act on Asylum, according to which, inter alia: "international protection" means granting asylum or subsidiary protection; "asylum" means protection of an alien against persecution on the grounds laid down in an international Treaty or a separate regulation; and "subsidiary protection" means protection against serious harm in the country of origin.

7.7. Hungary

Hungary has an Act on Asylum, according to which, among other things: a "foreigner" is a non-Hungarian citizen and a stateless person; a "stateless person" is a person who is not recognised by any State as its citizen under the operation of its own law; "asylum" is legal grounds for staying in the territory of Hungary and simultaneous protection against refoulement, expulsion, and extradition; "subsidiary protection" is the totality of the rights due to and the obligations lying with a beneficiary of subsidiary protection; "temporary protection" is the totality of the rights due to and the obligations lying with a beneficiary of temporary protection; and the "principle of non-refoulement" is observed in accordance with the Geneva Convention.

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8. Definitions related to migration and refugees in international and EU law[56]

Any analysis involving the presentation of definitions related to migration and refugees must include regulations under international and EU laws, given that the definitions contained in these legal acts may determine the content of the definitions

56 This subsection intentionally omits some of the legislation discussed in subsection 4, "Review of EU legislation on migration law, including asylum law" due to the irrelevance of the definitions contained therein.

contained in national law. Although national regulations were generally developed earlier, from the perspective of the hierarchy of sources of law, they are lower than international and EU laws (with the exception of supreme acts such as constitutions). It is also often the case that if an issue is regulated nationally, States choose to regulate the issue in accordance with international and EU law to strengthen, unify, or harmonise it in some way. This is particularly true for the effectiveness of regulations on cross-border issues. Examples include cross-border crimes and issues related to the freedom of the EU's internal market. It is impossible to introduce regulations that pass tests of effectiveness, efficiency, and interoperability solely at the national level from a cross-border perspective. What is needed here is cooperation between two or more States, and for this, we need regulations that constrain how States behave toward each other. The regulations that have this effect are the rules or legal norms of international and EU law. Accordingly, it seems reasonable to present definitions related to migration and refugees in international and EU law. These definitions can be divided into systemic, procedural, and substantive definitions (with the latter including substantive family norms, that is, substantive norms related to the family members of migrants and refugees). Within the framework of relevant acts, it is possible to group definitions according to the adopted division (systemic, procedural, and substantive), referring to the above observations. To this end, the analysis encompasses 14 legal acts, each of which is meticulously analysed and presented in the form of a table. The author believes that such a grouping of definitions is essential to fully illustrate the subject matter. While this approach may appear overly informational, the author intentionally employed it to ensure a comprehensive and structured presentation of the complex legal landscape surrounding migration and refugees.

First, the 1951 Refugee Convention laid the groundwork for further legislation, it was supplemented by the 1967 Protocol. Many pieces of legislation refer to this Convention, either directly or indirectly. This piece of international law has effectively acquired benchmark status; the definition of refugees contained therein has not only influenced national law, but also other pieces of international and EU law. The Convention contains important substantive and procedural definitions. The grouping process is presented in Table 1.[57]

57 Regarding the scope of this act of international law see, e.g., Weis, 1961, pp. 255–264; Blay and Tsamenyi, 1990, pp. 527–561; Abell, 1999, pp. 60–83.

Table 1. Groupings of definitions from the Convention relating to the Status of Refugees[58]

Convention relating to the Status of Refugees adopted 28 July 1951 by United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons convened under General Assembly resolution 429 (V) of 14 December 1950	
Definition	**Group**
Article 1 – Definition of the term "refugee" A. For the purposes of the present Convention, the term "refugee" shall apply to any person who: (1) Has been considered a refugee under the Arrangements of 12 May 1926 and 30 June 1928 or under the Conventions of 28 October 1933 and 10 February 1938, the Protocol of 14 September 1939 or the Constitution of the International Refugee Organization; Decisions of non-eligibility taken by the International Refugee Organization during the period of its activities shall not prevent the status of refugee being accorded to persons who fulfil the conditions of paragraph 2 of this section; (2) As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it. In the case of a person who has more than one nationality, the term "the country of his nationality" shall mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of his nationality if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national. B. (1) For the purposes of this Convention, the words "events occurring before 1 January 1951" in article 1, section A, shall be understood to mean either (a) "events occurring in Europe before 1 January 1951"; or (b) "events occurring in Europe or elsewhere before 1 January 1951"; and each Contracting State shall make a declaration at the time of signature, ratification or accession, specifying which of these meanings it applies for the purpose of its obligations under this Convention.	Substantive

58 Source: Author's own elaboration.

Convention relating to the Status of Refugees adopted 28 July 1951 by United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons convened under General Assembly resolution 429 (V) of 14 December 1950	
Definition	**Group**
(2) Any Contracting State which has adopted alternative (a) may at any time extend its obligations by adopting alternative (b) by means of a notification addressed to the Secretary-General of the United Nations. C. This Convention shall cease to apply to any person falling under the terms of section A if: (1) He has voluntarily re-availed himself of the protection of the country of his nationality; or (2) Having lost his nationality, he has voluntarily reacquired it; or (3) He has acquired a new nationality, and enjoys the protection of the country of his new nationality; or (4) He has voluntarily re-established himself in the country which he left or outside which he remained owing to fear of persecution; or (5) He can no longer, because the circumstances in connection with which he has been recognised as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality; Provided that this paragraph shall not apply to a refugee falling under section A (1) of this article who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality; (6) Being a person who has no nationality he is, because the circumstances in connection with which he has been recognised as a refugee have ceased to exist, able to return to the country of his former habitual residence; Provided that this paragraph shall not apply to a refugee falling under section A (1) of this article who is able to invoke compelling reasons arising out of previous persecution for refusing to return to the country of his former habitual residence.	Substantive

Convention relating to the Status of Refugees adopted 28 July 1951 by United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons convened under General Assembly resolution 429 (V) of 14 December 1950	
Definition	**Group**
D. This Convention shall not apply to persons who are at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance. When such protection or assistance has ceased for any reason, without the position of such persons being definitively settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations, these persons shall ipso facto be entitled to the benefits of this Convention. E. This Convention shall not apply to a person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country. F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that: (a) He has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes; (b) He has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee; (c) He has been guilty of acts contrary to the purposes and principles of the United Nations. Article 31 – Refugees unlawfully in the country of refuge (1) The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence. 2. the Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.	Substantive

Convention relating to the Status of Refugees adopted 28 July 1951 by United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons convened under General Assembly resolution 429 (V) of 14 December 1950	
Definition	**Group**
Article 32 – Expulsion (1) The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order. (2) The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority. (3) The Contracting States shall allow such a refugee a reasonable period within which to seek legal admission into another country. The Contracting States reserve the right to apply during that period such internal measures as they may deem necessary. Article 33 – Prohibition of expulsion or return (‘refoulement’) 1. no Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion. (2) The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country. Article 34 – Naturalization The Contracting States shall as far as possible facilitate the assimilation and naturalisation of refugees. They shall in particular make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings.	Procedural

Second, the 1967 Protocol relating to the Status of Refugees significantly supplemented the 1951 Refugee Convention. In particular, it involved abolishing the deadline of 1 January 1951 thus opening up the provisions of the 1951 Refugee Convention to all refugees (and not only those who became refugees before the deadline). The Protocol relating to the Status of Refugees contains important substantive definitions. The grouping process is summarised in Table 2.[59]

Table 2. Groupings of definitions from the Protocol relating to the Status of Refugees[60]

Protocol relating to the Status of Refugees adopted 16 December 1966 by the General Assembly in resolution 2198 (XXI)	
Definition	**Group**
Article 1 – General provision (1) The States Parties to the present Protocol undertake to apply articles 2 to 34 inclusive of the Convention to refugees as hereinafter defined. (2) For the purpose of the present Protocol, the term "refugee" shall, except as regards the application of paragraph 3 of this article, mean any person within the definition of article I of the Convention as if the words "As a result of events occurring before 1 January 1951 and…" and the words "…as a result of such events", in article 1 A (2) were omitted. (3) The present Protocol shall be applied by the States Parties hereto without any geographic limitation, save that existing declarations made by States already Parties to the Convention in accordance with article I B (I) (a) of the Convention, shall, unless extended under article I B (2) thereof, apply also under the present Protocol.	Substantive

Third, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families[61] differs slightly. Rather than refugees, it covers migration, specifically migration, as profiled through labour objectives. The Convention aims to protect migrant workers by setting standards for their protection in various areas and obligations for sending and receiving countries. What seems important is that this piece of international law defines the rights of

59 Regarding the scope of this act of international law, see, e.g., Hamlin and Wolgin, 2012, pp. 586–624; Tsamenyi, 1989, pp. 180–198; Skinner, 2008, pp. 270–299.

60 Source: Author's own elaboration.

61 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 2005.

all workers and their family members regardless of whether such migration is legal or illegal. The Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families addresses the entire migration process of all migrant workers (legal and illegal) and their family members. There are important substantive definitions in the Act under question. The grouping process is presented in Table 3.[62]

Table 3. Groupings of definitions from the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families[63]

International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families adopted 18 December 1990 by General Assembly resolution 45/158	
Definition	**Group**
Article 2 2. (A) The term "frontier worker" refers to a migrant worker who retains his or her habitual residence in a neighbouring state to which he or she normally returns every day or at least once a week.	Substantive

Fourth, turning to EU law and starting with the TFEU, it must be noted that the TFEU is an act of primary EU law. This is of great importance in terms of interpretation and the power to influence national law. The TFEU is one of the foundations of the EU, systematising it institutionally and defining the EU's competences and objectives. The TFEU contains many legal provisions related to migration and refugees. Definitions can also be found in these legal provisions, although they are not apparent at first glance. The definitions contained in the TFEU are systemic. The grouping process is presented in Table 4.[64]

62 Regarding the scope of this act of international law see, for example: Hune, 1991, pp. 800–817; Edelenbos, 2005, pp. 93–98; Lönnroth, 1991, pp. 710–736.

63 Source: Author's own elaboration.

64 Regarding the scope of this act of EU law see, e.g., Papagianni, 2013, pp. 283–299; Thym and Hailbronner, 2016, pp. 1023–1053.

Table 4. Groupings of definitions from the Treaty on the Functioning of the European Union[65]

Consolidated version of the Treaty on the Functioning of the European Union[66]	
Definition	**Group**
Article 77 (ex Article 62 TEC) 1. The Union shall develop a policy with a view to: (a) ensuring the absence of any controls on persons, whatever their nationality, when crossing internal borders; (b) carrying out checks on persons and efficient monitoring of the crossing of external borders; (c) the gradual introduction of an integrated management system for external borders. (2) For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures concerning: (a) the common policy on visas and other short-stay residence permits; (b) the checks to which persons crossing external borders are subject; (c) the conditions under which nationals of third countries shall have the freedom to travel within the Union for a short period; (d) any measure necessary for the gradual establishment of an integrated management system for external borders; (e) the absence of any controls on persons, whatever their nationality, when crossing internal borders.	Systemic

65 Source: Author's own elaboration.
66 OJ C 326, 26.10.2012, pp. 47–390.

Consolidated version of the Treaty on the Functioning of the European Union[66]	
Definition	**Group**
(3) If action by the Union should prove necessary to facilitate the exercise of the right referred to in Article 20(2)(a), and if the Treaties have not provided the necessary powers, the Council, acting in accordance with a special legislative procedure, may adopt provisions concerning passports, identity cards, residence permits or any other such document. The Council shall act unanimously after consulting the European Parliament. (4) This Article shall not affect the competence of the Member States concerning the geographical demarcation of their borders, in accordance with international law. Article 78 (ex Articles 63, points 1 and 2, and 64(2) TEC) (1) The Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement. This policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties. (2) For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures for a common European asylum system comprising: (a) a uniform status of asylum for nationals of third countries, valid throughout the Union; (b) a uniform status of subsidiary protection for nationals of third countries who, without obtaining European asylum, are in need of international protection; (c) a common system of temporary protection for displaced persons in the event of a massive inflow; (d) common procedures for the granting and withdrawing of uniform asylum or subsidiary protection status; (e) criteria and mechanisms for determining which Member State is responsible for considering an application for asylum or subsidiary protection;	Systemic

Consolidated version of the Treaty on the Functioning of the European Union[66]	
Definition	**Group**
(f) standards concerning the conditions for the reception of applicants for asylum or subsidiary protection; (g) partnership and cooperation with third countries for the purpose of managing inflows of people applying for asylum or subsidiary or temporary protection. (3) In the event of one or more Member States being confronted by an emergency situation characterised by a sudden inflow of nationals of third countries, the Council, on a proposal from the Commission, may adopt provisional measures for the benefit of the Member State(s) concerned. It shall act after consulting the European Parliament. Article 79 (ex Article 63, points 3 and 4, TEC) The Union shall develop a common immigration policy aimed at ensuring, at all stages, the efficient management of migration flows, fair treatment of third-country nationals residing legally in Member States, and the prevention of, and enhanced measures to combat, illegal immigration and trafficking in human beings. (2) For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures in the following areas: (a) the conditions of entry and residence, and standards on the issue by Member States of long-term visas and residence permits, including those for the purpose of family reunification; (b) the definition of the rights of third-country nationals residing legally in a Member State, including the conditions governing freedom of movement and of residence in other Member States; (c) illegal immigration and unauthorised residence, including removal and repatriation of persons residing without authorisation; (d) combating trafficking in persons, in particular women and children.	Systemic

Consolidated version of the Treaty on the Functioning of the European Union[66]	
Definition	**Group**
(3) The Union may conclude agreements with third countries for the readmission to their countries of origin or provenance of third-country nationals who do not or who no longer fulfil the conditions for entry, presence or residence in the territory of one of the Member States. (4) The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may establish measures to provide incentives and support for the action of Member States with a view to promoting the integration of third-country nationals residing legally in their territories, excluding any harmonisation of the laws and regulations of the Member States. (5) This Article shall not affect the right of Member States to determine volumes of admission of third-country nationals coming from third countries to their territory in order to seek work, whether employed or self-employed.	

Fifth, moving on to EU secondary legislation and starting with Directive 2011/95/EU of the European Parliament and Council on 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 (recast), it should be noted that this piece of legislation is of significant importance in the EU for matters related to international protection. In particular, it contains the conditions for determining the eligibility of a particular person for refugee or subsidiary protection. The purpose of this Directive was to establish standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status of refugees or persons eligible for subsidiary protection, and for the content of the protection granted. There are several substantive (separated into substantive family related definitions) and procedural definitions. The grouping process is presented in Table 5.[67]

67 Regarding the scope of this EU Act see, e.g., Morgese, 2012, pp. 255–275; Gordanić, 2012, pp. 60–67; Aldea, 2018, pp. 141–148.

Table 5. Groupings of definitions from Directive 2011/95/EU[68]

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 (recast)[69]	
Definition	**Group**
Article 2 – Definitions (a) 'international protection' means refugee status and subsidiary protection status as defined in points (e) and (g); (b) 'beneficiary of international protection' means a person who has been granted refugee status or subsidiary protection status as defined in points (e) and (g); (c) 'Geneva Convention' means the Convention relating to the Status of Refugees done at Geneva on 28 July 1951, as amended by the New York Protocol of 31 January 1967; (d) 'refugee' means 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; (e) 'refugee status' means the recognition by a Member State of a third-country national or a stateless person as a refugee; (f) 'person eligible for subsidiary protection' means 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;	Substantive

68 Source: Author's own elaboration.
69 OJ L 337, 20.12.2011, pp. 9–26.

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 (recast)[69]	
Definition	**Group**
(g) 'subsidiary protection status' means the recognition by a Member State of a third-country national or a stateless person as a person eligible for subsidiary protection; (h) 'application for international protection' means a request made by a third-country national or a stateless person for protection from a Member State, who can be understood to seek refugee status or subsidiary protection status, and who does not explicitly request another kind of protection, outside the scope of this Directive, that can be applied for separately; (i) 'applicant' means a third-country national or a stateless person who has made an application for international protection in respect of which a final decision has not yet been taken; (n) 'country of origin' means the country or countries of nationality or, for stateless persons, of former habitual residence.	Substantive
Article 2 – Definitions (j) 'family members' means, in so far as the family already existed in the country of origin, the following members of the family of the beneficiary of international protection who are present in the same Member State in relation to the application for international protection: – the spouse of the beneficiary of international protection or his or her unmarried partner in a stable relationship, where the law or practice of the Member State concerned treats unmarried couples in a way comparable to married couples under its law relating to third-country nationals, – the minor children of the couples referred to in the first indent or of the beneficiary of international protection, on condition that they are unmarried and regardless of whether they were born in or out of wedlock or adopted as defined under national law, – the father, mother or another adult responsible for the beneficiary of international protection whether by law or by the practice of the Member State concerned, when that beneficiary is a minor and unmarried;	Substantive family

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 (recast)[69]	
Definition	**Group**
(k) 'minor' means a third-country national or stateless person below the age of 18 years. (l) 'unaccompanied minor' means a minor who arrives on the territory of the Member States unaccompanied by an adult responsible for him or her whether by law or by the practice of the Member State concerned, and for as long as he or she is not effectively taken into the care of such a person; it includes a minor who is left unaccompanied after he or she has entered the territory of the Member States.	Substantive family
Article 2 – Definitions (m) 'residence permit' means any permit or authorisation issued by the authorities of a Member State, in the form provided for under that State's law, allowing a third-country national or stateless person to reside on its territory.	Procedural

Sixth, the same is true of Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 which laid down standards for the reception of applicants for international protection (recast). Similarly, this legislation concerned the reception stage. Reception conditions are important for the smooth functioning of a coherent international protection system across the EU. The purpose of this Directive was to establish standards for the reception of applicants for international protection in Member States. This Directive contains several important procedural and substantive definitions (as mentioned above, substantive family related definitions are separated). The grouping process is presented in Table 6.[70]

70 Regarding the scope of this EU Act see, for example: Barry, 2021, pp. 223–242.

Table 6. Groupings of definitions from Directive 2013/33/EU[71]

Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast)[72]	
Definition	**Group**
Article 2 – Definitions (a) 'application for international protection': means an application for international protection as defined in Article 2(h) of Directive 2011/95/EU; (f) 'reception conditions': means the full set of measures that Member States grant to applicants in accordance with this Directive; (g) 'material reception conditions': means the reception conditions that include housing, food and clothing provided in kind, or as financial allowances or in vouchers, or a combination of the three, and a daily expenses allowance; (h) 'detention': means confinement of an applicant by a Member State within a particular place, where the applicant is deprived of his or her freedom of movement.	Procedural
Article 2 – Definitions (b) 'applicant': means a third-country national or a stateless person who has made an application for international protection in respect of which a final decision has not yet been taken; (i) 'accommodation centre': means any place used for the collective housing of applicants; (j) 'representative': means a person or an organisation appointed by the competent bodies in order to assist and represent an unaccompanied minor in procedures provided for in this Directive with a view to ensuring the best interests of the child and exercising legal capacity for the minor where necessary. Where an organisation is appointed as a representative, it shall designate a person responsible for carrying out the duties of representative in respect of the unaccompanied minor, in accordance with this Directive; (k) 'applicant with special reception needs': means a vulnerable person, in accordance with Article 21, who is in need of special guarantees in order to benefit from the rights and comply with the obligations provided for in this Directive.	Substantive

71 Source: Author's own elaboration.
72 OJ L 180, 29.6.2013, pp. 96–116.

Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast)[72]	
Definition	**Group**
Article 2 – Definitions (c) 'family members': means, in so far as the family already existed in the country of origin, the following members of the applicant's family who are present in the same Member State in relation to the application for international protection: – the spouse of the applicant or his or her unmarried partner in a stable relationship, where the law or practice of the Member State concerned treats unmarried couples in a way comparable to married couples under its law relating to third-country nationals; – the minor children of couples referred to in the first indent or of the applicant, on condition that they are unmarried and regardless of whether they were born in or out of wedlock or adopted as defined under national law; – the father, mother or another adult responsible for the applicant whether by law or by the practice of the Member State concerned, when that applicant is a minor and unmarried; (d) 'minor': means a third-country national or stateless person below the age of 18 years; (e) 'unaccompanied minor': means a minor who arrives on the territory of the Member States unaccompanied by an adult responsible for him or her whether by law or by the practice of the Member State concerned, and for as long as he or she is not effectively taken into the care of such a person; it includes a minor who is left unaccompanied after he or she has entered the territory of the Member States.	Substantive family

Seventh, Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) contains a non-negligible addition of procedural issues to the two previous pieces of legislation. This concludes the system of operation of international protection and its framework, based on a distinction between the qualification, reception, and procedural stages. The purpose was to establish common procedures for granting and withdrawing international protection under Directive 2011/95/EU. However, the Directive under discussion contains not only procedural definitions but also definitions of a substantive nature, including family related substantive definitions. The grouping process is presented in Table 7.[73]

73 Regarding the scope of this EU Act see, for example: Spalding, 2014, pp. 483–487.

Table 7. Groupings of definitions from Directive 2013/32/EU[74]

Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast)[75]	
Definition	**Group**
Article 2 – Definitions (a) 'Geneva Convention' means the Convention of 28 July 1951 Relating to the Status of Refugees, as amended by the New York Protocol of 31 January 1967; (g) 'refugee' means a third-country national or a stateless person who fulfils the requirements of Article 2(d) of Directive 2011/95/EU; (h) 'person eligible for subsidiary protection' means a third-country national or a stateless person who fulfils the requirements of Article 2(f) of Directive 2011/95/EU; (i) 'international protection' means refugee status and subsidiary protection status as defined in points (j) and (k); (j) 'refugee status' means the recognition by a Member State of a third-country national or a stateless person as a refugee; (c) 'applicant' means a third-country national or stateless person who has made an application for international protection in respect of which a final decision has not yet been taken; (d) 'applicant in need of special procedural guarantees' means an applicant whose ability to benefit from the rights and comply with the obligations provided for in this Directive is limited due to individual circumstances; (p) 'remain in the Member State' means to remain in the territory, including at the border or in transit zones, of the Member State in which the application for international protection has been made or is being examined.	Substantive

74 Source: Author's own elaboration.
75 OJ L 180, 29.6.2013, pp. 60–95.

Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast)[75]	
Definition	**Group**
Article 2 – Definitions (b) 'application for international protection' or 'application' means a request made by a third-country national or a stateless person for protection from a Member State, who can be understood to seek refugee status or subsidiary protection status, and who does not explicitly request another kind of protection outside the scope of Directive 2011/95/EU, that can be applied for separately; (e) 'final decision' means a decision on whether the third-country national or stateless person be granted refugee or subsidiary protection status by virtue of Directive 2011/95/EU and which is no longer subject to a remedy within the framework of Chapter V of this Directive, irrespective of whether such remedy has the effect of allowing applicants to remain in the Member States concerned pending its outcome; (f) 'determining authority' means any quasi-judicial or administrative body in a Member State responsible for examining applications for international protection competent to take decisions at first instance in such cases; (k) 'subsidiary protection status' means the recognition by a Member State of a third-country national or a stateless person as a person eligible for subsidiary protection; (n) 'representative' means a person or an organisation appointed by the competent bodies in order to assist and represent an unaccompanied minor in procedures provided for in this Directive with a view to ensuring the best interests of the child and exercising legal capacity for the minor where necessary. Where an organisation is appointed as a representative, it shall designate a person responsible for carrying out the duties of representative in respect of the unaccompanied minor, in accordance with this Directive; (o) 'withdrawal of international protection' means the decision by a competent authority to revoke, end or refuse to renew the refugee or subsidiary protection status of a person in accordance with Directive 2011/95/EU; (q) 'subsequent application' means a further application for international protection made after a final decision has been taken on a previous application, including cases where the applicant has explicitly withdrawn his or her application and cases where the determining authority has rejected an application following its implicit withdrawal in accordance with Article 28(1).	Procedural

Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast)[75]	
Definition	**Group**
Article 2 – Definitions (l) 'minor' means a third-country national or a stateless person below the age of 18 years; (m) 'unaccompanied minor' means an unaccompanied minor as defined in Article 2(l) of Directive 2011/95/EU.	Substantive family

Eighth, another important piece of legislation in the EU was Council Directive 2001/55/EC on 20 July 2001 on minimum standards for providing temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof.[76] The purpose of this Directive is to enact minimum standards for providing temporary protection in the event of a mass influx of displaced persons from third countries who cannot return to their country of origin, and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof. Relevant procedural and substantive definitions (including substantive family related definitions) can also be found in legislation. The grouping process is presented in Table 8.[77]

76 OJ L 212, 7.8.2001, pp. 12–23.
77 Regarding the scope of this EU Act see, for example: Mazur, 2022, pp. 279–300.

Table 8. Groupings of definitions from Directive 2001/55/EC[78]

Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof[79]	
Definition	**Group**
Article 2 (a) "temporary protection" means a procedure of exceptional character to provide, in the event of a mass influx or imminent mass influx of displaced persons from third countries who are unable to return to their country of origin, immediate and temporary protection to such persons, in particular if there is also a risk that the asylum system will be unable to process this influx without adverse effects for its efficient operation, in the interests of the persons concerned and other persons requesting protection; (g) "residence permit" means any permit or authorisation issued by the authorities of a Member State and taking the form provided for in that State's legislation, allowing a third country national or a stateless person to reside on its territory;	Procedural
Article 2 (b) "Geneva Convention" means the Convention of 28 July 1951 relating to the status of refugees, as amended by the New York Protocol of 31 January 1967; (c) "displaced persons" means third-country nationals or stateless persons who have had to leave their country or region of origin, or have been evacuated, in particular in response to an appeal by international organisations, and are unable to return in safe and durable conditions because of the situation prevailing in that country, who may fall within the scope of Article 1A of the Geneva Convention or other international or national instruments giving international protection, in particular: (i) persons who have fled areas of armed conflict or endemic violence; (ii) persons at serious risk of, or who have been the victims of, systematic or generalised violations of their human rights;	Substantive

78 Source: Author's own elaboration.
79 OJ L 212, 7.8.2001, pp. 12–23.

Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof[79]	
Definition	**Group**
(d) "mass influx" means arrival in the Community of a large number of displaced persons, who come from a specific country or geographical area, whether their arrival in the Community was spontaneous or aided, for example through an evacuation programme; (e) "refugees" means third-country nationals or stateless persons within the meaning of Article 1A of the Geneva Convention.	Substantive
Article 2 (f) 'unaccompanied minors' means third-country nationals or stateless persons below the age of eighteen, who arrive on the territory of the Member States unaccompanied by an adult responsible for them whether by law or custom, and for as long as they are not effectively taken into the care of such a person, or minors who are left unaccompanied after they have entered the territory of the Member States; (h) "sponsor" means a third-country national enjoying temporary protection in a Member State in accordance with a decision taken under Article 5 and who wants to be joined by members of his or her family.	Substantive family

Ninth, another relevant piece of legislation is Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals. This Directive sets out common standards and procedures for returning illegally staying third-country nationals in accordance with fundamental rights as general principles of community and international law, including refugee protection and human rights obligations. Definitions of substantive and procedural nature can be found in the legislation. The grouping process is presented in Table 9.[80]

80 Regarding the scope of this EU Act see, for example: Mazur, 2022, pp. 279–300; Rojo, 2016, pp. 233–258.

Table 9. Groupings of definitions from Directive 2008/115/EC[81]

Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals[82]	
Definition	**Group**
Article 3 – Definition 1. 'third-country national' means any person who is not a citizen of the Union within the meaning of Article 17(1) of the Treaty and who is not a person enjoying the Community right of free movement, as defined in Article 2(5) of the Schengen Borders Code; 2. 'illegal stay' means the presence on the territory of a Member State, of a third-country national who does not fulfil, or no longer fulfils the conditions of entry as set out in Article 5 of the Schengen Borders Code or other conditions for entry, stay or residence in that Member State; 7. 'risk of absconding' means the existence of reasons in an individual case which are based on objective criteria defined by law to believe that a third-country national who is the subject of return procedures may abscond; 9. 'vulnerable persons' means minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence.	Substantive
Article 3 – Definition 3. 'return' means the process of a third-country national going back – whether in voluntary compliance with an obligation to return, or enforced – to: – his or her country of origin, or – a country of transit in accordance with Community or bilateral readmission agreements or other arrangements, or – another third country, to which the third-country national concerned voluntarily decides to return and in which he or she will be accepted; 4. 'return decision' means an administrative or judicial decision or act, stating or declaring the stay of a third-country national to be illegal and imposing or stating an obligation to return;	Procedural

81 Source: Author's own elaboration.
82 OJ L 348, 24.12.2008, pp. 98–107.

Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals[82]	
Definition	**Group**
5. 'removal' means the enforcement of the obligation to return, namely the physical transportation out of the Member State; 6. 'entry ban' means an administrative or judicial decision or act prohibiting entry into and stay on the territory of the Member States for a specified period, accompanying a return decision; 8. 'voluntary departure' means compliance with the obligation to return within the time-limit fixed for that purpose in the return decision.	Procedural

Tenth, another relevant piece of legislation in the EU secondary law system is 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 Member State by a third-country national or a stateless person (recast). As an EU Regulation, this directly affects the legal systems of its Member States. This Regulation establishes the criteria and mechanisms for determining the Member States responsible for examining an application for international protection lodged in one Member State by a third-country national or stateless person. Definitions of substantive (including family related) and procedural nature can be found in this piece of legislation. The grouping process is shown in Table 10.[83]

83 Regarding the scope of this EU Act see, for e.g., Di Pascale, 2021, pp. 272–298; Giménez, 2013, pp. 191–192; Boroi, 2018, pp. 55–59.

Table 10. Groupings of definitions from Regulation No 604/2013[84]

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 (recast)[85]	
Definition	**Group**
Article 2 – Definitions (a) 'third-country national' means any person who is not a citizen of the Union within the meaning of Article 20(1) TFEU and who is not national of a State which participates in this Regulation by virtue of an agreement with the European Union; (c) 'applicant' means a third-country national or a stateless person who has made an application for international protection in respect of which a final decision has not yet been taken; (f) 'beneficiary of international protection' means a third-country national or a stateless person who has been granted international protection as defined in Article 2(a) of Directive 2011/95/EU; (l) 'residence document' means any authorisation issued by the authorities of a Member State authorising a third-country national or a stateless person to stay on its territory, including the documents substantiating the authorisation to remain on the territory under temporary protection arrangements or until the circumstances preventing a removal order from being carried out no longer apply, with the exception of visas and residence authorisations issued during the period required to determine the Member State responsible as established in this Regulation or during the examination of an application for international protection or an application for a residence permit; (n) 'risk of absconding' means the existence of reasons in an individual case, which are based on objective criteria defined by law, to believe that an applicant or a third-country national or a stateless person who is subject to a transfer procedure may abscond.	Substantive

84 Source: Author's own elaboration.
85 OJ L 180, 29.6.2013, pp. 31–59.

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 (recast)[85]	
Definition	**Group**
Article 2 – Definitions (b) 'application for international protection' means an application for international protection as defined in Article 2(h) of Directive 2011/95/EU; (d) 'examination of an application for international protection' means any examination of, or decision or ruling concerning, an application for international protection by the competent authorities in accordance with Directive 2013/32/EU and Directive 2011/95/EU, except for procedures for determining the Member State responsible in accordance with this Regulation; (e) 'withdrawal of an application for international protection' means the actions by which the applicant terminates the procedures initiated by the submission of his or her application for international protection, in accordance with Directive 2013/32/EU, either explicitly or tacitly; (k) 'representative' means a person or an organisation appointed by the competent bodies in order to assist and represent an unaccompanied minor in procedures provided for in this Regulation with a view to ensuring the best interests of the child and exercising legal capacity for the minor where necessary. Where an organisation is appointed as a representative, it shall designate a person responsible for carrying out its duties in respect of the minor, in accordance with this Regulation; (m) 'visa' means the authorisation or decision of a Member State required for transit or entry for an intended stay in that Member State or in several Member States. The nature of the visa shall be determined in accordance with the following definitions: – 'long-stay visa' means an authorisation or decision issued by one of the Member States in accordance with its national law or Union law required for entry for an intended stay in that Member State of more than three months, – 'short-stay visa' means an authorisation or decision of a Member State with a view to transit through or an intended stay on the territory of one or more or all the Member States of a duration of no more than three months in any six-month period beginning on the date of first entry on the territory of the Member States, – 'airport transit visa' means a visa valid for transit through the international transit areas of one or more airports of the Member States.	Procedural

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 (recast)[85]	
Definition	**Group**
Article 2 – Definitions (g) 'family members' means, insofar as the family already existed in the country of origin, the following members of the applicant's family who are present on the territory of the Member States: – the spouse of the applicant or his or her unmarried partner in a stable relationship, where the law or practice of the Member State concerned treats unmarried couples in a way comparable to married couples under its law relating to third-country nationals, – the minor children of couples referred to in the first indent or of the applicant, on condition that they are unmarried and regardless of whether they were born in or out of wedlock or adopted as defined under national law, – when the applicant is a minor and unmarried, the father, mother or another adult responsible for the applicant, whether by law or by the practice of the Member State where the adult is present, – when the beneficiary of international protection is a minor and unmarried, the father, mother or another adult responsible for him or her whether by law or by the practice of the Member State where the beneficiary is present; (h) 'relative' means the applicant's adult aunt or uncle or grandparent who is present in the territory of a Member State, regardless of whether the applicant was born in or out of wedlock or adopted as defined under national law; (i) 'minor' means a third-country national or a stateless person below the age of 18 years; (j) 'unaccompanied minor' means a minor who arrives on the territory of the Member States unaccompanied by an adult responsible for him or her, whether by law or by the practice of the Member State concerned, and for as long as he or she is not effectively taken into the care of such an adult; it includes a minor who is left unaccompanied after he or she has entered the territory of Member States.	Substantive family

Eleventh, the next relevant EU Regulation is Regulation (EU) 2021/1147 of the European Parliament and of the Council of 7 July 2021 establishing the Asylum, Migration, and Integration Fund (for the period from 1 January 2021 to 31 December 2027), which lays down the objectives of the fund, the budget for the period from 1 January 2021 to 31 December 2027 the forms of union funding, and the rules regarding the allocation of such funding. Definitions of a substantive nature, including family related definitions, as well as procedural definitions, can be found in this legal act. The grouping process is presented in Table 11.

Table 11. Groupings of definitions from Regulation 2021/1147[86]

Regulation (EU) 2021/1147 of the European Parliament and of the Council of 7 July 2021 establishing the Asylum, Migration and Integration Fund[87]	
Definition	**Group**
Article 2 – Definitions (3) 'blending operation' means actions supported by the Union budget, including within blending facilities within the meaning of point (6) of Article 2 of the Financial Regulation; (5) 'humanitarian admission' means the admission following, where requested by a Member State, a referral from the European Asylum Support Office (EASO), the United Nations High Commissioner for Refugees ('UNHCR'), or another relevant international body, of third-country nationals or stateless persons from a third country to which they have been forcibly displaced to the territory of the Member States, and who are granted international protection or a humanitarian status under national law that provides for rights and obligations equivalent to those of Articles 20 to 34 of Directive 2011/95/EU for beneficiaries of subsidiary protection; (6) 'operating support' means a part of a Member State's allocation which may be used as support to the public authorities responsible for carrying out the tasks and providing the services which constitute a public service for the Union; (7) 'removal' means removal as defined in point (5) of Article 3 of Directive 2008/115/EC;	Procedural

86 Source: Author's own elaboration.
87 PE/56/2021/INIT, OJ L 251, 15.7.2021, pp. 1-47.

Regulation (EU) 2021/1147 of the European Parliament and of the Council of 7 July 2021 establishing the Asylum, Migration and Integration Fund[87]	
Definition	**Group**
(8) 'resettlement' means the admission following a referral from the UNHCR of third-country nationals or stateless persons from a third country to which they have been displaced, to the territory of the Member States, and who are granted international protection and have access to a durable solution in accordance with Union and national law; (9) 'return' means return as defined in point (3) of Article 3 of Directive 2008/115/EC; (10) 'specific actions' means transnational or national projects that bring Union added value in line with the objectives of the Fund for which one, several or all Member States may receive an additional allocation to their programmes; (13) 'Union actions' means transnational projects or projects of particular interest to the Union implemented in accordance with the objectives of the Fund.	Procedural
Article 2 – Definitions (1) 'applicant for international protection' means an applicant as defined in point (c) of Article 2 of Directive 2013/32/EU of the European Parliament and of the Council; 2) 'beneficiary of international protection' means a beneficiary of international protection as defined in point (b) of Article 2 of Directive 2011/95/EU of the European Parliament and of the Council; (11) 'third-country national' means any person, including a stateless person or a person with undetermined nationality, who is not a citizen of the Union as defined in Article 20(1) TFEU; (14) 'vulnerable person' means any person defined as a vulnerable person under the Union law relevant to the policy area of action supported under the Fund.	Substantive
Article 2 – Definitions (4) 'family member' means any third-country national defined as a family member under the Union law relevant to the policy area of action supported under the Fund; (12) 'unaccompanied minor' means an unaccompanied minor as defined in point (l) of Article 2 of Directive 2011/95/EU;	Substantive family

In 2020, the European Commission tabled new legislative proposals on migration and asylum issues within the framework of a new act on migration and asylum. Although this is not currently a law, regardless of the success of the legislative process, the content of legislative proposals is known. Accordingly, it can be surmised that potential future legislation in the EU will include definitional provisions. Substantive definitions, including family related and procedural definitions, can be found in these proposals. The grouping process has been presented in Tables 12, 13 and 14 separately for each legislative proposal of the European Commission.[88]

Table 12. Groupings of definitions from Proposal COM/2020/610 final[89]

Proposal for a Regulation of the European Parliament and of the Council on asylum and migration management and amending Council Directive (EC) 2003/109 and the proposed Regulation (EU) XXX/XXX [Asylum and Migration Fund].[90]	
Definition	**Group**
Article 2 – Definitions (a) 'third-country national' means any person who is not a citizen of the Union within the meaning of Article 20(1) of the Treaty and who is not a person enjoying the right to free movement under Union law as defined in Article 2, point (5) of Regulation (EU) 2016/399 of the European Parliament and of the Council; (c) 'applicant' means a third-country national or a stateless person who has made an application for international protection in respect of which a decision has not been taken, or has been taken and is either subject to or can still be subject to a remedy in the Member State concerned, irrespective of whether the applicant has a right to remain or is allowed to remain in accordance with Regulation (EU) XXX/XXX [Asylum Procedure Regulation], including a person who has been granted immediate protection pursuant to Regulation (EU) XXX/XXX [Regulation addressing situations of crisis and force majeure in the field of asylum and migration];	Substantive

88 Regarding the scope of the New Pact on Migration and Asylum see, for example: Gazi, 2021, pp. 167–175; Mouzourakis, 2020, pp. 171–180; Doliwa-Klepacka, 2021, pp. 9–21.

89 Source: Author's own elaboration.

90 COM/2020/610 final.

Proposal for a Regulation of the European Parliament and of the Council on asylum and migration management and amending Council Directive (EC) 2003/109 and the proposed Regulation (EU) XXX/XXX [Asylum and Migration Fund].[90]	
Definition	**Group**
(l) 'residence document' means any authorisation issued by the authorities of a Member State authorising a third-country national or a stateless person to stay on its territory, including the documents substantiating the authorisation to remain on the territory under temporary protection arrangements or until the circumstances preventing a removal order from being carried out no longer apply, with the exception of visas and residence authorisations issued during the period required to determine the Member State responsible as established in this Regulation or during the examination of an application for international protection or an application for a residence permit; (q) 'risk of absconding' means the existence of specific reasons and circumstances in an individual case, which are based on objective criteria defined by national law to believe that an applicant who is subject to a transfer procedure may abscond; (w) 'migratory pressure' means a situation where there is a large number of arrivals of third-country nationals or stateless persons, or a risk of such arrivals, including where this stems from arrivals following search and rescue operations, as a result of the geographical location of a Member State and the specific developments in third countries which generate migratory movements that place a burden even on well-prepared asylum and reception systems and requires immediate action; (x) 'resettled or admitted person' means a person who has been accepted by a Member State for admission pursuant to Regulation (EU) XXX/XXX [Union Resettlement Framework Regulation] or under a national resettlement scheme outside the framework of that Regulation; (aa) 'illegally staying third-country national' means a third-country national who does not fulfil or no longer fulfils the conditions of entry as set out in Article 6 of Regulation (EU) 2016/399 or other conditions for entry, stay or residence in a Member State.	Substantive

Proposal for a Regulation of the European Parliament and of the Council on asylum and migration management and amending Council Directive (EC) 2003/109 and the proposed Regulation (EU) XXX/XXX [Asylum and Migration Fund].[90]	
Definition	**Group**
Article 2 – Definitions (b) 'application for international protection' or 'application' means a request for protection made to a Member State by a third-country national or a stateless person, who can be understood as seeking refugee status or subsidiary protection status; (m) 'visa' means the authorisation or decision of a Member State required for transit or entry for an intended stay in that Member State or in several Member States, including: (i) an authorisation or decision issued in accordance with its national law or Union law required for entry for an intended stay in that Member State of more than 90 days, (ii) an authorisation or decision issued in accordance with its national law or Union law required for entry for a transit through or an intended stay in that Member State not exceeding 90 days in any 180-day period, (iii) an authorisation or decision valid for transit through the international transit areas of one or more airports of the Member States; (p) 'absconding' means the action by which an applicant does not remain available to the competent administrative or judicial authorities, such as by leaving the territory of the Member State without authorisation from the competent authorities for reasons which are not beyond the applicant's control; (u) 'relocation' means the transfer of a third-country national or a stateless person from the territory of a benefiting Member State to the territory of a contributing Member State; (z) 'return decision' means an administrative or judicial decision or act stating or declaring the stay of a third-country national to be illegal and imposing or stating an obligation to return that respects Directive 2008/115/EC of the European Parliament and of the Council.	Procedural

Proposal for a Regulation of the European Parliament and of the Council on asylum and migration management and amending Council Directive (EC) 2003/109 and the proposed Regulation (EU) XXX/XXX [Asylum and Migration Fund].[90]	
Definition	**Group**
Article 2 – Definitions (g) 'family members' means, insofar as the family already existed before the applicant or the family member arrived on the territory of the Member States, the following members of the applicant's family who are present on the territory of the Member States: (i) the spouse of the applicant or his or her unmarried partner in a stable relationship, where the law or practice of the Member State concerned treats unmarried couples in a way comparable to married couples under its law relating to third-country nationals, (ii) the minor children of couples referred to in the first indent or of the applicant, on condition that they are unmarried and regardless of whether they were born in or out of wedlock or adopted as defined under national law, (iii) where the applicant is a minor and unmarried, the father, mother or another adult responsible for the applicant, whether by law or by the practice of the Member State where the adult is present, (iv) where the beneficiary of international protection is a minor and unmarried, the father, mother or another adult responsible for him or her whether by law or by the practice of the Member State where the beneficiary is present, (v) the sibling or siblings of the applicant; (h) 'relative' means the applicant's adult aunt or uncle or grandparent who is present in the territory of a Member State, regardless of whether the applicant was born in or out of wedlock or adopted as defined under national law; (i) 'minor' means a third-country national or a stateless person below the age of 18 years; (j) 'unaccompanied minor' means a minor who arrives on the territory of the Member States unaccompanied by an adult responsible for him or her, whether by law or by the practice of the Member State concerned, and for as long as he or she is not effectively taken into the care of such an adult; it includes a minor who is left unaccompanied after he or she has entered the territory of Member States.	Substantive family

Table 13. Groupings of definitions from Proposal COM/2020/612 final[91]

Proposal for a Regulation of the European Parliament and of the Council introducing a screening of third country nationals at the external borders and amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817[92]	
Definition	**Group**
Article 2 – Definitions 1.'unauthorised crossing of the external border' means crossing of an external border of a Member State by land, sea or air, at places other than border crossing points or at times other than the fixed opening hours, as referred to in Article 5(3) of Regulation (EU) 2016/399.	Procedural
Article 2 – Definitions 5.'third-country national' means any person who is not a citizen of the Union within the meaning of Article 20(1) TFEU and who is not a person enjoying the right to free movement under Union law within the meaning of Article, 2 Point 5, of Regulation (EU) 2016/399.	Substantive

Table 14. Groupings of definitions from Proposal COM/2020/613 final[93]

Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL addressing situations of crisis and force majeure in the field of migration and asylum[94]	
Definition	**Group**
Article 1 (a) an exceptional situation of mass influx of third-country nationals or stateless persons arriving irregularly in a Member State or disembarked on its territory following search and rescue operations, being of such a scale, in proportion to the population and GDP of the Member State concerned, and nature, that it renders the Member State's asylum, reception or return system non-functional and can have serious consequences for the functioning of the Common European Asylum System or the Common Framework as set out in Regulation (EU) XXX/XXX [Asylum and Migration Management], or (b)an imminent risk of such a situation.	Substantive

91 Source: Author's own elaboration.
92 COM/2020/612 final.
93 Source: Author's own elaboration.
94 COM/2020/613 final.

These carefully constructed tables, which synthesise definitions relevant to these topics from 14 legal acts, provide a thorough overview of how international and EU laws shape the notions of migration and refugees. A fundamental standard was set by the 1951 Refugee Convention and its 1967 Protocol, which impacted other international and EU legal instruments, in addition to national laws. This is also reflected in the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, which emphasises the protection of all migrant workers regardless of their legal status and broadens the conversation to encompass labour migration. These criteria are further refined by the TFEU and other EU directives, which cover several phases of immigration and asylum processes, from qualifying and reception to procedure. This comprehensive compilation highlights the intricate and interrelated nature of legal terminology, underscoring the need for a unified approach to immigration and refugee legislation across the EU. By presenting this research in tabular form, the author hopes to demystify these complex legal environments and emphasise how crucial it is to have a cohesive legal framework to properly handle migration and asylum.

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9. Conclusion

Using 10 key points to summarise the complex web of difficulties around migration and refugees, this section captures the multidimensional character of these processes from several fields. This research highlights the significant role of the law in managing the intricacies of migration- and refugee-related issues, emphasising its ability to justify and control these worldwide movements. Exploring the wide-ranging effects of globalisation leads to a detailed comprehension of specific legal terms in international and EU contexts. In addition to illustrating the complexities of the law, these 10 observations emphasise the need for an integrated strategy that combines national and international collaboration to successfully handle the benefits and problems posed by migration and refugee movements. This synthesis not only improves our understanding but also lays forth a future-focused agenda for legislative and policy change in this dynamic environment.

First, concepts such as migration and refugees, and the entire conceptual grid associated with them are interdisciplinary, incorporating psychological, sociological, political, and legal sciences. Nevertheless, as a social phenomenon and regulatory tool of the State, it seems that the law has the power to control the highly sensitive and complex phenomena of migration and refugeeism. By defining and limiting how migration and refugeeism occur, the law rationalises these phenomena.

Second, globalism forms the basis of migration and refugee phenomena. Clearly, these phenomena do not refer to and accommodate purely internal State affairs; they

involve direct cross-border situations involving at least two States and typically far more State actors. Therefore, these phenomena exhibit global characteristics.

Third, the phenomena of migration and refugees are governed by various types and areas of law. This includes substantive and formal law as well as national, international, and EU law. This shows that migration- and refuge-related issues are of particular importance, requiring not only a systemic approach, but also enhanced international or EU cooperation.

Fourth, there is a broad regulatory framework within the EU dealing specifically deals with migration and refugee issues. We are talking here about provisions not only of EU primary law, but also, and perhaps especially, of EU secondary law. Many pieces of legislation touch, sometimes minute, the issue at hand. It is also important to note that most provisions of EU secondary law take the legal form of directives. Evidently, this means that, currently, the responsibility for building an efficient, effective, and coherent migration and asylum system in the EU lies not only with the EU but also (and, it seems, overwhelmingly) with EU Member States.

Fifth, the normative core defining the stages of the legal concepts of migrant and refugee is the so-called triad of directives: 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 (recast); Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast); and Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast). These stages are qualification, reception, and procedure.

Sixth, the content and form of definitions contained in national law, insofar as a particular State belongs to an international organisation or is a party to the relevant international agreements, depends on the definitions contained in international or EU law. This can be seen in the national regulations presented in this study. It is clear from their internal and external similarities that they are derived from international and EU regulations.

Seventh, there are many definitions of migration and refugees in international and EU law. We are talking here not only about the main terms but also about the slightly more peripheral ones, which together form an overall international or EU conceptual grid. This conceptual grid has a significant impact. In terms of international law, many States are parties to international agreements. In terms of EU law, EU primary and secondary laws directly affect all EU Member States. This leads to a conclusion similar to the previous one, namely, that international regulations at the EU-level level currently determine the direction of the definitional grid related to migration and refugees.

Eighth, the terms' migrant and refugee were not legally identical. The term migrant refers to someone who moves from one country to another or a third country

for various reasons. Thus, the term is extremely broad and covers many categories of foreigners. These categories can be defined differently. For example, considering the physical aspects of migrants, they can be categorised as children, vulnerable persons, older adults, or people with serious illnesses. One can also categorise migrants according to their purposes and reasons for migration, such as migrant workers or refugees. Hence, the term migrant encapsulates the concept of refugees such that not every migrant is a refugee, but every refugee is a migrant.

Ninth, while the term refugee has a legal definition, the term migrant does not. This does not mean that the term migrant is legally irrelevant, but that the law does not define it. Regarding the legitimacy of creating a definition of migrant, it seems that this is not necessary because of the settled dictionary meaning and common understanding of the term. After all, it is not the case that the law defines or should define every word used. Such a conclusion is obviously unwarranted in relation to the term refugee, a concept that requires strong intervention by legislators.

Tenth, the above leads to the conclusion that the concept of migrant does not require a legal definition, while the concept of refugee has required such normative clarification. The reason for this state of affairs is the decision to leave that particular state. In the case of a migrant, this can be for various purposes (e.g. economic, work-related, or leisure), but always refers to settling for an extended period. For refugees, the decision to leave the country is compelled by external forces. Thus, what differs between migrants and refugees from a legal perspective is whether the decision to migrate was made voluntarily or under compulsion.

Ultimately, it is important to recognise that migration is not necessarily negative; its effects depend on its magnitude and how it is managed. The core issue does not lie with the sovereignty of State actors but with the approach to and perception of migration. Conversely, the circumstances compelling refugees to flee their homes are indeed dire, but the situations in which they escape – not the refugees themselves – are fraught with negativity. These scenarios necessitate concerted global efforts to address the root causes of forced migration, primarily wars and armed conflicts. We hope that, through the formulation and implementation of robust legal frameworks, we can effectively address these challenges and ensure that every individual's dignity and human rights are upheld.

References

Bibliography

Abell, N. A. (1999) 'The Compatibility of Readmission Agreements with the 1951 Convention relating to the Status of Refugees', *International Journal of Refugee Law*, 11(1), pp. 60–83; https://doi.org/10.1093/ijrl/11.1.60.

Aldea, A. (2018) 'Applying Qualification Directive-2011/95/EU. CJEU's Decision C-473/16', *Bulletin of the Transilvania University of Braşov, Series VII: Social Sciences and Law*, 11(1), pp. 141–148.

Barry, K. (2021) 'Where is the vulnerability assessment tool? Disabled asylum seekers in Direct Provision in Ireland and the EU (recast) Reception Conditions Directive (2013/33/EU)' in Pomati, M., Jolly, A., Rees, J. (eds.) *Social Policy Review 33.– Analysis and Debate in Social Policy*. Bristol: Policy Press, 2021, pp. 223–242; https://doi.org/10.56687/9781447359739-013.

Berkeley, B. (2009) 'Stateless people, violent states', *World Policy Journal*, 26(1), pp. 3–15; https://doi.org/10.1162/wopj.2009.26.1.3.

Blay, S., Tsamenyi, M.B. (1990) 'Reservations and Declarations under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees', *International Journal of Refugee Law*, 2(4), pp. 527–561; https://doi.org/10.1093/reflaw/2.4.527.

Boroi, D. (2018) 'Dublin Regulation III-Considerations on the Respect of Asylum Applicants'rights', *Analele Universităţii Titu Maiorescu*, 2018/17, pp. 55–59.

Ciborowski, R. (2003) 'Procesy innowacyjne w warunkach globalizacji' in Bocian, A. (ed.) *Ekonomia – polityka – etyka, praca zbiorowa pod*, Białystok: Wydawnictwo Uniwersytetu w Białymstoku, pp. 163–183.

D'Amato, G. (2015) 'How Foreigners Became Muslims: Switzerland's Path to Accommodating Islam as a New Religion' in Burchardt, M., Michalowski, I. (eds.) *After Integration. Islam und Politik*, pp. 285–301; https://doi.org/10.1007/978-3-658-02594-6_15.

Di Pascale, A. (2021) 'Garanzie informative e partecipative del richiedente protezione internazionale e limiti al sindacato giurisdizionale nella procedura di ripresa in carico di cui al reg.(UE) n. 604/2013. nota a margine dei rinvii pregiudiziali alla Corte di giustizia', *Diritto, Immigrazione e Cittadinanza,* 2021(3), pp. 272–298.

Doliwa-Klepacka, A. (2021) 'The New Pact on Migration and Asylum as a Response to Current Migration Challenges-Selected Issues', *Bialystok Legal Studies*, 1(26), pp. 9–21; https://doi.org/10.15290/bsp.2021.26.01.01.

Edelenbos, C. (2005) 'The International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families', *Refugee Survey Quarterly*, 24(4), pp. 93–98; https://doi.org/10.1093/rsq/hdi088.

Eisenstadt, S.N. (1953) 'Analysis of Patterns of Immigration and Absorption of Immigrants', *Population Studies*, 7(2), pp. 167–180; https://doi.org/10.2307/2172030.

Gazi, T. (2021) 'The New Pact on Migration and Asylum: Supporting or Constraining Rights of Vulnerable Groups?', *European Papers–A Journal on Law and Integration*, 6(1), pp. 167–175.

Giménez, A. O. (2013) 'Reglamento (UE) no. 604/2013 del Parlamento Europeo y del Consejo, de 26 de junio de 2013, por el que se establecen los criterios y mecanismos de determinación del Estado miembro responsable del examen de una solicitud de protección internacional presenta', *AIS: Ars Iuris Salmanticensis*, 1(2), pp. 191–192.

Gordanić, J. (2012) 'Direktiva 2011/95/EU o kvalifikaciji državanjana trećih država ili lica bez državljanstva za korisnike međunarodne zaštite u jedinstvenom izbegličkom statusu ili status korisnika subsidijarne zaštite', *Evropsko zakonodavstvo*, 11(39-40), pp. 60–67.

Guiraudon, V. (2002) 'Including Foreigners in National Welfare States: Institutional Venues and Rules of the Game' in Rothstein, B., Steinmo, S. (eds.) *Restructuring the Welfare State: Political Institutions and Policy Change. Political Evolution and Institutional Change*. New York: Palgrave Macmillan, pp. 129–156; https://doi.org/10.1007/978-0-230-10924-7_6.

Hamlin, R., Wolgin, E.P. (2012) 'Symbolic politics and policy feedback: the United Nations Protocol Relating to the Status of Refugees and American refugee policy in the Cold War', *International Migration Review*, 46(3), pp. 586–624; https://doi.org/10.1111/j.1747-7379.2012.00898.x.

Heitmeyer, W. (1993) 'Hostility and Violence towards Foreigners in Germany' in Björgo, T., Witte, R. (eds.) *Racist Violence in Europe*, pp. 17–28; https://doi.org/10.1007/978-1-349-23034-1_2.

Hoffmeyer-Zlotnik, J. (2003) 'Regional Influences on Attitudes Toward Foreigners' in Alba, R., Schmidt, P., Wasmer, M. (eds.) *Germans or Foreigners? Attitudes Toward Ethnic Minorities in Post-Reunification Germany.* Europe in Transition: The NYU European Studies Series, New York: Palgrave Macmillan, pp. 255–268; https://doi.org/10.1057/9780230608825_12.

Hune, S. (1991) 'Migrant women in the context of the international convention on the protection of the rights of all migrant workers and members of their families', *International Migration Review*, 25(4), pp. 800–817; https://doi.org/10.1177/019791839102500407.

Iwaszczuk, N., Łamasz, B., Orłowska-Puzio, J. (2016) 'Globalizacja a nierówności w rozwoju wybranych krajów', *Social Inequality and Economic Growth*, 2016(3), pp. 161–174; https://doi.org/10.15584/nsawg.2016.3.12.

Jahn, E. (2015) "Multiculturalism" or German "Lead Culture" as Maxims for the "Integration" of Foreigners', in Jahn, E., *German Domestic and Foreign Policy*, pp. 75–90; https://doi.org/10.1007/978-3-662-47929-2_5.

Kajita, T. (1998) 'The Challenge of Incorporating Foreigners in Japan: 'Ethnic Japanese' and 'Sociological Japanese' in Weiner, M., Hanami, T. (eds.) *Temporary Workers or Future Citizens?*. London: Palgrave Macmillan, pp. 120–147; https://doi.org/10.1007/978-1-349-14418-1_5.

Karski, K., Oręziak, B. (2021) 'Jurysdykcja szczególna w sprawach o naruszenie dóbr osobistych w Internecie z perspektywy prawa Unii Europejskiej', *Studia Iuridica*, 2021/87, pp. 242–261; https://doi.org/10.31338/2544-3135.si.2020-87.12.

Karski, K., Oręziak, B. (2021) 'Selected Considerations Regarding the Digitalisation of Criminal Proceedings in Light of the Standards of the Council of Europe: Analysis Taking into Account the Experience of the Current Pandemic', *Białostockie Studia Prawnicze*, 26(6), pp. 55–69; https://doi.org/10.15290/bsp.2021.26.06.04.

Kane, J., Gezy, S., Miho, K. (2023) 'Health Care Experiences of Stateless People in Canada', *Journal on Migration and Human Security*, 11(3), pp. 261–278; https://doi.org/10.1177/23315024231200200.

Kerber, L. K. (2007) 'The stateless as the citizen's other: a view from the United States', *The American Historical Review*, 112(1), pp. 1–34; https://doi.org/10.1086/ahr.112.1.1.

Kleer, J. (2008) 'Globalizacja: zjawisko ogólne czy specyficzne?', *International Journal of Management and Economics*, 2008(23), p. 38.

Korczak, J. (2017) 'Poglądy na temat imigrantów formułowane przez użytkowników portalu sadistic.pl' in Pasamonik, B., Markowska-Manista, U. (eds.) *Kryzys migracyjny: Perspektywa społeczno-kulturowa.* Warszawa: Wydawnictwo Akademii Pedagogiki Specjalnej, pp. 69–91.

Lodzinski, S. (1999) 'Guarded welcome' A Review of New Legislation and Institutions Dealing with Migration and Foreigners' in Iglicka, K., Sword, K. (eds.) *The Challenge of East-West Migration for Poland. Studies in Russia and East Europe*. London: Palgrave Macmillan, pp. 66–89; https://doi.org/10.1007/978-1-349-27044-6_4.

Lönnroth, J. (1991) 'The international convention on the rights of all migrant workers and members of their families in the context of international migration policies: An analysis of ten years of negotiation', *International Migration Review*, 25(4), pp. 710–736; https://doi.org/10.1177/019791839102500404.

Maśloch, P. (2005) 'Globalizacja i jej wpływ na rozwój współczesnej cywilizacji, Przedsiębiorczość a współczesne wyzwania cywilizacyjne', *Entrepreneurship – Education* 1(1), pp. 17–26; https://doi.org/10.24917/20833296.1.2.

Mazur, S.K. (2022) 'The Temporary Protection Directive is Dead, Long Live the Temporary Protection Directive! Indispensability of the Temporary Protection Scheme in the EU Legal Landscape', *Polish Yearbook of International Law*, 2022/42, pp. 279–300; https://doi.org/10.24425/pyil.2023.147179.

Morgese, G. (2012) 'La Direttiva 2011/95/EU sull'attribuzione e il contenuto della protezione internazionale', *La Comunità internazionale*, 67(2), pp. 255–275.

Mouzourakis, M. (2020) 'More laws, less law: the European Union's New Pact on Migration and Asylum and the fragmentation of 'asylum seeker' status', *European Law Journal*, 26(3-4), pp. 171–180; https://doi.org/10.1111/eulj.12378.

Münz, R., Ulrich, R. (2003) 'The Ethnic and Demographic Structure of Foreigners and Immigrants in Germany' in Alba, R., Schmidt, P., Wasmer, M. (eds.) *Germans or Foreigners? Attitudes Toward Ethnic Minorities in Post-Reunification Germany.* Europe in Transition: The NYU European Studies Series. New York: Palgrave Macmillan, pp. 19–43; https://doi.org/10.1057/9780230608825_2.

Oręziak, B. (2020) 'Electronic evidence and the fairness of criminal trials', *Law in Action. Criminal Cases*, 41(2020), pp. 187–194.

Oręziak, B., Świerczyński, M. (2019) 'Electronic Evidence in the Light of the Council of Europe's New Guidelines', *Comparative Law Review*, 2019/25, pp. 257–275; https://doi.org/10.12775/CLR.2019.009.

Papagianni, G. (2013) 'Forging an external EU migration policy: from externalisation of border management to a comprehensive policy?', *European Journal of Migration and Law*, 15(3), pp. 283–299; https://doi.org/10.1163/15718166-00002037.

Pilich, M. (2022) 'Uchodźcy w prawie prywatnym międzynarodowym', *Gdańsk Legal Studies*, 26(53), pp. 11–42; https://doi.org/10.26881/gsp.2022.1.01.

Pluta, D. (2008) 'Zarys zjawiska uchodźstwa. Aktorzy zjawiska uchodźstwa a proces kształtowania uchodźcy' in Czerniejewska, I., Main, I. (eds.) *Uchodźcy – Teoria i praktyka*. Poznan: WydawcaStowarzyszenie „Jeden Świat", pp. 34–49.

Rojo, D.F. (2016) 'La detención de extranjeros en situación irregular: impacto de la Directiva 2008/115/CE y la jurisprudencia del TJUE en la legislación Española', *Revista de Derecho Comunitario Europeo*, 20(53), pp. 233–258; https://doi.org/10.18042/cepc/rdce.53.06.

Sandoz, L. (2019) 'Mobilities of the Highly Skilled towards Switzerland', *IMISCOE Research Series*, pp. 53–93; https://doi.org/10.1007/978-3-030-21122-6_2.

Skinner, G. (2008) *Bringing International Law to Bear on the Detention of Refugees in the United States*, Willamette Journal of International Law and Dispute Resolution, 16(2), pp. 270–299.

Spalding, A. (2014) 'EU Asylum Procedures and the Right to an Effective Remedy by Marcelle Reneman', *King's Law Journal*, 25(3), pp. 483–487; https://doi.org/10.5235/09615768.25.3.483.

Staniszewski, R.M. (2023) 'Uchodźcy czy migranci? – społeczna percepcja pojęć na podstawie wyników badań opinii publicznej', *Political Studies*, 68(2), pp. 9–37; https://doi.org/10.33896/SPolit.2023.68.1.

Szymańska, J. (2017) 'Strategia Unii Europejskiej wobec kryzysu migracyjnego: priorytety, bariery, efekty', *Studia BAS*, 3(51), p. 164.

Thym, D., Hailbronner, K. (2016) 'Legal Framework for EU Asylum Policy' in Thym, D., Hailbronner, K. (eds.) *EU Immigration and Asylum Law. Commentary,* 2nd edn-. Baden-Baden: Nomos, pp. 1023–1053; https://doi.org/10.5771/9783845259208-2.

Tsamenyi, B. M. (1989) 'Papua New Guinea's Accession to the1951 Convention and the 1967 Protocol Relating to the Status of Refugees', *International Journal of Refugee Law*, 1(2), pp. 180-198; https://doi.org/10.1093/ijrl/1.2.180.

Vlachopoulos, S., Tagkas, P., Gogas, T., Dogoriti, E., Vyzas, T. (2016) 'Foreigners Before Themis: Legal Interpreting' in Greece in Munyangeyo, T., Webb, G., Rabadán-Gómez, M. (eds.) *Challenges and Opportunities in Public Service Interpreting.* London: Palgrave Macmillan, pp. 213–234; https://doi.org/10.1057/978-1-137-45000-5_9.

Vourc'h, F., De Rudder, V., Tripier, M. (1999) 'Foreigners and Immigrants in the French Labour Market: Structural Inequality and Discrimination' in Wrench, J., Rea, A., Ouali, N. (eds.) *Migrants, Ethnic Minorities and the Labour Market. Migration, Minorities and Citizenship*. London: Palgrave Macmillan, pp. 72–92; https://doi.org/10.1007/978-1-349-27615-8_5.

Wasmer, M., Koch, A. (2003) 'Foreigners as Second-Class Citizens? Attitudes Toward Equal Civil Rights for Non-Germans' in Alba, R., Schmidt, P., Wasmer, M. (eds.) *Germans or Foreigners? Attitudes Toward Ethnic Minorities in Post-Reunification Germany.* Europe in Transition. The NYU European Studies Series. Palgrave Macmillan, New York, pp. 95–118; https://doi.org/10.1057/9780230608825_5.

Weis, P. (1961) 'The convention relating to the status of stateless persons', *International and Comparative Law Quarterly*, 10(2), pp. 255–264; https://doi.org/10.1093/iclqaj/10.2.255.

Wierzbicki, W. (1993) *Uchodźcy w prawie międzynarodowym*. Kraków: Temida 2.

Zygadlewicz, M. (2016) 'Niemiecka polityka socjalna a kryzys migracyjny', *Catallaxy*, 1(1), pp. 17–29; https://doi.org/10.24136/cxy.v1i1.2.

Legal sources

Act of May 7, 2009 on amending the Constitution of the Republic of Poland, Dz.U. 2009 no. 114 item 946.

Act of September 8, 2006 on amending the Constitution of the Republic of Poland, Dz.U. 2006 no. 200 item 1471.

Announcement by the Prime Minister of March 26, 2001 on the correction of errors, OJ. 2001 no. 28 item 319.

Announcement by the Speaker of the Sejm of the Republic of Poland of June 16, 2023 on the announcement of the uniform text of the Act on granting protection to foreigners on the territory of the Republic of Poland, OJ. 2023 item 1504.

Announcement by the Speaker of the Sejm of the Republic of Poland of January 27, 2023 on the announcement of the uniform text of the Act on foreigners, OJ. 2023 item 519.

Announcement by the Speaker of the Sejm of the Republic of Poland of September 4, 2023 on the announcement of the consolidated text of the Act on Polish citizenship, OJ. 2023 item 1989.

Constitution of the Republic of Poland of April 2, 1997, Dz.U.. 1997 No. 78 item 483.
Convention Relating to the Status of Refugees, drawn up in Geneva on July 28, 1951, OJ. 1991 no. 119 item 515.
International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, United Nations General Assembly, 3 March 2005. [Online]. Available at: https://www.ohchr.org/en/instruments-mechanisms/instruments/international-convention-protection-rights-all-migrant-workers (Accessed: 1 December 2023).
Law of January 13, 2023 Amending the Law on Assistance to Citizens of Ukraine in Connection with the Armed Conflict on the Territory of Ukraine and Certain Other Laws, OJ. 2023 item 185.
Law of March 9, 2023 on amending the Law on foreigners and certain other laws, OJ. 2023 item 547.
OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, adopted by the Assembly of Heads of State and Government at its Sixth Ordinary Session, Addis-Ababa, 10 September 1969. [Online]. Available at: https://www.unhcr.org/media/oau-convention-governing-specific-aspects-refugee-problems-africa-adopted-assembly-heads (Accessed: 24 November 2023).
Proposal for a Regulation of The European Parliament and of the Council on asylum and migration management and amending Council Directive (EC) 2003/109 and the proposed Regulation (EU) XXX/XXX [Asylum and Migration Fund], COM/2020/610 final.
Proposal for a Regulation of The European Parliament and of the Council introducing a screening of third country nationals at the external borders and amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817, COM/2020/612 final.
Proposal for a Regulation of The European Parliament and of the Council addressing situations of crisis and force majeure in the field of migration and asylum, COM/2020/613 final.
Protocol Relating to the Status of Refugees, done at New York on January 31, 1967, OJ. 1991 No. 119 item 517.
United Nations General Assembly (1948) The Universal Declaration of Human Rights (UDHR). New York: United Nations General Assembly, 10 December 1948. [Online]. Available at: https://www.un.org/en/about-us/universal-declaration-of-human-rights (Accessed: 15 December 2023)

CHAPTER II

The 1951 United Nations Convention Relating to the Status of Refugees: Contemporary Theory and Practice

Nóra Béres

Abstract

This chapter seeks to provide an analysis on the framework of interpretation of the 1951 United Nations Convention relating to the Status of Refugees with special regard to its key elements: the definition of the term 'refugee', the concept of refugee status (including illegal entry to a country), and the principle of non-refoulement. When it comes to the application of the provisions enshrined under the Convention, the fact that that neither a treaty body nor a human rights monitoring mechanism were set up by the drafters must be taken into consideration. Nevertheless, as an ultimate source of international law, the Convention is regularly and variously interpreted by both international courts and national tribunals, and in addition to legal scholarship, judicial case law operates as a guide in determining the real essence and meaning of the Convention's provisions. In this vein, this chapter applies concept analysis and legal case analysis as methodology to discuss in detail the most significant norms of contemporary international refugee law.

Keywords: Refugee Convention, refugee definition, refugee status, illegal entry to a country, non-refoulement

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https://doi.org/10.54237/profnet.2024.armace_2

1. Introduction

As of 2024, the issue of refugees remains among the problems of most concern to the international community. According to the latest data provided by the United Nations High Commissioner for Refugees (hereinafter: 'UNHCR') and Statista, in mid-2023, as a result of armed conflicts, persecution, human rights violations, or other events seriously disturbing public order, there were 110 million forcibly displaced people worldwide. The majority of the refugee flows are generated by the war in Ukraine, the conflict in Yemen, and the attacks in the eastern region of the Democratic Republic of the Congo, as well as the crises in Afghanistan, Ethiopia, and Syria.[1] Most people fleeing across borders come from just a few countries like Afghanistan, Myanmar, South Sudan, Syria, and Venezuela. To be more precise, over half of all refugees (52%) come from just three countries: Syria (6.5 million), Afghanistan (6.1 million), and Ukraine (5.9 million), while Pakistan, Bangladesh, Uganda, Iran, Türkiye, Columbia, and Germany host the largest number of refugees.[2] Although the phenomenon is not a new trend, the ongoing challenges highlighted by recent numbers means that the ongoing topicality of refugees issues remains undisputable.

When it comes to a global phenomenon with a universal scope, as is the case with migration and refugee-related challenges, it is worth examining what international law offers as a solution for these transnational problems. In this context, a focused analysis of the 1951 Convention relating to the Status of Refugees[3] (hereinafter: 'Refugee Convention' or 'Convention')[4] and its 1967 Protocol relating to the Status of Refugees[5] (hereinafter: 'Protocol') seems to be necessary, and the question should be raised as to how a legal instrument that is over seventy years old can provide appropriate mechanisms for modern legal difficulties. This chapter therefore combines concept analysis and legal case analysis as its methodology to pursue this research aim and to discuss in detail the most significant norms of contemporary international refugee law.

Even though the Refugee Convention is of great significance and reflects contemporary global challenges, the idea that it is outdated has become commonplace in recent decades. According to Fitzpatrick, these criticisms stem basically from three reasons. One is that the Refugee Convention's persecution-centred approach seems anachronistic and conceptually inadequate in that forced migration is typically

1 *Refugees and IDPs worldwide – Statistics & Facts* [Online]. Available at: https://www.statista.com/topics/10555/refugees-and-idps-worldwide/#topicOverview (Accessed: 14 May 2023). UNHCR, 2022.

2 UNHCR Refugee Data Finder [Online]. Available at: https://www.unhcr.org/refugee-statistics/ (Accessed: 25 January 2024).

3 Convention relating to the Status of Refugees, Geneva, 28 July 1951, UNTS, vol. 189.

4 For comprehensive analysis see Zimmermann and Mahler, 2011.

5 Protocol relating to the Status of Refugees, New York, 31 January 1967, UNTS, vol. 606, p. 267.

driven by violence that does not involve persecution.[6] Policy analysts also emphasise that the significant increase in the numbers of forcibly displaced persons has resulted in costly procedures, which are burdensome for States in economic and social terms.[7] Finally, and pragmatically, there has also been an erosion of support for the Refugee Convention among traditional asylum States, some of whom have expressed their desire for a new regime.[8] To set a hypothesis to this chapter, we should depart from the personal scope of the Refugee Convention, as the international protection it provides was tailored to a very limited category of refugees, i.e., individual political asylum seekers and not a mass influx. The Refugee Convention is therefore unable to provide protection for internally displaced persons (hereinafter: 'IDPs') or those who flee from their home countries without persecution or owing to some other drivers not enumerated under the Convention, like armed conflicts, famine, or extreme poverty. Nonetheless, in spite of the criticisms, the Refugee Convention is still in force and every year millions of asylum claims are settled in accordance with its provisions. Therefore, to understand the effective operation of the refugee legal regime, the following sub-chapters will pursue a detailed analysis on the definition of the term 'refugee', refugee status, and the principle of non-refoulement.

2. The adoption of the Refugee Convention and its Protocol

The refugee problem became of concern to the international community early in the twentieth century due to the development, and then coexistence, of two historical-legal-social preconditions: the closure of national borders and the intensity of refugee flows following a succession of major conflicts.[9] In connection with the events of the First World War, some two million Russians, Armenians, and others were forced to flee their countries of origin between 1917 and 1926.[10] Subsequently, for humanitarian reasons, the international community began to assume responsibility for protecting and assisting refugees, and the first institutional framework was provided under the auspices of the League of Nations, where numerous treaties were adopted: the 1926 Arrangement relating to the Issue of Identity Certificates to Russian and Armenian Refugees,[11] the

6 Zolberg, Suhrke and Aguayo, 1989, pp. 1–394.
7 Fitzpatrick, 1996, pp. 230–231.
8 Helton, 1994, p. 1623.
9 The Balkan Wars (1912–1913), the First World War (1914–1918), and its aftermath in the Near East, i.e., the wars in the Caucasus (1918–1921) and the Greco-Turkish War (1919–1922), caused significant refugee flows in the States involved, especially in the Russian Empire. Between one and two million refugees left Russia (or the Soviet Union) for Central Asia, East Asia, and the European countries of Asia Minor, between 1918 and 1922. See Jager, 2001, p. 727.
10 Hathaway, 2021, p. 19.
11 Arrangement of 12 May 1926 relating to the Issue of Identity Certificates to Russian and Armenian Refugees, League of Nations, Treaty Series Vol. LXXXIX, No. 2004.

1928 Arrangement relating to the Legal Status of Russian and Armenian Refugees,[12] the 1933 Convention relating to the International Status of Refugees[13] (hereinafter: '1933 Convention') the 1938 Convention concerning the Status of Refugees Coming from Germany,[14] and the 1939 Additional Protocol to the Provisional Arrangement and to the Convention concerning the Status of Refugees Coming from Germany.[15] As can be concluded based on the *ratione personae* of the treaties listed above, the majority of the League of Nations refugee instruments were limited in scope, focusing on Russians, Armenians, and Germans. Nonetheless, the 1933 Convention, initiated by the International Committee of the Red Cross (hereinafter: 'ICRC'), was a more comprehensive and forward-looking treaty and dealt with administrative measures (e.g., the issuing of Nansen certificates[16]), juridical conditions, labour conditions, industrial accidents, welfare and relief, education, and fiscal issues, as well as exemptions from reciprocity. Most importantly, the principle of non-refoulement acquired the status of international treaty law by virtue of Art. 3 of the 1933 Convention as follows:

> Each of the Contracting Parties undertakes not to remove or keep from its territory by applications of police measures, such as expulsions or non-admittance at the frontier (refoulement), refugees who have been authorised to reside there regularly, unless the said measures are dictated by reasons of national security or public order.

This provision of the 1933 Convention served later as a model for Art. 33 of the Refugee Convention[17] enshrining the prohibition of refoulement.[18] By stipulating non-refoulement under the 1933 Convention, a humanitarian approach appeared in international refugee law, thanks to the work of the ICRC. Regardless, the 'success' of the 1933 Convention is strongly questionable[19] as only nine States ratified it.[20]

The contemporary universal treaty regime of international refugee law currently in effect, adopted under the auspices of the United Nations (hereinafter: 'UN') and

12 Arrangement of 30 June 1928 relating to the Legal Status of Russian and Armenian Refugees, League of Nations, Treaty Series Vol. LXXXIX, No. 2005.

13 Convention of 28 October 1933 relating to the International Status of Refugees, 1933.

14 Convention of 10 February 1938 concerning the Status of Refugees Coming from Germany, League of Nations, Treaty Series Vol. CXCII, No. 4461.

15 Additional Protocol of 14 September 1939 to the Provisional Arrangement and to the Convention concerning the Status of Refugees Coming from Germany, League of Nations, Treaty Series Vol. CXCVIII, No. 4634.

16 The so-called 'Nansen certificates' were official refugee travel passports issued between 1922 and 1938. First, they were issued by the League of Nations' Office of the High Commissioner for Refugees to stateless persons. The refugee travel passports quickly became known for their promoter, the Norwegian statesman and polar explorer, Fridtjof Nansen.

17 Molnár, 2016, pp. 51–53.

18 Jager, 2001, p. 730.

19 Some authors argue that the unwillingness demonstrated towards acceptance of the 1933 Convention was driven by two competing understandings of the sovereignty concept. See Beck, 1999, pp. 597–624.

20 Convention of 28 October 1933 relating to the International Status of Refugees, 1933.

overseen by the UNHCR, comprises 'two key legal documents: the 1951 Refugee Convention and its 1967 Protocol. With 147 ratifications,[21] both instruments enjoy worldwide acceptance and many of their provisions have been levelled up to customary norms of international law. The Refugee Convention and its Protocol are built upon three fundamental pillars: the definition of 'refugee', refugee status, and the principle of non-refoulement. As Chetail remarks, these pillars perfectly reflect the 'existential dilemma' of refugee law, creating the fragile balance between the competence of States to control the access of aliens to their territory and the protection of the most vulnerable people fleeing from gross human rights violations.[22]

The Refugee Convention was drafted almost immediately after the Second World War, an outstanding achievement of the UN's early work, recognising that refugee problems affect the international community as a whole, and that cooperation and burden-sharing in this field are therefore inevitable. It is significant that the Refugee Convention was drafted in response to the specific horrifying events that had taken place during and after the Second World War, notably the Holocaust and the Stalinist expansion into Central and Eastern Europe.[23] Its adoption was therefore the result of an era when refugees were primarily the persecuted victims of highly organised predatory States.[24]

Taking into account the challenges of the post-war era, and given that most of the refugees were of European origin, victims of the Nazi mass extermination and the communist regimes in Central and Eastern Europe, the Refugee Convention contained a deadline which limited its scope of application to the then known groups of refugees, i.e., persons who had become refugees as a result of events occurring in Europe before 1 January 1951.[25] After the adoption of the Refugee Convention, however, refugee problems unrelated to the Second World War kept occurring in different parts of the globe, leading to efforts to make the Refugee Convention fully applicable to any refugee situations. As a result, the Protocol removing the geographical and temporal limitations was adopted sixteen years after the original Refugee Convention.[26] With the Protocol, the Refugee Convention assumed universal scope. Since then, however, no further modifications have been adopted related to the Refugee Convention or its Protocol.

21 See United Nations Treaty Collection, Chapter V Refugees and Stateless Persons, 2. Conventions relating to the Status of Refugees, Geneva, 28 July 1951, Status [Online]. Available at: https://treaties.un.org/pages/ViewDetailsII.aspx?src=TREATY&mtdsg_no=V-2&chapter=5&Temp=mtdsg2&clang=_en (Accessed: 13 January 2024).

22 Chetail, 2019, p. 169.

23 Hernández, 2019, p. 427.

24 Shacknove, 2016, p. 165.

25 For a comprehensive analysis, see Hathaway, 2021; Goodwin-Gill and McAdam, 2007; Lambert, 2010; Zimmermann 2011.

26 Weis, 1990, p. 1.

3. The definition of the term ‘refugee’ under the Refugee Convention

Who is a refugee? That is a simple question, and we might as well provide a simple answer to that. As Shacknove sums up, ‘a refugee […] is a person fleeing from life-threatening conditions, […] who has crossed an international frontier because of a well-founded fear of persecution’.[27] However, the legal definition of the term ‘refugee’ is not that simple, and its complexity basically lies in the limitations attached to it. These limitations are rooted in finding a delicate balance between States’ obligations stemming from the principle of solidarity and States’ concerns regarding unmanageable refugee flows. Therefore, defining who is a refugee serves a dual purpose: recognising those who are in need of international protection from persecution, while at the same time determining the obligations of States under international law.[28] Regarding the language used in the text of the Refugee Convention, it is the latter that is emphasised: the focus is significantly more on State obligations than on individual rights.

This feature of the Refugee Convention’s text is clearly a result of the treaty’s historical context. In 1951, no universal human rights covenants or conventions had yet been adopted; only the Universal Declaration of Human Rights[29] (hereinafter: ‘UDHR’) existed, which is not a treaty but a non-binding resolution of the UN General Assembly. Unlike human rights treaties adopted within the framework of the UN in subsequent years, the Refugee Convention does not simply enumerate unalienable and unconditional rights without discrimination for its beneficiaries. That is, the Refugee Convention is not a comprehensive instrument providing international protection for any victim of irregular forced migration. While human rights apply to everyone due to the dignity inherent in every individual, refugee rights depend on the formal recognition of refugee status.[30]

In accordance with Art. 1(A)(2) of the Refugee Convention,

> […] for the purposes of the present Convention, the term ‘refugee’ shall apply to any person who owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country.

27 Shacknove, 2016, p. 163.

28 Chetail, 2019, p. 169.

29 United Nations General Assembly Resolution 217 (III) A, 10 December 1948, Art. 14(1): *Everyone has the right to seek and to enjoy in other countries asylum from persecution. (2) This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.*

30 Chetail, 2014, pp. 19–72.

Beyond any doubt, the definition of the term 'refugee' is the real essence of the Refugee Convention. As Nagy observes, the term 'refugee' is a fundamental category of international migration law: refugees, unlike internally displaced persons, are involved in international migration, i.e., they are outside their country of origin, and irregular forced migrants, but cannot be considered illegal migrants. Moreover, Art. 14 of the 1948 UDHR *expressis verbis* enshrines the right to seek and enjoy asylum from persecution,[31] and States shall not abuse this human right in their asylum procedures. In practice, however, it is the final decision of the domestic asylum authority that will determine whether the asylum seeker needs international protection or not. Once this final decision enters into effect, the asylum seeker's refugee status will be recognised, or he will become an undocumented illegal alien.[32]

According to the Refugee Convention, refugee status is declaratory in nature. As the UNHCR eloquently stated,

> a person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition but is recognized because he is a refugee.[33]

One can therefore conclude that the declaratory nature of refugee status is based on a rebuttable presumption that asylum seekers are assumed to have the status of refugees with regard to the benefits of non-refoulement protection for the duration of the asylum procedure unless proven otherwise. As Goodwin-Gill and McAdam remark, 'in principle, its benefit ought not to be predicated upon formal recognition of refugee status which, indeed, may be impractical in the absence of effective procedures or in the case of a mass influx'.[34]

The declaratory nature of refugee status has also been given due consideration in judicial case law. For instance, Justice Kirby of the High Court of Australia in his dissenting opinion in *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH of 2004,*[35] where the applicant was an Afghan national of the Hazara ethnic group who feared that the Taliban would kill him upon returning to Afghanistan because of his ethnicity, emphasised that by using the term 'recognition', rather than 'rendering', 'becoming', or 'constituting', the Refugee Convention connotes a process whereby a person, who already is a refugee, gains 'formal recognition' as such within the country of refuge. Therefore, recognition does not render a person a 'refugee' but it simply recognises the status as one that preceded the recognition.

31 Ádány, 2016, p. 239.
32 Nagy, 2014, p. 525.
33 UNHCR, 2011, p. 38.
34 Goodwin-Gill and McAdam, 2021, p. 469.
35 *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH of 2004*, [2006] HCA 53 (Aus. HC, Nov. 15, 2006), at [96], per Kirby J. (dissenting).

Nonetheless, the definition of the term 'refugee' is a limited category from numerous perspectives. As Bhabha points out,

> from the outset, the refugee protection regime was intended to be restrictive and partial, a compromise between unfettered State sovereignty over the admission of aliens, and an open door for non-citizen victims of serious human rights violations. It was always clear that only a subset of forced transnational migrant persecutes were intended beneficiaries.[36]

At the Conference of Plenipotentiaries[37] of the Refugee Convention, State representatives, as a consequence of their general fear of unmanageable refugee flows, insisted they would not sign a 'blank cheque' assuming unlimited and indefinite commitments in terms of all refugees for the future.[38] Thus, the final definition of the term 'refugee' was adjusted in line with States' estimates of the probable numbers of prospective beneficiaries.[39] Simply put, the definition of the term 'refugee' was tailored to mean individual political refugees, not mass influxes of migrants. It is also true, however, that the Final Act of the Conference of Plenipotentiaries[40] made a recommendation[41] for State Parties to apply the Refugee Convention beyond 'its contractual scope' to other persons who otherwise would not be protected by the provisions of the Convention. That is, the Refugee Convention provides for the basic minimum standards that apply to refugees, while State Parties are free to offer additional protection for those who are not covered by the Convention's limited definition.

Although the Refugee Convention provides no agreed and detailed procedure for States to follow in establishing who is a refugee, the UNHCR issued a 'Handbook of Guidelines',[42] a soft law instrument, to assist domestic asylum authorities in ap-

36 Bhabha, 2002, p. 176.

37 Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: summary record of the 35th meeting, held at the Palais des Nations, Geneva, on Wednesday, 25 July 1951 [Online]. Available at: https://digitallibrary.un.org/record/696484 (Accessed: 14 August 2023).

38 Bem, 2004, p. 609.

39 Bhabha, 2002, p. 155.

40 Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, A/CONF.2/108/Rev.1, 25 July 1951 [Online]. Available at: https://www.unhcr.org/publications/final-act-united-nations-conference-plenipotentiaries-status-refugees-and-stateless (Accessed: 14 August 2023).

41 This recommendation served as an incentive to subsequent adoption of regional instruments in Africa, Asia, Europe, and Latin America. See Convention Governing the Specific Aspects of Refugee Problems in Africa (adopted on 10 September 1969, entered into force 20 June 1974) 1001 UNTS 45; Bangkok Principles on the Status and Treatment of Refugees, adopted at the Asian-African Legal Consultative Organization's 40th Session (31 December 1966) in New Delhi; Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 (n 15) (EU Qualification Directive); Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama (adopted on 22 November 1984).

42 UNHCR, 2019.

plying the refugee criteria in practice. The handbook was first published in 1979 and re-published in 1992 and 2019.

3.1. The inclusion clause

As already mentioned above, the definition of the term 'refugee' under the Refugee Convention is inherently limited in scope and requires three criteria to be met. Contemporary scholarly discussion classifies these criteria as the inclusion, exclusion, and cessation clauses.[43] The inclusion clause is provided under Art. 1(A)(2) of the Refugee Convention and enumerates four cumulative conditions of refugee status: (i) the refugee is outside his or her country of origin; (ii) the refugee is unable or unwilling to avail himself or herself of the protection of the country of origin; (iii) the reason for this inability or unwillingness is attributable to a well-founded fear of persecution; and (iv) persecution or the lack of protection provided by the country of origin is in connection with at least one of five limitative grounds (race, religion, nationality, membership of particular social group, or political opinion). These are positive preconditions of refugee status and they highlight a significant difference between refugee rights and human rights. Although all refugees, like all human beings, have human rights, as an especially vulnerable group they are entitled to consideration and additional protection on a national and an international level.

Rights under the Refugee Convention, however, unlike human rights, are not inalienable and unconditional. In accordance with the inclusion criterion, refugee status offers a protection of substitution based on the principle of surrogacy when the country of origin violates the bond of trust, loyalty, protection, and assistance between the national and the State which otherwise constitutes the normal basis of society.[44] As the UK Supreme Court clearly highlighted in *Horvath v Secretary of State for the Home Department,*[45] 'the general purpose of the Convention is to enable the person who no longer has the benefit of protection against persecution for a Convention reason in his own country to turn for protection to the international community.' In this particular case, the applicant was a Slovak national and a member of the Roma minority who, along with his family, had been the target of racially motivated ill-treatment by skinheads. After fleeing Slovakia, he applied for asylum in the UK, where his application was dismissed unanimously by the court as he was able to acquire protection from his country of origin against the non-state actors.

43 For comprehensive analysis, see in detail Goodwin-Gill and McAdam, 2007, pp. 63–197; Zimmermann and Mahler, 2011, pp. 281–465; Chetail, 2019, pp. 170–171.

44 Shacknove, 2016, p. 164.

45 *Horvath v Secretary of State for the Home Department* [2001] 1 AC 489, 497 (Lord Hope of Craighead).

3.1.1. 'Is outside the country of his nationality'

According to the UNHCR's interpretation, the term 'nationality' refers to citizenship, as in most cases refugees retain the nationality of their country of origin.[46] The applicant's well-founded fear of persecution must be connected with his or her country of nationality. As long as the asylum seeker's well-founded fear of persecution is related to some other country, he or she can avail himself or herself of the protection of the country of nationality, and therefore will not need international protection.[47] It functions as a *stricto sensu* rule, with no exceptions, that an applicant, who has a nationality, needs to be outside the country of his or her origin. Therefore, international protection cannot come into play as long as a person is within the territorial jurisdiction of his or her home country. IDPs, even though that they are also victims of forced migration and in need of protection, do not fall under the scope of the Refugee Convention. This *stricto sensu* rule is among the most significant limitations imposed by the Refugee Convention, and the growing mass of IDPs makes it an even more worrying problem for the international community.[48]

3.1.2. 'And is unable or, owing to such fear, is unwilling to avail himself of the protection of that country'

Inability to avail themselves of the protection of the country of nationality is caused by objective circumstances beyond the control of asylum seekers. For instance, insurgencies, grave disturbance, and (civil) wars may lead to a general situation in a country that prevents nationals from availing of protection. These circumstances may also make State protection ineffective or simply denied, meaning services that are normally available for co-nationals become unavailable, which may intensify the applicant's fear of persecution. By contrast, unwillingness refers to asylum seekers who refuse to accept the protection provided by their home country. Unwillingness is more subjective than inability; however, it is counterbalanced by the qualification of 'owing to such fear'. The UNHCR points out the relationship between unwillingness and being outside one's country of origin: 'where a person is willing to avail himself of the protection of his home country, such willingness would normally be incompatible with a claim that he is outside that country "owing to well-founded fear of persecution"'.[49]

46 Like nationals of any State, stateless persons may also become refugees, and the Refugee Convention offers protection for them under Art. 1(2) as follows: 'who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it'.

47 UNHCR, 2019, pp. 25–26.

48 According to UNHCR's Refugee Data Finder, as of the end of 2022, there were 62.5 million IDPs worldwide as a result of persecution, conflict, violence, human rights violations, or events seriously disturbing public order [Online]. Available at: https://www.unhcr.org/refugee-statistics/ (Accessed: 22 January 2024).

49 UNHCR, 2019, p. 27.

Art. 1(A)(2) of the Refugee Convention contains a subsequent parallel phrase that refers to stateless persons: *'or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it'.* In this context, 'former habitual residence' means 'the country in which he had resided and where he had suffered or fears he would suffer persecution if he returned'.[50] In the case of stateless asylum seekers, the 'country of nationality' is replaced by 'the country of his former habitual residence', and the expression 'unwilling to avail himself of the protection' is replaced by 'unwilling to return to it'. Logically, in the case of stateless persons, availment of protection will not arise. Of course, not all stateless persons will be refugees; nonetheless, once a stateless person is recognised as a refugee in relation to the country of his former habitual residence, any further change of country of habitual residence will not affect his refugee status.[51]

3.1.3. The well-founded fear of persecution

The well-founded fear of persecution is the key element of the definition of 'refugee'. Nevertheless, fear is an inherently subjective condition and a state of mind, meaning the definition of the term 'refugee' includes a subjective element related to the person applying for asylum. In this vein, the evaluation of the applicant's statements is more relevant than a judgment on the ongoing situation in the asylum seeker's country of origin. The evaluation of fear is inseparable from the assessment of the applicants' personality, their psychological reactions, credibility, family background, and their membership of a racial, religious, national, social, or political group, as well as their own interpretation of their situation and their personal experiences. Counterbalancing the subjectivity of fear, the drafters of the Refugee Convention added the qualification 'well-founded'. The UNHCR notes that 'well-founded'

> implies that it is not only the frame of mind of the person concerned that determines his refugee status, but that this frame of mind must be supported by an objective situation. The term 'well-founded fear' therefore contains a subjective and an objective element, and in determining whether well-founded fear exists, both elements must be taken into consideration.[52]

The Refugee Convention sets a reasonable degree of likelihood of persecution for the applicant to demonstrate, and accordingly, judicial case law confirmed that States cannot apply a higher standard. In *Immigration and Naturalization Service v*

50 Report of the Ad Hoc Committee on Statelessness and Related Problems, Lake Success, New York, 16 January to 16 February 1950, UN Doc. E/1618, p. 39.
51 UNHCR, 2019, p. 27.
52 UNHCR, 2019, p. 19.

Cardoza-Fonseca[53] the US Supreme Court held that to show a 'well-founded fear of persecution', aliens need not prove that it is more likely than not that they will be persecuted in their home country. Cardoza-Fonseca, a Nicaraguan national, entered the US in 1979 as a visitor; however, she overstayed her US visa, and the Immigration and Naturalization Service began proceedings to deport her. She admitted that she was in the US illegally but applied for two forms of relief in the deportation hearings: asylum and withholding of deportation. Under US law, the Immigration and Naturalization Service had the discretion to grant asylum to an alien eligible for that relief but must withhold deportation if the alien is eligible for that kind of relief. The US Supreme Court found that the threshold for withholding deportation, which was established previously in *Immigration and Naturalization Service v Stevic,*[54] was too high for asylum applicants to reach and confirmed that the standard set by the Refugee Convention is what needs to be met when applying for asylum in the US. Likewise, the UK House of Lords found in *R v Secretary of State for the Home Department, Ex parte Sivakumaran and Conjoined Appeals*[55] that the requirement that an asylum seeker had to have a 'well-founded' fear of persecution if he was returned to his own country meant that a reasonable degree of likelihood that he would be so persecuted had to be demonstrated, and in deciding whether the applicant had established his claim that his fear of persecution was well-founded, the Secretary of State could take into account facts and circumstances known to him or established to his satisfaction but possibly unknown to the applicant in order to determine whether the applicant's fear was objectively justified.[56]

Under universal treaty law, there is no adopted definition of the term 'persecution', and attempts to agree on such a definition have met with little success over the years. In accordance with Art. 33 of the Refugee Convention, a threat to life or freedom on the grounds of race, religion, nationality, membership of a particular social group, or political opinion unambiguously counts as persecution; however, other gross human rights violations may also fall within the meaning of the term 'persecution'. The New Zealand Refugee Status Appeals Authority found in *Refugee*

53 *Immigration and Naturalization Service v Cardoza-Fonseca*, 480 US 421; 107 S. Ct. 1207; 94 L. Ed. 2d 434; 55 U.S.L.W. 4313, 9 March 1987 (US Supreme Court).

54 *Immigration and Naturalization Service v Predrag Stevic*, 467 US 407, 467 US 407 104 S. Ct. 2489; 81 L. Ed. 2d 321; 1984 U.S. LEXIS 100, 5 June 1984 (US Supreme Court). In this judgment, the US Supreme Court held if an alien seeks to avoid deportation proceedings by claiming that he will be persecuted if he is returned to his native land, he must show a 'clear probability' that he will be persecuted there. This threshold was absolutely a higher one than the 'well-founded fear of persecution' established under the Refugee Convention.

55 *R v Secretary of State for the Home Department, Ex parte Sivakumaran and Conjoined Appeals* (UN High Commissioner for Refugees Intervening) [1988] AC 958, 16 December 1987 (UK House of Lords).

56 In this case, issue to be determined was the correct test to apply in order to determine whether six Tamils from Sri Lanka, who had arrived in the UK on various dates in 1987, were entitled to refugee status.

Appeal No. 71427/99[57] that core norms of international human rights law are relied on to define forms of serious harm within the scope of persecution. The applicant had divorced her abusive husband and had rediscovered her child that the husband had given up for adoption without her consent. If she had been returned to Iran, she would have been subjected to death or imprisonment. In this case, the refugee authority applied a human rights approach in establishing persecution. When assessing the existence of persecution, the individual circumstances of each case are determining, since 'the subjective character of fear of persecution requires an evaluation of the opinions and feelings of the person concerned'.[58] In *Korablina v Immigration and Naturalization Services,*[59] the applicant, a then fifty-five-year old native of Russia and a citizen of Ukraine, witnessed and was the subject of repeated beatings and severe harassment by an ultra-nationalist group in Kiev due to her Jewish heritage. The US Court of Appeals for the 9th Circuit held that less intense incidents of persecution (e.g., discrimination in different forms, specific instances of violence and harassment towards an individual and his or her family members) taken together, may be seen as persecution on cumulative grounds.

3.1.4. The five limitative grounds for persecution

Race is traditionally interpreted in line with Art. 1 of the International Convention on the Elimination of All Forms of Racial Discrimination[60] (hereinafter: 'ICERD'). The term 'race', in its widest sense, covers skin colour, descent, and national or ethnic origin. According to the UNHCR, the mere fact of being the member of a particular racial group is not enough to substantiate a claim to refugee status; at the same time, there may be cases where, due to the circumstances affecting the group, such membership provides in itself a sufficient ground to fear persecution.[61] Discrimination on the grounds of race has been condemned world-wide over the years and is today identified as one of the most serious form of human rights violations.

When interpreting the term 'religion', the UDHR and the International Covenant on Civil and Political Rights[62] (hereinafter: 'ICCPR') can serve as points of departure. Art. 18 of the UDHR and Art. 18 of the ICCPR deal with the freedom of thought, conscience, and religion that encompasses the freedom of the individual to change his or her beliefs, to manifest his or her religion even in public places, and his or her freedom in observance, practice, teaching, and worship. In this vein, persecution on

57 *Refugee Appeal No. 71427/99*, 16 August 2000 (New Zealand Refugee Status Appeals Authority).
58 UNHCR, 2019, p. 21.
59 *Korablina v Immigration and Naturalization Services*, No. 97-70361, 158 F 3d, 23 October 1998 (US Court of Appeals for the 9th Circuit).
60 International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965, UNTS, vol. 660, p. 195.
61 UNHCR, 2019, p. 23.
62 International Covenant on Civil and Political Rights, 16 December 1966, UNTS, vol. 999, p. 171 and vol. 1057, p. 407.

religious grounds may take place in various forms, e.g., it can be directed against those subscribing to a different belief system, or it can be directed against adherents of the same faith based on divisions within the religious group, such as a group's or an individual's refusal to recognise certain tenets of the same religion.[63] According to the UNHCR, it may also assume the form of the prohibition of membership of a religious community, worship in private or in public, or religious instruction, or serious measures of discrimination imposed on persons because they practise their religion or belong to a particular religious community.[64]

The term 'nationality' under the Refugee Convention means more than citizenship, it is the civil status thereof.[65] Nationality may refer to membership in a particular ethnic or linguistic group and it sometimes overlaps with race. A typical scenario of persecution on the ground of nationality occurs when two or more ethnic or linguistic groups live together within the boundaries of a State, conflicts ensue, and persecution or the danger of persecution arises. In these cases, when a conflict is combined with political movements, distinction between persecution on the grounds of nationality or of political opinion is quite difficult, especially when a political movement is strongly connected with a specific nationality. In addition, persecution related to nationality may assume numerous other forms, e.g., when an occupying State targets the nationals living on the occupied State's territory, or it may even take place against stateless persons when they are deprived of the access to nationality they are legally entitled to. Although most cases involve persecution of individuals who belong to a national minority, there also have been incidents in various continents where a person belonging to a majority group might have feared persecution by a dominant minority.[66]

The term 'membership in a particular social group' is potentially the broadest category among the grounds for persecution under the definition of 'refugee', the aim being to provide the Convention's protection for those otherwise not covered by the other four grounds. This category is therefore suitable for international and national courts to fill in lacunae when the other grounds prove to be inapplicable. For instance, in *González et al ('Cotton Field') v Mexico*[67] the Inter-American Court of Human Rights (hereinafter: 'IACtHR') established persecution on the ground of gender[68] as persecution on the ground of membership in a particular social group. In this case, three young women disappeared after leaving work, their bodies later found in the cotton fields of their hometown. The women's bodies displayed evidence of intense physical and psychological torture, mutilation, and sexual abuse. During

63 Hernández, 2019, p. 428. UNHCR 'Guidelines on International Protection No. 6: "Religion-Based Refugee Claims under Article 1A.2 of the 1951 Convention and/or the 1967 Protocol"', 28 April 2004, UN Doc. HCR/GIP/04/06.

64 UNHCR, 2019, p. 23.

65 Hernández, 2019, p. 428.

66 UNHCR, 2019, p. 24.

67 *González et al ('Cotton Field') v Mexico,* IACtHR Ser C, No 205 (16 November 2016).

68 Edwards, 2003, pp. 51–57.

the investigations, law enforcement officials did not provide the young women with justice, and they were not willing to help the victims' mothers in finding out what had happened. Indeed, the families of the deceased received continual threats from local officials to withdraw their complaints. As a result of the mothers' testimonies, the work of advocates, and data supplied by civil society organisations, a systematic pattern of violence against women and widespread discrimination was presented to the IACtHR.[69]

International courts have also confirmed that sexual orientation and gender identity may constitute 'membership in a particular social group'. For example, *X, Y, Z v Minister voor Immigratie en Asiel*[70] concerned three asylum seekers in the Netherlands from Senegal, Sierra Leone, and Uganda. In each country of origin, homosexuality is a crime punishable by life imprisonment (expect in Senegal where it is punishable by five years of imprisonment). Even though the applicants in none of the cases demonstrated that persecution had taken place, or that they had been threatened with persecution on the ground of their sexual orientation, the Court of Justice of the European Union established that due to the criminalisation of homosexuality in their countries of origin, they would have a well-founded fear of being persecuted if they were returned home. The European Court of Human Rights (hereinafter: 'ECtHR') arrived at a similar conclusion in *OM v Hungary*,[71] where the court held that the detention of a homosexual asylum seeker, who had fled Iran because of his homosexuality, was arbitrary, reiterating that sexual orientation and gender identity may be covered by the term 'membership in a particular social group'.

Additionally, when clarifying the term 'membership in a particular social group', *Canada (Attorney General) v Ward*[72] is a landmark case. The defendant, Patrick Ward, fled Northern Ireland for fear of being murdered by the Irish National Liberation Army (hereinafter: 'INLA'), from which he had defected. He was ordered by the INLA to guard hostages; however, when he found out the hostages were to be executed, he let them escape. After being tortured by the INLA and serving three years in an Irish jail for his role in the hostage-taking, he fled to Canada where he applied for refugee status. In the Ward judgment, the Supreme Court of Canada adopted a broad interpretation of the term 'membership in a particular social group' and took into special consideration the 'defence of human rights and anti-discrimination that form the basis for the international refugee protection initiative'. As Hernández sums up,[73] in accordance with the Ward judgment, a particular social group can be defined by:

69 According to reports, between 1993 and 2005, 4,456 young women disappeared in this Mexican municipality. See Tackling Violence against Women, Centre for Women, Peace + Security, Landmark Cases, Gonzalez, Monreal and Monarrez ('Cotton Field') v. Mexico [Online]. Available at: https://blogs.lse.ac.uk/vaw/landmark-cases/a-z-of-cases/gonzalez-et-al-v-mexico/ (Accessed: 10 January 2024).

70 *X, Y, Z v Minister voor Immigratie en Asiel*, C-199/12-C-201/12, CJEU (7 November 2013).

71 *OM v Hungary*, ECtHR, no. 9912/15, 5 July 2016.

72 *Canada (Attorney General) v. Ward* [1993] 103 DLR (4th) 1, paras. 67–68.

73 Hernández, 2019, p. 429.

(i) innate or unchangeable characteristics, e.g., gender, linguistic background, sexual orientation; (ii) associations that are fundamental to the members' human dignity, e.g., human rights activists; and (iii) a former voluntary status, as 'one's past is an immutable part of the person'.[74] Eventually, the court found that Ward did not fall into the category of 'membership in a particular social group' but had been persecuted by the INLA due to his political opinion, i.e., the killing of innocent hostages is an unacceptable way to bring about political changes.[75] Consequently, the idea that a particular social group normally comprises persons of similar background, habits, or social status, may also include other grounds of persecution, such as race, religion or nationality.

Under Art. 1(A)(2) of the Refugee Convention, the last of the grounds for persecution is political opinion. As has already been demonstrated with the Ward judgment above, the meaning of the term 'political opinion' goes beyond political affiliation or membership in a political party. The UNHCR observes that,

> holding political opinions different from those of the Government is not in itself a ground for claiming refugee status, and an applicant must show that he has a fear of persecution for holding such opinions. This presupposes that the applicant holds opinions not tolerated by the authorities, which are critical of their policies or methods. It also presupposes that such opinions have come to the notice of the authorities or are attributed by them to the applicant.[76]

This implies that the concerned individual holds an opinion that has either been expressed or has come to the attention of the authorities. It may also be that the applicant has not given any expression to his or her opinions; however, owing to the intensity of his or her convictions, it may be reasonable to believe that those convictions will sooner or later find expression and that the applicant will, as a result, come into conflict with the authorities. In such a case, the asylum seeker can be considered to fear persecution on the ground of political opinion.

In summary, Art. 1(A)(2) of the Refugee Convention provides an exhaustive list of grounds for persecution, and excludes many typical drivers of forced migration, e.g., armed conflicts, extreme poverty, famine, natural disasters, pandemics, or persecution on other grounds. As the Supreme Court of Canada pointed out in the Ward judgment,

> the international role was qualified by built-in limitations. These restricting mechanisms reflect the fact that the international community did not intend to offer a haven for all suffering individuals. The need for 'persecution' in order to warrant international protection, for example, results in the exclusion of such pleas as those of

74 *Canada (Attorney General) v. Ward,* para. 739.
75 *Canada (Attorney General) v. Ward,* para. 750.
76 UNHCR, 2019, p. 24.

> economic migrants, i.e., individuals in search of better living conditions, and those of victims of natural disasters, even when the home State is unable to provide assistance, although both of these cases might seem deserving of international sanctuary.[77]

3.2. The exclusion clause

The exclusion clause,[78] focusing on the common concerns held by States regarding aliens accessing to their territory, further underpins the conditionality and selectiveness of refugee status. Even if the abovementioned positive preconditions have been satisfied, asylum seekers can be excluded from the protection provided by the Refugee Convention under other supplementary circumstances. Art. 1(D) of the Refugee Convention provides,

> This Convention shall not apply to persons who are at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance. When such protection or assistance has ceased for any reason, without the position of such persons being definitively settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations, these persons shall ipso facto be entitled to the benefits of this Convention.

Besides that, Art. 1(E) of the Refugee Convention states,

> This Convention shall not apply to a person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country.

And finally, Art. 1(F) of the Refugee Convention spells out,

> The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that: (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes; (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee; (c) he has been guilty of acts contrary to the purposes and principles of the United Nations.

As can be concluded from Arts. 1(D), 1(E), and 1(F), a person cannot benefit from the substitute protection offered by the Refugee Convention if he or she: (i) already enjoys some other form of international or national protection; (ii) possesses the rights and obligations attached to nationality in the country of residence; or (iii)

77 *Canada (Attorney General) v. Ward,* paras. 67–68.
78 UNHCR, 2019, pp. 111–139; Chetail, 2019, pp. 169–177.

has committed serious crimes (crimes against peace [crime of aggression], crimes against humanity, war crimes, serious non-political crimes, and acts contrary to the purposes and principles of the UN). Related to the last excluding criterion, in *Pushpanathan v Canada*[79] the Supreme Court of Canada established, 'the rationale […] is that those who are responsible for the persecution which creates refugees should not enjoy the benefits of a Convention designed to protect those refugees'. In this case, the applicant arrived in Canada from his country of origin, Sri Lanka, seeking refugee status. However, before his asylum claim was settled in Canada, he had been convicted of conspiracy to traffic in narcotics and had been sentenced to imprisonment. Therefore, the court dismissed his refugee claim under Art. 1(F) of the Refugee Convention that excludes applicants 'with respect to whom there are serious reasons for considering that [they have] been guilty of acts contrary to the purposes and principles of the United Nations'.

3.3. The cessation clause

The cessation clause[80] underlines the temporary nature of the Convention's protection. Art. 1(C) of the Refugee Convention provides:

> This Convention shall cease to apply to any person falling under the terms of section A if: (1) He has voluntarily re-availed himself of the protection of the country of his nationality; or (2) Having lost his nationality, he has voluntarily re-acquired it; or (3) He has acquired a new nationality, and enjoys the protection of the country of his new nationality; or (4) He has voluntarily re-established himself in the country which he left or outside which he remained owing to fear of persecution; or (5) He can no longer, because the circumstances in connexion with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality; Provided that this paragraph shall not apply to a refugee falling under section A(1) of this article who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality; (6) Being a person who has no nationality he is, because of the circumstances in connexion with which he has been recognized as a refugee have ceased to exist, able to return to the country of his former habitual residence; Provided that this paragraph shall not apply to a refugee falling under section A (1) of this article who is able to invoke compelling reasons arising out of previous persecution for refusing to return to the country of his former habitual residence.

The provisions under Art. 1(C) enumerate the reasons for the termination of refugee status. When the rationale for refugee status is no longer justifiable, the

79 *Pushpanathan v. Canada (Minister of Citizenship and Immigration)* [1998] 1 SCR 982, para. 63.
80 UNHCR, 2019, pp. 140–163; Chetail, 2019, pp. 169–177.

surrogate convention protection ceases to apply. The reasons for the termination of refugee status can be either connected with the refugee concerned and his or her voluntary acts or with a change of circumstances in the country of origin.

4. Refugee status

Refugee rights and obligations make the refugee status. Their universal rights stem from two principal sources: international human rights law and the Refugee Convention. The latter outlines the basic minimum standards for the treatment of refugees as well as their own obligations towards the host State. For their obligations, refugees are required under Art. 2 of the Refugee Convention to abide by the laws and regulations of their country of asylum and respect measures taken for the maintenance of public order. Their rights, as Hathaway makes clear, derive from the Refugee Convention and result in obligations on the side of States. These Convention rights are still highly relevant, despite the significant development of human rights law since 1951. Throughout the last seven decades, several human rights conventions have been adopted, which provide legal safeguards and fundamental protection for refugees. Why is it important that not only the Refugee Convention but also human rights conventions provide guarantees for refugees? There are multiple reasons this two-layered protection is needed. First, many refugee-specific problems are not covered by general human rights law. Second, economic rights in general are defined as duties of progressive implementation and may legitimately be denied to non-citizens by less developed countries. Third, not all civil rights are guaranteed to non-citizens, and most of those which do apply to them can be withheld on the grounds of their lack of nationality during national emergencies. And finally, the duty of non-discrimination under international law has not always been interpreted in a way that guarantees refugees the substantive benefit of relevant protections.[81] Still, international human rights law provides additional rights for refugees under the Refugee Convention, and its application and interpretation by international and national courts make it possible to refine the standards of refugee rights to respond to contemporary challenges.

4.1. The rights of refugees under the Refugee Convention

Besides the determination of the term ‘refugee’ and conceptualising the principle of non-refoulement, the set of rights deriving from refugee status is the third fundamental pillar of the Refugee Convention. Indeed, access to protection is based upon these two other criteria: the recognition of the asylum seeker as a refugee,

81 Hathaway, 2021, p. 173.

and whether the asylum seeker is protected by the principle of non-refoulement.[82] While Shacknove defines the three core criteria of refugee status as asylum, material relief, and permanent resettlement,[83] Chetail identifies the essence of refugee status with criteria of entitlement and standard of treatment.[84] Additionally, Molnár summarises protection status under the Refugee Convention as follows: (i) the principle of non-refoulement, i.e., no State Party shall expel or return a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social or political opinion; (ii) recognised refugees should be provided with travel documents; and (iii) Contracting States should either provide refugees equal treatment with their own nationals (e.g., freedom of religion, access to justice, labour and social security rights, and intellectual property rights), or provide refugees with definitely not less favourable treatment than that provided for other foreigners (e.g., housing, self-employment, independent professions, and acquisition of property).[85] In detail, the Refugee Convention provides for (i) the right to non-discrimination (Arts. 3 and 5); (ii) the right to freedom of religion (Art. 4); (iii) the right to be issued civil, identity, and travel documents (Arts. 12, 27 and 28); (iv) the right to housing, land, and property, including intellectual property (Arts. 13, 14 and 21); (v) the right to access to justice (Art. 16); (vi) the right to decent work (Arts. 17 to 19 and 24); (vii) the right to education (Art. 22); (viii) the right to social protection (Arts. 23 and 24[2-4]); (ix) the right to freedom of movement within the territory (Art. 26 and Art. 31[2]); (x) the right not to be punished for irregular entry into the territory of a contracting State (Art. 31); and (xi) the right not to be expelled, except under certain, strictly defined conditions (Art. 32).[86]

As for the treatment of refugees, the Refugee Convention sets three standards. There are rights, e.g., freedom of religion, access to justice, or the right to elementary education, where all refugees enjoy the same treatment accorded to nationals. There are other rights, e.g., the right to decent work or the right to association, where refugees are treated as most favoured aliens, i.e., a treatment accorded to nationals of a foreign country in the same circumstances. And there is a third category of rights, e.g., the right to housing or the right to freedom of movement, where refugees are treated not less favourably than the treatment generally accorded to aliens in the same circumstances.[87]

The Refugee Convention's approach to refugee rights is not that regularly provided under human rights instruments. It is not based on an enumeration of States' obligations equally applicable to all refugees. Instead, the drafters of the Refugee

82 Chetail, 2014, p. 23.
83 Shacknove, 2016, p. 276.
84 Chetail, 2019, p. 177–179.
85 Molnár, 2016, p. 48.
86 For a comprehensive analysis, see Zimmermann, 2011.
87 Chetail, 2014, p. 42.

Convention attempted to give additional rights as the bond strengthens between the refugee and the asylum State. As a result, the structure of the refugee rights regime is incremental, i.e., whereas all refugees benefit from a basic set of rights, additional entitlements accrue as a function of the nature and duration of the attachment to the asylum State.[88] This was highlighted by the UK Supreme Court in *R (ST, Eritrea) v Secretary of State for the Home Department*.[89] The key issue was the age of an Eritrean asylum seeker who had presented himself to police claiming that he was sixteen years old, it being unlawful for the Home Department under UK domestic law to detain unaccompanied minors except in limited circumstances. The Court stated,

> [t]he rights that attach to the status of refugee under the Convention depend in each case on the possession of some degree of attachment to the contracting State in which asylum is sought […] An examination of the Convention shows that it contemplates five levels of attachment to the contracting States.

A textual analysis of the Refugee Convention shows five levels of rights. The most basic set of rights, or core rights, are applicable as soon as the refugee comes under the *de jure* or *de facto* jurisdiction of the asylum State. The second set applies when the refugee enters into the asylum State's territory, and the third only inheres once the refugee is lawfully or habitually within the asylum State's territory. A fourth set of rights is applicable when the refugee is lawfully staying within the asylum State's territory, while the final rights accrue only upon satisfaction of a durable residency requirement. Hathaway is of the view that 'as the refugee's relationship to the asylum State is solidified over the course of this five-part assimilative path, the Convention requires that a more inclusive range of needs and aspirations be met'.[90] However, Hathaway describes this 'assimilative path' as a doctrinal reconstruction that is not demonstrated by the *travaux préparatoires*, and accordingly, Chetail observes, 'albeit attractive, this conceptualization of the refugee status as an assimilative process remains an *a posteriori* and essentially doctrinal reconstruction'.[91]

At the same time, this incremental and multi-layered regime implies that the levels of refugee rights build upon each other: a refugee who enters into the asylum State's territory is also under the *de jure* or *de facto* jurisdiction of the asylum State; a refugee who is lawfully or habitually within the asylum State's territory has also entered into the asylum State's territory; a refugee who is lawfully staying is also lawfully or habitually within the asylum State's territory; and finally, a refugee

88 Hathaway, 2021, pp. 174–175.
89 *R (ST, Eritrea) v. Secretary of State for the Home Department*, [2012] UKSC 12 (UK SC, 21 Mach 2012), para. 21.
90 Hathaway, 2021, p. 177.
91 Chetail, 2019, p. 181.

satisfying the durable residency requirement is also lawfully staying within the asylum State's territory. Consequently, it is a preliminary and especially significant issue to define the nature of the refugee's attachment to the asylum State.[92] As the UK House of Lords highlighted in *Secretary of State for the Home Department v AH (Sudan)*[93] 'once they achieve refugee status, not merely are they safeguarded from return home but they secure all of the other manifold benefits provided for under the Convention relating to the Status of Refugees'.[94] In the same case, the UK House of Lords established that each of the three Sudanese applicants had a well-founded fear of persecution in Darfur; nevertheless, in reconsidering their remitted appeals, it found that it would not be unduly harsh to expect the applicants to internally relocate to Khartoum.

This progressive entitlement to rights and benefits under the Refugee Convention determines the applicable law at the three stages of a refugee's life cycle. At 'level 1', the recipients of rights are asylum seekers who are assumed to have a temporary presence and the sole purpose of their entitlements is to make it possible to examine their applications. At 'level 2', the holders of rights are formally recognised refugees supported by the legislative intent to facilitate their progressive integration into the asylum State's society. Finally, at 'level 3', rights encourage asylum States to naturalize refugees as a closure of the refugee's life cycle.

In accordance with the textual analysis of the Refugee Convention, the levels of protection, the levels of attachment to the asylum State, and the respective Convention rights can be synthetized as follows:

92 Hathaway, 2021, pp. 174–175.

93 *Secretary of State for the Home Department v. AH (Sudan),* [2007] UKHL 49 (UK HL, 14 November 2007).

94 *Secretary of State for the Home Department v. AH (Sudan),* para. 32.

Table 1. Levels of protection under the Refugee Convention[95]

Level of protection	**Level of attachment to the asylum State**	**Rights under the Refugee Convention**
Level 1: basic guarantees that refer to the term 'refugee' without any further qualification	1. The refugee is under the *de jure* or *de facto* jurisdiction of the asylum State	Art. 3: non-discrimination Art. 13: movable and immovable property Art. 16(1): access to courts Art. 20: rationing Art. 22: education Art. 29: fiscal charges Art. 33: non-refoulement Art. 34: naturalization Some contextual rights also apply: Art. 5: respect for other rights Art. 6: exemption from insurmountable requirements Art. 7(1): 'aliens generally' default Art. 8: exemption from exceptional measures Art. 12: respect for personal status
Level 2: physical or lawful presence	2. The refugee enters into the asylum State's territory	Physical presence Art. 4: religion Art. 27: identity papers Art. 31(1): non-penalization for illegal entry or presence Art. 31(2): movements of refugees unlawfully in the country of refugee
	3. The refugee is lawfully or habitually within the asylum State's territory	Lawful presence Art. 18: self-employment Art. 26: freedom of movement Art. 32: expulsion

95 Author's own.

Level of protection	Level of attachment to the asylum State	Rights under the Refugee Convention
Level 3: lawful residence or stay, physical residence, or habitual residence	4. The refugee is lawfully staying within the asylum State's territory	Lawful residence or stay Art. 15: right of association Art. 17: wage-earning employment Art. 19: liberal professions Art. 21: housing Art. 23: public relief Art. 24: labour legislation and social security Art. 28: travel documents In some cases, Art. 7(2) (exemption from reciprocity) and Art. 17(2) (exemption from restrictive measures imposed on aliens in the context of 'wage-earning employment') may also apply. (Physical residence – Art. 25: right to administrative assistance for civil status documents)
	5. The refugee meets the durable residency requirement	Habitual residents Art. 7(2): exemption from requirements of legislative reciprocity Art. 17(2)(a): exemption from requirements of any restrictive measures imposed on the employment of aliens

4.2. The evolution of an 'illegal entry to a country'

The Refugee Convention devotes an independent provision to the penalizing of asylum seekers illegally entering into or staying in a State Party's territory as well as referring to possible immunity under some circumstances. Art. 31(1) states,

> the Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

The rationale of this provision is eloquently explained by Hoffmann: 'the drafters aimed at establishing a well-functioning, orderly system of processing refugee claims'.[96] The benefit of immunity from penalties for illegal entry or presence may be contemplated as one of the refugee rights attached to the physical presence of the refugee on the territory of the asylum State;[97] at the same time, it is a benefit narrowly interpreted and applied upon the existence of exact circumstances: (i) applicants shall 'present themselves without delay to the authorities'; (ii) and they shall 'show a good cause for their illegal entry or presence'. These preconditions need further interpretation, where judicial case law can serve as a point of departure.

In respect of Art. 31 of the Refugee Convention, the England and Wales High Court made significant contributions in *R v Uxbridge Magistrates Court and Another, Ex parte Adimi,*[98] where each applicant had fled from persecution in their home countries and their claims were denied due to arriving in the UK with false passports. In this case, the court underlined that the purpose of Art. 31 of the Refugee Convention was to provide immunity for genuine refugees whose quest for asylum reasonably involved a breach of the law. Where the illegal entry or use of false documents or delay could be attributed to a *bona fide* desire to seek asylum, then that conduct should be covered by Art. 31. It follows that Art. 31 offers protection not only for those whose asylum claim was eventually recognised but also for those who seek asylum in good faith (so-called 'presumptive refugees').[99] Additionally, to enjoy the protection of Art. 31, a refugee must have come directly from the country of his persecution, have presented himself to the authorities without delay, and have shown good cause for his illegal entry or presence, and a brief stop *en route* to an intended sanctuary would not invalidate this protection. In this vein, Goodwin-Gill elaborates that refugees are not required to have come literally 'directly' from their home country:

> The intention, reflected in the practice of some States, appears to be that, for Article 31(1) to apply, other countries or territories passed through should also have constituted actual or potential threats to life or freedom, or that onward flight may have been dictated by the refusal of other countries to grant protection or asylum, or by the operation of exclusionary provisions, such as those on safe third country, safe country of origin, or time limits. The criterion of 'good cause' for illegal entry is clearly flexible enough to allow the elements of individual cases to be taken into account.[100]

The Refugee Convention fails to clarify whether the term 'penalties' refers only to criminal sanctions or also encompasses administrative sanctions. In *R v Secretary*

96 Hoffmann, 2016, p. 97.
97 Chetail, 2019, p. 178.
98 *R v. Uxbridge Magistrates Court and Another, Ex parte Adimi* [1999] EWHC 765 (Admin), [2001] Q.B. 667, 29 July 1999 (England and Wales High Court, Administrative Court).
99 Goodwin-Gill, 2003, p. 193.
100 Ibid. p. 194.

of State for the Home Department, ex parte Makoyi,[101] the Queen's Bench Division of the High Court of England held that 'a penalty, on the face of it, would appear to involve a criminal sanction […] the word 'penalty' in Article 31 is not apt to cover detention such as exists in the present situation'. Hoffmann, based on Art. 33(4) of the 1969 Vienna Convention on the Law of Treaties[102] (hereinafter: 'VCLT'), the official French version of the convention text *('sanctions pénales'*), and the fact that Art. 31 was adopted on the initiative of France,[103] likewise argues that the term 'penalties' should be understood as 'criminal penalties', while Goodwin-Gill is of the view that the humanitarian object and purpose of the Refugee Convention should prevail when interpreting Art. 31(1) and a broader interpretation covering administrative penalties should be adopted.[104]

When interpreting the term 'penalties' under Art. 31(1) of the Refugee Convention, *Amuur v France*[105] marks a landmark decision of the ECtHR, where the court found that the French authorities had violated the applicants' right to liberty and security by holding four Somali nationals in the international zone of the Paris-Orly airport. The applicants arrived in France by airplane after fleeing Somalia due to fear for their lives there; however, the Minister of the Interior refused them the right to entry and the applicants were sent back to Somalia. The ECtHR established that holding third-country nationals in international zones involves restrictions upon liberty; however, the court also held that the fact that an asylum seeker can voluntarily leave the country where he or she wishes to take refuge cannot exclude a restriction on liberty. As for penalties, the ECtHR argued,

> in order to determine whether someone has been 'deprived of his liberty' within the meaning of Article 5 [of the ECHR], the starting point must be his concrete situation, and account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question. The difference between deprivation of and restriction upon liberty is merely one of degree or intensity, and not one of nature or substance. Holding aliens in the international zone does indeed involve a restriction upon liberty, but one which is not in every respect comparable to that which obtains in centres for the detention of aliens pending deportation. Such confinement, accompanied by suitable safeguards for the persons concerned, is acceptable only in order to enable States to prevent unlawful immigration while complying with their international obligations, particularly under the 1951 Geneva Convention Relating to the Status of Refugees and the European Convention

101 *R v. Secretary of State for the Home Department, ex parte Makoyi,* English High Court (Queen's Bench Division), No. CO/2372/91, 21 November 1991.

102 Vienna Convention on the Law of Treaties, Vienna, 23 May 1969, UNTS, vol. 1155, p. 331., Art. 33(4) '[…] the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted'.

103 Hoffmann, 2016, pp. 97–98.

104 Goodwin-Gill, 2003, pp. 194–195.

105 *Amuur v. France*, ECtHR, no. 19776/92, 25 June 1996.

> on Human Rights. States' legitimate concern to foil the increasingly frequent attempts to circumvent immigration restrictions must not deprive asylum seekers of the protection afforded by these conventions. Such holding should not be prolonged excessively, otherwise there would be a risk of it turning a mere restriction on liberty – inevitable with a view to organising the practical details of the alien's repatriation or, where he has requested asylum, while his application for leave to enter the territory for that purpose is considered – into a deprivation of liberty. In that connection account should be taken of the fact that the measure is applicable not to those who have committed criminal offences but to aliens who, often fearing for their lives, have fled from their own country. Although by the force of circumstances the decision to order holding must necessarily be taken by the administrative or police authorities, its prolongation requires speedy review by the courts, the traditional guardians of personal liberties. Above all, such confinement must not deprive the asylum-seeker of the right to gain effective access to the procedure for determining refugee status.[106]

In connection with penalties, the UN Human Rights Committee (hereinafter: 'HRC') found in *A v Australia*[107] that it was not arbitrary *per se* to detain individuals requesting asylum, nor was there a rule of customary international law which would render all such detention arbitrary. In this case, 'A' was a Cambodian national who arrived in Australia by boat in 1989 with his Vietnamese wife and their children. In the same year, the Australian Government declared people fleeing post-genocidal violence in Cambodia to be 'economic refugees', and the family was detained for more than four years in immigration detention. They had no contact with a lawyer for nearly a year and, as a result of transfers between detention centres in different Australian states, lost contact with the legal support they did obtain. In *A v Australia,* the HRC found that every decision to keep a person in detention should be open to periodic review so that the grounds justifying the detention can be assessed. In any event, detention should not continue beyond the period for which the State can provide appropriate justification. For example, the fact of illegal entry may indicate a need for investigation and there may be other factors particular to the individual, such as the likelihood of absconding and lack of cooperation, which may justify detention for a period. Without such factors, detention may be considered arbitrary, even if entry was illegal.

Consequently, while administrative detention is permissible under Art. 31(2) of the Refugee Convention, in the end of the day, it is equivalent to a penal sanction whenever essential safeguards are lacking, such as judicial remedies or restrictions on excessive duration. Goodwin-Gill is of the view that the distinction between criminal and administrative sanctions seems irrelevant in this context.[108]

106 *Amuur v. France,* paras. 42–43.
107 *A v. Australia*, CCPR/C/59/D/560/1993, 30 April 1997 (UN Human Rights Committee).
108 Goodwin-Gill, 2003, pp. 195–196.

The term 'illegal entry or presence' has quite a straightforward meaning. Illegal entry may encompass the use of false or falsified documents (e.g., passports, visas), the use of other means to deceive authorities, or entry into a State's territory with the help of smugglers or human traffickers. Illegal presence may even result from a legal entry, e.g., after a permitted period of stay expires. The meaning of the term 'good cause' is also not problematic, since being a refugee with a well-founded fear of persecution is generally accepted as sufficient good cause.

5. The principle of non-refoulement

The ultimate cornerstone of the Refugee Convention is the principle of non-refoulement. Art. 33(1) of the Refugee Convention provides:

> No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

According to contemporary interpretation of non-refoulement, Art. 33 of the Convention, to which no reservations are allowed under Art. 42[109] of the Convention and under VII (1) of its Protocol, embodies a *lex specialis* within the framework of international refugee law, distinguishing it from other human rights instruments.

Beyond a shadow of a doubt, the principle of non-refoulement qualifies as a landmark of international refugee law; moreover, it has such a considerable impact on the regime of the Refugee Convention that it can be labelled 'the cornerstone of international refugee law'.[110] As Gammeltoft-Hansen establishes, 'the non-refoulement obligation serves as the entry point for all subsequent rights that may be claimed under the 1951 Refugee Convention. Without this, little else matters'.[111] At the same time, it is important to note that in accordance with Art. 33(1) of the Refugee Convention, non-refoulement does not mean a right of the individual to be granted asylum in a particular State.[112] Indeed, it means that where a particular State is not prepared to grant asylum to a person in need of international protection, it must adopt a fair procedure and offer efficient guarantees that the person in need will not be removed or expelled to a country where his or her life, dignity, or freedom would

109 Refugee Convention, Art. 42(1) 'At the time of signature, ratification or accession, any State may make reservations to articles of the Convention other than to articles 1, 3, 4, 16(1), 33, 36–46 inclusive'.

110 San Remo Declaration, 2001.

111 Gammeltoft-Hansen, 2011, p. 44.

112 Weis, 1995, p. 342.

be endangered based on race, religion, nationality, membership of a particular social group, or political opinion.[113] The prohibition of refoulement applies to all authorities of a State Party to the Refugee Convention and all persons acting on behalf of a State Party. As for the standard of proof for the prohibition of refoulement, 'would be threatened' means a relatively high threshold, a 'reasonable degree of likelihood that the persecution will occur'.[114]

Non-refoulement differs from asylum from both conceptual and legal perspectives. While non-refoulement is a negative obligation of States, prohibiting them from sending any person back to a country of persecution, asylum is a positive one encompassing the admission to a new residence and long-lasting protection from the jurisdiction of another state. In other words, non-refoulement is an obligation of States, whereas granting asylum is a right they possess, which at the same time means that it is not a right of the individual.[115] As a consequence of this normative separation, the Refugee Convention, except in its Preamble,[116] does not include any provisions on asylum, and this kind of silence was intentional on the part of those drafting the Refugee Convention. The statement of the UK delegate to the Conference of Plenipotentiaries unambiguously clarified this stance; 'The right of asylum […] was only a right, belonging to the State, to grant or refuse asylum not a right belonging to the individual and entitling him to insist on its being extended to him'.[117] Nevertheless, there are unalienable interactions between the State obligation of non-refoulement and the State right to grant asylum: non-refoulement shall be taken into consideration when a State decides on granting or refusing asylum. From this viewpoint, the separation of non-refoulement and asylum seems quite hypothetical, as in practice, before removing an asylum seeker from a State's territory, the assessment of non-refoulement shall be conducted by the respecting State in all circumstances.

Under Art. 33(1) of the Refugee Convention, the material scope of the principle of non-refoulement is relatively broad. The wording 'in any manner whatsoever' means any act of sending back non-nationals when there is a real risk of their persecution. According to contemporary jurisprudence, the legal nature of that act is irrelevant, and it might be realised in deportation, extradition, maritime interception, non-admission at the border, transfer, rendition etc.[118] Therefore, the essence is not the act but its consequence, i.e., putting the dignity, life, or liberty of the person in danger. At the same time, refoulement is different from expulsion or deportation as these

113 Lauterpacht and Bethlehem, 2003, p. 76.

114 *R v. Secretary of State for the Home Office, ex parte Sivakumaran and Conjoined Appeals* (UNCHR Intervening) [1998] AC 958 (UK), para. 993.

115 Chetail, 2019, pp. 190–190.

116 Refugee Convention, Preamble:
Considering that the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of a problem of which the United Nations has recognized the international scope and nature cannot therefore be achieved without international co-operation.

117 UNGA 'Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: Summary Record of the Thirteenth Meeting' (22 November 1951) UN Doc. A/CONF.2/SR/13, 13.

118 Chetail, 2019, p. 187; Lauterpacht and Bethlehem, 2003, p. 87.

terms cover a more formal process whereby a lawfully residing non-national may be required to leave a State or be forcibly removed.[119] The prohibition of refoulement encompasses not only the prohibition on being returned to the country of origin, but also to any country where the person's life or freedom would be threatened based on any of the five limitative grounds.

As for the personal scope, the protection against refoulement under Art. 33(1) applies to any person who meets the 'inclusion criteria' of the refugee definition provided under Art. 1(A)(2) of the Refugee Convention, and at the same time does not fall under the scope of the 'exclusion criteria' (see the comprehensive analysis above).[120] Additionally, the prohibition of refoulement applies not only to refugees but also to asylum seekers, which can be primarily explained by the declaratory nature of the refugee status. As the UNHCR established,

> every refugee is, initially, also an asylum seeker, therefore, to protect refugees, asylum seekers must be treated on the assumption that they may be refugees until their status has been determined. Otherwise, the principle of non-refoulement would not provide effective protection for refugees, because application might be rejected at borders or otherwise returned to persecution on the grounds that their claim had not been established.[121]

One can therefore conclude that the declaratory nature of refugee status is based on a rebuttable presumption that asylum seekers are assumed to have the equivalent status as refugees with regard to the benefits from non-refoulement protection for the duration of the asylum procedure unless proven otherwise. As Goodwin-Gill and McAdam remark, 'in principle, its benefit ought not to be predicated upon formal recognition of refugee status which, indeed, may be impractical in the absence of effective procedures or in the case of a mass influx'.[122] Consequently, non-refoulement is of special significance for asylum seekers: as they may be potential refugees, they should not be returned or expelled while their asylum application is pending. Additionally, as Chetail observes,[123] the personal scope of non-refoulement under the Refugee Convention can be also supported by the principle of *effet utile*. According to the International Court of Justice, which took its stance on *effet utile* in the *Case Concerning the Territorial Dispute between Libya and Chad*, the principle of effectiveness is among the 'the fundamental principles of interpretation of treaties'.[124] *Effet utile* means that among the numerous methods of treaty interpretation the one

119 Goodwin-Gill and McAdam, 2021, p. 466.
120 UNHCR, 2007.
121 UNHCR 'Note on International Protection: Submitted by the High Commissioner' (31 August 1993) UN Doc. A/AC.96/815, para. 5.
122 Goodwin-Gill and McAdam, 2021, p. 469.
123 Chetail, 2019, p. 188.
124 *Case Concerning the Territorial Dispute, Libyan Arab Jamahiriya v. Chad*, (1994) ICJ Reports 6, para. 51.

which best gives the practical effect of the respective norm shall be applied, and it could not be realised if asylum seekers were excluded from the protection based on non-refoulement.

The asylum seeker's application *per se* triggers the application of non-refoulement as soon as the person is within the jurisdiction of the State Party to the Refugee Convention. The ECtHR pointed out in *Amuur v France* (see in detail above) and *Hirsi Jamaa and Others v Italy*[125] that non-refoulement protects from the moment when the person concerned intends to cross the border of another country, i.e., it does not only protect those already within the territory of a particular country from being removed. The *Hirsi Jamaa and Others v Italy* case involved Somali and Eritrean migrants travelling from Libya who had been intercepted at sea by the Italian authorities and sent back to Libya. Returning them to Libya without examining their case exposed them to a risk of ill-treatment and amounted to a collective expulsion. As the HRC remarks, this jurisdiction is extended to 'anyone within the power of effective control of that State Party, even if not situated within the territory of the State Party'.[126] Therefore, non-refoulement has a so-called extraterritorial scope, meaning it is applicable on those territories that are not part of state territory in a legal sense but under the effective control of the respective State Party.[127] According to the UNHCR interpretation, where the drafters of the Refugee Convention intended a particular clause of the treaty to apply only to those within the territory of a State Party, they chose language which leaves no doubt as to their intention. Besides, the UNHCR established that any interpretation which tailors the geographical scope of Art. 33(1) as not applicable to measures whereby a State, outside its territory, drives back refugees to a country where they are threatened by persecution would be manifestly inconsistent with the humanitarian object and purpose of the Refugee Convention and its Protocol.

The first two paragraphs of the Preamble of the Refugee Convention read as follows:

> Considering that the Charter of the United Nations and the Universal Declaration of Human Rights approved on 10 December 1948 by the General Assembly have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination', and 'considering that the United Nations has, on various occasions, manifested its profound concern for refugees and endeavoured to assure refugees the widest possible exercise of these fundamental rights and freedoms.

The UNHCR underpins the overriding humanitarian object and purpose of the Refugee Convention based on a comprehensive review of the *travaux préparatoires*.

125 *Hirsi Jamaa et al v. Italy,* ECtHR, no. 27765/09, 23 February 2012.

126 UN Human Rights Committee (HRC), General comment no. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant, 26 May 2004, para. 10.

127 De Boer, 2015, pp.118–134; Goodwin-Gill, 2011, pp. 443–457; Trevisanut, 2014, pp. 661–675.

The UNHCR, in accordance with Art. 32 of the VCLT[128] on the supplementary nature of historical interpretation, is of the view that turning to the drafting history of Art. 33(1) is not necessary due to the unambiguous wording of this provision; however, *travaux préparatoires* might be of interest in explaining the content and scope of non-refoulement.[129]

Even though non-refoulement has a relatively broad scope of application, it is not an absolute term under the Refugee Convention. During the drafting of the Refugee Convention, the 1951 Conference of Plenipotentiaries raised concerns related to the absoluteness of the prohibition of non-refoulement.[130] The final text of Art. 33(2) therefore provides that,

> the benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

This provision encompasses two exceptions that reflect a state-centred approach: the first is connected with the public security of the host country, while the second protects the host country specifically against crime. Nonetheless, these provisions should be interpreted restrictively and only be applied to highly exceptional circumstances. The wording of Art. 33(2) clearly implies this restrictive approach when it comes to the second exception defending the host country specifically against crime: (i) 'convicted by a final judgment' suggests effective remedies were exhausted; (ii) 'for a particularly serious crime' suggests that international crimes, such as crimes against humanity, and crimes against the state, such as terrorism, should be taken into consideration; and (iii) 'constitutes a danger to the community of that country' suggests that due to the risk of subsequent offence the person represents a danger to the host country.[131] However, Art. 33(2) of the Refugee Convention does not affect the host State's non-refoulement obligations under international human rights law, which are absolute and allow no such exceptions.[132]

Although a return to the State where persecution has occurred is prohibited under Art. 33(1) of the Refugee Convention, a return to any other State is not, which has led to restrictions applied by host States such as the 'first country of arrival rule' and the

128 VCLT, Art. 32:
Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.

129 UNHCR, 2007.

130 Goodwin-Gill and McAdam, 2021, p. 468.

131 Chetail, 2019, pp. 189–190.

132 Lauterpacht and Bethlehem, 2003, pp. 159, 166, 179.

'safe third country rule'. This approach often entails 'chains of deportation', leading to refugees finding themselves in the first State where they arrived after having fled their homeland.[133] Additionally, some States practice 'extraterritorial refoulement' and intercept refugees on the high seas to keep them outside territorial waters. In *Sale v Haitian Centers Council,* the US Supreme Court[134] found that intercepting Haitians on the high seas and returning them to their home State is lawful; however, the Inter-American Commission on Human Rights (hereinafter: IACommHR) in the same case (*Haitian Interdiction Case*)[135] declared it a breach of Art. 33 of the Refugee Convention. The *Sale v Haitian Centers Council* is a case in which the US Supreme Court ruled that the President's executive order that all aliens intercepted on the high seas could be repatriated was not limited by the Immigration and Nationality Act of 1952 or Art. 33 of the Refugee Convention. In the same vein, Italy and Libya signed a bilateral agreement in 2012 to return refugees (though the ECtHR declared this unlawful in *Hirsi Jamaa and Others v Italy* [see in detail above]). Australia has also pursued a legally dubious practice for a number of years concerning 'offshore processing centres', where asylum seekers have not only been returned on the high seas so they cannot enter state territory, but their asylum applications have also been assessed in these processing centres, and even if they are recognised as refugees, they have been legally prevented from settling in Australia.[136]

6. Concluding remarks

This chapter has focused on the framework of interpretation of the Refugee Convention with special regard to the definition of the term 'refugee', the nature of refugee status, including the benefit of immunities from penalties for illegal entry to or presence in a country, and the principle of non-refoulement. In order to provide a contemporary interpretation of the Refugee Convention, this chapter has paid special attention to the subsequent development of international law, construing and applying the core concepts of the Refugee Convention within the normative context prevailing at the time of its interpretation, i.e., in light of the human rights treaties (UDHR, ECHR, ICERD, ICCPR etc.) adopted since its entry into force. In addition, as those drafting the Refugee Convention established neither a treaty body nor a human rights monitoring mechanism to provide an authentic interpretation for the instrument, due consideration has been devoted to respecting international

133 Hernández, 2019, pp. 431–432.
134 *Sale v. Haitians Centers Council* (1993) 509 US 155.
135 *The Haitian Centre for Human Rights et al v. US* 10.675 IACommHR No 51/96 OEA/Ser.L/V/II.95 doc.7 Rev [1997] 550, paras. 156–158.
136 Gammeltoft-Hansen, 2011, pp. 100–157.

and national judicial and committee case law, such as that of the ECtHR, IACtHR, HRC, IACommHR, the UK House of Lords and Supreme Court, and the US Supreme Court.

The analysis of the definition of the term 'refugee' demonstrates that international protection was tailored to a very limited category of refugees, and the Refugee Convention is therefore not able to provide protection for IDPs or those who flee their home countries without persecution or owing to some other drivers not enumerated under Art. 1(A)(2) (such as armed conflicts, famine, or extreme poverty). It is worth mentioning as well that the Refugee Convention is not a human rights treaty guaranteeing unalienable and unconditional rights paired with refugee status. Although recognition of a refugee is declaratory in nature, rights stemming from refugee status are not unalienable and unconditional: the acquisition of refugee rights presupposes recognition, and these rights cease to apply when refugee status is terminated. Moreover, refugee rights are also incremental; that is, the more the bond strengthens between the refugee and the asylum State, the more the Refugee Convention provides for refugees. Two of the refugee rights have been analysed in this chapter in detail: the benefit of immunities from penalties for illegal entry to or presence in a Contracting State and the guarantee that foreign nationals will not be sent back based on the principle of non-refoulement. As far as the assessment of illegal entry or presence is concerned, the prohibition of criminal sanctions is not an absolute one, and applicants need to present themselves without delay to the authorities, as well as needing to show a good cause for their illegal entry or presence. Non-refoulement, the centrepiece of international refugee law, has proved to be limited in scope under the Refugee Convention; nonetheless, the ever-evolving doctrine of international human rights law has broadened its meaning to an absolute one, and it has grown beyond Art. 33(2) of the Convention.

Based on the concise analysis outlined in this chapter, one may conclude that while the Refugee Convention has many textual limitations, it has been applied as an ultimate tool in protecting those who really are in need, and despite its outdated concept, judicial interpretation finds a way to maintain it as a living instrument.

References

Ádány, T. V. (2016) 'Nemzetközi jogi szempontok a migrációs válság kezeléséhez', *Iustum Aequum Salutare,* 12(2), pp. 237–249.

Beck, R. J. (1999) 'Britain and the 1933 Refugee Convention: National or State Sovereignty?', *International Journal of Refugee Law,* 11(4), pp. 597–624; https://doi.org/10.1093/ijrl/11.4.597.

Bem, K. (2004) 'The Coming of a "Blank Cheque" – Europe, the 1951 Convention, and the 1967 Protocol', *International Journal of Refugee Law,* 16(4), pp. 609–627; https://doi.org/10.1093/ijrl/16.4.609.

Bhabha, J. (2002) 'International Gatekeepers? The Tension between Asylum Advocacy and Human Rights', *Harvard Human Rights Journal,* 15(1), pp. 151–181.

Chetail, V. (2014) 'Are Refugee Rights Human Rights? An Unorthodox Questioning of the Relations between Refugee Law and Human Rights Law', in Rubio-Marín, R. (ed.) *Human Rights and Immigration,* First edn. Oxford: Oxford University Press, pp. 19–72; https://doi.org/10.1093/acprof:oso/9780198701170.003.0002.

Chetail, V. (2019) *International Migration Law*, Firs edn. Oxford: Oxford University Press https://doi.org/10.1093/law/9780199668267.001.0001.

De Boer, T. (2015) 'Closing Legal Black Holes: The Role of Extraterritorial Jurisdiction in Refugee Rights Protection', *Journal of Refugee Studies,* 28(1), pp. 118–134; https://doi.org/10.1093/jrs/feu024.

Edwards, A. (2003) 'Age and Gender Dimensions in International Refugee Law' in Feller E., Türk, V., Nicholson, F. (eds.) *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*. First edn. Cambridge: Cambridge University Press, pp. 46–80; https://doi.org/10.1017/CBO9780511493973.006.

Fitzpatrick, J. (1996) 'Revitalizing the 1951 Refugee Convention', *Harvard Human Rights Journal,* 9(1), pp. 229–253.

Gammeltoft-Hansen, T. (2011) *Access to Asylum: International Refugee Law and the Globalisation of Migration Control,* First edn. Cambridge: Cambridge University Press https://doi.org/10.1017/CBO9780511763403.006.

Goodwin-Gill, G. S. (2003) 'Article 31 of the 1951 Convention Relating to the Status of Refugees: Non-Penalization, Detention, and Protection' in Feller, E., Türk, V., Nicholson, F. (eds.) *Refugee Protection in International Law,* First edn. Cambridge: Cambridge University Press; https://doi.org/10.1017/CBO9780511493973.011.

Goodwin-Gill, G. S., McAdam, J. (2021) *The Refugee in International Law,* Fourth edn. Oxford: Oxford University Press, https://doi.org/10.1093/law/9780198808565.001.0001.

Hathaway, J. C. (2021) *The Rights of Refugees under International Law*, Second edn. Cambridge: Cambridge University Press, https://doi.org/10.1017/9781108863537.004.

Helton, A. C. (1994) 'Forced Migration: A Need for New Approaches by the International Community', *Fordham International Law Journal,* 18(1), pp. 1623–1636.

Hernández, G. (2019) *International Law*, First edn. Oxford: Oxford University Press, https://doi.org/10.1093/he/9780192848260.001.0001.

Hoffmann, T. (2016) 'Can Asylum-Seekers Be Penalized for Illegal Entry to the Country? Some Comments on the Compatibility of the Hungarian Regulation with Article 31 of the 1951 Geneva Convention' in Rixer, Á. (ed.) *Migrants and Refugees in Hungary. A Legal Perspective,* Budapest: Károli Gáspár University of the Reformed Church in Hungary, pp. 95–103.

Jager, G. (2001) 'On the History of the International Protection of Refugees', *International Review of the Red Cross,* 83(843), pp. 727–737; https://doi.org/10.1017/S1560775500119285.

Lambert, H. (2016) *International Refugee Law,* First edn. New York: Routledge.

Lauterpacht, E., Bethlehem, D. (2003) 'The Scope and Content of the Principle of Non-Refoulement: Opinion' in Feller, E., Türk, F., Nicholson, F. (eds.) *Refugee Protection in International Law: The UNHCR's Global Consultations on International Protection,* Cambridge – New York – Geneva: Cambridge University Press, pp. 81–177, [Online]. Available at: https://www.unhcr.org/publications/refugee-protection-international-law (Accessed: 13 January 2024); https://doi.org/10.1017/CBO9780511493973.008.

League of Nations (1933) Convention of 28 October 1933 relating to the International Status of Refugees, Refworld. Global Law&Policy Database, Treaty Series, 159(3663), [Online]. Available at: https://www.refworld.org/legal/agreements/lon/1933/en/17584 (Accessed: 20 March 2024).

Molnár, T. (2016) 'The Right to Asylum in International Law' in Rixer, Á. (ed.) *Migrants and Refugees in Hungary. A Legal Perspective,* Budapest: Károli Gáspár University of the Reformed Church in Hungary, pp. 37–53.

Molnár, T. (2016) 'The Principle of Non-Refoulement under International Law: Its Inception and Evolution in a Nutshell', *Corvinus Journal of International Affairs,* 1(1), pp. 51–61.

Nagy, B. (2014) 'A menekültjog' in Kende, T., Nagy, B., Sonnevend, P., Valki, L. (eds.) *Nemzetközi jog,* Budapest: Wolters Kluwer CompLex Kiadó.

Shacknove, A. E. (2016) 'Who is a Refugee?' in Lambert, H. (ed.) *International Refugee Law.* First edn. New York: Routledge, pp. 163–173; https://doi.org/10.4324/9781315092478-7.

Trevisanut, S. (2014) 'The Principle of Non-Refoulement and the De-Territorialization of Border Control at Sea', *Leiden Journal of International Law,* 27(3), pp. 661–675; https://doi.org/10.1017/S0922156514000259.

UNHCR (2007) Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol, UN High Commissioner for Refugees, 26 January 2007. [Online]. Available at: https://www.refworld.org/docid/45f17a1a4.html (Accessed: 3 October 2023).

UNHCR (2011) Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, UN High Commissioner for Refugees, UN Doc. HCR/1P/4/ENG/REV.3, p. 38.

UNHCR (2019) Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, UN High Commissioner for Refugees, UN Doc. HCR/1P/4/ENG/REV.4.

UNHCR (2022) UNHCR's Global Trends Report: 100 Million Displaced, UN High Commissioner for Refugees, 16 June 2022. [Online]. Available at: https://www.youtube.com/watch?v=vl8gYm4nNDQ (Accessed: 25 January 2024).

Zimmermann, A., Mahler, C. (2011) 'Article 1A para 2 (Definition of the Term "Refugee")', *The 1951 Convention relating to the Status of Refugees and its 1967 Protocol: A Commentary,* First edn. Oxford: Oxford University Press, pp. 281–465; https://doi.org/10.1093/actrade/9780199542512.001.0001.

Zolberg, A. R., Suhrke, A., Aguayo, S. (1989) *Escape from Violence. Conflict and the Refugee Crisis in the Developing World.* Oxford: Oxford University Press.

Weis, P. (1990) *The Refugee Convention. The Travaux Préparatoires with a Commentary* [Online]. Available at: https://www.unhcr.org/sites/default/files/legacy-pdf/4ca34be29.pdf (Accessed: 13 August 2023).

Weis, P. (1995) *The Refugee Convention, 1951: The Travaux Préparatoires Analysed with a Commentary,* First edn. Cambridge: Cambridge University Press.

San Remo Declaration on the Principle of Non-Refoulement, September 2001. [Online]. Available at: https://perma.cc/JH4T-JDQD (Accessed: 20 August 2023).

CHAPTER III

The Practices of the Council of Europe and the European Court of Human Rights From a Central European Perspective Regarding Questions on Migration

Gyula Fábián

Abstract

Over the past decade, Europe and particularly the European Union annually receive several migrants owing to the failure to respect the principle of the 'first safe state' according to public international law, and a lack of effective measures to address the causes of migration.

In this context, the Council of Europe, as a classical, non-supranational international cooperation organisation was unable to regulate migration policies, although it aims to protect human rights on the European continent. This was largely owing to the members' reluctance regarding asylum regulations and the 'soft law' initiatives adopted by its institutions. It was not until the migration phenomenon caught the attention of the ECtHR in 1999 that the situation began to change.

The ECtHR relies on the ECHR to prevent member states from returning or expelling aliens who have entered their territory illegally, replacing the lack of anchoring of the right of asylum in positive law with the impossibility of removing people who do not fulfil the criteria for refugee status owing to substantive or procedural loopholes. In the absence of a pan-European lex specialis on migration, the ECtHR is forcing a lex generalis to oblige some 600 million Europeans to host several billion people who seek a better future in Europe, often overlooking the principle of 'safe first country'

Gyula Fábián (2024) 'The Practices of the Council of Europe and the European Court of Human Rights From a Central European Perspective Regarding Questions on Migration'. In: Anikó Raisz (ed.) *Migration and Central Europe. Challenges and Legal Responses,* pp. 121–185. Miskolc–Budapest, Central European Academic Publishing.

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for those who are genuinely persecuted within the meaning of the 1951 Geneva Convention relating to the Status of Refugees.
This study reviews the powers, instruments, and means available to the Council of Europe in relation to the member states of the Council of Europe with respect to migration, dealing with the problem of the imposition of the ECHR by the ECtHR as lex generalis in the absence of lex specialis, particularly in relation to Eastern and Central European countries. Although they have no colonial past laden with 'moral debts' and are not the priority target of migration, they are unjustifiably and sometimes excessively 'condemned' by the ECtHR.

Keywords: vulnerable group, detention for extradition vs detention for deportation, accountability of member states, Special Representative for Migration and Refugees, rich imagination with soft law results, asylum seeker

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1. Introduction

The movement of people across borders/boundaries/limits is a permanent feature of European history, and the need for its regulation emerged during the Roman Empire in the form of "*jus gentium*".[1] European Christian society operated from the very beginning with the concept of inter-human "amity", and often recommended the parable of the "Good Samaritan". Chetail described the following on the topic:

> The free movement of persons was first recognised by Francisco de Vitoria (1480–1546) and Hugo Grotius (1583–1645) as a rule of international law based on the right of communication between people. In contrast, Samuel von Pufendorf (1632–1694) and Christian von Wolff (1697–1754) insisted on the discretionary power of the state to refuse the admission of foreigners as a consequence of its territorial sovereignty. However, between these two different poles – sovereignty versus hospitality – Emeric de Vattel (1714–1767) counterbalanced the sovereign power of the state with a right of entry based on necessity. Thus … the dialectic between sovereignty and hospitality offered innovative ways of rethinking migration.[2]

The peak of forced migration occurred after the Second World War and led to the global regulation of the refugee status in 1951/1967. At the beginning of the 21st century, when under the pressure of wars and revolutions in the Muslim world, certain states of the European Union (EU) became preferred targets of migration,

1 *Jus gentium* at the time of its emergence was domestic, state law, although it later conceptually covered public international law.
2 Chetail, 2017, p. 902.

which led the phenomenon to transform into a material source of emergency asylum law in this supranational organisation. At present, Chetail rightly notes that, in Europe, the control of the movement of people was driven by the two World Wars, and that although the wars are over: 'Still today, the vicious circle of armed conflicts, terrorism, and economic recession constitute influential factors for justifying immigration control'.[3]

The United Nations High Commissioner for Refugees (also known as UNHCR) estimates that the global number of people forcibly displaced owing to persecution, conflict, violence, human rights violations, and events that have seriously disrupted law and order will exceed 110 million in May 2023. In Europe at the end of 2022, 11.6 million Ukrainians remained displaced, of which 5.9 million were internally displaced and 5.7 million fled to neighbouring countries and beyond. On this, Grandi, United Nations High Commissioner for Refugees, said: 'These figures show us that some people are far too quick to rush to conflict, and way too slow to find solutions'[4]. In total, however, 281 million people (i.e. 3.6% of the world's population) currently live outside their country of origin.[5]

2. The legal nature of the Council of Europe and the competences of its bodies in the field of migration

The Council of Europe is an international intergovernmental, political, regional, open, classically cooperative (non-supranational) international organisation which in principle groups together the democratic states of Europe. This international organisation, named the Council of Europe by Winston Churchill,[6] is the result of a spontaneous manifestation of several European movements that emerged in the immediate aftermath of the end of the Second World War, when the countries held a Congress on this subject in the famous Riderzaal Hall, in The Hague, the Netherlands, on 7 May 1948.[7] The Statute of the Council of Europe would eventually be signed by 10 states (Belgium, the Netherlands, Luxembourg, France, Denmark, Ireland, Italy, England, Norway, and Sweden) in St. James's Palace, London, on 5 May 1949, and enter into force on 3 August 1949. The seat of the Council of Europe is in Strasbourg,[8] France, and from 2011–2022, it had 47 Member States. Currently, it

3 Chetail, 2017, p. 922.
4 Grandi, 2023, pp. 7–8.
5 OHCHR, no date.
6 It was Winston Churchill (1874–1965) who used the name Council of Europe for a future pan-European political organisation in 1942, in his famous speech in Zurich on 19 September 1946.
7 Ecobescu, 1999, pp. 11–13.
8 Address: Palais de l'Europe, Avenue de l'Europe, F-67075 Strasbourg Cedex, France.

has 46 Member States[9] after the Committee of Ministers decided, on 16 March 2022, to exclude the Russian Federation. Importantly, all 27 EU Member States are also members of the Council of Europe, and the countries of the former communist bloc have already been cooperating with the Council for 30 years. The aim of this international organisation, according to the Preamble and Art. 1 of its Statute,[10] is to achieve greater unity among its members, to safeguard and realise the ideals and principles which are their common heritage, and to facilitate their economic and social progress. This broadly-defined aim makes no reference to the issue of migration, and in point (d) of the same article, it is qualified by an extremely important nuance: 'Matters relating to national defence do not fall within the competence of the Council of Europe'. Thus, if a Member State considers that the phenomenon of migration is its national defence problem, it can evade the competence of this international organisation. In concrete terms, the Council of Europe currently acts de facto for a) defending human rights and a pluralist democracy (in 1950, it adopted the Convention for the Protection of Human Rights and Fundamental Freedoms, hereinafter ECHR, which to date has been supplemented by 16 protocols[11]); b) promoting awareness and appreciation of the European cultural identity and fighting against all forms of intolerance; c) seeking solutions to societal problems (e.g. against minorities, xenophobia, intolerance, environmental protection, bioethics, human immunodeficiency virus, and drugs); d) support for the countries of Eastern and Central Europe to implement and strengthen their political, legislative, and constitutional reforms through major cooperation programmes.

On its homepage, the Council of Europe states under the heading "values" that it 'promotes human rights through international conventions'.[12] I believe that this short sentence expresses the essence of the work of this Council, but would also add that this organisation, according to the principle of the useful effect (fr. "*effet utile*") and with the help of its bodies, tries to get the most out of every treaty guaranteeing respect for fundamental rights and freedoms, whether it succeeds in achieving this result directly or indirectly. The bodies of the Council also act in the field of asylum, immigration, and refugees, with the major ones being the Committee of Ministers, the Parliamentary Assembly, and the European Court of Human Rights (ECtHR). The

9 The states which have joined the founding countries are the following: Greece (1949, 1974), Iceland, Germany (1950), Turkey (1950, 1984), Austria (1956), Cyprus (1961), Switzerland (1963), Malta (1965), Portugal (1976), Spain (1977), Liechtenstein (1978), San Marino (1988), Finland (1989), Hungary (1990), Poland (1991), Bulgaria (1992), Estonia, Lithuania, Slovenia, Romania, the Czech Republic, Slovakia (1993), Andorra (1994), Latvia, Albania, North Macedonia, Moldova, Ukraine (1995), Croatia (1996), Georgia (1999), Armenia, Azerbaijan (2001), Bosnia and Herzegovina (2002), Serbia (2003), Monaco (2004), and Montenegro (2007).

10 Statute of the Council of Europe and texts of statutory character, London 5 May 1949, European Treaty Series – No. 1. Available at: https://rm.coe.int/1680a1c6b3 (Accessed: 11 August 2023).

11 For up-to-date information on the Convention and Protocols, see: https://www.coe.int/en/web/conventions/full-list?module=treaty-detail&treatynum=005 (Accessed: 11 August 2023).

12 The Council of Europe in Brief. Values: Human Rights, Democracy, Rule of Law [Online].Available at: https://www.coe.int/en/web/about-us/values (Accessed: 4 July 2023).

work of these bodies has also been supplemented since 1989 by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (also known as CPT), since 1999 by the Commissioner for Human Rights,[13] and since 2016 by the Council of Europe Special Representative on Migration and Refugees.

The Committee of Ministers, also considered the decision-making body, is the body competent to act on behalf of the Council, comprising the foreign ministers of each Member State and holding one ordinary session a year in Strasbourg and weekly sessions of the permanent representatives. The Ministers' Deputies are assisted by a Bureau, rapporteur groups, thematic coordinators, and ad hoc working parties. Its main tasks are as follows: concluding conventions; issuing recommendations to the governments of Member States; taking binding decisions on internal and organisational matters; and contributing to the execution of ECtHR judgments. Decisions of a definitive nature by the Committee of Ministers may often take the form of resolutions and, where appropriate, its conclusions may take the form of recommendations to the governments of Member States, which may be invited to inform the Committee of the measures taken to implement these recommendations. The recommendations, although not binding, are of a "soft law" nature and have a clear moral authority, considering that they represent a collective expression of the views of the Member States' governments on the issues they address.[14]

The Parliamentary Assembly is the deliberative body, composed of representatives of the national parliaments of Member States, the size of the delegation of each parliament varying according to the size of the territory, the population, and the contribution of the respective State to the budget of the Council.[15] The Assembly adopts four categories of texts, namely recommendations, resolutions, opinions, and directives. Recommendations contain proposals addressed to the Committee of Ministers, the implementation of which is the responsibility of governments. Resolutions contain the Assembly's decisions on matters on which it is empowered to regulate or on which it expresses opinions that are its sole responsibility. Opinions are mostly expressed by the Assembly on matters referred to it by the Committee of Ministers, such as the admission of new Member States to the Council of Europe, but may also concern draft conventions, budgets, the application of the European Social Charter, or the activities of the Congress of Local and Regional Authorities of Europe. Directives are usually instructions from the Assembly to its committees.

The ECtHR is a body established by the ECHR and that acquired the status of an independent judicial body by Protocol No. 11 of 1994 to the Convention. On the entry into force of the Protocol on 1 November 1999, the "new" court started/continued its work. Until that date, only less sensitive cases (i.e. which had passed

13 Resolution (99)50 on the Council of Europe Commissioner for Human Rights – adopted by the Committee of Ministers on 7 May 1999, 104th Session, Budapest.

14 Ecobescu, 1999, p. 81.

15 Fábián, 2023, p. 11.

through the political body called the European Commission of Human Rights) had been brought before the ECtHR, which was set up in 1954.

> The Convention makes a distinction between two types of application: individual applications lodged by any person, group of individuals, company or NGO having a complaint about a violation of their rights, and inter-State applications brought by one State against another.
> Cases can only be brought against one or more States that have ratified the Convention. Any applications against third States or individuals, will be declared inadmissible.
> The Convention system provides for "easy" access to the Court, enabling any individual to bring a case even if he or she lives in a remote region of a member State or is penniless. With this in mind, there are no fees for proceedings before the Court.[16]

It should be noted that the ECtHR did not adopt any judgments in the field of migration until 1985,[17] and the first judgment in favour of persons in relation to migration was adopted only in 1988.[18] Part of the literature considers that this jurisprudence/case law, characterised by judgments of inadmissibility or rejection, even today has many shortcomings.[19]

The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment was established by the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, which entered into force in 1989. This Committee is not a monitoring body but provides a non-judicial preventive tool to protect persons deprived of their liberty against torture or other forms of ill-treatment. It thus complements the legal work of the ECtHR, drawing attention through its annual report[20] to the treatment to which refugees are subjected. It does so by delegating persons to make regular visits (usually every four years) and "ad hoc" visits as necessary to any place where there may be cases of deprivation of liberty.

The Commissioner for Human Rights has been in operation since 1999, being an extra-judicial institution charged with promoting education and awareness of and respect for human rights. Its task is monitoring respect for fundamental human rights, promoting information and education, assisting Member States in this field,

16 European Court of Human Rights, 2021, p. 6.
17 ECtHR, *Abdulaziz, Cabales and Balkandali v. United Kingdom*, App. Nos. 9214/ 80, 9473/ 81, and 9474/ 81 (28 May 1985).
18 ECtHR, *Berrehab v. the Netherlands*, App. No. 10730/ 84 (21 June 1988).
19 Dembour, 2021, p. 19.
20 See for example: 'Prevention of ill-treatment of aliens deprived of their liberty in the context of forced expulsions at borders' in the 32nd GENERAL REPORT OF THE CPT 1 January–31 December 2022, pp. 23–33.

and facilitating the work of national ombudsmen.[21] The Commissioner exercises his/her functions independently, without bias, and without the possibility of lodging complaints with the ECHR or receiving complaints. After the entry into force of Protocol No. 14 to the ECHR, he/she has the possibility to submit written opinions and partake in the oral proceedings of the ECHR. However, the current Commissioner is very active in the field of migration, if we consider that he draws attention to the double standard for the treatment of refugees in Ukraine, the lack of transparency in border protection,[22] reproaches some Member States for the disappearance of underage asylum seekers on their territory,[23] and campaigns for the right of the public to know how many migrants lose their lives while trying to enter the EU.[24]

Last, the Council of Europe Special Representative for Migration and Refugees[25] was established in 2016 in response to the humanitarian crisis following various refugee and migration movements. The goal is affording immediate assistance and support to the Member States concerned, complementing the activities of other relevant Council of Europe bodies and coordinating actions with other international partners, particularly the United Nations High Commissioner for Refugees, International Organization for Migration, United Nations International Children's Emergency Fund (also known as UNICEF), EU, FRONTEX, and others. The mandate of the Special Representative include: a) to seek, collect, and analyse information, including through fact-finding missions, on the human rights situation of refugees and migrants, and to report to the Secretary General. Importantly, the Representative has already produced reports in the period 2016–2023 following fact-finding missions to all Eastern and Central European countries;[26] b) liaise and exchange information with relevant international organisations and specialised agencies, as well as with migration authorities in Member States; c) provide input to the Secretary General on how to strengthen Council of Europe assistance and advice to Member States in the treatment of refugees and migrants from a human rights perspective, as well as in the fulfilment of their obligations under the ECHR and other Council of Europe standards; d) to strengthen the Council of Europe's response, working closely with the Council of Europe Commissioner for Human Rights, the Parliamentary Assembly, the Congress, and across all relevant structures within the Organisation; e) Chair the Migration Focal Points Network, support its work by preparing its working methods, organising meetings and consultations with its members, and chair the Intersecretariat Steering Group on Migration.

21 So far, this function has been fulfilled by Álvaro Gil-Robles (1999–2006), Thomas Hammarberg (2006–2012), Nils Muižnieks (2012–2018), and Dunja Mijatović (2018–).

22 *Europarat warnt vor Zwei-Klassen-Asylpolitik*, 2022.

23 *Europarat kritisiert Österreich für Mängel bei Asyl-() und Frauenrechten*, 2022.

24 Mijatović, 2022.

25 Currently held by Leyla Kayacik.

26 Council of Europe, Country Reports (no date). Available at: https://www.coe.int/en/web/special-representative-secretary-general-migration-refugees/country-reports (Accessed: 19 July 2023).

3. The basis and mechanisms for the accountability of Member States for the commitments undertaken when establishing or acceding to the Council of Europe

First, a general commitment is derived from Art. 3 (1) and (2) of the Statute of the Council of Europe, as follows:[27] para. 1, 'Each member of the Council of Europe shall accept the principles of the rule of law and the principle that everyone within its jurisdiction should enjoy fundamental human rights and freedoms'; para. 2, 'Each member undertakes to co-operate sincerely and effectively in furthering the purposes of the Council […]'. This general commitment was complemented by Protocol No. 15 to the Convention, in force from 1 August 2021 and which recently inserted the principle of subsidiarity into the Preamble to the Convention.[28] This principle 'imposes a shared responsibility between the States Parties and the Court' as regards human rights protection, and the national authorities and courts must interpret and apply domestic law in a manner that gives full effect to the rights and freedoms defined in the Convention and the Protocols thereto.[29] Second, the Member States' obligations may derive from conventions concluded within the Council. Third, there are situations where new Member States, when joining the Council of Europe, have to assume certain individual commitments.

The first direct reference of the Council of Europe's specific legal rules to the issue of migration was made in 1963 in Protocol No. 4 to the ECHR, which, first of all, guarantees all persons (including the citizens of the Member States) the freedom to leave any country, including their own,[30] and states that: 'No one may be expelled, individually or collectively, from the territory of the State of which he is a national' and 'No one may be deprived of the right to enter the territory of the State of which he is a national'.[31] However, the regime is more restrictive with regard to aliens, and is exhausted in a single sentence: 'Collective expulsions of aliens are prohibited'.[32] As can be seen in 1963, aliens do not have guaranteed access to the territory of the Member States, but only the right to leave their territory, namely, they are not protected against individual expulsion.

The legal situation regarding the expulsion of aliens has been qualified according to the model of the obligation of "non-refoulement" in the Geneva Convention of 1950[33]

27 Council of Europe,Statute of the Council of Europe and texts of statutory character, 1949. Available at: https://rm.coe.int/1680a1c6b3 (Accessed: 16 July 2023).
28 *Guide on the case-law of the European Convention on Human Rights. Immigration*, 2022, p. 5.
29 *Case of Grzęda v. Poland* – 43572/18, Judgment 15.3.2022 [GC]. § 324.
30 Art. 2 para. 2 of Protocol No. 4.
31 Art. 3 para. 1 and 2 of Protocol No. 4.
32 Art. 4 of Protocol No. 4.
33 Convention relating to the Status of Refugees, done at Geneva on 28 July 1951.

by Protocol No. 7 of 1984, as amended by Protocol No. 11 (1998),[34] where Art. 1, entitled 'Procedural safeguards in the case of expulsion' has been inserted. It contains the following provisions:

> 1. An alien lawfully residing in the territory of a State may be expelled only in pursuance of a decision taken in accordance with law, and he must be able to:
> a. (a) give reasons against his expulsion;
> b. request an examination of his case; and
> c. request to be represented for this purpose before the competent authorities or a person or persons designated by that authority.
> 2. An alien may be expelled before exercising the rights listed in paragraph 1, point (1). (a), (b) and (c) of this Article where expulsion is necessary in the *interests of public policy or on grounds of national security.*

I draw attention a second time to the fact that invoking national security/national defence may override Council of Europe rules on refugees. At this level, the issue was the treatment of an alien legally residing in the territory of a Member State.

In the field of migration, there has been an increasing use of Art. 1 of Protocol No. 12,[35] which provides as described herein:

> The exercise of any right provided for by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Perhaps more important is para. 2, which states, 'No one shall be discriminated against by a public authority on any of the grounds referred to in paragraph 1'.

To the question of what mechanism can force Member States to comply with the above commitments if they forget the provisions of Art. 1 para. 2 of the Statute, the solution is primarily to be found in judicial proceedings before the ECtHR. According to Art. 1 of the ECHR entitled 'Obligation to respect human rights', 'The High Contracting Parties recognize to everyone within their jurisdiction the rights and freedoms defined in Title I of this Convention'[36]. According to Art. 33 of the ECHR entitled 'Inter-State Cases', 'Any High Contracting Party may submit to the Court any alleged violation of the provisions of the Convention and its Protocols by another

34 Council of Europe, Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, As Amended by Protocol No. 11. Available at: https://www.echr.coe.int/documents/d/echr/Library_Collection_P7postP11_ETS117E_ENG (Accessed: 11 August 2023).

35 European Treaty Series 177, Convention for the Protection of Human Rights (Protocol No. 12), 4 November 2000.

36 Title I of the ECHR contains 13 articles on the most important fundamental human rights, to which are added all those rights regulated in the 16 Additional Protocols.

High Contracting Party'. Furthermore, according to Art. 34 entitled 'Individual Applications':

> The Court may receive applications from any person, non- governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto […].

Thus, Member States on whose territory fundamental human rights are violated can be sued before the ECtHR not only by the other Member States but also by the individuals or groups who have suffered as a result of these violations. Moreover, according to Art. 46 of the ECHR, para. 1, 'The High Contracting Parties undertake to comply with the final judgments of the Court in disputes to which they are parties'. That is to say that:

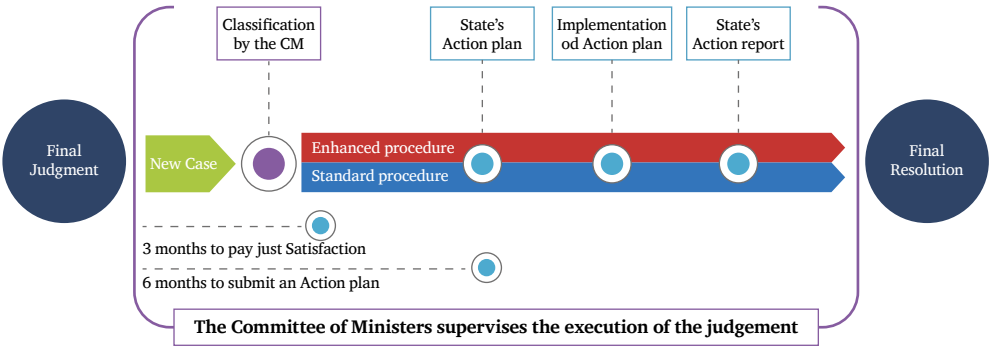
> If the Committee of Ministers considers that a High Contracting Party refuses to comply with a final judgment in a case to which it is a party, and after having put the High Contracting Party in default by a decision taken by a two-thirds majority vote of the representatives entitled to take part in the proceedings of the Committee of Ministers, it may refer the matter to the Court for a decision on whether the High Contracting Party concerned is complying with its obligations under paragraph 1. (para. 4)
> If the Court finds a violation of the provisions of paragraph 1, it shall refer the case back to the Committee of Ministers for appropriate action. If the Court finds that there has been no violation of the provisions of paragraph 1, it shall refer the case back to the Committee of Ministers, which shall decide to close the supervision of enforcement. (para. 5)

The seriousness shown in this area by the Committee of Ministers is reflected in the fact that it is assisted by the Department for the Execution of Judgments of the Court (Directorate General I of Human Rights and Rule of Law). The States have a legal obligation to remedy the violations found, but they enjoy a margin of appreciation regarding the means to be used. The measures to be taken are, in principle, identified by the State concerned while under supervision of the Committee of Ministers. The Court can assist the execution process, in particular through the pilot-judgment procedure (used in case of major structural problems). Measures to be taken may relate to the individual applicant or to be of a general nature.[37]

A summary of the procedure for the execution of ECtHR decisions is presented below:

37 Council of Europe, Presentation of the Department [Online].
Available at: https://www.coe.int/en/web/execution/presentation-of-the-department (Accessed: 16 July 2023).

Figure 1. Outline of the procedure for the enforcement of ECtHR judgments[38]



More recently, the ECtHR has published a Factsheet devoted strictly to the enforcement process of migration judgments[39]. Furthermore, a 'magic formula' for the acceptance under the ECtHR of the widest possible range of instruments of public international law is Art. 53, which states:

> Nothing in this Convention shall be interpreted as restricting or adversely affecting any human rights and fundamental freedoms which may be recognised under the laws of any Contracting Party or any other convention to which that Contracting Party is a party.

Meanwhile, Art. 55 reinforces the ECtHR's claim of exclusive jurisdiction by providing that:

> Except by special agreement, the High Contracting Parties shall refrain from invoking treaties, conventions or declarations in force between them for the purpose of submitting, by way of application, a dispute arising out of the interpretation or application of this Convention to a mode of settlement other than those provided for in the said Convention.

These two articles form the foundation of the ivory tower from which the ECtHR judges have allowed themselves to create a "praetorian law" in the field of asylum. Furthermore, "holding states accountable" or "making states responsible" takes place

38 Council of Europe, The Supervision Process [Online]. Available at: https://www.coe.int/en/web/execution/the-supervision-process (Accessed: 16 July 2023).

39 Migration and Asylum. Thematic Factsheet, November 2021. Available at: https://rm.coe.int/thematic-factsheet-migration-asylum-eng/1680a46f9b (Accessed 19 July 2023).

through the monitoring procedures established by the various conventions concluded under the umbrella of the Council of Europe.

Within the context of the United Nations, the Council of Europe is not a specialised institution, but belongs to the category of Intergovernmental Organizations, and received a standing invitation to participate as Observers in the sessions and the work of the General Assembly and not maintaining Permanent Offices at Headquarters. Therefore, as an independent regional organisation, it does not have to follow the United Nations guidelines, but must comply with "*jus cogens*" rules.

4. Analysis of conventions and treaties signed and ratified within the Council of Europe on migration

The source of general formal law used in the field of protection of the rights of migrants and refugees in Europe is the ECHR, signed in 1950 and ratified in 1953, which does not expressly provide for the right to asylum nor the right of non-refoulement. According to the official position:[40]

> The mission of the system set up by the Convention is thus to determine, in the general interest, issues of public policy, thereby raising the standards of protection of human rights and extending human rights jurisprudence throughout the community of the Convention States[41]. Indeed, the Court has emphasised the Convention's role as a "constitutional instrument of European public order" in the field of human rights.[42]

Most research in the field of protection of the rights of migrants and refugees deals only with this source of law (i.e. the Geneva Convention), overlooking the Council of Europe's own conventions, the most important of which are described below.

The first special agreement on the protection of the rights of migrants and refugees is the European Convention on Establishment and its Protocol, signed in Paris on 13 December 1955 and entered into force on 23 February 1965.[43] Art. 1 of this Convention provides that:

40 Guide on the case law of the European Convention on Human Rights. Immigration. Updated on 30 April 2022. Edited by the Council of Europe, 2022.

41 *Konstantin Markin v. Russia [GC]*, App. No. 30078/06, § 89, ECHR 2012.

42 *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland [GC]*, App. No. 45036/98, § 156, ECHR 2005-VI, and more recently, *N.D. and N.T. v. Spain [GC]*, App. Nos. 8675/15 and 8697/15, § 110 (13 February 2020).

43 European Treaty Series, No. 19. Available at: https://www.coe.int/en/web/conventions/full-list?module=treaty-detail&treatynum=019 (Accessed: 16 July 2023).

> Each Contracting Party shall facilitate the entry into its territory by nationals of the other Parties for the purpose of temporary visits and shall permit them to travel freely within its territory except when this would be contrary to order public, national security, public health or morality.

The Parties further allow long or permanent residence for their nationals and ensure that they cannot be expelled unless they endanger national security or are contrary to public policy or morality (Art. 2, 3). They also ensure the benefit of most of the rights enjoyed by nationals—that is, the avoidance of double taxation.

However, in Art. 30, the Member States have established that, 'For the purpose of this Convention, "nationals" means physical persons possessing the nationality of one of the Contracting Parties'. There are only 12 Contracting Parties in this Convention: Belgium, Denmark, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Norway, Sweden, Turkey, and the United Kingdom.

The second agreement is the European Agreement on Regulations governing the Movement of Persons between Member States of the Council of Europe,[44] signed in Paris on 13 December 1957. This agreement is valid for the following Parties: Austria, Belgium, France, Germany, Greece, Hungary, Italy, Liechtenstein, Luxembourg, Malta, the Netherlands, Portugal, Slovenia, Spain, Switzerland, Turkey, Ukraine, and the Netherlands. With signing this document, these States agree that their nationals, irrespective of country of residence, may enter or leave the territory of another Party at all frontiers on presentation of one of the documents listed in the Treaty, provided that this is only for visits not exceeding three months in duration. Still, valid passports and visas may be required for all visits exceeding three months in duration, or whenever entering the territory of another Party for the purpose of carrying out a gainful activity.

The European Agreement on the Abolition of Visas for Refugees, signed in 1959 and entered into force in 1960,[45] is the most important act/treaty at the Council of Europe level in the field of migration. According to Art. 1 of this Agreement:

> 1. Refugees lawfully resident in the territory of a Contracting Party are exempt, subject to reciprocity, from the requirement to obtain a visa to enter or leave the territory of another Party by any frontier, provided that:
> a. hold a valid travel document issued in accordance with the Convention relating to the Status of Refugees of 28 July 1951 or the Agreement relating to the issue of a travel document to refugees of 15 October 1946 by the authorities of the Contracting Party in whose territory they are legally resident;
> b. their visit shall be for a period not exceeding three months.

44 European Treaty Series, No. 25. European Agreement on Regulations governing the Movement of Persons between Member States of the Council of Europe, Paris, 13 December 1957.

45 European Treaty Series, No. 31. European Agreement on the Abolition of Visas for Refugees Strasbourg, 20 April 1959.

The parties also agree on a visa regime for stays of more than three months, or for the purpose of taking up employment, on a mutual readmission regime; that is, they have reserved the right to prohibit the entry or stay in their territory of persons they consider undesirable. Unfortunately, this treaty has only been ratified by 24 (out of 46) Member States, which are Belgium, the Czech Republic, Denmark, Finland, France, Germany, Iceland, Ireland, Italy, Liechtenstein, Luxembourg, Malta, the Netherlands, Norway, Poland, Portugal, Romania, Slovakia, Spain, Sweden, Switzerland, Turkey, Ukraine, and the United Kingdom.

Another useful treaty is the European Convention on the Repatriation of Minors,[46] signed in The Hague, the Netherlands, on 28 May 1970. Still, it only entered into force in 2015:

> 1. This Convention shall apply to minors in the territory of a Contracting State whose repatriation is requested by another Contracting State for one of the following reasons:
> a. the presence of the minor in the territory of the requested State is against the will of the person or persons having parental authority in respect of him;
> b. the presence of the minor in the territory of the requested State is incompatible with a measure of protection or re-education taken in respect of him by the competent authorities of the requesting State;
> c. the presence of the minor is necessary in the territory of the requesting State because of the institution of proceedings there with a view to taking measures of protection and re-education in respect of him.
> 2. This Convention shall also apply to the repatriation of minors whose presence in its territory a Contracting State deems to be incompatible with its own interests or with the interests of the minors concerned, provided that its legislation authorises removal of the minor from its territory.

One last document worthy of mention would be the European Convention on the Legal Status of Migrant Workers (1977/1983).[47] As is clear from the literature, the European Convention on the Legal Status of Migrant Workers is one of a series of conventions drawn up within the Council of Europe regarding the treatment of foreigners in the territory of Member States of the Council. As far as it relates to the social and economic rights of workers, it complements and gives specificity to certain provisions of the European Social Charter (also known as ESC).[48] This treaty has

46 European Treaty Series, No. 71. Available at: https://www.coe.int/en/web/conventions/full-list?module=treaty-detail&treatynum=071 (Accessed 16 July 2023).

47 European Treaty Series, No. 93. European Convention on the Legal Status of Migrant Workers Strasbourg, 24 November 1977.

48 Elspeth Guild: The European Convention on the Legal Status of Migrant Workers, 1977, An Analysis of its Scope and Benefits, March 1999, University of Nijmegen, The Netherlands. Available at: https://www.coe.int/t/dg3/migration/archives/documentation/Legal_texts/CDMG%20_99_11_en.pdf (Accessed 16 July 2023).

been ratified by only 11 Member States, namely Albania, France, Italy, the Netherlands, Norway, Portugal, Moldova, Spain, Sweden, Turkey, and Ukraine.

Based on the low number of ratifications across the different agreements and documents, it is easy to see the lack of enthusiasm of Member States to regulate this area. What is more, I can reinforce my observation, as the Protocol to the European Convention on Consular Functions concerning the Protection of Refugees, signed on 11 December 1967, has not yet entered into force, although five ratifications would have been sufficient for it to enter into force.[49]

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5. Soft law sources: analysis of resolutions and recommendations adopted by the Committee of Ministers, the Parliamentary Assembly, and other sources in the field of migration

5.1. Committee of Ministers' recommendations[50]

Out of a total of 898 recommendations provided by the Committee of Ministers, 29 relate to migrants and migration. They are presented hereinafter in reverse chronological order:

CM/Rec(2022)22 of the Committee of Ministers to member states on human rights principles and guidelines on age assessment in the context of migration and its Explanatory Memorandum, adopted on 14 December 2022 at the 1452nd meeting of the Ministers' Deputies.

CM/Rec(2022)17 of the Committee of Ministers to member states on protecting the rights of migrant, refugee and asylum-seeking women and girls, adopted on 20 May 2022 at the 132nd Session of the Committee of Ministers.

CM/Rec(2022)10 of the Committee of Ministers to member states on multilevel policies and governance for intercultural integration, adopted on 6 April 2022 at the 1431st meeting of the Ministers' Deputies.

CM/Rec(2019)11 of the Committee of Ministers to member states on effective guardianship for unaccompanied and separated children in the context of migration, adopted on 11 December 2019 at the 1363rd meeting of the Ministers' Deputies.

49 European Treaty Series, No. 061A. Available at: https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=061A (Accessed 16 July 2023).

50 'In appropriate cases, the conclusions of the Committee may take the form of recommendations to the governments of members, and the Committee may request the governments of members to inform it of the action taken by them with regard to such recommendations'. Art. 15 lit. b of the Statute.

CM/Rec(2019)4 of the Committee of Ministers to member states on supporting young refugees in transition to adulthood, adopted on 24 April 2019 at the 1344th meeting of the Ministers' Deputies.

CM/Rec(2012)10 of the Committee of Ministers to member states on the protection of child and young athletes from dangers associated with migration, adopted on 19 September 2012 at the 1151st meeting of the Ministers' Deputies.

CM/Rec(2011)13 of the Committee of Ministers to member states on mobility, migration and access to health care, adopted on 16 November 2011 at the 1126th meeting of the Ministers' Deputies.

CM/Rec(2011)5 of the Committee of Ministers to member states on reducing the risk of vulnerability of elderly migrants and improving their welfare, adopted on 25 May 2011 at the 1114th meeting of the Ministers' Deputies.

CM/Rec(2011)1 of the Committee of Ministers to member states on interaction between migrants and receiving societies, adopted on 19 January 2011 at the 1103rd meeting of the Ministers' Deputies.

CM/Rec(2011)2 of the Committee of Ministers to member states on validating migrants' skills, on 19 January 2011 at the 1103rd meeting of the Ministers' Deputies.

CM/Rec(2008)10 of the Committee of Ministers to member states on improving access of migrants and persons of immigrant background to employment, adopted on 10 July 2008 at the 1032nd meeting of the Ministers' Deputies

CM/Rec(2008)4 of the Committee of Ministers to member states on strengthening the integration of children of migrants and of immigrant background, adopted on 20 February 2008 at the 1018th meeting of the Ministers' Deputies.

CM/Rec(2008)5 of the Committee of Ministers to member states on policies for Roma and/or Travellers in Europe, adopted on 20 February 2008 at the 1018th meeting of the Ministers' Deputies.

CM/Rec(2007)10 of the Committee of Ministers to member states on co-development and migrants working for development in their countries of origin, adopted on 12 July 2007 at the 1002nd meeting of the Ministers' Deputies.

CM/Rec(2007)9 of the Committee of Ministers to member states on life projects for unaccompanied migrant minors, adopted on 12 July 2007 at the 1002nd meeting of the Ministers' Deputies.

Rec(2006)10 of the Committee of Ministers to member states on better access to health care for Roma and Travellers in Europe, adopted on 12 July 2006 at the 971st meeting of the Ministers' Deputies.

Rec(2006)9 of the Committee of Ministers to member states on the admission, rights and obligations of migrant students and co-operation with countries of origin, adopted on 12 July 2006 at the 971st meeting of the Ministers' Deputies.

Rec(2005)4 of the Committee of Ministers to member states on improving the housing conditions of Roma and Travellers in Europe, adopted on 23 February 2005 at the 916th meeting of the Ministers' Deputies.

Rec(2004)14 of the Committee of Ministers to member states on the movement and encampment of Travellers in Europe, adopted on 1 December 2004 at the 907th meeting of the Ministers' Deputies.

Rec(2004)2 of the Committee of Ministers to member states on the access of non-nationals to employment in the public sector, adopted on 24 March 2004 at the 877th meeting of the Ministers' Deputies.

Rec(2000)15 of the Committee of Ministers to member states concerning the security of residence of long-term migrants, adopted on 13 September 2000 at the 720th meeting of the Ministers' Deputies.

Rec(90)14 of the Committee of Ministers to member states on the preparation of an information brochure of the social security rights and obligations of migrant workers and of their families, adopted on 18 June 1990 at the 442nd meeting of the Ministers' Deputies.

Rec(88)14 of the Committee of Ministers to member states on migrants' housing, adopted on 22 September 1988 at the 419th meeting of the Ministers' Deputies.

Rec(88)6 of the Committee of Ministers to member states on social reactions to juvenile delinquency among young people coming from migrant families, adopted on 18 April 1988 at the 416th meeting of the Ministers' Deputies.

Rec(84)18 of the Committee of Ministers to member states on the training of teachers in education for intercultural understanding, notably in a context of migration, adopted on 25 September 1984 at the 877th meeting of the Ministers' Deputies.

Rec(84)9 of the Committee of Ministers to member states on second-generation migrants, adopted on 20 March 1984 at the 368th meeting of the Ministers' Deputies.

Rec(84)7 of the Committee of Ministers to member states on the maintenance of migrants' cultural links with their countries of origin and leisure facilities, adopted on 28 February 1984 at the 367th meeting of the Ministers' Deputies.

Rec(80)14 of the Committee of Ministers to member states concerning the vocational re-integration of migrant workers who return to their countries of origin, adopted on 18 September 1980 at the 322nd meeting of the Ministers' Deputies.

Rec(79)10 of the Committee of Ministers to member states concerning women migrants, adopted on 29 May 1979 at the 305th meeting of the Ministers' Deputies.

We can see that the first recommendation of the Committee of Ministers dates back to 1979. This implies that for 30 years after the establishment of the Council of Europe, migration was not at the centre of the recommendations to Member States. From 1979 to 2000, only eight recommendations were adopted, whereas there have already been 20 recommendations since 2004. On the one hand, these recommendations target the most vulnerable points of the migration phenomenon, such as age, children, unaccompanied and separated children, young refugees (five recommendations), women, girls (two recommendations), elderly migrants (one recommendation), and Roma and travellers (four recommendations). On the other hand, 12

recommendations deal with the integration of migrants, the interaction between migrants and receiving societies, intercultural understanding, second generation migrants, and only one recommendation refers to the idea of reintegrating these people in their countries of origin. These numbers and documents reflects the fact that the political leadership of the Member States has lost the war on dealing with the reasons for migration and is looking for palliative measures in Europe for problems imported from other continents.

5.2. Parliamentary Assembly's resolutions and recommendations

The Parliamentary Assembly addresses the issues of asylum and migration in 35 resolutions and 34 recommendations. Regarding the resolutions, they are the following (Table 1):

Table 1. Parliamentary Assembly resolutions addressing asylum and migration issues

	Resolution number and date of adoption	**Topic**
1.	RES. 2503/21/06/2023	Social inclusion of migrants, refugees and internally displaced persons through sport
2.	RES. 2502/21/06/2023	Integration of migrants and refugees: benefits for all parties involved
3.	RES. 2462/2022	Pushbacks on land and sea: illegal measures of migration management
4.	RES. 2409/26/11/2021	Voluntary relocation of migrants in need of humanitarian protection and voluntary resettlement of refugees
5.	RES. 2380/28/05/2021	Humanitarian action for refugees and migrants in countries in North Africa and the Middle East
6.	RES. 2379/28/05/2021	Role of parliaments in implementing the United Nations global compacts for migrants and refugees
7.	RES. 2356/04/12/2020	Rights and obligations of NGOs assisting refugees and migrants in Europe
8.	RES. 2340/13/10/2020	Humanitarian consequences of the Covid-19 pandemic for migrants and refugees
9.	RES. 2323/30/01/2020	Concerted action against human trafficking and the smuggling of migrants

	Resolution number and date of adoption	Topic
10.	RES. 2280/11/04/2019	The situation of migrants and refugees on the Greek islands: more needs to be done
11.	RES. 2243/11/10/2018	Family reunification of refugees and migrants in the Council of Europe member States
12.	RES. 2238/10/10/2018	Radicalisation of migrants and diaspora communities in Europe
13.	RES. 2128/24/06/2016	Violence against migrants
14.	RES. 2109/20/04/2016	The situation of refugees and migrants under the EU–Turkey Agreement of 18 March 2016
15.	RES. 2108/20/04/2016	Human rights of refugees and migrants – The situation in the Western Balkans
16.	RES. 2089/27/01/2016	Organised crime and migrants
17.	RES. 2059/22/05/2015	Criminalisation of irregular migrants: a crime without a victim
18.	RES. 2006/25/06/2014	Integration of migrants in Europe: the need for a proactive, long-term and global policy
19.	RES. 1997/23/05/2014	Migrants and refugees and the fight against Aids
20.	RES. 1972/29/01/2014	Ensuring that migrants are a benefit for European host societies
21.	RES. 1889/27/06/2012	The portrayal of migrants and refugees during election campaigns
22.	RES. 1821/21/06/2011	The interception and rescue at sea of asylum seekers, refugees and irregular migrants
23.	RES. 1805/14/04/2011	The large-scale arrival of irregular migrants, asylum seekers and refugees on Europe's southern shores
24.	RES. 1788/26/01/2011	Preventing harm to refugees and migrants in extradition and expulsion cases: Rule 39 indications by the European Court of Human Rights
25.	RES. 1742/22/06/2010	Voluntary return programmes: an effective, humane and cost-effective mechanism for returning irregular migrants

	Resolution number and date of adoption	Topic
26.	RES. 1741/22/06/2010	Readmission agreements: a mechanism for returning irregular migrants
27.	RES. 1707/28/01/2010	Detention of asylum seekers and irregular migrants in Europe
28.	RES. 1618/25/06/2008	State of democracy in Europe Measures to improve the democratic participation of migrants
29.	RES. 1569/01/10/2007	Assessment of transit and processing centres as a response to mixed flows of migrants and asylum seekers
30.	RES. 1568/01/10/2007	Regularisation programmes for irregular migrants
31.	RES. 1521/05/10/2006	Mass arrival of irregular migrants on Europe's Southern shores
32.	RES. 1509/27/06/2006	Human rights of irregular migrants
33.	RES. 1429/18/03/2005	Asylum seekers and irregular migrants in Turkey
34.	RES. 1000/14/05/1993	Vietnamese migrants and asylum-seekers in Hong Kong ("boat people")
35.	RES. 631/16/09/1976	Integration of migrants into society as regards education and cultural development

Regarding the recommendations, the list is provided below (Table 2).

Table 2. Parliamentary Assembly recommendations on issues of asylum and migration

	Recommendation number and date of adoption	Topic
1.	REC. 2253/27/04/2023	Deportations and forcible transfers of Ukrainian children and other civilians to Russian Federation or to Ukrainian territories temporarily occupied: create conditions for their safe return, stop these crimes and punish the perpetrators
2.	REC. 2203/28/05/2021	Humanitarian action for refugees and migrants in countries in North Africa and the Middle East
3.	REC. 2192/04/12/2020	Rights and obligations of NGOs assisting refugees and migrants in Europe

	Recommendation number and date of adoption	Topic
4.	REC. 2171/30/01/2020	Concerted action against human trafficking and the smuggling of migrants
5.	REC. 2155/11/04/2019	The situation of migrants and refugees on the Greek islands: more needs to be done
6.	REC. 2141/11/10/2018	Family reunification of refugees and migrants in the Council of Europe member States
7.	REC. 2028/22/11/2013	Monitoring the return of irregular migrants and failed asylum seekers by land, sea and air
8.	REC. 2003/28/06/2012	Roma migrants in Europe
9.	REC. 1974/21/06/2011	The interception and rescue at sea of asylum seekers, refugees and irregular migrants
10.	REC. 1967/14/04/2011	The large-scale arrival of irregular migrants, asylum seekers and refugees on Europe's southern shores
11.	REC. 1956/26/01/2011	Preventing harm to refugees and migrants in extradition and expulsion cases: Rule 39 indications by the European Court of Human Rights
12.	REC. 1926/22/06/2010	Voluntary return programmes: an effective, humane and cost-effective mechanism for returning irregular migrants
13.	REC. 1925/22/06/2010	Readmission agreements: a mechanism for returning irregular migrants
14.	REC. 1917/30/04/2010	Migrants and refugees: a continuing challenge for the Council of Europe
15.	REC. 1900/28/01/2010	Detention of asylum seekers and irregular migrants in Europe
16.	REC. 1840/25/06/2008	State of democracy in Europe Measures to improve the democratic participation of migrants
17.	REC. 1808/01/10/2007	Assessment of transit and processing centres as a response to mixed flows of migrants and asylum seekers
18.	REC. 1807/01/10/2007	Regularisation programmes for irregular migrants
19.	REC. 1768/05/10/2006	The image of asylum-seekers, migrants and refugees in the media

	Recommendation number and date of adoption	Topic
20.	REC. 1767/05/10/2006	Mass arrival of irregular migrants on Europe's Southern shores
21.	REC. 1755/27/06/2006	Human rights of irregular migrants
22.	REC. 1619/08/09/2003	Rights of elderly migrants
23.	REC. 1618/08/09/2003	Migrants in irregular employment in the agricultural sector of southern European countries
24.	REC. 1596/31/01/2003	Situation of young migrants in Europe
25.	REC. 1544/08/11/2001	The propiska51 system applied to migrants, asylum seekers and refugees in Council of Europe member states: effects and remedies
26.	REC. 1503/14/03/2001	Health conditions of migrants and refugees in Europe
27.	REC. 1277/30/06/1995	Migrants, ethnic minorities and media
28.	REC. 1211/11/05/1993	Clandestine migration: traffickers and employers of clandestine migrants
29.	REC. 1206/04/02/1993	Integration of migrants and community relations
30.	REC. 1187/08/05/1992	Relations between migrants and trade unions
31.	REC. 1154/26/04/1991	North African migrants in Europe
32.	REC. 1070/23/03/1988	Problems of Yugoslav migrants and the development of relations between Yugoslavia and the Council of Europe
33.	REC. 915/30/01/1981	Situation of migrants workers in the host countries
34.	REC. 841/30/09/1978	Second generation migrants
35.	REC. 786/16/09/1976	Education and cultural development of migrants

A possible conclusion here is that the issue of migration has become topical only since 2001 for the Parliamentary Assembly. This is because, until this year and for 55 years of the existence of the institution, only two resolutions and nine

51 In the countries that have emerged from the former Soviet Union raises a specific concern because of their traditional use of an obligatory residence permit, *propiska*. *Propiska* has formally been outlawed in most of these countries. However, its vestiges remain in some of them, causing undue hardship to the displaced population, in particular to forced migrants and refugees.

recommendations were adopted, whereas the last 22 years saw the adoption of 59 soft law documents by the deputies delegated by the Member States. Still, the Parliamentary Assembly shows a richer content in this field than the Committee of Ministers because, in addition to addressing the classic issues I mentioned above, it deals with the migration phenomenon in a territorial context (e.g. North Africa, Middle East, Greek islands, Turkey, Western Balkans, Southern Europe's shores, and Ukraine), and considers the work of non-governmental organisations (NGOs) in the field. Accordingly, it addresses the issue of migrants' rights, including their right to their image in the media.

The Parliamentary Assembly, even if in a restrained way, also addresses the issues of migration-related crimes pertaining to human trafficking and migrant smuggling, the radicalisation of migrants and diaspora communities in Europe, violence against migrants, organised crime and migrants, criminalisation of irregular migrants (as a crime without victims), and sensitive issues such as voluntary returns, readmission agreements for irregular migrants, and failed asylum seekers.

5.3. Strategies, action plans, reports, and manuals

The activity of the Council of Europe in the field of refugees can be captured on two different main plans, namely the plan of the political–legal activity of the bodies of the respective organisation, and the jurisprudence/case law plan related to the work of the ECHR. However, between positive law/soft law and case law, the strategies, action plans, and reports with which the Council of Europe operates are interspersed as political–legal instruments. The most recent actions of the Council on this matter are the following a) Action Plan on Protecting Refugee and Migrant Children in Europe (2017–2019); b) Council of Europe Strategic Action Plan for Roma and Traveller Inclusion (2020–2025); c) Council of Europe Action Plan on Protecting Vulnerable Persons in the Context of Migration and Asylum in Europe (2021–2025).[52]

This Action Plan from point three provides a means to: (i) assist in building stronger asylum and migration systems based on a foundation of human rights and standards in the area (e.g. relevant Council of Europe conventions, Committee of Ministers' recommendations, recommendations of monitoring bodies, and recommendations and resolutions of the Council of Europe Parliamentary Assembly and Congress of Local and Regional Authorities); (ii) place migration at the heart of the transversal action of the Council of Europe and its partners; (iii) take new action together with Member States in priority areas; (iv) develop further synergies with key international partners, when appropriate.[53] The structure of the action plan reflects a total of four pillars, as described herein: I. Human rights; II. Human rights and the rule of law; III. Human rights and democracy; IV. Transversal support.

52 Council of Europe, 2021.
53 Council of Europe, 2020.

The total budget of the Action Plan on Protecting Vulnerable Persons in the Context of Migration and Asylum in Europe amounts to EUR 11 272 739.40 for 20 projects, and in order to respond to the consequences of the Russian Federation's aggression against Ukraine, a prioritisation of funding needs has been made.[54] From this field, I would also highlight a document that is in the third edition, namely the Handbook on European law relating to asylum, borders, and immigration 2020, edited from the Council of Europe together with the EU, European Union Agency for Fundamental Rights (also known as FRA), and Publications Office of the European Union.[55] This Handbook is an official publication on the common position of the Council of Europe and the EU in the field of migration.[56]

6. Case law … or how the fundamental rights guaranteed by the ECHR are used by the ECtHR as a barrier to Member States in the field of migration

The last part of my research contribution will address the case law of the ECHR in the field of immigration,[57] from the perspective of respecting certain fundamental rights relevant to the migration phenomenon. Importantly, various authors[58] have already delved into the topic, and the Council of Europe published an official, scientific publication on this subject[59] that is accessible to the general public in an official and updated format. Accordingly, my goal here is to present the case law regarding Central and Eastern European countries, after a brief review of the theoretical issues raised in the case of the application, in a migration context, of certain fundamental rights guaranteed by the ECHR.

In the terminology of the Council of Europe, the word "migrant" describes a person who moves from one place, region, or country to another. The term "asylum seeker" refers to a migrant who seeks international protection, which may take the form of refugee status or subsidiary protection in Europe. The refugee status is governed by the 1951 Geneva Convention on the Status of Refugees, and is granted by a foreign State to a person who has a well-founded fear of persecution in his/

54 Information Documents SG/Inf(2023)8 from 10 February 2023 – First Interim Report on the Implementation of the Action Plan on Protecting Vulnerable Persons in the Context of Migration and Asylum in Europe (2021-2025), pp. 23–24.

55 FRA and ECtHR, 2020, pp. 14–15.

56 Ibid.

57 European Court of Human Rights, Simplified version of selected articles from the European Convention on Human Rights and its protocols [Online]. Available at: https://echr.coe.int/Documents/Simplified_Conv_ENG.pdf (Accessed: 19 July 2023).

58 Dembour, 2015, pp. 172–187; Sinha, 2019, pp. 176–227; Mole and Meredith, 2003; Breitenmoser and Marelli, 2017, p. 169.

59 *Guide on the case-law of the European Convention on Human Rights. Immigration*, 2022.

her country of origin on the basis of race, religion, nationality, membership of a particular social group, or political opinion. If a foreign State deems that a migrant should be protected for reasons not listed in the Geneva Convention, it can decide to grant subsidiary protection instead of refugee status.[60] The ECtHR is not competent to examine the application of the Geneva Convention, and the ECHR does not provide for a right to asylum.

At this point, my analysis should end with the conclusion that the right to control the entry, stay, and expulsion of non-nationals belongs to Member States. Nonetheless, Council of Europe Member States are under the obligation to provide everyone within their jurisdiction, including migrants, with the respect of the rights guaranteed by the ECHR. On that basis, the ECtHR's case law imposes certain limitations on the right of States to turn someone away from their borders.

Key ECHR representatives[61] recognise that although the Convention does not explicitly mention refugees, important protections have emerged from the Court's case law, including in the areas of non-refoulement, family reunification, and limitation of deprivation of liberty. These representatives also point out that albeit not a new practice, Council of Europe Member States sometimes try to evade their obligations under the ECHR when it comes to the reception of refugees and migrants. For example, some Member States, while drawing up asylum and immigration policies, increasingly seem to no longer focus on compatibility with the ECHR, and attempt to use new methods to prevent the implementation of related obligations. One instance of this can be seen in pro-migrant jurisprudence being interpreted restrictively and selectively, while on the contrary, if the Court finds no violation in certain situations, Member States are more than willing to derive from this a broad justification for their practices to exclude those. Furthermore, politicians have been increasingly arguing that human rights are not an essential element of border control, but an obstacle to it.

In reality, the ECtHR is looking to the ECHR for barriers to prevent Member States from returning or expelling aliens who have entered their territory illegally, replacing the lack of anchoring to the right of asylum in positive law with the impossibility of removing people who do not qualify for refugee status because of substantive or procedural loopholes.

60 Presentation: Asylum, from the Series Human Rights Education for Legal Professionals and COURTalks/disCOURs – Bringing the Convention closer to home/La Convention a votre porte, 2016, pp. 1–2 and 7. Available at: https://www.echr.coe.int/documents/d/echr/COURTalks_Asyl_Talk_ENG (Accessed 9 July 2023).

61 Mijatović, 2020.

6.1. Arts. 2 and 3: Right to life and prohibition of torture

Art. 2 of the Convention guarantees the right to life, and Art. 3 prohibits torture, inhuman or degrading treatment, or punishment. As an introduction to this topic, and according to the Commissioner for Human Rights:

> […] since 2014, about 25,000 persons are known to have died or gone missing in the Mediterranean in attempts to reach Europe. […] In the same time span, it is estimated that about 900 persons died or went missing while moving along routes within Europe, both on land and at sea. 277 were reported missing in the Western Balkans alone – for example, in rivers in the Balkans -, while 204 are estimated to have gone missing while seeking to reach the UK through the English Channel. A significant number of migrants, and especially unaccompanied children, go missing after their arrival in Europe […] between 2018 and 2020, more than 18,000 unaccompanied child migrants have gone missing.[62]

Under the interpretation of those articles, no one can be returned to a place where there is a real risk of him/her being subjected to treatment contrary to any of those provisions. This is the principle of non-refoulement; the Court also notes that the right to political asylum is not contained in neither the Convention nor its Protocols.[63] From the point of view of Eastern and Central European states, violations of Arts. 2 and 3 of the ECHR have been found in the cases presented below, which are provided in chronological order of the adoption of the judgment.

In the case of *M.G. v. Bulgaria*[64] in 2014, the complainant was a Russian citizen of Chechen origin who, in March 2004, together with his wife and three children, entered Poland, where they were granted refugee status, while a court in Ingushetia issued an arrest warrant for M.G. for membership to an armed group. In December 2005, M.G. and his family moved to Berlin, where they were also granted refugee status on humanitarian grounds. In July 2012, M.G. was intercepted with his family during an identity check while they were crossing the Romanian-Bulgarian border by car. The Bulgarian court ordered his detention pending extradition proceedings initiated by the Russian Federation. On 14 September 2012, the Court decided, under Rule 39 of the Rules of Court (interim measures), to indicate to the Government that Mr. M.G. should not be extradited to the Russian Federation during the proceedings before the Court. Based on reports of frequent torture of detainees suspected of belonging to armed groups operating in the North Caucasus[65] in order to make con-

62 Mijatović, 2022.

63 *Vilvarajah and Others v. the United Kingdom*, 30 October 1991, § 102; *Ahmed v. Austria*, 17 December 1996, § 38.

64 *M.G. v. Bulgaria*, App. No. 59297/12, 25 March 2014, Final 25 June 2014.

65 The ECHR relied on the 2011 visit reports of the Council of Europe's Committee for the Prevention of Torture, the Council of Europe Commissioner for Human Rights, and the 2012 concluding observations of the UN Committee against Torture.

fessions, and on the general failure of the Russian authorities to conduct an effective investigation into allegations of abuse in pre-trial detention facilities in the North Caucasus, The Court ruled that, despite diplomatic assurances to the contrary, the extradition of a Chechen from Bulgaria to the Russian Federation would violate his rights under Art. 3 (prohibition of inhuman or degrading treatment) of the ECHR. Finally, the Bulgarian court was criticised by the ECHR for relying solely on diplomatic assurances from the Russian authorities and failing to take proper account of the risk of abuse to which the applicant would be subjected if extradited.

The Court noted that previous refugee status was an "important indication" that there was sufficient evidence of a risk of persecution at the time it was granted, but it only functions as a "starting point" for the ECHR's assessment of the proposed extradition. It further noted that, 'the North Caucasus, including Ingushetia [the place of extradition], continues to be an area of armed conflict, marked by violence and insecurity and serious violations of fundamental rights [. …], such as extrajudicial killings, disappearances, torture or other ill-treatment', in respect of which it found a violation of Art. 3 of the ECHR by Bulgaria.

In the *M.A. and Others v. Lithuania* case,[66] in 2018, the applicants, who had fled the Chechen Republic, attempted to cross the border between Lithuania and Belarus on three separate occasions. Although they claimed they were seeking international protection each time, they were refused entry on the grounds that they did not have the necessary travel documents. The Lithuanian border guards had not accepted their asylum applications, nor had they forwarded them to a competent authority for examination and status determination, as required by domestic law. The ECtHR found that no assessment had been carried out of whether or not it was safe to return the applicants to Belarus, a country that was not a State Party to the ECHR. The Court ruled that the failure to allow the applicants to submit their asylum applications and their removal to Belarus amounted to a violation of Art. 3 of the ECHR. In extreme cases, a removal, extradition or expulsion may also raise an issue under Art. 2 of the ECHR, which protects the right to life.[67]

The case of *Ilias and Ahmed v. Hungary*,[68] in 2019, concerned two Bangladeshi nationals who transited Greece, the former Yugoslav Republic of Macedonia, and Serbia before arriving in Hungary and the Röszke transit zone, where they immediately applied for asylum and were detained for 23 days. The asylum applications of both applicants were rejected on the grounds that Serbia was considered a "safe third country" under Government Decision No. 191/2015, and the applicants were deported to Serbia. The applicants complained, inter alia, that their expulsion to Serbia exposed them to possible "chain refoulement" to Greece. The Court held that

66 ECtHR, *M.A. and Others v. Lithuania*, App. No. 59793/17, 11 December 2018.
See also ECtHR, *M.K. and Others v. Poland*, App. Nos. 40503/17, 42902/17, and 43643/17, 23 July 2020.

67 ECtHR, *N.A. v. Finland*, App. No. 25244/18, 14 November 2019.

68 *Ilias and Ahmed v. Hungary* [GC], App. No. 47287/15, 21 November 2019.

the Hungarian authorities had not acted in accordance with their obligation to safely assess the risk that the applicants would be subjected to inhuman and degrading treatment in the event of their return to Serbia or a further return to Greece. The government argued that Serbia's inclusion on a list of safe third countries was based on a possibility offered by EU law, and that there was no evidence of Serbia's failure to comply with refugee law and the principle of non-refoulement. Meanwhile, the Court pointed out that when an application is not examined on its merits, it is not possible to know whether an Art. 3 risk exists unless a full and comprehensive legal procedure is in place to assess the existence of such a risk, including an ex officio updated assessment of the adequacy of the asylum system of the receiving State (paras. 137–141). The judges noted the creation of a list of safe third countries, and considered that the Convention does not necessarily prohibit such lists, albeit any such presumption should be accompanied by an analysis of the relevant conditions in the country concerned and its asylum system. Notwithstanding, Hungary did not provide any documentation showing that the inclusion of Serbia on the list of safe third countries was made following a thorough assessment of the situation in that country (paras. 152–154). Finally, the Court found a violation of Art. 3.

In this case, the Court did not consider the principle of non-interference in the internal affairs of other states to which Hungary was bound, nor the EU standards, nor the principle of "safe third state". Moreover, it practically urged Hungary to undertake the assessment in the future, and to monitor neighbouring states to ascertain whether they are safe or not, as trust in Serbia was based on multilateral information. Moreover, a chain return could lead all the way to Greece, which as an EU member state cannot be considered an unsafe state.

Advancing the principle of "non-refoulement in chains", there is an interesting judgment that was adopted in the case named *Sh.D. and Others v. Greece, Austria, Croatia, Hungary, North Macedonia, Serbia and Slovenia*,[69] in 2019. In it, the claimants sought not only the "condemnation" of the country where they arrived as illegal immigrants, but also of the countries that were on their route to Germany. It concerned the complaint of five Afghan nationals who entered Greece as unaccompanied migrant minors in 2016, when they were aged between 14 and 17 years. During 2016, the five complainants were detained in police stations and housed in a makeshift camp in Idomeni, on the Greek-North Macedonian border. S.M. and A.A. were granted refugee status in October 2016 and January 2017, respectively. Under Art. 3, all complainants spoke out against their living conditions in Greece. Specifically, two of the complainants objected to their living conditions at the Polykastro and Filiata police stations, where they were held in "protective custody", while four complainants criticised their living conditions in Idomeni camp. Relying on Art. 5, three of the applicants claimed that their placement in pre-trial detention at the police

69 *Sh.D. and Others v. Greece, Austria, Croatia, Hungary, North Macedonia, Serbia and Slovenia*, App. No. 14165/16, 13 June 2019, Final 13 September 2019.

stations of Polykastro, Filiata, and Aghios Stefanos was incompatible with this provision of the Convention.

The Court pointed out that the police stations had features which were likely to give detainees a sense of solitude (e.g. no access to the open air for walking or exercise, no internal catering arrangements, and no radio or television allowing contact with the outside world), and were not suitable for prolonged detention. Detention in this place was therefore likely to arouse in the persons feelings of isolation from the outside world, with potentially negative repercussions for their physical and mental well-being. Accordingly, the conditions of detention to which three of the applicants were subjected in various police stations amounted to degrading treatment, and the Court found a violation of Art. 3 of the Convention.

In relation to the Idomeni camp, the Court found that the applicants in question had spent a month in an environment unsuitable for adolescents—regarding security, accommodation, hygiene, and access to food and care—and in precarious conditions incompatible with their young age. The Court was therefore not satisfied that the authorities had done all that could reasonably be expected of them to fulfil their obligation to care for and protect the applicants in question, an obligation incumbent on the respondent State in respect of persons who were particularly vulnerable on account of their age. The Court thus found that there had been a violation of Art. 3 of the Convention regarding the living conditions of these four applicants. The Court also held that the Greek Government had not explained why the authorities had first placed three of the applicants in police stations in degrading conditions of detention, and not in alternative temporary accommodations. The applicants' detention was therefore not lawful and there was a violation of Art. 5 § 1 of the Convention.[70]

At the same time, although the applicants pointed out that the application as a whole was directed against Greece and Austria, Croatia, Hungary, Northern Macedonia, Serbia, and Slovenia (i.e. against all States on the "Balkan route"), the Court, after examining the applicants' arguments in the light of all the evidence in the file, found that the application must be declared inadmissible as manifestly ill-founded under Art. 35 §§ 1, 3, and 4 of the Convention (paras. 70 and 71).

In the case of *M.K. and Others v. Poland*,[71] from 2020, the complainants were Russian citizens of Chechen origin who, in 2017, presented themselves several times at border checkpoints between Poland and Belarus, where they wished to lodge asylum applications. Each time they tried, they were denied this possibility by border police, who refused them entry and deported them to Belarus, albeit the complainants claimed that they would not have access to a proper asylum procedure in Belarus, and that they would be subjected to torture or other forms of inhuman or degrading treatment if returned to the Russian Federation (the Chechen Republic).

70 By way of just satisfaction (Art. 41), the Court determined that Greece had to pay EUR 4 000 to one applicant, EUR 6 000 to each of the four applicants by way of non-material damage, and EUR 1 500 to the applicants jointly by way of costs and expenses.

71 *M.K. and Others v. Poland*, App. Nos. 40503/17 and 2 others, 23 July 2020, 14 December 2020.

The Court indicated interim measures under Art. 39 of the Court's Rules, but some of the applicants were nevertheless returned to Belarus, whereas the asylum applications of some of the applicants were eventually accepted by the Polish authorities. The latter were placed in a reception centre.

In determining whether or not the applicants expressed their wish to seek asylum when they presented themselves at the border checkpoints, the Court gave more weight to the applicants' version of the events at the border because they were corroborated with the statements of other witnesses. Reports from national human rights institutions have indicated the existence of a systemic practice of distorting statements made by asylum seekers in official notes drawn up by border guards at checkpoints between Poland and Belarus.

Although the Polish government argued that by refusing the applicants' entry to Poland it acted in accordance with the legal obligations of the EU, the Court stated that EU law clearly embraced the principle of non-refoulement, as guaranteed by the Geneva Convention, and also applied it to persons who were subject to border checks before being admitted to the territory of one of the Member States. Therefore, the Court noted that the contested measure taken by the Polish authorities does not fall within the scope of Poland's strict international legal obligations, and concluded that the applicants did not benefit from effective guarantees that would have protected them from being exposed to a real risk of being subjected to inhuman or degrading treatment, as well as to torture. The absence of a procedure through which the applicants' claims for international protection could be examined constituted a violation of Art. 3. Furthermore, in view of the situation in the neighbouring state, the Polish authorities, by not allowing the applicants to remain on Polish territory pending the examination of their claims, knowingly exposed them to a serious risk of refoulement and treatment, which is prohibited by Art. 3. Moreover, the Court considered that the decisions to refuse entry to Poland issued in the applicants' cases constituted a collective expulsion of foreigners, and thus there was a violation of Art. 13 in conjunction with Art. 3 of the Convention and Art. 4 of Protocol no. 4. Specifically, there was a lack of an appeal with automatic suspensive effect, and the respondent State did not fulfil its obligations under Art. 34 of the Convention as it did not comply with the provisional measures indicated by the Court under Art. 39 of the Rules of Court than with a significant delay or not at all.[72]

Even if, following the jurisprudence of the *Matthews*[73] and *Bosphorus*[74] cases, we have become accustomed to the fact that the ECtHR considers the existence of EU law, in this case it demonstrated that it even allows itself to interpret EU law to the

72 According to Art. 41, the European court awarded EUR 34 000 for each individual plaintiff and for both families of plaintiffs as moral damages.

73 ECtHR, Grand Chamber, *Denise Matthews v. the United Kingdom*, App. No. 24833/94, 18 February 1999, ECHR 1999-I, ECLI:CE:ECHR:1999:0218JUD002483394.

74 ECtHR, Grand Chamber, *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi (Bosphorus Airways) v. Ireland*, App. No. 45036/1998, 30 June 2005, CEDH 2005-VI, ECLI:CE:ECHR:2005:-0630JUD004503698.

detriment of EU Member States. At the same time, in this case against the Member States, the Court once again resorted to the absolute presumption of the "danger of return in the chain", and to the absolute relativisation of the existence of safe states outside the EU.

In the *M.H. and Others v. Croatia* case,[75] in 2021, the applicants were a family of 14 Afghan nationals comprising a man, his two wives, and their 11 children. In 2016, they left Afghanistan and travelled through Pakistan, Iran, Turkey, Bulgaria, and Serbia before reaching the Croatian border. On the night of 21 November 2017, one of the children, a six-year-old girl, died after being hit by a train in Serbia near the Croatian-Serbian border, after Croatian border guards denied them any possibility of seeking asylum and ordered them to return to Serbia by rail; on the way, M.H. was hit by a train and died. The Court noted, in particular, that the investigating authorities did not analyse the inconsistencies between the police officers' statements, and never verified their claim that there were no recordings of the disputed events. Proposals by the complainants and the Croatian Ombudsman to establish contact between the complainants and the police by inspecting the signals from their mobile phones and the GPS of the police car were ignored, and the statement by the Serbian authorities that the complainants were forced to return to Serbia was not addressed. Finally, the authorities refused to provide the complainants' lawyer with information about the investigation, and the complainants were only allowed to meet with the lawyer after a certain period. The Court concluded that the investigation into M.H.'s death was ineffective, leading to a procedural violation of Art. 2.

In the same case, it was held that four months after this tragic event, on 21 March 2018, this Afghan family illegally entered the territory of Croatia, where the police placed them in a transit centre for immigrants in Tovarnik to verify their identity. After several rejected asylum applications, they managed to leave Croatia, also illegally, after being placed in an open centre in Kutina. The Court found that although the material conditions in the Tovarnik centre were satisfactory and the applicants received medical and psychological assistance, some aspects resembled a prison (e.g. the presence of police officers, barriers in the corridors, and bars on the windows). The Court took note of the Croatian Ombudsmen's comments on the inadequacy of the centre for the accommodation of the children, along with the fact that they were in a particularly vulnerable state, considering that most of them had witnessed the death of their sister near the border. The Court also noted that these children had spent two months without any organised activity to occupy their time, which led to a violation of Art. 3 of the Convention in respect of minor children.[76] As can be deduced from the judgment, the Court did not consider either the guilt of the person who exposed his family to an unsafe journey of thousands of kilometres without choosing the first safe state, nor the obligations of an EU Member State to

75 *M.H. and Others v. Croatia*, App. Nos. 15670/18 and 43115/18, 18 November 2021.

76 The Court held that Croatia was to pay the applicants EUR 40 000 non-pecuniary damage and EUR 16 700 in respect of costs and expenses.

comply with common asylum legislation aimed at preventing illegal entry into EU territory by applying unconditionally, almost in an ideal vacuum, Art. 3.

In *D. v. Bulgaria,*[77] *in 2021*, the complainant, a former journalist by a Turkish daily newspaper in Bozova, Turkey, entered Bulgaria illegally with a trailer attached to a heavy goods vehicle. He was fleeing the persecution of journalists following the 2016 coup attempt when he was arrested on 14 October 2016 by Bulgarian border police at the Bulgarian-Romanian border. During and after his arrest, he repeatedly indicated that he wished to seek protection in Bulgaria, but the authorities who ordered his removal did not consider his explanations to amount to a request for protection, and no procedure was initiated with the authorities responsible for international protection. The Court was struck by the flagrant failure to examine the applicant's particular situation and found a violation of Art. 3, in that within 24 hours of his detention, the applicant was expelled to Turkey, his country of origin, from which he had fled, without prior examination of the risks to which he was exposed in the light of Art. 3 of the Convention and, therefore, of his application for international protection.

In the case of *S.F. and Others v. Bulgaria*,[78] in 2021, the applicants, three Iraqi minors who had fled Iraq with their parents, were intercepted by police at the Bulgarian-Serbian border and detained (together with their parents) in a border police detention centre in Vidin, Bulgaria. The complainants were detained for 30–42 hours in a filthy facility with used mattresses and bedding, rubbish, and a wet cardboard on the floor. Access to the toilet was limited, forcing them to urinate on the floor of the cell in which they were held. The authorities failed to provide the complainants with food and drink for more than 24 hours and the complainants' mother only had access to the bottle and milk of the youngest complainant, who was one and a half years old, approximately nineteen hours after they were taken into custody.

In the decision related to this case, the Court did not focus on the evaluation of the duration of placing a person in a place with degrading and inhumane conditions, but on the intensity of such treatment, showing that the combination of the aforementioned factors must have affected the applicants considerably, both physically and psychologically, and must have had particularly adverse effects on the youngest applicant, given his very young age. The European court held that, although it was true that the Member States located on the external borders of the EU had difficulties in dealing with the massive influx of migrants, it cannot be said that, at that time, Bulgaria was facing a situation of emergency of such proportions that it was practically impossible for its authorities to ensure minimally-decent conditions in the short-term detention centres where they decided to place migrant minors immediately after their interception and arrest. In any case, given the absolute nature of Art. 3, an increasing influx of migrants could not absolve a Member State of its obligations under this provision, therefore the Court found a violation of Art. 3 of the ECHR. As occurred in the case of *M.S.S. v. m./Belgium and Greece*, the Court did not

77 *D v. Bulgaria*, App. No. 29447/17, 20 July 2021.
78 *S.F. and Others v. Bulgaria*, App. No. 8138/16, 7 December 2017.

consider the special situation in which some Member States that are overwhelmed by migration waves may find themselves.

In the case of *R.R. and Others v. Hungary*,[79] in 2021, the applicants, an Iranian-Afghan family of five, arrived in Hungary from Serbia and applied for asylum in the Röszke transit zone. They remained in an isolation area owing to a hepatitis infection and complained that the services in that area were inadequate, the food was not appropriate for their age, and the police services carried out frequent invasive checks, including being present at gynaecological examinations. In addition, as the father had applied for asylum in Hungary before entering the transit zone with his family, he was assigned accommodation in this zone but was not offered free meals and had to eat his family's leftovers. Finally, following an initial rejection of their asylum application, the applicants were recognised as beneficiaries of subsidiary protection.

The lack of a food supply raised an issue under Art. 3 in relation to the first applicant, given his state of extreme poverty and total dependence on the Hungarian Government during his stay in the Röszke transit zone. The physical conditions of the container in which the family stayed, the inappropriate facilities for the children, the irregularities in the provision of medical services, and the prolonged stay in the area constituted a further violation of Art. 3 in relation to the applicant's mother and the children.[80] According to the Court, the provision of food by NGOs that do not have a legal relationship in this regard with the state cannot be a circumstance of graduation. The family's stay in the Röszke transit zone was a deprivation of liberty due, inter alia, to the absence of any domestic legal provisions setting the maximum length of the applicants' stay, the excessive length of the applicants' stay, and the conditions in the transit zone. Their deprivation of liberty was unlawful under Art. 5(1), as there was no strictly defined legal basis for the applicants' detention, and the Hungarian authorities had not issued any formal reasoned decision for detention. Here, the Court reiterated the factors set out in *Ilias and Ahmed v. Hungary*. At the same time, Art. 5(4) was also violated because the applicants had no means by which a court could have promptly decided on the lawfulness of their detention. From this ruling, it follows that the ECtHR, when it has an interest, relies on the reports and activity of NGOs, but when NGOs practically help the state in fulfilling its obligations through their activity, it ignores or minimises their contribution.

In the case of *T.K. and Others v. Lithuania*,[81] in 2022, the husband and wife applicants arrived in Lithuania, coming from Tajikistan, in January 2019 and applied for asylum, claiming that they faced a risk of persecution in their country of origin because of the first applicant's political activities, and because the second applicant was being persecuted as her and her daughters wore hijab. The Lithuanian authorities

79 *R.R. and Others v. Hungary*, App. No. 36037/17, 2 March 2021, Final 05 July 2021.

80 The Court cited the findings of the Committee for the Prevention of Torture regarding the prolonged stay of families in the Röszke transit zone.

81 *T.K. and Others v. Lithuania*, App. No. 55978/20, 22 March 2022, Final 22 June 2022.

rejected the asylum applications repeatedly lodged, finding that the applicant's accounts were not credible, perceiving that she was neither persecuted nor wanted by the Tajik authorities for her political activity, and that the restrictions on wearing the hijab did not rise to the threshold of seriousness required to constitute persecution or inhuman or degrading treatment.

On 23 December 2020, the ECtHR duty judge granted the applicants' request for an interim measure under Art. 39 of the Court's Rules, indicating to the Lithuanian government that they should not be relocated to Tajikistan during the proceedings before the Court. The Court determined that the fact that it has not been credibly established that the applicants have been ill-treated or threatened in the past in their country of origin is not determinative when assessing whether there is a real risk. The Court took inventory of the reports of the United Nations Human Rights Committee, Human Rights Watch, Amnesty International, Freedom House, and US State Department. Then, it observed that although the above mentioned reputable sources do not explicitly state that a person simply having any links to the Islamic Renaissance Party of Tajikistan, however remote, would necessarily be at risk of persecution, they described a widespread harassment of political opponents, and contained information about hundreds of members of banned political parties being arbitrarily detained and imprisoned on politically-motivated charges (e.g. thousands of members included in international search lists). Based on this general information, the Court, underlining the absolute nature of the rights guaranteed by Art. 3 of the Convention, found that there would be a violation of this provision if the applicants were moved to Tajikistan without a new assessment of their claims, and their return there would expose them to a risk of mistreatment.

In view of the above, the Court decided that, given that the national authorities had not sufficiently assessed the existence in Tajikistan of a practice of ill-treatment of persons who were in a similar situation to the applicants, their return to Tajikistan without a new assessment in this respect would violate Art. 3 of the Convention. It also indicated to the Government, pursuant to Art. 39 of the Rules of Court, that it was desirable, in the interest of the proper conduct of the proceedings, not to expel the applicants until the present time.

In this way, the ECtHR practically opened "Pandora's box" from two points of view. On the one hand, it launched an encouragement/urge to future asylum seekers to present untrue/fantasy factual situations, and turned the burden of proof into the national authorities, who cannot intervene in the internal affairs of other states. On the other hand, it overestimated the importance of reports and the monitoring carried out by NGOs and US institutions, to which the positive law of the Council of Europe or public international law in general does not reserve any role in the procedure judicial.

By consistently failing to apply positive law on "safe states" or on the conditions of entry of aliens into a country, as well as to consider the undue burden on state authorities on the frontline of migration, the ECtHR is pushing the issue and relativising the "rule of law" principle, giving the impression/encouragement that anyone

in this world who invokes an unproven ground of persecution and who has passed through 10 safe countries before arriving in a State in which he/she has lodged an asylum application will be able to count on a positive outcome to his/her application, at least by acquiring subsidiary protection status in the Western part of the European continent.

6.2. Art. 5: Right to liberty and security

There may be various obstacles to the removal of an asylum seeker coming from the risk of a flagrant violation of Arts. 5 (Right to liberty and security) or 6 (Right to a fair trial) of the Convention in the country of destination. As stated in the official ECtHR literature,[82] Art. 5(1)(f) of the Convention allows States to control the liberty of aliens in the context of immigration in two different situations. First, the initial part of this provision allows for the detention of an asylum seeker or other immigrant before the State grants authorisation for entry; second, the second part of Art. 5 § 1 gives States the right to keep a person in detention for the purpose of expulsion or extradition.

The question of when the first part of Art. 5 § 1(f) ceases to apply when the individual has been granted a formal entry or residence permit depends largely on national law. Such detention must be compatible with the general purpose and requirements of Art. 5, in particular its lawfulness, including the obligation to comply with the substantive and procedural rules of national law. However, compliance with domestic law is not sufficient, as a deprivation of liberty may be lawful as a matter of domestic law, but may still be arbitrary.[83] In the case of mass arrivals of asylum seekers at State borders, subject to the prohibition of arbitrariness, the requirement of lawfulness under Art. 5 can generally be regarded as satisfied by a domestic legal regime which provides, for example, only for the name of the authority competent to order the deprivation of liberty in a transit zone, the form of the order, the possible grounds and limits of the order, the maximum duration of detention and, as required by Art. 5 § 4, the applicable judicial remedy.[84] However, legality problems may arise where: the detention was based on an administrative circular; the legal basis was not publicly available; no maximum period of detention was laid down in the legislation.

Even if detention under Art. 5 § 1(f) is not required to be reasonably necessary in the case of adults who are not particularly vulnerable, it must not be arbitrary. Detention is not arbitrary, but carried out in good faith, if: it is closely linked to the purpose of preventing the unauthorised entry of the person into the country; the place and conditions of detention are appropriate, bearing in mind that the measure

82 *Guide on the case law of the European Convention on Human Rights. Immigration*, 2022, pp. 16/53; 38–39/53.

83 *Saadi v. United Kingdom [GC]*, § 67.

84 *Z.A. and Others v. Russia [GC]*, § 162.

does not apply to persons who have committed offences but to foreigners who, often in fear for their lives, have fled their own country; it does not exceed the period reasonably necessary for the purpose. Once an alien has received a final expulsion order, his/her presence is no longer "lawful" and he/she can no longer avail himself of the right to freedom of movement as guaranteed by Art. 2 of Protocol No. 4.[85] Furthermore, under the second part of Art. 5 § 1 (f), States have the right to keep a person in detention for the purpose of his/her expulsion or extradition. Detention cannot be arbitrary in this case either.

Meanwhile, detention will not be considered reasonably necessary, for example, to prevent the person from committing a crime or fleeing, but will only be justified while the removal or extradition proceedings are pending. In this context, it is irrelevant whether the underlying decision to expel or surrender is justified under national law or the Convention if the expulsion, extradition, or surrender proceedings are not carried out with due diligence. Since asylum seekers cannot be expelled before their asylum application has been decided, in a number of cases, the Court has found that there is no close link between the detention of an applicant who has lodged an asylum application which has not yet been decided, and the possibility of expelling him/her, nor any good faith on the part of the national authorities.

Another problematic legal situation arises when extradition overlaps with the asylum procedure following the submission of an asylum application during the extradition procedure. In the case of *Komissarov v. Czech Republic*,[86] the Court was faced with a situation where the applicant was detained pending extradition and, in the following day, lodged an asylum application, which prevented his extradition and led to a halt in the extradition process pending the asylum procedure. The latter procedure was significantly delayed and led to the applicants detention pending extradition not being "in accordance with the law". Meanwhile, detention for extradition purposes may be arbitrary from the outset because of the person's refugee status, which prohibits extradition.

Now, let us take a look into cases in Eastern and Central European countries involving judgements by the ECtHR. In the *Singh v. the Czech Republic* case,[87] in 2005, the applicants, Indian nationals, were remanded in custody on Czech territory on 11 November 1996, where they were lawfully residing. Then, on 9 April 1998, the Prague 7 District Court found the applicants guilty of committing the offence of smuggling migrants, sentencing them to 21 months' imprisonment and indefinite expulsion. On 31 July 1998, the district court decided to detain the applicants pending deportation, with effect from 11 August 1998, the day on which the applicants were to serve the prison sentence. The applicants were detained until 11 February 2001 with a view to deportation, which did not take place as it was not possible to obtain travel documents for them.

85 *Piermont v. France*, § 44.
86 The case will be treated at length in what follows.
87 *Singh v. the Czech Republic*, App. No. 60538/00, 25 January 2005.

The Court noted that the applicants' detention pending deportation began on 11 August 1998, after they had served their prison sentence, and ended on 11 February 2001 with their release. That is, it took two and a half years, for which reason the Court considered that the Czech authorities had not shown due diligence in dealing with the applicants' case, and that the period of two and a half years could not be regarded as reasonable in the present case. Therefore, it found that there had been a violation of Art. 5 § 1 (f) of the Convention. The Court also compared the present case with other cases in which it had found that the requirement of "promptness", within the meaning of Art. 5 § 4, had not been complied with, and in view of the fact that during that period the applicants had been deprived of the right to lodge fresh applications, the Court held that the provision had been breached. This entails that States must therefore make an active effort to organise an expulsion, take concrete steps, and provide evidence of the efforts made to secure admission in order to comply with the requirement of diligence, with an example being where the authorities of a receiving State are particularly slow in identifying their own nationals.

In the *Mikolenko v. Estonia* case,[88] in 2009, the Estonian authorities ordered the arrest of the applicant, a former Soviet army officer, on 29 October 2003 with a view to deportation. His immediate deportation was not possible, as he did not have valid travel and identification documents. From 4 November 2003, the applicant was detained in the Harku deportation centre, a facility with a guarded perimeter, and then kept under visual and electronic surveillance until 8 October 2007, when the Tallinn Administrative Court refused to extend the applicant's detention any further. This Administrative Court found that the length of his detention had become disproportionate and, in those circumstances, unconstitutional, ordering his release. Meanwhile, the ECtHR held that: the deprivation of liberty must be "lawful" (i.e. ordered on the basis of a "procedure prescribed by law"); concordant with the purpose of protecting the individual against arbitrariness; the place and conditions of detention must be appropriate; the duration of detention must not exceed the duration reasonably necessary for the purpose sought. The Court reiterated that deprivation of liberty under Art. 5 § 1(f) is justified only as long as the removal proceedings are pending, or in the specific case that the applicant's detention for removal was extraordinarily long. The person was detained for more than 3 years and 11 months in this case, and the expulsion of the applicant had become practically impossible, since for all practical purposes it required his cooperation, which he was unwilling to offer. The Court found a violation of Art. 5 § 1 of the Convention by holding that the applicant's detention for such a long period, even if the conditions of detention as such were adequate, could not be justified by an expected change in the legal circumstances, and that the authorities in fact had other measures at their disposal than the applicant's prolonged detention in the removal centre.[89]

88 *Mikolenko v. Estonia*, App. No. 10664/05, 8 October 2009, Final 8 January 2010.

89 At the same time, Estonia was obliged to pay the amount of EUR 2 000 as moral damage, and to pay the amount of EUR 208 as expenses.

In conclusion, for detention to comply with the second part of Art. 5 § 1 (f), there must be a realistic prospect that expulsion or extradition will take effect, and detention cannot be said to be effected with a view to the alien's expulsion if expulsion is or becomes impossible because the alien is unwilling to give his/her cooperation (i.e. because cooperation is necessary for the procedure to be undertaken).

In the case of *Longa Yonkeu v. Latvia*,[90] in 2011, the complainant, originally from Cameroon, entered the EU through Latvia in 2008 travelling via Russia Federation, without applying for asylum at the time. On 22 March 2008, he tried to cross the border into Lithuania, where he was arrested on suspicion of using false documents and convicted, but applied for asylum. At Lithuania's request, the complainant was transferred to Latvia, where he was detained in an accommodation centre for foreign detainees from 23 December 2008 until the date of his deportation to Cameroon on 9 January 2010. The Court noted that the detention of the applicant until 20 May 2009 was justified and lawful, but from 20 May 2009 and onwards, the asylum procedure concerning the applicant's first application ended; thus, the applicant no longer enjoyed the status and rights of an asylum seeker in Latvia, and under domestic law, the detention of an asylum seeker after the date of a final decision in the asylum procedure was not authorised. However, the Court held that when the applicant was detained with a view to his expulsion in the same period from 20 May 2009 to January 2010, the detention was justified.

Thus, although the Court found a violation of Art. 5 § 1 of the Convention in respect of these periods and awarded the applicant the sum of EUR 9 000 in respect of non-material damage, in the grounds of its decision, it distinguished between detention following a rejected asylum application and detention necessary to enforce a removal order. It specifically found that after the rejection of an asylum application, a person cannot be detained in a new asylum procedure or following the rejection of that application. Meanwhile, the detention imposed with a view to expulsion was justified. As can be seen, the ECtHR has not remained consistent with its practice in the *Mikolenko v. Estonia* case, as it condemned the excessive length of detention for expulsion in one case and qualified as justified the detention ordered for expulsion in another.

This inconsistency takes on new forms in the case that follows. In the case of *M and Others v. Bulgaria*,[91] in 2011, the applicants were an Afghan national, his wife (Armenian national), and their two minor children living in Bulgaria. M entered Bulgaria in 1998, where he converted to Christianity in 2001 and was granted refugee status in 2004 on the grounds that he faced religious persecution in Afghanistan. On 6 December 2005, the Director of the National Security Service, on charges of migrant smuggling, ordered M's detention for deportation to an unspecified country on the grounds that he posed a "serious threat to national security", but because the Afghan Embassy in Sofia refused to issue an identity document, he could not be

90 *Longa Yonkeu v. Latvia*, App. No. 57229/09, 15 November 2011, Final 15 February 2012.
91 *M and Others v. Bulgaria*, App. No. 41416/08, 26 July 2011, Final 26 October 2011.

deported. On 1 September 2008, the ECtHR issued an interim measure under Art. 39 of Regulation 39, requiring Bulgaria to refrain from expelling M to Afghanistan until further notice. M was released on 3 July 2009.

In the light of the above facts, the Court observed that detention pending expulsion is compatible with Art. 5(1) only if the expulsion procedure is ongoing and carried out with due diligence. The Court ruled that M's detention was not in compliance with Art. 5(1) because of (a) M's detention for more than two years, (b) the 14-month delay between the order and the first application for identity documents, (c) the 19-month delay between the first application and the second application, (d) and the uncertainty caused by two separate detention orders. The ECtHR also found a violation of Art. 5(4) because the Bulgarian courts, by requiring M to follow two separate procedures to challenge the two detention orders, did not provide an effective review of his detention. In the first procedure, the Court refused to examine his appeal, while in the second the appeal took two and a half years to be allowed and did not result in his release. The ECtHR found that the Bulgarian courts, which examined M's appeal only formally, had given the authorities too wide a margin of appreciation on grounds of national security, without there being any evidence to justify the detention order and the risk of arbitrariness resulting from this procedure was considered a violation of Art. 8 (right to respect for his private and family life). In addition, the ECHR observed that, in Bulgaria, the remedies against expulsion on grounds of national security did not have suspensive effect and were inadequate. Therefore, a violation of Art. 13 (Right to an effective remedy) was found.

Importantly, the Court noted that, in view of a number of previous cases in which similar infringements on the part of Bulgaria had been found, it was necessary to assist the Bulgarian Government in the enforcement of these judgments. The Court recommended measures including amendments to aliens legislation to improve the judicial review of expulsion orders, ensure that the country of destination is indicated in a legally binding act, and give automatic suspensive effect to expulsion appeals. As can be seen, not even national security interests or the fight against terrorism can be successfully invoked by Member States before the Court. Moreover, the Court decided to assist the Bulgarian government in adapting its legislation in this field.

In the case of *Nabil and Others v. Hungary*,[92] in 2015, three Somali nationals entered Hungary from Serbia, where they were then intercepted and arrested by police in November 2011 for deportation. On 9 November 2011, the applicants applied for asylum and their detention was extended until 24 March 2012 three times by a court, which always based its decision on section 54.1(b) of the Immigration Act,[93] under which detention of third-country nationals is possible when they refuse to leave the country or can be presumed to be delaying or preventing the enforcement of removal. Regarding the first three days of the applicants' detention, a period during which they had not yet applied for asylum, the Court was satisfied that the measure

92 *Nabil and Others v. Hungary*, App. No. 62116/12, 22 September 2015, Final 22 December 2015.
93 Law no. LXXX of 2007 regarding asylum in Hungary published in the OJ of Hungary, no. 83/2007.

served the purpose of detaining a person with a view to removal, in accordance with the second part of Art. 5(1)(f) of the Convention and Art. 54(1)(b) of the Hungarian Immigration Act. The Court also noted that the second part of Art. 5(1)(f) of the Convention was not applicable to the applicants. Regarding compliance with domestic law, the Court found that none of the four court judgments that reviewed the lawfulness of the applicants' detention between November 2011 and February 2012 effectively assessed whether the domestic legal conditions for the applicants' continued detention were met, and found a violation of Art. 5 §1 of the Convention between 8 November 2011 and 3 March 2012.

In the *O.M. v. Hungary* case,[94] in 2016, the applicant crossed the Hungarian border from Serbia in June 2014, where he was detained by a patrol of border guards as he was unable to produce supporting documents regarding his identity or his right to stay in the country. He applied for asylum, saying he fled Iran because of his homosexuality, and that criminal proceedings had been initiated against him in Iran for this reason. The competent court ordered his detention from 26 June 2014 to 22 August 2014. The complainant requested on several occasions to be released from detention or transferred to an open facility, explaining that he found it difficult to cope with asylum detention for fear of harassment because of his sexual orientation. His multiple requests were rejected. The complainant was recognised as a refugee by the Hungarian authorities on 31 October 2014. The ECtHR found that the obligation to cooperate does not require an asylum seeker to provide documentary evidence of identity and nationality, but requires cooperation with the asylum authority (e.g. to disclose the circumstances under which he fled; communicate relevant personal information; facilitate clarification of his identity, etc.). Furthermore, it can be inferred from section 5(3) of the Hungarian Asylum Act that the submission of documents is not the only option for asylum seekers to prove their identity and nationality. Therefore, the Court concluded that O.M.'s situation was not assessed in a sufficiently individualised manner as required by national law.

The ECHR also held that national authorities should pay particular attention to asylum seekers who claim to be part of a vulnerable group in their country of origin, in order to avoid situations that may reproduce the difficult situation that forced these persons to flee in the first place. In O.M.'s case, the Hungarian authorities failed to do this when they ordered his detention without considering the extent to which him, as a vulnerable person—e.g. LGBT persons such as the applicant—would be safe or not in detention among other detained persons, many of whom come from countries with widespread cultural or religious prejudices against people of different sexual orientations. The ECHR therefore found once again that the national authorities had failed to make an individualised assessment of the applicant's case and his membership of a vulnerable group by virtue of his sexuality, and in the light of all these considerations decided that the applicant's detention had been borderline arbitrary in violation of Art. 5 § 1 ECHR. It can be seen that in the Court's view,

94 *O.M. v. Hungary*, App. No. 9912/15, 5 July 2016, Final 5 October 2016.

the grounds of political persecution or those based on sexual orientation become absolutes which, in addition to not having to be proven, unconditionally justify the asylum application.

In *M.M. v. Bulgaria*,[95] in 2017, the complainant, M.M., was a stateless person of Palestinian origin born in 1991 in Damascus, who arrived in Bulgaria in 2008, and lived in Sofia. After two applications for a refugee status were rejected, the Refugee Agency granted him humanitarian status, but by an order of 13 July 2013, the National Security Agency withdrew the complainant's residence permit and ordered his expulsion, as well as a ten-year entry ban. This was on the grounds that his presence in the country posed a threat to national security. He was also held in detention from 13 July 2013 until 16 December 2014, a time during which he was in court with the Bulgarian authorities. The Court reiterated that the requirement of a "short time" must be assessed in the light of the circumstances of each case and, inter alia, the complexity of the issues to be decided; in the present case, the examination of the applicant's appeal appeared to exceed the time limits provided for under domestic law both at first instance and on appeal. The Court reiterates in this regard that it is for the Contracting States to organise their judicial systems in such a way as to enable their courts to meet the requirements of the Convention and, in particular, of Art. 5 § 4.[96] The time that elapsed since the lodging of the appeal on 30 December 2013, namely approximately nine months, could not be considered as meeting the "short period" requirement of this provision, and therefore a violation of Art. 5 § 4 occurred. The conclusion that can be drawn from this is that regardless of the national procedural provisions devised by a Member State, it is incumbent on the courts to comply with the requirement of a speedy/rapid disposal of cases involving asylum, expulsion, or even extradition.

In the case of *Al Husin v. Bosnia and Herzegovina*,[97] in 2019, the Syrian citizen Al Husin had been in the former Yugoslav state since 1983 and obtained citizenship, but his Bosnian citizenship was withdrawn in 2007 due to a criminal offence, which led him to apply for asylum. In 2008, following the rejection of his application, he was placed in an immigration centre for security reasons. Although the ECHR found, at the applicant's request, that deportation to Syria would expose him to the risk of being subjected to treatment contrary to Art. 3 of the Convention, and that his detention constituted a violation of Art. 5 § 1 of the Convention, he was held in detention for more than eight years, while 38 states appealed by Bosnia and Herzegovina rejected his removal. The Court reiterated the principle that Art. 5 § 1 (f) does not require detention to be regarded as reasonably necessary, but that it will only be justified as long as expulsion or extradition proceedings are pending and are carried out with due diligence. The Court also drew attention to the principle of legality

95 *M.M. v. Bulgaria*, App. No. 75832/13, 8 June 2017, Final 8 September 2017.

96 The just satisfaction awarded was in the amount of EUR 2 000 (non-pecuniary damage) and EUR 3 000 (costs and expenses).

97 *Al Husin v. Bosnia and Herzegovina (no. 2)*, App. No. 10112/16, 25 June 2019.

and avoidance of arbitrariness. In the present case, the reasons for the detention of the applicant did not remain valid for the entire period of eight years because, after contacting more than 40 countries with a view to expulsion, there was no realistic prospect of expulsion. In this respect, the Court found a violation of Art. 5 § 1(f) for the period from August 2014 to February 2016.

However, in the end the question arises, how should we regulate the situation of persons who constitute a danger to national security, cannot be expelled to their country of origin, and are not received by any state of the world community? We may need to wait for a 9.11-type disaster to occur before we can act reactively. In my opinion, states cannot refuse to receive their own citizens expelled from other countries without violating their own national legislation, and the prospect of returning "problem persons" to the countries from which they have fled must remain a reason for them to refrain from committing anti-social acts, regardless of their scale.

The case of *Shiksaitov v. Slovakia*,[98] in 2020, mainly concerns the alleged unlawfulness of the applicant's provisional arrest in Slovakia, when he had previously obtained refugee status in Sweden and was travelling from Sweden to Ukraine, and his subsequent detention for one year, 9 months, and 18 days with a view to extradition to the Russia Federation. As regards the applicant's detention pending extradition, the Court agreed with the national courts that such detention was not fundamentally prohibited, as the decisions of the Swedish authorities were not binding on Slovakia. Moreover, it was acceptable that the Slovak authorities had examined the applicant's case in detail, especially as the Swedish authorities had not checked his status with Interpol. In general, the detention of the applicant was justified by the need to detain him in Slovakia in order to establish whether there were any legal or factual obstacles to his extradition. In its judgment, the ECtHR unanimously found that there had been a violation of Art. 5 § 1 (Right to liberty and security) and Art. 5 § 5 (Right to compensation in case of unlawful arrest) of the ECHR. The Court found in particular that the applicant's arrest and individual detention orders were in conformity with Slovak law and the Convention. However, the total duration of the applicant's detention was too long, and the grounds for his detention ceased to be valid, thus violating his rights. The Court also found that the applicant did not have an enforceable right to compensation for the above violation.[99] It follows from this judgment that the acquisition of refugee status in a particular country does not prevent other States from carrying out extradition proceedings at the request of a third State if the refugee arrives in their territory.

In *Komissarov v. the Czech Republic*,[100] in 2022, the Court held that in situations where extradition and asylum procedures run concurrently, domestic law provides for separate time-limits for the processing of the asylum application and the rendering of a decision by the competent authorities. Still, in both cases, the decision

98 ECtHR, *Shiksaitov v. Slovakia*, App. Nos. 56751/16 and 33762/17, 10 December 2020.

99 Slovakia was ordered to pay EUR 8500 for moral damages and EUR 8000 in costs and expenses.

100 *Komissarov v. the Czech Republic*, App. No. 20611/17, 3 February 2022, Final 3 May 2022.

must be taken "without undue delay". This was unlike the present case, where the asylum procedure took almost 17 months, instead of the six months provided for under domestic law. In the Court's view, strict time-limits for examining asylum applications constitute an important safeguard against arbitrariness, so under both domestic law and the Convention, the domestic authorities had an obligation to demonstrate due diligence. Thus, as a result of the delays in the asylum procedure, the length of detention pending extradition did not comply with domestic law, constituting a violation of Art. 5 § 1 (f) of the Convention.[101]

In *Nikoghosyan and Others v. Poland*,[102] in 2022, the applicants, five Armenian citizens and members of the same family (i.e. parents and children) were caught in November 2016 while trying to illegally cross the Polish border. Although they tried to apply for international protection, they were automatically placed, as asylum seekers, in detention for six months without an individualised assessment of their specific situations and needs. While the Court acknowledged that the domestic courts had considered the alternative of imposing a less restrictive measure on the applicants, it also noted that after the domestic courts verified that the applicants had only EUR 50 on them and no address in Poland, they simply concluded that the applicants did not qualify for any alternative measure under the law. The Court concluded that the detention of both the adult and the child applicants for a period of almost six months was not a measure of last resort for which there was no alternative. Accordingly, the Court found a violation of Art. 5 § 1 (f) of the Convention, and ordered Poland to pay the sum of EUR 15 000 by way of non-material damage.

The case of *M.M. v. Hungary*,[103] in 2023, concerns the detention of an applicant pending asylum proceedings. Specifically, the applicant, after illegally crossing the border into Hungary, lodged an asylum application on 29 August 2014, on which day the asylum authority initiated the asylum procedure and ordered his detention on the basis of national law.[104] The authority referred to the need to clarify the applicant's identity, given that he had no travel documents, no resources to subsist, and there was thus a risk of absconding during the verification procedure. The Court noted that the application was similar to that in *O.M. v. Hungary*, in which the Court had found a violation of Art. 5 § 1, and where the decisions ordering and extending the applicant's detention had referred to the need to clarify his identity and prevent his escape, but where the reasoning was not sufficiently individualised to justify the measure in question, as also required by national law. Finally, the Court concluded that there had been a violation of Art. 5 § 1 of the Convention regarding the applicant's detention from 29 August to 26 November 2014, and decided to award him the sum of EUR 1 500 by way of costs.

101 The Czech Republic was ordered to pay the sum of EUR 7500 in moral damages and EUR 1600 in costs and expenses.

102 *Nikoghosyan and Others v. Poland*, App. No. 14743/17, 3 March 2022, Final 3 June 2022.

103 *M.M. v. Hungary,* App. No. 26819/15, 4 May 2023.

104 Art. 31/A paragraph (1) letters (a) and (c) of Law no. LXXX of 2007 regarding the asylum published in JO of Hungary, no. 83/2007.

In *H.N. v. Hungary*,[105] in 2023, the applicant had irregularly crossed the Hungarian border and lodged an application for asylum on 12 August 2014. On 13 August 2014, the asylum authority initiated the asylum procedure and ordered his detention on the basis of the "Asylum Act".[106] It referred to the need to clarify the applicant's identity in view of the fact that he had no travel documents, the lack of connections in the country, or resources to subsist and the resulting risk of absconding. The Court, finding that the case was similar to that in *O.M. v. Hungary*, held that there had been a violation of Art. 5 § 1 of the Convention in relation to the applicant's detention.[107]

6.3. Art. 6: Right to a fair trial

Art. 6 guarantees the right to a fair trial, namely the right of a person to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law, which shall decide either on the violation of his civil rights and obligations or on the merits of any criminal charge against him/her. Forms of unfairness[108] regarding this right could include the following: conviction *in absentia*, without the possibility of a subsequent determination of the merits of the charge; a trial that is a summary in nature and conducted with total disregard for the rights of the defence; detention without any access to an independent and impartial tribunal for the legality of the detention to be reviewed; a deliberate and systematic denial of access to a lawyer, particularly for a person detained in a foreign country; the use in criminal proceedings of statements obtained as a result of torture of the accused or a third person, thus being in violation of Art. 3.

There was one case from Central and Eastern Europe in the asylum context where non-compliance with Art. 6 was raised. In *Andrejeva v. Latvia*,[109] in 2009, the applicant, Natālija Andrejeva, lived in Latvia from 1954 (age 12 years at the time) until her retirement in 1997, when she had the status of 'non-citizen with permanent residence'. When calculating her pension, the Latvian authorities did not consider the 17 years during which she worked for companies based outside Latvia, although Latvian citizens are entitled to a pension for all periods worked, including those worked outside Latvian territory and regardless of their social security contributions. On judicial review, a full bench of the Supreme Court of Justice started the hearing earlier than the time notified to the applicant, and subsequently refused the applicant's request for reconsideration. In the light of the above, the applicant submitted that the Latvian authorities had infringed Arts. 6 and 14 of the ECHR. The Court pointed out, first, that when a State chooses to establish a pension scheme,

105 *H.N. v. Hungary,* App. No. 26250/15, 4 May 2023.
106 *Ibid*.
107 The Court awarded the applicant EUR 6 500 as moral damages, and EUR 1500 as expenses.
108 *Harkins v. United Kingdom*, paras. 62–65.
109 *Andrejeva v. Latvia [GC]*, App. No. 55707/00, 18 February 2009, ECHR 2009.

the individual rights and interests arising therefrom fall within the scope of Art. 1 of Protocol No. 1,[110] irrespective of the payment of contributions and the means by which the pension scheme is financed. Second, it stated that the applicant's pecuniary claim fell within the scope of the aforementioned article, and that the applicant was refused the pension in question solely because she was not a Latvian national. The refusal of the national authorities to consider the applicant's work "outside Latvian territory" was based solely on her nationality, since it was not disputed that a Latvian national in the same situation as the applicant, who had worked in the same situation/job during the same period, would have received the disputed part of the retirement pension. The Court found that, in the applicant's case, a "reasonable relationship of proportionality" could not be justified to make the contested difference in treatment compatible with the requirements of Art. 14.

As regards Art. 6 § 1 of the Convention, the Court found that the applicant had been a party to the administrative proceedings which had been initiated at her request. Accordingly, as the main protagonist in those proceedings, she should have enjoyed all the guarantees deriving from the adversarial principle, and had the right to be present at the hearing of her case, a right which she had been unable to exercise, although she had wished to do so.[111]

6.4. Art. 8: Right of respect for private and family life

According to Art. 8, everyone has the right of respect for his/her private and family life, his/her home, and his/her correspondence, and the public authorities may interfere only in exceptional cases. These interferences are justified on grounds of national security, public safety, the economic well-being of the country, protection of the public order, prevention of criminal offences, protection of health, morals, and rights and freedom of others. In the field of migration, states often intervene in the exercise of this right on grounds of national security.

The Court set out the relevant criteria for assessing compatibility with Art. 8 of the Convention in the *Üner v. the Netherlands*[112] and *Savran v. Denmark* cases,[113] as follows: the nature and gravity of the offence committed by the applicant; the length of the applicant's stay in the country from which he/she is to be expelled; the time which has elapsed since the offence was committed and the applicant's

110 'Every natural or legal person has the right to respect for his property. No one shall be deprived of his property except in the public interest and subject to the conditions prescribed by law and by the general principles of international law. The foregoing provisions shall be without prejudice to the right of States to adopt such laws as they deem necessary to regulate the use of property in the public interest or to provide for the payment of taxes or other contributions, or fines'. Art. 1 of Protocol No. 1 to the ECHR, Protection of Property

111 The claimant was awarded EUR 5 000 for all the damage suffered, in accordance with Art. 41 of the Convention.

112 *Üner v. The Netherlands (GC)*, App. No. 46410/99, Judgment from 18 October 2006, paras. 54–60.

113 *Savran v. Denmark*, App. No. 57467/15, Judgment 1 October 2019, para. 182.

conduct during that period; the nationalities of the various persons concerned; the applicant's family situation, such as the length of the marriage and other factors expressing the effectiveness of a couple's family life; whether the husband knew of the offence at the time he entered into a family relationship; whether there are children of the marriage and, if so, their ages; the seriousness of the difficulties the spouse is likely to encounter in the country to which the applicant is to be removed; the best interests and welfare of the children, in particular the seriousness of the difficulties any children of the applicant are likely to encounter in the country to which the applicant is to be removed; the strength of social, cultural, and family ties with the host country and the country of destination; the limited or unlimited duration of the removal; medical aspects.

The related cases originating from Eastern and Central European countries are those presented hereinafter. In the *Slivenko and Others v. Latvia*[114] case, in 2003, the applicants Tatjana Slivenko (hereinafter T.S.) and her daughter Karina Slivenko (hereinafter K.S.), of Russian origin, who had been resident in Latvia since 1993, were entered into the Latvian residents' register as "former citizens of the USSR". Meanwhile, Nikolay Slivenko (hereinafter N.S.) was refused a residence permit in 1994 because he was a former Russian army officer. Following the issuance of an expulsion order in 1996, N.S. moved to Russia, while the applicants remained in Latvia, but following continued persecution by the Latvian authorities, T.S. and K.S. also moved to Russia in 1999, leaving T.S.'s elderly parents without care in Latvia and unable to return to Latvia until 2001.

The applicants alleged a violation of Art. 14 of the Convention in conjunction with Art. 8 because of the difference in legal treatment between the family members of Russian military officers who were forced to leave Latvia, and other Russian-speaking on a general finding that their removal was necessary for national security was not as such compatible with Art. 8, nor was the implementation of such a scheme without no possibility to consider the individual circumstances of the applicants T.S. and K.S., as they had already integrated into Latvian society at the time and could not be considered as endangering national security. This is because they were part of T.S.'s father's family, who had retired in 1986, remained in Latvia, and was not considered to present any such danger himself. Therefore, the Court found a violation of Art. 8 of the ECHR in respect of K.S. and T.S., indicating that there was no need to deal separately with the complaint based on Art. 14.[115]

In *Weller v. Hungary*,[116] in 2009, a mother from Romania who did not hold Hungarian nationality but lived in Hungary was refused a maternity allowance, although her husband and children had Hungarian nationality. The Court observed that, on the basis of the relevant provisions of the law, a family with children of a Hungarian mother and a foreign father is entitled to maternity benefits. However, this was not

114 *Slivenko and Others v. Latvia*, App. No. 48321/99, Judgment from 9 October 2003.
115 Latvia was also ordered to pay each claimant EUR 10000 in non-pecuniary damage.
116 *Weller v. Hungary*, App. No. 44399/05, 31 March 2009, Final 30 June 2009.

the case for the second and third applicants, as their father was Hungarian and their mother was foreign. They were therefore prevented from receiving such an allowance on the basis of that difference. The Court found that the right to an allowance due to a family cannot depend on which of the children's two biological parents is a Hungarian citizen. It then concluded that this difference in treatment amounted to discrimination, and thus violated Art. 14 of the Convention in conjunction with Art. 8 in the present case in respect of each of the applicants.[117]

In the *Bistieva and Others v. Poland* case,[118] in 2018, a Russian national and her three children were detained for almost six months in the Kętrzyn guard centre for foreigners. Originally, the applicant, Mrs. Bistieva, arrived in Poland with her husband and first two children in 2012. After their asylum application was rejected, the family fled to Germany, where Mrs. Bistieva had a third child. German authorities sent her and the children back to Poland in January 2014, where they were detained and the applicant applied for refugee status for herself and her three children. The Polish courts found that the decision to place Mrs. Bistieva in administrative detention was justified because she was an illegal alien in Poland, and had illegally crossed the German border. They were released in June 2014, eventually moving back to Germany. The applicants complained that their detention violated their rights under Arts. 5 and 8 of the ECHR.

Regarding the applicants' complaints under Art. 8 ECHR, the Court found that the applicants' detention interfered with the effective exercise of their family life, but that this interference could initially be considered justified because the family presented a clear risk of absconding. However, reiterating the need to consider other relevant instruments of international law,[119] and the broad consensus in international law on the paramount importance of the principle of the best interests of the child, the ECHR found that the Polish authorities failed to assess the impact of detention on the family and children in particular (i.e. failed to fulfil their obligation to consider family detention as a measure of last resort), and failed to consider alternative measures. Respect for the best interests of the child cannot be limited to keeping the family together, but rather includes taking all necessary measures to limit, as far as possible, the detention of families with children. The Court, therefore, concluded that, even considering the risk of the family absconding, the authorities had not provided sufficient grounds to justify the detention for almost six months, which constituted a violation of Art. 8 ECHR.[120] The ECtHR also declared the applicants' complaints under Art. 5 inadmissible, as they had not exhausted the domestic remedies available to them to challenge the lawfulness of their detention.

117 The Court ordered Hungary to pay EUR 720 in material damages, EUR 1500 in non-material damages, and EUR 950 in costs and expenses.

118 *Bistieva and Others v. Poland*, App. No. 75157/14, 10 April 2018, Final 10 July 2018.

119 In particular, the Convention on the Rights of the Child adopted by the United Nations General Assembly on 20 November 1989, which entered into force on 2 September 1990.

120 The applicant was also awarded the sum of EUR 12000 in respect of non-material damage.

In the *Hoti v. Croatia* case,[121] in 2018, the applicant was born in 1962 in the autonomous region of Kosovo in the former Yugoslavia (Socialist Federal Republic of Yugoslavia), and his parents were political refugees from Albania. In 1979, he moved to Croatia, where he has lived ever since without having the nationality of any State. In 2014, his right of residence in Croatia was no longer extended on the grounds that he could not obtain a travel document from the Kosovo authorities. The Court found that the respondent State, contrary to the principles arising from the United Nations Convention relating to the Status of Stateless Persons,[122] had failed to comply with its positive obligation to provide an effective and accessible procedure or combination of procedures enabling the applicant to obtain a decision on matters relating to his continued residence and status in Croatia, with due regard for his privacy interests. This constituted a violation of Art. 8, since this stateless immigrant had been unable to regularise his residence status following the break-up of the predecessor State, despite having been tolerated for many years.[123]

In the *Sudita Keita v. Hungary* case,[124] in 2020, the complainant was a stateless person (of Somali and Nigerian origin) who had been living in Budapest since 2002 and was unable to regularise his legal status as a refugee. When the question of his expulsion arose, the applicant, who had completed a heavy machinery operator training course in 2010 and had been living with his girlfriend, a Hungarian citizen, in Budapest since 2009, invoked in particular Art. 8 of the ECHR. The complaint related to the authorities' long-standing reluctance to regularise his situation, claiming that this had a negative impact on his access to healthcare, employment, and his right to marry. The Court found that in fact, contrary to the principles arising from the 1954 UN Convention relating to the Status of Stateless Persons, the applicant, a stateless person, was required to meet requirements which, by virtue of his status, he could not meet. The Court, in para. 41 of the judgment,[125] found a violation of Art. 8 in an extremely unconvincing formulation, saying that:

> Having regard to the combined effect of the above elements, the Court is not satisfied that, in the particular circumstances of the applicant's case, the respondent State has complied with its positive obligation to provide an effective and accessible procedure or combination of procedures enabling the applicant to obtain a decision on the question of his status in Hungary with due regard to his privacy interests under Art. 8 of the Convention.[126]

121 *Hoti v. Croatia*, App. No. 63311/14, 26 April 2018, Final 26 July 2018.
122 1954 UN Convention relating to the Status of Stateless Persons.
123 Croatia was also ordered to pay EUR 7 500 in moral damages.
124 *Sudita Keita v. Hungary*, App. No. 42321/15, 12 May 2020.
125 The Court awarded the claimant EUR 8 000 in moral damages and EUR 4 000 in costs.
126 See also *Abuhmaid v. Ukraine*, App. No. 31183/13 § 126, 12 January 2017.

6.5. Art. 13: Right to an effective remedy

Any person whose rights and freedom, as recognised by the Convention, have been violated, has the right to an effective remedy before a national court or tribunal, even when the violation is allegedly due to persons acting in an official capacity. By any person, we also mean migrants, who must have this right before they can turn to the international court, the ECHR. An effective remedy should include the following criteria:

> i. The remedy must be effective in practice as well as in law. It is not enough that remedies are available in theory; they must be accessible in practice, provide adequate redress and not be hindered by acts or omissions of state authorities, and the timeliness of complaints procedures must not take precedence over the effectiveness of the remedy.
> ii. If a single remedy does not fully meet the requirements of Art. 13 ECHR in itself, the full range of remedies available under domestic law may do so.
> iii. Where there are substantial grounds for fearing that the deportation of a person will result in a real risk of treatment contrary to Arts. 2 and 3 of the ECHR, there must be an independent and rigorous examination of any complaint made by the person concerned and of the remedy with automatic suspensive effect.[127]

In the *D v. Bulgaria* case,[128] in 2021, the Court found that, regarding procedural guarantees, the applicant was not: provided with the assistance of an interpreter or translator; provided with information on his rights as an asylum seeker (e.g. on the relevant procedures); granted access to a lawyer or a representative of specialised organisations, who would have helped him assess whether his circumstances entitled him to international protection; the Bulgarian Ombudsman was not consulted with a view to supervising the expulsion of the aliens concerned, contrary to the express legal requirement to that effect. These irregularities were for aliens was issued late and sent by e-mail to the centre, while the complainant's transfer to the border was already in progress. The order contained an annotation to the effect that the complainant refused to sign it, whereas, and contrary to the explanations provided, it is clear that the document could not have been physically handed over. The Court found that as a result of this haste and the failure to follow the relevant internal procedures, which were nevertheless designed to provide protection against the prospect of a swift removal without an examination of the individual circumstances, the applicant was in practice deprived of an assessment of the risk he allegedly faced if returned. At the same time, the expulsion order was implemented immediately, without the applicant being given the opportunity to understand its contents, and thus he was deprived of the possibility under domestic law to apply to the courts for

127 FRA. 2021, p. 2.
128 *D v. Bulgaria*, App. No. 29447/17, 20 July 2021.

a stay of execution of the order, such that the remedies available were in practice ineffective and inaccessible. Accordingly, the ECtHR found a violation of Art. 13 in relation to Art. 3, as the applicant did not have an effective remedy available to him, although domestic law provided for this.[129]

In the *Auad v. Bulgaria* case,[130] in 2012, the applicant, a stateless person of Palestinian origin, applied for asylum shortly after arriving in Bulgaria in May 2009. By a decision of October 2009, the State Refugee Agency refused him a refugee status, but granted him humanitarian protection on the grounds that there was "a real danger and risk of interference with the applicant's life and person". However, the following month, the head of the State Agency for National Security issued an order expelling the applicant, on the grounds that he was suspected of terrorism and that his presence in Bulgaria posed a serious threat to national security. The Court held that a planned expulsion would violate Art. 3 of the Convention if it was established that there were reasonable grounds for believing that there was a real risk that the person concerned would be subjected in the country of destination to treatment prohibited by Art. 3, even if it was considered to constitute a threat to national security. Therefore, any national security considerations in the applicant's case were irrelevant to the only important issue: whether his expulsion would give rise to a real risk of prohibited treatment. The Court also found a violation of Art. 13, because the Supreme Administrative Court expressly refused to address the issue of risk, even if an irreversible risk of death or ill-treatment in the receiving State was alleged, on the grounds that it was irrelevant, and the Government had not indicated any procedure by which the applicant could challenge the authorities' assessment of his claims.

At the same time, in view of the serious and irreversible nature of the consequences of expelling aliens to countries where they might face ill-treatment, and the apparent lack of sufficient safeguards in Bulgarian law in this regard, the Court determined that it appeared necessary to assist the Government in the execution of its obligations under Art. 46 § 1 of the Convention.[131]

6.6. Art. 14: Prohibition of discrimination

At first sight, Art. 14 sight simply supplements the other substantive provisions of the Convention and its Protocols, meaning that Art. 14 does not prohibit discrimination as such, but only discrimination in "the exercise of the rights and freedoms recognised by the Convention". However, the accessory character of Art. 14 does not imply, in any case, that its applicability would depend on the existence of a violation of the substantive provision.[132] This relative autonomy of Art. 14 regarding its applicability entails certain procedural consequences, since in some cases the Court first

129 The Bulgarian State was ordered to pay EUR 15000 in moral damages.
130 *Auad v. Bulgaria*, App. No. 46390/10, 11 October 2011, Final 11 January 2012.
131 EUR 3500 was also awarded as non-material damages.
132 *Carson and Others v. United Kingdom*, 2010, p. 63; *Sidabras and Džiautas v. Lithuania*, 2004, p. 38.

examined the alleged violation of the substantive provision, and then, separately, the alleged violation of Art. 14 in conjunction with the substantive provision in question. Meanwhile, in other cases, the Court found a violation of a substantive provision in conjunction with Art. 14, and did not consider it necessary to examine the violation of the substantive provision separately.[133]

Art. 1 of Protocol No. 12 extends the scope of protection against discrimination to "any right provided by law", therefore establishing a general prohibition of discrimination and an "autonomous" right not to be discriminated against.[134] According to the Court's case law, the concept of discrimination, prohibited by both Art. 14 of the Convention and Art. 1 of Protocol No. 12, must be interpreted in the same way.[135]

Discrimination has also been showcased in several Central and Eastern European cases, which are explored below. In the case of *Ponomaryov v. Bulgaria*,[136] in 2011, the applicants A. Ponomaryov and V. Ponomaryov were brothers of Russian nationality who, in 1994, settled in Bulgaria with their mother, A.P., a Russian national, who, following a divorce, remarried a Bulgarian national and was then granted a permanent residence permit on the basis of her marriage. The applicants had the right of residence in Bulgaria on the basis of their mother's permit. After completing their studies in 10 years in Bulgaria and reaching the age of 18 years, the Bulgarian authorities made the granting of a permanent residence permit and the issue of the graduation documents conditional on the payment of fees.[137] The Court first found that the complaint fell within the scope of Art. 2 of Protocol No. 1, and this was sufficient for Art. 14 of the Convention to be applicable, namely that the applicants were clearly treated less favourably than other persons in a similar relevant situation because of a personal characteristic. The Court also recalled that:

> […] discrimination means treating differently, without objective and reasonable justification, persons in similar relevant situations; in other words, there is discrimination if the distinction in question does not pursue a legitimate aim or if the means used to attain that aim are not reasonably proportionate to it.[138]

133 *Guide to Article 14 of the European Convention on Human Rights and Article 1 of Protocol No. 12 to the Convention. Prohibition of discrimination*. Updated 31 August 2021, p. 6. Available at: http://ier.gov.ro/wp-content/uploads/2018/11/Guide-Art-14_Art-1-P12_-31_08_2021_RO.pdf (Accessed 14 October 2023).

134 *Ibid*, p. 9.

135 *Sejdić and Finci v. Bosnia and Herzegovina*, 2009, paras. 55–56.

136 *Ponomaryovi v. Bulgaria*, App. No. 5335/05, ECHR 2011, Final 28 November 2011.

137 'No one shall be denied the right to education. The State, in the exercise of the functions which it assumes in the field of education and teaching, shall respect the right of parents to ensure such education and teaching in conformity with their religious and philosophical convictions'. Art. 2 of Protocol No. 1 to the ECHR.

138 See in this respect *D.H. and Others v. Czech Republic [GC]*, App. No. 57325/2000, paras. 175 and 196, ECHR 2007-IV.

Accordingly, the Court found that, in the specific circumstances, the requirement for the applicants to pay tuition fees for secondary education because of their nationality and immigration status was not justified. There had therefore been a violation of Art. 14 of the Convention in conjunction with Art. 2 of Protocol No. 1.[139]

6.7. Arts. 2 and 4 of Protocol No. 4: Freedom of movement

According to Art. 2(1) of Protocol No. 4, "Everyone lawfully within the territory of a State shall have the right to liberty of movement and freedom to choose his residence", and according to Art. 2(2) of Protocol No. 4, "Everyone is free to leave any country, including his own". However, the exercise of these rights may be restricted for reasons of national security, public safety, the maintenance of public order, the prevention of criminal offences, the protection of health or morals, or the protection of the rights and freedoms of others. Ultimately, this restriction can only be put into practice through the expulsion of aliens, but according to Art. 4 of the same Protocol No. 4, this can only be done individually, with collective expulsions of aliens being prohibited.

The term "expulsion" here refers to any forcible removal of an alien from the territory, irrespective of the legality, length of stay, place of detention, status, or conduct of the person. An expulsion is characterised as "collective" when there is no reasonable and objective examination of the particular case of each individual within a group, who must be given the opportunity to present their case to the competent authorities individually. The size of the expelled group is irrelevant, as even two individuals may be sufficient to form a group[140].

Hereinafter, ECHR case law in Eastern and Central European cases is presented. In the *Soering Stamose v. Bulgaria* case,[141] in 2013, the applicant was deported from the United States of America to his home country of Bulgaria in 2003, after accepting paid employment in violation of the conditions attached to his student visa. Upon his arrival in the country, the Bulgarian authorities imposed a two-year travel ban on the complainant, and confiscated his passport after receiving a letter from the US Embassy. An application for judicial review of the Bulgarian authorities' decisions by the applicant was rejected. The Court pointed out that a prohibition on leaving his own country imposed in connection with a violation of the immigration law of another State could be considered justified in certain compelling circumstances, but the automatic imposition of such a measure without regard to the individual circumstances of the person concerned could be characterised as unnecessary in a democratic society. Accordingly, the Court unanimously found a violation of Art. 2 of Protocol No. 4 to the Convention and Art. 13 of the Convention.

139 The ECHR awarded EUR 2000 in moral damages to the two applicants and EUR 2000 in legal costs.
140 FRA, 2020, p. 6.
141 *Soering Stamose v. Bulgaria*, App. No. 29713/05, ECHR 2012, Final 27 February 2013.

In *Shahzad v. Hungary*,[142] in 2021, the Court interpreted that the rejection of the migrant on a narrow strip of State territory on the outside of a border fence amounted to expulsion after a group of 12 Pakistani nationals, including the applicant, entered Hungary irregularly in August 2016. They cut a hole in the Hungarian-Serbian border fence, there were intercepted, detained, and escorted to the nearest border fence, and then sent by police officers through the gate on the outer side of the fence into Serbia. Importantly, the applicant was sent to the strip of land between the border fence and the actual border between Hungary and Serbia, which belongs to Hungary, formally meaning that the contested measure does not fall within the scope of this provision. However, the Court found that the applicant's move to the outer side of the border fence amounted to expulsion within the meaning of Art. 4 of Protocol No. 4, since the narrow strip of land without apparent infrastructure on the outer side of that fence served only a technical purpose related to border management, and in order to enter Hungary, the expelled migrants had to go to one of the transit areas, which normally involved crossing Serbia.[143] If only the formal status of the strip of land on the outer side of the border fence as part of Hungarian territory were to be considered and the practical realities mentioned above ignored, Art. 4 of Protocol No. 4 would be devoid of practical effectiveness in cases such as the present one, and would allow States to evade their obligations under that provision.

Accordingly, the absence of an individual expulsion decision cannot be attributed to the applicant's own conduct. In conclusion, in view of the fact that the authorities expelled the applicant without identifying him and without examining his situation, and in view of the lack of effective access to legal means of entry, his expulsion was collective in nature. Thus, in its decision, the Court unanimously held that there had been a violation of Art. 13 in conjunction with Art. 4 of Protocol No. 4 due to the lack of an effective remedy for the applicant to complain about his expulsion, and ordered Hungary to pay EUR 5 000 by way of non-pecuniary damage.

I consider that the European Court disregarded the rules of international law in this case, as it did not consider that Serbia was a safe country where the complainant could have been granted asylum, like many other countries (e.g. Turkey, Greece, North Macedonia) through which he passed. Furthermore, instead of submitting an asylum application in these countries, he preferred to fraudulently cross the border of Hungary (the first state in the compact Schengen Area). Meanwhile, the Court described the asylum procedures of a Member State as ineffective without the applicant having attempted to make use of them, disregarded the applicant's attitude to return voluntarily to the territory of Serbia, and allowed itself to interpret the notion of State territory arbitrarily, acting in unmitigated bad faith towards Hungary.

142 *Shahzad v. Hungary*, App. No. 12625/17, 8 July 2021, Final 08 October 2021.

143 In its judgment of 17 December 2020 on Hungary's compliance with Directives 2008/115/EC and 2013/32/EU, the CJEU found that migrants removed under Art. 5(1a) of the State Borders Act had no option but to leave Hungarian territory.

In the *M.H. and Others v. Croatia* case,[144] in 2021, the Court found it to be true that, on 21 November 2017, Croatian police officers returned the applicant and her 11 children to Serbia without considering their individual situation and found that their deportation to Serbia was of a collective nature, in violation of Art. 4 of Protocol No. 4 to the Convention.

In the case of *L.B. v. Lithuania*,[145] in 2022, a Russian citizen of Chechen origin came to Lithuania in 2001, in view of the ongoing war and widespread human rights violations in the Chechen Republic, and was granted subsidiary protection on several occasions between 2004 and 2008. However, since 2018, the Lithuanian authorities have rejected his applications for a passport, something based on the fact that he could obtain a travel document from the Russian authorities. This was the first case in which the Court examined the refusal to issue a travel document to a foreign national. In the Court's view, Art. 2 of Protocol No. 4 to the Convention cannot be regarded as imposing a general obligation on the Contracting States to issue to aliens residing in their territory a certain document enabling them to travel abroad, but it also pointed out that under Art. 2 para. 2 of Protocol No. 4, the right to leave any country, including one's own, was granted to "any person". The applicant was legally resident in Lithuania and had no valid identity documents other than those issued to him by the Lithuanian authorities. The Court held that it could not be considered that the applicant could move freely even within the Schengen area without the requested passport, since without a valid travel document, he could not travel to countries outside the Schengen area and outside the EU, including the United Kingdom, where his children lived. In the meantime, Lithuanian legislation recognised, albeit at a time when it was no longer of use to the applicant, that beneficiaries of subsidiary protection may have a well-founded fear of contacting their national authorities; such a fear is now considered an objective ground for not being able to obtain a travel document from these authorities. In conclusion, the Court found a violation of Art. 2 of Protocol No. 4.[146]

In the case of *A.A. and Others v. North Macedonia*,[147] in 2022, in which the applicants, who were Afghan, Iraqi, and Syrian nationals, after breaking through the fence of the refugee camp in Idomeni, Greece, in March 2016, crossed the border by forcing the border fence together with 1 500 other persons. In so doing, they fraudulently entered Macedonian territory, calling their endeavour the "March of Hope". The ECtHR gave a surprising ruling regarding this case compared to its usual case law; finding that the applicants were intercepted by soldiers shortly after the border was forced, who more or less violently ordered them to return to Greece, did not find a violation of Art. 4 of Protocol No. 4, holding that there was nothing to suggest that the potential asylum seekers were in any way prevented from approaching legitimate

144 *M.H. and Others v. Croatia*, App. Nos. 15670/18 and 43115/18, 18 November 2021.
145 *L.B. v. Lithuania*, App. No. 38121/20, 14 June 2022, Final 14 September 2022.
146 EUR 5000 was awarded to the applicant for non-material damage.
147 *A.A. and Others v. North Macedonia*, App. Nos. 55798/16, 55808/16, 55817/16, 5 April 2022.

border crossing points and lodging an asylum application, or that the applicants had attempted to apply for asylum at the border crossing point before being returned. The applicants in the present case did not even allege that they had ever attempted to enter Macedonian territory by lawful means, and were not interested in applying for asylum in North Macedonia. This solution adopted by the ECtHR should be widely invoked by all Member States exposed to the waves of migration towards their "green" borders.

In *RN v. Hungary*[148] (2023) the applicant was a Pakistani national who let himself be smuggled across the border into Hungary on 21 June 2017. He claimed before the Court that he had repeatedly been physically assaulted by members of the "field guards", after which, on the same day, he was detained by Hungarian policemen. These policemen, together with 10 other migrants, took him to the border fence and forced him to walk in the direction of Serbia, without being given a chance to apply for asylum. Importantly, at that time, the complainant was 14 years old and unaccompanied. The complainant complained to the ECtHR that he had been subjected to collective expulsion in violation of Art. 4 of Protocol No. 4 to the Convention, namely that under Art. 13 of the Convention in conjunction with Art. 4 of Protocol No. 4, no effective remedy was available to him.

The ECtHR, referring to its findings in the *Shahzad v. Hungary* case, held that the applicant's removal constituted an expulsion within the meaning of Art. 4 of Protocol No. 4 because it was carried out in the absence of any formal decision or examination of the applicant's situation. The Court also found that the only means of legal entry into Hungary—namely through the two transit zones—could not have been considered effective in the case of the applicant, who was an unaccompanied minor, given the limited access (daily quota) and the lack of any formal procedure with adequate safeguards governing the admission of individual migrants. Finally, the Court could not ignore the fact that, at the time of his removal, the applicant was an unaccompanied minor and was therefore in an extremely vulnerable situation, having the status of a migrant in an irregular situation[149], and in view of the above, the Court found that there had been a violation of Art. 4 of Protocol No. 4 to the Convention and of Art. 13 of the Convention in relation to Art. 4 of Protocol No. 4[150].

In the case of *S.S. and Others v. Hungary*,[151] in 2023, the applicants are seven Yemeni citizens and three Afghan citizens, in fact two families, who were stopped at Budapest International Airport in April 2019 and December 2019, respectively, the former arriving from Istanbul and the latter from Dubai. They tried to enter Hungary using forged travel documents, and after applying for asylum, the Hungarian authorities evacuated them to Serbia. The Court reiterated that in all cases of removal of

148 ECtHR, *R.N. v. Hungary*, App. No. 71/18, 4 May 2023.

149 For example, *Khan v. France*, App. No. 12267/16, para. 74, 28 February 2019; see also: *N.T.P. and others v. France*, App. No. 68862/13, para. 44, 24 May 2018.

150 Hungary was also ordered to pay EUR 6500 in respect of non-material damage and EUR 1500 in respect of costs.

151 *S.S. and Others v. Hungary*, App. Nos. 56417/19 and 44245/20, 12 October 2023.

an asylum seeker from a Contracting State to an intermediate third country without examination of the substance of the asylum application, whether or not the receiving third country is a State Party to the Convention, it is the duty of the State carrying out the removal to examine in detail the question whether or not there is a real risk that the asylum seeker will be denied access to an adequate asylum procedure in the receiving third country, protecting him/her against refoulement. The Court concluded that the respondent State had failed to fulfil its procedural obligation under Art. 3 of the Convention to examine whether the applicants would have access to an adequate asylum procedure in Serbia, the country to which they had been removed, and found a violation of Art. 3 of the Convention in its procedural aspect. The Court also found that the applicants had been removed to Serbia without an expulsion order, but only on the basis of a removal order, implying that they did not have an effective opportunity to present arguments against their removal, and that their removal was of a collective nature, constituting a violation of Art. 4 of Protocol No. 4[152].

In this context, the ECHR does not seem to attach any relevance to the fact that many migrants cross the borders of Council of Europe Member States illegally without being sanctioned, although according to Art. 31 of the 1951 Geneva Refugee Convention, States do not have to sanction "intruders", unless they come directly from a territory where their life or freedom has been threatened and present themselves without delay to the authorities.

6.8. Art. 1 of Protocol No. 7 to the Convention: Prohibition of arbitrary expulsion

Since 1984, under Art. 1 para. 1 of Protocol No. 7 to the Convention:

> An alien lawfully residing in the territory of a State shall not be expelled except in pursuance of a decision rendered in accordance with law, and he shall be able: a. to submit reasons against his expulsion; b. to request an examination of his case; and c. to request to be represented for this purpose before the competent authorities or one or more persons designated by the competent authorities.

According to Art. 1 para. 2, States may expel an alien before exercising the rights listed in points a, b, and c of Art. 1, where expulsion is necessary in the interests of public order or on grounds of national security. Central and Eastern European countries have resorted quite frequently to expulsions based on national security grounds, and a few cases have even reached the ECHR.

For example, the case of *C.G. and others v. Bulgaria*,[153] in 2008, concerned three Turkish nationals—two parents and a daughter—who were living in Bulgaria. The

152 The Court fixed the amount of EUR 10000 for the first to seventh claimant jointly, EUR 7000 for the eighth to tenth claimant jointly, and EUR 3000 for costs and expenses for the claimants jointly.

153 *C.G. and others v. Bulgaria*, App. No. 1365/07, 24 July 2008.

first applicant, who was granted a permanent residence permit in 1996, was ordered to be expelled on 8 June 2005 on the grounds that he posed a serious threat to national security. The day after this decision, he was deported to Turkey, without being allowed to contact his wife and daughter or a lawyer. The Court confirmed that the measures taken by the authorities against the first applicant constituted an interference with the applicants' right to respect for family life, as the decision to expel the applicant was based on the argument that he posed a threat to national security because of his involvement in illegal drug trafficking, in collaboration with several Bulgarian citizens, and based on unspecified information contained in a secret internal document. The courts examining the case did not gather additional evidence in that regard, but confined themselves to a purely formal examination of the first applicant's expulsion decision. Thus, the Court found a violation of Art. 8 of the Convention, and that the judicial review procedures were not sufficient for the applicants to claim their right to respect for family life, and did not provide an effective remedy, and therefore there was also a violation of Art. 13.

Regarding the complaint under Art. 1 of Protocol 7 to the Convention, the Court noted that, under this provision, expulsion must be in accordance with the law. Regarding the other requirements of Art. 1, the Court observed that the first applicant had not been given an opportunity to have his case reviewed, in breach of subparagraph 1(b). Still, the first applicant was able to challenge the measures against him only once outside the territory of Bulgaria. Referring to the second paragraph of Art. 1 of Protocol No. 7, the Court reiterated that the first applicant's expulsion was not based on genuine grounds of national security, and therefore did not fall within the scope of that provision. In view of the above, the Court concluded that the applicant should have been given the opportunity to exercise his rights under Art. 1(1) before being expelled from Bulgaria, and therefore found a violation of this provision.

In the *Ljatifi v. the former Yugoslav Republic of Macedonia* case,[154] in 2018, the applicant, a Serb national, fled Kosovo in 1999 at the age of 8 years, was granted asylum in 2005, and has been living legally in the Former Yugoslav Republic of Macedonia. In 2014, the Ministry of Interior revoked her asylum status, considering that she was "a risk to national security" and ordered her to leave the country within 20 days of the decision. She unsuccessfully challenged this decision before the Administrative Court and the Higher Administrative Court. In this case, the Court reiterated from its previous case law[155] that even where national security is at stake, the concepts of legality and the rule of law in a democratic society require that expulsion measures affecting fundamental human rights are subject to a form of adversarial procedure. It also concluded that the administrative courts limited themselves to a purely formal examination of the expulsion order, and wrongly accepted the general allegation that the applicant posed a risk to national security, without further details. This implies that the Macedonian courts failed to verify whether an expulsion order was

154 *Ljatifi v. the former Yugoslav Republic of Macedonia*, App. No. 19017/16, 17 May 2018.
155 *C.G. and others v. Bulgaria*, App. No. 1365/07, 24 July 2008.

issued for genuine reasons of national security, thus constituting a violation of Art. 1(1)(a) and (b) of Protocol No. 7 to the Convention.

In the *Muhammad and Muhammad v. Romania* case,[156] in 2020, the applicants, Pakistani citizens living in Romania with student visas, were expelled on grounds of national security. The relevant decision was based on classified documents. The applicants did not have access to them, nor were they provided with specific information on the facts and reasons underlying that decision. The Court has developed two guiding principles. First, the more limited the information available to the alien, the more important the safeguards will be; second, where the circumstances of a case reveal particularly significant repercussions for the alien's situation, countervailing safeguards must be strengthened accordingly. In this case, the ECtHR found that there was a significant limitation on the applicants' right to be informed of the facts submitted in support of their expulsion, and of the content of the relevant documents, and that the domestic courts did not carry out any examination of the need for such a limitation, nor did they clarify the real national security reasons in question, as domestic law did not allow them to examine such matters of their own motion. The fact that a press release issued by the Romanian Intelligence Service contained more detailed factual information than that provided to the applicants in the course of the previous proceedings contradicted the alleged need to deprive them of specific information. A mere enumeration of the number of legal provisions invoked could not suffice, even if minimally, to constitute adequate information on the allegations. Since their lawyers did not have authorisation to access the classified documents, their mere presence before the national court, without the possibility of being informed of the charges against their clients, was not capable of ensuring an effective defence for the latter. It was also not even clear whether the national courts actually had access to all the classified information, or whether they verified the credibility and veracity of the underlying facts; the nature and degree of their control was not apparent, at least briefly, from the reasoning of their decisions. Thus, the limitations were not counterbalanced in the domestic procedure so as to preserve the very essence of the rights under Art. 1 of Protocol No. 7, which was thus infringed.

6.9. Rule 39 of the Rules of Procedure: interim measures

In *D.A. and Others v. Poland*,[157] in 2021, the applicants were Syrian citizens who, between 2013 and 2015, lived and studied in Belarus. After graduation, claiming that they would be persecuted in Syria and that their visas were due to expire in Belarus, they presented themselves on three occasions between 14 and 18 July 2017 at the Polish-Belarus border crossing point at Terespol, Poland. On each occasion, they expressly expressed their wish to lodge an application for international protection,

156 *Muhammad and Muhammad v. Romania [GC]*, App. No. 80982/12, 15 October 2020.
157 *D.A. and Others v. Poland*, App. No. 51246/17, 8 July 2021, Final 22 November 2021.

which were rejected by administrative decisions. On 20 July 2017, the applicants, through their chosen lawyer, filed an application under Rule 39 of the Rules of Court, requesting the Court to prevent the applicants' deportation to Belarus. On 20 July 2017, at 10:08 AM, the Court (the duty judge) decided to apply Rule 39 of the Rules of Court, indicating to the Government that the applicants should not be expelled to Belarus until 3 August 2017. Although the Government had been informed of the interim measure before the planned time of expulsion, the applicants were returned to Belarus at 11:25 AM. In the light of this state of affairs, the Court held that the applicants had not benefited from effective safeguards, which would have protected them from exposure to a real risk of being subjected to inhuman or degrading treatment, as well as to torture. Furthermore, the fact that no procedure involving a review of the applicants' applications for international protection had been initiated on the five occasions on which the applicants had been present at Polish border crossings, and that—despite their claims of a risk of refoulement—on each of those occasions the applicants had been sent back from the Polish border to Belarus, constituted a violation of Art. 3 of the Convention.

The Court noted that the circumstances of the rendering of this decision were similar to those described in *M.K. and Others v. Poland* and found that the decisions in the applicants' cases constituted a collective expulsion of aliens in the sense prohibited by Art. 4 of Protocol No. 4, in breach also of Art. 13 of the Convention in conjunction with Arts. 3 and 4 of Protocol No. 4 to the Convention.

The Court's position on the regime of interim measures is of great importance, in which it has pointed out that the interim measures provided for in Art. 39 are indicated by the Court for the purpose of ensuring the effectiveness of the right of individual petition. Accordingly, the failure of the respondent State to comply with those measures entails a violation of the right of individual petition,[158] since a Contracting State is not in a position to substitute its own judgment for that of the Court in order to verify whether or not there was a real risk of immediate and irreparable harm to an applicant at the time when the interim measure was indicated. The Court, noting that the interim measure issued in the applicant's case has not yet been complied with and remains in force, found that Poland failed to fulfil its obligations under Art. 34 of the Convention, considering that the direction made to the Government under Rule 39 of the Rules of Court should remain in force until the present judgment becomes final, or until the Court takes a new decision on the matter. The Court disregarded the fact that the applicants had never been lawfully admitted to Polish territory.

158 *Mamatkulov and Askarov v. Turkey [GC]*, App. Nos. 46827/99 and 46951/99, § 125, ECHR 2005-I; *Paladi v. Moldova [GC]*, App. No. 39806/05, § 88, 10 March 2009; *M.K. and Others v. Poland*, App. Nos. 40503/17 and 2 others, 23 July 2020, 14 December 2020.

7. Concluding remarks

The Council of Europe, as a classical, non-supranational international cooperation organisation, was not able to decisively influence the migration phenomenon until the issue was brought to the attention of the ECtHR in 1999, and this was mostly due to the reluctance shown by its Member States in the field of asylum regulation, respectively owing to the "soft law" actions adopted by its institutions. Still, the Council aims, among other things, to protect human rights on the European continent.

The right to control the entry, stay, and expulsion of non-nationals belongs to Member States. Although the Convention does not explicitly mention refugees, important protections have emerged from the Court's case law, including in the areas of non-refoulement, family reunification, and limitation of deprivation of liberty. Furthermore, although this is no new phenomena, Council of Europe Member States sometimes try to evade their obligations under the Convention when it comes to the reception of refugees and migrants. Thus, Member States, while drawing up asylum and immigration policies, increasingly seem to no longer focus on compatibility with the Convention, instead using new methods to prevent the implementation of these obligations. In reality, the ECtHR is looking to the ECHR for barriers to prevent Member States from returning or expelling aliens who have entered their territory illegally, replacing the lack of anchoring the right of asylum in positive law with the impossibility of removing people who do not qualify for refugee status because of substantive or procedural loopholes.

One important thing to note after analysing the above theme is that only Council of Europe Member States are entitled to determine who among the asylum seekers qualifies for international protection, and the ECHR has no competence to decide on the merits of "who deserves" such protection, even if its case law ensures that Member States "do not forget" to respect human rights even in the procedure of examining asylum applications. A brief conclusion can be borrowed from Laffranque, a judge in the European Court of Human RightsECtHR:[159]

> In relation to the Court's case law, it is important to understand that finding by the Court of a violation of the Convention … is not so much a condemnation „against" the country, but it constitutes in a sense a learning lesson for democracy, rule of law, and human rights protection system. However, at the same time, it is quite natural that some of the Court's judgements are more easily accepted than others. The overall image of the Court is a mosaic of images of the Court in all respective countries of jurisdiction. Thus, the Court cannot take the risk of treating the smaller and less problematic countries as less important for the impact of the overall case law and the image of the Court: every person and every case counts. The Court's case law is a moving target: it is impossible to make any final deductions […]

159 Laffranque, 2015, pp. 4–16.

Meanwhile, the pro-person techniques applied in ECHR case law include the reversal of the presumption of state sovereignty in the field of migration, as other ECHR judges have stated in their works.[160] This position converges with the very dangerous views of globalist authors who consider that international cooperation in migration governance takes place at the international, regional, and sub-regional level. These views are motivated by the promise of high economic growth resulting from the free mobility of people and labour, and regard that sovereignty considerations often diminish adherence to international law instruments specific to international migration, thus undermining the potential effectiveness of global migration governance.[161]

Nonetheless, we can also use, as an epilogue, other findings from the literature, 'There is no international law of migration, only a patchwork of fragmented international legal regimes, alongside regional and sub-regional systems'.[162] The optimists say that in the context of the current refugee crisis in Europe, when both the Council of Europe and the EU Member States have clearly failed, the role of the two European courts ECHR and CJEU has become important because it is they who fill the gaps where individual states and European institutions are unable to prevent the countless human tragedies that have persisted for years. These two institutions are also said to ensure basic minimum guarantees under the rule of law, and it is described that their jurisprudence can constitute a precedent, a model, a minimum standard also for the rest of the world, where fragmented international migration law applies.[163] Others, along these lines, consider that the case law of the ECHR in the field of migration constitutes the "backbone" of European law in the field of asylum and migration,[164] or at least an example to be followed on other continents.[165]

In the absence of a paneuropean "*lex specialis*" in the field of migration, the ECtHR forces a *lex generalis*, obliging approximately 600 million Europeans to host several billion people who see a brighter future in changing the continent of their birth in favour of Europe. Meanwhile, the ECtHR ignores the concept of the "first safe country" for refugees for those genuinely persecuted within the meaning of the 1951 Geneva Convention relating to the Status of Refugees. However, in relation to the Central and Eastern European states, it is necessary to highlight some specificities: their approach to the situation of those persons who, either in Yugoslavia or in the former USSR, enjoyed a status, and after the break-up of these "unions", remained on the territory of the successor states without their legal status of citizenship being synchronised with the new realities.

Another specificity of the above countries is that they were not colonialist states and do not have "moral debts" to pay to the "oppressed peoples" on other continents,

160 Çalı, Bianku and Motoc, 2021, p. 3.
161 Awad, 2017, pp. 157–158.
162 Awad, 2017.
163 Breitenmoser and Marelli, 2017, pp. 190–191.
164 Labayle and De Bruycker, 2012, p. 11.
165 Beduschi, 2018, p. 55.

nor did they participate in the US efforts that in the last decade destroyed Iraq, Afghanistan, Syria, Lybia, and other states. Still, owing to their location, they ended up on land migration routes that lead precisely to the territory of the former colonialist states. This entails that they are facing this phenomenon at the front line, but if they were left to apply EU common law on visas, asylum, and migration to the letter, Europe would not be facing a visa, asylum, and migration crisis. Still, the permissiveness of the European Commission and the pressure from the Western European press and ill-favoured NGOs have turned Greece, from a migration point of view, into a lawless place from which waves of economic migrants start, instead of real refugees being legally identified and helped. It can be seen that the countries that are in the way of the waves of migrants due to Greece's inefficiency have the most unfavourable judgments from the ECtHR, namely 12 judgments regarding Hungary and nine regarding Bulgaria.

Fortunately, on the basis of the international conventions adopted within the Council of Europe, 'long-term migrants do not enjoy the status of a national minority on account of their lack of historical presence in a country'.[166] Notwithstanding, if we look at the excessive liberalism of some countries such as Sweden, where immigrants can take part in the electoral process without having citizenship, the next step will be for these groups who constantly come to European countries to claim minority or even collective rights.

Pope Francis said the following in 2021 on a visit to Cyprus:[167] 'The worst thing is that we get used to it. "Ah", it will be said, "today a boat sank, there are many missing". This habit is a bad disease! It is a very bad disease!' We are already in a situation where, as non-politicians, we suffer from the so-called "compassion fatigue" even we jurists, as instead of applying public international law to stop the sources of migration of necessity, we are analysing the flawed, overreaching jurisprudence of the ECtHR, which wants to put out fires with flammable materials or with instruments that were not invented for that purpose.

166 Cholewinski, 2005, pp. 695–716.
167 Jacobsen, 2021.

References

Bibliography

Awad, I. (2017) 'The multiple levels of governance of international migration: Understanding disparities and disorder', *American Journal of International Law*, 2017/111, pp. 153–158; https://doi.org/10.1017/aju.2017.36.

Beduschi, A. (2018) 'Vulnerability on trial: Protection of migrant childrens rights in the Jurisprudence of International Human Rights Courts', *Boston University International Law Journal*, 36(1), pp. 55–85.

Breitenmoser, S., Marelli, G. (2017) 'Die neuste Rechtsprechung des EGMR und des EuGH zu Fragen des Migrationsrechts sowie zu Schengen und Dublin', *Swiss Review of International and European Law*, 27(2), pp. 190–191.

Çalı, B., Bianku, L., Motoc, I. (2021) *Migration and the European Convention on Human Rights*. Oxford: Oxford University Press; https://doi.org/10.1093/oso/9780192895196.001.0001.

Chetail, V. (2017) 'Sovereignty and Migration in the Doctrine of the Law of Nations: An Intellectual History of Hospitality from Vitoria to Vattel', *The European Journal of International Law,* 27(4), pp. 901–922; https://doi.org/10.1093/ejil/chw059.

Cholewinski, R., (2005) 'Migrants as Minorities: Integration and Inclusion in the Enlarged European Union', *Journal of Common Market Studies*, 43(4), pp. 695–716; https://doi.org/10.1111/j.1468-5965.2005.00592.x.

Dembour, M-B. (2021) 'The Migrant Case Law of the European Court of Human Rights. Critique and Way Forward' in Çalı, B. (ed.) *Migration and the European Convention on Human Rights*, Oxford:Oxford University Press, pp. 19–40; https://doi.org/10.1093/oso/9780192895196.003.0002.

Ecobescu, N., Micu, N., Nitelea, M., Filip, A., Hagiopol, M., Ecobescu, S. (1999) *Manualul Consiliului Europei*. Council of Europe Information and Documentation Centre in Bucharest.

Fábián, Gy. (2023) *Drept instituțional al Uniunii Europene*, Hamangiu Publishing House.

Grandi, F. (2023) *Global Forced Displacement in Global Trends. Forced Displacement in 2022, Produced by UNHCR* (14 June 2023), United Nations High Commissioner for Refugees Statistics and Demographics Section UNHCR Global Data Service.

Jacobsen, L. (2021) 'Das Jahr, in dem Push-backs normal wurden', *Zeit Online,* 25 December 2021. [Online]. Available at:https://www.zeit.de/politik/ausland/2021-12/europaeische-migrationspolitik-eu-aussengrenze-pushbacks?utm_referrer=https%3A%2F%2Fwww.google.com (Accessed: 18 July 2023).

Labayle, H., De Bruycker, P. (2012) *The influence of ECJ and ECtHR case law on asylum and immigration*, European Parliament, Directorate-General for Internal Policies, Policy Department, April 2012.

Laffranque, J. (2015) 'European Human Rights Law and Estonia: One- or Two-way Street?' *Juridica International*, *Law Review University of Tartu*, 2015/23, pp. 4–16; https://doi.org/10.12697/JI.2015.23.01.

Mijatović, D. (2022) *For the rights of the living, for the dignity of the dead – It's time to end the plight of missing migrants in Europe* Commissioner for Human Rights, 29 September 2022. [Online]. Available at: https://www.coe.int/en/web/commissioner/-/for-the-rights-of-the-living-for-the-dignity-of-the-dead-time-to-end-the-plight-of-missing-migrants-in-europe (Accessed: 16 July 2023).

Mijatović, D. (2020) 'Flüchtlingsschutz in Europa: die EMRK und darüber hinaus' *Europa, Corona und die Menschenrechte – Die Bedeutung der Europäischen Menschenrechtskonvention für den Flüchtlingsschutz*, 22 June 2020. [Online]. Available at: https://rm.coe.int/fluchtlingsschutz-in-europa-die-emrk-und-daruber-hinaus-video-ansprach/16809ebe78 (Accessed: 19 July 2023).

OHCHR (no date) 'About migration and human rights' *United Nations*. [Online]. Available at: https://www.ohchr.org/en/migration/about-migration-and-human-rights (Accessed: 19 July 2023).

Europa, Corona und die Menschenrechte – Die Bedeutung der Europäischen Menschenrechtskonvention für den Flüchtlingsschutz (2020) Council of Europe, 22 June 2020. [Online]. Available at: https://rm.coe.int/fluchtlingsschutz-in-europa-die-emrk-und-daruber-hinaus-video-ansprach/16809ebe78 (Accessed: 19 July 2023).

Europarat kritisiert Österreich für Mängel bei Asyl-() und Frauenrechten (2022) *Die Presse*, 12 May 2022. [Online]. Available at: https://www.diepresse.com/6138013/europarat-kritisiert-oesterreich-fuer-maengel-bei-asyl-und-frauenrechten (Accessed: 16 July 2023).

Europarat warnt vor Zwei-Klassen-Asylpolitik (2022) vaticannews.va 7 April 2022. [Online]. Available at: https://www.vaticannews.va/de/welt/news/2022-04/europarat-asylrecht-doppelte-standards-mijatovic-pushback.html (Accessed: 16 July 2023).

Legal sources

Council of Europe (2022) *Guide on the case-law of the European Convention on Human Rights: Immigration*, 30 April 2022.

Council of Europe (2021) *Action Plan on Protecting Vulnerable Persons in the Context of Migration and Asylum in Europe* (2021-2025) [Online]. Available at: https://rm.coe.int/action-plan-on-protecting-vulnerable-persons-in-the-context-of-migrati/1680a409fc (Accessed 17 July 2023).

Council of Europe (2020) *Strategic Action Plan for Roma and Traveller Inclusion (2020–2025)* [Online]. Available at: https://rm.coe.int/coe-strategic-action-plan-for-roma-and-traveller-inclusion-en/16809fe0d0 (Accessed 17 July 2023).

European Court of Human Rights (2021) *ECHR in 50 questions*. Council of Europe. [Online]. Available at: https://www.echr.coe.int/documents/d/echr/50Questions_ENG (Accessed: 16 July 2023).

European Court of Human Rights (2021) *Guide to Article 14 of the European Convention on Human Rights and Article 1 of Protocol No. 12 to the Convention. Prohibition of discrimination.* 31 August 2021, [Online]. Available at: http://ier.gov.ro/wp-content/uploads/2018/11/Guide-Art-14_Art-1-P12_-31_08_2021_RO.pdf (Accessed: 14 October 2023).

European Court of Human Rights (2016) 'Presentation: Asylum, from the Series Human Rights Education for Legal Professionals and COURTalks/disCOURs – Bringing the Convention closer to home/La Convention a votre porte' *Human Rights Education for Legal Professionals*, (7), pp. 1–2. [Online]. Available at: https://www.echr.coe.int/documents/d/echr/COURTalks_Asyl_Talk_ENG (Accessed: 9 July 2023).

FRA (2021) *European standards on legal remedies, complaints mechanisms and effective investigations at borders.* Council of Europe, 9 July 2021 [Online]. Available at: https://fra.europa.eu/sites/default/files/fra_uploads/coe-fra-2021-effective-remedies-european-borders_en.pdf (Accessed: 14 October 2023).

FRA (2020) *Fundamental rights of refugees, asylum applicants and migrants at the European borders*. Council of Europe, 27 March 2020 [Online]. Available at: https://fra.europa.eu/sites/default/files/fra_uploads/fra-coe-2020-european-law-land-borders_en.pdf (Accessed: 19 July 2023).

FRA and ECtHR (2020) *Handbook on European law relating to asylum, borders and immigration*. Edition 2020, Luxembourg, Publications Office of the European Union. [Online]. Available at: https://www.echr.coe.int/documents/d/echr/Handbook_asylum_ENG (Accessed: 19 July 2023).

CHAPTER IV

Limits and Use of European Union Competences: General Considerations in the Context of Policies on Border Checks, Asylum, and Immigration

Bartłomiej Oręziak

Abstract

Competences of the European Union have recently become an increasingly interesting issue from a scientific viewpoint. This is primarily because of the law-making activity of European Union institutions, particularly the Court of Justice of the European Union and European Commission. This study aims to analyse the boundaries and rules for exercising the European Union competences in the field of migration and refugee law. The key for this analysis is the principle of conferral, which is of fundamental importance for the limits of European Union competences because of the sovereignty of the subjects of public international law. Moreover, the principles of proportionality and subsidiarity are invoked as determinants for exercising European Union competences. This study explains the meaning of these three principles, particularly focusing on the treaty image of the principle of conferral in the European Union. In this context, it also presents the phenomenon of competence creep described in the literature. The analysis is based on the primary law of the European Union, especially the relevant provisions of the Treaty on European Union and Treaty on the Functioning of the European Union, as a model for the scope of sovereign states' consent while considering the principle of conferral. Further, the study analyses the secondary law of the European Union regarding its compliance with the primary law, specifying the scope of the European Union's

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competences and determining current European Union standards for border checks, asylum, and immigration policies. Consequently, it analyses the decision-maker's choice regrading compliance of the detailed scope of the European Union competences when encountering doubts that cannot be resolved using a literal or systemic interpretation, that is, where it is necessary to refer to a purposive interpretation. The study concludes with a concise summary proposing how to solve the identified problem.

Keywords: EU competences, migration law, refugee law, principle of conferral, principle of subsidiarity, principle of proportionality, competence creep

1. Introduction

An interesting scientific topic for analysis is the limits assigned to the competences of the European Union (EU)[1] under the principle of conferral by the subjects of public international law. The literature contains scientific items related to the phenomenon of competence creep or creeping competence. The essence of competence creep is that the EU extends—particularly through the soft law issued by the European Commission (EC) and jurisprudence of the Court of Justice of the European Union (CJEU)—its competences to areas that have not been assigned to it by the sovereign entities of international law (i.e. states).[2] Thus, competence creep occurs when the EU acts beyond the limits of the competences conferred on it by the principle of conferral. Therefore, legal research focuses on the analysis of borders, and the rules for exercising EU competences appear to be up-to-date and justified by tangible needs. For this analysis, the relevant provisions of the Treaty on the Functioning of the European Union (TFEU)[3] and Treaty on European Union (TEU),[4] as well as the EU picture of the principle of granting as a model for the scope of sovereign states' consent, are crucial. Selected EU secondary legislation, which set the current EU standards in the fields of border control, asylum, and immigration policies and specify the scope of EU competences, are also helpful. This leads to a discourse related to the decision-maker's choice when encountering doubts regarding compliance of the scope of EU competences specified in the EU secondary law, with the relevant provisions of the EU primary law determining the limits of these competences. First, the EU image of the award principle is analysed as a foundation for

1 On EU competences, see, for example, Öberg, 2017, pp. 391–420; Mostowik, 2011, pp. 9–41; Kuś, 2014, pp. 79–95.
2 See, for example, Garben, 2020, pp. 429–447; Prechal, 2010, pp. 5–22; Weatherill, 2004, pp. 1–55.
3 Treaty on the Functioning of the European Union, OJ C 326, 26 October 2012, pp. 47–390.
4 Treaty on European Union, OJ C 326, 26 October 2012, pp. 13–390.

further and more detailed scientific discourse. This is a fundamental principle of public international law, which states that an international organisation such as the EU only has competences that have been transferred to it by sovereign states.[5] This transfer can occur based on international agreements, and only the EU primary law has such a status in the EU.

2. Principle of conferral in the EU

The principle of conferral is the cornerstone of EU competence, because the source of the EU's competences are their transfer to the EU by sovereign states. The EU does not have competences that are due to it because it is an international organisation, and it only has competences that it has been granted based on the autonomous decisions of states that are members of this international organisation. This is directly expressed by the EU primary law. According to Art. 5 of the TEU, the limits of EU competences are determined by the principle of conferral, according to which the EU acts only within the limits of competences granted by EU Member States (EUMeSt) under the EU primary law to achieve the objectives set out therein.[6] Additionally, Art. 5 of the TEU underlines that any powers not conferred on the EU in the EU primary law belong to the EUMeSt.[7] The wording of Art. 5 of the TEU leaves no room for doubt. Art. 3, 4, and 6 of the TFEU remain in synergy with Art. 5 of the TEU. According to Art. 3 of the TFEU, the EU has exclusive competence in areas such as the customs union; establishment of competition rules necessary for functioning of the internal market; monetary policy for the EUMeSt, whose currency is the euro; conservation of marine biological resources under the common

5 See, for example, C-155/91 *Commission of the European Communities v. Council of the European Communities*, Judgement, 17 March 1993, ECLI:EU:C:1993:98; Calliess, 1999, p. 32; Joined Cases C-7/56, C-3/57 to C-7/57 *Dinecke Algera, Giacomo Cicconardi, Simone Couturaud, Ignazio Genuardi, Félicie Steichen v. Common Assembly of the European Coal and Steel Community*, Judgement, 12 July 1957, ECLI:EU:C:1957:7; Pache and Rösch, 2008, pp. 473–480; Judgement of the German Federal Constitutional Court of 30 June 2009, 2 BvE 2/08, 2 BvE 5/08, 2 BvR 1010/08, 2 BvR 1022/08, 2 BvR 1259/08, 2 BvR 182/09; Judgement of the Czech Constitutional Court of 26 November 2008—Pl. ÚS 19/80; Judgement of the Polish Constitutional Tribunal of 24 November 2010, K32/09 (Journal of Laws 2010 No. 229 item 1506).

6 See, for example, C-361/14 P in proceedings *European Commission v. Peter McBride, Hugh McBride, Mullglen Ltd, Cathal Boyle, Thomas Flaherty, Ocean Trawlers Ltd, Patrick Fitzpatrick, Eamon McHugh, Eugene Hannigan, Larry Murphy and Brendan Gill*, Judgement, 14 June 2016, ECLI:EU:C:2016: 434; C-600/14 in proceedings *Federal Republic of Germany v. Council of the European Union*, Judgement, 5 December 2017, ECLI:EU:C:2017:935; C-687/15 in proceedings *European Commission v. Council of the European Union*, Judgement, 25 October 2017, ECLI:EU:C:2017:803.

7 See, for example, Lohse, 2014, pp. 165–182; Żelazna, pp. 593–606.

fisheries policy; and the common commercial policy.[8] The exclusive competence of the EU is characterised by a hard and intrusive approach. In this respect, competences belong exclusively to the EU, and the EUMeSt voluntarily exercised their sovereignty and waived its exercise for the benefit of the EU. According to Art. 4 of the TFEU, the EU shares competences with the EUMeSt if the primary EU law grants it competences that are not related to the areas specified in Art. 3 and 6 of the TFEU. The areas of shared competence include the internal market; social policy in relation to the aspects set out in EU primary law; economic, social, and territorial cohesion; agriculture and fisheries, excluding the conservation of marine biological resources; environment; consumer protection; transport; trans-European networks; energy; freedom, security, and justice; and common public health safety issues with respect to the aspects set out in the EU primary law.[9] When interpreting the norm included in Art. 4 of the TFEU, it implies that the EU has a field of competence to act in the aforementioned areas in the dimension specified by detailed provisions of the EU primary law. Thus, within the scope of shared competences, what has been transferred to the EU by sovereign states, included in the EU primary law, and defined in terms of scope under specific treaty provisions may constitute EU competences, and what has not been transferred or included in the EU primary law, including that which is not within the specified scope, should not be the subject of EU activity. However, pursuant to Art. 6 of the TFEU, the EU also has the competence to conduct activities aimed at supporting, coordinating, and supplementing activities of the EUMeSt in areas such as the protection and improvement of human health, industry, culture, tourism, education, vocational training, youth and sports, civil protection, and administrative cooperation.[10] EU competences, as set out in Art. 6 of the TFEU, are characterised by the soft approach of EU institutions that can support, coordinate, and supplement activities of the EUMeSt and cannot go beyond

8 The EU also has the exclusive competence to conclude international agreements if their conclusion is provided for in an EU legislative act or is necessary to enable the EU to exercise its internal competences, or to the extent that their conclusion may affect the common rules or alter their scope (see Art. 3(2) of the TFEU); see, for example, C-66/13 *Green Network SpA v. Autorità per l'energia elettrica e il gas*, Judgement, 26 November 2014, ECLI:EU:C:2014:2399; C-422/19 *Johannes Dietrich and Norbert Häring v. Hessischer Rundfunk*, Judgement, 26 January 2021, ECLI:EU:C:2021:63.

9 In the areas of research, technological development, and space, the EU has the competence to conduct activities, particularly to define and implement programmes; however, the exercise of these competences must not prevent multinational corporations (MNCs) from exercising their competences (see Art. 4(3) of the TFEU). Conversely, in the areas of development cooperation and humanitarian aid, the EU has competences to conduct activities and implement common policies; however, exercise of these competences must not prevent MNCs from exercising their competences (see Art. 4(4) of the TFEU).

10 See, for example, C-275/12 *Samantha Elrick v. Bezirksregierung Köln*, Judgement, 24 October 2013, ECLI:EU:C:2013:684; C-391/20 in proceedings brought by *Boriss Cilevičs, Valērijs Agešins, Vjačeslavs Dombrovskis, Vladimirs Nikonovs, Artūrs Rubiks, Ivans Ribakovs, Nikolajs Kabanovs, Igors Pimenovs, Vitālijs Orlovs, Edgars Kucins, Ivans Klementjevs, Inga Goldberga, Evija Papule, Jānis Krišāns, Jānis Urbanovičs, Ļubova Švecova, Sergejs Dolgopolovs, Andrejs Klementjevs, Regīna Ločmele-Luņova, and Ivars Zariņš*, Judgement, 7 September 2022, ECLI: EU:C:2022:638.

this dimension. Nevertheless, it is noteworthy that supporting and coordinating the EUMeSt's activities do not by nature constitute interfering; however, supplementing the activities of the EUMeSt may already be of such nature. Therefore, it is important to note that the EU's exercise of the competences set out in Art. 6 of the TFEU may not prevent the EUMeSt from exercising its competences.

In terms of EU competences, an important, even fundamental, supplement is provided by Art. 2 of the TFEU. This article, by systematising the rules related to EU competences, completes the picture of the principle of conferral in the EU that results from the correlation of Art. 5 of the TEU with Art. 3, 4, and 6 of the TFEU.[11] According to Art. 2 of the TFEU, first, if the EU primary law confers exclusive competence on the EU in a specific area, only the EU can legislate and adopt legally binding acts, whereas the EUMeSt can do so only with EU authorisation or to implement EU acts. Second, if the EU primary law confers on the EU a competence shared with the EUMeSt in a specific area, the EU and EUMeSt can legislate and adopt legally binding acts in that area. In such a situation, to avoid a conflict of competences, the EUMeSt may exercise competences to the extent that the EU has not exercised or does not exercise a specific shared competence. If the EU first decides to exercise a shared competence and then decides to cease exercising it, the EUMeSt may exercise this competence again to the extent that the EU has ceased exercising it. It is worth emphasising here that an important complement is provided by the principles of both proportionality and subsidiarity, which are principles directly related to the exercise of EU competences; the complement is discussed later. Third, the EUMeSt coordinate their economic and employment policies in accordance with the principles provided for in the EU primary law, which the EU has the competence to define. Fourth, the EU has the competence to define and implement a common foreign and security policy, including the progressive definition of a common defence policy. Fifth, in certain areas and under the conditions provided for in the EU primary law, the EU has the competence to conduct activities to support, coordinate, and supplement the activities of the EUMeSt without replacing their competences in these areas. In this dimension, legally binding EU acts cannot lead to harmonisation of laws and regulations of the EUMeSt. Sixth, the detailed scope and conditions for the exercise of EU competences are determined by the provisions of the EU primary law relating to a specific area.

The EU competences are broad, resulting from the relevant provisions of the EU primary law. The EUMeSt voluntarily agreed to this scope using their sovereign

11 In the context of Art. 2 of the TFEU, for example, see the Judgement of the Polish Constitutional Tribunal of 24 November 2010, K32/09; C-24/20 *European Commission v. Council of the European Union*, Opinion of Advocate General Maciej Szpunar, 19 May 2022, ECLI:EU:C:2022:404; Opinion of Advocate General Giovanni Pitruzzelli delivered on 29 September 2020 in Joined Cases C-422/19 and C-423/19 in *Johannes Dietrich (C-422/19) and Norbert Häring (C-423/19) v. Hessischer Rundfunk*, ECLI:EU:C:2020:756; Opinion of Advocate General Eleanor Sharpston delivered on 21 December 2016 on the issuance of Opinion 2/15 in proceedings brought at the request of the European Commission, ECLI:EU:C:2016:992.

powers. The EUMeSt assigned competences to the EU in accordance with the principle of conferral, which was included in the relevant provisions of the TEU and TFEU. In the EU, the principle of conferral has a legally regulated image. Based on the treaty nomenclature, the EU has exclusive, shared, and supporting or coordinating competences. In each case, the areas covered by specific competencies are listed. In addition, in the case of shared competences, the EU plays a privileged role, as it depends only on its own decision, subject to the principles of proportionality and subsidiarity, on whether to exercise entrusted shared competence. If the EU decides to exercise shared competence, the EUMeSt lose the possibility of exercising such competence in the scope specified in the treaty, which implies specific "sharing" of competences in the EU arena. This may even lead to the conclusion that shared competences are, in fact, exclusive competences of the EU that are expressed only indirectly, as is the case in Art. 3 of the TFEU. However, the result of both is that the EU is assigned competences that, if exercised by EU institutions, should not be interfered with by the EUMeSt, as the latter have transferred them to the EU in accordance with the principle of conferral. Although the nomenclature of shared competences should be considered inaccurate, it appears that the ratio law of this division is significantly different between exclusive and shared competences. The difference is the subsidiarity principle, which applies only in areas that do not fall within the exclusive competence of the EU.

There can be only one conclusion to this part of the study: the limits of EU competences are the same as the scope of competences transferred to the EU by the EUMeSt, in accordance with the principle of conferral. These scopes overlap as the EU has no competence of its own. Thus, the source of EU competences is the sovereign competences of the EUMeSt. This implies that if the EUMeSt have transferred competences to the EU, the EU may exercise them but only within the limits of the conferral. If the EU exceeds these limits, the consequences tantamount to competence creep. Therefore, provisions of the TFEU that specify the limits of competences conferred on the EU are of key importance for this analysis. In addition, it appears that other interpretations of the law are not justified by the content of the EU primary law or the principles of public international law and should be regarded as groundless.

3. Limits of EU competences in migration and refugee law: Area of freedom, security and justice

The above discussion clarifies that the area of freedom, security, and justice is a shared competence of the EU, and the TFEU itself contains provisions specifying its limits. The EU's competence in the area of freedom, security, and justice comprises four blocks or categories. The first category includes border checks, asylum, and immigration policies. The second concerns judicial cooperation in civil matters. The

third issue concerns judicial cooperation in criminal matters. The fourth concerns police cooperation. It is already clear *prima facie* that the first segment is of key importance to the subject of this study. According to Art. 67 Para. 2 of the TFEU, the EU has developed a common policy in the field of asylum, immigration, and external border control, based on solidarity between the EUMeSt and fairness towards third-country nationals.[12] In this context, Art. 72 of the TFEU directly emphasises that the legal norms defining the competences of the EU in the area of freedom, security, and justice do not violate the EUMeSt's performance of duties related to the maintenance of law and order and safeguarding of internal security.[13] Using treaty nomenclature, this is the exclusive competence of the EUMeSt.

More detailed limits of EU competences in the field of border checks, asylum, and immigration result from the wording of Art. 77, 78, and 79 of the TFEU. Art. 77 of the TFEU requires the EU to develop a policy aimed at ensuring the absence of any controls on persons regardless of their nationality when crossing internal borders, conducting checks on persons, and efficiently monitoring the crossing of external borders, and the gradual introduction of an integrated management system for external borders. Therefore, the European Parliament (EP) and Council of the European Union (hereinafter referred to as the "Council"), acting in accordance with ordinary legislative procedures, may adopt measures concerning the following: the common policy on visas and other short-stay residence permits; checks to which persons crossing external borders are subject; conditions under which third-country nationals shall have the freedom to travel within the EU for a short period; and any measure necessary for the gradual establishment of an integrated management system for external borders.[14] Art. 78 of the TFEU requires the EU to develop a common policy on asylum, subsidiary protection, and temporary protection, aimed at granting appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement.[15] This policy must comply with the Geneva Convention of 28 July 1951[16] and the Protocol of 31 January 1967 relating to the status of refugees,[17] as well as with other relevant

12 Under the TFEU, stateless persons are treated as third-country nationals; see also C-483/20 *XXXX v. Commissaire général aux réfugiés et aux apatrides*, Judgement, 22 February 2022, ECLI:EU:C:2022:103; C-817/19 *Ligue des droits humains v. Conseil des ministers*, Judgement, 21 June 2022, ECLI:EU:C:2022:491.

13 See C-72/22 PPU *M.A. v. Valstybės sienos apsaugos tarnyba*, Judgement, 30 June 2022, ECLI:EU:C:2022:505; Joined Cases C-368/20 and C-369/20 *NW v. Landespolizeidirektion Steiermark and Bezirkshauptmannschaft Leibnitz*, Judgement, 26 April 2022, ECLI:EU:C:2022:298.

14 In addition, it is worth emphasising that the legal norm contained in Art. 77 of the TFEU does not affect the competence of the MNCs to geographically delimit their borders in accordance with international law.

15 In the context of the non-refoulement principle, see Goodwin-Gill, 2011, pp. 443–457; Loper, 2010, pp. 404–439; Chan, 2006, pp. 231–239.

16 Convention Relating to the Status of Refugees, drawn up in Geneva on 28 July 1951 (Journal of Laws 1991 No. 119, item 515).

17 Protocol Relating to the Status of Refugees, drawn up in New York on 31 January 1967 (OJ 1991 No. 119, item 517).

treaties. For this purpose, the EP and Council, acting in accordance with the ordinary legislative procedure, have the legitimacy to adopt measures concerning the Common European Asylum System, which includes a uniform status of asylum for third-country nationals, valid throughout the EU; uniform status of subsidiary protection for third-country nationals who, without obtaining European asylum, are in need of international protection; common system of temporary protection for displaced persons in the event of a massive inflow; common procedures for granting and withdrawing uniform asylum or subsidiary protection status; criteria and mechanisms for determining which EUMeSt are responsible for considering an application for asylum or subsidiary protection; standards concerning the conditions for the reception of applicants for asylum or subsidiary protection; and partnership and cooperation with third countries for managing inflows of people applying for asylum or subsidiary or temporary protection. In addition, if one or more EUMeSt experience an emergency situation characterised by a sudden influx of third-country nationals, the EUMeSt, at the request of the EC, may adopt interim measures for the benefit of the concerned or interested EUMeSt.[18] Art. 79 of the TFEU requires the EU to develop a common immigration policy aimed at ensuring, at every stage, the effective management of migration flows, fair treatment of third-country nationals residing legally in the EUMeSt, and prevention and strengthening of the fight against illegal immigration and trafficking of human beings.[19] For this purpose, the EP and Council, acting in accordance with the ordinary legislative procedure, are empowered to adopt measures in the following areas: the conditions of entry and residence as well as standards on the EUMeSt's issue of long-term visas and residence permits, including those for family reunification; definition of the rights of third-country nationals residing legally in EUMeSt, including the conditions governing freedom of movement and residence in other EUMeSt; illegal immigration and unauthorised residence, including removal and repatriation of persons residing without authorisation; and combat of the trafficking of persons, particularly women and children. Moreover, the EU is entitled to conclude agreements with third countries on the readmission of third-country nationals who do not or no longer fulfil the conditions for entry, presence, or stay in the territory of one of the EUMeSt, their countries of origin, or the countries from which they arrive. In addition, the EP and Council, acting in accordance with ordinary legislative procedures, are authorised to establish measures to encourage

18 In such a case, the CJEU shall act after consultation with the EP [e.g. Council Decision (EU) 2015/1523 of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece (OJ L 239, 15 September 2015, pp. 146–156); Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece (OJ L 248, 24 September 2015, pp. 80–94)]; see also Joined Cases C-715/17, C-718/17, and C-719/17 *European Commission v. Republic of Poland, Hungary and Czech Republic*, Judgement, 2 April 2020, ECLI:EU:C:2020:257; Joined Cases C-643/15 and C-647/15 *Slovak Republic and Hungary v. Council of the European Union*, Judgement, 6 September 2017, ECLI:EU:C:2017:631.

19 See C-431/11 *United Kingdom of Great Britain and Northern Ireland v. Council of the European Union*, Judgement, 26 September 2013, ECLI:EU:C:2013:589.

and support the activities of the EUMeSt that aim to promote the integration of third-country nationals residing legally in their territories. However, in this case, the possibility of the EU harmonising laws and regulations of the EUMeSt was excluded. Importantly, the powers referred to in Art. 79 of the TFEU do not infringe on the right of the EUMeSt to determine the size of the influx of third-country nationals to their territory in search of employment or self-employment. Moreover, Art. 80 of the TFEU is also important in the context of the entire area of freedom, security, and justice relating to policies on border checks, asylum, and immigration. According to this provision, EU policies on border checks, asylum, and immigration, as well as their implementation, are governed by the principles of solidarity and fair sharing of responsibility between the EUMeSt, including on financial matters.[20] In this context, EU policies adopted to implement Arts. 77, 78, and 79 of the TFEU contain, whenever necessary, appropriate measures to apply this principle.

The cited provisions of the TFEU regarding the scope of EU competence in the context of migration and refugee law are characterised by a certain level of generality. This fact should not come as a surprise, as the provisions of the TFEU, which define the framework for the functioning of the EU and constitute, next to the TEU, a primary legal act legitimising the EU's activity, cannot be casuistic. However, this implies some problems of interpretation considering the principle of conferral, which is particularly evident during the review of the selected secondary EU law. Nevertheless, it can already be seen that the treaty provisions have a programmatic nature and thus indicate a certain direction the EU should follow. Thus, this type of legislation demonstrates the objectives the EU should pursue. They do not state that this goal has already been achieved, nor do they constitute finite or ready-made legal institutions. Achieving the intended goal is a process that may involve several stages.[21] This observation further blurs the transparency of the treaty provisions on border checks, asylum, and immigration from the perspective of the principle of conferral. This implies that there is much room for interpretation here, not so much literal or systemic but more purposive interpretation.[22] This leads to the justified conclusion that, based solely on the provisions of the EU primary law, knowledge of the actual limits of competences granted to the EU in the field of migration and refugee law can only be limited. To determine more precisely the boundaries of the competences granted to the EU by EUMeSt in the analysed scope, it is necessary to refer to the appropriate techniques of legal interpretation. Here, a question arises

20 See Judgement of the Court of Justice of the European Union of 15 July 2021 in Case C-848/19 P in proceedings involving an appeal under Art. 56 of the Statute of the CJEU, filed on 20 November 2019 (Federal Republic of Germany), ECLI:EU:C:2021:598.

21 Based on the content of the provisions of the EU primary law in the context of border control, asylum, and immigration, it appears that the EU legislator has attributed the characteristic of continuous improvement to the process in question.

22 On the legal interpretation, see Kondej, 2019, pp. 39–52; Chauvin, Stawecki, and Winczorek, 2021, pp. 245–256; Smolak, 2014, pp. 5–12; Lewandowska and Lewandowski, 2010, pp. 19–29; Łazor, 2021, pp. 31–48; Kotowski, 2017, pp. 137–153; Choduń, 2016, pp. 57–67.

about the entity authorised to make a binding interpretation of the provisions of the EU primary law that directly determines the limits of the competences granted to the EU. This question is essential for analysis, and its answer is a key conclusion supported by scientific discourse. Therefore, this issue is addressed in the final section of this chapter.

4. Use of EU competences in migration and refugee law

In the context of the area of freedom, security, and justice, particularly border control, asylum, and immigration policies, one may wonder whether the EU primary law contains any guidance regarding the form of EU secondary legislation. The principle of conferral does not answer this question; however, functioning of the EU is based on two other fundamental principles. In accordance with Art. 5 of the TEU, the limits of EU competences are determined by the principle of conferral; however, the exercise of these competences is subject to the principles of subsidiarity[23] and proportionality.[24] As stipulated in Art. 5 Para. 3 of the TEU, in accordance with the principle of subsidiarity, in areas that do not fall within the exclusive competence of the EU, the EU shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the EUMeSt, at either the central or the regional and local levels, but can be better achieved at the EU level because of the scale or effects of the proposed action. Importantly, this provision also emphasises that EU institutions apply the principle of subsidiarity in accordance with Protocol (No. 2) on the application of the principles of subsidiarity and proportionality,[25] and national parliaments ensure compliance with the principle of subsidiarity in accordance with the procedure provided for in this protocol. However, pursuant to Art. 5 Para. 4 of the TEU, in accordance with the principle of proportionality, the scope and form of an EU action do not go beyond what is necessary to achieve the objectives of the EU primary law. This provision emphasises that EU institutions apply the principle of proportionality in accordance with the Protocol on the application of the principles of subsidiarity and proportionality; however, in this case, national parliaments no longer have the legitimacy to ensure that this principle is respected in the EU. Thus, Art. 5 of the TEU results in a triad of rules directly related to EU competences. The principle of conferral determines the limits of EU competences, whereas the principles of subsidiarity and proportionality determine the exercise of EU competences. However, it should be noted that the principle of subsidiarity applies only to

23 See Melé, 2005, pp. 293–305; Spicker, 1991, pp. 3–14; Follesdal, 2013, pp. 37–62.
24 See Hermerén, 2012, pp. 373–382; Portuese, 2013, pp. 612–635; Poto, 2007, pp. 835–869.
25 The Protocol (No. 2) on the application of the principles of subsidiarity and proportionality is an integral part of the EU primary law.

areas that, according to the nomenclature provided for in EU primary law, do not fall within the exclusive competence of the EU. It is worth recalling that the area of freedom, security, and justice is a shared competence. This fact is important because it leads to the conclusion that EU competences in the fields of border checks, asylum, and immigration policies are governed by all three principles of Art. 5 of the TEU. This implies that, in addition to the principle of conferral, it should be checked whether the objectives of border checks, asylum, and immigration policies can be sufficiently achieved by the EUMeSt, at both the central and the regional and local levels, and whether the exercise of competences by the EU, considering the scale or effects of the proposed action, will lead to better achievement of those objectives. If the conditions of the subsidiarity principle are met, it is necessary to analyse the form of exercise of competences by the EU considering the principle of proportionality. This principle provides a clear indication that the scope and form of EU actions must not exceed what is necessary to achieve the objectives of the EU primary law. The exercise of EU competences occurs through the issuance of the EU secondary legislation, which is of two chief types—directives and regulations. EU directives harmonise or approximate EUMeSt regulations, whereas EU regulations unify legal standards throughout the EU. This leads to the conclusion that, from the perspective of compliance with the principle of proportionality, the EU should first use the possibility of issuing directives for reducing interference with an EUMeSt legal order.

The EU secondary legislation in the fields of migration and refugee law is extensive.[26] Therefore, to analyse the compliance of the provisions of the EU secondary law with provisions of the EU primary law, it is necessary to select an exemplary EU secondary law that will enable the presentation of interpretation problems related to conducting such an analysis. As the legal situation of foreigners seeking international protection in one of the EUMeSt is currently primarily determined by the triad of asylum directives, it appears that their choice is justified and sufficient. The first directive is 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

26 In addition to the triad of asylum directives, such legislation includes, of example, Council Directive 2001/55/EC of 20 July 2001 on minimum standards for providing temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof (OJ L 212, 7 August 2001, pp. 12–23); Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (OJ L 348, 24 December 2008, pp. 98–107); 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 (recast) (OJ L 180, 29 June 2013, pp. 31–59); and Commission Implementing Regulation (EU) No. 118/2014 of 30 January 2014 amending Regulation (EC) No. 1560/2003 laying down detailed rules for the application of Council Regulation (EC) No. 343/2003 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 (OJ L 39, 8 February 2014, pp. 1–43).

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 (recast; hereinafter referred to as the "Qualification Directive").[27] The second is Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast; hereinafter referred to as the "Reception Conditions Directive").[28] The third is Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast; hereinafter referred to as the "Procedural Directive").[29] The EU's adoption of the Qualification, Reception, and Procedure Directives proves that it has moved to the second stage of building a Common European Asylum System.[30] However, before proceeding to a proper analysis, it is necessary to refer to specific provisions of the triads of asylum directives and their juxtaposition with relevant provisions of the EU primary law. For example, in accordance with Art. 30 of the Qualification Directive, the EUMeSt ensure that beneficiaries of international protection have access to healthcare according to the same eligibility criteria as nationals of the EUMeSt that granted such protection. According to Art. 7 Para. 1 of the Reception Directive, applicants may move freely within the territory

27 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 (recast; OJ L 337, 20 December 2011, pp. 9–26).

28 Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast; OJ L 180, 29 June 2013, pp. 96–116).

29 Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast; OJ L 180, 29 June 2013, pp. 60–95).

30 Moreover, it should be noted that as part of the first stage of building a Common European Asylum System, the direction of which was set at the Tampere European Council (see European Parliament, 1999, paras. 13–27) and the first versions of the Qualification Directive (Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third-country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted; OJ L 304, 30 September 2004, pp. 12–23), Reception Directive (Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers; OJ L 31, 6 February 2003, pp. 18–25), and Procedural Directive (Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status; OJ L 326, 13 December 2005, pp. 13–34). It is also impossible not to mention that, in September 2020, the European Commission presented, not yet in force, the New Pact on Migration and Asylum (see European Commission, 2020, para. X). However, the New Pact on Migration and Asylum is not the subject of this study, as it is not yet hard EU law. One can only hint at the apparent tendency in this area to move away from directives towards regulations, which may raise legitimate questions considering the principles of proportionality and subsidiarity. The potential adoption of these legislative proposals in the EU should be read as the beginning of the implementation of the third stage of building a Common European Asylum System.

of the receiving EUMeSt or within the area designated for them by that EUMeSt.[31] According to Art. 15 Para. 3, lit. pursuant to Art. 1(a) of the Procedural Directive, the EUMeSt shall ensure that the person who conducts the interview is competent to consider the personal and general circumstances of the application, including the cultural background, gender, sexual orientation, gender identity, and special needs of the applicant. An interesting example of a Procedural Directive is the provision of Art. 15 Para. 3 lit. d) of the Procedural Directive, according to which the EUMeSt shall ensure that the person conducting the interview on the substance of the application for international protection does not wear a military or police uniform. The chief question that arises in the context of such regulations is the basis of the EU primary law. Thus, each matter regulated in the EU secondary law must be legitimised by a specific provision of the EU primary law, confirming that the EU has the competence to undertake such activities. The Qualification Directive was adopted as stated in its preamble, particularly because of the content of Art. 78 Para. 2 lit. a) and b) of the TFEU. This implies that the EU has the competence to adopt measures relating to the Common European Asylum System in terms of 'a uniform status of asylum for nationals of third countries, valid throughout the European Union' and 'a uniform status of subsidiary protection for nationals of third countries who, without obtaining European asylum, are in need of international protection'.[32] The Reception Directive was adopted as stated in its preamble, particularly because of the content of Art. 78 Para. 2 lit. f) of the TFEU, which provides for the EU competence to adopt measures relating to the Common European Asylum System with regards to 'standards concerning the conditions for the reception of applicants for asylum or subsidiary protection'.[33] However, the Procedural Directive was adopted, as stated in its preamble, particularly because of the content of Art. 78 Para. 2 lit. d) of the TFEU. This provision provides a legal basis for the EU's competence to adopt measures relating to the Common European Asylum System in the field of 'common procedures for the granting and withdrawing of uniform asylum or subsidiary protection status'.[34]

By comparing the regulations contained in the Qualification, Reception, and Procedure Directives with the relevant provisions of the EU primary law, one can conclude that assessing their mutual compatibility is difficult. This is because the triad of asylum directives is characterised by a detailed normative nature. Simultaneously, provisions of the EU primary law are, as already emphasised, characterised by a

31 The designated area must not affect the inviolable sphere of private life and must provide sufficient freedom to guarantee access to all benefits under the Reception Directive.

32 See in terms of the Qualification Directive, Eaton, 2012, pp. 765–792; Bauloz and Ruiz, 2016, pp. 240–268; McAdam, 2005, pp. 461–516; Freier and Jean-Pierre, 2020, pp. 321–362; Lambert, 2006, pp. 161–192; Storey, 2008, pp. 1–49.

33 See in terms of the Reception Directive: Peek and Tsourdi, 2016, pp. 1382–1478; O'Sullivan and Ferri, 2020, pp. 272–307; Velluti, 2016, pp. 203–221; Slingenberg, 2022, pp. 257–276.

34 See on the procedural directive: Ackers, 2005, pp. 1 –34; Schittenhelm, 2019, pp. 229–244; Costello, 2005, pp. 35–70; Costello and Hancox, 2016, pp. 375–445.

general normative nature. Mere juxtaposition of these legal norms does not lead to conclusions relevant to this analysis regarding the compatibility of the provisions of the EU secondary law with those of the EU primary law in the context of the principle of conferral. The same can be said of compliance with the principles of proportionality and subsidiarity. To illustrate the indicated difficulty in assessing conformity, it is necessary to decide whether, for example, Art. 30 of the Qualification Directive is compatible, in particular, with Art. 78 Para. 2 lit. a) and b) of the TFEU. Thus, in this case, it must be decided whether providing beneficiaries of international protection with access to healthcare according to the same eligibility criteria as nationals of the EUMeSt that granted them protection falls within the limits of adopting measures on the Common European Asylum System in terms of 'a uniform status of subsidiary protection for nationals of third countries who, without obtaining European asylum, are in need of international protection'. Another example is the compliance assessment of Art. 7 Para. 1 of the Reception Directive, in particular, Art. 78 Para. 2 lit. f) of the TFEU. In this case, it is necessary to decide whether the guarantee of the applicants' freedom of movement within the territory of the EUMeSt receiving the applicant or in the area assigned to them by the EUMeSt falls within the EU's competence to adopt measures relating to the Common European Asylum System in terms of 'standards concerning the conditions for the reception of applicants for asylum or subsidiary protection'. The last example concerns the conformity assessment in Art. 15 Para. 3 lit. a) and d) of the Procedural Directive, particularly with Art. 78 Para. 2 lit. d) of the TFEU. It is important to decide whether introducing the two requirements of (i) the person conducting the interview to be competent to, inter alia, consider cultural origin, gender, sexual orientation, and gender identity and (ii) the person conducting the interview on the substance of the application for international protection to not wear a military or police force uniform should both fall within the EU competence to adopt measures concerning the Common European Asylum System with regard to 'common procedures for the granting and withdrawing of uniform asylum or subsidiary protection status'. It is worth emphasising that the reference in these cases to the content of Art. 78 Para. 1 of the TFEU[35] does not solve the problem of interpretation; rather, it complicates the problem further because this article is an even more general legal norm. It is noteworthy that such dilemmas concern most provisions of the EU secondary law, and only selected examples have been presented. The solution to these interpretation problems is not to use literal or systematic interpretation techniques. In such cases, it is necessary to refer to a purposeful interpretation. This is because the validity of specific provisions cannot be determined based on the general standards. In the examples presented, answers regarding the EU secondary

35 Content of Art. 78(1) of the TFEU:
The Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement. This policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties.

law's compatibility with the EU primary law may be either positive or negative. The reason for this is that limits of the aforementioned EU competences can either include everything or remain minimal. Thus, it is extremely important and relevant to answer the question regarding the EUMeSt's intention when transferring competences to the EU, as defined in Art. 78 of the TFEU. Moreover, it is necessary to exactly decipher the sovereign will of the EUMeSt, because it was decided based on the actual limits of the EU's competences. This leads to the conclusion that indicating the entity that should be authorised to decipher the sovereign will of the EUMeSt is fundamental. In addition, similar interpretation problems arise in the context of compliance with the EU secondary legislation with the principles of proportionality and subsidiarity. In this case and in the context of the same examples, a decision on compliance can be made based on not a literal or systemic interpretation but rather a purposeful interpretation. The problem of interpretation is determining whether Art. 30 of the Qualification Directive, Art. 7 Para. 1 of the Reception Directive, Art. 15 Para. 3 lit. a) and d) of the Procedural Directive, and other provisions of the EU secondary law under migration and refugee law are actions taken by the EU (i) in a situation and to the extent that the objectives of the intended action could not be sufficiently achieved by the EUMeSt at either the central or the regional and local levels; (ii) where the objectives could be better achieved at the EU level owing to the size or effects of the proposed action; or (iii) where their scope and form do not go beyond what is necessary to achieve the objectives of the EU primary law. In these cases, it is fundamentally important to indicate which entity should make a binding decision regarding the compatibility of the EU secondary law with the principles governing the exercise of EU competence.

In sum, the EUMeSt, using their sovereign powers and under the principle of conferral, transferred competences in the field of migration and refugee law to the EU, as defined in the EU primary law. The limits of these competences are set by the EU image of the principle of conferral. However, the treaty provisions relevant in this respect are of a general and directional nature. There is much room for interpretation here, which is directly visible in the situation of juxtaposing the EU secondary law with its appropriate basis in the EU primary law. Such a juxtaposition clearly demonstrates that it is not possible to assess the conformity of the EU secondary law with the principle of conferral set out in the EU primary law to the full extent using a literal and systemic interpretation. It is necessary to interpret the actual and sovereign will of the EUMeSt purposefully from the moment of ratification of the currently binding EU primary law. A similar situation applies to compliance with the EU secondary legislation on border checks, asylum, and immigration policies with the principles of subsidiarity and proportionality. In this case, based on not a literal or systemic interpretation but a purposeful interpretation, it is possible to decide on compliance. Importantly, the entire EU bases its operations on three basic principles: the principles of conferral, subsidiarity, and proportionality. This implies that making interpretative decisions related to these principles is of key importance for not only the functioning of the EU, including its competences, but also a sovereign

EUMeSt. Interpretations of the scope and form of EU activities directly determine the scope and form of EUMeSt activities. This leads to the conclusion that interpretative decisions regarding the principles of conferral, subsidiarity, and proportionality affect the content of the decisions made by the EUMeSt in connection with the EU primary law. This is of fundamental legal importance.

Therefore, the entire scientific discourse to date has led to the need to analyse the last research segment in this chapter, that is, the indication of which entity should be authorised to make binding interpretative decisions regarding compliance with the EU secondary law relating to border checks, asylum, and immigration policies with the principles of conferral, proportionality, and subsidiarity.

5. Decision-maker on EU competences

In accordance with the current legal framework in the EU, it is clear that considering Art. 19 of the TEU,[36] the CJEU is the EU institution responsible for respecting the interpretation and application of the EU primary law. Therefore, the CJEU is competent to consider, in principle, every case in which it is necessary to interpret the provisions of the EU primary law. We discuss literal, systemic, and purposeful interpretations. As a rule, the EU primary law itself states that the CJEU does not have jurisdiction in a strictly defined matter. According to Art. 275 of the TFEU, the CJEU has no jurisdiction over provisions relating to the Common Foreign and Security Policy or the acts adopted on their basis.[37] However, the same provision also emphasises that the CJEU is competent to review compliance with Art. 40 of the TEU and adjudicate on complaints lodged under the conditions provided for in Art. 263 of the TFEU regarding reviewing the legality of decisions imposing restrictive measures against natural or legal persons adopted by the Council based on Art. 23 to 46 of the TEU.

Therefore, considering the version of the EU primary law currently in force, after the adoption of the Treaty of Lisbon,[38] it is clear which entity is authorised to make decisions in the fields of conferral, proportionality, and subsidiarity. However, this

36 Thought-provoking rulings on Art. 19 of the TEU: C-204/21 *European Commission v. Republic of Poland*, Judgment, 5 June 2023, ECLI:EU:C:2023:442; C-156/21 *Hungary v. European Parliament and Council of the European Union*, Judgment, 16 February 2022, ECLI: EU:C:2022:97; C-157/21 *Republic of Poland v. European Parliament and Council of the European Union*, Judgment, 16 February 2022, ECLI:EU:C:2022:98.

37 See C-72/15 *The Queen on the application of PJSC Rosneft Oil Company v. Her Majesty's Treasury, Secretary of State for Business, Innovation and Skills, Financial Conduct Authority*, Judgment, 28 March 2017, ECLI:EU:C:2017:236.

38 Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007 (OJ C 306, 17 December 2007, pp. 1–271).

study does not aim to indicate which entity is legitimised from the perspective of the EU legal framework, but rather which entity should be legitimised to increase the transparency of the EU's functioning, counteract the phenomenon of competence creep, and prevent the blurring of the EU's status as an international organisation. Therefore, at this point, it is necessary to consider which solution best meets the objectives set in this manner, justified by concerns for the sovereignty of the EUMeSt, and ensures compliance of the scope and form of EU activities with the principles of conferral, proportionality, and subsidiarity, which have their own specificity and are determined by the actual will of the EUMeSt image in the EU primary law. When analysing possible solutions, it should be noted that, generally and at the moment, regardless of any arguments, there are two possible solutions in the indicated scope. First, EU institutions, such as the EC, Council, and CJEU, or one of them, should be authorised to make binding decisions regarding the interpretation of the principles of granting, proportionality, and subsidiarity in the EU. Second, the EUMeSt should be authorised to make such decisions. All other solutions that fall between these two should be classified as hybrids.

Referring to the solution that comprises providing the decision-making field to EU institutions, or one of them, when interpreting the principles of conferral, proportionality, and subsidiarity, it should be stated that this solution is the current and functioning standard within the EU. As noted above, considering Art. 19 of the TEU, the CJEU, which is an EU institution, has the task to respect the law in the interpretation and application of the EU primary law. However, it should be emphasised that such a solution is not conducive to objectively controlling EU activity in terms of the triad of principles set out in Art. 5 of the TEU, which have their own fundamental specificity. This is about the fullest possible implementation of the aforementioned objectives, that is, increasing the transparency of the EU's functioning, counteracting the phenomenon of competence creep, and preventing the blurring of the EU's status as an international organisation. Unfortunately, adoption of the currently assessed solution in the EU has led to the opposite effects. It appears that the reason for this was natural. If the EU decides on its own the scope and form of exercising its competences through a creative process because it is based on teleological interpretation, interpretation of the principles of conferral, subsidiarity, and proportionality leads to a lack of objectivity. Objectivity is lost first when one judges one's own case (*nemo iudex in causa sua*). Such a situation occurs in the analysed case because, as already mentioned, the principles of Art. 5 of the TEU have their own fundamental specificity. These are not legal norms of a standard nature, as their content determines the most sensitive aspects of EU functioning. These legal norms determine the validity and content of other norms in the EU legal order. Therefore, they can be referred to as meta-norms.[39] It appears that an important purpose of the principles of conferral, subsidiarity, and proportionality is to act as a watchdog so that the EU acts in accordance with the actual will of the EUMeSt, which expresses its will by being bound

39 See Czepita, 1994, pp. 31–38.

by the provisions of the EU primary law.[40] Therefore, if we assume that the principles of Art. 5 of the TEU are the watchdog overseeing the EU and continue with this example, this watchdog cannot be employed by the EU, which includes paying him and deciding on his responsibilities. In such a situation, the function of the guard misses the illusory point. In addition, it is noteworthy that the entire issue concerns decoding the image of the actual will of the EUMeSt from the moment of binding the current version of the provisions of the EU primary law. For example, in criminal proceedings, we want to know specific facts about certain circumstances; the easiest method is to ask questions of the person to whom these facts directly concern (e.g. the defendant or a witness).[41] In such a case, the court will not consider what the person saw, thought, or did, but will interrogate them. In addition, it is worth mentioning that if the adjudicating panel includes a person whose legal or factual interest is directly related to the outcome of the court case, there are precise provisions for the mandatory exclusion of a judge in this circumstance.[42] These are European standards that are part of the rule of law[43] and the principle of citizens' trust in the state and law, including the principle of legal certainty.[44] This leads to the conclusion that it is not the EU institutions, but the EUMeSt, that should express their opinion on the actual scope of their will from the moment of binding the current version of the EU primary law. This is because the EUMeSt created the EU, the source of the EU's competences are the EUMeSt's sovereign powers, and the EUMeSt defined the content of the rules from Art. 5 of the TEU; thus, the EUMeSt have the most complete information regarding the actual image of their will. In such a situation, the EUMeSt will not be a judge in their own case, because it does not involve a dispute but rather sovereign decision-making on the scope and form of exercising state powers (the essence of sovereignty). In the context of the latter, it is worth mentioning that the EU, as an international organisation, does not have the attribute of sovereignty, and, therefore, in the same situation, it will be a judge in its own case. Therefore, leaving the decision-making field regarding the interpretation of the principles of conferral,

40 By ratifying either the Lisbon Treaty or Accession Treaty [e.g. Treaty between the Kingdom of Belgium, the Republic of Bulgaria, the Czech Republic, the Kingdom of Denmark, the Federal Republic of Germany, the Republic of Estonia, Ireland, the Hellenic Republic, the Kingdom of Spain, the French Republic, the Italian Republic, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Grand Duchy of Luxembourg, the Republic of Hungary, the Republic of Malta, the Kingdom of the Netherlands, the Republic of Austria, the Republic of Poland, the Portuguese Republic, Romania, the Republic of Slovenia, the Slovak Republic, the Republic of Finland, the Kingdom of Sweden, the United Kingdom of Great Britain and Northern Ireland (Member States of the European Union) and the Republic of Croatia concerning the accession of the Republic of Croatia to the European Union; OJ L 112, 24 April 2012, pp. 10–110].

41 For example, see Art. 177 of the Act of 6 June 1997, the Code of Criminal Procedure (hereinafter referred to as the "Code of Criminal Procedure"; i.e. Journal of Laws 2022, item 1375, as amended).

42 For example, see Art. 40 of the Code of Criminal Procedure; on the scope of Polish criminal procedure, see Wielec, 2017a, pp. 111–124; Wielec, 2014, pp. 39–44; Wielec, 2020, pp. 76–87; Wielec, 2017b, pp. 51–96.

43 See Varga, 2023, pp. 13–58.

44 See Węglińska, 2020, pp. 169–188.

proportionality and subsidiarity to the EUMeSt appears to be sufficiently justified, not only in the area of border control, asylum, and immigration policies but also more broadly within the EU legal order. Nevertheless, this conclusion does not apply to other provisions of EU primary law. As a rule, it is appropriate for the CJEU to interpret it. This is because these provisions do not have the status of meta-norms but rather have a standard character.

Referring to the solution that comprises providing the EUMeSt the decision-making field in interpreting the principles of conferral, proportionality, and subsidiarity, it should be stated that, based on the above arguments, this solution is conducive to objective control of the EU's activity in terms of the triad of principles of Art. 5 of the TEU. Such a solution is also conducive to the achievement of objectives such as counteracting the phenomenon of competence creep and preventing blurring of the EU's status as an international organisation. In addition, this appears to be consistent with the general principles of public international law. However, in this case, the objective of increasing transparency in the EU's functioning is worse. This is because the internal structure of the EUMeSt determines which of its national entities is competent to take a position on behalf of the EUMeSt on the compliance of EU activities with the principles of Art. 5 of the TEU.[45] Most likely, in the vast majority of cases, these entities comprise national constitutional courts (constitutional tribunals or councils).[46] However, such a solution could lead to excessive decision-making dispersion, which could result in organisational chaos. Thus, a solution may be considered wherein the EUMeSt would create a joint entity (within or outside the EU) under which they would make sovereign decisions on compliance of EU activities with the principles of Art. 5 of the TEU. Instead of establishing a new entity, it is also possible to designate one of the EU's institutions for this purpose. However, because of the need to represent only national interests in this case, the Council or European Council[47] could potentially be considered. However, regardless of the form, in this context, it is important that the vote of each EUMeSt be treated as a sovereign decision of a specific EUMeSt in relation to the EU, along with all the related consequences, such as suspension of the EU secondary legislation in relation to this specific EUMeSt or the need to amend the EU primary law.[48] It appears that these are the standards of sovereignty resulting from the statehood of the EUMeSt. In addition, it may be considered that the EUMeSt jointly set a deadline within which they should

45 However, it appears that a boundary condition should be that such an entity becomes entrenched in the basic act or constitution of the selected state.

46 For example, see Art. 188 of the Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws 1997 No. 78, item 483, as amended).

47 However, in that case it would be necessary to amend the EU primary law through a treaty amending the provisions of the TEU and TFEU.

48 A unilateral decision by an MNC should not lead to a change in the EU primary law in relation to it, as this could interfere with the sovereignty of other MNCs. However, it is important to keep in mind the possibilities offered by the institution of reservations in public international law, which can be applied successfully when binding the provisions of the EU primary law.

make decisions to avoid possible protractions or inaction. Each EUMeSt should also be free to submit cases for resolution under the principles of Art. 5 of the TEU.

However, the above proposals are only recommendations, as impositions cannot be placed on sovereign subjects of public international law regarding the manner in which they make decisions about interpretation of the principles of proportionality, subsidiarity, and conferral in the EU. Nevertheless, this recommendation appears to be a solution that enables more effective supervision of the EU's activities than the current EU standard in terms of the triad of principles set out in Art. 5 of the TEU. This also leads to the elimination of, or at least a significant reduction in, the occurrence of such pathologies in the EU, such as lack of transparency in the EU's functioning, the phenomenon of competence creep, or blurring of the EU's status as an international organisation. However, currently in the EU, considering the already cited Art. 19 of the TEU, the fact that another standard applies does not mean that it is appropriate or unchangeable. This also does not mean that it should be assessed positively.[49] This is valid in the EU because the EUMeSt agreed to it by ratifying the current version of the EU primary law. However, as a natural consequence of the sovereignty resulting from the statehood of the EUMeSt, they can change their will by reporting the need to depart from one standard in the direction of another. The changeability of such standards should be made conditional on the existence of a justified need, and it appears that, in the analysed case and considering the arguments cited, such a justified need exists. For all these reasons, it is recommended that the EUMeSt at least consider using their indisputable sovereignty and make this seemingly justified change in the functioning of an international organisation, that is, the EU.

6. Conclusion

The EU was established because of the sovereign decisions of the first (founding) EUMeSt. Subsequent EUMeSt joined or left it, also making independent decisions. The EU does not have its own competences, resulting from being an international organisation. All competences the EU has assigned to it as a result of sovereign decisions of the EUMeSt are in accordance with the principle of conferral. The source of the EU competences is, therefore, competences of the EUMeSt resulting from their statehood and sovereignty. The EU is neither a state nor a sovereign. The EU is an international organisation founded by states to pursue common goals. Therefore, specific competences have been provided by the EUMeSt, including those related to border control, asylum, and immigration policies. Although the EUMeSt may, at any time and each separately, remove the competences transferred to the EU

49 This standard has stood the test of time, and its objective evaluation is fully justified.

using the power of their sovereignty, the EUMeSt decided to provide additional protection contained in the content of the EU primary law: the principles of subsidiarity and proportionality. Therefore, considering the arguments cited in this study, it is recommended to consider shifting the decision-making field from the CJEU to the EUMeSt in the context of interpreting the principles of conferral, proportionality, and subsidiarity in the EU, including the assessment of the conformity of the EU secondary law relating to migration law and asylum with these rules. At the end of the scientific discourse, one can refer to the position of the Polish Constitutional Tribunal expressed in the judgement of 7 October 2021.[50] The Polish Constitutional Tribunal noted that

> the Constitutional Tribunal fully appreciates the place and role of the CJEU as an institution solely authorised to adjudicate in the areas entrusted by the Treaty, but only within the competences transferred to the EU, while respecting the constitutional identity and basic functions of the Member States as well as the principles of subsidiarity and proportionality, and provided that EU law is interpreted in a way that is not manifestly arbitrary. These are the impassable limits of a European law-friendly interpretation of the Constitution. Leaving the Constitutional Tribunal's control over the constitutionality of any norms of law which, on any basis, are binding in the Republic of Poland, would mean consent to the resignation of sovereignty. The provisions of the Lisbon Treaty should ensure a balance between preserving the subjectivity of the Member States and the subjectivity of the EU. From the point of view of the fundamental principles of the Union, an interpretation of the treaty provisions aimed at eliminating state sovereignty or a threat to national identity, taking over non-treaty sovereignty in the area of competences not transferred, would be contrary to the Treaty of Lisbon. (judgement of the Constitutional Tribunal ref. K 32/09)

Finally, the content of the norm is contained in Art. 4 of the TEU.[51] The EU should respect the EUMeSt's equality against the EU primary law as well as their national identity, which is inextricably linked to their basic political and constitutional structures, including those related to their regional and local governments. The EU should respect the essential functions of the state, particularly those aimed at ensuring territorial integrity, maintaining public order, and protecting national security. This provision emphasises that national security remains the sole responsibility of each EUMeSt.

50 Judgement of the Constitutional Court of 7 October 2021 on file K 3/21 (Journal of Laws of 2021, item 1852).

51 See C-546/14 *Degano Trasporti Sas di Ferrucio Degano & C*, Judgement, 7 April 2016, ECLI:EU:C:2016:206; C-317/18 *Cátia Correia Moreira v. Município de Portimão*, Judgement, 13 June 2019, ECLI:EU:C:2019:499.

References

Bibliography

Ackers, D. (2005) 'The negotiations on the asylum procedures directive', *European Journal of Migration and Law,* 7(1), pp. 1–34; https://doi.org/10.1163/1571816054396860.

Bauloz, C., Ruiz, G. (2016) 'Refugee Status and Subsidiary Protection: Towards a Uniform Content of International Protection?' in Chetail, V., De Bruycker, P., Maiani, F. (eds.) *Reforming the Common European Asylum System: The New European Refugee Law*. Brill/ Nijhoff, pp. 240–268; https://doi.org/10.1163/9789004308664_010.

Calliess, C. (1999) *Subsidiaritäts- und Solidaritätsprinzip in der Europäischen Union. Vorgaben für die Anwendung von Art. 5 (ex-Art. 3b) EGV nach dem Vertrag von Amsterdam*. Second edn. Nomos.

Chan, P. C. W. (2006) 'The protection of refugees and internally displaced persons: Non-Refoulement under customary international law?', *The International Journal of Human Rights*, 10(3), pp. 231–239; https://doi.org/10.1080/13642980600828552.

Chauvin, T., Stawecki, T., Winczorek P. (2021) *Wstęp do prawoznawstwa*. Warsaw: C.H. BECK.

Choduń, A. (2016) 'Koncepcja wykładni prawa Macieja Zielińskiego', *Ruch Prawniczy, Ekonomiczny i Socjologiczny*, 78(4), pp. 57–67; https://doi.org/10.14746/rpeis.2016.78.4.5.

Costello, C. (2005) 'The Asylum Procedures Directive and the proliferation of safe country practices: deterrence, deflection and the dismantling of international protection?', *European Journal of Migration and Law*, 7(1), pp. 35–70; https://doi.org/10.1163/1571816054396842.

Costello, C., Hancox, E. (2016) 'The Recast Asylum Procedures Directive 2013/32/EU: Caught between the stereotypes of the abusive asylum-seeker and the vulnerable refugee' in Chetail, V., De Bruycker, P., Maiani, F. (eds.) *Reforming the Common European Asylum System*, Brill/Nijhoff, pp. 375–445; https://doi.org/10.1163/9789004308664_014.

Czepita, S. (1994) 'Reguły Konstrukcji Systemu Prawnego a Prawotwórstwo', *Ruch Prawniczy, Ekonomiczny i Socjologiczny*, 54(4), pp. 31–38.

Eaton, J. (2012) 'The internal protection alternative under European union law: examining the recast qualification directive', *International Journal of Refugee Law*, 24(4), pp. 765–792; https://doi.org/10.1093/ijrl/ees051.

Follesdal, A. (2013) 'The principle of subsidiarity as a constitutional principle in international law', *Global Constitutionalism*, 2(1), pp. 37–62; https://doi.org/10.1017/S2045381712000123.

Freier, L.F., Gauci, J.P. (2020) 'Refugee Rights Across Regions: A comparative overview of legislative good practices in Latin America and the EU', *Refugee Survey Quarterly*, 39(3), pp. 321–362; https://doi.org/10.1093/rsq/hdaa011.

Garben, S. (2020) 'From sneaking to striding: Combatting competence creep and consolidating the EU legislative process', *European Law Journal,* 26(5–6), pp. 429–447; https://doi.org/10.1111/eulj.12408.

Goodwin-Gill, G. (2011) 'The right to seek asylum: Interception at sea and the principle of non-refoulement', *International Journal of Refugee law*, 23(3), pp. 443–457; https://doi.org/10.1093/ijrl/eer018.

Hermerén, G. (2012) 'The principle of proportionality revisited: interpretations and applications', *Medicine, Health Care and Philosophy,* 15(4), pp. 373–382; https://doi.org/10.1007/s11019-011-9360-x.

Kondej, M. (2019) 'Przełamanie rezultatów wykładni językowej zgodnie z zasadą nadrzędności Konstytucji', *Ruch Prawniczy, Ekonomiczny i Socjologiczny,* 81(3), pp. 39–52; https://doi.org/10.14746/rpeis.2019.81.3.3.

Kotowski, A. (2017) 'Ujęcia interpretacji celowościowej w teorii prawa', *Prokuratura i Prawo*, 11, pp. 137–153.

Kuś, A. (2014) 'Rodzaje kompetencji Unii Europejskiej a unijna polityka podatkowa', *Studia z polityki publicznej*, 2(2), pp. 79–95; https://doi.org/10.33119/KSzPP.2014.2.4.

Lambert, H. (2006) 'The Eu Asylum Qualification Directive, Its Impact on the Jurisprudence of the United Kingdom And International Law', *International & Comparative Law Quarterly,* 55(1), pp. 161–192; https://doi.org/10.1093/iclq/lei070.

Łazor, M. (2021) 'Kilka uwag o wykładni celowościowej w prawie ochrony środowiska', *Ruch Prawniczy, Ekonomiczny i Socjologiczny*, 83(4), pp. 31–48; https://doi.org/10.14746/rpeis.2021.83.4.3.

Lewandowska, K., Lewandowski, T. (2010) 'Wykładnia celowościowa i językowa w prawie administracyjnym. Wytyczne doktryny i praktyczny przykład ich zastosowania', *Samorząd Terytorialny*, 9, pp. 19–29.

Lohse, K. (2014) 'The European public prosecutor: issues of conferral, subsidiarity and proportionality', in Erkelens, L., Meij, A., Pawlik, M. (eds.) *The European Public Prosecutor's Office: An extended arm or a Two-Headed dragon*. T.M.C. Asser Press The Hague, pp. 165–182; https://doi.org/10.1007/978-94-6265-035-0_10.

Loper, K. (2006) 'Human rights, non-refoulement and the protection of refugees in Hong Kong', *International Journal of Refugee Law*, 22(3), pp. 404–439; https://doi.org/10.1093/ijrl/eeq029.

McAdam, J. (2005) 'The European Union qualification directive: the creation of a subsidiary protection regime', *International Journal of Refugee Law*, 17(3), pp. 461–516; https://doi.org/10.1093/ijrl/eei018.

Melé, D. (2005) 'Exploring the principle of subsidiarity in organisational forms' *Journal of Business Ethics*, 60, pp. 293–305; https://doi.org/10.1007/s10551-005-0136-1.

Mostowik, P. (2011) 'Kwestie kompetencji Unii Europejskiej oraz warunków pomocniczości i proporcjonalności prawodawstwa unijnego na tle projektów rozporządzeń o jurysdykcji, prawie właściwym i skuteczności zagranicznych orzeczeń w majątkowych sprawach małżeńskich i partnerskich', *Zeszyty Prawnicze BAS*, 31(3), pp. 9–41.

O'Sullivan, C., Ferri, D. (2020) 'The Recast Reception Conditions Directive and the Rights of Asylum Seekers with Disabilities: Opportunities, Challenges and the Quest for Reform', *European Journal of Migration and Law,* 22(2), pp. 272–307; https://doi.org/10.1163/15718166-12340077.

Öberg, J. (2017) 'Subsidiarity as a Limit to the Exercise of EU Competences', *Yearbook of European Law*, 36, pp. 391–420; https://doi.org/10.1093/yel/yew027.

Pache, E., Rösch, F. (2008) 'Der Vertrag von Lissabon', *Neue Zeitschrift für Verwaltungsrecht*, 28(5), pp. 473–480.

Peek, M., Tsourdi, L., (2016) 'Asylum Reception Conditions Directive 2013/33/EU' in Hailbronner K., Thym, D. (eds.) *EU Immigration and Asylum Law*. Second edn. Bloomsbury Publishing, pp. 1382–1478; https://doi.org/10.5771/9783845259208-1382.

Portuese, A. (2013) 'Principle of proportionality as principle of economic efficiency', *European Law Journal*, 19(5), pp. 612–635; https://doi.org/10.1111/j.1468-0386.2012.00611.x.

Poto, A. (2007) 'The principle of proportionality in comparative perspective', *German Law Journal*, 8(9), pp. 835–869; https://doi.org/10.1017/S2071832200006003.

Prechal, S. (2010) 'Competence creep and general principles of law', *Review of European administrative law*, 3(1), pp. 5–22; https://doi.org/10.7590/REAL_2010_01_02.

Schittenhelm, K. (2019) 'Implementing and rethinking the European Union's asylum legislation: the asylum procedures directive', *International migration*, 57(1), pp. 229–244; https://doi.org/10.1111/imig.12533.

Slingenberg, L. (2022) 'Political Agreement on a Recast Asylum Reception Conditions Directive: Continuation of Tents, Containment and Discipline?', *Reforming the Common European Asylum System*, pp. 257–276; https://doi.org/10.5771/9783748931164-257.

Smolak, M. (2014) 'Aksjologiczne założenia stosowania dyrektyw wykładni celowościowej', *Ruch Prawniczy, Ekonomiczny i Socjologiczny*, 76(1), pp. 5–12; https://doi.org/10.14746/rpeis.2014.76.1.1.

Spicker, P. (1991) 'The principle of subsidiarity and the social policy of the European Community', *Journal of European Social Policy*, 1(1), pp. 3–14; https://doi.org/10.1177/095892879100100102.

Storey, H. (2008) 'EU Refugee Qualification Directive: A Brave New World?', *International Journal of Refugee Law*, 20(1), pp. 1–49; https://doi.org/10.1093/ijrl/een012.

Varga, C. (2023) 'Rechtsstaat, Rule of Law – Expectations, criticisms, and the nature of claims' in Pastuszko, G. (ed.) *Rule of Law.* Warsaw: The Publishing House of the Institute of Justice, pp. 13–58.

Velluti, S. (2016) 'The revised Reception Conditions Directive and adequate and dignified material reception conditions for those seeking international protection', *International Journal of Migration and Border Studies*, 2(3), pp. 203–221; https://doi.org/10.1504/IJMBS.2016.077640.

Weatherill, S. (2004) 'Competence Creep and Competence Control', *Yearbook of European Law*, 23(1), pp. 1–55; https://doi.org/10.1093/yel/23.1.1.

Węglińska, J. (2020) 'Zasada ochrony zaufania obywateli do państwa i do stanowionego przez nie prawa jako dyrektywa poprawnej legislacji', *Prawo w Działaniu*, 42, pp. 169–188; https://doi.org/10.32041/PWD.4207.

Wielec, M. (2014) 'Instytucja kuratora procesowego w postępowaniu karnym-uwagi na marginesie Uchwały 7 sędziów Sądu Najwyższego z dnia 30 września 2010 r., sygn. I KZP 10/10', *Studia Prawnicze i Administracyjne*, 8(2), pp. 39–44.

Wielec, M. (2017a) 'Koincydencja postępowania karnego i dyscyplinarnego w kontekście przepisów ustawy Prawo o szkolnictwie wyższym', *Białostockie Studia Prawnicze*, 22(1), pp. 111–123; https://doi.org/10.15290/bsp.2017.22.01.en.09.

Wielec, M. (2017b) *Wartości – analiza z perspektywy osobliwości postępowania karnego*. Lublin: Academicon.

Wielec, M. (2020) 'Immunitet versus przeszukanie w postępowaniu karnym', *Prawo w Działaniu*, 2020/41, pp. 76–87; https://doi.org/10.32041/PWD.4104.

Żelazna, E. (2022) 'The external dimension of the principle of conferral: division of competences in international trade' in Ziegler, K., Neuvonen, P., Moreno-Lax, V. (eds.) *Research Handbook on General Principles in EU La*. Cheltenham Glos: Edward Elgar Publishing, pp. 593–606; https://doi.org/10.4337/9781784712389.00047.

Online sources

European Parliament (1999) *Presidency Conclusions, Tampere European Council, October 15 and 16, 1999* [Online]. Available at: https://www.consilium.europa.eu/media/21059/tampere-european-council-presidency-conclusions.pdf (Accessed: 22 April 2023).

European Commission (2020) *Communication from the Commission on a new pact on migration and asylum* [Online]. Available at: https://commission.europa.eu/publications/migration-and-asylum-package-new-pact-migration-and-asylum-documents-adopted-23-september-2020_en (Accessed: 22 April 2023).

CHAPTER V

Migration and Refugee Affairs: Role of Constitutional Court in Poland, Hungary, the Czech Republic, Slovakia, Serbia, Croatia, Slovenia and Romania

Bartłomiej Oręziak

Abstract

The chapter highlights the roles of national constitutional courts in Poland, Hungary, the Czech Republic, Slovakia, Serbia, Croatia, Slovenia, and Romania. A national constitutional court exists in these countries in accordance with the supreme law regulations. The common denominator is that each national constitutional court has the power to a) assess the compatibility of lower-level legislation with higher-level legal regulations, specifically with the supreme law in a given country (constitution, fundamental law, etc.) and b) derogate or repeal, and sometimes temporarily suspend, in part or whole, legal norms declared unconstitutional. Aside from certain differences, these competencies seem to be a shared standard across all the analysed states. Additionally, in each state analysed, some regulations within the supreme law are about migration and asylum. The combination of these regulations with the indicated powers of national constitutional courts potentially allows for strong influence on topics related to migration and asylum, at least theoretically. Therefore, this chapter examines the jurisprudence of the national constitutional courts in Poland, Hungary, the Czech Republic, Slovakia, Serbia, Croatia, Slovenia, and Romania. The primary insights from this jurisprudence were presented and examined in terms of the power of position and image of position. This served as the basis for proposing an original

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methodology to assign a specific role to each national constitutional court and then to make an assignment.

Keywords: constitutional law, migration, asylum, sovereignty, constitutional courts, comparative law.

1. Introduction

This study's central question is the constitutional courts' roles in Poland, Hungary, the Czech Republic, Slovakia, Serbia, Croatia, Slovenia, and Romania concerning migration and refugee affairs. This involves primarily, though not exclusively, an analysis of the relevant jurisprudence of the constitutional courts of the selected countries. First, the constitutional status of the constitutional courts in Poland, Hungary, the Czech Republic, Slovakia, Serbia, Croatia, Slovenia, and Romania is presented. The aim is to show what legitimacy and competencies constitutional courts have in the analysed countries and whether there are any differences. Then, we discuss the constitutional aspects of migration and refugee affairs in these countries. The aim is to verify whether there is a legal basis for migration and asylum within the norms of the highest national law. In other words, the objective is to examine whether the highest law of a given country contains provisions that enable the national constitutional court to thematically focus on migration and refugees and exercise its competences in this area. The third part of this chapter is an analysis of the relevant case law of constitutional courts in Poland, Hungary, the Czech Republic, Slovakia, Serbia, Croatia, Slovenia, and Romania. This analysis illustrates the image of position and the power of position of the national constitutional courts in migration and asylum matters, which is crucial for the subsequent part the paper, involving categorising the role of the constitutional courts in Poland, Hungary, the Czech Republic, Slovakia, Serbia, Croatia, Slovenia, and Romania concerning migration and refugee affairs. The result of this categorisation does not only assign each national constitutional court one of the defined roles in the field of migration and asylum but also determines the hierarchy (significance) of these roles. The penultimate part of this chapter presents proposals for a standard concerning the constitutional court's role in asylum and refugee affairs, followed by the paper's conclusions.

2. Constitutional status of the constitutional courts in Poland, Hungary, the Czech Republic, Slovakia, Serbia, Croatia, Slovenia, and Romania

In Poland, the constitutional status of the national constitutional court is determined by the provisions of the Constitution of the Republic of Poland (CRP).[1] Under Art. 188 points from (1) to (5) CRP, the Constitutional Tribunal[2] shall adjudicate regarding the following matters: (1) the conformity of statutes and international agreements to CRP; (2) the conformity of a statute to ratified international agreements whose ratification required prior consent granted by statute; (3) the conformity of legal provisions issued by central State organs to CRP, ratified international agreements and statutes; (4) the conformity to CRP of the purposes or activities of political parties; (5) complaints concerning constitutional infringements, as specified in Art. 79 (1) CRP.[3] Article 189 CRP stresses that the Constitutional Tribunal shall settle disputes over authority between the central constitutional organs of the state. According to Art. 190 (1) CRP, judgments of the Constitutional Tribunal shall be of universally binding application and final. According to Art. 190 (2) CRP, judgments of the Constitutional Tribunal regarding matters specified in Article 188 CRP, shall be required to be immediately published in the official publication in which the original normative act was promulgated. If a normative act has not been promulgated, the judgment shall be published in the Official Gazette of the Republic of Poland (Monitor Polski). According to Art. 190 (3) CRP, a judgment of the Constitutional Tribunal, shall take effect from the day of its publication. However, the Constitutional Tribunal may specify another date for the end of the binding force of a normative act. Such a period may not exceed 18 months in relation to a statute or 12 months in relation to any other normative act. Where a judgment has financial consequences not provided for in the budget, the Constitutional Tribunal shall specify the date for the end of the binding force of the normative act concerned after seeking the opinion of the Council of Ministers. Pursuant to Art. 190 (4) CRP, a judgment of the Constitutional Tribunal on the non-conformity to the CRP, an international agreement or statute, of a normative act based on which a legally effective judgment of a court, a final administrative decision, or settlement of other matters was issued, shall be a basis for reopening proceedings, or for quashing the decision or other

1 The Constitution of the Republic of Poland [Online]. Available at: https://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm (Accessed: 2 August 2023).

2 In Poland, in fact, this is not constitutional court but constitutional tribunal (It's only a semantic difference based on history).

3 According to Art. 79 (1) CRP, in accordance with principles specified by statute, everyone whose constitutional freedoms or rights have been infringed, shall have the right to appeal to the Constitutional Tribunal for its judgment on the conformity to the CRP of a statute or another normative act upon which basis a court or organ of public administration has made a final decision on his freedoms or rights or on his obligations specified in CRP; This is constitutional complaint.

settlement in a manner and on principles specified in provisions applicable to the given proceedings. Pursuant to Art. 190 (5) CRP, a majority vote shall make judgments of the Constitutional Tribunal. Additionally, in light of Art. 193 CRP, any court may refer a question of law to the Constitutional Tribunal as to the conformity of a normative act to the CRP, ratified international agreements, or statutes if the answer to such a question of law will determine an issue currently before such a court.[4]

The Fundamental Law of Hungary (FLH)[5] contains provisions defining national constitutional courts' status. According to Art. 24 (1) FLH the Constitutional Court shall be the principal organ for protecting FLH. Art. 24 (2) points from a) to g) FLH provides that the Constitutional Court: a) shall examine adopted acts not yet promulgated for conformity with FLH; b) shall, at the initiative of a judge, review the conformity with FLH of any law applicable in a particular case as a priority but within no more than ninety days; c) shall, based on a constitutional complaint, review the conformity with FLH of any law applied in a particular case; d) shall, based on a constitutional complaint, review the conformity with FLH of any judicial decision; e) shall, at the initiative of the Government, one-quarter of the Members of the National Assembly, the President of the Curia, the Prosecutor General or the Commissioner for Fundamental Rights, review the conformity with FLH of any law; f) shall examine any law for conflict with any international treaties; g) shall exercise further functions and powers as laid down in FLH[6] and in a cardinal act.[7] Art. 24 (3) points from a) to c) FLH provides that Constitutional Court: a) shall, within its powers set out in Art. 24 (2) b), c), and e) FLH, annul any law or any provision of a law which conflicts with FLH; b) shall, within its powers set out in Art. 24 (2) d) FLH, annul any judicial decision which conflicts with FLH; c) may, within its powers set out in Art. 24 (2) f) FLH, annul any law or any provision of a law which conflicts with an international treaty. In light of Art. 24 (3) FLH, the Constitutional Court shall also determine the legal consequences set out in a cardinal act. What is also important, in accordance with Art. 24 (4) FLH, is that provisions of a law that were not requested to be reviewed may be reviewed and annulled by the Constitutional Court, but only

4 Other important constitutional regulations related to the Constitutional Court in Poland: Art. 191 CRP (Entities legitimized to apply to the Constitutional Tribunal); Art. 192 CRP (Entities legitimized to initiate a competence dispute before the Constitutional Tribunal); Art. 194 CRP (Composition of the Constitutional Tribunal); Art. 195 CRP (The status of the Constitutional Tribunal judges); Art. 196 CRP (Immunity); Art. 197 CRP (Organization and procedure).

5 Fundamental Law of Hungary. [Online]. Available at: https://njt.hu/jogszabaly/en/2011-4301-02-00 (Accessed: 2 August 2023).

6 For example in the light of Art. 13 (5) FLH, Constitutional Court shall have the power to conduct the impeachment procedure against the President of Hungary (see whole Art. 13 FLH).

7 FLH is appended with numerous cardinal laws, which regulate the individual fields in detail, such as laws regarding local governments, the election of Members of Parliament, the protection of families, state assets, efficient state management and budgetary responsibility.

if there is a close substantive connection between them and the provisions requested to be reviewed.[8]

In the Czech Republic, the statutes of the constitutional court are regulated by provisions of the Czech Republic's Constitution (CCR).[9] Pursuant to Art. 83 CCR, the Constitutional Court is a judicial body charged with protecting constitutional rules. Pursuant to Art. 87 (1) CCR points from a) to m), the Constitutional Court shall rule on: a) repeal of laws or individual provisions thereof should they contravene the constitutional order; b) repeal of other legal regulations or individual provisions thereof should they contravene the constitutional order or the law; c) constitutional complaints filed by territorial self-government bodies against illegal interventions by the State; d) constitutional complaints filed against final decisions and other interventions by agencies of public authority, violating constitutionally guaranteed fundamental rights and freedoms; e) appeals against decisions in matters of confirmation of the election of a Deputy or Senator; f) reservations on loss of eligibility and on incompatibility of holding the office of Deputy or Senator according to Art. 25 CCR;[10] g) impeachment by the Senate of the President of the Republic under Art. 65 (2) CCR;[11] h) the Presidential proposal to repeal a decision of the Chamber of Deputies and the Senate according to Art. 66 CCR;[12] i) measures essential for the implementation of a ruling by an international court, which is binding for the Czech Republic, unless it can be implemented in a different manner; j) whether a decision on the dissolution of a political party, or another decision regarding the activity of a political

8 Further part of Art. 24 FLH contains also important regulations concerning Constitutional Court in Hungary: Art. 24 (5) FLH (Review FLH or the amendment of FLH; Examination criterion; Entities legitimized to apply for such an examination); Art. 24 (6) FLH (Procedure concerning review FLH or the amendment of FLH; competences of Constitutional Court in relation to such an examination); Art. 24 (7) FLH (Public hearing); Art. 24 (8) FLH (Composition, election, incompatibilities, term of office); Art. 24 (9) FLH (legal basis for the cardinal act).

9 Constitution of the Czech Republic [Online]. Available at: https://www.psp.cz/en/docs/laws/1993/1.html (Accessed: 14 August 2023).

10 According to Art. 25 CCR, the office of a Deputy or a Senator shall be terminated by: a) refusal to take the oath of office or by taking the oath with reservation; b) expiration of the electoral term; c) resignation from office; d) loss of eligibility; e) dissolution of the Chamber of Deputies in the case of Deputies; f) emergence of incompatibility of office under Art. 22 CCR.

11 According to Art. 65 (2) CCR, President of the Republic may be prosecuted for high treason at the Constitutional Court based on the Senate's suit. The punishment may be the loss of his presidential office and of his eligibility to regain it.

12 According to Art. 66 CCR, if the office of the President of the Republic is vacated and a new President has not yet been elected or has not yet taken his oath of office, as well if the President of the Republic is unable to execute his official duties for serious reasons, and if the Chamber of Deputies and the Senate has adopted such resolution, the execution of the presidential duties pursuant to the provisions of Art. 63 (1) points a), b), c), d), e), h), i) and j) CCR, and Art. 63 (2) CCR shall appertain to the Prime Minister. The Chairman of the Chamber of Deputies shall be entrusted with execution of official duties of the President of the Republic specified in Art. 62 points a), b), c), d), e), k) and l) CCR at the time when the Prime Minister executes the defined duties of the President of the Republic. If the office of the President of the Republic has been vacated at the time when the Chamber of Deputies is dissolved, the execution of these duties shall appertain to the Chairman of the Senate.

party, conforms to constitutional or other laws; k) disputes regarding the scope of the jurisdiction of state agencies and territorial self-government agencies, unless such disputes are under the jurisdiction of a different body; l) on the remedy against a decision adopted by the President of the Republic not to announce a referendum concerning the accession of the Czech Republic to EU; m) on whether the procedure of the referendum concerning the accession of the Czech Republic to EU is in accordance with the Constitutional Act on Referendum concerning the Accession of the Czech Republic to EU and the implementing regulation related thereto. Pursuant to Art. 87 (2) CCR, the Constitutional Court shall also decide on the conformity of international agreements under Arts. 10a CCR[13] and 49 CCR[14] with the constitutional order before their ratification. The agreement could not be ratified until the Constitutional Court ruling was delivered. Pursuant to Art. 87 (3), points a) and b) CCR, a law may stipulate that in place of the Constitutional Court, rulings shall be issued by the Supreme Administrative Court in respect of a) repeal of legal regulations or their provisions, which violate the law; and b) disputes regarding the scope of the jurisdiction of state agencies and territorial self-government agencies, unless such disputes are under the jurisdiction of a different body. Pursuant to Art. 89 (1) CCR, a ruling issued by the Constitutional Court, shall be enforceable upon its promulgation in a manner set by law unless the Constitutional Court rules differently on its enforcement. Art. 89 (2) CCR additionally emphasises that enforceable rulings of the Constitutional Court shall be binding for all agencies and individuals. Finally, pursuant to Art. 89 (3) CCR, a decision of the Constitutional Court, whereby, in accordance with Art. 87 (2) CCR, the inconformity of an international agreement with the constitutional order is pronounced, prevents ratification of the agreement until such an inconformity is eliminated.

In Slovakia, the Constitution of the Slovak Republic (CSR)[15] applies. This Act lays down legal norms that regulate the status of constitutional courts. According to Art. 124 CSR, the Constitutional Court shall be an independent judicial authority vested with the mandate to protect constitutionality. Pursuant to Art. 125 (1) points from a) to d) CSR, the Constitutional Court shall decide on the conformity of: a) laws with CSR, constitutional laws, and international treaties to which the National Council of the Slovak Republic has expressed its assent and which were ratified and promulgated in the manner laid down by a law; b) government regulations, generally

13 According to Art. 10a CCR: (1) An international agreement may provide for a transfer of certain powers of bodies of the Czech Republic to an international organization or institution; (2) An approval of the Parliament is required to ratify an international agreement stipulated in Art. 10a (1) CCR unless a constitutional law requires an approval from a referendum.

14 According to Art. 49 CCR, an approval of both Chambers of Parliament is required to ratify international agreements: a) governing rights and duties of persons; b) of alliance, peace, or other political treaties; c) which result in the membership of the Czech Republic in an international organization; d) that are economic of a general nature; (e) on other issues to be governed by the law.

15 Constitution of the Slovak Republic [Online]. Available at: https://www.prezident.sk/upload-files/46422.pdf (Accessed: 5 August 2023).

binding legal regulations of Ministries and other central state administration bodies with CSR, with constitutional laws, with international treaties to which the National Council of the Slovak Republic has expressed its assent and which were ratified and promulgated in the manner laid down by a law and with laws; c) generally binding regulations pursuant to Art. 68 CSR,[16] with CSR, with constitutional laws, and with international treaties to which the National Council of the Slovak Republic has expressed its assent and which were ratified and promulgated in the manner laid down by a law, save another court shall decide on them; d) generally binding legal regulations of the local bodies of state administration and generally binding regulations of the bodies of territorial self-administration pursuant to Art. 71 (2) CSR,[17] with CSR, with constitutional laws, with international treaties promulgated in the manner laid down by a law, with laws, with government regulations, and with generally binding legal regulations of Ministries and other central state administration bodies, save another court shall decide on them. Pursuant to Art. 125 (2) CSR, if the Constitutional Court accepts the proposal for proceedings according to Art. 125 (1) CSR, it can suspend the effect of challenged legal regulations, their parts, or some of their provisions if fundamental rights and freedoms may be threatened by their further application and if there is a risk of serious economic damage or other serious irreparable consequences. Pursuant to Art. 125 (3) CSR, if the Constitutional Court holds by its decision that there is an inconformity between the legal regulations stated in Art. 125 (1) CSR, the respective regulations, their parts, or some of their provisions shall lose effect. The bodies that issue these legal regulations shall be obliged to harmonise them with CSR, with constitutional laws and international treaties promulgated in the manner laid down by law, and if it regards regulations stated in Art. 125 (1) b) and c) CSR also with other laws, if it regards regulations stated in Art. 125 (1) d) CSR also with government regulations and with generally binding legal regulations of ministries and other central state administration bodies within six months of the promulgation of the Constitutional Court's decision. If they fail to do so, these regulations, their parts, or their provisions will lose effect six months after the promulgation of the decision. Pursuant to Art. 125 (4) CSR, the Constitutional Court shall not decide on the conformity of a draft law or a proposal of other generally binding legal regulations with CSR with an international treaty promulgated in the manner laid down by law or constitutional law. Pursuant to Art. 125 (5) CSR, the validity of a decision on the suspension of the effect of the challenged legal regulations, their parts, or some of their provisions shall terminate at the promulgation

16 According to Art. 68 CSR, in matters of territorial self-administration and for securing the tasks of self- administration provided by a law, the municipality and the higher territorial unit may issue generally binding regulations.

17 According to Art. 71 (2) CSR, when exercising the powers of state administration, a municipality and a higher territorial unit may also issue generally binding regulations within their territory upon authorization by a law and within its limitations. Exercise of state administration transferred to a municipality or to a higher territorial unit by a law shall be directed and controlled by the government. A law shall lay down the details.

of the decision of the Constitutional Court if the Constitutional Court has not already cancelled the decision on suspension of the effect of the challenged legal regulation because the reasons for which it was adopted had terminated. Finally, according to Art. 125 (6) CSR, decision of the Constitutional Court issued pursuant to Arts. 125 (1), (2) and (5), CSR shall be promulgated in the manner laid down for the promulgation of laws. A valid judgment by the Constitutional Court shall be generally binding. What also seems to be important and interesting is that, in accordance with Art. 128 CSR, the Constitutional Court shall give an interpretation of CSR or constitutional law if the matter is disputable. The Constitutional Court's judgment on the interpretation of CSR or constitutional law shall be promulgated in a manner laid down for the promulgation of laws. This interpretation is generally based on the date of promulgation.[18]

In Serbia, the status of constitutional court is governed by the Constitution of the Republic of Serbia (hereinafter: CRS).[19] Pursuant to Art. 166 CRS, the Constitutional Court shall be an autonomous and independent state body which shall protect constitutionality and legality, as well as human and minority rights and freedoms. Constitutional Court decisions are final, enforceable, and generally binding. The jurisdiction of the Constitutional Court in Serbia is determined by Art. 167 CRS, according to which the Constitutional Court shall decide on 1) compliance of laws and other general acts with CRS, generally accepted rules of international law, and ratified international treaties; 2) compliance of ratified international treaties with the CRS; 3) compliance of other general acts with the law; 4) compliance of the statute and general acts of autonomous provinces and local self-government units with the CRS and the law; and 5) compliance of general acts of organisations with delegated public powers, political parties, trade unions, civic associations, and

18 The specificity of CSR is such that in other provisions of this legal act there are important legal regulations determining the competences of the constitutional court. In the light of the provisions of Arts. from 125a to 129 CSR, the Constitutional Court in Slovakia also has some competence in the scope of: the conformity of negotiated international treaties with CRS and constitutional law (see Art. 125a CRS); the conformity of the subject of a referendum with CRS or constitutional law (see Art. 125b CRS); disputes over competency between the central state administration bodies (see Art. 126 CRS); complaints of natural persons or legal persons (see Art. 127 CRS); complaints of the bodies of territorial self-administration (see Art. 127a CRS); the complaint against decision verifying or rejecting verification of the mandate of a Member of Parliament (see Art. 129 (1) CRS); the conformity of election of the President of the Slovak Republic, the elections to the National Council of the Slovak Republic, and the elections to local self-administration bodies with CRS and the law (see Art. 129 (2) CRS); complaints against the result of a referendum and complaint against the result of a plebiscite (see Art. 129 (3) CRS); the conformity of a decision dissolving a political party or movement or suspending political activities with the constitutional laws and other laws (see Art. 129 (4) CRS); prosecution by the National Council of the Slovak Republic against the President of the Slovak Republic in matters of willful infringement of CRS or treason (see Art. 129 (5) CRS); the conformity of a decision on declaring an exceptional state or an emergency state and other decisions connected to this decision with CRS and constitutional law (see Art. 129 (6) CRS).

19 Constitution of the Republic of Serbia [Online]. Available at: http://www.parlament.gov.rs/upload/documents/Constitution_%20of_Serbia_pdf.pdf (Accessed: 11 August 2023).

collective agreements with CRS and the law. Art. 167 CRS also emphasises that the Constitutional Court shall 1) decide on the conflict of jurisdictions between courts and state bodies; 2) decide on the conflict of jurisdictions between republic and provincial bodies or bodies of local self-government units; 3) decide on the conflict of jurisdictions between provincial bodies and bodies of local self-government units; 4) decide on the conflict of jurisdictions between bodies of different autonomous provinces or bodies of different local self-government units; 5) decide on electoral disputes for which court jurisdiction is not specified by law; and 6) perform other duties stipulated by the CRS and laws. In addition, Art. 167 CRS provides that the Constitutional Court shall decide on banning a political party, trade union organisation, or civic association and shall perform other duties stipulated by the CRS. Pursuant to Art. 168 CRS, proceedings assessing constitutionality may be instituted by state bodies, bodies of territorial autonomy, local self-governments, and at least 25 deputies. The Constitutional Court may have also instituted this procedure. Art. 168 CRS also contains other important regulations concerning the Constitutional Court. First, any legal or natural person shall have the right to institute proceedings to assess constitutionality. Second, the law or other general acts that do not comply with the CRS or the law shall cease to be effective on the day of the publication of the Constitutional Court decision in the official journal. Third, before passing the final decision, and under the terms specified by the law, the Constitutional Court may suspend the enforcement of an individual general act or action undertaken on the grounds of the law or another general act whose constitutionality or legality it assesses. Fourth, The Constitutional Court may assess the compliance of the law and other general acts with the CRS, compliance of general acts with the law, even when they ceased to be effective if the proceedings assessing the constitutionality have been instituted within no more than six months since they ceased to be effective.[20]

In Croatia, the applicable law is the Constitution of the Republic of Croatia (CRC),[21] which contains legal norms specifying the status of the Constitutional Court. Pursuant to Art. 129 CRC, the Constitutional Court of the Republic of Croatia 1) shall decide upon the compliance of laws with CRC; 2) shall decide upon the compliance of other regulations with CRC and laws; 3) may decide on the constitutionality of laws and the constitutionality and legality of other regulations which are no longer valid, provided that less than one year has elapsed from the moment of such cessation until the filing of a request or a proposal to institute proceedings; 4) shall decide on

20 Other important constitutional regulations related to the Constitutional Court in Serbia: Art. 169 CRS (Assessment of constitutionality of the law prior to its coming into force); Art. 170 CRS (Constitutional appeal); Art. 171 CRS (Ensuring the enforcement of decisions); Art. 172 CRS (Organisation of the Constitutional Court. Election and appointment of the Constitutional Court justices); Art. 173 CRS (Conflict of interest. Immunity); Art. 174 CRS (Termination of the tenure of office of the Constitutional Court justice); Art. 175 CRS (The manner of deciding in the Constitutional Court. The Law on the Constitutional Court).

21 Constitution of the Republic of Croatia [Online]. Available at: https://www.sabor.hr/sites/default/files/uploads/inline-files/CONSTITUTION_CROATIA.pdf (Accessed: 9 August 2023).

constitutional petitions against individual decisions taken by governmental agencies, bodies of local and regional self-government and legal persons vested with public authority where such decisions violate human rights and fundamental freedoms, as well as the right to local and regional self-government guaranteed by CRC; 5) shall monitor compliance with CRC and laws and shall report to the Croatian Parliament on detected violations thereof; 6) shall decide upon jurisdictional disputes between the legislative, executive and judicial branches; 7) shall decide, in conformity with CRC, on the impeachment of the President of the Republic; 8) shall supervise compliance of the platforms and activities of political parties with CRC and may, in compliance with CRC, ban non-compliant parties; 9) shall monitor whether elections and referenda are conducted in compliance with CRC and laws and shall resolve electoral disputes falling outside the jurisdiction of the courts; 10) shall perform other duties specified by CRC. Pursuant to Art. 131 CRC, the Constitutional Court shall repeal a law if it finds it unconstitutional. The Constitutional Court of the Republic of Croatia also repeal or annul any other regulations if it finds them unconstitutional or illegal. Additionally, in the cases specified in Art. 129(1)(3) CRC,[22] if the Constitutional Court of the Republic of Croatia finds that a law is non-compliant with the CRC and law or that another regulation is non-compliant with the CRC and law, it shall hand down a decision pronouncing non-compliance with the CRC or law.

In Slovenia, the constitutional status of the national constitutional court is determined by the provisions of the Constitution of the Republic of Slovenia (CRSa).[23] Pursuant to Art. 160 CRSa, the Constitutional Court decides on: the conformity of laws with CRSa; the conformity of laws and other regulations with ratified treaties and with the general principles of international law; the conformity of regulations with CRSa and with laws; the conformity of local community regulations with CRSa and with laws; the conformity of general acts issued for the exercise of public authority with CRSa, laws, and regulations; constitutional complaints stemming from the violation of human rights and fundamental freedoms by individual acts; jurisdictional disputes between the state and local communities and among local communities themselves; jurisdictional disputes between courts and other state authorities; jurisdictional disputes between the National Assembly, the President of the Republic, and the Government; the unconstitutionality of the acts and activities of political parties; other matters vested in the Constitutional Court by CRSa or laws. Art. 160 CRSa also provides that in the process of ratifying a treaty, the Constitutional Court, on the proposal of the President of the Republic, the Government, or a third of the deputies of the National Assembly, issues an opinion on the conformity of such a treaty with the CRSa. The opinion of the Constitutional Court binds the National Assembly. The

22 According to Art. 129(1)(3) CRC, the Constitutional Court of the Republic of Croatia may decide on the constitutionality of laws and the constitutionality and legality of other regulations which are no longer valid, provided that less than one year has elapsed from the moment of such cessation until the filing of a request or a proposal to institute proceedings.

23 Constitution of the Republic of Slovenia [Online]. Available at: https://www.us-rs.si/media/constitution.pdf (Accessed: 15 August 2023).

next part of Art. 160 CRSa states that unless otherwise provided by law, the Constitutional Court decides on a constitutional complaint only if legal remedies have been exhausted. The Constitutional Court decides whether to accept a constitutional complaint for adjudication based on the criteria and procedures provided by law. Another important regulation is Art. 161 CRSa. According to this provision, if the Constitutional Court establishes that a law is unconstitutional, it will abrogate it in whole or in part. Such an abrogation takes effect immediately or within a period, as determined by the Constitutional Court. This period did not exceed one year. The Constitutional Court annuls ab initio or abrogates other regulations or general acts that are unconstitutional or contrary to the law. Under the conditions provided by the law, the Constitutional Court may, up until a final decision, suspend, in whole or in part, the implementation of an act whose constitutionality or legality is being reviewed. Additionally, if the Constitutional Court establishes the unconstitutionality of a regulation or general act in deciding on a constitutional complaint, it may, under the provisions of Art. 161 CRSa, annul ab initio or abrogate such regulation or act. Importantly, the legal consequences of Constitutional Court decisions shall be regulated by the law.[24]

In Romania, the constitutional status of the constitutional court is determined by the norms of the Constitution of Romania (hereinafter: CR).[25] Pursuant to Art. 142 (2) CR, the Constitutional Court shall be the guarantor of the supremacy of the CR. Pursuant to Art. 146 points from a) to l) CR, the Constitutional Court shall have the following powers: a) to adjudicate on the constitutionality of laws, before the promulgation thereof upon notification by the President of Romania, one of the presidents of the two Chambers, the Government, the High Court of Cassation and Justice, the Advocate of the People, a number of at least 50 deputies or at least 25 senators, as well as ex officio, on initiatives to revise CR; b) to adjudicate on the constitutionality of treaties or other international agreements, upon notification by one of the presidents of the two Chambers, a number of at least 50 deputies or at least 25 senators; c) to adjudicate on the constitutionality of the Standing Orders of Parliament, upon notification by the president of either Chamber, by a parliamentary group or a number of at least 50 Deputies or at least 25 Senators; d) to decide on objections as to the unconstitutionality of laws and ordinances, brought up before courts of law or commercial arbitration; the objection as to the unconstitutionality may also be brought up directly by the Advocate of the People; e) to solve legal disputes of a constitutional nature between public authorities, at the request of the President of Romania, one of the presidents of the two Chambers, the Prime Minister, or of the president of the Superior Council of Magistracy; f) to guard the observance of the procedure

24 Other important constitutional regulations related to the Constitutional Court in Slovenia: Art. 162 CRSa (Proceedings before the Constitutional Court); Art. 163 CRSa (Composition and Election); Art. 164 CRSa (Early Termination of Office of a Constitutional Court Judge); Art. 165 CRSa (Term of Office of Judges); Art. 166 CRSa (Incompatibility of Office); Art. 167 CRSa (Immunity).

25 Constitution of Romania [Online]. Available at: https://www.presidency.ro/en/the-constitution-of-romania (Accessed: 22 August2023).

for the election of the President of Romania and to confirm the ballot returns; g) to ascertain the circumstances which justify the interim in the exercise of the office of President of Romania, and to report its findings to Parliament and the Government; h) to give advisory opinion on the proposal to suspend from office the President of Romania; i) to guard the observance of the procedure for the organisation and holding of a referendum, and to confirm its returns; j) to check the compliance with the conditions for the exercise of the legislative initiative by citizens; k) to decide on the objections of unconstitutionality of a political party; l) to carry out also other duties stipulated by the organic law of the Court. Pursuant to Art. 147 (1) CR, the provisions of the laws and ordinances in force, as well as those of the regulations that are found to be unconstitutional, shall cease their legal effects within 45 days of the publication of the decision of the Constitutional Court if, in the meantime, the Parliament or the Government, as the case may be, cannot bring into line the unconstitutional provisions with the provisions of the CR. Given this limited length of time, provisions found to be unconstitutional shall be suspended de jure. Pursuant to Art. 147 (2) CR, in cases of unconstitutionality of laws, before the promulgation thereof, the Parliament is bound to reconsider those provisions to bring them into line with the decision of the Constitutional Court. Pursuant to Art. 147 (3) CR, if the constitutionality of a treaty or international agreement has been found, according to Art. 146 (1) b) CR, such a document cannot be the subject of an objection to unconstitutionality. A treaty or international agreement found to be unconstitutional should not be ratified. Pursuant to Art. 147 (4) CR, the decisions of the Constitutional Court shall be published in the Official Gazette of Romania. According to their publication, decisions shall generally be binding and effective only in the future.

The list of relevant constitutional provisions in Poland, Hungary, the Czech Republic, Slovakia, Serbia, Croatia, Slovenia, and Romania is important for this study. The reason for this is that although the constitutional courts of these countries are regulated slightly differently, it is possible to find commonalities, perhaps reflecting a certain paradigm, features, or competences of these state bodies. However, starting with a brief indication of the differences, it should be noted that these differences are sometimes noticeable and may concern specific functions and competences or the internal organisation of constitutional courts. For example, this concerns the competences or functions of constitutional courts, which are not obvious to this type of state body, for which the impeachment procedure can be an example. However, these differences do not involve systemic positions or essential constitutional competencies. Such elements seem universal standards and constitute a common matrix of constitutional regulations in Poland, Hungary, the Czech Republic, Slovakia, Serbia, Croatia, Slovenia, and Romania. It should also be emphasised that the indication of these common features or competences of constitutional courts will significantly improve by unifying to some extent, the subjective scope of the analysis and the determination of the role of constitutional courts in Poland, Hungary, the Czech Republic, Slovakia, Serbia, Croatia, Slovenia, and Romania in migration and refugee affairs. This was the first and most important step in the analysis. Therefore, by

focusing on similarities, it is appropriate to emphasise the corresponding elements of the constitutional statuses of constitutional courts in the indicated countries. First, although it may seem an obvious conclusion, in each of these countries, a state body such as the constitutional court functions because it has been provided with a place in the structure of the state. Second, the general status of the constitutional courts in each of these countries is regulated at the constitutional level by the norms contained in the most important legal acts of a particular country. This means that in these countries, the constitutional court ranks as a constitutional body and is an important element of the state system. Third, in each of these countries, the main task of the constitutional court is to respect the supreme constitutional law of the state (regardless of the nomenclature: Constitution, fundamental law, etc.) concerned with its interpretation and application. This means that in each of these countries, the constitutional court is the only body in the entire state system equipped with appropriate instruments to assess and enforce the constitutionality of the legal system. This is because, first, in each of these countries, in light of Arts. 188 CRP, 24 (2) FLH, 87 (1) CCR, 125 (1) CSR, 167 CRS, 129 CRC, 160 CRSa, and 146 CR, the Constitutional Court has the power to assess the compatibility of lower-ranking legislation with higher-ranking legal regulations, particularly with the supreme law in a given country (constitution, fundamental law, etc.). Second, after the assessment of constitutionality and in the event of unconstitutionality being detected, in light of Arts. 190 (3) CRP, 24 (3) FLH, 87 (1) CCR, 125 (2) and (3) CSR, 168 CRS, 131 CRC, 161 CRSa, and 147 CR, constitutional courts also act as negative legislators in each of these countries.[26] This means that the constitutional courts in each analysed country have the power to derogate or repeal, and sometimes also temporarily suspend, in part or in whole, legal norms declared unconstitutional. However, they do not have the right to create and introduce norms into the legal order. Hence, in the literature, their role is sometimes referred to as that of negative legislators.

These elements constitute a common normative standard for the constitutional status of constitutional courts in Poland, Hungary, the Czech Republic, Slovakia, Serbia, Croatia, Slovenia, and Romania. However, it should be noted that simply referring to the provisions of the constitutional court contained in the Supreme Law in a given country (constitution, fundamental law, etc.) is not sufficient to determine the role of the constitutional court of that country in migration and refugee affairs. Such considerations only provide a basis for the conclusion that the constitutional court in a selected country is competent in interpreting provisions of the Supreme Law, which is connected with further competencies, such as conformity assessment and derogation of unconstitutional law. However, to determine the role of a country's constitutional court in migration and asylum affairs, it is necessary to check whether the country's supreme law contains legal norms on asylum, migration, or refugees. This element is important because such legal provisions contained in the Supreme

26 In terms of the concept of "negative legislator", see: Cieślak, 2008, p. 61; Decision of the Polish Constitutional Tribunal of 10 June 2020, K 3/19, OTK-A 2020, item 27.

Law of a given country open the way for the constitutional court to speak thematically focused on migration and refugees and exercise its competences in this area. Second, a simple reference to provisions in a given country's supreme law related to asylum, migration, or refugees is insufficient for this study. Such considerations will only provide a basis for concluding that the Constitutional Court is entitled (in the abstract) to exercise its constitutional powers in migration and refugee affairs where the subject of its jurisprudence may be relevant provisions of the Supreme Law of a given country. Nevertheless, the Constitutional Courts' role in migration and refugee affairs in the country remains unclear. To this end, it is necessary to analyse the case law of the constitutional courts of selected countries that have relevant constitutional powers and are legitimate in exercising these competences in migration and refugee affairs. This shows how the National Constitutional Court views its role in this regard. It may turn out that despite the Supreme Law of a given country giving clear competencies and legitimising their use in matters of migration and refugee status, the constitutional court itself refrains from exercising them or sees them to a very limited extent. This may be related to EU law on the one hand and constitutional identity on the other. Finally, it may turn out that the constitutional court sees its competences and uses them broadly or sees these competences but at the same time refrains from exercising them, indicating that it reserves the right to intervention only in borderline situations. Therefore, to determine whether the constitutional courts in Poland, Hungary, the Czech Republic, Slovakia, Serbia, Croatia, Slovenia, and Romania perceive their role in migration and refugee affairs as active or passive, it is necessary to examine their relevant case law.

3. Migration and refugee affairs in Poland, Hungary, the Czech Republic, Slovakia, Serbia, Croatia, Slovenia and Romania – Constitutional aspect

In Poland, migration and refugee affairs are regulated by the CRP. Under Art. 56 (1) CRP, foreigners shall have the right of asylum in the Republic of Poland under the principles specified by the statute. Art. 56 (2) CRP emphasises that foreigners who seek protection from persecution in the Republic of Poland may be granted refugee status in accordance with international agreements to which the Republic of Poland is a party. It is also worth noting that in accordance with Art. 37 CRP, on the one hand, anyone under the authority of the Polish State shall enjoy the freedoms and rights ensured by the CRP; on the other hand, Art. 37 CRP also provides that exemptions from this principle concerning foreigners shall be specified by statute.[27]

27 In the subject of refugee and migration affairs in Poland, see, for example: Czaplinski, 1994, pp. 636–642; Klaus, 2017, pp. 523-528; Łukasiewicz, 2017, pp. 47-70.

In Hungary, migration and refugee affairs are regulated by the FLH. Pursuant to Art. XIV (1) FLH, no foreign population shall be settled in Hungary. A foreign national, not including persons with the right to free movement and residence, may only live in Hungary under an application individually examined by the Hungarian authorities. The basic rules regarding the requirements for submitting and assessing such applications shall be laid down in a cardinal act. Art. XIV (2) FLH states that foreigners residing in Hungary can only be expelled under lawful decisions. Collective expulsion shall be prohibited. Pursuant to Art. XIV (3) FLH, no one shall be expelled or extradited to a state where there is a risk of being sentenced to death, tortured, or subjected to other inhuman treatment or punishment. The next regulation is Art. XIV (4) FLH, a provision containing a very important legal norm in refugee law. According to this provision, Hungary shall, upon request, grant asylum to non-Hungarian nationals who are persecuted in their country or the country of their habitual residence for reasons of race, nationality, membership in a particular social group, religious, or political beliefs, or have a well-founded reason to fear direct persecution if they do not receive protection from their country of origin or any other country. The same provision also states that a non-Hungarian national shall not be entitled to asylum if he or she arrives in Hungary from any country where he or she was not persecuted or directly threatened with persecution. The last part of Art. XIV FLH, namely Art. XIV (5), states that the basic rules for granting asylum shall be laid down in a cardinal act. Hungarian FLH has another relevant and important legal norm concerning migration and refugee affairs. Art. 46 FLH states that police will participate in preventing illegal immigration.

In the Czech Republic, CCR provides a legal framework for the state and the rule of law. The CCR does not specifically address migration or refugee affairs. Nevertheless, the CCR contains important provisions, namely Art. 3, according to which an integral component of the constitutional system of the Czech Republic is the Charter of Fundamental Rights and Freedoms (CFRF).[28] Thus, when analysing the constitutional order in the Czech Republic globally, both CCR and CFRF should be considered. It should be noted that the CCR contains a legal framework for the national constitutional court, and the CFRF contains asylum and migration regulations. Under Art. 43 CFRF, the Czech Republic grants asylum to persecuted aliens to assert their political rights and freedom. An asylum may be denied to someone who has acted contrary to fundamental human rights and freedoms. In addition, Art. 14 of the CFRF is an important provision guaranteeing freedom of movement and residence. Anyone who legitimately stays within the territory of the Czech Republic has the right to leave freely. These freedoms may be limited by law if they are unavoidable for the security of the state, maintenance of public order, protection of the rights and freedoms of others, or, in demarcated areas, to protect nature. Every

28 Charter of Fundamental Rights and Freedoms (Czech Republic) [Online]. Available at: https://www.usoud.cz/fileadmin/user_upload/ustavni_soud_www/Pravni_uprava/AJ/Listina_English_version.pdf (Accessed: 3 October 2023).

citizen is free to enter the Czech Republic. No citizen may be forced to leave his or her homeland, and more importantly, an alien may be expelled only in cases specified by law. Therefore, whether the CCR contains legal migration and asylum affairs standards should be answered negatively. However, whether the constitutional order in the Czech Republic contains legal norms on migration and asylum affairs should be answered positively because the CFRF should be considered part of the Czech Republic's constitutional order.[29]

In Slovakia, migration and refugee affairs are regulated by CSR. Pursuant to Art. 53 CSR, the Slovak Republic shall grant asylum to aliens persecuted for exercising political rights and freedoms. Such asylum may be denied to those contradicting fundamental human rights and freedoms. The law lays down these details. This is the basic legal provision. However, CSR also contains a legal norm in Art. 23, which links migration and asylum affairs. This provision guarantees freedom of movement and residence, and everyone residing legally in the Slovak Republic has the right to leave its territory freely. Such defined freedoms may be restricted by law if necessary for national security, maintenance of public order, health protection, or protection of the rights and freedoms of others and in the interest of environmental protection in specified territories. What is important is that, according to Art. 23 CSR, a citizen must not be forced to emigrate or be expelled from their homeland, and an alien may be expelled only in cases provided for by law.[30]

In Serbia, migration and refugee affairs are regulated by the CRS. According to Art. 13 CRS, pursuant to international treaties, foreign nationals in the Republic of Serbia shall have all rights guaranteed by CRS and law, except the rights to which only citizens of the Republic of Serbia are entitled under CRS and law. According to Art. 39 entry and stay of foreign nationals in the Republic of Serbia shall be regulated by law. A foreign national may be expelled only under the decision of the competent body in a procedure stipulated by the law, and if the time to appeal has been provided for him and only when there is no threat of persecution based on his race, sex, religion, national origin, citizenship, association with a social group, political opinions, or when there is no threat of serious violation of rights guaranteed by the CRS. On the other hand, regulations directly concerning the right to asylum are provided in Art. 57 CRS. According to this legal norm, any foreign national with a reasonable fear of prosecution based on race, gender, language, religion, national origin, or association with some other group or political opinion shall have the right to asylum in the Republic of Serbia. The law regulates the procedure for granting asylum. Last but not least, part four of CRS, entitled "Competences of the Republic of Serbia", contains a list of Serbia's competences. One of the elements of this list is the

29 In the subject of refugee and migration affairs in Czech Republic, see, for example: Jelínková, 2019, pp. 33-45; Szczepanikova, 2011, pp. 789-806; Drbohlav, 2003, pp. 194-224; Bauerová, 2018, pp. 397-420.

30 In the subject of refugee and migration affairs in Slovakia, see, for example: Pechočiak and Hrdá, 2017, pp. 32-40; Androvičová, 2017, pp. 197-220; Brljavac, 2017, pp. 91-107; Bolečeková , 2017, pp. 564-581.

competence that Serbia shall organise and provide for a border crossing system and control trade in goods, services, and passenger traffic over border crossings, as well as the status of foreigners and foreign legal entities.[31]

In Croatia, migration and refugee affairs are regulated by the CRC. According to Art. 26 CRC, all citizens of the Republic of Croatia and aliens shall be equal before the courts, governmental agencies, and other bodies vested with public authority. Arts. 48 and 49 CRC are also interesting legal regulations, from which it follows that first, a foreign person may exercise the right of ownership under the conditions specified by law, and second, foreign investors shall be guaranteed free transfer and repatriation of profits and invested capital. Nevertheless, Croatia's most important constitutional regulation regarding migration and asylum is Art. 33 CRC. Under this legal standard, foreign citizens and stateless persons may be granted asylum in Croatia unless they are prosecuted for nonpolitical crimes and activities contrary to the fundamental principles of international law. The same provision also emphasises that no alien legally in the territory of the Republic of Croatia shall be banished or extradited to another state, except in cases where decisions made in compliance with an international treaty or law are enforced.[32]

In Slovenia, migration and refugee affairs are regulated by CRSa. Pursuant to Art. 13 CRSa, in accordance with treaties, aliens in Slovenia enjoy all the rights guaranteed by the CRSa and laws, except for those rights pursuant to the CRSa or law-only citizens of Slovenia enjoy. CRSa, in its Art. 32 affirms the fundamental right to freedom of movement, the ability to choose one's place of residence, freedom to exit the country, and the right to return at any time. Nonetheless, it stipulates that this right can be restricted by legal measures only when such limitations are deemed necessary to uphold the progress of criminal proceedings, prevent the transmission of infectious diseases, safeguard public order, or are essential for the nation's defence. Furthermore, the law permits foreign nationals to regulate entry into the country and the duration of their stay, all of which are established through legal provisions. Art. 47 CRSa additionally safeguards the interests of Slovenian citizens by prohibiting their extradition to foreign nations. By contrast, the extradition of aliens is permissible only in instances covered by binding treaties involving Slovenia. In its provisions concerning migration and asylum, the CRSa explicitly acknowledges the rights of asylum. As outlined in Art. 48 CRSa, within the confines of the law, foreign nationals and stateless individuals who face persecution due to their dedication to human rights and fundamental freedoms are entitled to seek asylum.[33]

31 In the subject of refugee and migration affairs in Serbia, see, for example: Lukić, 2016, pp. 31-43; Bobić and Šantić 2020, pp. 220-234; Rajović, 2014, pp. 28-49; Lažetić, 2018, pp.131-178.

32 In the subject of refugee and migration affairs in Croatia, see, for example: Gregurović and Dubravka , 2012, pp. 99-113; Borozan, 2017, pp. 141-163; Harvey, 2006, pp. 89-144; Spadina and Kovacevic, 2023, pp. 467–485. Jorens, 2023, pp. 467–485.

33 In the subject of refugee and migration affairs in Slovenia, see, for example: Vezovnik, 2018, pp. 39-56; Beznec and Gombač, 2023, pp. 250-265; Geddes and Andrew, 2016, pp. 587-605; Meško et al., 2018, pp. 495–527. Kury and Redo, 2018, pp. 495–527.

In Romania, migration and refugee affairs are regulated by the CR. First, Art. 3 (4) CR unequivocally prohibits the displacement or colonisation of foreign populations on the territorial expanse of the Romanian State. The fundamental aim of this constitutional provision was to safeguard the unity and integrity of the state's territory. Nevertheless, the most pivotal legal regulation was enshrined under Art. 18 CR when addressing migration and asylum affairs in Romania. To expound upon this, Art. 18 (1) CR expressly mandates that foreign nationals and stateless individuals residing in Romania are entitled to the broad protection of their rights and possessions, as stipulated by CR and other applicable laws. This crucial safeguard is augmented by the legal framework outlined in Art. 18 (2) CR, which underscores that the right to seek asylum and the determination of its grant or revocation shall be executed following the provisions of the law, in conformity with international treaties and conventions to which Romania is a part. Furthermore, pursuant to the rules outlined in Art. 19 (3), the CR, the extradition of foreign nationals and stateless individuals may solely be carried out with strict adherence to an international agreement or based on reciprocity principles. This underscores Romania's commitment to uphold its international obligations and standards in migration and refugee affairs.[34]

The norms of the highest law (constitution, fundamental law, etc.) relevant to migration and asylum in Poland, Hungary, the Czech Republic, Slovakia, Serbia, Croatia, Slovenia, and Romania are presented above. These regulations are not identical, but they all prioritise international agreements and human rights and protect those facing persecution while ensuring the power to protect sovereignty, national interests, and security. For this reason, it can be said that the constitutional provisions governing migration and refugee affairs in Poland, Hungary, the Czech Republic, Slovakia, Serbia, Croatia, Slovenia, and Romania demonstrate a shared commitment not only to respect human rights and international agreements but also to address migration and asylum issues with full respect for sovereignty. While each nation has its unique set of constitutional articles, common themes include recognising the right to asylum and protection from extradition in countries where persecution or harm may occur. Based solely on the wording of the abovementioned provisions of the Supreme Law (constitution, fundamental law, etc.), Poland, Hungary, the Czech Republic, Slovakia, Serbia, Croatia, Slovenia, and Romania seek to strike a balance between protecting sovereignty and national interests, such as territorial integrity and national security, and fulfilling their international obligations to protect people from persecution or violence. However, in this case, this depends on national constitutional courts' interpretation of the law and how they define their role in migration and asylum affairs.

This part of the academic paper also leads to another important conclusion: in every analysed country, there are regulations of the highest law (constitution,

34 In the subject of refugee and migration affairs in Romania, see, for example: Elrick and Ciobanu, 2009, pp. 100-116; Zlătescu, 2014, pp. 37-49; Matei and Cocosatu, 2009, pp. 403-440; Goga, 2019, pp. 148-160.

fundamental law, etc.) concerning migration and asylum affairs. The legal foundations of asylum are more specific than migration's; however, both elements are visible within the highest law. This is an important observation because it means that not only does every national constitutional court have power (especially the power to assess the compatibility of lower-ranking legislation with higher-ranking legal regulations, particularly with the supreme law in a given country, such as the constitution or fundamental law; the power to derogate or repeal, and sometimes also temporarily suspend, in part or in whole, legal norms declared unconstitutional), but that they can also theoretically use it in matters related to migration and asylum cases. Nevertheless, as already noted, the mere observation of this fact is only evidence that, in theory, constitutional courts in Poland, Hungary, the Czech Republic, Slovakia, Serbia, Croatia, Slovenia, and Romania can use their powers concerning migration, refugees, and asylum issues, including in the context of protecting sovereignty and the perspective of EU legislation (of course, if the state is a Member State of EU). However, the question of whether, and if so, how, the constitutional courts of these countries decide to intervene in such matters can only be answered through an analysis of their case law.

4. Relevant case law of constitutional courts in Poland, Hungary, the Czech Republic, Slovakia, Serbia, Croatia, Slovenia and Romania

In light of Arts. 56 and 37 CRP, 24 (1) FLH, 83, 87, and 89 CCR, 124, 125, and 128 CSR, 166, 167, and 168 CRS, 129 and 131 CRC, 160 and 161 CRSa, 142, 146, and 147 CR in conjunction with Arts. 79, 188, 189, 190, and 193 CRP, XIV(1), and 46 FLH, 3 CCR, 43, and 14 CFRF, 53, and 23 CSR, 13, 39, and 57 CRS, 26, 48, 49, and 33 CRC, 13, 32, 47, and 48 CRSa, 3 (4), 18, and 19 CR regarding migration and asylum, the national constitutional court in Poland, Hungary, Czech Republic, Slovakia, Serbia, Croatia, Slovenia, and Romania holds the power to assess the compatibility of lower-tier legal acts with higher-tier legal acts, particularly with CRP, FLH, CCR, CFRF, CSR, CRS, CRC, CRSa, and CR. In incompatibility and hence unconstitutionality cases, it also possesses the power to annul and occasionally temporarily suspend legal acts deemed unconstitutional in migration and asylum matters. This applies to any legal act subordinate to CRP, FLH, CCR, CFRF, CSR, CRS, CRC, CRSa, and CR and should apply to all except CRP, FLH, CCR, CFRF, CSR, CRS, CRC, CRSa, and CR. This stance can be assumed after scrutinising the pure content of the supreme laws in Poland, Hungary, the Czech Republic, Slovakia, Serbia, Croatia, Slovenia, and Romania. Nevertheless, legal practices have particular interpretive significance, particularly court cases before the national constitutional courts in Poland, Hungary, the Czech Republic, Slovakia, Serbia, Croatia, Slovenia, and Romania. On the one

hand, the jurisprudence of a specific national constitutional court serves as an invaluable source of guidance on interpreting the provisions of the CRP, FLH, CCR, CFRF, CSR, CRS, CRC, CRSa, and CR. On the other hand, it also answers how a national constitutional court perceives its role and understands its powers. This is crucial because, as previously mentioned, a national constitutional court may interpret its role broadly or narrowly, displaying either a proactive or a passive approach. Ultimately, the jurisprudence of the national constitutional courts in Poland, Hungary, the Czech Republic, Slovakia, Serbia, Croatia, Slovenia, and Romania can reveal whether these courts consider themselves strong defenders of national constitutionality, merely as observers or enforcers of decisions made by other decision-making bodies, or even as non-playing substitutes or non-players.

In Poland,[35] the Constitutional Court has not addressed migration, refugees, or asylum issues in its rulings. However, this does not mean that decisions that could be valuable for the analysis in this study were not made. First, the Constitutional Court highlighted the significance of broadening the rights and liberties of non-citizens, particularly EU residents. This broadening fortified their legal status substantially, enabling them to oversee matters in Poland without obtaining citizenship.[36] Second, the Constitutional Court acknowledged the common good as a crucial constitutional concept that moulds the connection between international and national law. It underlines Poland's willingness to embrace the global order, particularly EU law, as long as it adheres to the essential principles of the CRP, including the common good, sovereignty, democracy, and the rule of law. The Court emphasised the importance of evaluating each transfer of authority in light of the development of Poland's constitutional identity.[37] Third, The Constitutional Court concluded that the foundational principles stated in Chapter I of the Polish Constitution, which contributed to the common good, should not precede the provisions in Chapter II. The Court conveyed its conviction that while the common good holds significance, issues related to human rights should not be neglected when fulfilling public responsibilities, regardless of an individual's nationality.[38] Fourth, the Constitutional Court allowed the establishment of limitations on human rights based on nationality criteria.[39] Fifth, the Court stressed that certain constitutional rights, such as the right to public information and the right to vote in local elections, are extended to foreigners by legislators.[40] Sixth, the Constitutional Court emphasised that the principle of loyalty deter-

35 See in general: Syryt, 2023, pp. 283–309.

36 Decision of the Polish Constitutional Tribunal of 18 January 2012, Kp 5/09, OTK ZU no. 1/A/2012, item 5.

37 Decision of the Polish Constitutional Tribunal of 26 June 2013, K 33/12, OTK ZU no. 5/A/2013, item 63.

38 Decision of the Polish Constitutional Tribunal of 29 April 2003, SK 24/02, OTK ZU no. 4/A/2003, item 33.

39 Decision of the Polish Constitutional Tribunal of 15 November 2000, P 12/99, OTK ZU no. 7/2000, item 260.

40 Decision of the Polish Constitutional Tribunal of 31 May 2004, K 15/04, OTK ZU no. 5/A/2004, item 47.

mines the legal situation not only for citizens but also for foreigners and other private entities subject to Polish authority.[41] Seventh, the Constitutional Court did not negate the admissibility of the continued storage of telecommunications data concerning foreigners under Polish authority, especially if there were serious and justified suspicions regarding their involvement in activities threatening national security.[42] Eighth, the Constitutional Court underscored that foreigners in Poland must adhere to Polish law, even in cases of forced migration.[43] Ninth, the Constitutional Court defined the EU order as autonomous, although it was genetically based on international law. This underscores the importance of preserving Poland's constitutional values.[44] The Constitutional Court clarified that the right to fair trial applies to everyone, including Polish citizens, foreigners, and stateless individuals.[45] Eleventh, the Constitutional Court affirmed that the privilege of participating in local government elections could be broadened to encompass EU citizens affiliated with local communities. The Court stressed the necessity for a meticulous definition of the extent of transferred competencies, excluding delegating competencies linked to fundamental matters delineating specific state entities' jurisdiction. Moreover, it emphasised that the transfer of competencies should not compromise the existence of Polish state institutions. Furthermore, the Court expressed its belief that EU law provisions should not contradict the CRP and should not impede Poland's functioning as a sovereign and democratic state.[46] The Constitutional Court indicated that the presumption of the constitutionality of EU Treaties can only be rebutted when there is no interpretation of the treaty and the CRP that allows for the compatibility of treaty provisions with the CRP. The Constitutional Court stressed that it must consider the context of the consequences of its judgment in terms of constitutional values and principles and the impact of the decision on state sovereignty and its constitutional identity. The Constitutional Court explained that, regardless of the difficulties associated with determining a detailed catalogue of competencies that cannot be transferred, issues subject to an absolute prohibition on transfer should encompass provisions that define the guiding principles of the CRP and provisions concerning individual rights that determine the identity of the state, particularly the requirement to protect human dignity and constitutional rights, the principle of statehood, the principle of democracy, the rule of law, the principle of social justice, the principle of subsidiarity, the requirement for

41 Decision of the Polish Constitutional Tribunal of 7 February 2001, K 27/00, OTK ZU no. 2/2001, item 29.

42 Decision of the Polish Constitutional Tribunal of 30 July 2014, K 23/11, OTK ZU no. 7/A/2014, item 80.

43 Decision of the Polish Constitutional Tribunal of 11 April 2000, K 15/98, OTK ZU no. 3/2000, item 86.

44 Decision of the Polish Constitutional Tribunal of 19 December 2006, P 37/05, OTK ZU no. 11/A/2006, item 177.

45 Decision of the Polish Constitutional Tribunal of 20 September 2006, SK 63/05, OTK ZU no. 8/A/2006, item 108.

46 Decision of the Polish Constitutional Tribunal of 11 May 2005, K 18/04, OTK ZU no. 5/A/2005, item 49.

a better implementation of constitutional values, and the prohibition of delegating constitutional powers and competencies to create competencies.[47] Additionally, on 7 October 2021, the Constitutional Court issued a new judgment regarding EU Law. The Constitutional Court ruled that specific provisions of the Treaty on the European Union[48] could threaten Poland's sovereignty and constitutional identity. The Constitutional Court emphasised the importance of interpreting EU law under the values and principles of the CRP, expressing concerns about the potential violation of national sovereignty by EU law. The Constitutional Court stressed the need to balance preserving member states' sovereignty and the EU's identity. The Court highlighted that the interpretation of EU provisions that eliminate national sovereignty or pose a threat to national identity was inconsistent with the Lisbon Treaty.[49]

In Hungary,[50] the Constitutional Court first emphasised its power to assess whether the joint exercise of competences under Art. E (2) FLH[51] violates human dignity, fundamental rights, the sovereignty of Hungary, or its identity based on its historical constitution. However, according to the Court, such an analysis is permissible only in exceptional situations and as a last resort in constitutional dialogue among member states and within the scope of the Constitutional Court's jurisdiction. The Constitutional Court stressed that in issues related to asylum and migration, both aspects of sovereignty and constitutional identity must be considered. Furthermore, the Constitutional Court emphasised the importance of constitutional identity by presenting a list of fundamental values covered by this domain, such as freedoms, the separation of powers, republican forms of government, public autonomy, religious freedom, the proper exercise of power, parliamentarism, equality of rights, respect for the rule of law, and the protection of nationalities residing in Hungary. From the perspective of the Constitutional Court, these values are considered crucial and can only be removed from Hungary in the case of a permanent loss of sovereignty and independence. The Constitutional Court stressed that sovereignty and constitutional identity are interconnected in various ways and that both elements must be considered simultaneously in specific cases.[52] Second, the Constitutional

47 Decision of the Polish Constitutional Tribunal of 24 November 2010, K 32/09, OTK ZU no. 9/A/2010, item 108.

48 Treaty on European Union, OJ C 326, 26.10.2012, pp. 13–390.

49 Decision of the Polish Constitutional Tribunal of 7 October 2021, K 3/21, OTK-A 2022, item 65; Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (OJ C 306, 17.12.2007, p. 1–271).

50 See in general: Berkes, 2023, pp. 9–31.

51 According to Art. E) (2) FLH, with a view to participating in EU as a Member State and on the basis of an international treaty, Hungary may, to the extent necessary to exercise the rights and fulfil the obligations deriving from the "Founding Treaties", exercise some of its competences arising from FLH jointly with other Member States, through the institutions of EU. Exercise of competences under this paragraph shall comply with the fundamental rights and freedoms provided for in FLH and shall not limit the inalienable right of Hungary to determine its territorial unity, population, form of government and state structure.

52 Decision of Hungarian Constitutional Court 22/2016 (XII. 5.).

Court analysed the potential consequences of not using the competences mentioned in Article E (2) FLH. The Constitutional Court expressed concerns that failing to enforce these powers could lead to the permanent and mass settlement of foreigners in Hungary without democratic authorisation, potentially violating Hungary's right to identity and self-determination based on human dignity. The failure of Hungary to enforce these competencies could result in significant and uncontrolled changes to the traditional social environment of Hungary's residents. The Constitutional Court emphasized that the principle of preserving sovereignty applies to all competences that have not been exclusively transferred to the EU under the Treaty on the Functioning of the European Union (hereinafter: TFEU).[53] The Constitutional Court highlighted the interconnection between constitutional identity and sovereignty. In this context, the Court recognised that preserving Hungary's constitutional identity is closely related to its sovereignty and that maintaining sovereignty is crucial for protecting constitutional identity. The Constitutional Court also emphasised the importance of safeguarding values constituting Hungary's constitutional identity, such as linguistic, historical, and cultural traditions. These values, which have evolved throughout the country's history, are considered inviolable legal facts that international agreements or changes in the FLH cannot change. Importantly, the Constitutional Court emphasised the need to protect human dignity, even in the face of EU actions that may pose a threat to that dignity, expanding the understanding of one's constitutional competencies and allowing for the non-application of EU law in exceptional cases and under certain conditions, which, in the Court's opinion, enhances control over fundamental rights.[54] Third, the Constitutional Court noted that the exercise of competencies through EU institutions cannot exceed what is necessary according to international agreements. Emphasising the principle of reserved sovereignty, the Constitutional Court stated that the joint exercise of competence cannot violate Hungary's inalienable right to determine its territorial unit, population, form of government, or state structure. On the other hand, in the same judgment, the Constitutional Court ruled that a person who is not a Hungarian citizen and enters Hungary through a country where he or she was not persecuted or threatened with persecution has no right to apply for asylum as a fundamental subjective right. The Constitutional Court stressed that, in such a situation, these individuals have a fundamental right to have their asylum application considered under the rules for granting asylum. The Constitutional Court also noted that Hungary, as a sovereign state, independently determines its constitutional organisation and legal system without subjecting its sovereignty to other states. In this regard, sovereign power includes full and exclusive control over people residing in Hungary.[55] Fourth, the Constitutional Court pointed out that the FLH establishes legal conditions for granting asylum,

53 Treaty on the Functioning of the European Union, OJ C 326, 26.10.2012, pp. 47–390.

54 Decision of Hungarian Constitutional Court 32/2021 (XII. 20.).

55 Decision of Hungarian Constitutional Court 2/2019 (III. 5.); In the scope of the last sentence also: Decision of Hungarian Constitutional Court 9/2018 (VII. 9.).

determining whether a particular person qualifies for international protection. The Court also emphasised that individuals applying for international protection have certain guarantees under Hungarian law. Additionally, as in the previous case, the Constitutional Court stated that protection was not granted to individuals who entered Hungary through a country where they were not persecuted or threatened with persecution.[56]

First, in the Czech Republic,[57] firstly, in 2006, the Constitutional Court ruled that the delegation of competencies from national bodies to EU institutions was a conditional process. According to the Court, the Czech Republic retains sovereignty, and delegated competencies are subject to formal and material conditions. This formal condition restricts delegation to compliance with the fundamentals of Czech sovereignty. The material condition pertains to how delegated competencies are exercised and how they must safeguard the essence of the rule of law. The Constitutional Court serves as a guardian and is ready to intervene when necessary.[58] Second, in 2006, the Constitutional Court stated that the courts could not assess individual EU norms unless EU developments threatened the essence of the constitutional order. The Court emphasised this was an exceptional and unlikely situation but allowed individual assessments. Additionally, the Court stressed that it could assess the constitutionality of a specific EU act if it was doubtful because of a conflict with essential elements of the democratic rule of law. Importantly, the Court noted that EU developments did not need to threaten these elements; it was sufficient if a specific EU norm violated them. Regarding the laws adopted to implement EU laws, the Constitutional Court mentioned that if the implemented EU norms leave no discretion in choosing appropriate measures, they lack the competence to assess their compatibility with the Czech Republic's constitutional order. However, it was also noted that there are certain exceptions.[59] Third, the Constitutional Court highlighted that the primacy of EU Law in the Czech Republic depends on whether EU legal norms are valid and effective (in the context of the Lisbon Treaty, the Constitutional Court, while assessing this legal act, found that it was not yet valid or effective). The Court also pointed out that the fundamental rights and freedoms of individuals, principles of democracy, people's sovereignty, the separation of powers, and the concept of the rule of law constitute the essential elements of a democratic rule of law. This could be relevant to the constitutional identity and the material conditions mentioned earlier.[60] Fourth, the Constitutional Court rejected a judgment of the Court of Justice of the European Union (CJEU), deeming it contrary to Czech law, and indicated that the CJEU exceeded the competencies transferred by the Czech Republic to the

56 Decision of Hungarian Constitutional Court 3/2019 (III. 7.).
57 See in general: Otta, 2023, pp. 211–237.
58 Decision of Czech Constitutional Court, 8 March 2006, Case No. ÚS 50/04.
59 Decision of Czech Constitutional Court, 3 May 2006, Pl. ÚS 66/04.
60 Decision of Czech Constitutional Court, 26 November 2008, Pl. ÚS 19/08.

EU under Art. 10a CCR.[61] Fifth, in 2020, the same Constitutional Court expressed the belief that only the CJEU could issue binding interpretations of EU Law[62] and also stated that it was obligated to refer preliminary questions to the CJEU if the interpretation of EU Law was unclear.[63] Sixth, the Constitutional Court noted that Arts. 78 (3) and 79 (1) TFEU essentially transposed Art. 64 (2) of the treaty establishing the European Community,[64] with the change brought about by the Lisbon Treaty strengthening the European Parliament's role in EU decisions. Additionally, the Constitutional Court observed that Art. 79 (5) TFEU explicitly grants Member States the right to determine the volume of third-country nationals entering their territories to seek work or engage in business, allowing the Lisbon Treaty to leave the regulatory mechanism of the movement of third-country nationals to Member States. In light of this, the Constitutional Court considered this regulation acceptable under Art. 10a CCR and not in conflict with the constitutional order.[65] Seventh, the Constitutional Court emphasised that ensuring effective migration control can be considered a valid and lawful objective of the legislation.[66] Eighth, the Constitutional Court pointed out that the right to asylum is not an absolute entitlement. In this context, the Constitutional Court considered that neither the CFRF nor international human rights agreements to which the Czech Republic is a party mandate the automatic granting of asylum to applicants. Importantly, the Constitutional Court underlined that the decision to refuse political asylum to foreigners does not necessarily violate Art. 43 CFRF.[67] Ninth the Constitutional Court recognised that foreigners do not have a constitutionally guaranteed fundamental right to enter and reside in the territory of the Czech Republic, as the sovereign state decides without discrimination under what conditions foreigners can stay in its territory.[68] Tenth, the Constitutional Court concluded that the Czech legislature had significant discretion in determining deportation penalties, including imposing them on foreigners for an indefinite period, under the constitutional order.[69]

In Slovakia,[70] the Constitutional Court first confirmed its authority to assess the compatibility of national law with primary EU law, classifying it as equivalent to international treaties. The Constitutional Court based its interpretation on CSR, which

61 Decision of Czech Constitutional Court, 31 January 2012, Pl. ÚS 5/12; According to Article 10a CCR, an international agreement may provide for a transfer of certain powers of bodies of the Czech Republic to an international organization or institution. An approval of the Parliament is required to ratify such international agreement unless a constitutional law requires an approval from a referendum.

62 Decision of Czech Constitutional Court, 3 November 2020, Pl. ÚS 10/17.

63 Decision of Czech Constitutional Court, 7 April 2020, Pl. ÚS 30/16.

64 Treaty establishing the European Community, OJ C 325, 24.12.2002, pp. 33–184.

65 Decision of Czech Constitutional Court, 3 November 2009, Pl. ÚS 29/09.

66 Decision of Czech Constitutional Court, 27 November 2018, Pl. ÚS 41/17.

67 Decision of Czech Constitutional Court, 30 January 2007, IV ÚS 553/06.

68 Decision of Czech Constitutional Court, 9 December 2008, Pl.ÚS 26/07.

69 Decision of Czech Constitutional Court, 18 September 2014, III ÚS 3101/13.

70 See in general: Gregová, 2023, pp. 111–132.

assigns the Constitutional Court to assess the compatibility of national regulations with CSR, constitutional laws, and international treaties. Importantly, the Constitutional Court established the principle that EU primary law takes precedence over Slovak law in accordance with Art. 7 (2) CSR.[71] However, the Constitutional Court introduced a self-limiting approach. This means that if the Constitutional Court finds that a national law is incompatible with CSR, there is usually no need for further examination of its compatibility with EU law. In this matter, the Constitutional Court also addressed a hypothetical situation in which national law is in line with CSR but irreconcilable with EU primary law, and this issue cannot be resolved through the principles of EU law interpretation. In such cases, the Constitutional Court suggests amending CSR, but this decision falls beyond the competence of the Constitutional Court in Slovakia.[72] Second, the Constitutional Court emphasised the commitment to respect human rights, drawing on the opinions and positions of international human rights bodies. The Court referred to reports from the Norwegian Helsinki Committee[73] and the intervention of the Commissioner for Human Rights of the Council of Europe submitted to the European Court of Human Rights[74] to use these documents as the basis for its decision and assessment of individuals seeking asylum in Greece. This case illustrates the Constitutional Court's dedication to protecting fundamental rights in line with international human rights norms.[75] Third, the Constitutional Court stressed the importance of expeditious decision-making by courts in the context of detention decisions. The Constitutional Court believed that it is the task of the courts to strike a balance between the right to a prompt decision in cases of deprivation of liberty under Art. 5 (4) of the European Convention on Human Rights (hereinafter: ECHR)[76] and the right to maintain minimal procedural standards in the investigative process.[77] Fourth, in its jurisprudence, the Constitutional Court interpreted the substantive core doctrine, which included human rights, democracy, and the rule of

71 According to Art. 7 (2) CSR, the Slovak Republic may, by an international treaty, which was ratified and promulgated in the way laid down by a law, or on the basis of such treaty, transfer the exercise of a part of its powers to the European Communities and the European Union. Legally binding acts of the European Communities and of the European Union shall have precedence over laws of the Slovak Republic. The transposition of legally binding acts which require implementation shall be realized through a law or a regulation of the Government according to Article 120 (2) CSR.

72 Decision of the Slovak Constitutional Court, Ref. No. PL. ÚS 3/09, 26 January 2011.

73 Norwegian Helsinki Committee (NHC), NOAS and Aitima, Out the Back Door: The Dublin II Regulation and Illegal Deportations from Greece, 2009.

74 Third party intervention by the Council of Europe Commissioner for Human Rights under Article 36, paragraph 2, of the European Convention on Human Rights, Application No. 30696/09 M.S.S. v. Belgium and Greece, Strasbourg, 31 May 2010, CommDH.

75 Decision of the Slovak Constitutional Court, Ref. No. III. ÚS 110/2011, 31 May 2011.

76 European Convention on Human Rights [Online]. Available at: https://www.echr.coe.int/documents/d/echr/convention_ENG (Accessed: 24 October 2023).

77 Decision of the Slovak Constitutional Court, Ref. No. II. ÚS 147/2013, 9 October 2013.

law. It seems that this can be compared with constitutional identity.[78] Fifth, the Constitutional Court noted that in the context of marriage between a foreign national and a Slovak citizen, the criteria set out in Art. 8 (2) ECHR require a proper legal assessment of the refusal to grant permanent residence to determine whether such a refusal may be considered an interference with the right to respect for family life in a given case.[79] Sixth, the Court explained the relationship between detention and deportation proceedings. The Constitutional Court emphasised that although these processes are separate, they are not completely independent or isolated from each other. The Constitutional Court also pointed out that the restriction on personal liberty in cases of detention for deportation was closely related to the purpose of detention itself.[80] Seventh, the Constitutional Court emphasised the broad discretion of state authorities in regulating issues related to foreigners' stay, especially in the area of the right to long-term residence. The Constitutional Court added that there is no subjective right to obtain permanent residence and that the Slovak authorities have significant discretion in this matter.[81] Eighth, the Constitutional Court noted that, according to Slovak law, one of the legitimate reasons for revoking the right to temporary residence is the discovery of circumstances justifying the rejection of the application, including situations in which a third-country national provides false or misleading information, presents false documents, or uses documents belonging to another person.[82] Ninth, the Constitutional Court emphasised the need to balance the protection of private and family lives with the interests of state security. The Constitutional Court noted that in some cases, to ensure the interests of state security, it is necessary to consider the criminal history of foreigners applying for one form of legal residence within the country. However, according to the Constitutional Court, examining whether State interference, including public authority, is justified in the case of national laws concerning foreigners is inevitable.[83] Tenth, in 2023, the Constitutional Court issued a judgment stating that EU Law has a unique character defined by the CJEU, establishing a separate legal order binding on member states and their courts. The Constitutional Court also emphasised that EU law establishes the principle of the primacy of its provisions in cases where national regulations cannot be interpreted following the requirements of EU law. Interestingly, according to the Constitutional Court, in such cases, national courts are obligated to fully consider EU law when making decisions.[84]

78 Decision of the Slovak Constitutional Court, Ref. No. PL. ÚS 7/2017, 31 May 2017; Decision of the Slovak Constitutional Court, Ref. No. PL. ÚS 21/2014, 30 January 2019; Decision of the Slovak Constitutional Court, Ref. No. PL ÚS 16/2019, 2 April 2020; Decision of the Slovak Constitutional Court, Ref. No. PL. ÚS 8/2022, 25 May 2022.

79 Decision of the Slovak Constitutional Court, Ref. No. III. ÚS 331/09, 16 December 2009.

80 Decision of the Slovak Constitutional Court, Ref. No. II. ÚS 264/09, 19 October 2010.

81 Decision of the Slovak Constitutional Court, Ref. No. II. ÚS 480/2014, 12 February 2015.

82 Decision of the Slovak Constitutional Court, Ref. No. III. ÚS 414/2016, 21 June 2016.

83 Decision of the Slovak Constitutional Court, Ref. No. II. ÚS 675/2017, 10 November 2017.

84 Decision of the Slovak Constitutional Court, Ref. No. PL. ÚS 15/2020, 15 March 2023.

In Serbia,[85] the Constitutional Court frequently rules individual cases based on constitutional complaints.[86] It is rare for a court's decision to pertain to general matters,[87] although there is sometimes room to interpret a general standard. Nevertheless, a few statements from the Court of Serbia concerning asylum and migration are worth noting. First, the Constitutional Court found, relying on European Court of Human Rights (hereinafter: ECtHR) jurisprudence, a violation of Art. 32 (1) CRS[88] because it determined that the Administrative Court had infringed the applicant's right to a fair trial by issuing a judgment lacking proper reasoning. The Constitutional Court also emphasised the importance of considering whether a person deserves complementary protection, especially after it had been determined during judicial proceedings that refugee status could not be granted.[89] Second, based on ECtHR jurisprudence, the Constitutional Court emphasised that the list of safe countries in Serbia could not be automatically applied without considering reports from the United Nations High Commissioner for Refugees.[90] Third, related to the previous case, the Constitutional Court found that the list of safe countries in Serbia could not be applied automatically without thoroughly assessing whether a specific country could be considered safe in each case. The Constitutional Court stressed that asylum authorities should thoroughly examine all complaint documentation. The Constitutional Court emphasised that an asylum application should not be rejected solely because the person was transported through a country on the list of safe countries if the asylum procedure in that country was inconsistent with international law.[91] Fourth, the Constitutional Court emphasised that the right to freedom is a fundamental constitutional right and, referring to ECtHR jurisprudence, noted that depriving someone of their freedom is subject to specific legal requirements. The Constitutional Court underlined a distinction between the right to freedom and freedom of movement. The Constitutional Court also observed that Serbia has the right to control its borders and establish the identities of individuals staying illegally without identification.[92] Fifth, the Constitutional Court emphasised that in the context of an allegation of discrimination, complaining individuals must prove that

85 See in general: Krstić, 2023, pp. 133-156.

86 Decision of Serbian Constitutional Court, Uz-5331/2012, 24 December 2012; Decision of Serbian Constitutional Court, Uz-3651/2015, 27 July 2022; Decision of Serbian Constitutional Court, Uz-6006/2016, 19 December 2018; Decision of Serbian Constitutional Court, Uz-1189/2015, 1 April 2021.

87 Decision of Serbian Constitutional Court, IUo-812/2012, 24 April 2013; Decision of Serbian Constitutional Court, IUo-45/2020, 25 October 2020.

88 According to Article 32 (1) CRS, everyone shall have the right to a public hearing before an independent and impartial tribunal established by the law within reasonable time which shall pronounce judgment on their rights and obligations, grounds for suspicion resulting in initiated procedure and accusations brought against them.

89 Decision of Serbian Constitutional Court, Uz-6596/2011, 30 October 2014.

90 Decision of Serbian Constitutional Court, Uz-1286/2012, 29 March 2012.

91 Decision of Serbian Constitutional Court, Uz-3548/2013, 19 September 2013.

92 Decision of Serbian Constitutional Court, Уz 1823/2017, 20 January 2021.

they were treated differently from individuals in a similar situation. In this context, and citing ECtHR jurisprudence, the Constitutional Court highlighted that discrimination occurs when a person is treated less favourably than another person in a similar situation.

In Croatia,[93] the Constitutional Court emphasised the importance of aligning domestic case law with international legal obligations arising from the ECHR. The Court noted that it is essential for Croatia to adhere to relevant legal justifications and ECtHR case law because these standards constitute the binding norms of international law for Croatia.[94] Second, the Constitutional Court stated that, due to the compatibility of the referendum question with EU law, the CRC, given its legal force, takes precedence over EU law.[95] Third, the Constitutional Court decided not to conduct investigations into the application of EU Law on its initiative in cases where applicants failed to substantiate their claims regarding violations of EU migration law and did not refer to any judgments of the CJEU.[96] Fourth, the Constitutional Court found a violation of the CRC when the court did not apply the acquis of the European Union within the Dublin system, a common European asylum protection system. Despite the complainant's lack of reference to EU law, the Constitutional Court invoked the principle of mutual trust among the member states participating in the Dublin system. In this context, the Constitutional Court emphasised that the principle of mutual trust imposes an obligation on Croatian authorities, including judicial authorities, to respect decisions made by the relevant bodies of other countries participating in the common Dublin system.[97] Fifth, the Constitutional Court emphasised that prohibiting inhuman or degrading treatment is one of the most important values in democratic societies. In this context, the Constitutional Court stressed that if there were legitimate grounds to believe that an individual in the receiving state would be exposed to treatment, contrary to Art. 3 ECHR, under such circumstances, the individual could not be deported to that country. The Constitutional Court believes that national authorities have a duty to thoroughly examine the conditions in a third country, particularly the availability and credibility of its asylum system and how the authorities of that third country implement their asylum regulations in practice.[98] Sixth, the Constitutional Court emphasised the importance of two key principles: equivalence and effectiveness. The Constitutional Court underlined that these principles, based on established CJEU jurisprudence, require that procedural provisions concerning the protection of rights under EU law be at least as favourable as those concerning similar national actions (the principle of equivalence) and should not be constructed to practically hinder or excessively hinder the use of

93 See in general: Ofak, 2023, pp. 187–209.
94 Decision of Croatian Constitutional Court, U-III-3304/2011, 23 January 2013.
95 Decision of Croatian Constitutional Court, U-VIIR-1159/2015, 8 April 2015.
96 Decision of Croatian Constitutional Court, U-III-6958/2014, 27 February 2018.
97 Decision of Croatian Constitutional Court, U-III-208/2018, 10 July 2018.
98 Decision of Croatian Constitutional Court, U-III-4865/2018, 4 March 2021.

rights granted by EU law (the principle of effectiveness).[99] Seventh, the Constitutional Court explained the principles of the applications for international protection. The Constitutional Court highlighted the importance of assessing circumstances "ex nunc", meaning that the assessment should consider facts known or knowable by the relevant state authorities when deciding on international protection applications. The Constitutional Court stated that when granting international protection, the state must assess the risk of ill-treatment in the country where the applicant would be returned. According to the Constitutional Court, this assessment should focus on the foreseeable consequences, considering the country's general situation and the applicant's situation. In this context, the Constitutional Court also added that the relevant authorities must consider all relevant evidence and that the assessment of this threat should be rigorous. However, the Constitutional Court noted that international protection applicants may have difficulty providing evidence due to their particular circumstances; therefore, the benefit of the doubt should be applied when assessing the credibility of their statements and documents. The Constitutional Court emphasised that even if some details of the applicant's testimony seem unconvincing, it does not necessarily weaken the overall credibility of their claim. Additionally, the Constitutional Court noted that in the case of victims of domestic violence, there was a need for sensitivity and understanding during their interviews because of the psychological effects of violence.[100]

In Slovenia,[101] the Constitutional Court first identified two possible violations of non-refoulement principles. These involve directly deporting an individual to a country where they face persecution or indirectly deporting them to a third country, which could subsequently deport them to a place of persecution.[102] Second, in a case concerning the recognition of family members in the context of international protection, the Constitutional Court referred to Art. 14 CRSa.[103] Even though this constitutional provision does not explicitly mention homosexuality as a legally protected category, the Constitutional Court indicated that the non-discrimination principle also protects same-sex relationships as it fits within other personal circumstances. Considering Slovenia's legal provisions concerning the right to unite with family members (in terms of international protection), the Constitutional Court noted that this includes same-sex spouses regardless of whether they are officially registered, married in another country, or living together in a partnership.[104] Third,

99 Decision of Croatian Constitutional Court, U-III-424/2009 and U-III-1411/2009, 17 December 2019.

100 Decision of Croatian Constitutional Court, U-III-557/2019, 11 September 2019.

101 See in general: Cvikl and Flander, 2023, pp. 51–87.

102 Decision of Slovenian Constitutional Court, U-I-59/17, Official Gazette of the Republic of Slovenia, No. 62/2019, 18 September 2019.

103 According to Article 14 CRSa, in Slovenia everyone shall be guaranteed equal human rights and fundamental freedoms irrespective of national origin, race, sex, language, religion, political, or other conviction, material standing, birth, education, social status, disability, or any other personal circumstance. All are equal before the law.

104 Decision of Slovenian Constitutional Court, U-I-68/16, Up-213/15, Official Gazette of the Republic of Slovenia, No. 49/2016, 16 June 2016.

in the context of the freedom of movement for asylum seekers, the Constitutional Court found that the obligation to conduct interviews and obtain prior consent for residence at a private address may constitute proportional limitations on freedom of movement, if necessary, to ensure satisfactory living conditions. However, the Constitutional Court has also stated that restrictions on movements operating based on automatism are disproportionate and unconstitutional.[105] Fourth, the Constitutional Court has pointed out that a request to extend international protection should be treated the same as a new application for international protection. The Constitutional Court disagreed with the view that adopting such a rule would violate the principle of efficiency, which aims to save time and cost in the procedure. The Constitutional Court affirmed that applicants for international protection have the constitutional right for both administrative bodies and courts to consider all their claims, whether based on previous or new claims.[106] Fifth, the Constitutional Court confirmed the right to unite with family members (international protection), even for relatives not formally recognised as family members.[107] Sixth, to increase the efficiency of legal asylum proceedings in Slovenia, a decision was made to introduce and apply simplified procedures. In this regard, the Constitutional Court determined that if an asylum seeker claims any form of violence or persecution, the use of any simplified procedure in such a case is excluded.[108] Seventh, the Constitutional Court emphasised that every decision to reject an asylum application must involve in-depth assessments to ensure that the applicant is not exposed to life or health risks due to torture, mistreatment, or similar actions in their country of origin. The Constitutional Court stressed that national authorities should not oversimplify this task by presenting general or naïve explanations. Drawing on the ECHR and ECtHR jurisprudence, the Constitutional Court recognised the need for rigorous scrutiny in this regard.[109] Eighth, the Constitutional Court also emphasised that persistently ignoring an applicant's request for supplementary protection could significantly violate his or her right to a fair trial.[110]

In Romania,[111] the Constitutional Court first observed that these structures do not acquire super-competence or sovereignty by transferring certain competencies to EU structures. The Constitutional Court stated that EU member states decided

105 Decision of Slovenian Constitutional Court, U-I-95/08, Up-1462/06, Official Gazette of the Republic of Slovenia, No. 111/2008, 15 October 2008.

106 Decision of Slovenian Constitutional Court, U-I-189/14, Up-663/14, Official Gazette of the Republic of Slovenia, No. 82/2015, 15 October 2015.

107 Decision of Slovenian Constitutional Court, U-I-309/13, Up-981/13, Official Gazette of the Republic of Slovenia, No. 6/2015, 14 January 2015.

108 Decision of Slovenian Constitutional Court, Up-96/09, Official Gazette of the Republic of Slovenia, No. 57/2009, 09 July 2009.

109 Decision of Slovenian Constitutional Court, Up-763/09, Official Gazette of the Republic of Slovenia, No. 80/2009, 17 September 2009.

110 Decision of Slovenian Constitutional Court, Up-2963/08, Official Gazette of the Republic of Slovenia, No. 22/2009, 05 March 2009.

111 See in general: Nicu, 2024.

to collectively exercise certain powers that traditionally belonged to the sphere of national sovereignty. The Constitutional Court also noted that, in the current era of global challenges, international development, and global-scale human communication, national sovereignty can no longer be perceived as absolute and indivisible without risking unacceptable isolation.[112] Second, the Constitutional Court affirmed that the essence of the EU lies in member states relinquishing certain competencies to achieve common goals without ultimately infringing upon their national constitutional identities.[113] Third, the Constitutional Court emphasised that member states retain the powers essential for maintaining their constitutional identity. The Constitutional Court underlined that the transfer of powers and establishing new guidelines within the already transferred competencies fell within the constitutional margin of freedom for member states.[114] Fourth, the Constitutional Court determined that Romania accepted that, in areas where exclusive competence belongs to the EU, regardless of international treaties, implementing the resulting commitments should adhere to EU rules. Thus, under the compatibility clause in Art. 148 CR,[115] Romania cannot adopt a normative act conflicting with the commitments made by an EU member state. Additionally, the Constitutional Court stressed that Romania faithfully adhered to obligations arising from its accession to the EU without encroaching upon its exclusive competencies. However, the Constitutional Court emphasised that this is subject to a constitutional limit expressed by what is defined as a national constitutional identity.[116] Fifth, the Constitutional Court noted that the CR reflects the will of the people, implying that it cannot lose its binding force solely because

112 Decision of Romanian Constitutional Court, no. 148, 16 April 2003, published in the Official Monitor of Romania, no. 317, 12 May 2003.

113 Decision of Romanian Constitutional Court, no. 683, 27 June 2012, published in the Official Monitor of Romania, no. 479, 12 July 2012.

114 Decision of Romanian Constitutional Court, no. 104, 6 March 2018, published in the Official Monitor of Romania, no. 446, 29 May 2018.

115 According to Art. 148 CR, (1) Romania's accession to the constituent treaties of EU, with a view to transferring certain powers to community institutions, as well as to exercising in common with the other member states the abilities stipulated in such treaties, shall be carried out by means of a law adopted in the joint sitting of the Chamber of Deputies and the Senate, with a majority of two thirds of the number of deputies and senators. (2) As a result of the accession, the provisions of the constituent treaties of EU, as well as the other mandatory community regulations shall take precedence over the opposite provisions of the national laws, in compliance with the provisions of the accession act. (3) Such a regulation shall also apply accordingly for the accession to the acts revising the constituent treaties of EU. (4) The Parliament, the President of Romania, the Government, and the judicial authority shall guarantee that the obligations resulting from the accession act and the content of Article 148 (2) CR are implemented. (5) The Government shall send to the two Chambers of the Parliament the draft mandatory acts before they are submitted to the EU institutions for approval.

116 Decision of Romanian Constitutional Court, no. 887, 15 December 2015, published in the Official Monitor of Romania, no. 191, 15 March, 2016; Decision of Romanian Constitutional Court, no. 683, 27 June 2012, published in the Official Monitor of Romania, no. 479, 12 July 2012; Decision of Romanian Constitutional Court, no. 64, 24 February 2015, published in the Official Monitor of Romania, no. 286, 28 April 2015.

of the discrepancies between its provisions and European provisions.[117] Sixth, the Constitutional Court expressed the belief that the right to freedom of movement must be restricted by a judge.[118] Seventh, the Constitutional Court observed that when the decision at the first instance is both final and immediately enforceable, it breaches the right to defence under Art. 24 (1) of the CR,[119] particularly affecting potential refugee applicants who are unable to secure an effective and suspensive review of the first-instance decision.[120] Eighth the Constitutional Court ruled that legal regulations foreseeing the lack of the possibility to directly complain about the field of international protection and the absence of the possibility to file a complaint through a representative violated Art. 21 CR,[121] which guaranteed the principle of free access to justice.[122]

5. Categorization of the role of constitutional court in Poland, Hungary, the Czech Republic, Slovakia, Serbia, Croatia, Slovenia and Romania concerning migration and refugee affairs

After presenting the selected positions of the national constitutional courts in Poland, Hungary, the Czech Republic, Slovakia, Serbia, Croatia, Slovenia, and Romania, it is time to categorise their roles in migration and asylum issues. These two Parameters were decisive. The first Parameter is the jurisprudence of the National Constitutional Court on migration and asylum. In this case, the national constitutional court can adopt two general positions: a) it pronounces migration and asylum matters either specifically (concerning the interpretation of specific provisions) or generally (regarding the interpretation of legal principles), or b) it does not pronoun migration and asylum matters. This Parameter is substantive, as it concerns the interpretation of migration, refugees, or asylum law. It mostly has an internal character, as it mostly pertains to domestic law. However, in the latter

117 Decision of Romanian Constitutional Court, no. 80, 16 February 2014, published in the Official Monitor of Romania, no. 246, 7 April 2014.

118 Decision of Romanian Constitutional Court, no. 106, 11 April 2001, published in the Official Monitor of Romania, no. 416, 26 July 2001.

119 According to Art. 24 (1) CR, the right to defense is guaranteed.

120 Decision of Romanian Constitutional Court, no. 176, 29 May 2001, published in the Official Monitor of Romania, no. 374, 11 July 2001.

121 According to Art. 21 CR, every person is entitled to bring cases before the courts for the defense of his legitimate rights, liberties and interests. The exercise of this right shall not be restricted by any law. All parties shall be entitled to a fair trial and a solution of their cases within a reasonable term. Administrative special jurisdiction is optional and free of charge.

122 Decision of Romanian Constitutional Court, no. 604, 20 May 2008, published in the Official Monitor of Romania, no. 469, 25 June 2008.

case, international or EU law interpretations may exist. Nevertheless, even in such a case, it will still be the interpretation of the law applicable within the given country and thus still internal. This is true with one exception, where the national constitutional court may see its obligation to use preliminary ruling procedures for the CJEU as dependent on the second Parameter. The second Parameter also determines whether the national constitutional court speaks on migration and asylum matters and represents the voice of the highest national constitutional judicial body or the highest constitutional judicial body in the respective country, even above international bodies. If the National Constitutional Court has not yet spoken about migration and asylum matters in its jurisprudence, the second Parameter indicates its potential future stance. The second Parameter involves checking whether and, if so, how the national constitutional court speaks about its relationship with EU law. The National Constitutional Court adopted three positions. It can be argued that a) national law (constitutional), including the competencies of the national constitutional court, is above EU law; b) national law (constitutional), including the competencies of the national constitutional court, is generally above EU law and claims that the national constitutional court does not intend to use its competences for now, but will not hesitate to do so in an exceptional situation requiring a response (reserved right to intervene); and c) national law (constitutional) is under EU law. Because of this Parameter, the chapter presented the positions (case law) of selected national constitutional courts on this subject, although not necessarily all judicial cases were related to competence in migration and asylum matters. National constitutional courts prefer to take a general stance in this area, presenting the principle of interpreting the relationship between domestic and EU law. However, such a general position can reveal much about understanding this relationship within a specific area of competence. This Parameter is institutional or systemic as it concerns the interpretation of legal principles within the system of a given country. This is the answer to the question of the hierarchy and level of importance of domestic law and the national constitutional courts to EU law, including CJEU jurisprudence. This Parameter also has an external character, as it concerns the interpretation of the systemic or institutional relationship of the state with the international organisation, the EU. It is worth noting that in the case of these two Parameters, it is still possible that the National Constitutional Court has not issued any decisions that fit the outlined topics. If this is the case, it will signify a question mark because each of the analysed national constitutional courts from the considered countries can issue such judgments, as per the analysis of the relevant constitutional law provisions (mentioned above).

It's worth noting that the substantive internal and systemic/institutional external Parameters are unequal. In the case of the EU member states, substantive internal Parameters are less important than systemic/institutional external Parameters. This is because if a national constitutional court sees its position to the EU as an executor of EU law, where EU law is above national (constitutional) law and is understood under CJEU jurisprudence, in its substantive jurisprudence,

such a national constitutional court would have no decision-making margin at all or a minimal one. This means that the role of a national constitutional court in migration and asylum matters either does not exist or is insignificant. Hence, systemic/institutional external Parameters might determine the significance of substantive internal Parameters. However, without substantive jurisprudence from the National Constitutional Court, it is impossible to present an interpretation of the law made by the National Constitutional Court regarding migration and asylum matters. In such a situation, one can only say that the potential interpretation of such a national constitutional court might have legally significant or insignificant importance, but relevant jurisprudence is necessary to determine the image of this interpretation. This leads to the conclusion that the presented Parameters form a complementary system. Based on this, the national constitutional courts in Poland, Hungary, the Czech Republic, Slovakia, Serbia, Croatia, Slovenia, and Romania can be assigned to one of the following categories: a) strong specific, b) strong unspecific, c) moderate specific, d) moderate unspecific, e) weak specific, f) weak unspecific, g) unknown strong specific, or h) unknown strong unspecific.

Considering the outlined assumptions and the jurisprudence of the National Constitutional Courts thus far, Table 1 presents the results of the correlation between this jurisprudence and Parameter 1 (substantive internal Parameter, where the variants are: a) the national constitutional court expresses itself generally (regarding the interpretation of legal principles) and/or specifically (concerning the interpretation of specific provisions) on migration and asylum matters; b) the national constitutional court has not yet expressed itself on migration and asylum matters) and Parameter 2 (systemic/institutional external Parameter, where the variants are: a) the national constitutional court speaks about the relationship with EU law and argues that national law (constitutional), including the competences of the national constitutional court, is above EU law; b) the national constitutional court speaks about the relationship with EU law and asserts that national law (constitutional), including the competences of the national constitutional court, is generally above EU law and claims that the national constitutional court does not intend to use its competences for now but will not hesitate to do so in an exceptional situation requiring a response (reserved right to intervene); c) the national constitutional court speaks about the relationship with EU law and argues that national law (constitutional), including the competences of the national constitutional court, is under EU law; d) the national constitutional court has not yet expressed itself on the relationship with EU law).

Table 1. Correlation of jurisprudence of national constitutional courts with substantive internal Parameter and systemic/institutional external Parameter[123]

Country	Parameter 1		Parameter 2			
	variant a)	variant b)	variant a)	variant b)	variant c)	variant d)
Poland	☒	☑	☑	☒	☒	☒
Hungary	☑	☒	☑	☒	☒	☒
Czechia	☑	☒	☒	☒	☑	☒
Slovakia	☑	☒	☒	☒	☑	☒
Serbia	☑	☒	☒	☒	☒	☑
Croatia	☑	☒	☑	☒	☒	☒
Slovenia	☑	☒	☒	☒	☒	☑
Romania	☑	☒	☑	☒	☒	☒

Table 1 indicates the classification of the jurisprudence of the national constitutional court into two variants for Parameter 1 and four variants for Parameter 2. This classification is based on the rule that the national constitutional court of a specific country should be assigned the variant most consistent with its jurisprudence. However, this classification requires further explanation. In Poland, although the National Constitutional Court takes a firm stance on its relationship with EU Law, it has not yet been pronounced on issues related to migration and asylum. The fact that the court's jurisprudence concerns the rights, freedoms, and obligations of foreigners in Poland does not change this verdict because it does not pertain to asylum or migration issues. Therefore, Poland was classified as variant b) of Parameter 1. In the Czech Republic, the National Constitutional Court expressed a view most aligned with variant b) of Parameter 2 in 2006; however, in 2020, it issued a ruling departing from that view and proposed an interpretation aligned with variant c) of Parameter 2. Hence, the Czech Republic was classified as variant c) of Parameter 2. In Slovakia, this situation is similar to that in the Czech Republic. Until 2023, the jurisprudence of the national constitutional court was closest to variant a) of Parameter 2, but in 2023, a ruling was issued in alignment with variant c) of Parameter 2. Therefore, Slovakia was classified as variant c) of Parameter two. In Serbia, the National Constitutional Court did not have the opportunity to take a position regarding its relationship with EU law because Serbia is not a member state of the EU. For this reason, Serbia was classified as variant d) of Parameter 2.

123 Source: Author's own elaboration.

This classification leads to different conclusions regarding the roles of national constitutional courts in Poland, Hungary, the Czech Republic, Slovakia, Serbia, Croatia, Slovenia, and Romania in matters related to migration and asylum. However, the rules used for such an evaluation are outlined before an assessment of such a role is presented. Firstly, Parameter 2 determines the legal significance of Parameter 1. Parameter 2 indicates the power of the position held by a national constitutional court in a particular country. In other words, this Parameter indicates whether the national constitutional court holds the position of solely the highest national constitutional judicial body or whether it holds the position of the highest constitutional judicial body in the country, including the above international bodies. This leads to the conclusion that the power of the national constitutional court's position based on its jurisprudence can be categorised into one of the following groups: a) strong, b) moderate, c) weak, and d) unknown strong. Categorisation into group a) occurs when the jurisprudence of the national constitutional court has been classified into variant a) of Parameter 2. Categorisation into group b) will occur when the jurisprudence of the national constitutional court has been classified as variant b) of Parameter 2. Categorisation into group c) will occur when the jurisprudence of the national constitutional court has been classified as variant c) of Parameter 2. Categorisation into group d) will occur when the jurisprudence of the national constitutional court has been classified into variant d) of Parameter 2. The exception to this rule will only be the National Constitutional Court of Serbia because Serbia is not an EU member state. This means that the national constitutional court in Serbia did not have the opportunity to issue a ruling related to the relationship between national law (constitutional law), including the competencies of the national constitutional court in Serbia and EU law. Although Serbia is a candidate for the EU, it does not engage in complex competency interactions. This reasoning leads to the conclusion that the national constitutional court in Serbia automatically holds the status of the highest constitutional judicial body in Serbia, including the above international bodies, as it currently does not engage with EU law and CJEU jurisprudence (which could potentially contribute to the issuance of a ruling by the national constitutional court of Serbia regarding the relationship between national law (constitutional) and its competencies with EU law). Serbia's membership in other international organisations does not alter this conclusion because the legal norms of international law serving as the foundation for these other international organisations do not impact the status of the national constitutional court in Serbia. This occurs even though the national constitutional court in Serbia often refers to the ECtHR jurisprudence. Thus, regarding the specific power assignment to the National Constitutional Court, assigning Serbia to Group a) strong is justified. Further emphasis is needed on the significant differences between this situation and the practices of the National Constitutional Court in Slovenia. Despite issuing rulings related to migration and asylum, and Slovenia being an EU member state, the national constitutional court in Slovenia has never ruled concerning the relationship between national law (constitutional) and its competencies as a national constitutional court in Slovenia with EU law. In this instance, even though the national constitutional court in Slovenia had the opportunity

to address this issue, it never did so. Second, based on the results of the correlation between the jurisprudence of the national constitutional courts and Parameter 1, which has a substantive and internal character, one can conclude that the image of the position of the national constitutional court can be assigned to one of the following groups: a) specific and b) unspecific. Categorisation into group a) occurs when the jurisprudence of the National Constitutional Court has been classified into variant a) of Parameter 1. Categorisation into group b) will occur when the jurisprudence of the national constitutional court has been classified into variant b) of Parameter 1.

Based on these assumptions, one can conclude that specific national constitutional courts play a role in migration and asylum matters. The assessment of this role is based on two premises. The first is the premise of the power of position, and the second is the premise of the image of position. In other words, combining the power of the position with its image addresses the question of the role of the national constitutional court in migration and asylum matters. Within the first premise, each analysed country can be assigned to one of four groups: a) strong, b) moderate, c) weak, and d) unknown strong. In the context of the second premise, each analysed country can be assigned to one of two groups: a) specific and b) unspecific. Therefore, the national constitutional courts in Poland, Hungary, the Czech Republic, Slovakia, Serbia, Croatia, Slovenia, and Romania can be assigned one of the following roles in migration and asylum matters: a) strong specific; b) strong unspecific; c) moderate specific; d) moderate unspecific; e) weak specific; f) weak unspecific; g) unknown strong specific; h) unknown strong unspecific.

Table 2. Role of national constitutional courts in Poland, Hungary, Czech Republic, Slovakia, Serbia, Croatia, Slovenia, and Romania in migration and asylum matters[124]

Country	**Role**
Poland	strong unspecific
Hungary	strong specific
Czechia	weak specific
Slovakia	weak specific
Serbia	strong specific
Croatia	strong specific
Slovenia	unknown strong specific
Romania	strong specific

124 Source: Author's own elaboration.

The results of correlating the power of position with the image of the national constitutional courts in Poland, Hungary, the Czech Republic, Slovakia, Serbia, Croatia, Slovenia, and Romania are indicated in Table 2, which led to an assessment of the roles of these national constitutional courts in migration and asylum matters according to the presented criteria. The justification for this assessment is as follows: First, the Polish Constitutional Court was classified into variant b) of Parameter 1 and variant a) of Parameter 2; hence, its position power was categorised into group a) strong, while the position's image was categorised into group b) unspecific, leading to an assessment of its role as strong unspecific. Second, the Hungarian Constitutional Court was classified into variant a) of Parameter 1 and variant a) of Parameter 2; thus, its position power was categorised into group a) strong, while the position's image was categorised into group a) specific, resulting in the assessment of its role as strongly specific. Third, the Czech Constitutional Court was classified into variant a) of Parameter 1 and variant c) of Parameter 2; thus, its power of position was categorised into group c) weak, whereas the position's image was categorised into group a) specific, resulting in the assessment of its role as weakly specific. Fourth, the Slovak Constitutional Court was classified into variants a) of Parameter 1 and c) of Parameter 2; thus, its power of position was categorised into group c) weak, while the position's image was categorised into group a), leading to the assessment of its role as weakly specific. Fifth, the Serbian Constitutional Court was classified into variants a) of Parameter 1 and d) of Parameter 2; thus, its position's image was categorised into group a). However, owing to the previously argued exception, the power of position was categorised into group a) strong. Therefore, the Serbian Constitutional Court assigned the role of strong specifics. Sixth, the Croatian Constitutional Court was classified into variant a) of Parameter 1 and variant a) of Parameter 2; thus, its position power was categorised into group a) strong, whereas the position's image was categorised into group a) specific, resulting in the assessment of its role as strongly specific. Seventh, the Slovenian Constitutional Court was classified into variant a) of Parameter 1 and variant d) of Parameter 2; thus, its position power was categorised into group d) unknown strong, while the position's image was categorised into group a) specific, leading to the assessment of its role as unknown strong specific. Eighth, the Romanian Constitutional Court was classified into variant a) of Parameter 1 and variant a) of Parameter 2; thus, its power of position was categorised into group a) strong, whereas the position's image was categorised into group a) specific, resulting in the assessment of its role as strongly specific.

Finally, arranging the hierarchical order of the roles of national constitutional courts from top to bottom and considering the results of the analysis, it should be noted that the national constitutional courts in Poland, Hungary, the Czech Republic, Slovakia, Serbia, Croatia, Slovenia, and Romania have varying degrees of significance. The first level of significance should be assigned to the "strong specific" role. This role was assigned to the national constitutional courts in Hungary, Serbia, Croatia, and Romania. The second level of significance should be assigned to the role of "strong unspecific". This role has been assigned to Poland's National

Constitutional Court. The third level of significance should be assigned to the role of "moderate specific". This role has not been assigned to any national constitutional court. The fourth level of significance should be assigned to the role of "moderate unspecific". This role has not been assigned to any national constitutional court. The fifth level of significance was assigned to the role of "weak specific". This role was assigned to the Czech Republic and Slovakia national constitutional courts. The sixth level of significance should be assigned to the role of "weak unspecific". This role has not been assigned to any national constitutional court. However, roles such as "unknown strong specific", assigned to the Constitutional Court in Slovenia, and "unknown strong unspecific", not assigned to any national constitutional court, cannot be classified into any level of significance until the power of position is known.

This leads to the important conclusion that the national constitutional courts in Hungary, Serbia, Croatia, and Romania were classified at the first significance level. This means that their rulings on migration and asylum matters must be considered within their country and at the EU level. Additionally, it is crucial to remember that migration and asylum issues based on the EU nomenclature are shared competencies. Therefore, assigning a high level of significance to the role of the National Constitutional Court has become increasingly important. A slightly less important role in this context is the national constitutional court in Poland, which has been classified at the second significance level. However, it is important to note that if the national constitutional court in Poland made rulings on asylum and migration, it would automatically qualify for the first level of significance. However, national constitutional courts in the Czech Republic and Slovakia were classified in a less favourable position, at the fifth significance level. This indicates that while the rulings of these national constitutional courts are important within their national structures at the EU level, they are less or not significant. This is primarily because migration and asylum fall under shared competencies regulated by primary EU law. Consequently, in line with the decisions of the national constitutional courts in the Czech Republic and Slovakia, the EU may not consider its positions on migration and asylum matters. Meanwhile, the mystery lies with the national constitutional court in Slovenia, which will determine its position once, if ever, it issues a ruling regarding the relationship between national (constitutional) law and its competencies with EU law.[125]

125 This chapter pertains to migration and asylum matters, but the conclusions drawn here may have broader applications.

6. Proposal of the standard concerning the role of the constitutional court in asylum and refugee affairs

Considering the scope of this publication, and without repeating what has already been written elsewhere, the proposal of a standard concerning the role of the constitutional court in asylum and refugee affairs should refer to another publication that was also part of the international research project of the Central European Professors' Network.[126] In brief, the proposal suggests that EU member states, while safeguarding their independence and sovereignty, should take the stance that, as national entities, they are fully legitimate in making binding interpretations of EU primary law concerning the principles of conferral, proportionality, and subsidiarity. Even though EU member states under such circumstances might opt to create a new structure at the international level, including within the EU, the most natural solution would be for their national constitutional courts to act as megaphones. This proposal seems to provide valuable guidance for EU member states and EU candidate countries such as Serbia.

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7. Conclusions

The considerations in this chapter lead to the conclusion that there is currently no common standard concerning the role of national constitutional courts in Poland, Hungary, the Czech Republic, Slovakia, Serbia, Croatia, Slovenia, and Romania regarding migration and asylum issues. There are certain similarities or even convergences in terms of the power and image of these positions. This also implies assigning similar or sometimes the same roles to migration and asylum. However, it is essential to remember that the image of the position categorised here as specific or unspecific carries different substantive loads. While these similarities are visible, each national constitutional court's approach to substantive matters is somewhat different, reflecting the specificity of national identity. Conversely, the position of each national constitutional court concerning structural or institutional issues is more susceptible to methodological analysis. This is an important distinction because while it is challenging to expect the emergence of a common substantive standard (image of the position), it is feasible to anticipate the development of a shared institutional/structural standard (power of the position), even when utilising the proposed method outlined in this chapter. Additionally, this chapter leads to another significant conclusion: For the significance of the roles of national constitutional courts in countries engaged in complex competency interactions with the EU, defining the

126 See: Oręziak.

relationship between national (constitutional) law and the competencies of the national constitutional court with EU law, including CJEU case law, is crucial. Hence, it can be concluded that, in the context of interactions between EU member states and the EU, the significance of the role of the national constitutional court in migration and asylum matters is determined by defining the relationship between national law (constitutional), including the competencies of the national constitutional court, and EU law, including the CJEU competencies. This conclusion is also valuable for EU candidate countries (e.g. Serbia).

References

Bibliography

Androvičová, J. (2017) 'Human Rights Discourse on Migration–the Case of Slovakia', *Journal of Modern Science,* 35(4), pp. 197–220; https://doi.org/10.13166/jms/84821.

Bauerová, H. (2018) 'The Czech Republic and the reality of migrant integration policy in the context of European integration', *Hrvatska i komparativna javna uprava: časopis za teoriju i praksu javne uprave,* 18(3), pp. 397–420; https://doi.org/10.31297/hkju.18.3.3.

Berkes, L. (2023) 'The Practice of the Hungarian Constitutional Court on Asylum', *Law, Identity and Values*, *3*(2), pp. 9-31; https://doi.org/10.55073/2023.2.9-31.

Beznec, B., Jure, G. (2023) 'New migration policies and innovative practices. Slovenia between bordering and inclusion', *Innovation: The European Journal of Social Science Research,* 36(2), pp. 250–265; https://doi.org/10.1080/13511610.2022.2071240.

Bobić, M., Šantić, D. (2020) 'Forced migrations and externalization of European Union border control: Serbia on the Balkan migration route', *International Migration,* 58(3), pp. 220–234; https://doi.org/10.1111/imig.12622.

Boleček̆ová, M., Olejárová, B. (2017) 'Migration as part of the state's foreign policy: Case study Slovakia', *CES Working Papers,* 9(4), pp. 564–581.

Borozan, D. (2017) 'Internal migration, regional economic convergence, and growth in Croatia', *International Regional Science Review*, 40(2), pp. 141–163; https://doi.org/10.1177/0160017615572889.

Brljavac, B. (2017) 'Refugee crisis in Europe: the case studies of Sweden and Slovakia', *Journal of Liberty and International Affairs,* 3(1), pp. 91–107.

Cieślak, Z. (2008) 'Trybunał Konstytucyjny – „prawotwórca" negatywny' in Bąkowski, K., Grajewski, K., Warylewski J. (eds.), *Orzecznictwo w systemie prawa*, Warsaw. pp. 60–71.

Cvikl, L., Flander, B. (2023) 'Asylum and Refugee Issues in the Case Law of the Constitutional Court of the Republic of Slovenia', *Law, Identity and Values*, *3*(2), pp. 51–87. https://doi.org/10.55073/2023.2.51-87.

Czaplinski, W. (1994) 'Aliens and refugee law in Poland—recent developments', *International Journal of Refugee Law,* 6(4), pp. 636–642; https://doi.org/10.1093/ijrl/6.4.636.

Drbohlav, D. (2003) 'Immigration and the Czech Republic (with a special focus on the foreign labor force)', *International Migration Review,* 37(1), pp. 194–224; https://doi.org/10.1111/j.1747-7379.2003.tb00134.x.

Elrick, T., Ciobanu, O. (2009) 'Migration networks and policy impacts: insights from Romanian–Spanish migrations', *Global networks,* 9(1), pp. 100–116; https://doi.org/10.1111/j.1471-0374.2009.00244.x.

Geddes, A., Andrew T. (2016) 'In the shadow of fortress Europe? Impacts of European migration governance on Slovenia, Croatia and Macedonia', *Journal of Ethnic and Migration Studies,* 42(4), pp. 587–605; https://doi.org/10.1080/1369183X.2015.1102041.

Goga, C. (2019) 'The Effects of the" Refugee Crisis" in the European Union and in Romania', *Revista Universitară de Sociologie,* 15(2), pp. 148–160.

Gregová Širicová Ľ. (2023) 'The Practice of the Slovak Constitutional Court Concerning Migration and Refugee Affairs', *Law, Identity and Values*, *3*(2), pp. 111–132; https://doi.org/10.55073/2023.2.111-132.

Gregurović, S., Dubravka M. (2012) 'The challenges of migration policies in Croatia: Migration history, trends and prospects', *AEMI Journal,* 10, pp. 99–113.

Harvey, J. (2006) 'Return dynamics in Bosnia and Croatia: A comparative analysis', *International Migration,* 44(3), 89–144; https://doi.org/10.1111/j.1468-2435.2006.00373.x.

Jelínková, M. (2019), 'A Refugee Crisis Without Refugees: Policy and media discourse on refugees in the Czech Republic and its implications', C*entral European Journal of Public Policy,* 13(1), pp. 33–45; https://doi.org/10.2478/cejpp-2019-0003.

Jorens, Y. (2023) *The Lighthouse Function of Social Law.* Cham: Springer*,* https://doi.org/10.1007/978-3-031-32822-0.

Klaus, W. (2017) 'Security first: The new right-wing government in Poland and its policy towards immigrants and refugees', *Surveillance & Society,* 15(3-4), pp. 523–528; https://doi.org/10.24908/ss.v15i3/4.6627.

Krstić, I. (2023) 'The Role of the Serbian Constitutional Court in the Area of Asylum and Migration', *Law, Identity and Values*, *3*(2), pp. 133–156; https://doi.org/10.55073/2023.2.133-156.

Kury, H., Redo, S. (2018) *Refugees and Migrants in Law and Policy,* Cham: Springer*,* https://doi.org/10.1007/978-3-319-72159-0.

Lažetić, M. (2018) 'Migration Crisis and the Far Right Networks in Europe: A Case Study of Serbia', *Journal of Regional Security,* 13(2), pp. 1–48; https://doi.org/10.5937/jrs13-19429.

Łukasiewicz, K. (2017) 'Refugee Protection in the United States and Poland. Comparative Perspective on Policy Shaping and Delivery', *Studia Migracyjne – Przegląd Polonijny,* 43 (165), pp. 47–70.

Lukić, V. (2016) 'Understanding transit asylum migration: Evidence from Serbia', *International migration,* 54(4), pp. 31–43; https://doi.org/10.1111/imig.12237.

Matei, A., Cocosatu, M. (2009) 'Towards an Administration Without Frontiers – An Analysis on the Instruments and Mechanisms of Cooperation in the Field of Migration from Romanian View', *European Review of Public Law/Revue Europeenne de Droit Public,* 21, pp. 403–440.

Nicu, A. L. (2024) 'The Practice of the Constitutional Court of Romania Concerning Migration and Refugee Affairs', *Central European Journal of Comparative Law*, 5(1), in press.

Ofak, L. (2023) 'The Case Law of the Constitutional Court of the Republic of Croatia Concerning Migration and Asylum Issues', *Law, Identity and Values*, *3*(2), pp. 187-209; https://doi.org/10.55073/2023.2.187-209.

Oręziak, B. (2024) 'Limits and Use of EU Competences: General Considerations in the Context of Policies on Border Checks, Asylum, and Immigration', in Raisz, A. (ed.) *Migration and Central Europe. Challenges and Legal Responses.* Miskolc–Budapest, Central European Academic Publishing, pp. 187–211; https://doi.org/10.54237/profnet.2024.armace_4.

Otta, Š. (2023) 'The Practice of National Constitutional Courts Concerning Migration and Refugee Affairs – The Czech Republic', *Law, Identity and Values*, 3(2), pp. 211–237; https://doi.org/10.55073/2023.2.211-237.

Pechočiak, T., Hrdá, V. (2017) 'Mapping of migration in Slovakia', *Mathematics in Education, Research and Applications,* 3(1), pp. 32–40; https://doi.org/10.15414/meraa.2017.03.01.32-40.

Rajović, G. (2014) 'Geographical contribution of contemporary labour migration from Serbia and Montenegro to Denmark', *International Journal of Migration and Residential Mobility,* 1(1), pp. 28–49; https://doi.org/10.1504/IJMRM.2014.059698.

Spadina, H., Kovacevic, L. (2023) 'Social Law as a Lighthouse for Labour Migration Law: Comparative Study—Croatia and Serbia' in Jorens, Y. (ed.) *The Lighthouse Function of Social Law*, Cham: Springer, pp. 467–485.

Syryt, A. (2023) 'Issues Relating to Migration and Refugees in the Constitution of the Republic of Poland and the Jurisprudence of the Constitutional Tribunal', *Law, Identity and Values*, 3(2), pp. 283–309; https://doi.org/10.55073/2023.2.283-309.
Szczepanikova, A. (2011) 'From the Right of Asylum to Migration Management: The Legal–Political Construction of 'a Refugee'in the Post-Communist Czech Republic', *Europe-Asia Studies,* 63(5), pp. 789–806; https://doi.org/10.1080/09668136.2011.576022.
Vezovnik, A. (2018) 'Securitizing migration in Slovenia: A discourse analysis of the Slovenian refugee situation', *Journal of Immigrant & Refugee Studies,* 16(1-2), pp. 39–56; https://doi.org/10.1080/15562948.2017.1282576.
Zlătescu, I. (2014) 'Migration and Law issues related to legislation on migration in Romania', *Drepturile omului,* (24)1, pp. 37–49.

Legal sources

Charter of Fundamental Rights and Freedoms (Czech Republic) [Online]. Available at: https://www.usoud.cz/fileadmin/user_upload/ustavni_soud_www/Pravni_uprava/AJ/Listina_English_version.pdf (Accessed: October 3, 2023).
Constitution of Romania [Online]. Available at: https://www.presidency.ro/en/the-constitution-of-romania (Accessed: August 22,2023).
Constitution of the Czech Republic [Online]. Avaible at: https://www.psp.cz/en/docs/laws/1993/1.html Accessed: August 14, 2023).
Constitution of the Republic of Croatia [Online]. Available at: https://www.sabor.hr/sites/default/files/uploads/inline-files/CONSTITUTION_CROATIA.pdf (Accessed: August 9, 2023).
The Constitution of the Republic of Poland [Online]. Available at: https://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm (Accessed: August 2, 2023).
Constitution of the Republic of Serbia [Online]. Available at: http://www.parlament.gov.rs/upload/documents/Constitution_%20of_Serbia_pdf.pdf (Accessed: August 11, 2023).
Constitution of the Republic of Slovenia [Online]. Available at: https://www.us-rs.si/media/constitution.pdf (Accessed: August 15, 2023).
Constitution of the Slovak Republic [Online]. Avaible at: https://www.prezident.sk/upload-files/46422.pdf (Accessed: August 5, 2023).
Fundamental Law of Hungary [Online]. Available at: https://njt.hu/jogszabaly/en/2011-4301-02-00 (Accessed: August 2, 2023).
Norwegian Helsinki Committee (NHC), NOAS and Aitima, Out the Back Door: The Dublin II Regulation and Illegal Deportations from Greece, 2009. [Online]. Available at: https://www.statewatch.org/media/documents/news/2009/oct/greece-illegal-deportations-report.pdf (Accessed: 3 August 2023).
Treaty establishing the European Community, OJ C 325, 24, December 2002, pp. 33–184.
Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (OJ C 306, 17, December 2007, p. 1–271).
Treaty on European Union, OJ C 326, 26, October 2012.
Treaty on the Functioning of the European Union, OJ C 326, 26, October 2012.

Constitutional court decisions

Decision of Croatian Constitutional Court, U-III-208/2018, 10 July 2018
Decision of Croatian Constitutional Court, U-III-3304/2011, 23 January 2013

Decision of Croatian Constitutional Court, U-III-424/2009 and U-III-1411/2009, 17 December 2019
Decision of Croatian Constitutional Court, U-III-4865/2018, 4 March 2021
Decision of Croatian Constitutional Court, U-III-557/2019, 11 September 2019
Decision of Croatian Constitutional Court, U-III-6958/2014, 27 February 2018
Decision of Croatian Constitutional Court, U-VIIR-1159/2015, 8 April 2015
Decision of Czech Constitutional Court, 18 September 2014, III ÚS 3101/13
Decision of Czech Constitutional Court, 26 November 2008, Pl. ÚS 19/08
Decision of Czech Constitutional Court, 27 November 2018, Pl. ÚS 41/17
Decision of Czech Constitutional Court, 3 May 2006, Pl. ÚS 66/04
Decision of Czech Constitutional Court, 3 November 2009, Pl. ÚS 29/09
Decision of Czech Constitutional Court, 3 November 2020, Pl. ÚS 10/17
Decision of Czech Constitutional Court, 30 January 2007, IV ÚS 553/06
Decision of Czech Constitutional Court, 31 January 2012, Pl. ÚS 5/12
Decision of Czech Constitutional Court, 7 April 2020, Pl. ÚS 30/16
Decision of Czech Constitutional Court, 8 March 2006, Case No. ÚS 50/04
Decision of Czech Constitutional Court, 9 December 2008, Pl.ÚS 26/07
Decision of Hungarian Constitutional Court 2/2019 (III. 5.)
Decision of Hungarian Constitutional Court 22/2016 (XII. 5.)
Decision of Hungarian Constitutional Court 3/2019 (III. 7.)
Decision of Hungarian Constitutional Court 32/2021 (XII. 20.)
Decision of Hungarian Constitutional Court 9/2018 (VII. 9.)
Decision of the Polish Constitutional Tribunal of 15 November 2000, P 12/99, OTK ZU no. 7/2000, item 260
Decision of the Polish Constitutional Tribunal of 19 December 2006, P 37/05, OTK ZU no. 11/A/2006, item 177
Decision of the Polish Constitutional Tribunal of 24 November 2010, K 32/09, OTK ZU no. 9/A/2010, item 108
Decision of the Polish Constitutional Tribunal of 11 April 2000, K 15/98, OTK ZU no. 3/2000, item 86
Decision of the Polish Constitutional Tribunal of 7 February 2001, K 27/00, OTK ZU no. 2/2001, item 29
Decision of the Polish Constitutional Tribunal of 29 April 2003, SK 24/02, OTK ZU no. 4/A/2003, item 33
Decision of the Polish Constitutional Tribunal of 31 May 2004, K 15/04, OTK ZU no. 5/A/2004, item 47
Decision of the Polish Constitutional Tribunal of 11 May 2005, K 18/04, OTK ZU no. 5/A/2005, item 49
Decision of the Polish Constitutional Tribunal of 18 January 2012, Kp 5/09, OTK ZU no. 1/A/2012, item 5
Decision of the Polish Constitutional Tribunal of 26 June 2013, K 33/12, OTK ZU no. 5/A/2013, item 63
Decision of the Polish Constitutional Tribunal of 30 July 2014, K 23/11, OTK ZU no. 7/A/2014, item 80
Decision of the Polish Constitutional Tribunal of 10 June 2020, K 3/19, OTK-A 2020, item 27
Decision of the Polish Constitutional Tribunal of 20 September 2006, SK 63/05, OTK ZU no. 8/A/2006, item 108

Decision of the Polish Constitutional Tribunal of 7 October 2021, K 3/21, OTK-A 2022, item 65
Decision of Romanian Constitutional Court, no. 104, 6 March 2018, published in the Official Monitor of Romania, no. 446, 29 May 2018
Decision of Romanian Constitutional Court, no. 106, 11 April 2001, published in the Official Monitor of Romania, no. 416, 26 July 2001
Decision of Romanian Constitutional Court, no. 148, 16 April 2003, published in the Official Monitor of Romania, no. 317, 12 May 2003
Decision of Romanian Constitutional Court, no. 176, 29 May 2001, published in the Official Monitor of Romania, no. 374, 11 July 2001
Decision of Romanian Constitutional Court, no. 604, 20 May 2008, published in the Official Monitor of Romania, no. 469, 25 June 2008
Decision of Romanian Constitutional Court, no. 64, 24 February 2015, published in the Official Monitor of Romania, no. 286, 28 April 2015
Decision of Romanian Constitutional Court, no. 683, 27 June 2012, published in the Official Monitor of Romania, no. 479, 12 July 2012
Decision of Romanian Constitutional Court, no. 683, 27 June 2012, published in the Official Monitor of Romania, no. 479, 12 July 2012
Decision of Romanian Constitutional Court, no. 80, 16 February 2014, published in the Official Monitor of Romania, no. 246, 7 April 2014
Decision of Romanian Constitutional Court, no. 887, 15 December 2015, published in the Official Monitor of Romania, no. 191, 15 March, 2016
Decision of Serbian Constitutional Court, Uz-3651/2015, 27 July 2022
Decision of Serbian Constitutional Court, IUo-45/2020, 25 October 2020
Decision of Serbian Constitutional Court, IUo-812/2012, 24 April 2013
Decision of Serbian Constitutional Court, Uz-1189/2015, 1 April 2021
Decision of Serbian Constitutional Court, Uz-1286/2012, 29 March 2012
Decision of Serbian Constitutional Court, Uz-3548/2013, 19 September 2013
Decision of Serbian Constitutional Court, Uz-5331/2012, 24 December 2012
Decision of Serbian Constitutional Court, Uz-6006/2016, 19 December 2018
Decision of Serbian Constitutional Court, Uz-6596/2011, 30 October 2014
Decision of Serbian Constitutional Court, Уz 1823/2017, 20 January 2021
Decision of Slovenian Constitutional Court, U-I-189/14, Up-663/14, Official Gazette of the Republic of Slovenia, No. 82/2015, 15 October 2015
Decision of Slovenian Constitutional Court, U-I-309/13, Up-981/13, Official Gazette of the Republic of Slovenia, No. 6/2015, 14 January 2015
Decision of Slovenian Constitutional Court, U-I-59/17, Official Gazette of the Republic of Slovenia, No. 62/2019, 18 September 2019
Decision of Slovenian Constitutional Court, U-I-68/16, Up-213/15, Official Gazette of the Republic of Slovenia, No. 49/2016, 16 June 2016
Decision of Slovenian Constitutional Court, U-I-95/08, Up-1462/06, Official Gazette of the Republic of Slovenia, No. 111/2008, 15 October 2008
Decision of Slovenian Constitutional Court, Up-2963/08, Official Gazette of the Republic of Slovenia, No. 22/2009, 05 March 2009
Decision of Slovenian Constitutional Court, Up-763/09, Official Gazette of the Republic of Slovenia, No. 80/2009, 17 September 2009
Decision of Slovenian Constitutional Court, Up-96/09, Official Gazette of the Republic of Slovenia, No. 57/2009, 09 July 2009

Decision of the Slovak Constitutional Court, Ref. No. II. ÚS 147/2013, 9 October 2013
Decision of the Slovak Constitutional Court, Ref. No. II. ÚS 264/09, 19 October 2010
Decision of the Slovak Constitutional Court, Ref. No. II. ÚS 480/2014, 12 February 2015
Decision of the Slovak Constitutional Court, Ref. No. II. ÚS 675/2017, 10 November 2017
Decision of the Slovak Constitutional Court, Ref. No. III. ÚS 110/2011, 31 May 2011
Decision of the Slovak Constitutional Court, Ref. No. III. ÚS 331/09, 16 December 2009
Decision of the Slovak Constitutional Court, Ref. No. III. ÚS 414/2016, 21 June 2016
Decision of the Slovak Constitutional Court, Ref. No. PL ÚS 16/2019, 2 April 2020
Decision of the Slovak Constitutional Court, Ref. No. PL. ÚS 15/2020, 15 March 2023
Decision of the Slovak Constitutional Court, Ref. No. PL. ÚS 21/2014, 30 January 2019
Decision of the Slovak Constitutional Court, Ref. No. PL. ÚS 3/09, 26 January 2011
Decision of the Slovak Constitutional Court, Ref. No. PL. ÚS 7/2017, 31 May 2017
Decision of the Slovak Constitutional Court, Ref. No. PL. ÚS 8/2022, 25 May 2022

CHAPTER VI

Impact of Migration on the Demographic and Religious Landscapes of Central European Countries: Legal Perspectives

Dalibor Đukić

Abstract

This study examines the role of migration in transforming the demographic and religious landscapes of European countries, with a special focus on Central Europe. Since the 1950s, Europe has faced low population growth rates, which stagnated by the end of the 20th century. Migration has played a key role in reversing this trend, particularly in Central European countries such as Poland, Hungary, Slovenia, Czechia, and Slovakia, although the proportion of foreign-born residents in these countries remains below the European Union average. In 2022, member countries of the Organisation for Economic Co-operation and Development saw significant increases in asylum applications, labour migration, and international students, with family migration a leading cause of new permanent migration. Migrant populations tend to cluster in urban areas, especially in Central European capitals, except in Poland. By 2023, Europe's population growth was bolstered by positive net migration, especially following the COVID-19 pandemic and displacement of persons from Ukraine. Despite migration's role in population growth, its long-term effectiveness and the challenges it poses to Europe's cultural, social, and political fabric are debated. The increasing non-working-age population strains healthcare systems and elevates old-age dependency ratios, threatening economic growth and productivity. Migration alone cannot offset the declining fertility rates; hence, pro-natalist policies are crucial. This study highlights the influence of migrants' religiosity on Europe's religious diversity, with implications for secularisation trends. The projected growth of religious groups, including Muslims, necessitates reassessing and reformulating legislation on

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religions in Europe to ensure sustainable pluralism. Ultimately, addressing Europe's demographic challenges requires supporting the native population's fertility rates, enhancing labour productivity, facilitating continuous education, and providing flexible employment options after retirement. These measures, while not globally altering population numbers, aim to sustain a capable environment for future sustainable population growth.

Keywords: migration, demography, population ageing, workforce shortages, religion and religiosity, religious pluralism.

1. Introduction

The word "demography" consists of two Greek words: *demos* (δῆμος), which refers to ordinary people or ordinary citizens, and *graphein* (γράφειν), which means writing or study about a particular topic. This word was first used by Achille Guillard in 1855 in his famous work titled Elements de Statistique Humaine ou Demographie Comparee.[1] Guillard's primary focus within demography encompassed a comprehensive understanding of populations, including their numerical aspects; overall dynamics; and physical, societal, intellectual, and ethical conditions. His exploration of population size, distribution, demographic processes, and structural aspects foreshadowed the foundations of contemporary demography.[2] Demography is usually divided into two traditions: formal demography, which is concerned with 'the precise mathematical measurement of the three demographic processes of fertility, mortality, and migration' and social demography, which examines 'the determinants and consequences of population size, distribution, and composition and of the demographic processes of fertility, mortality, and migration that determine them'.[3] According to the classic definition outlined by Hauser and Duncan, 'Demography is the study of the size, territorial distribution, and composition of population, changes therein, and the components of such changes, which may be identified as natality, mortality, territorial movement (migration), and social mobility (change of status)'.[4]

Demography is usually considered an applied discipline. Although a basic demographic theory is necessary for collecting and processing demographic data, the main contribution of demographic studies is providing proposals for real-world problems. The results of demographic analyses are, therefore, often applied using

1 Guillard, 2010.
2 Thomas, 2018, p. 1.
3 Murdock and Ellis, 2020, p. 4; Keely, 2000, p. 44; Teitelbaum, 2008, p. 52.
4 Hauser and Duncan, 1959, p. 2.

non-demographic factors.[5] This study examines how demographic theories, concepts, and data contribute to decision-making that affects the legal regulation of migrations.

Accordingly, this study examines the impact of migration on the demographic and religious landscapes of Europe and Central European states, employing various scientific methods, including the dogmatic, axiological, comparative, and demographic methods. These methods contribute to assessing the influence of fertility, mortality, average life expectancy, and migration on the demographic landscape of Europe.[6] The research is closely connected to the question of religious shifts in European societies and the impact of migration on them. The hypothesis under investigation is whether migration can resolve the main demographic challenges of European states and how it affects their ethnic composition and religious landscape.

This chapter is structured as follows. Section 2 explores the intersection between migration and demography, analysing the demographic aspect of migration and its implications on demographic shifts in Europe and Central European countries. Section 3 briefly presents the current demographic landscape of Europe and the European Union (EU). Section 4 then delves into various aspects related to the intersections between migration and population decline in Europe, exploring the extent to which migration can reverse the population decline in European countries.

Section 5 analyses other important demographic processes, focusing on the impact of immigration on population ageing and workforce shortages in Europe. The final section of the chapter concentrates on the influence of migration on the religious landscape of Europe and future trends in Europe's religious shift. Migration contributes to an increase in individuals with religious affiliations while introducing new religious communities and practices that need accommodation within European legal systems. The aim is to highlight tendencies in the religious affiliation of the European population and the effects of migration on them. The conclusion in section 6 summarises the main findings of the analysis.

2. Demography and migration

While demography delves into human populations broadly, not all population characteristics fall within the scope of a demographic analysis. As evident in the outlined definitions of formal and social demography, three fundamental demographic processes—fertility, mortality, and migration—emerge. This study focuses on migrations and their influence on demographic structure. Migration, within demographic

5 Thomas, 2018, pp. 2–5.

6 For more details on demographic methods, see Yusuf, Swanson, and Martins, 2014, pp. 97, 123, 143, 173.

theory, is delineated as the process wherein individuals, families, or groups relocate from one place to another. A detailed examination of the term "migration" follows. However, it is pertinent to note R. Thomas's observation that, in the contemporary world, migration holds greater societal implications than patterns of fertility or mortality.[7] Fertility and mortality have diminished in significance primarily because of declining fertility and mortality rates.

Demographers focus on not individual attributes but rather the collective traits of groups of people. Demography is widely regarded as the study of human populations.[8] Typically, a population constitutes an agglomeration of various individual units capable of self-reproduction. The foundation for this grouping can stem from diverse factors, although among the most significant populations today are the global population and individual nations within specific geographic boundaries, encompassing their respective inhabitants.[9] While each person may possess a "demographic profile", demographers are primarily concerned with the attributes of larger aggregates—a community, state, or nation. It is crucial to note that considerable variation exists within any group concerning its attributes. Any population's members might display a spectrum of values for various attributes. Therefore, what captivates the demographer's interest is the "average" characteristics of the population.[10] This chapter focuses on the demographic profile of European countries, with a special emphasis on Central European states, and the impact of migrations on their demographic landscape.

Demography plays a crucial role in shaping social policies, managing populations, and regulating migrations. As such, the findings of demographic research can serve as a strong foundation for the development and understanding of both domestic and international migration laws and regulations.

Defining migrants and migration can also be challenging. As mentioned, migration is the third population change component. From the demographic point of view, it is the most difficult process to measure.[11] Furthermore, it is most dynamic and complex.[12] While the number of births per woman is around two and death occurs to each individual only once, migration proves to be significantly more recurrent in Western societies. Current estimates suggest that an average American relocates approximately 20 times throughout their lifespan from birth to death.[13] Especially difficult to measure is temporary and circular migration.[14] Not only is migration challenging to register and measure, but it also holds the most significant influence on population changes.

7 Thomas, 2018, p. 12.
8 Murdock and Ellis, 2020, p. 4.
9 Bean and Brown, 2015, p. 67.
10 Thomas, 2018, p. 2.
11 Murdock and Ellis, 2020, p. 134.
12 Thomas, 2018, p. 151.
13 Winthrop, 2015.
14 Constant, Nottmeyer, and Zimmermann, 2013, p. 55.

Migration can be defined as 'a physical move involving an intended permanent change in residence'.[15] A permanent change in residence signifies the individual's or household's intention to remain in the new residence for an unspecified duration. A residence is characterised as the location where a person typically sleeps and eats. Possessing any form of residence suggests a level of permanence in suitable housing, although specific groups may lack officially recognised residences.

Migration encompasses two primary categories: internal and international. Individuals involved in migration may relocate either between nations or within a singular country. Internal migration signifies a change in residence within a specific country and is typically less regulated compared to international migration. Demographers classify individuals moving into an area as in-migrants, while those departing from an area are labelled out-migrants. International migration denotes the purposeful and enduring movement from one country to another. Those entering a country are denoted as immigrants, while those leaving are termed emigrants. Each nation establishes regulations and policies governing international migration, particularly immigration. Immigration laws regulate the entry conditions and criteria, country-specific limitations on acquiring formal residence permissions, and related procedures.[16] Generally, countries do not impose restrictions on emigration since citizens typically have the liberty to depart from the country as long as another nation permits entry. Exceptions to this rule may arise in specific situations, such as during periods of martial law.[17]

Migration can be also categorised as voluntary or involuntary. Voluntary migration is initiated by the migrant's choice and typically involves moves driven by economic needs, retirement, family reasons, or simply a desire for change. Contrastingly, involuntary migration commonly arises from political or religious persecution, wars, civil unrest, or natural disasters such as famines. This distinction has fuelled discussions regarding the duties of states towards migrants. At least two opposing views can be identified. The first one perceives voluntary migration as a mere preference and free choice of a migrant that does not deserve any special treatment by institutions. The other view represents those who advocate for migrants' rights and tend to classify all current migrations as involuntary.[18] Consequently, the distinction between refugees and migrants was based on the criteria of voluntariness. According to this distinction, refugees are those who have left their homes involuntarily.[19] However, involuntary migration on an international scale presents a considerable challenge in the 21st century. Factors such as war, famine,[20] climate change, persecution, and societal disruptions have led to a crisis concerning displaced individuals

15 Thomas, 2018, p. 152.
16 Ibid.
17 For example, during the martial law in Ukraine, men aged 18– 60 years may be mobilised and have no right to leave Ukraine; VisitUkraine.today, 2023.
18 Ottonelli and Torresi, 2013, p. 784.
19 Brettell, 2015, p. 198.
20 Carney, 2015, p. 10.

worldwide.[21] Even though the distinction between voluntary and non-voluntary migration is not always crucial, it can have significant consequences for the legal status of migrants and refugees.

Another critical distinction lies between legal and illegal immigration. Legal immigration involves entry into a country with formal permission, allowing for temporary or permanent residence. Illegal immigrants, conversely, enter a country without proper legal authorisation.[22] Keeping record of illegal immigrants is almost impossible, and therefore limited data are available on illegal migrants. Although the growth of illegal immigration led to improvements in border monitoring and internal police activities, it is often connected with income inequality, problems of public health protection, low performance of public institutions, etc.

At the international level, there is no universally accepted definition of either migration or migrant. The United Nations (UN) International Organization for Migration defines migration as

> The movement of a person or a group of persons, either across an international border, or within a State. It is a population movement, encompassing any kind of movement of people, whatever its length, composition and causes; it includes migration of refugees, displaced persons, economic migrants, and persons moving for other purposes, including family reunification.[23]

The same organisation interprets "migrant" as an umbrella term that reflects

> … the common lay understanding of a person who moves away from his or her place of usual residence, whether within a country or across an international border, temporarily or permanently, and for a variety of reasons. The term includes a number of well-defined legal categories of people, such as migrant workers; persons whose particular types of movements are legally defined, such as smuggled migrants; as well as those whose status or means of movement are not specifically defined under international law, such as international students.[24]

These definitions, however, are not generally accepted and should not bear any legal consequences.

Two general approaches are used to define the aforementioned terms: the inclusivist and residualist views. The inclusivist view defines migrants as individuals who

21 According to Brettell and Hollifield, 2015, p. 2,
At the end of 2020, the number of "persons of concern" to the United Nations High Commissioner for Refugees (UNHCR) was 82.4 million (1 percent of the world's population), including 26.4 million refugees, 4.1 million asylum seekers, 48 million internally displaced people, and a relatively new category, 5.4 million Venezuelans forced to flee their country, a number that continues to rise.

22 Thomas, 2018, p. 154.

23 International Organization for Migration, 2011, p. 62.

24 International Organization for Migration, 2019, p. 132.

have moved from their usual place of residence, regardless of their legal status and motivation for moving. This broad definition includes refugees, foreign workers, trafficking victims, trailing spouses, international students, and other individuals falling under various categories. By contrast, the residualist view defines migrants as people who have relocated for any reason other than fleeing war or persecution, making them a diverse category of individuals who share the characteristic of not being refugees.[25] Thus, human migration can be classified into various types based on different factors such as reasons, territory, and duration. Some examples of human migration types that have not been mentioned include economic, environmental, and seasonal migration.

The focal point of the disagreement lies in determining whether refugees should fall under the category of "migrants". Despite the widespread acceptance of the inclusive viewpoint, the UN Refugee Agency advocates for the residualist stance, emphasising the distinction between refugees and migrants. This differentiation is justified by the assertion that confusion between these terms poses problems for both groups.[26] The agency's position is attributed to its aim of safeguarding its specific interests within inter-agency power conflicts, stemming from the International Organization for Migration joining the UN in 2016 and becoming the UN Migration Agency.[27]

Without delving into the highly significant and intriguing debate about distinguishing between migrants, refugees, and other "people on the move",[28] this chapter treats migration as an umbrella term encompassing all the aforementioned categories.

3. Demographic landscape of Europe and the EU

The global population has exhibited sustained growth over centuries, with varying growth rates that peaked in the early 1960s and subsequently declined. Europe experienced consistently low growth rates since 1950, even reaching stagnation by the end of the preceding century. However, migration served as a pivotal factor in reversing this trend, contributing to an upsurge in growth rates.[29] The region of the Organisation for Economic Co-operation and Development (OECD) and

25 Carling, 2023, p. 400.
26 UNHCR, 2016, paras. 2–7.
27 Carling, 2023, p. 400. Ramji-Nogales (2017, p. 10) noted that 'Contemporary interpretations of refugee law, particularly as interpreted in the popular debate, draw a stark binary between worthy refugees and unworthy economic migrants'.
28 '"People on the move" can loosely be defined as people who are moving from one place to another for relatively long periods of time'. Pijnenburg and Rijken, 2021, p. 274.
29 Willekens, 2015, p. 13.

the EU demonstrate considerable percentages of foreign-born inhabitants, surpassing 10% and 13% of their respective total populations. Central Europe showcases diverse scenarios: Poland and Hungary have experienced considerable increases in their foreign-born populations, with Poland witnessing a doubling since 2012.[30] Yet, these populations represent less than 3% or 6.5% of their total populations, respectively.[31] These figures exclude temporary protection recipients primarily from Ukraine. Despite notable growth rates, these countries maintain a relatively low proportion of foreign-born residents compared to the total population. Conversely, Slovenia observed a noteworthy 28% surge in its foreign-born population over the last decade, reaching 14% of the total population;[32] this highlights a distinct situation wherein growth rates may be moderate or low, but the proportion exceeds the European average. Lastly, countries such as the Czech Republic and Slovak Republic exhibit lower growth rates (16% and 34%, respectively) and a smaller proportion of foreign-born residents, hovering around 4.3% to 4.2% of their total population, respectively.[33] Overall, while the foreign-born populations in most Central European countries are growing, their proportion relative to the total population remains rather low, falling below the EU average.

In 2022, OECD nations documented remarkable levels of international migration, with some countries in these regions reporting record-high figures. There was a notable increase across all migration categories. New asylum applications even surpassed the records seen in 2015/2016. Additionally, there was a significant surge in labour migration and temporary labour migration. For the first time in history, the count of international students approached nearly 2 million. Family migration retained its status as the leading category for new permanent-type migration, constituting 40% of all such migration. Meanwhile, managed labour migration and free mobility each accounted for 21% of the overall permanent-type migration.[34]

Migrant populations tend to concentrate more in specific regions within countries, notably the capital and urban areas, as compared to native-born populations. Within Europe, non-EU migrants exhibit a stronger inclination than EU migrants to cluster in these urbanised regions. The surge in immigrant populations over the past decade has been particularly notable in urban areas. In Central Europe, capital-city regions overwhelmingly harbour the highest proportions of immigrant populations, with Poland being the exception to this trend. Regions characterised by high proportions of well-educated native residents often mirror similar proportions of well-educated immigrant populations. This suggests a trend where highly educated foreign-born individuals tend to settle in regions akin to those chosen by their native-born counterparts.[35]

30 OECD, 2023, pp. 236, 262.
31 OECD, 2023, pp. 236, 262.
32 OECD, 2023, p. 270.
33 OECD, 2023, pp. 222, 268.
34 OECD, 2023, pp. 11–12.
35 OECD and European Union, 2018, p. 38.

The heightened migration rates are poised to significantly impact the demographic landscape of Europe. Migration, especially immigration, is viewed as a potential remedy for key demographic challenges prevalent in Europe, including population decline, ageing, low fertility rates, and labour scarcity. Immigration directly contributes to bolstering the total population of host countries, thereby exerting an immediate influence on population growth.

Moreover, there is an anticipation that the influx of young individuals within the working age bracket through immigration will alter the age distribution, potentially skewing it towards a younger demographic. Additionally, there exists a hypothesis that the presence of young immigrants may elevate the fertility rate, given that migrant populations in Europe tend to exhibit higher fertility rates compared to native populations. Lastly, immigration is perceived as an immediate and effective solution to address the escalating labour shortages observed across European countries. These hypotheses concerning the impact of migration on demographic shifts in Europe will be methodically tested and analysed in subsequent sections of this chapter.

4. Population decline and migration in Europe

In 2023, Europe's population reached approximately 742.2 million, showing a modest increase of 2.2 million compared to 2013. Since the 1960s, Europe's population growth has declined significantly, reaching negative figures in the mid-1990s. Although there has been a slight recovery since the low point of -0.07% in 1998, the growth rate for 2020 remained modest at just 0.04%.[36] Vaclav Smil, a Canadian professor, noticed years ago that

> In 1900 Europe (excluding Russia) had nearly 20 percent of the world's population and accounted for roughly 40 percent of the global economic product; 100 years later it had less than 9 percent of all people and produced less than 25 percent of the global output…By 2050 its population share will slip to about 6 percent of the global total, and its share of global economic product may be as low as 10 percent: these are hardly trends leading toward global dominance.[37]

Europe is expected to lose 11% of its population by 2050 if no immigration takes place, while the global population will increase by 32%.

From the beginning of the 21st century until 2020, the EU experienced population growth. This increase in population was the result of the EU's enlargement, positive natural change, and net migration. Between 1952 and 2010, six expansions

36 Statista Research Department, 2023, para. 1.
37 Smil, 2005, pp. 605–643, p. 609.

resulted in the addition of 248 million individuals to the EU, constituting 70% of its overall growth. Demographic expansion, encompassing both natural population growth and international migration, accounted for 72 million or 30% of the total.[38] However, between 2020 and 2022, the EU's total population declined by 585,000 individuals, primarily due to the COVID-19 pandemic. By 1 January 2023, the EU's total population rebounded to 448.4 million. Eurostat attributed this growth to increased migratory movements post-COVID-19 and the mass influx of displaced persons from Ukraine who received temporary protection status in EU Member States. In 2022, deaths continued to outnumber live births in the EU, resulting in negative natural population change. The overall population increase in 2022 was solely due to positive net migration, with deaths surpassing live births. In summary, the natural change in the EU population was outweighed by net migration, resulting in a population increase. Net migration significantly rose from 1.1 million in 2021 to 2.9 million in 2022, playing a crucial role in population growth. The anticipated increase in deaths due to an ageing population suggests that the EU's future population trends will heavily rely on the contribution of net migration, especially if fertility rates remain relatively low.[39]

Among the countries with the highest population decrease are several Central European states. A decrease in population was recorded in Hungary, Poland, and Slovakia due only to natural change, while in Serbia, the decline was more a result of negative net migration. Some Central European states, such as Slovenia and the Czech Republic, recorded population increases only due to positive net migration. It is interesting that growth was recorded due to natural change only in Türkiye.[40]

As is evident, the primary cause of a population decline in Europe is the low fertility rates. Fertility, commonly defined as the reproductive experience of a population, is analysed by examining 'the number of births as well as the characteristics of those births, along with characteristics of the individuals involved in reproductive activities'.[41] Fertility can be measured in terms of the number of births occurring within a population. Various measures are used to describe fertility, including crude birth rate, general fertility rate, and specific fertility rates. Crude birth rate calculates the number of births relative to the total population, expressing it as the number of births per 1,000 population.[42] It is calculated by dividing the total number of births for a given year by the midyear total population for that year; this quotient is then expressed as the number of births per 1,000 population.[43] The general fertility rate more closely limits the measurement of the base to persons actually at risk of the event, and it adjusts the denominator of the rate by focusing on the population at

38 Fargues, 2011, p. 2.
39 Eurostat, 2023a, para. 1.
40 Eurostat, 2023b, tab. 3.
41 Thomas, 2018, p. 101.
42 Murdock and Ellis, 2020, p. 115.
43 Thomas, 2018, p. 102.

risk.[44] It is expressed in terms of births per 1,000 women of the ages in which child-bearing is most likely to occur: 15–44 or 15–49 years.[45] Finally, specific fertility rates indicate the greatest specificity, measuring events relative to the specific population at risk (e.g. births to women aged 20–30 years relative to the number of women aged 20–30 years). The advantage of using specific rates is their ability to measure events more precisely relative to the persons most likely to experience them.[46] One good example of specific rates is the age-specific fertility rate.[47]

An additional measure is the child-woman ratio, indicating 'the number of persons 0 to 4 years of age divided by the number of females of child-bearing age'.[48] Finally, a widely discussed and utilised measure is the total fertility rate, which is

> … the sum of the age-specific fertility rates for all women in the child-bearing ages, and when adjusted to be per-person-specific, indicates the number of children that the average woman would have in her reproductive lifetime if she aged through her reproductive years exposed to the age-specific rates prevailing at a specific point in time.[49]

Among the commonly discussed levels of total fertility is the rate of 2.1, known as the replacement rate of fertility.[50] This is the total fertility rate required for mere population replacement, as the average woman must replace both herself and her mate.

In 2021, the total fertility rate within the EU stood at 1.53 live births per woman, marking a slight uptick from the 2020 figure of 1.50. The EU's total fertility rate had experienced fluctuations, reaching a low of 1.43 in 2001 and 2002, then rising to a relatively high point of 1.57 in 2010. Subsequently, it underwent a modest decrease to 1.51 in 2013, followed by slight rebounds until 2017. However, from 2017 onwards, the indicator began to decline again, reaching a low of 1.50 in 2020. The observed increase in 2021 indicates a shift compared to the previous year.[51] However, the total fertility rate in the EU is below the replacement rate of fertility and will remain low in the future. The situation is similar in Central European states, in which total fertility rates vary from 1.33 in Poland to 1.83 in the Czech Republic.[52]

The question arises about whether one demographic factor can substitute for another, specifically if migration can effectively replace low fertility rates in Europe, thereby acting as the rejuvenation factor in population dynamics. The concept of replacement

44 Murdock and Ellis, 2020, p. 117.
45 Thomas, 2018, p. 103.
46 Murdock and Ellis, 2020, p. 117.
47 Thomas, 2018, pp. 103–105.
48 Murdock and Ellis, 2020, p. 124.
49 Murdock and Ellis, 2020, p. 126.
50 Thomas, 2018, p. 106.
51 Eurostat, 2023c, para. 1.
52 Ibid.

demographic factors and the perspective of population dynamics at equilibrium can be traced back to the works of demographers from the 18th century, including figures such as Pastor Johann-Peter Süssmilch (1707–1767).[53] As P. Demeny noted, 'Europe is not an island, surrounded by uninhabited deserts or endless oceans. It has neighbors that follow their own peculiar demographic logic'.[54] Near Europe are located regions with the fastest growing populations globally, such as the Middle East and Sub-Saharan Africa. In the context of the EU, European states that are not EU members are grappling with similar or even more severe demographic challenges. Consequently, high rates of international migration will likely involve migration from the abovementioned non-European regions. The key question is whether this form of international migration can counteract the population decline and boost fertility rates in Europe.

As of 2011, the EU has witnessed significant positive net migration balances. Nevertheless, the overall growth of the EU population has been modest, and in some cases, even negative. Although fertility rates have increased, they still fell below the replacement rate needed for population growth sustainability. The influx of refugees and migrants from 2016 to 2023 has, in essence, merely delayed the inevitable population decline. While immigration can gloss over the real demographic problems, it is insufficient to generate lasting and sustainable population growth.

The strategy of "replacement migration" to maintain the population size presents specific challenges. Notably, high immigration rates may lead to shifts in the social, cultural, political, and racial characteristics of European countries. Additionally, migration has been identified as a source of socioeconomic and security challenges. In light of these considerations, D. Coleman raised questions about the feasibility of multicultural societies with multiple identities and loyalties succeeding in European democracies.[55] The contrary perspective underscores the importance of intermarriages and interactions between migrants and host societies, potentially leading migrants to adopt the ideas, values, and practices to which they are exposed. Given that the extent of migrants' exposure depends on various factors, P. Fargues concluded that 'the better socio-economic integration of the migrant, the smoother the encounter of migrants' and natives' cultural identities'.[56] In the case of high migration rates in the future, the population shift will impact European states, posing an increasingly challenging task for the integration of large migrant communities. Low fertility rates in combination with high immigration rates will certainly affect the population composition of European countries. The primary concern that European policymakers will need to address is how European states can utilise migration as, at the very least, a temporary solution for population decline without losing their cultural identity.

However, immediate EU population growth can be achieved through not only immigration but also enlargement. Initially, expansion of the EU will impact the size

53 Héran, 2023, p. 87.
54 Demeny, 2003, p. 4.
55 Coleman, 2006, pp. 84–85.
56 Fargues, 2011, p. 15.

of only the EU and not the entire continent. Many countries set to join the EU face similar or even more severe demographic challenges, including ageing populations, high emigration rates, and low population growth. The current situation in Eastern Europe does not contribute positively to the EU's demography, as countries with the potential to significantly increase the total population, such as Russia, Ukraine, and Türkiye, are far from becoming new EU members. Nevertheless, EU enlargement could boost its overall population and help Member States adopt policies and legislation to enhance fertility rates across all European countries. The words of P. Fargues appear more relevant than ever: 'If the EU wants to maintain its present level of influence in world affairs, immigration will not suffice, and enlargement combined with nation-building seems to be the only solution'.[57]

5. Population ageing, workforce shortages, and migration in Europe

One outcome of technological and scientific progress and medical advances is an extended life expectancy. Although this trend is undeniably one of the most positive outcomes of modern progress, it presents several challenges. Primarily, the increase in the non-working-age population will impact the healthcare system as its resources will need to be expanded. Moreover, the length of retirement will increase, affecting the old-age dependency ratios.

Ageing of the European population is a consequence of not only modern progress but also low fertility and mortality rates. In Europe, fewer children are born and fewer older people die, leading to an increasing share of older individuals among the net population. The shift in the population structure towards older ages is projected to persist in the future.[58] The population within the working-age bracket (20–64 years) is anticipated to experience a more pronounced decline, decreasing from 265 million in 2019 to 217 million in 2070. This decline is attributed to factors such as fertility rates, life expectancy, and patterns of migration flows.[59] Consequently, the demographic landscape of Europe will transform, characterised by high proportions of older individuals and low proportions of the working-age population.[60] These trends are anticipated to result in a doubling of the old-age dependency ratios by 2050, regardless of immigration rates.[61]

57 Fargues, 2011, p. 16.
58 Goujon et al., 2021, p. 5.
59 European Commission, 2021, p. 3.
60 Goujon et al., 2021, p. 13.
61 Fargues, 2011, p. 10.

Some authors outlined the opportunities of an ageing population. Bloom et al. highlighted that increased allocation of resources to the training, education, and health of workers can mitigate the decline in the workforce resulting from lower fertility rates. If such investments contribute to a higher level of human capital within the workforce, it could improve the productivity and overall living standards.[62] A decline in fertility will allow more women to enter the labour force, and because of the increased life expectancy, a higher portion of income will be allocated to savings,[63] which will push the real interest rate down.[64] Furthermore, low mortality rates and population ageing may increase the skill premium.[65] However, many authors perceived population ageing as a threat to the economic growth and sustainability of health care systems. It will have huge impact on productivity and the structure of consumption.[66] Finally, some authors believe that the current European welfare schemes will become financially unsustainable.[67]

Migration is frequently considered a solution to the problems of population ageing and labour shortages. Typically, migrants arriving in Europe, particularly those from Africa and Asia, are younger than the native population, and they contribute to the expansion of the labour force.[68] Mathematically, an increase in the working-age population could change the demographic structure of the population towards a higher proportion of young population. Furthermore, migrants usually make families in host countries, and, as already mentioned, they have higher fertility rates than their native peers.

However, demographic analysis has shown that immigration cannot be a substitute for decreased fertility.[69] This is because immigration rates need to be extremely high to prevent population ageing. The most prominent UN report on replacement migration showed that the EU (having only 15 members at the time) will need 674 million immigrants until 2050 to maintain a balance between the proportions of populations older than 65 years and aged 15–64 years.[70] As it is unlikely that such an influx of immigrants would ever happen, the ageing of the European population is inevitable.

Migration contributes to the workforce and population structure directly, as migrants belong to the working-age population upon their arrival. However, the population added through permanent migration undergoes the ageing process similar to natives.[71] If migrants are increasingly relied upon to compensate for retiring natives,

62 Bloom et al., 2015, p. 654.
63 Bloom, Canning, and Graham, 2003, p. 337.
64 Teulings and Baldwin, 2014, p. 14.
65 Afonso et al., 2019, p. 130.
66 Börsch-Supan, 2003, pp. 6–7.
67 Fargues, 2011, p. 10.
68 Peri, 2020.
69 Paterno, 2011, p. 66.
70 United Nations Secretariat, Population Division, 2000, p. 3.
71 Fargues, 2011, p. 12.

a continuous influx of new migrants is required to offset the retirement of earlier migrants. Therefore, replacement migration cannot curb ageing; rather, it initiates a spiral in which the ageing of migrants can only be offset by more migrants being called in.

Migrants from developing countries often exhibit higher birth rates than their native peers. As they enter the labour force, their children contribute to mitigating the increase in old-age dependency ratios. However, it is anticipated that the birth rates will converge over one generation. Ultimately, while permanent migration may temporarily delay the rise of old-age dependency, it is not a sustainable long-term solution.

International migration is often analysed in light of the economic benefit it allegedly brings. The period of a fast workforce decline has started, as predicted by demographers, and it will probably affect the economic goals of European states. Deficits of the working-age population have increased, especially at the bottom of the professional ladder, and low-skilled migration has increased. The Eastern European pools of migrants have dried up, especially from Western Balkans. New migrant waves will predominantly consist of migrants from outside Europe. As Loichinger and Marois pointed out, a rise in migration flows is not expected to significantly mitigate the economic impacts of population ageing. Their projections indicate that even if migration were to double, there would be only a marginal enhancement in the labour force dependency ratio, and broader trends towards high levels of ageing would remain largely unchanged.[72] Therefore they concluded that

> The effect of migration on derived labor force indicators such as the labor force dependency ratio of the host region are relatively small. In short, migration, while increasing the population size, affects both the active and the inactive population at the same pace, and as so, has only little effect on the labor force dependency ratio.[73]

Both ageing of the population and a workforce decrease can be reversed if birth rates return to the replacement levels. This aim can be achieved with some legal measures as well. Pro-natalist legislation can contribute to increasing fertility. However, even if pro-natalist policies brought results, they would impact the working-age population in 20 years. In the short and medium terms, ageing of the population together with workforce shortages seem ineluctable.

72 Loichinger and Marois, 2018, p. 50.
73 Loichinger and Marois, 2018, p. 49.

6. Impact of migration on the religious landscape of Europe

As mentioned earlier, European countries have witnessed a rise in migration from within Europe and from former colonial states, regions affected by conflicts (e.g. the Balkans, Middle East, and Afghanistan), and nations that have historically supplied workforce to developed Western European countries. Among these immigrants, some originate from countries currently undergoing religious revival,[74] while others are from a diverse set of religious denominations usually different from those dominant in host societies.[75] Moreover, religiosity is higher among migrants,[76] even second-generation migrants.[77] This supports the notion that migrants are more successful in transmitting their religion to the next generation.[78] Considering that fertility rates appear to be higher among migrants compared to their native peers,[79] immigrants will influence religious diversity in European states, even in the absence of further migration.[80] Therefore, religion and religious organisations can have a key role in integrating migrants in destination societies, while migrants will shape the future religious landscape of Europe.

Migrants' religiosity has the potential to slow down the process of secularisation of European societies.[81] Since migrants usually come from less secular societies and are preserving their religious beliefs through generations, the pace of their secularisation will shape the process of European societies' secularisation. The classic secularisation theory interconnects modernisation with secularisation.[82] Even though some religious practices of migrants can resist secularising trends,[83] they cannot affect the general process of secularisation.[84]

As mentioned earlier, the total population of Europe will decrease if no immigration occurs. The total number of Christians in Europe is projected to reduce by about 100 million people to reach 54 million in 2050. Moreover, the Jewish population will decline from 1.4 million in 2010 to 1.2 million in 2050. All other religious groups are projected to grow. Their growth will be fuelled by demographic

74 Pollack and Rosta, 2017, pp. 211–212.
75 Guveli and Platt, 2023, p. 2.
76 Aleksynska and Chiswick, 2013, pp. 588–589.
77 De Hoon and Van Tubergen, 2014, p. 203.
78 De Hoon and Van Tubergen, 2014, pp. 203–204; Molteni and Van Tubergen, 2022, p. 623; Molteni and Dimitriadis, 2021, p. 1486.
79 Kulu and González-Ferrer, 2014, p. 421.
80 Guveli and Platt, 2023, p. 5.
81 Guveli and Platt, 2023, p. 2.
82 Berger, 2011, p. 90; Wilson, 1982, p. 95.
83 Drouhot, 2021, pp. 795–851; Molteni and Van Tubergen, 2022, pp. 623–624; Guveli and Platt, 2011, pp. 1023–1024.
84 Spohn, 2009, p. 370.

processes, including higher fertility rates, younger population, and gains via migration and religious switching.[85]

The only religious group in Europe with a fertility rate at the replacement level is Europe's Muslims. Fertility rates are below the replacement level for all other major religious groups, including the religiously unaffiliated, who have the lowest fertility rates. However, the total number of the religiously unaffiliated is projected to grow because of religious switching, which will affect only the total number of Christians and not a significant number of other religious groups.[86]

Migration will significantly impact the religious landscape of Europe in the coming years. Continued migration from Asia to Europe is expected to result in an increase in the share of Muslims, Hindus, Buddhists, adherents of folk religions, and other religions among the European population. In contrast, migration is anticipated to decrease the share of the region's population that identifies as Christian or unaffiliated. In a projection without migration, the Muslim share of Europe's population is estimated to grow from the current level of 4.9% to 7.4% by 2050. In a medium migration scenario, the share of Muslims in Europe is projected to reach 11.2%, while a high migration scenario suggests that Muslims could constitute 14% of Europe's population by 2050.[87] These projections exclude the Western Balkan countries, Russia, Belarus, Moldova, and Ukraine, with overall projections for the entire continent showing minimal differences.[88] There is a possibility that Muslim populations in Europe may return to their countries of origin when conditions improve there. However, historical precedents from Germany show that this is unlikely. As migration scholar Philip Martin noted decades ago, 'there is nothing more permanent than temporary workers and traders'.[89] It can be concluded that migration has played a role and will continue to contribute to the European societies' religious diversity, which is expected to increase as a result of demographic processes in the years to come.

The migration of adherents from various religious groups presents challenges to the existing legislation that governs the legal status of religious organisations in European states. Issues such as legal recognition of religious groups and communities, state financial support for religion, religious instruction in public schools, and status of religious symbols in the public sphere are among the most significant matters that need to be reconsidered and re-regulated to effectively accommodate the religious rights of migrants. True and sustainable pluralism involves not only respecting the individual right to freedom of religion and belief but also acknowledging the collective and corporate rights of religious organisations. This holds true for migrants and their religious communities as well.

85 Pew Research Center, 2015, para. 1.
86 Pew Research Center, 2015, para. 3.
87 Pew Research Center, 2017, p. 5.
88 Pew Research Center, 2015, para. 2.
89 Martin, 1994, p. 169.

7. Conclusion

Demography, as the study of human populations, plays a crucial role in shaping social policies, managing populations, and regulating migrations. This study directs attention to the demographic profile of European countries, notably central European states, and delves into how migrations influence their demographic landscapes. The study adopts an inclusive definition of migrant, which is treated as an umbrella term covering refugees, foreign workers, students, and various categories of "people on the move".

The global population has witnessed sustained growth, but Europe, experiencing consistently low growth rates since 1950, encountered stagnation by the end of the 20th century. Migration has played a crucial role in reversing this trend, contributing to increased growth rates. Central European countries, such as Poland, Hungary, Slovenia, Czechia, and Slovakia exhibit varying scenarios regarding foreign-born populations. While some countries such as Poland and Hungary have experienced significant growth, the proportion of foreign-born residents remains relatively low compared to the EU average.

The OECD nations reported remarkable levels of international migration in 2022. New asylum applications, labour migration, temporary labour migration, and international student numbers all saw notable increases. Family migration remained the leading category for new permanent-type migration. Migrant populations tend to concentrate in specific regions within countries, particularly in the capital and urban areas. Non-EU migrants in Europe exhibit a stronger inclination towards clustering in urbanised regions. Central European capital-city regions, except in Poland, house the highest proportions of immigrant populations.

As of 2023, Europe's population has experienced modest growth, reaching approximately 742.2 million. However, a historical decline in growth rates since the 1960s, coupled with the projection of losing 11% of its population by 2050 without immigration, raises concerns about long-term sustainability. The EU witnessed a population decline between 2020 and 2022, largely due to the COVID-19 pandemic, but the population rebounded to 448.4 million by 1 January 2023, attributed to increased migratory movements and displaced persons from Ukraine. The role of migration in offsetting Europe's demographic challenges is apparent, with positive net migration playing a crucial role in population growth, especially as fertility rates remain below replacement levels.

While migration has contributed to population growth, questions arise about its long-term effectiveness and the challenges it poses to the cultural, social, and political characteristics of European societies. The concept of "replacement migration" faces scrutiny, emphasising the need for the socioeconomic integration to ensure successful encounters between migrants and natives. Potential EU enlargement could be a way to address immediate population growth, even though potential new members face similar demographic challenges. The complex interplay of fertility rates, migration, and policy considerations underscores the multifaceted nature of Europe's

demographic landscape and the necessity for thoughtful policymaking to navigate these challenges.

The increase in non-working-age individuals places a strain on healthcare systems and elevates the old-age dependency ratios in Europe. Despite potential opportunities outlined by some authors, such as investments in education and health to enhance workforce productivity, the overarching perception is that population ageing presents a significant threat to economic growth, productivity, and sustainability of welfare configurations in Europe. Migration has been considered a potential solution to mitigate these challenges, as migrants often belong to the working-age population and contribute to economic activity. However, demographic analysis reveals that immigration alone cannot substitute for declining fertility rates, and the sheer magnitude of immigration required to counteract population ageing is deemed impractical.

Moreover, while migration temporarily influences the workforce and population structure, relying on continuous immigration to offset the ageing of earlier migrants creates an unsustainable cycle. If migration were to double, its impact on labour force indicators and the overall age structure would be limited. The long-term solution lies in addressing low fertility rates through pro-natalist policies. However, ageing of the population and workforce shortages are anticipated to persist in the short to medium term, necessitating comprehensive strategies to navigate these demographic shifts.

As migrants, particularly from regions experiencing religious revival, bring diverse religious denominations to Europe, their higher religiosity, even into the second generation, contributes to shaping the future religious makeup of European societies. The interplay between migrants' higher fertility rates and the transmission of religious beliefs suggests that, even without further migration, immigrants will significantly influence religious diversity in European states. The role of religion and religious organisations emerges as crucial in the integration of migrants into the destination societies, illustrating the intricate relationship between migration and the evolving religious fabric of Europe.

Migrants' religiosity has the potential to influence the pace of secularisation in European societies. Coming from less secularised societies, migrants' preservation of religious beliefs across generations may impact the overall trajectory of secularisation. The projection that the total number of Christians in Europe is expected to decline, while other religious groups, including Europe's Muslims, are projected to grow, highlights the profound demographic consequences of migration on the continent's religious composition. The expected rise in the proportion of Muslims, alongside followers of other religions, highlights the necessity for a thorough reassessment and reformulation of legislation governing religion in European states. This is essential to adequately address the religious rights of migrants and establish sustainable pluralism within European societies.

Overall, migration, including international migration, lacks the potential to adequately address Europe's demographic challenges, encompassing issues such as population decline, ageing, low fertility rates, and labour shortages. Consequently,

efforts should be directed towards alternative approaches aimed at supporting the native population in increasing fertility rates, as this remains the sole effective solution for ensuring stable economic growth. Such initiatives should involve the development of appropriate legal regulations that foster an increase in fertility rates. Moreover, labour legislation should be enhanced to increase productivity and facilitate ongoing education and skill development within the workforce. There should be flexible employment options during retirement, and the mandatory retirement age ought to be eliminated. All these measures will not affect the numbers globally, but it can increase the working-age population. This approach stands as the singular viable solution to address the demographic shift in European countries and maintain a labour market capable of supporting economic growth in the future.

References

Afonso, O., Gil, P.M., Neves, P.C., Sequeira, T.N. (2019) 'Demographic Change, Wage Inequality, and Technology' in Bucci, A., Prettner, K., Prskawetz, A. (eds.) *Human Capital and Economic Growth*, Cham: Palgrave Macmillan, https://doi.org/10.1007/978-3-030-21599-6_4 124.

Aleksynska, M., Chiswick, B. R. (2013) 'The determinants of religiosity among immigrants and the native born in Europe', *Review of Economics of the Household*, 11(4), pp. 563–598; https://doi.org/10.1007/s11150-013-9188-7.

Bean, F.D., Brown, S. K. (2015) 'Demographic Analyses of Immigration' in Brettell, C. B., Hollifield, J. F. (eds.) *Migration theory: Talking across disciplines*, Third edition, New York: Routledge.

Berger, P. (2011) *The Sacred Canopy: Elements of a Sociological Theory of Religion*. New York: Open Road Media.

Bloom, D. E., Canning, D. & Graham, B. (2003) 'Longevity and Life Cycle Savings', *Scandinavian Journal of Economics*, 105(3), pp. 319–338; https://doi.org/10.1111/1467-9442.t01-1-00001.

Bloom, D. E., Chatterji, S., Kowal, P. Peter Lloyd-Sherlock, McKee, M., Rechel, B., Rosenberg, L., Smith, J. P. (2015) 'Macroeconomic implications of population ageing and selected policy responses', *The Lancet*, 385(9968), pp. 649–657; https://doi.org/10.1016/S0140-6736(14)61464-1.

Börsch-Supan, A. (2003). 'Labor market effects of population aging' *Labour*, 17, pp. 5–44; https://doi.org/10.1111/1467-9914.17.specialissue.2.

Brettell, C. B. (2015) 'Theorizing Migration in Anthropology: The Cultural, Social, Phenomenological, and Embodied Dimensions of Human Mobility' in Brettell, C. B., Hollifield, J. F. (eds.) *Migration theory: Talking across disciplines*. Third edition, New York: Routledge, pp. 194–231; https://doi.org/10.4324/9781003121015-6.

Brettell, C. B., Hollifield, J. F (2015) 'Introduction: Migration Theory: Talking across Disciplines' in Brettell, C. B., Hollifield, J. F. (eds.) *Migration theory: Talking across disciplines*, Third edition, New York: Routledge, pp. 1-43; https://doi.org/10.4324/9781003121015-1.

Carling, J. (2023) 'The phrase 'refugees and migrants' undermines analysis, policy and protection' *International Migration*, 61(3), pp. 399–403. https://doi.org/10.1111/imig.13147.

Carney, M. A. (2015) *The Unending Hunger: Tracing Women and Food Insecurity across Borders*. Berkeley: University of California Press. https://doi.org/10.1525/9780520959675.

Coleman, D. (2006) 'Europe's Demographic Future: Determinants, Dimensions, and Challenges, *Population and Development Review*, The Political Economy of Global Population Change, 1950-2050, 32, pp. 52–95. https://doi.org/10.1111/j.1728-4457.2006.tb00003.x.

Constant, A. F., O. Nottmeyer and K. F. Zimmermann (2013) 'The Economics of Circular Migration' in Constant, A. F. and K. F. Zimmermann (eds.) *International Handbook on the Economics of Migration*, Cheltenham: Edward Elgar, pp. 55–74; https://doi.org/10.4337/9781782546078.00010.

De Hoon, S., Van Tubergen, F. (2014) 'The religiosity of children of immigrants and natives in England, Germany, and the Netherlands: The role of parents and peers in class', *European Sociological Review*, 30(2), pp. 194–206; https://doi.org/10.1093/esr/jcu038.

Demeny, P. (2003) 'Population Policy Dilemmas in Europe at the Dawn of the Twenty-First Century', *Population and Development Review*, 29(1), pp. 1–28. https://doi.org/10.1111/j.1728-4457.2003.00001.x.

Drouhot, L. G. (2021). 'Cracks in the melting pot? Religiosity and assimilation among the diverse Muslim population in France', *American Journal of Sociology*, 126(4), pp. 795–851; https://doi.org/10.1086/712804.

European Commission (2021) *The 2021 Ageing Report: Economic and Budgetary Projections for the EU Member States (2019-2070)*. Luxembourg: Publications Office of the European Union.

Eurostat (2023a) *Population and population change statistics* [Online]. Available at: https://ec.europa.eu/eurostat/statisticsexplained/index.php?title=Population_and_population_change_statistics#EU_population_shows_a_strong_increase_in_2022 (Accessed: 27 November 2023).

Eurostat (2023b) *Contribution of natural change and net migration (and statistical adjustment) to population change, 2022* [Online]. Available at: https://ec.europa.eu/eurostat/statistics-explained/index.php?title=File:Tab_3_rev_Contribution_of_natural_change_and_net_migration_(and_statistical_adjustment)_to_population_change,_2022.png (Accessed: 27 November 2023).

Eurostat (2023c) *Fertility statistics* [Online]. Available at: https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Fertility_statistics#Almost_half_of_children_born_in_the_EU_in_2021_were_born_from_first-time_mothers (Accessed: 27 November 2023).

Fargues, P. (2011) *International Migration and Europe's Demographic Challenge*. San Domenico di Fiesole (FI): European University Institute.

Goujon A., Jacobs-Crisioni C., Natale F., Lavalle C. (2021) *The demographic landscape of EU territories: challenges and opportunities in diversely ageing regions*. Luxembourg: Publications Office of the European Union.

Guillard, A. (2010) *Elements de Statistique Humaine ou Demographie Comparee*. Charleston: Nabu Press.

Guveli A., Platt L. (2023) 'Religiosity of Migrants and Natives in Western Europe 2002-2018: Convergence and Divergence', *European Journal of Population*, 39(9), pp. 1–27; https://doi.org/10.1007/s10680-023-09660-9.

Guveli, A., Platt, L. (2011) 'Understanding the religious behavior of Muslims in the Netherlands and the UK', *Sociology*, 45(6), pp. 1023–1024; https://doi.org/10.1177/0038038511416165.

Hauser, P., Duncan, O. D. (1959) *The Study of Population*. Chicago: Chicago University Press.

Héran, F. (2023) 'Demography and Migration: The Wildcard in Population Dynamics' in Brettell, C. B., Hollifield, J. F. (eds.) *Migration Theory: Talking Across Disciplines*. Fourth edition, New York and London: Routledge, pp. 78–129; https://doi.org/10.4324/9781003121015-3.

International Organization for Migration (2011) *International Migration Law: Glossary on Migration*, Geneva: International Organization for Migration [Online]. Available at: https://publications.iom.int/system/files/pdf/iml25_1.pdf (Accessed: 27 September 2023).

International Organization for Migration (2019) *International Migration Law: Glossary on Migration*, Geneva: International Organization for Migration [Online]. Available at: https://publications.iom.int/system/files/pdf/iml_34_glossary.pdf (Accessed: 27 September 2023).

Kulu, H., González-Ferrer, A. (2014) 'Family dynamics among immigrants and their descendants in Europe: Current research and opportunities', *European Journal of Population*, 30, pp. 411–435; https://doi.org/10.1007/s10680-014-9322-0.

Loichinger, E., Marois, G. (2018) 'Education-specific labour force projections for EU-28 countries' in Lutz, W., Stilianakis, N., Stonawski, M., Goujon, A., Samir, K. C. (eds.) *Demographic and human capital scenarios for the 21st century*, Luxembourg: Publications Office of the European Union, pp. 43–51; https://doi.org/10.2760/835878.

Martin, P. L. (1994) 'Comparative Migration Policies' *The International Migration Review*, 28(1), pp. 164–170; https://doi.org/10.2307/2547031.

Statista Research Department (2023) *Population of Europe 1950-2023* [Online]. Available at: https://www.statista.com/statistics/1106711/population-of-europe/ (Accessed: 27 November 2023).

Molteni, F., Dimitriadis, I. (2021) 'Immigrants' religious transmission in Southern Europe: reaction or assimilation? Evidence from Italy' *Journal of International Migration and Integration*, 22, 1485–1504; https://doi.org/10.1007/s12134-021-00815-3.

Molteni, F., Van Tubergen, F. (2022) 'Immigrant generation and religiosity: A study of Christian immigrant groups in 33 European countries', *European Societies*, 24(5), pp. 605–627; https://doi.org/10.1080/14616696.2022.2044067.

Murdock, E., Keely, C. B. (2000) 'Demography and International Migration' in Brettell, C. B., Hollifield, J. F. (eds.) *Migration Theory: Talking Across Disciplines*. First edition, New York: Routledge, pp. 43–60.

Murdock, S. H., Ellis, D. R. (2020) *Applied Demography: An Introduction to Basic Concepts, Methods, and Data*, New York: Routledge.

OECD (2023) *International Migration Outlook 2023*. Paris: OECD Publishing, https://doi.org/10.1787/b0f40584-en.

OECD, European Union (2018) *Settling in 2018: Indicators of Immigrant Integration*, Paris, Brussels: OECD Publishing, https://doi.org/10.1787/9789264307216-en.

Ottonelli, V., Torresi, T. (2013) 'When is migration voluntary' *International Migration Review*, 47(4), pp. 783–813; https://doi.org/10.1111/imre.12048.

Paterno, A. (2011) 'Is immigration the solution to population aging?', *Genus*, 67(3), pp. 65–82.

Peri, G. (2020) *Immigrant Swan Song, Finance & Development Magazine*, March 2020, pp. 26–29. [Online]. Available at: https://www.imf.org/en/Publications/fandd/issues/2020/03/can-immigration-solve-the-demographic-dilemma-peri (Accessed: 27 November 2023).

Pew Research Center (2015) *The future of world religions: population growth projections, 2010-2050: Europe* [Online]. Available at: https://www.pewresearch.org/religion/2015/04/02/europe/#fn-22806-58 (Accessed: 2 October 2023).

Pew Research Center (2017) *Europe's growing Muslim population* [Online]. Available at: https://www.pewforum.org/wp-content/uploads/sites/7/2017/11/FULL-REPORT-FOR-WEB-POSTING.pdf (Accessed: 2 October 2023).

Pijnenburg, A., Rijken, C. (2021) 'Moving beyond refugees and migrants: reconceptualising the rights of people on the move', *Interventions International Journal of Postcolonial Studies*, 23(2), pp. 273–293; https://doi.org/10.1080/1369801X.2020.1854107.

Pollack, D., Rosta, G. (2017) *Religion and modernity. An international comparison*. Oxford: Oxford University Press. https://doi.org/10.1093/oso/9780198801665.001.0001.

Ramji-Nogales J. (2017) 'Moving Beyond the Refugee Law Paradigm', *American Journal of International Law Unbound*, 111, pp. 8–12; https://doi.org/10.1017/aju.2017.9.

Smil, V. (2005) 'The Next 50 Years: Unfolding Trends', *Population and Development Review*, 31(4), pp. 605–643; https://doi.org/10.1111/j.1728-4457.2005.00091.x.

Spohn, W. (2009) 'Europeanization, religion and collective identities in an enlarging Europe: A multiple modernities perspective', *European Journal of Social Theory*, 12(3), pp. 358–374; https://doi.org/10.1177/1368431009337351.

Teitelbaum, M. S. (2008) 'Demographic Analyses of International Migration' in Brettell, C. B., Hollifield, J. F. (eds.) *Migration Theory: Talking Across Disciplines*, Second edition, New York: Routledge, pp. 51–62.

Teulings, C., Baldwin, R. (2014) 'Introduction' in Teulings, C., Baldwin, R (eds.) *Secular Stagnation: Facts, Causes, and Cures,* London: CEPR Press.

Thomas, R. (2018) *Concepts, Methods and Practical Applications in Applied Demography*, Cham: Springer. https://doi.org/10.1007/978-3-319-65439-3.

UNHCR (2016) UNHCR viewpoint: 'Refugee' or 'migrant' – Which is right? [Online]. Available at: https://www.unhcr.org/us/news/stories/unhcr-viewpoint-refugee-or-migrant-which-right (Accessed: 27 September 2023).

United Nations Secretariat, Population Division (2000) Replacement Migration: Is It a Solution to Declining and Ageing Populations? [Online]. Available at: https://www.un.org/development/desa/pd/sites/www.un.org.development.desa.pd/files/unpd-egm_200010_un_2001_replacementmigration.pdf (Accessed: 28 November 2023).

Willekens, F. (2015) 'Demographic Transitions in Europe and the World' in Matthijs, K., Neels, K., Timmerman, C., Haers, J. (eds.) *Population Change in Europe, the Middle-East and North Africa: Beyond the Demographic Divide*, First edn; London and New York: Routledge, pp. 13–44; https://doi.org/10.4324/9781315601496.

Wilson, B. (1982) *Religion in Sociological Perspective*. Oxford: Oxford University Press.

Winthrop, S. (2015) *When moving matters: Residential and economic mobility trends in America: 1880–2010*. Manhattan Institute, 10 November 2015 [Online]. Available at: https://manhattan.institute/article/when-moving-matters-residential-and-economic-mobility-trends-in-america-1880-2010. (Accessed: 27 September 2023).

Yusuf, F., Swanson, D., Martins, J. M. (2014) *Methods of Demographic Analysis*, Dordrecht: Springer. https://doi.org/10.1007/978-94-007-6784-3.

Departure of men abroad in 2023: what has changed for military servicemen (2023) Visit Ukraine, 7 January 2023. [Online]. Available at: https://visitukraine.today/blog/1385/departure-of-men-abroad-in-2023-what-has-changed-for-military-servicemen (Accessed: 27 September 2023).

CHAPTER VII

Changes in Attitudes Towards Migrations

Frane Staničić

Abstract

Migrations are always active, and it is impossible to imagine a world without them. However, migrations in the past decade have become a leading problem globally, especially in the European Union (EU). The EU migration policy and its common asylum system are undergoing tectonic changes, as negotiations between the Member States pave the road to a new and sustainable EU migration policy. Moreover, the need to remake the Dublin procedure is obvious; consequently, the European Commission is trying to satisfy national differences among Member States on the one hand and the state interest-oriented approach on the other. In all this, it is crucial that the fundamental rights of migrants and asylum seekers not be overlooked.

Keywords: migrations, legal regulation, perception, asylum, future regulation

1. Introduction

Migration is a phenomenon that originated at the time of the making of mankind. It is all present, continuous, and unstoppable. However, migrations in today's world prompt all countries to rethink their response and attitude towards them. Namely, migrations are becoming the foremost challenge for Western countries, which generally attract immigrants. This is especially so for (Western) European countries.

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Migrations in Europe can be divided into three phases.[1] The first phase involved guest workers in Western European countries. The main destination countries were Belgium, France, Germany, Luxembourg, the Netherlands, Sweden, and Switzerland. The recruited foreign workers were expected to return home after completing a stint of labour. During this period, most migrants in North-Western Europe originated from Algeria, Greece, Italy, Morocco, Portugal, Spain, Tunisia, Turkey, and Yugoslavia.[2] The second phase was marked by the oil crisis in 1974, which, as many authors argue, marked a sharp surge in global migration.[3] The third phase started in the 1990s and was marked by the fall of communism and the "Iron Curtain" in Europe. The collapse of the Iron Curtain and opening of the borders of Eastern Europe induced new migration flows across Europe. The end of the Cold War, as well as wars in the former Yugoslavia, led to new flows of asylum seekers into Western Europe.[4] The fourth phase of migrations in Europe began after the Syrian crisis with the subsequent deluge[5] of migrants coming to Europe via Turkey and other migration routes. This fourth phase is marked by vast changes in the European Union (EU) legislation regulating migrations and border control. It is also marked by a sharp change in the attitude of EU citizens towards migrations and migrants. These changes demand further research, as it is necessary to safeguard migrants in need of protection and ensure that they have access to the asylum system. At the same time, it is necessary to protect the EU's outer border and ensure that it functions as a barrier for those who do not meet the prescribed conditions for entry[6] or the conditions to become asylum seekers. Of course, it is difficult to build such a system that would ensure that all who do not meet the aforementioned conditions are banned from entry and those who do are permitted into the EU (and the Schengen area). Therefore, we must understand who migrants are and why it is important for the EU to have jurisdiction on the way migrations are regulated. First, the Schengen cooperation in the Treaty of Amsterdam was heavily criticised for its lack of transparency, its duplicative role, and the absence of any democratic or judicial control, whereas the Maastricht Treaty's third pillar was criticised for its ineffectiveness.[7] These shortcomings have led to the incorporation of the former within the framework of the EU and the communitarisation of the latter during the Amsterdam Intergovernmental Conference. The Treaty of Amsterdam undoubtedly represents a major turning point in migration policy at

1 See Van Mol and de Valk, p. 32.
2 Ibid.
3 See, e.g. Hansen, 2023; Van Mol and de Valk, p. 35.
4 Van Mol and de Valk, p. 37.
5 Only in 2015, the total number of people who entered the European Union was 1,255,600. See Mikac, Cesarec, and Jajić, 2016, p. 89.
6 Regulation 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the Rules Governing the Movement of Persons across Borders (Schengen Borders Code) (Codification); OJ 2016 L 77/5, 23 March 2016.
7 Namely, the Maastricht Treaty did not include immigration policy as the question of interest for the European Community. See Popović and Petek, 2019, p. 208.

the European level, even though its innovative character is strongly contested.[8] Migration policy at the EU level was shaped in two different policy sets: the so-called "migration stricto sensu" and "migration in the classic sense". The former concerns the entry for short-term purposes and mere circulation within the common area following the abolition of internal border controls. It is mainly linked with border and visa policy issues as well as certain aspects of return policy, which are considered as the necessary "flanking measures" for the abolition of internal border controls. In addition to this first policy framework, the second framework developed progressively, most likely following the acknowledgement of related demographic and economic needs.[9] As we know, the legal basis for today's regulation of the EU migration policy resides in Art. 79[10] and 80[11] of the Treaty on the Functioning of the European Union (TFEU). In that respect, the main EU legal instruments adopted following the entry into force of the Amsterdam Treaty are clearly building upon the Schengen acquis in this area. These measures concern those related to border controls, visa policy, and return policy,[12] all of which relate to migrants. So, who are migrants, and what is the definition of a migrant? It is necessary to highlight that there are also persons who are refugees; all such persons are migrants, but not all migrants are

8 Papagianni, 2014, p. 377.

9 Papagianni, 2014, p. 379.

10 Art. 79:
The Union shall develop a common immigration policy aimed at ensuring, at all stages, the efficient management of migration flows, fair treatment of third-country nationals residing legally in Member States, and the prevention of, and enhanced measures to combat, illegal immigration and trafficking in human beings.
For the purposes of para. 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures in the following areas:
the conditions of entry and residence, and standards on the issue by Member States of long-term visas and residence permits, including those for the purpose of family reunification;
the definition of the rights of third-country nationals residing legally in a Member State, including the conditions governing freedom of movement and of residence in other Member States;
illegal immigration and unauthorised residence, including removal and repatriation of persons residing without authorisation;
combating trafficking in persons, in particular women and children.
The Union may conclude agreements with third countries for the readmission to their countries of origin or provenance of third-country nationals who do not or who no longer fulfil the conditions for entry, presence or residence in the territory of one of the Member States.
The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may establish measures to provide incentives and support for the action of Member States with a view to promoting the integration of third-country nationals residing legally in their territories, excluding any harmonisation of the laws and regulations of the Member States.
This Article shall not affect the right of Member States to determine volumes of admission of third-country nationals coming from third countries to their territory in order to seek work, whether employed or self-employed.

11 The EU policies set out in this chapter and their implementation shall be governed by the principles of solidarity and fair sharing of responsibility, including its financial implications, between the Member States. Whenever necessary, the EU acts adopted pursuant to this chapter shall contain appropriate measures to give effect to this principle.

12 Papagianni, 2014, p. 380.

refugees. The definition of a refugee is given in the Convention Relating to the Status of Refugees from 1951, and people that fit into this definition are migrants who are entitled to help and protection. However, when talking about migrations, not only the humanitarian aspects but also the security, economic, and social challenges as well as the question of mass migrations are relevant for the societies of the recipient countries.[13] Until the 1990s, most migrants could conveniently be classified under the categories of "family reunification", "labour migration", and "asylum". Since the 1990s, however, migration motives have become increasingly diversified.[14] When looking at the EU law, the Qualification Directive and Asylum Procedures Directive aim at either specifically defining what constitutes a refugee or streamlining the application process.[15]

2. European migration programme of 2015

The momentum created by the so-called "2015 migration/refugee crisis" provided a new political impetus and led to concrete initiatives and achievements, both in forging truly comprehensive policy responses firmly embedded in the EU's overall external relations and in enhancing the efficiency of the EU's policymaking.[16]

The European Commission (or "Commission" hereafter) introduced A European Agenda on Migration,[17] a 22-page document that begins with an explanation of the context and details a list of immediate and long-term measures that it proposes the Member States should undertake to effectively respond to the migration challenge.[18] Moreover, the Partnership Framework approach had a significant impact on the EU's internal policy and decision-making process, notably as regards enhancement of the links between the internal and external dimensions of the EU's migration policy. A series of joint Foreign Affairs and Interior Ministerial Councils were organised (in November 2014 and April 2015), and migration became a recurrent subject at the Foreign Affairs Council. This was matched with the increased role of the EU's High Representative for Foreign Policy, who was given a coordinating role at the request of the EU's heads of state and government—a clear sign that migration was becoming an integral part of the EU's foreign policy.[19]

There are four main areas targeted in the Agenda: reducing incentives for illegal migration, saving lives and securing external borders, implementing a strong asylum

13 Mikac, Cesarec, and Jajuć, 2016, p. 87.
14 Van Mol and de Valk, p. 40.
15 Maani, 2018, p. 96.
16 Papagianni, 2022, p. 62.
17 European Commission, 2015.
18 Šabić, 2017, p. 4.
19 Papagianni, 2022, p. 64.

policy, and developing a new policy on legal migration. The Commission stated that there is a

> … need to restore confidence in our ability to bring together European and national efforts to address migration, to meet our international and ethical obligations and to work together in an effective way, in accordance with the principles of solidarity and shared responsibility. No Member State can effectively address migration alone. It is clear that we need a new, more European approach.[20]

Accordingly, the Commission proposed immediate action focused on saving of lives at sea while targeting criminal smuggling networks, the highly controversial relocation of migrants between Member States,[21] resettlement of displaced persons in need of protection,[22] the highly important partnership with third countries to tackle migration upstream (see *infra* on the EU–Turkey agreement), and use of EU tools to help Member States tackle migrations. This agenda utilised four pillars to manage migration better: reduction of incentives for irregular migration, border management to save lives and secure external borders, implementation of a strong common asylum policy, and development of a new policy on legal migration. This agenda was a tool by which the Commission sought to offer 'solutions that will allow Europe to move forward in these areas in the short and medium term'[23]. However, the Commission also stated its resolution to complete the Common European Asylum System (CEAS), establish shared management of the European border, and create a new model of legal migration.

As mentioned, a very important part of the agenda was the cooperation with third countries. Accordingly, on 18 March 2016, the European Council and Turkey reached an agreement aimed at stopping the flow of irregular migration via Turkey to Europe. According to the EU-Turkey Statement, all new irregular migrants and asylum seekers arriving from Turkey to the Greek islands whose applications for asylum were declared inadmissible should be returned to Turkey.

The agreement followed a series of meetings with Turkey since November 2015 dedicated to deepening Turkey-EU relations and strengthening their cooperation on the migration crisis. Notably, this resulted in the EU-Turkey Joint Action Plan activated on 29 November 2015 and the 7 March 2016 EU-Turkey Statement. In addition, on 15 December 2015, the Commission proposed a voluntary humanitarian admission

20 European Commission, 2015.

21 European Commission, 2015:
The EU needs a permanent system for sharing the responsibility for large numbers of refugees and asylum seekers among Member States. The Commission will table a legislative proposal by the end of 2015 to provide for a mandatory and automatically-triggered relocation system to distribute those in clear need of international protection within the EU when a mass influx emerges.

22 'By the end of May, the Commission will make a Recommendation proposing an EU-wide resettlement scheme to offer 20,000 places'. European Commission, 2015.

23 European Commission, 2015.

scheme for Syrian refugees in Turkey. To break the business model of smugglers and offer migrants an alternative to putting their lives at risk, the EU and Turkey decided in March 2016 to work together to end irregular migration from Turkey to the EU. For that purpose, the EU and Turkey agreed that all new irregular migrants crossing from Turkey to the Greek islands as of 20 March 2016 will be returned to Turkey. For every Syrian returned to Turkey from the Greek islands, another Syrian will be resettled to the EU. Moreover, Turkey will take any necessary measures to prevent new sea or land routes for irregular migration from Turkey to the EU. Once irregular crossings between Turkey and the EU end or are substantially reduced, a Voluntary Humanitarian Admission Scheme will be activated. Fulfilment of the visa liberalisation roadmap will be accelerated with a view to lifting the visa requirements for Turkish citizens at the latest by the end of June 2016. Turkey will take all the necessary steps to fulfil the remaining requirements. The EU will, in close cooperation with Turkey, further speed up the disbursement of the initially allocated €3 billion under the Facility for Refugees in Turkey. Once these resources are about to be used in full, the EU will mobilise additional funding for the facility up to an additional €3 billion by the end of 2018. The EU and Turkey welcomed the ongoing work on upgrading the Customs Union. The accession process will be re-energised, with Chapter 33 opened during the Dutch Presidency of the Council of the EU, and preparatory work on opening other chapters has continued at an accelerated pace. The EU and Turkey will work to improve humanitarian conditions within Syria.

Turkey furthermore agreed to accept the rapid return of all migrants not in need of international protection who have crossed from Turkey into Greece, and to take back all irregular migrants intercepted in Turkish waters. Turkey and the EU decided to continue stepping up measures against migrant smugglers and welcomed the establishment of activities of the North Atlantic Treaty Organization in the Aegean Sea.[24]

3. Temporary protection: Why use it in 2022 and not 2015?

The Temporary Protection Directive 2001/55/EC1[25] was created against the background of conflicts related to the disintegration of the former Socialist Federal Republic of Yugoslavia in the 1990s. It lays down standards for the temporary protection of persons displaced by armed conflict or human rights violations in the event

24 Legislative Train, 2024, p. 1-3. This statement was subject to judicial control before the General Court, which concluded that the statement was not concluded by the European Council but by the heads of state or governments of EU Member States and the Turkish Prime Minister. Consequently, the statement could not have been deemed as an act of an EU institution pursuant to Art. 263 of the TFEU. Therefore, the court said that it lacked jurisdiction to review the statement's legality. See Goldner Lang, 2022, p. 178.

25 OJ L 212, 7 August 2001.

of a mass influx of these persons into the EU.[26] This temporary protection should be compatible with the Member States' international obligations as regards refugees. In particular, it must not prejudge the recognition of refugee status pursuant to the Geneva Convention of 28 July 1951 on the status of refugees, as amended by the New York Protocol of 31 January 1967 and ratified by all Member States. Temporary protection refers to a procedure of exceptional character to provide—in the event of a mass influx or imminent mass influx of displaced persons from third countries who are unable to return to their country of origin—immediate and temporary protection to such persons, particularly if there is also a risk that the asylum system will be unable to process this influx without adverse effects for its efficient operation, in the interests of the persons concerned and other persons requesting protection (Art. 2, item a). According to Art. 1 of the Directive, its objective is twofold: (1) to provide temporary protection and (2) to promote "burden sharing" among EU Member States. The United Nations High Commissioner for Refugees (UNHCR) further explains that the idea behind the instrument is to allow for fast and simplified processing, which would reduce costs and increase efficiency for national asylum systems. The asylum systems are further relieved through a solidarity relocation mechanism and financial support as foreseen in the Directive.[27] According to Art. 5(1), the European Council establishes the existence of a "mass influx" situation with a qualified majority decision on the proposal from the Commission. Any Member State can request such a proposal from the Commission. If the existence of a "mass influx" is established, the Member States shall adopt the necessary measures to provide persons enjoying temporary protection with residence permits for the entire duration of protection. Documents or other equivalent evidence shall be issued for that purpose. Such persons must be given the rights prescribed by Art. 13.[28]

It is interesting to note that the Temporary protection was instigated at the onset of the Ukrainian war[29] but not during the Syrian crisis. A series of commentators

26 Glunns and Wessels, 2017, p. 57.

27 UNHCR, 2015, pp. 1–2. See also Glunns and Wessels, 2017, p. 61.

28 Art. 13:
The Member States shall ensure that persons enjoying temporary protection have access to suitable accommodation or, if necessary, receive the means to obtain housing.
The Member States shall make provision for persons enjoying temporary protection to receive necessary assistance in terms of social welfare and means of subsistence, if they do not have sufficient resources, as well as for medical care. Without prejudice to para. 4, the assistance necessary for medical care shall include at least emergency care and essential treatment of illness.
Where persons enjoying temporary protection are engaged in employed or self-employed activities, account shall be taken, when fixing the proposed level of aid, of their ability to meet their own needs.
The Member States shall provide necessary medical or other assistance to persons enjoying temporary protection who have special needs, such as unaccompanied minors or persons who have undergone torture, rape or other serious forms of psychological, physical or sexual violence.

29 See the Council Implementing Decision establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Art. 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection from 4 March 2022; OJ L 71.

have argued, regarding the Syrian crisis, that '[t]he case for the use of the Temporary Protection Directive is compelling', and that '[i]f ever there was a time to implement this directive this is it'.[30] Others have concluded that '[a]lthough not a panacea, temporary protection could be a very important part of Europe's response to the Syrian refugee crisis' and '[c]ompared to what the Syrian asylum seekers have been experiencing in the past few months and taking into account other available solutions, temporary protection looks like the only right choice from a human rights perspective'.[31] The Temporary Protection Directive has been seen as a method that should be used (more often) as part of the EU response to the migration crisis.[32] It is also seen as a method to encourage solidarity and fair sharing of responsibility among the EU Member States.[33] The Court of Justice also said that the burdens related to emergency situations characterised by a sudden influx of third-country nationals on their territory, must, in principle, be divided between all other Member States.[34]

4. "Reinvention" of the CEAS and the common migration policy

The CEAS's goal is to offer a satisfying status and ensure implementation of the non-refoulment principle with regard to all third-country nationals in need of international protection.[35] The EU competences regarding asylum and creation of the CEAS policy stem from Articles 78[36] and 80 of the TFEU as well as

30 Glunns and Wessels, 2017, p. 59.
31 Glunns and Wessels, 2017, p. 59.
32 Meltem, 2016, p. 32.
33 Bakhtina, 2022, p. 9.
34 Joint cases C-715/17, C-718/17, and C-719/17, *Commission v. Poland, Hungary and the Czech Republic*.
35 Bježančević, 2019, p. 1232.
36 Art. 78:
1. The Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement. This policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties.
2. For the purposes of para. 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures for a common European asylum system comprising:
(a) a uniform status of asylum for nationals of third countries, valid throughout the Union;
(b) a uniform status of subsidiary protection for nationals of third countries who, without obtaining European asylum, are in need of international protection;
(c) a common system of temporary protection for displaced persons in the event of a massive inflow;
(d) common procedures for the granting and withdrawing of uniform asylum or subsidiary protection status;

Art. 18[37] of the Charter of Fundamental Rights of the EU.[38] However, before of the emergence of this common asylum policy, Member States participated in informal cooperation over decades, and with the implementation of the Treaty of Amsterdam, a crucial step was taken towards creating the CEAS.[39] The most important instrument was the Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One of the Member States of the European Communities – Dublin Convention[40] from 1990, which came into effect in 1997. The Dublin Convention obligated the first EU Member State in which an asylum seeker landed to assume responsibility to examine the seeker's asylum claim. The obligation was a kind of punishment to the Member State that made it possible for an asylum seeker to enter the EU territory by crossing the state's border either legally through the state's visa or illegally without a valid visa.[41] The Treaty of Maastricht made the areas of justice and internal affairs regulating asylum policy a question of common interest for Member States, as part of the third pillar of the EU, but the states reserved their competences. However, as the number of asylum cases continued to increase, Member States recognised the need to implement joint measures and actions in the area of justice and internal affairs.[42] Therefore, the Treaty of Amsterdam was crucial in developing the CEAS.[43] As one of the objectives of the EU, the treaty lists the maintenance and development of the EU as an area of freedom, security, and justice, in which free movement of persons is assured in conjunction with appropriate measures with respect to external border control, asylum, immigration, and prevention and combat of crime.[44] The Dublin Convention of 1990 was replaced by the Dublin Regulation of 18 February 2003 (Dublin II).[45] Dublin II laid down the criteria for identifying the Member State responsible for examining

(e) criteria and mechanisms for determining which Member State is responsible for considering an application for asylum or subsidiary protection;
(f) standards concerning the conditions for the reception of applicants for asylum or subsidiary protection;
(g) partnership and cooperation with third countries for the purpose of managing inflows of people applying for asylum or subsidiary or temporary protection.
3. In the event of one or more Member States being confronted by an emergency situation characterised by a sudden inflow of nationals of third countries, the Council, on a proposal from the Commission, may adopt provisional measures for the benefit of the Member State(s) concerned. It shall act after consulting the European Parliament.

37 The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty on European Union and the TFEU.
38 OJ C 326, 26.10.2012.
39 Bježančević, 2019, pp. 1232–1233.
40 OJ C 254 19.8.1997.
41 Lalić Novak and Padjen, 2009, p. 81.
42 Bježančević, 2019, p. 1234.
43 One should also mention three programmes important for CEAS: the Tampere programme (1999–2004), Hague programme (2004–2009), and Stockholm programme (2009–2014).
44 Lalić Novak and Padjen, 2009, p. 79.
45 OJ L 50, 25.2.2003.

asylum applications lodged in one of the Member States, based on the rules ordering asylum seekers to seek asylum in the Member State whose territory they first stepped into, regardless of the current asylum policy of the respective country.[46] Dublin II was created to establish a mechanism to swiftly determine the Member State responsible for examining an asylum application and to ensure that all asylum claims received a substantive examination. It also introduced the use of Eurodac, a database for recording the fingerprint data of asylum applicants.[47] In turn, this regulation was replaced by the Dublin Regulation of 26 June 2013 (Dublin III).[48] Dublin III (now in force) was meant to 'confirm the principles underlying Regulation (EC) No 343/2003, while making the necessary improvements, in the light of experience, to the effectiveness of the Dublin system and the protection granted to applicants under that system'.[49] Dublin III clarified the hierarchy of criteria determining Member States' responsibility and established a mechanism to warn of potential problems with the Member States' asylum systems. Most importantly, Dublin III prohibited the transfer of asylum seekers to states with "systemic flaws" and introduced an early warning and preparedness mechanism to identify deficiencies in Member States' asylum systems before they developed into a crisis.[50]

5. European Commission's 2022 proposal for a new and sustainable EU migration policy

However, during the Syrian crisis, it became obvious that the Dublin system does not work. Of course, some authors argued that it did not work as planned from the beginning.[51] The principal objectives of the Dublin regulations were to (1) ensure access to effective, time-efficient procedures for determining refugee status; (2) prevent exploitation of the asylum system by parties attempting to make multiple claims in different EU Member States; and (3) identify in the shortest possible time the single Member State responsible for examining a claim.[52] However, instead of increasing efficiency and mitigating the refugee crisis, the Dublin Regulation appears to have unfairly burdened smaller countries, specifically those with fewer resources.

46 Lalić Novak and Padjen, 2009, p. 81.
47 Mitchell, 2017, p. 301.
48 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.
49 Mitchell, 2017, p. 302.
50 Ibid.
51 Maani, 2018, p. 97.
52 Langford, 2013, cited in Maani, 2018, p. 98.

As a result of the regulation, some Member States now fear for their national interests and state sovereignty. Member States are cooperating less because of the regulation.[53] Therefore, the EU Council set up an emergency relocation mechanism in September 2015. This mechanism was put to paper in the EU Council decision of September 2015, and it was titled "Establishing Provisional Measures in the Area of International Protection for the Benefit of Italy and Greece".[54] The decision entailed the relocation of 120,000 applicants from Greece and Italy to other Member States. The Council had the authority to make such a decision under Art. 78(3) of the TFEU, which says that

> in the event of one or more Member States being confronted by an emergency situation characterised by a sudden inflow of nationals of third countries, the Council … may adopt provisional measures for the benefit of the Member State(s) concerned.

Unlike Dublin III, the Council decision addresses the unequal burden on the southern border States.[55]

After this, knowing that the current CEAS setup does not work, the Commission introduced its proposal to reform the CEAS (May and July 2016). This would reform the Dublin system towards a better and more just reallocation of asylum cases between the Member States, strengthen the Eurodac Regulation, establish a real asylum agency, etc.[56] The reform proposal for Dublin III appears to prioritise two objectives: enforcement of allocation rules and prevention of secondary movements within the EU.[57] Furthermore, the interest of the Dublin IV Proposal in discouraging secondary movements is reflected in measures that include far-reaching sanctions for secondary movements. The difference between the Commission's and European Parliament's focus as regards the ruling of secondary movements is that the Commission is reactive in penalising the movement already realised, and the European Parliament appears proactive in dissuading asylum seekers from moving to a second Member State.[58] As some authors argue, the core problem of Dublin III comprises the national differences among Member States on the one hand and the State interest-oriented approach on the other.[59]

In September 2020, the Commission issued its Communication on a new Pact on Migration and Asylum.[60] In this document, the Commission undertook the following tasks: (1) launch work immediately to develop and deepen tailor-made

53 Maani, 2018, p. 98.
54 Council Decision 2015/1601, Establishing Provisional Measures in the Area of International Protection for the Benefit of Italy and Greece, 2015; OJ (L 248) 80.
55 Mitchell, 2017, p. 320.
56 Bježančević, 2019, p. 1239.
57 Abrisqueta Uriarte, 2019, p. 264.
58 Abrisqueta Uriarte, 2019, p. 269.
59 Abrisqueta Uriarte, 2019, p. 271.
60 European Commission, 2020.

comprehensive and balanced migration dialogues and partnerships with countries of origin and transit, complemented by engagement at the regional and global levels; (2) scale up support to help those in need and their host communities; (3) increase support for economic opportunity and address the root causes of irregular migration; (4) step up the place of migration in the programming of the new instruments in the next Multiannual Financial Framework; (5) ensure full and effective implementation of existing EU readmission agreements and arrangements and examine options for new ones; (6) make use of the Visa Code to incentivise and improve cooperation to facilitate return and readmission, as well as work through the Asylum and Migration Management Regulation when in place; and (7) take forward the recommendation on legal pathways to protection in the EU, including resettlement, and develop EU talent partnerships with key partner countries to facilitate legal migration and mobility.

After this communication, the Commission issued the Communication Attracting Skills and Talent to the EU.[61] This initiative will, according to the Commission, improve the EU's legal migration framework, help attract skills and talent from non-EU countries, and respect Member States' right to decide on the number of workers they admit.

There were also other initiatives such as the Proposal for a Directive of the European Parliament and of the Council on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State (recast)[62] and the Proposal for a Directive of the European Parliament and of the Council concerning the status of third-country nationals who are long-term residents (recast).[63]

On 8 June 2023, the Member States at the Home Affairs Council brokered a successful political agreement on the New Pact on Migration and Asylum, which the Commission had presented in September 2020. A general approach was reached for two key pillars of the pact: the Asylum and Migration Management Regulation and the Asylum Procedure Regulation. This is in addition to the agreement already achieved on other pillars of the pact. These proposals will allow a fairer, more efficient, and sustainable system for asylum and migration management. The pact provides for a common solution that ensures a balance between solidarity and responsibility among Member States.[64] The four key parts of the deal—the asylum and border procedure, increase in the EU's capacity, new solidarity mechanism, and Asylum and Migration Management Regulation—are expected to replace the Dublin Regulations. Furthermore, on 19 January 2022, the new mandate of the EU Agency for Asylum[65] entered into force following an agreement in 2021 between the European

61 European Commission, 2022a.
62 European Commission, 2022b.
63 European Commission, 2022c.
64 European Commission, 2023.
65 Established by Regulation (EU) 2021/2303 of the European Parliament and of the Council of 15 December 2021 on the European Union Agency for Asylum and repealing Regulation (EU) No

Parliament and the Council of the EU on the European Commission's proposal. This agency should work in close cooperation with the national authorities responsible for asylum and immigration and other relevant services, drawing on the capacity and expertise of those authorities and services, and with the Commission. The Member States should cooperate with the agency to ensure that it is capable of fulfilling its mandate.

Moreover, the Commission Recommendation (EU) 2020/1365 of 23 September 2020 on cooperation among Member States concerning operations carried out by vessels owned or operated by private entities for the purpose of search and rescue activities[66] should be mentioned. This recommendation improves cooperation among EU Member States in managing private vessels involved in search and rescue operations. It has set the ground for regular meetings of the European Contact Group on Search and Rescue. Member States should cooperate with each other in relation to operations carried out by privately owned or operated vessels for search and rescue activities, with a view to reducing fatalities at sea, maintaining navigation safety, and ensuring effective migration management in compliance with the relevant legal obligations.

6. Attitude towards migrations and integration of migrants as EU citizens

Today, around 5% of the EU's total population comprises third-country nationals.[67] According to a Standard Eurobarometer survey conducted in November 2017, immigration is seen as the most important issue the EU faces by nearly a fourth (39%) of the respondents; this percentage had peaked in the autumn 2015 survey (at 58%)).[68]

The recent Eurobarometer survey "Integration of Immigrants in the European Union"[69] reveals public opinion on the topic, providing useful insights for the integration policy. Between 2 November and 3 December 2021, 26,510 citizens from all 27 EU countries participated in the survey. People tended to overestimate the

439/2010; OJ L 468, 30 December 2021. It replaced the European Asylum Support Office (EASO): Having regard to the structural weaknesses of the CEAS, which were brought to the fore by the large-scale and uncontrolled arrival of migrants and asylum seekers to the Union, and the need for an efficient, high and uniform level of application of Union law on asylum in the Member States, it is necessary to improve the implementation and functioning of the CEAS by building on the work of EASO and further developing it into a fully-fledged agency. Regulation, para (6).

66 OJ L 317, 1.10.2020.

67 Eurostat, 2022.

68 Special Eurobarometer 2018, p. 3.

69 Special Eurobarometer, 2022.

number of third-country nationals as a proportion of the population of their country (68%). Only 38% of Europeans considered themselves well informed about migration and integration. More than half of respondents (56%) received information on these topics through traditional media (television, radio, and newspapers), while the second largest information source was social media and networks (15%). At the same time, a strong majority of Europeans (70%) viewed integration as a two-way process, in which both host societies and immigrants play an important role. Half of the Europeans agreed that integration of migrants is successful in their city or local area, while slightly fewer (42%) thought the same about integration in their country. Just over half of the Europeans (53%) agreed that their national government is doing enough to promote the integration of migrants into the society. A clear majority (69%) of respondents agreed that it is necessary for their country to invest in integrating migrants. Moreover, three out of four Europeans (75%) believed that the integration needs of migrants should be considered when designing measures to fight the effects of the COVID-19 pandemic.

In contrast, in the last such survey in 2018, respondents from all countries except Croatia and Estonia overestimated the proportion of immigrants living in their country. Just over half (54%) of the Europeans agreed that integration of immigrants has been a success in their local area, city, or country, but this figure varied widely between countries. A clear majority (69%) of respondents agreed that fostering integration of immigrants is a necessary investment for their country in the long run. Nearly 7 in 10 (69%) respondents—and a majority in all but one Member State—said that successful integration is the responsibility of both immigrants and the host society, while a fifth (20%) said that immigrants are mostly responsible. Over half (57%) of the respondents said they feel comfortable with having social relations with immigrants in any of the situations explored in the survey. Nearly 4 in 10 (38%) Europeans thought that immigration from outside the EU is more of a problem than an opportunity. Just under a third (31%) saw it as equally a problem and an opportunity, while only a fifth (20%) saw it more as an opportunity.

The Eurobarometer surveys show that the attitude towards migrations and the need to integrate migrants in the EU did not change from 2018 to 2022, and that the citizens feel that integration is crucial for migrants.

7. Role of Schengen rules and the Eurodac system in managing migrations

The Schengen Borders Code (SBC) regulates border checks and, to a lesser extent, border surveillance along the EU's external borders. It lays down the entry conditions third-country nationals should satisfy to be allowed entry into the Schengen area (Art. 6(1)). The SBC provides for the derogation from entry conditions for three

categories of persons (Art. 6(5)).[70] One of these categories is third-country nationals whose entry may be authorised on humanitarian grounds or because of international obligations. Under Art. 14(1) of the SBC, a third-country national who does not satisfy the entry conditions under Art. 6(1) and does not belong to any of the categories of persons referred to in Art. 6(5) should be refused entry into the territories of the Member States. However, the refusal of entry should be without prejudice to the application of special provisions concerning the right of asylum and international protection. Further, Art. 4 provides that when applying the SBC, Member States should act in full compliance with the relevant EU law, including the Charter of Fundamental Rights of the EU; relevant international law, including the Convention Relating to the Status of Refugees; obligations related to access to international protection, particularly the principle of non-refoulement; and fundamental rights. Moreover, Art. 3(a) stresses that the SBC applies without prejudice to the rights of refugees and persons requesting international protection, particularly as regards non-refoulement. Hence, Member States cannot refuse entry to a person requesting international protection without assessing whether or not they are in need of protection.[71] To ensure this, the Eurodac[72] system is very important. This system was envisaged in the late 1990s as the Commission started to prepare the "Eurodac" project, an EU initiative to use biometrics (specifically finger printing) for controlling illegal immigration and border crossings by asylum seekers.[73] This system was somewhat controversial from the beginning, as some argued that the obligation to surrender one's biometric data violates certain human rights.[74] Nevertheless, the Eurodac regulation was adopted by the Council of the European Union in 2000 and came into force on 15 January 2003.[75] Especially after the Syrian crisis, efficient border management through better use of information technology (IT) systems and technologies was a top policy priority for the Commission. By making full use of these systems, the EU wanted to

70 European Council on Refugees and Exiles, 2021, p. 14.

71 Ibid.

72 European Asylum Dactyloscopy Database, a large-scale information technology system that helps with the management of European asylum applications since 2003.

73 Van der Ploeg, 1999, p. 295.

74 Van der Ploeg, 1999, p. 301; Queiroz, 2019, p. 159.

75 The basic application is a combination of biometric identification technology and computerised data processing. The Central Unit, managed by the European Agency for the Operational Management of Large-Scale IT Systems in the Area of Freedom, Security, and Justice, contains an automatic fingerprint identification system that receives data and replies "hit–no hit" to the Member States' national authorities who are responsible for the quality of data and security of their transmission. The database contains information on three categories of persons who (1) seek asylum, (2) cross borders irregularly, or (3) are found to stay "illegally" within the EU territory. Collectable data include fingerprints of all persons aged 14 years and above, dates of collection, sex, place and date of the application for asylum or apprehension, reference number, date of transmission to the Central Unit, and user identification of the person who transmitted the data. Data on asylum seekers are compared against data in the database and stored for 10 years. Data on irregular border crossers are stored for 18 months. Fingerprints of the third category of individuals are checked against previous asylum applications but are not stored. Bredström, Krifors, and Mešić, 2022, p. 69.

not only improve border management but also reduce irregular migration and return illegally staying third-country nationals.[76] Of course, data must only be used for legitimate purposes, equivalent to a "ban on aimless data collection".[77] Additionally, these legitimate purposes must be specified before collection, and use or disclosure of the data must be compatible with the specified purposes. Finally, the principle of purpose limitation entails that data should not be retained for any period longer than necessary for the purpose for which they were collected and stored.[78]

8. Conclusion

It is safe to conclude that the attitude towards migration in the EU has changed dramatically in the past decade. The biggest facilitator was the Syrian crisis. This crisis showed that the then in force legal regulation for migrations and asylum was not up to the task. The crisis also showed the obvious differences in the approach to migrations between the Member States. Therefore, the legal regulation was changed in 2016 (SBC), Frontex was strengthened, and the Commission is now in the process of "reinventing" the CEAS and common migration policy. It is obvious that the EU migration policy had undergone a change in the past 20 years towards increasing "securitisation", and, during this discourse, migration has turned into "risk management".[79] Therefore, it is important to also be careful not to amend the EU migration and asylum policies in a way that would have detrimental effects on the fundamental rights of migrants and asylum seekers. Equilibrium is, of course, hard to achieve.

76 Queiroz, 2019, p. 158.
77 Queiroz, 2019, p. 163.
78 Ibid.
79 Bredström, Krifors, and Mešić, 2022, p. 75.

References

Bibliography

Abrisqueta Uriarte, J. (2019) 'The Reform of the Dublin III Regulation: How to Build or Not to Build Further Enforcing Mechanisms', *Spanish Yearbook of International Law*, vol. 23, pp. 264–271; https://doi.org/10.17103/sybil.23.16.

Bakhtina, K. (2022) 'The Temporary Protection Directive: The Analysis of the Dutch Case' *Amsterdam Law Forum*, 14(3), pp. 1–10.

Bježančević, S. (2019) 'Migrantska kriza u Europskoj uniji – izazovi, europska sigurnost I zaštita temeljnih prava' *Zbornik Pravnog fakulteta Sveučilišta u Rijeci*, 40(3), pp. 1231–1252; https://doi.org/10.30925/zpfsr.40.3.11.

Bredström, A., Krifors, K. and Mešić, N. (2022) 'Border Reconfiguration, Migration Governance, and Fundamental Rights: A Scoping Review of EURODAC as a Research Object' *Social Inclusion*, 10(3), pp. 68–81; https://doi.org/10.17645/si.v10i3.5398.

European Council on Refugees and Exiles (2021) *Reception, detention and restriction of movement at EU external borders*, Heinrich-Böll-Stiftung European Union.

Eurostat (2022) *Non-EU citizens make up 5.3% of the EU population*, https://ec.europa.eu/eurostat/web/products-eurostat-news/-/ddn-20220330-2.

Glunns, D. and Wessels, J. (2017) 'Waste of Paper or Useful Tool? The Potential of the Temporary Protection Directive in the Current "Refugee Crisis' *Refugee Survey Quarterly,* 36(2), pp. 57–83; https://doi.org/10.1093/rsq/hdx001.

Goldner Lang, I. (2022) 'Towards 'Judicial Passivism' in European Union Migration and Asylum Law' in: Ćapeta, T., Goldner Lang, I. and Perišin, T. (eds.) *The Changing European Union a Critical View on the Role of Law and the Courts*, Hart, Oxford, pp. 175–192; https://doi.org/10.5040/9781509937363.ch-009.

Hansen, R. (2023) War, Work and Want: How the OPEC Oil Crisis unleased Revolution and Mass Migration, https://academic.oup.com/book/46869.

Lalić Novak, G. and Padjen, I. (2009) 'The Europeanization of Asylum Policy: From Sovereignty via Harmony to Unity', *Politička misao*, 46(5), pp. 75–101.

Legislative Train (2024) Foreign Affairs – AFET, European Parliament, https://www.europarl.europa.eu/legislative-train/carriage/eu-turkey-statement-action-plan/report?sid=8301.

Maani, L. (2018) 'Refugees in the European Union: The Harsh Reality of the Dublin Regulation', *Notre Dame Journal of International and Comparative Law*, 8(2), pp. 83–106.

Meltem, I-C. (2016) 'Time to Activate the Temporary Protection Directive', *European Journal of Migration and Law*, 18(1), pp. 1–33; https://doi.org/10.1163/15718166-12342088.

Mikac, R., Cesarec, I. and Jajić, K. (2016) 'Migracijske politike Europske unije i Australije: sličnosti i razlike', *Međunarodne studije*, 16(1), pp. 85–103.

Mitchell, J. (2017) 'The Dublin Regulation and Systemic Flaws', *San Diego International Law Journal*, 18, pp. 295–324.

Papagianni, G. (2014) 'EU Migration Policy' in Triandafyllidou, A,, Gropas, R. (eds.) *European immigration : a sourcebook*. Second edn. Ashgate : Aldershot, 2014, Research in Migration and Ethnic Relations; pp. 377–388.

Papagianni, G. (2022) 'The challenges and opportunities of the EU migration partnerships: A North African perspective', *International Migration*, 60(4), special issue, pp. 61–72; https://doi.org/10.1111/imig.12979.

Popović N. and Petek, A. (2018) 'Imigracijska politika Europske unije: prikaz metodologije istraživanja', *Anali,* 15(1), pp. 201–227; https://doi.org/10.20901/an.15.09.

Queiroz, B.M. (2019) 'The Impact of EURODAC in EU Migration Law: The Era of Crimmigration', *Market and Competition Law Review,* 3(1), pp. 157–183; https://doi.org/10.7559/mclawreview.2019.318.

Special Eurobarometer (2018) *Integration of immigrants in the European Union*, European Union, Bruxelles, https://ec.europa.eu/migrant-integration/sites/default/files/2021-05/ebs_469_en.pdf.

Special Eurobarometer (2022) *Integration of immigrants in the European Union*, European Union, Bruxelles, https://europa.eu/eurobarometer/surveys/detail/2276.

Šabić, S.Š. (2017) *The Relocation of Refugees in the European Union, Implementation of Solidarity and Fear.* Zagreb: Heinrich-Böll-Stiftung.

United Nations High Commissioner for Refugees (UNHCR) (2015) UNHCR's proposals in light of the EU response to the refugee crisis and the EU package of 9 September 2015 [Online]. Available at: https://www.unhcr.org/sites/default/files/legacy-pdf/55f28c4c9.pdf (Accessed: 5 September 2024).

Van der Ploeg, I. (1999) 'The illegal body: Eurodac' and the politics of biometric identification', *Ethics and Information Technology*, vol. 1, pp. 295–302; https://doi.org/10.1023/A:1010064613240.

Van Mol, C., and de Valk, H. A. G. (2016) 'Migration and Immigrants in Europe: A Historical and Demographic Perspective' in Garcés-Mascareñas, B., Penninx, R. (eds.) *Integration Processes and Policies in Europe. Contexts, Levels and Actors*, Cham: Springer, pp. 31–55; https://doi.org/10.1007/978-3-319-21674-4_3.

Legal sources

Charter of Fundamental Rights of the European Union, OJ C 326, 26.10.2012.

Commission Recommendation (EU) 2020/1365 of 23 September 2020 on cooperation among Member States concerning operations carried out by vessels owned or operated by private entities for the purpose of search and rescue activities, OJ L 317, 1.10.2020.

Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities – Dublin Convention, OJ C 254 19.8.1997.

Dublin Regulation of 18 February 2003 (Dublin II), OJ L 50, 25.2.2003.

Regulation 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the Rules Governing the Movement of Persons across Borders (Schengen Borders Code) (Codification), OJ 2016 L 77/5, 23 March 2016.

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.

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 June 2013.

The Temporary Protection Directive 2001/55/EC1, OJ L 212, 7 August 2001.

European Commission (2015) *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions A European Agenda on Migration,* European Union, Bruxelles, https://home-affairs.ec.europa.eu/system/files/2020-09/communication_on_the_european_agenda_on_migration_en.pdf.

European Commission (2020) *Communication from the Commission to the European Parliamen, the Council, the European Economic and Social Committee and the Committee of Regions on a New Pact on Migration and Asylum*, European Union, Bruxelles, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2020%3A609%3AFIN.

European Commission (2022a) *Communication from the Commission to the European Parliamen, the Council, the European Economic and Social Committee and the Committee of Regions Attracting skills and talent to the EU,* European Union, Bruxelles, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2022%3A657%3AFIN.

European Commission (2022b) *Proposal for a Directive of the European Parliament and of the Council on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State (recast),* European Union, Bruxelles, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022PC0655.

European Commission (2022c) *Proposal for a Directive of the European Parliament and of the Council concerning the status of third-country nationals who are long-term residents (recast),*https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2022%3A650%3AFIN&qid=1651218479366.

European Commission (2023) *Statement on the political agreement on the New Pact on Migration and Asylum*, European Union, Bruxelles, https://ec.europa.eu/commission/presscorner/detail/en/statement_23_3183.

CHAPTER VIII

The Concept of Safe Third Country with Special Regard to the Greek Safe Third Country Declaration

Dalibor Đukić

Abstract

This study explores the "safe third country" (STC) concept as outlined in the Dublin III Regulation of the European Union, focusing specifically on the Greek list of designated STCs. The concept of STC is viewed as a strategic tool used by developed countries to address challenges such as "asylum shopping" and "orbit" situations. However, there are significant concerns about its compliance with international law, especially the 1951 Refugee Convention. In 2021, Greece issued a Joint Ministerial Decision designating Türkiye as an STC for certain nationals. This designation was later expanded to include Albania and northern Macedonia. Despite criticism, the Greek authorities continued to implement their decisions, resulting in many applications being deemed inadmissible and applicants being ordered to return to Türkiye, even though such readmissions have been suspended since 2020. The Greek Council of States affirmed that designating Türkiye as a STC met the requirements of the Revised Asylum Procedures Directive. To be considered an STC, countries should typically have stable political environments, effective legal systems, respect for human rights, and established asylum procedures. However, the present study highlights how the interpretation of STC rules varies significantly. The effectiveness of the STC principle hinges on the provision of effective protections for asylum seekers. Although the standard for effective protection may be ambiguous, if used effectively, the STC concept can enhance the efficiency of asylum procedures without compromising the rights of asylum seekers' rights. The STC concept has the potential to improve the asylum process by reducing irregular migration and deterring human

Dalibor Đukić (2024) 'The Concept of Safe Third Country with Special Regard to the Greek Safe Third Country Declaration'. In: Anikó Raisz (ed.) *Migration and Central Europe. Challenges and Legal Responses,* pp. 305–324. Miskolc–Budapest, Central European Academic Publishing.

https://doi.org/10.54237/profnet.2024.armace_8

trafficking and smuggling. Nonetheless, a merit-based evaluation of individual applications, including asylum seeker's circumstances and conditions in designated STC, remains crucial.

Keywords: safe third country, safe country of origin, European safe third country, Greece, refugees, migration, national safe third country lists

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1. Introduction

The "safe third country" (STC) concept is one of the most contentious in international refugee law, and has been extensively debated over the last two decades. It has been seen as a legal and institutional barrier intended to prevent asylum seekers from reaching the borders of destination countries[1] and as a measure of deterrent policies targeting both illegal immigrants and forced migrants.[2] Frequently linked to abuse, this principle has been criticised as a component of governmental efforts to evade the international obligation to comprehensively and effectively assess asylum applications and make decisions regarding the international protection of asylum seekers.[3] It has been perceived as a practice of burden (or responsibility) shifting rather than one of burden (or responsibility) sharing, potentially undermining the principle of international solidarity.[4] Furthermore, it has been noted that standards of effective protection of refugees in designated STCs diverge from the rights framework established by the Refugee Convention and International Human Rights Law.[5]

The STC concept emerged in Switzerland in 1979 and was gradually extended to several other European nations during the 1980s. By the 1990s, it gained broad acceptance. It was officially integrated into European Union (EU) law via the Dublin Convention of 1990.[6] The main idea of the STC is that the State may decline asylum requests from individuals who have passed through countries typically considered safe, where it is believed that they could have sought appropriate international protection.[7] In such cases, the State has no responsibility for the asylum seeker or any obligation to examine the merits of his application; the applicant can be returned to the STC through which they passed. The prevailing perspective suggests that if effective protection exists in a third State, transfers can be considered acceptable under

1 Randall, 2014, p. 254.
2 Scheel and Squire, 2014, pp. 195–196.
3 Davinić and Krstić, 2013, pp. 97–98.
4 Garlick, 2016, p. 164.
5 Freier, Karageorgiou and Ogg, 2021.
6 McAdam, 2013, pp. 28–29.
7 Legomsky, 2003, pp. 570.

the Refugee Convention, even though it neither explicitly permits nor forbids them. A critical concern revolves around defining adequate protection criteria available to third countries. The dominant view asserts that a third country must adhere to all the obligations outlined in the Refugee Convention. However, the academic literature provides different minimal criteria for determining STCs.[8] In this study, the notion of STC was evaluated as a component of the broader concept of safe countries, as defined by Arts. 35-39 of the Asylum Procedures Directive (APD) 2013/32/EU.

While the STC principle may optimise asylum processes, its deployment warrants meticulous implementation alongside robust safeguards protecting against potential encroachments on the fundamental rights and security of refugees. Achieving equilibrium between efficiency and the protection of individual rights is pivotal, in order to establish a manageable system while upholding international refugee protection obligations.

For the purposes of this chapter, three different sets of rules must be distinguished: a safe country of origin, the STC, and a safe European country. A safe country of origin is a State whose nationals are perceived as not having a well-founded fear of persecution or other serious harm. An STC is a State in which applicants receive adequate international protection. Safe European countries have ratified the Geneva Convention and the European Convention on Human Rights (ECHR) and have regulated asylum procedures by law.[9] This paper consists of seven sections addressing these different areas. Section 2 examines the EU legal framework that regulates the concept of safe country of origin. This is followed by analyses of the STC concept (Section 3) and the European safe country concept (Section 4), as defined by the abovementioned APD. Section 5 scrutinises the recent jurisprudence of European courts related to the STC concept, while Section 6 offers a detailed analysis of issues around the national list of STCs in Greece and contextualises "the Greek case" within the general framework of the STC concept. The main findings are summarised in the conclusion.

2. Safe country of origin concept

Among all the safe country concepts, the concept of "safe country of origin" is generally deemed the least controversial. It rests on the assumption that, under specific circumstances, certain countries can be identified as generally safe for their citizens or for stateless individuals who are habitual residents. Member States are entitled to adopt further rules at the national level for the application of the safe

8 Legomsky, 2003, pp. 673–675.

9 Thym and many others add to this list the concept of the first country of asylum; Thym, 2023, p. 381.

country-of-origin concept;[10] the EU legislation does not directly specify its components.[11] According to Annex I of the recast APD,

> A country is considered a safe country of origin when, on the basis of the legal situation, the application of the law within a democratic system, and the general political circumstances, it can be shown that there is generally and consistently no persecution as defined in Article 9 of Directive 2011/95/EU, no torture or inhuman or degrading treatment or punishment, and no threat due to indiscriminate violence in situations of international or internal armed conflict.

While this comprehensive definition establishes the criteria for designating safe countries of origin, Annex I provides additional guidelines that specify what should be evaluated during this process. Assessments should encompass the degree to which protection against persecution or mistreatment is ensured through a country's laws and regulations, including their implementation. Adherence to the rights and freedoms outlined in international and European instruments for human rights protection, compliance with the non-refoulement principle, and whether an effective system of remedies for addressing violations of rights and freedoms has been established.[12]

The most contentious aspect of the safe country-of-origin concept is the adoption of domestic lists of safe countries by EU Member States, which can be utilised in the examination of international protection applications. Third, countries are designated as safe based on information provided by various international organisations, including the European Asylum Support Office (EASO), the United Nations High Commissioner for Refugees (UNHCR), the Council of Europe, and other Member States.[13] One consequence of these lists is the presumption of adequate protection of human rights in the listed countries, which can be rebutted during the examination of individual applications. This special examination scheme requires applicants to present the overriding reasons for their particular situations. According to the Court of Justice of the European Union (CJEU), when there are no overriding reasons, the application may be rejected as manifestly unfounded.[14] In such cases, applicants whose applications are rejected are not permitted to remain in the State where the application was lodged.

Thus, the designation of safe countries of origin does not exempt competent asylum authorities from assessing individual applications; rather, it accelerates such proceedings.[15] This is highlighted in Recital 42 of the APD, which stipulates that

10 APD 2013/32/EU, Art. 36.
11 Thym, 2023, p. 382.
12 APD 2013/32/EU, Annex I.
13 APD 2013/32/EU, Art 37.
14 CJEU, *A v Migrationsverket*, Case C-404/17, Judgement of 25 July 2018, para. 26.
15 Thym, 2023, p. 382.

> The designation of a third country as a safe country of origin cannot establish an absolute guarantee of safety for nationals of that country. By its very nature, the assessment underlying the designation can only consider the general civil, legal, and political circumstances in that country and whether actors of persecution, torture, or inhuman or degrading treatment or punishment are subject to sanction in practice when found liable in that country. For this reason, it is important that where an applicant shows that there are valid reasons to consider the country unsafe in his or her particular circumstances, the designation of the country as safe can no longer be considered relevant for him or her.

The majority of EU Member States implement the safe country-of-origin concept and have established lists of safe countries, including all Central European states except Poland.[16] EU candidates and potential candidate countries, particularly those in the Western Balkans, are commonly recognised as safe countries of origin and feature prominently on national lists maintained by European states. The designation of a safe country of origin may include exemptions pertaining to specific geographical areas or the profiles of asylum seekers. For instance, such exemptions are applied to the Transnistria region of Moldova in Czechia and Switzerland and to religious minorities (Christians and Muslims) from India in the Netherlands. In these cases, regular asylum procedures are followed as the safe country-of-origin concept does not apply.[17]

The former APD 2005/85/EC had envisioned the establishment of a 'minimum common list of third countries which shall be regarded by Member States as safe countries of origin'.[18] This provision was annulled this provision on institutional grounds.[19] In 2015, the European Commission proposed a regulation aimed at establishing a common EU list of safe countries of origin for Directive 2013/32/EU.[20] This initiative was formulated at the peak of the refugee crisis with the aim of designating the Western Balkan countries and Türkiye as safe countries of origin.[21] However, the EU Council failed to reach an agreement on the proposed regulation for a common list of safe countries of origin and it was withdrawn in 2019. Consequently, the existing legal framework does not include a common list of safe EU countries. Nevertheless, the new EU Pact on Migration and Asylum is expected to lead to the adoption of a common EU list. Within the Pact, the European Commission once again recognised the necessity for 'streamlined and harmonised rules related to safe countries of origin and safe third countries'.[22] Thus, we concluded that there is a tendency toward

16 European Union Agency for Asylum, 2022, p. 6.
17 European Union Agency for Asylum, 2022, pp. 5–9.
18 Council Directive 2005/85/EC, Official Journal of the European Union L 326/13, Art. 29.
19 CJEU, *European Parliament v. Council of the European Union*, Case C-133/06, Judgement of 6 May 2008, para. 67.
20 European Commission, 2015.
21 Thym, 2023, p. 382.
22 European Commission, 2020, p. 4.

creating a common European list of safe countries of origin. After several attempts to adopt such a list, it can be anticipated that the new act on migration and asylum will lead toward the adoption of harmonised rules on the concept of a safe country of origin.

3. The concept of safe third country

One of the most controversial elements of the EU asylum *acquis* is the notion of STC. This concept is based on the presumption that certain countries which are not EU members can be designated safe for asylum seekers. According to the APD, EU Member States may apply the STC concept only if competent authorities ensure that individuals seeking international protection in a third country are treated in line with specific principles. These principles include ensuring that life and liberty are not threatened by factors such as race, religion, nationality, membership in a particular social group, and adherence to a specific political opinion. Additionally, there should be no risk of serious harm, as defined in Directive 2011/95/EU, and a third country must adhere to the principle of non-refoulement as per the Geneva Convention. Furthermore, the prohibition of removal in violation of the right to freedom from torture and cruel, inhuman, or degrading treatment, as outlined in the international law, must be respected. Finally, individuals must be able to request refugee status and receive protection from the STC in accordance with the Geneva Convention.[23]

The application of the STC concept has to be regulated in detail by the national legislation of EU Member States. Such legislation should encompass rules on connection between the applicant and the third country (justifying the reasonableness for the person to go to that country), rules on the methodology employed by competent authorities to ensure the applicability of the STC concept to a specific country or applicant (this methodology involves a case-by-case evaluation of the country's safety for a particular applicant and-or may include the national designation of countries considered generally safe), and finally rules permitting examinations to determine the safety of the third country for a particular applicant. These rules should include effective legal remedies and allow the applicant to challenge the use of the STC concept by asserting that a third country is not safe in their specific circumstances, or to challenge the existence of a connection between them and the third country.[24]

The APD prescribes additional obligations to states when implementing the STC concept. They are required to inform the applicant and provide them with a

23 APD 2013/32/EU, Art. 38, 1.
24 APD 2013/32/EU, Art. 38, 2.

document in the language of a third country notifying the authorities of the STC in question that the application has not been examined for its merits. Additionally, the Directive addresses a specific scenario: If a third country denies entry to the applicant, Member States must ensure access to a procedure in accordance with the fundamental principles and guarantees outlined in Chapter II of the Directive. In other words, the Member State must grant full access to asylum procedures, including a thorough examination of the merits, in cases where the STC does not permit entry into the applicant. Finally, Member States are required to periodically update the European Commission on the countries to which the STC concept has been applied.[25] According to CJEU jurisprudence, the conditions stipulated in Art. 38 of the Recast APD are cumulative.[26]

Application of the STC concept varies across European states. Some have adopted national lists that explicitly identify STCs, whereas others lack such lists and assess each case individually based on relevant legal procedures. Still, others fall in between; while they may lack a national list, they have legal provisions outlining procedures for determining STCs on a case-by-case basis.[27] The current voluntary approach to the STC concept among EU Member States is set to change under the proposed new act on migration and asylum. This pact introduces a mandatory pre-entry screening procedure that deems individuals inadmissible if they can be returned to a designated STC.[28] This mandatory process aims to harmonise the application of the STC concept across the EU, thereby contributing to the improved management of migration flows.

4. The concept of European safe country

Member States can opt for a limited examination or no examination of an asylum application or of the safety of the applicant in their particular circumstances if it is established by a competent authority that the applicant has entered or is attempting to enter its territory illegally from a European safe third country. For a third country to be considered a European safe third country, it must ratify and adhere to the Geneva Convention without geographical limitations, have a legal asylum procedure in place, and ratify the ECHR, observing its provisions and standards for effective remedies. Applicants have the right to challenge the application of the European safe country concept based on the assertion that a third country is not safe in their

25 APD 2013/32/EU, Art. 38, 3–5.

26 CJEU, *Serin Alheto v. Zamestnik-predsedatel na Darzhavna agentsia za bezhantsite*, Case C-585/16, Judgement of 25 July 2018, para. 121.

27 European Union Agency for Asylum, 2022, p. 13.

28 European Commission, 2020, p.13. See also: Nur Osso, 2023, p. 15 fn. 139.

particular circumstances. Member States must establish procedures in national law for implementing these provisions and the consequences of decisions, aligning with the non-refoulement principle, and may include exceptions for humanitarian, political, or public international law reasons. The same rules apply as in the case of an STC concerning notifications to the applicant and authorities of a European safe country, the issue of non-readmission, and the requirement to periodically inform the European Commission. [29]

The concept of a "European safe country" within the European context has faced criticism for its ambiguity, hindering its widespread implementation. Only three EU Member States have incorporated it into their domestic legislation; even in these cases, its practical application has been limited. For Switzerland, the concept appears redundant, given its application 'as the concept is applied in the context of safe third country in relation to the EU and EFTA Member States'.[30] It has been observed that in some EU Member States, asylum procedures are insufficient, leading to the removal of asylum seekers from countries where they could face persecution. Moreover, in the landmark case *M.S.S v. Belgium and Greece*, the European Court of Human Rights (ECtHR) concluded that Greece could not be deemed a safe country.[31] As a result, the concept of a "European safe country" has not been transposed into the legislation of many EU Member States; it has never been implemented and there is a significant likelihood that it will not be implemented in the future.

5. An overview of recent jurisprudence of European courts

The implementation of safe country concepts remains under the primary jurisdiction of national courts. The CJEU interprets relevant rules through preliminary rulings or evaluates the enforcement of infringement procedures. The ECtHR indirectly scrutinises safety country concepts while assessing human rights violations.

In the case *Khlaifia and Others v. Italy*, the applicants, who were Tunisian nationals, departed Tunisia by sea in September 2011, but their boats were intercepted by the Italian authorities, leading them to be taken to a reception centre in Lampedusa. They described deplorable conditions including inadequate hygiene, overcrowding, and limited water supply. A riot in the centre resulted in fire damage. After being transferred to Palermo, the applicants spent four days aboard ships before returning to Tunisia. They argued that their detention violated Art. 3 (prohibition of inhuman or degrading treatment), Art. 5 § 1, § 2, and § 4 (right to liberty

29 APD 2013/32/EU, Art. 39.
30 European Union Agency for Asylum, 2022, p. 16.
31 ECtHR, *M.S.S. v. Belgium and Greece*, Application No. 30696/09, Judgement of 21 January 2011, paras. 362–368.

and security, right to be promptly informed of reasons for detention, and right to a decision on the lawfulness of detention), and Art. 13 (right to an effective remedy) of the European Convention. They also alleged that collective expulsion is prohibited under Art. 4 of Protocol No. 4. In its response, the Italian Government argued that Tunisia was 'a safe country which respected human rights, this being shown by the fact that the applicants had not reported experiencing persecution or violations of their fundamental rights after their return'.[32] However, the ECtHR found a violation of Art. 4 of Protocol 4 The Court asserted that an expulsion lacking a comprehensive assessment of the individual circumstances of a case and devoid of procedural safeguards heightened the risk of refoulement. The *Khlaifia* decision presented mixed outcomes for Italy and the other states. While it may force them to undertake the complex and time-consuming political process of revising their laws to guarantee proper legal procedures for migrants, it also offers them more flexibility in managing large influxes of migrants.[33]

In the case *D.L. v. Austria*, the ECtHR stated that simply designating a territory as a safe country of origin 'does not relieve the extraditing State from conducting an individual risk assessment'.[34] Specifically, the ECtHR found no violations of the ECHR when an individual was extradited to a territory deemed safe by domestic law. However, this decision was based on an extensive investigation demonstrating that individuals faced no real risk of harm under the ECHR provisions in that territory.

In the landmark case of *Ilias and Ahmed v. Hungary*,[35] the Grand Chamber of the ECtHR violated Art. 3 of the ECHR, as Hungarian authorities failed to evaluate the potential risks of the prohibition or ill treatment of applicants in Serbia. Additionally, the Court clarified that the applicants were not detained in the "transit zone" between Hungary and Serbia because of a lack of any direct risk in Serbia. This case establishes the crucial principles for safeguarding asylum seekers from refoulement and inhuman or degrading treatments before applying the STC concept. A merit-based examination is necessary to ensure that asylum seekers face no risk of denying access to the asylum procedure in the STC and are not at risk of expulsion, refoulement, or chain refoulement. The ECtHR emphasised that asylum applicants should not be removed from a third country if there are insufficient guarantees against refoulement. However, the Grand Chamber's decision faced criticism for breaking the connection between 'the qualification of behaviour as deprivation of liberty' (Art. 5 of the ECHR) and protection from refoulement (Art. 3 of the ECHR).[36]

These guiding principles and safeguards were reiterated in other cases, such as *M.K. and others v. Poland* where the ECtHR identified a violation of ECHR Art. 3 because of the removal of a third-country national to Belarus without proper

32 ECtHR, *Khlaifia and Others v. Italy*, Application No. 16483/12, Judgement of 15 December 2016, para. 223.
33 Goldenziel, 2018, p. 278.
34 ECtHR, *D.L. v. Austria*, Application No. 34999/16, Judgement of 9 April 2018, para. 59.
35 ECtHR, *Lias and Ahmed v. Hungary*, Application No. 47287/15, Judgement of 21 November 2019.
36 Stoyanova, 2020, p. 496.

consideration of the risk of chain refoulement and lacking effective guarantees against the real risk of inhuman or degrading treatment or torture.[37]

In March 2017, Serbian national A applied for asylum in Sweden and referred to the threats and assaults from an illegal paramilitary group between 2001 and 2003. The Immigration Board of Sweden rejected the application as unfounded, asserting that Serbia could provide effective protection. *A*n appeal, and the Court, uncertain about interpreting Art. 31(8) of Directive 2013/32, referred a question to the CJEU. The CJEU concluded that

> Article 31(8)(b) of Directive 2013/32, read in conjunction with Article 32(2), must be interpreted as not allowing an application for international protection to be regarded as manifestly unfounded in a situation such as that at issue in the main proceedings, in which, first, it is apparent from the information on the applicant's country of origin that acceptable protection can be ensured for him in that country and, second, the applicant has provided insufficient information to justify the grant of international protection, where the Member State in which the application was lodged has not adopted rules implementing the concept of a safe country of origin.[38]

A few cases have arisen because of the rejection of applications on the grounds that the applicant had reached the territory of the EU Member State through a State in which they could be granted sufficient protection and were not exposed to persecution or the risk of harm. The CJEU was asked to interpret Arts. 33 and 46(3) of Directive 2013/32/EU and Art. 47 of the EU Charter in a case involving the *LH* and the Immigration and Asylum Office of Hungary. The dispute arose when the *LH*'s request for international protection was rejected as inadmissible without examining its merits, leading to its removal and a ban on entry. The CJEU reiterated that the conditions laid down in the Directive were cumulative, and all of them must be satisfied to deny admissibility. In the present case, the connection between the applicant and STC was not met. Furthermore, the Court clarified that transit alone was insufficient to constitute a connection between the applicant and a third country within the meaning of Art. 38(2)(a) of Directive 2013/32.[39] The Court has repeated the same consideration in the joined cases *FMS and others v. Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság.*[40]

37 ECtHR, *M.K. and Others v. Poland*, Applications nos. 40503/17, 42902/17, and 43643/17, Judgement of 23 July 2020, paras. 174–186.

38 CJEU, *A v. Migrationsverket*, Case C-404/17, Judgement of 25 July 2018, para. 35.

39 CJEU, *LH v. Bevándorlási és Menekültügyi Hivatal*, Case C-564/18, Judgement of 19 March 2020, paras. 40, 49.

40 CJEU, *FMS and Others v Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság*, Joined Cases C-924/19 PPU and C-925/19 PPU, Judgement of the Court (GC) of 14 May 2020, paras 148–165.

In the case of *Serin Alheto v Zamestnik-predsedatel na Darzhavna agentsia za bezhantsite* the CJEU clarified that 'full and *ex nunc* examination of both facts and points of law' may extend to grounds of inadmissibility based on the safe country concept. The CJEU asserted that when examining the grounds of inadmissibility of the application for international protection, including the STC concept, the referring court must rigorously assess the satisfaction of each condition cumulatively and ensure that the applicant has the opportunity to express their views on the applicability of the grounds of inadmissibility.[41]

6. The STC concept: Greece as a case study

The main result of applying the STC concept is the return or removal of persons to an STC, dislocating them to a jurisdiction that is different from that of the removing Member State. This return or removal is operationalised through readmission agreements or special arrangements with third states, with the aim of preventing 'the risk of orbiting and refoulment'.[42] One such arrangement was applied in Greece following the EU-Türkiye Statement of 18 March 2016.

At the height of the European migration crisis in 2015, more than 850,000 irregular migrants transited from Türkiye to Greek islands.[43] In an attempt to manage this unprecedented influx, the EU and Türkiye reached a deal in the form of a press statement, endorsing the returnability of illegal migrants.[44] Although the EU decided to regulate this process differently from the 2014 Readmission Agreement between the EU and Türkiye, it was concluded in a form that would not produce any legally binding effects,[45] including judicial scrutiny.[46] While the STC concept was not explicitly mentioned in the EU-Türkiye Statement, its implementation – including the examination of asylum applications under the STC notion [47]– led to the *de facto*

41 CJEU, *Serin Alheto v Zamestnik-predsedatel na Darzhavna agentsia za bezhantsite*, Case C-585/16, Judgement of 25 July 2018, paras. 121–130.

42 Moreno-Lax, 2015, p. 673.

43 UNHCR, 2023, Mediterranean Situation: Greece. Available at: https://data2.unhcr.org/en/situations/mediterranean/location/5179 (Accessed: 30 October 2023).

44 Council of the European Union, 2016.

45 Moreno-Lax, 2017, p. 28.

46 UN Human Rights Council, 2017, pp. 5–6. The Report refers to a *NF, NG and NM v. European Council* case in which the General Court of the EU determined the Statement to be non-reviewable. *NF v European Council* (T-192/16), *NG v European Council* (T-193/16) and *NM v European Council* (T-257/16), ECLI:EU:T:2017:128. The appeal was also unsuccessful. Order of the Court (First Chamber) of 12 September 2018 — *NF (C-208/17 P), NG (C-209/17 P), NM (C-210/17 P) v European Council*, Official Journal of the European Union C 399/13. Furthermore, the ECtHR determined that the EU–Türkiye Statement is a migration agreement between EU Member States and Türkiye. ECtHR, *J.R. and Others v. Greece*, Application No. 22696/16, Judgement of 25 January 2018, para. 7.

47 Drakopoulou, Konstantinou and Koros, 2020, p. 176.

designation of Türkiye as an STC. The issue arises from the fact that Türkiye does not comply with the conditions set by the recast APD for designation as an STC. One significant reason is that it maintains a geographical limitation on the 1951 Refugee Convention, denying convention-based protection to individuals from non-European countries.[48] The European Commission, aiming to uphold the Statement, issued a Communication in which it clarified that the STC notion, as defined in the recast APD, 'requires that the possibility exists to receive protection in accordance with the Geneva Convention, but does not require that the STC has ratified that Convention without geographical reservation'.[49] That is, the conditions specified in the recast APD were relaxed; it was considered sufficient that protection comparable to or similar to that of the Geneva Convention was considered sufficient.[50]

Moreover, implementing the STC concept in the case of Türkiye raises the issue of assessing whether there is a connection, as defined in the recast APD, between the applicant and the STC, and whether it is reasonable for them to go to that territory. The European Commission again supported the deal with Türkiye, stating that

> The question of whether there is a connection with the third country in question, and whether it is therefore reasonable for the applicant to go to that country, can also consider whether the applicant has transited through the STC country in question or whether the third country is geographically close to the country of origin of the applicant.[51]

As previously mentioned, the CJEU does not deem transit alone adequate to establish a connection between the applicant and a third country. This perspective is also shared by the UNHCR, which has noted that 'transit alone is not a "sufficient" connection or meaningful link, unless there is a formal agreement for the allocation of responsibility for determining refugee status between countries with comparable asylum systems and standards'.[52] It can be concluded that the EU-Türkiye Statement has revealed how the STC concept may be interpreted and adjusted in ways that enhance its effectiveness in processing asylum applications but potentially compromise the protection of applicants' rights.

The STC concept was transposed to Greek national law following the announcement of the EU-Türkiye Statement, along with other provisions of the APD. Since then, multiple legal frameworks have governed the removal of third-country nationals from Greece.[53] The return of Syrian nationals to Türkiye followed the STC concept, whereas non-Syrians initially returned on grounds of unfounded applications, indicating that they were not genuinely in need of international protection.

48 Moreno-Lax, 2017, pp. 28–30.
49 European Commission, 2016, para. 62.
50 Dimitriadi, 2016, p. 5.
51 European Commission, 2016, para. 62.
52 UNHCR, 2016, p. 6.
53 Drakopoulou, Konstantinou and Koros, 2020, p. 183.

Until the Joint Ministerial Decision (JMD) of June 2021,[54] only asylum claims by Syrian nationals were assessed under the STC concept, and Türkiye was considered safe for most Syrians without examining the substance of their requests. However, the merits of non-Syrian applications were not evaluated until June 2021. The JMD expanded the STC provisions to include additional populations and extended their application from the Greek islands to the mainland, designating Türkiye as an STC for Afghans, Bangladeshi, Pakistani, Somali, and Syrian refugees. The JMD was amended in 2021, and the list was expanded to include Albania and North Macedonia for individuals who arrived irregularly in Greece and sought protection.[55] This will be confirmed in 2022 by a new ministerial decision.[56] The JMD allows the rejection of asylum applications from these nationalities without a merit-based examination, resulting in a blanket application of the STC concept across Greece.

Returns and readmissions under the EU-Türkiye Statement faced a temporary interruption following the attempted coup in Türkiye on 15 July 2016. Starting in March 2020, Turkish authorities indefinitely suspended readmissions from Greece, citing the challenges posed by the coronavirus pandemic. Despite these developments, Greece has persisted in processing asylum applications using the admissibility procedure and STC concept since March 2020.[57]

The implementation of the STC concept by Greek authorities has been widely criticised. The resulting denial of asylum affected the location and content of the protection for Greece's refugees. The use of the STC concept in Greece instils constant fear of removal to Türkiye and, ultimately, to countries of origin, violating the prohibition of direct and indirect refoulement. The second repercussion is the right to enjoy asylum, as the misuse or dilution of protection standards under international and EU laws exacerbates the denial of asylum in Greece. The JMD's designation in June 2021 of Türkiye as an STC has led to automatic inadmissibility and return orders, further reducing protection standards. Thus, the STC concept in Greece, in its current form, leaves thousands of refugees in a state of "orbit", excluding asylum procedures.[58]

54 Κοινή Υπουργική Απόφαση Αριθμ. 42799/2021 (Koini Ypourgiki Apofasi Arithm. 42799/2021, JMD No. 42799/2021) Καθορισμός τρίτων χωρών που χαρακτηρίζονται ως ασφαλείς και κατάρτιση εθνικούκαταλόγου, κατά τα οριζόμενα στο άρθρο 86 του ν. 4636/2019 (Α' 169) (Kathorismos triton choron pou charaktirizontai os asfaleis kai katartisi ethnikou katalogou, kata ta orizomena sto arthro 86 tou n. 4636/2019 (A' 169), Determination of third countries characterised as safe and preparation of a national list, as defined in Art. 86 of Law 4636/2019 (A' 169), ΦΕΚ 2425/Β/7-6-2021 (FEK, Official Gazette No. 2425/B/7-6-2021).

55 Υπουργική Απόφαση Αριθμ. οικ. 458568/2021 (Ypourgiki Apofasi Arithm. oik. 458568/2021, Ministerial Decision No. internal 458568/2021), ΦΕΚ 5949/Β/16-12-2021 (FEK, Official Gazette No. 5949/B/16-12-2021).

56 Υπουργική Απόφαση Αριθμ. 734214 (Ypourgiki Apofasi Arithm. 734214, Ministerial Decision No. 734214), ΦΕΚ 6250/Β/12-12-2022 (FEK, Official Gazette No. 6250/B/12-12-2022).

57 Nur Osso, 2023, p. 25.

58 Nur Osso, 2023, p. 25.

Nonetheless, certain Greek authors have provided arguments that justify the designation of Türkiye as a safe country for asylum seekers, according to Art. 38 of the recast APD. Greek authorities determined that following the failed coup d'état on 15 July 2016 widespread violations of constitutional guarantees were not recorded and did not affect asylum procedures. The ECtHR has adopted a similar stance when dealing with appeals from Turkish citizens. Consequently, a person's life and liberty are not threatened, fulfilling the first condition stipulated by the APD (Art. 38, 1a). Furthermore, Türkiye respects the prohibition of refoulement, which is proved by the presence of millions of refugees remaining within the Turkish territory. Furthermore, the Turkish government has provided the European Commission with assurances that Türkiye respects the principle of non-refoulement and those assurances are confirmed by reliable sources. In addition, there is no risk of serious harm, as the death penalty is prohibited and no evidence of torture has been uncovered.[59]

One of the main controversies surrounding Türkiye's designation as an STC relates to the ratification of the Refugee Convention with a "geographical reservation". This reservation limits Türkiye's obligation to protect refugees to those originating from European countries. However, two arguments have been presented that suggest a different approach. First, a systematic interpretation suggests that when the EU legislator intended to have a third country ratify the Geneva Convention, it explicitly prescribed it, as in the case of a safe European country. Second, a historical interpretation points out that the initial proposal for a Directive dated 24 October 2000 explicitly stated that the third country was not obliged to ratify the Convention. The layout of the provision was completely changed, but there was no indication of the intention to modify its essential content.[60] These arguments create a legal grey area around countries designated as STCs. They highlighted the complexities of interpreting the STC concept and applying it in specific situations.

7. Concluding remarks

This study examines the intricate mechanisms of implementing the STC concept, as articulated in the EU's Dublin III Regulation, with a specific focus on its application in Greece. The STC concept has emerged as a strategic tool employed by developed nations to address challenges within their refugee and asylum systems, particularly in dealing with issues such as "asylum shopping" and "orbit" situations.[61] However,

59 Παπαϊωάννου (Papaioannou), 2023, p. 16.
60 Κοφίνης (Kofínhs), 2019.
61 Nur Osso, 2023, p. 31.

concerns persist regarding the alignment of this concept with international law and the 1951 Refugee Convention.[62]

Controversies often revolve around the designation of certain countries as STCs and their assessment of whether they have fulfilled the conditions stipulated by international law. The adoption of national lists of STCs to operationalise this principle has been used to justify the automatic refusal of asylum applications. The final elements of this concept include readmission agreements and arrangements with third countries to regulate the relocation of applicants whose applications have been refused.

The STC concept should be interpreted and operationalised in a way that balances practical limitations with upholding fundamental human rights obligations. This is evident from the presumption of STC safety, which is based on effective legal guarantees. The example of Türkiye, which has not ratified the Refugee Convention for individuals coming from outside Europe, highlights that ratification is not a prerequisite as long as effective protection is available in law and practice. However, this should not lower the thresholds of effective and appropriate refugee protection standards that must be accessible within the STC.

On 7 June 2021 Greece issued JMD 42799/2021, designating Türkiye as an STC for nationals from Syria, Afghanistan, Somalia, Pakistan, and Bangladesh. This list was expanded to include individuals from Albania and North Macedonia who arrived irregularly in Greece and sought protection. However, civil society organisations have criticised the Greek government's decision, stating that it does not comply with the APD. Despite concerns raised, Greek authorities continue to implement the JMD, resulting in numerous applicants having their applications dismissed as inadmissible and being ordered to return to Türkiye (even though readmissions to Türkiye had been suspended since 2020). The Greek Council of State concluded that qualifying Türkiye as an STC meets all the requirements set by the recast APD. Conversely, numerous scholars and NGOs have found that Türkiye does not comply with all the relevant APD provisions. This indicates that the criteria for designating countries as safe are prone to arbitrariness, and should be regulated more consistently.

The rules on the STC should focus on the essential concern regarding the effective protection of asylum seekers. Although the standard of effective protection may seem blurred, it can enhance the efficiency of the STC principle without undermining the protection of asylum seekers' rights. The STC concept has the potential to enhance the efficiency of asylum procedures and reduce irregular migration; it can discourage asylum seekers from engaging in irregular migration and consequently undermine human trafficking and smuggling activities.

The New Pact on Migration and Asylum will likely 'expand the scope for defining third countries as safe'[63] and introduce a minimal European list of safe countries of origin and STCs, harmonising rules on safe countries at the EU level, and enhancing

62 Goodwin-Gill and McAdam, 2021, pp. 600–607.
63 Vedsted-Hansen, 2022, p. 108.

legal certainty. This enhancement will likely affect Western Balkan countries by potentially categorising them as safe at the EU level. This represents a significant development, particularly considering its inclusion in most national lists of safe countries of origin. However, if Western Balkan countries are designated safe, there is a potential risk of creating refugee hotspots on their borders with EU Member States. To prevent this scenario, these countries may seek to initiate gradual implementation of the STC principle, resulting in the return of asylum seekers to eastern and south-eastern EU Member States.

The overall focus should remain on the merit-based examination of individual applications, considering factors such as the individual circumstances of the asylum seeker, prevailing conditions in the STC, and legal and human rights frameworks in place. Therefore, Member States must be provided with updated, thorough, and independent information on the conditions prevailing in the STC. Countries that commonly consider themselves as STCs tend to have a stable political situation, effective legal systems, and respect for human rights. Examples include countries with well-established asylum procedures, adherence to international conventions, and a history of protecting refugees. Assessing whether a specific country is safe for a particular applicant remains a challenge, indicating that STC implementation will continue to occur in many different forms, thus remaining a relevant legal topic.

References

Bibliography

Davinić, M, Krstić, I. (2013) 'Zloupotreba koncepta sigurne treće zemlje u pravu azila' (Misuse of the 'safe third country' concept in the Asylum Law), in Vasić, R., Krstić, I. (eds.) *Development of the legal system of the Republic of Serbia and its harmonisation with EU Law*, Belgrade: University of Belgrade Faculty of Law, pp. 97–116.

Dimitriadi, A. (2016), The Impact of the EU-Turkey Statement on Protection and Reception: The Case of Greece, [Online]. Available at: https://www.iai.it/sites/default/files/gte_wp_15.pdf (Accessed: 25 October 2023).

Drakopoulou, A., Konstantinou, A., Koros, D. (2020) 'Border Management at the External Schengen Borders: Border Controls, Return Operations, and Obstacles to Effective Remedies in Greece' in Carrera, S., Stefan, M. (eds) *Fundamental Rights Challenges in Border Controls and Expulsion of Irregular Immigrants in the European Union: Complaint Mechanisms and Access to Justice*, Routledge, pp. 175–196; https://doi.org/10.4324/9780429203275-11.

European Union Agency for Asylum (2022) *Applying the Concept of Safe Countries in the Asylum Procedure*. Luxembourg: Publications Office of the European Union.

Freier, F. L., Karageorgiou, E., Ogg, K. (2021) 'The Evolution of Safe Third Country Law and Practice' in Costello, C., Foster, M., and McAdam, J. (eds) *The Oxford Handbook of International Refugee Law*, Oxford: Oxford University Press, pp. 518–534; https://doi.org/10.1093/law/9780198848639.003.0029.

Garlick, M. (2016) 'The Dublin System, Solidarity and Individual Rights' in Chetail, V., De Bruycker Ph., and Maiani F. (eds) *Reforming the Common European Asylum System: The New European Refugee Law*, Boston: Brill Nijhoff. https://doi.org/10.1163/9789004308664_008.

Goldenziel, J. I. (2018) 'Khlaifia and Others v. Italy', *American Journal of International Law*, 112(2), pp. 274–280; https://doi.org/10.1017/ajil.2018.28.

Goodwin-Gill, G., McAdam, J. (2021) *The Refugee in International Law*. Fourth edn; Oxford: Oxford University Press.

Legomsky, S. (2003) 'Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection', *International Journal of Refugee Law* 15 (4), pp. 567–677; https://doi.org/10.1093/ijrl/15.4.567.

McAdam, J. (2013) 'Migrating Laws? The "Plagiaristic Dialogue" Between Europe and Australia' in Lambert, H., McAdam, J., and Fullerton, M. (eds) *The Global Reach of European Refugee Law* Cambridge: Cambridge University Press, pp. 25–71; https://doi.org/10.1017/CBO9781107300743.002.

Moreno-Lax, V. (2015) 'The Legality of the "Safe Third Country" Notion Contested: Insights from the Law of Treaties' in Goodwin-Gill, G. S., Weckel, P. (eds) *Migration and Refugee Protection in the 21st Century: International Legal Aspects* , Hague: Martinus Nijhoff, pp. 665–721.

Moreno-Lax, V. (2017) 'The Migration Partnership Framework and the EU–Turkey Deal: Lessons for the Global Compact on Migration Process?' in Gammeltoft-Hansen, T., Guild, E., Moreno-Lax, V., Panizzon, M., Roele, I. (eds.) *What Is a Compact? Migrants' Rights and State Responsibilities Regarding the Design of the UN Global Compact for Safe, Orderly and Regular Migration*, Lund: Raoul Wallenberg Institute, pp. 27–32.

Nur Osso, B. (2023) 'Unpacking the Safe Third Country Concept in the European Union: B/orders, Legal Spaces, and Asylum in the Shadow of Externalization', *International Journal of Refugee Law*, 35(3), pp. 272–303; https://doi.org/10.1093/ijrl/eead028.

Randall, H. (2014) 'State Controls: Borders, Refugees, and Citizenship' in Qasmiyeh, F. E., Loescher, G., Long, K., Sigonap, N. (eds.) *The Oxford Handbook of Refugee and Forced Migration Studies*, pp. 253-264.

Scheel, S., Squire, V. (2014) 'Forced Migrants as 'Illegal' Migrants' in Qasmiyeh, F. E., Loescher, G., Long, K., Sigonap, N. (eds.) *The Oxford Handbook of Refugee and Forced Migration Studies*. Oxford: Oxford Academic, pp. 188-199.

Stoyanova, V. (2020) 'Introductory note to Ilias and Ahmed v. Hungary (Eur. Ct. H.r.), *International Legal Materials*, 59(3), pp. 495-553; https://doi.org/10.1017/ilm.2020.30.

Thym, D. (2023) *European Migration Law*. Oxford: Oxford University Press. https://doi.org/10.1093/oso/9780192894274.001.0001.

UN Human Rights Council, Report of the Special Rapporteur on the human rights of migrants on his mission to Greece, 24 April 2017, A/HRC/35/25/Add.2, [Online]. Available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/G17/098/41/PDF/G1709841.pdf?OpenElement (Accessed: 25 October 2023).

UNHCR (2016) Legal considerations on returning asylum seekers & refugees from Greece to Turkey under safe third country & first country of asylum concepts, [Online]. Available at: https://www.unhcr.org/fr-fr/en/media/legal-considerations-returning-asylum-seekers-refugees-greece-turkey-under-safe-third-country (Accessed: 25 October 2023).

UNHCR (2023) Mediterranean Situation: Greece. Operational Data Portal. [Online]. Available at: https://data2.unhcr.org/en/situations/mediterranean/location/5179 (Accessed: 30 October 2023).

Vedsted-Hansen, Jens. 'Border Procedure on Asylum and Return: Closing the Control Gap by Restricting Access to Protection?' in Thym, D., Odysseus Academic Network (eds.) *Reforming the Common European Asylum System: Opportunities, Pitfalls, and Downsides of the Commission Proposals for a New Pact on Migration and Asylum*, Baden-Baden: Nomos, pp. 99-111; https://doi.org/10.5771/9783748931164-99.

Κοινή Υπουργική Απόφαση Αριθμ. 42799/2021 (Koini Ypourgiki Apofasi Arithm. 42799/2021, Joint Ministerial Decision No. 42799/2021) Καθορισμός τρίτων χωρών που χαρακτηρίζονται ως ασφαλείς και κατάρτιση εθνικούκαταλόγου, κατά τα οριζόμενα στο άρθρο 86 του ν. 4636/2019 (Α' 169) (Kathorismos triton choron pou charaktirizontai os asfaleis kai katartisi ethnikou katalogou, kata ta orizomena sto arthro 86 tou n. 4636/2019 (A' 169), Determination of third countries characterized as safe and preparation of a national list, as defined in article 86 of Law 4636/2019 (A' 169), ΦΕΚ 2425/Β/7-6-2021 (FEK, Official Gazette No. 2425/B/7-6-2021)

Κοφίνης (Kofinis), Σ (S). (2019) Η έννοια της ασφαλούς τρίτης χώρας στο προσφυγικό δίκαιο (I ennoia tis asfalous tritis choras sto prosfygiko dikaio, The Concept of Safe Third Country in the Refugee Law) [Online]. Available at: http://www.esdi.gr/nex/images/stories/pdf/epimorfosi/2019/kofini_2019.pdf (Accessed: 25 October 2023).

Παπαϊωάννου (Papaioannou), Κ. (2023) Η Τουρκία ως Ασφαλής Τρίτη Χώρα. Νομική Διάσταση και Αντιπαραθέσεις. (I Tourkia os Asfalis Triti Chora. Nomiki Diastasi kai Antiparatheseis, Turkey as a Safe Third Country. Legal Dimensions and Disputes) Αθήνα: Ευρωπαϊκό Κέντρο Αριστείας Jean Monnet Εθνικό Και Καποδιστριακό Πανεπιστήμιο Αθηνών (Athina: Evropaiko Kentro Aristeias Jean Monnet Ethniko kai Kapodistriako Panepistimio Athinon, Athens: European Center of Excellence Jean Monnet National and Kapodistrian University of Athens).

Υπουργική Απόφαση Αριθμ. 734214 (Ypourgiki Apofasi Arithm. 734214, Ministerial Decision No. 734214), ΦΕΚ 6250/B/12-12-2022 (FEK, Official Gazette No. 6250/B/12-12-2022).
Υπουργική Απόφαση Αριθμ. οικ. 458568/2021 (Ypourgiki Apofasi Arithm. oik. 458568/2021, Ministerial Decision No. internal 458568/2021), ΦΕΚ 5949/B/16-12-2021 (FEK, Official Gazette No. 5949/B/16-12-2021)

Legal sources

Asylum Procedures Directive 2013/32/EU. Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) OJ L 180, 29/06/2013, p. 60–95
Council of the European Union, (2016) EU–Turkey Statement, 18 March 2016, [Online]. Available at: https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/ (Accessed: 25 October 2023).
European Commission (2015) Proposal for a Regulation of the European Parliament and of the Council establishing an EU common list of safe countries of origin for the purposes of Directive 2013/32/EU of the European Parliament and of the Council on common procedures for granting and withdrawing international protection, and amending Directive 2013/32/EU [Online]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2015:0452:FIN (Accessed: 25 October 2023).
European Commission (2016) Communication from the Commission to the European Parliament and the Council on the State of Play of Implementation of the Priority Actions under the European Agenda on Migration, COM(2016) 85 final, [Online]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52016DC0085 (Accessed: 25 October 2023).
European Commission (2020) Amended proposal for a Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU, COM(2020) 611 final [Online]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020PC0611 (Accessed: 25 October 2023).
Order of the Court (First Chamber) of 12 September 2018 — NF (C-208/17 P), NG (C-209/17 P), NM (C-210/17 P) v European Council, Official Journal of the European Union C 399/13.
CJEU, *A v. Migrationsverket*, Case C-404/17, Judgment of 25. July 2018.
CJEU, *European Parliament v. Council of the European Union*, Case C-133/06, Judgment of 6 May 2008.
CJEU, *FMS and Others v. Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság*, Joined Cases C-924/19 PPU and C-925/19 PPU, Judgment of the Court (GC) of 14 May 2020.
CJEU*, LH v. Bevándorlási és Menekültügyi Hivatal*, Case C-564/18, Judgment of 19 March 2020.
CJEU, *Serin Alheto v. Zamestnik-predsedatel na Darzhavna agentsia za bezhantsite*, Case C-585/16, Judgment of 25 July 2018.
Council Directive 2005/85/EC, Official Journal of the European Union L 326/13.
ECtHR, *D.L. v. Austria*, Application No. 34999/16, Judgment of 9 April 2018.
ECtHR, *J.R. and Others v. Greece*, Application No. 22696/16, Judgment of 25.01.2018.
ECtHR, *Khlaifia and Others v. Italy*, Application No. 16483/12, Judgment of 15.12.2016.
ECtHR, *Lias and Ahmed v. Hungary*, Application No. 47287/15, Judgment of 21 November 2019.

ECtHR, *M.K. and Others v. Poland*, Applications nos. 40503/17, 42902/17 and 43643/17, Judgment of 23 July 2020.
ECtHR, *M.S.S. v. Belgium and Greece*, Application No. 30696/09, Judgment of 21.01.2011.
NF v. European Council (T-192/16)
NG v. European Council (T-193/16)
NM v. European Council (T-257/16)

CHAPTER IX

(Non)Functionality of the Dublin System

Kateřina Frumarová

Abstract

The chapter focuses on a key element of EU asylum and migration policy and legislation, the Dublin system. The Dublin system is the mechanism whereby a single state among the EU Member States, as well as Norway, Iceland, Liechtenstein, and Switzerland, is designated to examine and decide on a foreigner's application for international protection, wherever the application for international protection is lodged within the territory of these states. The chapter explains its nature and function, as well as the main principles of its application in practice, including its historical development and background. The main focus is on a critical analysis of its current functioning and the identification of its fundamental shortcomings. This describes the process of reform efforts in relation to the Dublin system, which appears to be successfully approaching its goal. The existing Dublin III Regulation should be replaced by the "Asylum and Migration Management Regulation". The text therefore also includes a comparison of these two key regulations. To balance the current system whereby a few Member States are responsible for most asylum applications, a *new solidarity mechanism* is being proposed that is simple, predictable, and workable. The new rules combine mandatory solidarity with flexibility for Member States as regards the choice of individual contributions. The chapter also includes statistical data related to the application of the Dublin system in practice in the EU Member States.

Keywords: Dublin system, international protection, asylum, migration, refugee, reform

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1. Introduction

The so-called Dublin system is an important element of the European asylum and migration policy, which has been, and still is, a very sensitive issue, because of the clash between important rights and freedoms (especially of persons seeking international protection) and the interests of both individual states and the European Union (EU) as a whole (i.e. economic, security, and other interests). In particular, this chapter aims to shed light on the main purpose of the Dublin system and the functions it should fulfil in the modern European asylum policy. However, understanding its essence, current form, and current shortcomings is not possible without highlighting on its origins and historical development, which has not been easy. Therefore, this chapter also focuses on an analysis of this aspect, including a critical assessment of the predecessors of today's Dublin III Regulation and how they have (not) fulfilled their functions.

However, the main part of the chapter is quite logically devoted to the analysis of the current regulation of the Dublin system, especially the Dublin III Regulation, and its application in the practice of EU Member States. Of course, it also includes a reflection on the relevant case law of both the Court of Justice of the EU (CJEU) and European Court of Human Rights (ECtHR). In this regard, the main research question is whether the Dublin system is functional and fulfils the purpose for which it was adopted. Following the critical analysis of legislation and practice, shortcomings and problematic aspects of the current system are further identified. The final part of the text is focused on reform efforts in relation to both the Dublin system and the entire Common European Asylum System (CEAS); however, it must be stated in advance that such efforts constitute a very slow, difficult, and still ongoing process.

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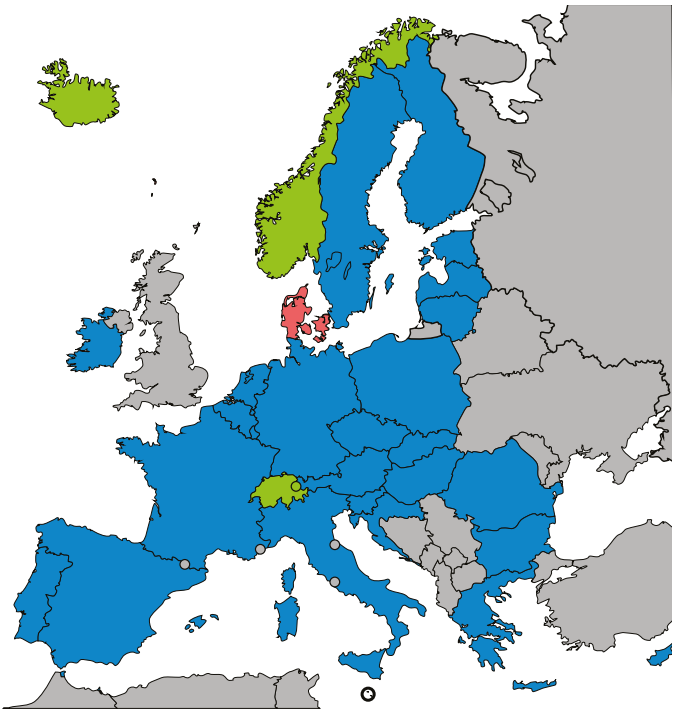
2. The Dublin system: General characteristics and functions

The Dublin system is the mechanism whereby a single state among the EU Member States, as well as Norway, Iceland, Liechtenstein, and Switzerland, is designated to examine and decide on a foreigner's application for international protection, wherever the application for international protection is lodged within the territory of these states. The Dublin system is intended to precisely mean that applicants for international protection have the right to have their application for international protection examined on merit in only one of the abovementioned states (the so-called "one-chance-only principle"). The Dublin system is an important part of the CEAS, whose main purpose is to harmonise EU Member States' policies, legislation, and practices in the field of asylum, migration, and refugee protection.

Figure 1: States applying the Dublin system and its instruments[1]



Dublin Regulation
EU-Denmark agreement
Non-EU Member States with an agreement to apply the provisions

The EU provides its citizens with an area of freedom, security, and justice without internal borders. Within this framework, free movement of persons is guaranteed, in conjunction with appropriate measures relating to external border protection, asylum, immigration, and the fight against crime. The CEAS plays a key role in these respects. There is no binding definition of the CEAS, but it is reflected in several acts of a political nature or in the form of regulations and directives.[2] However, its cornerstone is undoubtedly the 1951 Geneva Convention Relating to the Status of Refugees (Geneva Convention). The CEAS includes standards for fair and efficient asylum procedures in the Member States and, in the long term, rules leading to a common asylum procedure. It also includes standards governing the granting of refugee status and its content, including measures relating to subsidiary forms of

1 https://en.m.wikipedia.org/wiki/File:Dublin_Regulation.svg. Author: Danlaycock. It is under licence CC BY-SA 3.0.
2 Chmelíčková, 2008, p. 11.

protection. Finally, it includes rules defining a clear and workable method for determining the Member State responsible for examining an asylum application. An essential feature of the CEAS is therefore the establishment of basic and functional rules in both substantive and procedural law.[3] The legislation answers the basic questions relating to determining the state responsible for examining an application for international protection, as well as to whom protection may be granted and by what procedural procedure.

The adjective "common" should reflect the uniformity of the Member States' implementation of these rules. The uniform rules on asylum have two main goals; first, to ensure a uniform approach to providing protection to those who need it and, second, to reduce the so-called secondary movement of applicants, which is motivated by differences in national legislation and the abuse of unjustified advantages.

The Dublin system is an integral part of the CEAS,[4] as it sets out the rules to determine which Member State is responsible for examining applications for international protection.[5] The Dublin system, which currently has the Dublin III Regulation at its core, is the legal mechanism used to "determine the state responsible for examining an application for international protection lodged by a third-country national in an EU Member State". It is based on the principle that one Member State is responsible for examining the application, namely the Member State that played the largest role in the applicant's entry and stay in the territory of the Member States (with certain exceptions, of course). In the long term, creation of a CEAS is intended to lead to a common asylum procedure and uniform legal status throughout the EU for persons who are applicants for or have been granted international protection (see the preamble to the Dublin III Regulation).[6]

Existence of the Dublin system is, among other things, a manifestation of "the principle of mutual trust" between EU Member States.[7] It thus makes it possible to create and, particularly, maintain an area without internal borders. The purpose of the Dublin system is to "expeditiously" designate a Member State so as to guarantee applicants' effective access to the international protection procedure and ensure that examination of an application for international protection is properly, fairly and

3 Jurníková, 2016, pp. 12–13.

4 Judgment of the CJEU of 17 March 2016 in case C-695/15 PPU *Shiraz Baig Mirza*.

5 Judgment of the Constitutional Court of the Czech Republic, II. ÚS 3505/18 of 3 June 2019.

6 Resolution of the Supreme Administrative Court of the Czech Republic, Nad 179/2021 of 30 September 2021.

7 See judgment of the CJEU of 21 December 2011, N.S. (C-411/10) *Secretary of State for the Home Department and M.E. and others* (C-493/10):
The principle of mutual trust between member states is of fundamental importance in EU law, given that it enables the creation and preservation of an area without internal borders. At the same time, this principle, especially in connection with the area of freedom, security and law, imposes on each of these states to assume, except in exceptional circumstances, that all other member states observe EU law, and in particular the fundamental rights recognized by EU law.

expeditiously "completed".[8] Thus, the Dublin system also aims to 'accelerate the examination of applications in the interests of both asylum seekers and the States concerned'.[9]

However, the essence of the Dublin system is to not only rationalise the examination of applications for international protection and avoid overloading the system of national authorities with multiple applications from the same applicant, but also increase legal certainty as regards determination of the state responsible for examining an application for international protection.[10] The Dublin system thus seeks to reduce or even eliminate the phenomenon of "forum shopping" or "asylum shopping".[11] Asylum shopping involves a foreigner pursuing an application for international protection simultaneously or successively in several states to become successful in at least one of them.[12] The applicant thus seeks to take advantage of the differences in the asylum legislation of various Member States and obtain asylum in the country he considers to be the most benign.[13] It must be recognised that seeking the most favourable conditions is a natural human characteristic, and this is no different in the case of migration, whether legal or illegal.[14]

At the same time, the Dublin system is intended to avoid the situation known as "refugee in orbit", wherein no state is considered competent to examine an application for international protection on its merits. This system aims to prevent applicants from being left in uncertainty about the outcome of their application for a disproportionately long time period and from being transferred from one state to another without any state being willing to accept its competence to examine their

8 Judgment of the CJEU of 17 March 2016 in case C-695/15 PPU *Shiraz Baig Mirza*. The second option for an effective procedure is offered by Art. 17 of the Dublin III Regulation, which allows Member States to assess the application for international protection on merits even if they are not competent to assess it according to the Dublin III Regulation (this is a so-called discretionary provision, which is a reflection of the Member States' sovereignty and thus has a completely optional character; see the Judgement of the CJEU of 4 October 2018 in case C-56/17 Fathi). According to the jurisprudence of the CJEU, each Member State 'can therefore decide sovereignly, taking into account political, humanitarian and practical considerations, whether to accept an application for international protection for assessment, even if it is not competent on the basis of the criteria set out in this Regulation'; see the Judgement of the CJEU of 23 January 2019 in case C-661/17 M.A. and others.

9 See the Opinion of Advocate General Sharpston of 17 March 2016 in Case C-155/15 *Karim*:
The objective of the Dublin system … is, as follows from the 4th and 5th recitals of this regulation, in particular to enable the rapid determination of the relevant Member State in such a way as to guarantee effective access to the procedure for granting international protection and not to jeopardize the objective of speedy processing of requests for international protection.
Judgment of the CJEU of 16 February 2017, *C.K. and others v Republika Slovenija,* C-578/16 PPU.

10 Judgment of the Supreme Administrative Court of the Czech Republic, 8 Azs 123/2016 of 5 October 2016.

11 See Judgment of the CJEU of 21 December 2011, N.S. (C-411/10) Secretary of State for the Home Department and M.E. and others (C-493/10).

12 Davis, 2021, p. 266.

13 Kosař et al., 2010, p. 58.

14 Boccardi, 2002, p. 43.

application.[15] In such situations, the Dublin system guarantees the applicant for international protection that his or her application will be duly examined by one (only one) of the Member States at any time. The Dublin system therefore presupposes that the applicant has made at least one application that a Member State is obliged to examine, is examining, or has already decided on.[16]

3. Reasons for the Dublin system and its historical development

To understand the nature of the Dublin system and its functions, it is necessary to shed light on, at least briefly, the circumstances and reasons for its creation and to outline the gradual evolution of this institution. Both its legal form and content have changed over time, in response to the new needs of the European Community as well as the problems, threats, and events relating to international migration and asylum law. Therefore, the Dublin system has been and is a continuously evolving set of legal instruments and measures. Understanding the historical context and different phases of its development is also essential for a comprehensive view of the current form of the Dublin system and its shortcomings, as well as a critical assessment of its proposed reforms.

Since the beginning of European integration, the asylum policy has been the exclusive competence of individual Member States.[17] The issue of migration was dealt with by the individual states themselves within the framework of their national law, with restrictive approaches prevailing. The gradual liberalisation of the movement of persons in the European area, which began in the 1980s, had several positive consequences but also problematic aspects, including in the area of asylum policy and the fight against illegal migration. In the 1980s, EU Member States began to face a significant increase in the number of refugees and asylum applications.[18] At the same time, phenomena such as asylum shopping and refugees in orbit began to emerge (see above).[19] All this was reflected in the increased burden on decision-making bodies, delays in proceedings, overloaded asylum centres, etc. This situation also impacted the economic and security stability of individual states. To improve this situation, Member States started adopting individual restrictive measures. These measures were influenced by the economic and political requirements of each country and focused on management procedures rather than the substance of the matter. The whole

15 Pazderová, 2012, p. 322.
16 Judgment of the CJEU of 3 May 2012, Kastrati, C-620/10.
17 Judgment of the ECtHR in the case *Moustaquim v. Belgium*, of 8 February 1991, no. 12313/86.
18 Moses, 2016, p. 7.
19 Pazderová, 2012, p. 322.

situation led to a kind of race to see which country would have the most restrictive policy, which required a Europe-wide response.

The intended transformation was primarily aimed at the convergence of national asylum policies. The issue of determining national competence to examine asylum claims has not escaped attention. In view of the gradual elimination of internal borders between Member States and the associated facilitation of secondary movements of refugees within this area, it was necessary to focus on the rules that would determine which Member State would be responsible for examining an application for international protection and what obligations the concerned state would incur in such a case.

The idea underlying the current Dublin system—that only one state is responsible for examining an application for international protection lodged in another state—became firmly established in the European area in the early 1990s. Although the idea itself has always been closely linked to the process of progressive integration of states within European Communities, or later the EU, the initial positive legal expression of the idea came about through two international treaties whose status was different from the Community law of the time.[20]

Historically, the first key document in this respect was the Convention Implementing the Schengen Agreement,[21] which laid down the rules for determining the Contracting State responsible for examining an asylum application lodged in the territory of these states. However, this solution was not sufficient because of the small number of signatories,[22] with the majority of the Member States of the European Community not even being contracting parties; however, the number of asylum applications in the European Community Member States was growing disproportionately and with it the need for a common European regulation.[23]

The provisions of the Convention Implementing the Schengen Agreement were therefore replaced by the Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities – Dublin Convention of 1990, which entered into force in 1997. Its signatories were the EU Member States together with Norway and Iceland. The Dublin Convention laid the foundation for the redistribution of responsibility for assessing asylum claims in Europe, with the main idea being that the first European country an applicant entered would be the only country in which his or her claim would be processed.[24] The Dublin Convention was intended to ensure that the jurisdiction of a Member State to examine an asylum application was determined as quickly as possible, and to eliminate multiple asylum applications in different EU states or, conversely, in cases where none of these states seemed competent.[25] Thanks to the

20 Větrovský, 2012, p. 307.
21 Entry into force on 1 September 1993.
22 These included only France, Germany, Belgium, Luxembourg, and the Netherlands.
23 Jurman, 2005, pp. 42–45.
24 Pikna, 2012, p. 132.
25 Battjes and Brouwer, 2015, pp. 183–214.

abolition of internal borders of the Schengen area states, applicants were able to move more easily between Member States and choose the country whose asylum policy was most welcoming to them. Furthermore, the criteria and procedures for determining the jurisdiction of the state for examining an asylum application were specified, rules for receiving asylum seekers were minimised, the asylum status was recognised, procedures for recognising or withdrawing this status were harmonised, and equality between asylum seekers was guaranteed, together with the principle of non-refoulement.[26]

A comparison between the Dublin Convention and Convention Implementing the Schengen Agreement shows that the Dublin Convention contained essentially the same obligations as those in the latter convention. In both agreements, the intention to move towards the creation of a European area without internal borders is evident, and the Dublin Convention already provides for close cooperation and harmonisation of the asylum policies.

The Dublin Convention consists of a preamble and 22 articles. The objectives of the convention were to (1) ensure that every single asylum application would be processed in one of the Member States, and thus refugees in orbit could be avoided; (2) ensure that asylum seekers could not lodge multiple applications in more than one Member State (so-called "asylum shopping"); and (3) prevent secondary refugee movements within the EU territory.[27]

Assessment of the application was carried out based on the national law while respecting international obligations. Member States could use the institution of transferring the applicant to a third safe country while respecting their international obligations, particularly the Geneva Convention. The actual process of determining the responsible state began with the first application to a Member State, which was obliged to examine the application and take back the applicant, even if the applicant had since left the state, withdrawn his or her first application, or made a new application in another Member State.

It was essential in practice to establish the criteria and their order to determine the state that would decide on the application. The order of the criteria listed below was binding. The Dublin Convention established the following criteria: The primary decision was to be made by the state in which the applicant's family member has a legal residence and where he was granted refugee status according to the Geneva Convention; secondarily, the decision would be made by the state that granted the residence permit. If this was not possible, the decision was to be made by the state that granted the visa (with certain exceptions). The fourth in order was the state through whose borders the applicant illegally entered the state; fifth in order was the state to which the applicant lawfully entered under a visa waiver. If it was not possible to determine the state according to the above criteria, the decision would be made by the state to which the applicant submitted the asylum application.

26 Svobodová, 2017, p. 1.
27 Kloth, 2000, p. 8.

For humanitarian reasons and with the consent of the applicant, another Member State could also examine the application; the Dublin Convention envisaged particular family or cultural motives in such cases. The responsibility for assessing the application was then transferred to that state.

In 1992, the Treaty on EU was adopted in Maastricht, which included justice and home affairs in the area of shared responsibility. These policies formed the so-called third pillar, which envisaged intergovernmental cooperation in these areas and the creation of instruments and procedures for international harmonisation. Initially, this form of cooperation seemed a good step, but over time, it proved to be insufficient and unsuccessful, as each Member State had a different view on such sensitive issues, and no common compromise could be found to adopt legally binding standards for all Member States. Therefore, non-binding documents, such as recommendations, were mainly accepted in the third pillar. While the intended objectives were not achieved in practice, the link between the EU and Schengen system was deepened.

The real Europeanisation and communitarisation of the rule of a single state responsible for examining an application for international protection did not take place until 1999, when the so-called Treaty of Amsterdam entered into force. The treaty brought about two important changes from the point of view under examination. First, Protocol No 2 incorporated the entire Schengen acquis, including the Convention Implementing the Schengen Agreement, into the framework of the EU. Second, the area of asylum and immigration policy was communitarised, that is, incorporated into the so-called first pillar of the three-pillar structure of the then EU. The status of the Dublin Convention as such was not formally affected.[28]

In the same year (1999, in Tampere), the European Council decided to work towards a CEAS based on the full and inclusive application of the Geneva Convention, as supplemented by the New York Protocol of 31 January 1967.[29] With reference to this convention, the principle of non-refoulement, which is a key principle of refugee law, was to be guaranteed. This principle constitutes a certain limitation on the freedom of states to take measures against refugees on their territory and provides protection to the concerned persons against return to their country of origin where they are in danger. This principle, which has its roots in the French term *refouler*, meaning "to return", includes, according to the wording of the Geneva Convention, the obligation of the state not to expel or return a refugee in any way to the borders of countries where his life or personal freedom would be threatened on account of his race, religion, nationality, membership of a particular social class, or political opinion. This principle is also enshrined in other international or European documents, including Art. 19 of the Charter of Fundamental Rights of the European Union.

28 Větrovský, 2012, p. 308.
29 Pikna, 2012. pp. 131–155.

Council Regulation No 2725/2000 of 11 December 2000 concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention was adopted for effective application of the Dublin Convention. This document and the material covered by it significantly complement and support the effective implementation of the Dublin system. The fingerprint database was intended to help address the challenge Member States face in applying the Dublin Convention, that is, to establish the identity of the asylum seeker and, where appropriate, the "travel route"—the route of movement and the place where the individual entered the EU territory.[30] Eurodac was created to strengthen the Dublin procedure, and its use was therefore strictly limited to the information and data needed to identify the state responsible for examining the asylum application.

From the very beginning, the Dublin Convention was widely criticised, especially by nongovernmental organisations, as being inequitable, unworkable, and expensive. One major point of criticism was that the convention did not consider the legitimate interest of asylum seekers in choosing the state to examine their asylum claim. Moreover, the criteria of the first point of entry into the Member States' territory was said to be unfair in putting the burden on particular Member States due to asylum seekers' travel routes and the country's geographical location, instead of establishing a mechanism of burden sharing. Furthermore, the European Council on Refugees and Exile (ECRE) particularly criticised the application of the safe third country concept, allowing Member States to expel asylum seekers to states outside the EU. The concept did not serve the objective of every asylum request to be considered by one of the Member States and led to a risk of "refugees in orbit" and chain refoulement.[31]

The usefulness and effectiveness of the Dublin Convention was also subsequently questioned, as it applied to less than 6% of the total asylum applications in the EU, and less than 2% of all applicants for asylum were actually transferred from one Member State to another.[32] Furthermore, only slightly less than 40% of the accepted requests to take back or take charge resulted in actual transfers.[33] This low transfer rate constituted one of the core problems of the operation of the convention. Ultimately, even Member States acknowledged that the Dublin Convention did not work based on several factors, as revealed by a study by the Danish Refugee Council[34] and reiterated by the European Commission in its Staff Working Paper 'Revisiting the Dublin Convention', whereby it was acknowledged that 'few if any Member States

30 Hailbronner, 2000, p. 401.

31 ECRE, 2006, pp. 7–11.

32 Commission Staff Working Paper: Evaluation of the Dublin Convention, Brussels, 13 June 2001, SEC (2001) 756, p. 2. See also Heinonen and Matti, 2000, pp. 281–297. On statistics by country see also Danish Refugee Council: The Dublin Convention. Study on its Implementation in the 15 Member States of the European Union, January 2001, pp. 129–162.

33 Ibid.

34 Danish Refugee Council: The Dublin Convention. Study on its Implementation in the 15 Member States of the European Union, January 2001, pp. 129–162.

appear to regard the Dublin Convention as an unqualified success'.[35] The European Commission's evaluation concluded with the observation that the convention did not have a noticeable effect on the demand for asylum within the EU.

Following an assessment of the application of the Dublin Convention in practice, the European Commission submitted a proposal in June 2001 for the adoption of the Regulation establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application. The European Council adopted this Regulation No 343/2003, referred to as "Dublin II", on 18 February 2003, replacing the Dublin Convention just one month later.[36] Commission Regulation No 1560 laid down rules for application of the Dublin II Regulation, such as on processing, receipt, and withdrawal of asylum applications; requests for information; transfers of applicants; and settlement of contractual disputes between Member States.[37]

The main objectives of the Dublin II Regulation, as outlined in the Preamble and the Commission Proposal for the regulation, were to (1) ensure that asylum seekers have effective access to procedures for determining refugee status, (2) prevent abuse of asylum procedures in the form of multiple applications for asylum submitted simultaneously or successively by the same person in several Member States, and (3) determine as quickly as possible the Member State responsible for examining an asylum claim.

The Dublin II Regulation established a hierarchy of criteria for identifying the Member State responsible for examining an asylum application lodged in one of the states by a third-country national, as laid down in Chapter III of the regulation. The criteria set out how the responsibility for examining the application is attributed to the following Member States in order of priority: (1) a state in which the applicant has a family member who has refugee status or whose application for asylum is being examined; (2) a state that has provided the applicant a residence permit or visa or whose border the applicant has crossed illegally; and (3) in case the above circumstances are not applicable, a Member State whose territory the applicant has entered and in which he or she needs to have the visa waived.

If none of the above criteria are applicable, the first Member State with which the asylum application was lodged should be responsible for examining it. Basically, each Member State, when examining an application, establishes responsibility based on these criteria—either at the admissibility stage or when the claim is examined on its merits. If State A arrives at the conclusion that State B is responsible for the claim, it will send a request to the latter to take charge or take back the asylum seeker. When, after considering the request, State B agrees to take over the responsibility, the asylum seeker will be transferred from State A to State B. Time limits are set for all these proceedings.

35 Commission Staff Working Paper: Revisiting the Dublin Convention, SEC(2000)522, p. 5.
36 Huybreghts, 2015, pp. 379–426.
37 Peers, 2014, pp. 485–494.

However, a Member State may decide to examine an application for asylum even if it is not its responsibility under the criteria laid down in the Regulation according to Art. 3(2), commonly referred to as the "sovereignty" clause. In addition, under Art. 15, the "humanitarian" clause, any Member State may bring together extended family members on humanitarian grounds.[38]

Regarding the relationship between humanism and asylum issues (including the Dublin system), the gradual promotion of humanity and human rights considerations in decisions on the transfer of applicants for international protection between EU Member States occurred mainly through the case law of the ECtHR and CJEU. In its judgement in Case C-245/11,[39] the CJEU concluded that in accordance with the literal wording of Art. 15(2) of the Dublin Regulation, it is the duty, and not merely the possibility, of states not to separate or to reunite an asylum seeker with another relative in cases where one of the persons concerned is dependent on the assistance of the other, and family ties between the two persons already existed in the country of origin. Thus, according to the CJEU, the possibility to derogate from the imperatives not to separate or to reunite is not available at any time, but only 'when justified by the exceptional nature of the situation'.[40] Otherwise, the refugee may seek protection through the national courts.

However, Větrovský[41] pointed out that the CJEU was not the first to make a dent in the state-centric understanding of the Dublin system. As early as 2000, the ECtHR held that participation in the Dublin Convention does not relieve the states of their responsibility, under Art. 3 of the European Convention, to ensure that, as a result of a decision to transfer an alien to another Contracting State responsible for examining his or her asylum application, the person concerned is not exposed to the risk of treatment prohibited by Art. 3.[42] Applying that rule 11 years later to the case of the transfer of an applicant for international protection from Belgium to Greece, the ECtHR concluded that, in view of the systemic deficiencies relating to the reception conditions and asylum procedure in Greece, Belgium had violated the applicant's right protected by Art. 3 of the European Convention when the transfer to Greece took place despite the facts set out above.[43] The CJEU reached an analogous conclusion on a date exactly 11 months later. Following a preliminary question referred to by the British and Irish courts, the CJEU held that

> Article 4 of the Charter of Fundamental Rights of the European Union must be interpreted as meaning that Member States, including national courts, cannot transfer an asylum seeker to a "Member State of competence" within the meaning of Regulation

38 ECRE, 2006, pp. 7-11.
39 Judgement of the CJEU (Grand Chamber) of 6 November 2012 in case C-245/11 *K v. Bundesasylamt*.
40 Ibid.
41 Větrovský, 2012, pp. 309–310.
42 Judgment of the ECtHR of 7 March 2000, in the case of *T.I. v. Great Britain*, no. 43844/98.
43 Judgment of the ECtHR of 21 January 2011, in the case of *M.S.S. v. Belgium and Greece*, no. 30696/09. For more details, see Moreno-Lax, 2012, pp. 1–31.

> No 343/2003 if the systemic deficiencies in the asylum procedure and reception conditions for asylum seekers in that Member State constitute serious and demonstrable grounds for believing that the applicant will be exposed to a real risk of inhuman or degrading treatment within the meaning of that provision.[44]

A substantial part of this CJEU opinion was subsequently incorporated into the text of the Dublin Regulation No 604/2013 (Dublin III Regulation). The imperative of protecting human dignity and human rights has thus definitively gained a firm place in the Dublin system.[45]

The national courts of the Member States have also ruled in the same way. For example, the Czech Supreme Administrative Court stated that

> Under the Dublin system, it is not possible to transfer applicants for international protection to countries where the asylum procedures are so seriously, i.e. systemically, deficient in terms of the binding standards of the Common European Asylum System that the risk of inhuman or degrading treatment contrary to the requirements of Article 4 of the Charter of Fundamental Rights of the EU or Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms would arise in the event of the applicant's transfer.[46]

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4. Current regulation and practice regarding the Dublin system

4.1. Dublin III Regulation

In 2013, the ECRE presented a report that aimed to evaluate the (non)functioning of the Dublin system, that is, Dublin II. The result indicated an insufficiently fair or efficient review of applications and disproportionately long asylum procedures. An equally criticized shortcoming was the division of families, because individual

44 Judgment of the CJEU of 21 December 2011, N.S. (C-411/10) *Secretary of State for the Home Department and M.E. and others* (C-493/10).

45 Judgment of the CJEU of 21 December 2011, N.S. (C-411/10) Secretary of State for the Home Department and M.E. and others (C-493/10), of 14 November 2013, *Puid*, C-4/11, and of 10 December 2013, *Abdullahi*, C-394/12; Judgment of the ECtHR of 21 January 2011, in the case of *M.S.S. v. Belgium and Greece*, no. 30696/09, or of 4 November 2014, in the case of *Tarakhel v. Switzerland*, no. 29217/12 and others.

46 Judgment of the Supreme Administrative Court of the Czech Republic 5 Azs 195/2016 of 12 September 2016 or the Judgment of the Supreme Administrative Court of the Czech Republic 1 Azs 248/2014 of 25 February 2015.

applications of family members were assessed by officials in different Member States, regardless of the existence of the relationship between the applicants. In addition to the obvious and systematic violations of human rights during the transfer of applicants and non-compliance with family ties, the possibility of detention, lack of information for applicants, and absence of a suspensive effect of appeal or requests for judicial review of the decision on takeover or readmission, became major shortcomings of the regulation.[47] Simultaneously, case law has called for changes to Dublin II.[48] Therefore, based on a proposal from the European Commission, "Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and procedures 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"—that is, "Dublin III"—was adopted.

Thus, the CEAS currently consists mainly of the following fundamental documents: the Dublin Regulation (Dublin III), Qualification Directive,[49] Procedural Directive,[50] Reception Directive,[51] and Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 concerning the establishment of "Eurodac" for the comparison of fingerprints.

The new Dublin Regulation, referred to as Dublin III, sought to address the shortcomings of the previous legislation and thus improve the efficiency of the system. However, the basic principles remain the same as those for the previous Dublin Regulation, particularly the position that the Member State playing the greatest role in the applicant's entry into the territory of the Member States is competent to examine the application for international protection. Great emphasis was placed on the protection of unaccompanied minors and the preservation of family unity.

A change from the previous regulation was made in the case of applicants for subsidiary protection and persons enjoying such protection. While Regulation No 343/2003 covered only asylum seekers, the current system also covers applicants for international protection and allows them to better defend their rights. A completely new instrument is the early warning, preparedness, and crisis response mechanism, which addresses the root causes of dysfunctional national asylum systems or problems arising from specific pressures. In the area of detention of applicants, the only permissible ground for detention for the purpose of relocation is established,

47 Horková, 2016, pp. 105–106.

48 E.g. Judgment of the CJEU of 21 December 2011, N.S. (C-411/10) Secretary of State for the Home Department and M.E. and others (C-493/10) or Judgement of the ECtHR of 21 January 2011, in the case of *M.S.S. v. Belgium and Greece*, no. 30696/09.

49 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.

50 Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection.

51 Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection.

namely serious risk of escape. A case-by-case assessment is required, and detention can only be used in cases where the use of less coercive measures is not effective. Detention shall be of the shortest possible duration and shall be decided based on the application of the principles of necessity and proportionality. There has also been a shift in the area of appeals against decisions to transfer an applicant. Member States are obliged to guarantee an appeal against a relocation decision, and any such decision should be subject to a suspensive remedy within a reasonable time period. Explicit mention is made of the applicant's right to remain in the territory of the state, pending the court's decision on the appeal.

In the application of the previous Dublin Regulation, the level and form of information provided to applicants were also frequently criticised. The institution of a personal interview is intended to improve the information provided to the applicant.[52] The emphasis is on communication in a language that the applicant understands and can communicate in. Member States are obliged to provide free legal aid on request to applicants who cannot afford to pay for it. Legal aid and representation shall not be arbitrarily restricted by Member States, and the applicant shall not be prevented from having effective access to justice. In the area of enhanced protection of applicants, safeguards for minors have been extended, considering the best interests of the child. In assessing those best interests, particular consideration is given to family reunification and ensuring of the development and safety of the minor, accounting for the views of the child.[53]

The preamble of the Dublin III Regulation already mentions the basic principles, which are specifically reflected in the individual articles of the regulation. These include, in particular, the principle of non-refoulement, explicit reference to the application of the general sources of international refugee law, and emphasis on the importance of the principle of family unity. The principle of solidarity and mutual trust has not been overlooked. The core principle remains the examination of an asylum application by one Member State and one Member State only to avoid a multi-country examination; however, the sovereignty clause allows Member States to assume jurisdiction even if another Member State is competent under the Dublin criteria. The right to return an applicant for international protection to a safe third country remains in accordance with the Geneva Convention.[54]

In determining the relevant criteria, Art. 7 of the Regulation is decisive, as it expressly provides that the individual criteria are applied in the order in which they are listed in the regulation. The Member State responsible in accordance with the criteria set out in the regulation shall be determined based on the situation wherein the applicant first lodged his or her application for international protection with a Member State.[55]

52 Judgement of the ECtHR of 5 April 2011, in the case of *Rahimi v. Greece*, No. 8687/08.

53 The principle of acting in the best interest of the child is based on Art. 3 para. 1 of the International Convention on the Rights of the Child.

54 For more details, see Gil-Bazo, 2015, pp. 42–77.

55 Kotzeva et al., 2008, p. 329.

As mentioned above, the priority criteria are family ties and respect for the principle of family unity, which significantly improve the protection of unaccompanied minors and whose position has been strengthened by the adoption of the Dublin III Regulation.[56]

There are two sets of criteria that are (1) designed to protect the integrity of the family (Arts. 8–11 and 16–17) and (2) relate to the Member State that played the greatest role in the applicant's entry to or stay in the territory of the Member States (Arts. 12–15). The "order of the criteria" for determining the Member State responsible, as set out in Chapter III of the Dublin III Regulation, means that the criteria are applied in that order: For family unity, the order is "unaccompanied minor" (Art. 8), "family members enjoying international protection" (Art. 9), "family members who are applicants for international protection" (Art. 10), and finally "family procedure" (Art. 11). Then, the criteria of "major share of entry or stay" are applied in this order: "issuance of residence permits or visas" (Art. 12), "illegal entry or stay" (Art. 13), "entry with visa exemption" (Art. 14), and "application for international protection in the international transit area of an airport" (Art. 15).

When applying the Dublin III Regulation, Member States must also, of course, comply with their obligations under European and international human rights law, including the Geneva Convention, and particularly the Charter of Fundamental Rights of the European Union, European Convention on Human Rights, and relevant case law of the CJEU and ECtHR. Emphasis is also placed on effective cooperation between Member States within the framework of the regulation and on the application of the principle of mutual trust in the field of asylum policy.

The Dublin system aims to ensure that only one Member State is responsible for each asylum application lodged in any Member State. If none of the above criteria apply, the first Member State in which the application was lodged is responsible for examining the application for international protection. If it is not possible to transfer the applicant to the Member State that was primarily designated as competent—because there are serious grounds for believing that systematic deficiencies exist in the asylum procedure and reception conditions in that Member State entail a risk of inhuman or degrading treatment within the meaning of Art. 4 of the Charter of Fundamental Rights of the EU—the Member State conducting the procedure to determine the Member State responsible shall continue to examine the criteria to see whether another Member State can be designated as competent. Here, the Dublin III Regulation reflects the requirements of the ECtHR case law and the subsequent CJEU case law—that is, the need to examine at all times the risk of violation of fundamental rights in the treatment of applicants for international protection, including a possible violation of the principle of non-refoulement.[57]

56 Battjes and Brouwer, 2015, p. 2.

57 Judgement of the ECtHR of 21 January 2011, in the case of *M.S.S. v. Belgium and Greece*, no. 30696/09, or judgement of the CJEU of 21 December 2011, N.S. (C-411/10) Secretary of State for the Home Department and M.E. and others (C-493/10).

Moreover, when assessing obstacles to transferring to another Member State under the Dublin system, the individual situation of the foreigner and the resulting risk of violation of Art. 4 of the Charter of Fundamental Rights of the EU or Art. 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms cannot be disregarded. The case law[58] states that

> …the transfer of an asylum seeker under the Dublin III Regulation may be carried out only under conditions which exclude the possibility that the transfer will entail a real risk of the person concerned being subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter.[59]

The transfer of an applicant for international protection within the meaning of the Dublin III Regulation can only be carried out in a situation where the Member State concerned will not have a problem—at a systemic level in general or, where appropriate, at an individual level (e.g. on account of a particularly serious medical condition)—in ensuring at least minimum decent conditions as regards the procedure and reception conditions for the applicant concerned.

If the transfer cannot be made to any Member State designated based on the above criteria set out in Chapter III (of the Dublin III Regulation) or to the first Member State in which the application was lodged, the Member State conducting the procedure for designating the Member State responsible shall become the Member State responsible.

Dublin III also contains discretionary provisions in relation to Member States. The "sovereignty clause" in Art. 17(1) allows Member States to take responsibility for an application lodged on their territory even if they are not the Member State responsible according to the Dublin criteria. The "humanitarian provision" in Art. 17(2) provides that the Member State in which international protection is applied for and that is conducting the procedure for determining the Member State responsible, or the Member State that is responsible, may, at any time before the first decision on merits is taken, require another Member State to take charge of the applicant on humanitarian grounds, arising particularly from family or cultural reasons, with a view to reuniting other family members, even if that Member State is not responsible according to the criteria set out above.

58 Judgement of the CJEU of 16 February 2017, C.K. and others, C-578/16; similarly, judgement of the ECtHR of 4 November 2014, in the case of *Tarakhel v. Switzerland*, no. 29217/12.

59 National courts also rule in the same way; see, e.g. judgement of the Supreme Administrative Court of the Czech Republic of 9 November 2020, no. 5 Azs 65/2020-31, Supreme Administrative Court, 1 Azs 248/2014-27, Supreme Administrative Court, 9 Azs 27/2016-37.

Figure 2. Reasons for incoming take charge and take back requests in the EU for 2022[60]

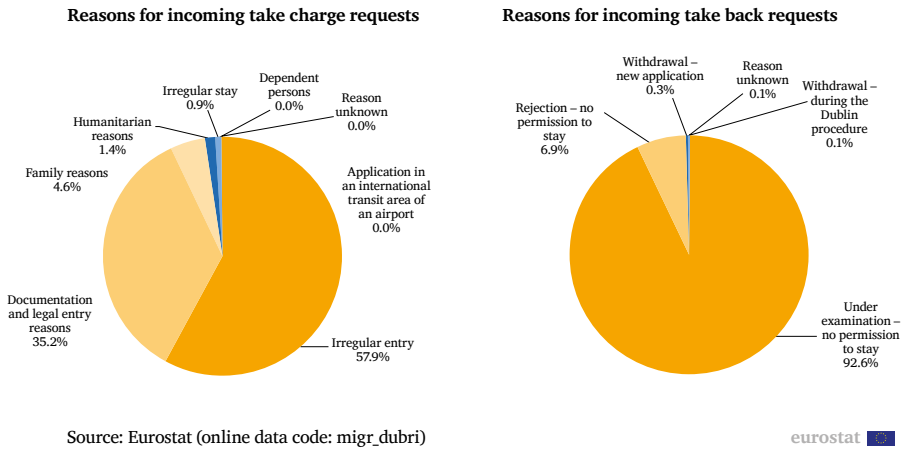
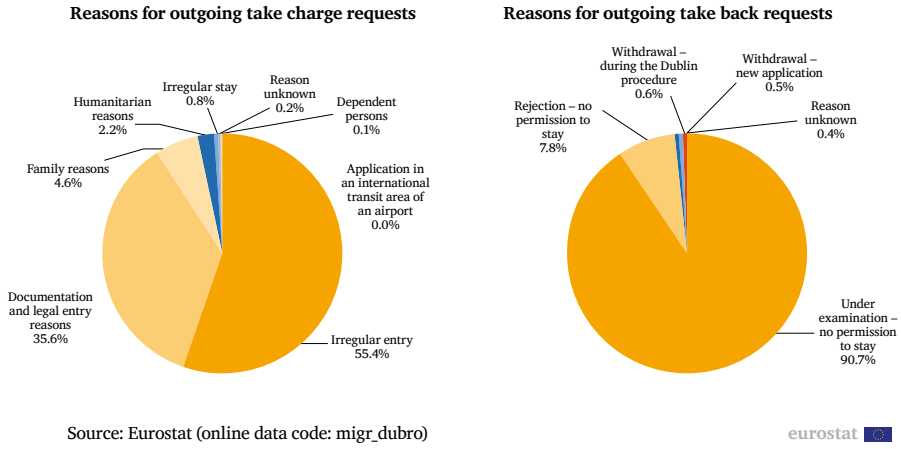


Figure 3. Reasons for outgoing take charge and take back requests in the EU for 2022[61]



60 Source: Eurostat. All figures and statistical data presented in this chapter are available from Eurostat: https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Statistics_on_countries_responsible_for_asylum_applications_(Dublin_Regulation)#Decisions_on_Dublin_requests (Accessed: 30 October 2023). For this figure: https://ec.europa.eu/eurostat/statistics-explained/index.php?title=File:Fig4_Reasons_for_incoming_take_charge_and_take_back_requests,_EU,_2022_(%25).png.

61 Source: Eurostat: https://ec.europa.eu/eurostat/statistics-explained/index.php?title=File:Fig7_Reasons_for_outgoing_take_charge_and_take_back_requests,_EU,_2022_(%25).png.

In 2022, most incoming take charge requests received in EU Member States were related to irregular entry (57.9%), documentation and legal entry (35.2%) and family reasons (4.6%); together, these three categories accounted for over 97% of all take charge requests. For incoming take back requests, the lack of permission to stay for an asylum applicant (no residence permit) accounted for 92.6% of cases still under examination, while 6.9% had been rejected. The withdrawal of applications—either during the Dublin procedure or with new applications—made up only 0.4% of the reasons for incoming take back requests in the EU Member States.

In 2022, most outgoing take charge requests sent in EU Member States were related to irregular entry (55.4%) and documentation and legal entry (35.6%); together, these two categories accounted for 9 out of 10 (91%) take charge requests. Nearly all outgoing take back requests sent in EU Member States were related to no permission to stay, either concerning applications under examination (90.7%) or rejected ones (7.8%).

A very fundamental prerequisite for ensuring procedural fairness is the applicant's right to information. According to Art. 4(1) of the Dublin III Regulation, after the applicant has lodged an application for international protection in a Member State, the competent authorities shall inform him of, in particular, the objectives of the Dublin III Regulation, consequences of making another application in a different Member State, and consequences of moving from one Member State to another during the phases in which the Member State responsible under this Regulation is being determined and the application for international protection is being examined. In addition, they must be given the criteria for determining the Member State responsible, the hierarchy of such criteria in the different steps of the procedure and their duration, and the fact that an application for international protection lodged in one Member State can result in that Member State becoming responsible even if such responsibility is not based on those criteria. The applicant must also be informed of the personal interview and the possibility of submitting information regarding the presence of family members, relatives, or any other family relations in the Member States. It is also necessary to provide information on the possibility to challenge a transfer decision and, where applicable, apply for a suspension of the transfer. Finally, the applicant is advised that the competent authorities of Member States can exchange data on him or her for the sole purpose of implementing their obligations arising under this Regulation; that he or she has the right to access data relating to him or her and the right to request that such data be corrected, if inaccurate, or deleted, if unlawfully processed; and the procedures for exercising those rights.

In accordance with Art. 4(2) of Dublin III Regulation, information shall be provided in writing and in a language the applicant understands or may reasonably be supposed to understand. Where necessary for proper understanding (for persons with special needs), information must also be given orally. Such information shall be provided through the common information leaflets contained in Annexes X and XI of the implementing Regulation, as provided for in Art. 4(3) of the Dublin III Regulation; this shall be supplemented by information relating to the specific Member State.

The Dublin III Regulation also contains an obligation for the Member State to conduct a personal interview with the applicant. This is also a significant innovation compared to the previous Dublin legislation. The main purpose of the interview is to gather all the facts relevant for determining the Member State responsible. Therefore, the personal interview in the Dublin procedure has a different scope and meaning than the personal interview on the substance of the application for international protection under Art. 14 of the Asylum Procedures Directive.

The personal interview in the Dublin procedure has two objectives:

The purpose of the interview is to facilitate the determination of the Member State responsible, as the information obtained should help establish the relevant facts for the determination of jurisdiction.

The interview must also enable the applicant to understand correctly the information provided to him in accordance with Article 4 (of the Dublin III Regulation).

In this context, the personal interview in the Dublin procedure has the potential to serve several purposes. It allows the authorities to provide the applicant orally with information on the Dublin III Regulation and allows applicants to ask for clarification on any aspects of the Dublin III Regulation that they do not understand. It also allows applicants to provide information necessary for a correct determination of jurisdiction and express their views effectively. Finally, it allows the authorities to clarify directly and effectively aspects of the information provided by the applicant.

In addition to the substantive provisions, the Dublin III Regulation contains procedural provisions. The procedure for determining the Member State responsible is initiated by lodging an application for international protection in a Member State. The asylum seeker is duly informed (see above) and is issued with a certificate confirming his or her status as an asylum seeker, together with information about whether he or she is entitled to free movement within the territory of that state or part of it.

In the procedure, it is necessary to establish the reasons for which the foreigner left the country and whether those reasons meet the conditions for asylum or subsidiary protection. Pending the decision, the applicant is usually placed in a detention centre. An important and, with a few exceptions, mandatory element of the process is the personal interview. A Member State is not obliged to conduct such an interview unless the applicant is unavailable or has already provided the necessary information by other means.

The Dublin III Regulation also contains new provisions on custodial measures. This is only possible if the person is the subject of Dublin proceedings and there is a substantial risk of absconding. The general rule that detention must be as short as possible and must not exceed a period that is reasonably long and necessary for the administrative procedures must also be observed.[62] However, detention should only be used as a last resort, and, in all cases, the situation of families, persons with health problems, women, and unaccompanied minors must be considered.Dublin III

62 Peers, 2015, pp. 7–9.

regulation distinguishes between procedures for take charge and take back requests. Where a Member State with which an application for international protection has been lodged considers that another Member State is responsible for examining the application, it may—as quickly as possible and in any event within three months of the date on which the application was lodged—request that another Member State take charge of the applicant. In the case of a Eurodac hit with data recorded pursuant to Art. 14 of Regulation (EU) No 603/2013, the request shall be sent within two months of receiving that hit. Where the request to take charge of an applicant is not made within the periods laid down, responsibility for examining the application for international protection shall lie with the Member State in which the application was lodged. The requested Member State shall make the necessary checks and give a decision on the request to take charge of an applicant within two months of receipt of the request. Failure to act within the period shall be tantamount to accepting the request and entail the obligation to take charge of the person, including the obligation to provide for proper arrangements for arrival.

Where a Member State with which a person, as referred to in Art. 18(1)(b), (c), or (d), who has lodged a new application for international protection considers that another Member State is responsible in accordance with Art. 20(5) and Art. 18(1)(b), (c), or (d), it may request that another Member State take back that person (see Art. 23 Dublin III Regulation). A take back request shall be made as quickly as possible and, in any event, within two months of receiving the Eurodac hit. If the take back request is based on evidence other than data obtained from the Eurodac system, it shall be sent to the requested Member State within three months of the date on which the application for international protection was lodged. Where the take back request is not made within the periods laid down, responsibility for examining the application for international protection shall lie with the Member State in which the new application was lodged. The requested Member State shall make the necessary checks and give a decision on the request to take back the person concerned as quickly as possible and, in any event, no later than one month from the date on which the request was received. When the request is based on data obtained from the Eurodac system, that time limit shall be reduced to two weeks. Failure to act within these time limits shall be tantamount to accepting the request and entail the obligation to take back the person concerned, including the obligation to provide for proper arrangements for arrival.

4.2. Eurodac

The immediate identification of applicants for international protection and detainees is essential for the functioning of the Dublin system. Fingerprinting is an important element in establishing the exact identity of persons, especially due to the use of false travel documents or refugees' travel to Europe without documents. Fingerprints are not easily interchangeable and are not affected by, e.g. ageing or

illness;[63] they are often used in biometric systems because of the simplicity and speed of their acquisition.[64]

Eurodac is currently governed by Regulation (EU) No 603/2013 of the European Parliament and of the Council, which has brought many changes, especially regarding security and data protection.[65] It is a central database of fingerprint data linked to Member States through electronic means. This system collects, stores, exchanges, and compares fingerprints of asylum seekers. The purpose of establishing this system is facilitating the implementation of the Dublin system to avoid multiple asylum applications in several Member States under different names.[66]

Member States take the fingerprints of all third-country nationals over the age of 14 years who applied for asylum in their territory and were apprehended when illegally crossing the external borders of the EU or, in the case of third-country nationals, when illegally staying in the EU. In addition to fingerprints, other information is transmitted, such as origin of the applicant, gender, place and date of the application for international protection, and Member State reference number. These data must be sent without delay by the national authorities, together with the digitised form of the fingerprints in a quality that allows comparison, to the Eurodac Central Unit, which stores all data, to compare them with the data already stored. This comparison shall take place within 24 hours of transmission, although in exceptional cases, the process may be accelerated.

Access to the data is very limited; a Member State can neither search the data transmitted by another Member State nor can it receive the data, except in the case of a comparison. Only the Member State of origin has the right to access the data, namely the pre-designated authority of each Member State, which is listed in the comprehensive list of responsible authorities in the Official Journal of the EU.

4.3. Statistical data

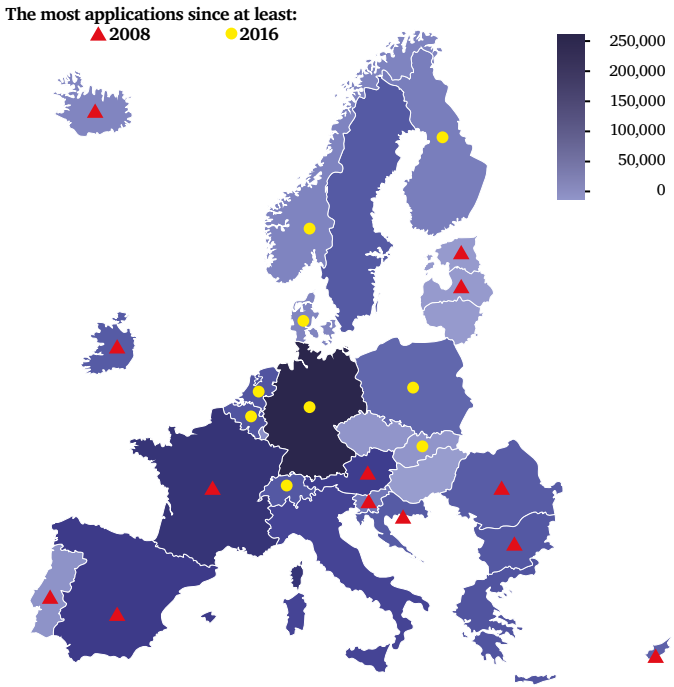
About 996,000 applications for international protection were lodged in EU+ countries in 2022, up by about one-half from 2021 and two-fifths higher than the pre-COVID level of 2019. More applications were lodged in nearly all EU+ countries, except in Malta, Lithuania, and Liechtenstein (where they decreased) as well as Latvia (where they remained stable).

While the EU+ total remained well below the high of 2015, the number of applications exceeded the 2015 values in several countries. France, Spain, and Austria and, at lower levels, Cyprus, Bulgaria, Ireland, Croatia, Romania, Slovenia, Iceland, Estonia, Portugal, and Latvia received (in descending order) the most applications on record. Many other countries, notably the Netherlands, Belgium, and Switzerland

63 Kindt, 2013, p. 53.
64 Thomas, 2005, p. 299.
65 Roots, 2015, p. 3.
66 Heinonen and Marinho, 1998, p. 8.

and, at lower levels, Poland, Finland, Norway, Denmark, and Slovakia received (in descending order) the most applications since at least 2016. The rise in applications came in addition to about 3.9 million beneficiaries of temporary protection, as reported by Eurostat.[67]

Figure 4. Applications for international protection by EU+ countries in 2022[68]



Across EU+ countries, 7 out of every 10 applications were lodged in the top-five receiving countries: Germany, France, Spain, Austria, and Italy (in descending order). Germany (244,000) continued to be the main receiving country; applications increased by more than one-quarter from 2021 and reached the highest level since 2016. Germany was followed at a distance by France (156,000), where applications rose by 30% from 2021 and reached the highest since at least 2008. Applications lodged in Spain (118,000) increased by about four-fifths, following a decline in the two previous years. Applications in Austria (109,000) rose the most in absolute terms, nearly tripling from 2021. This was partially driven by stronger secondary movements, increased flows along the Balkan route, and visa-free policies of some

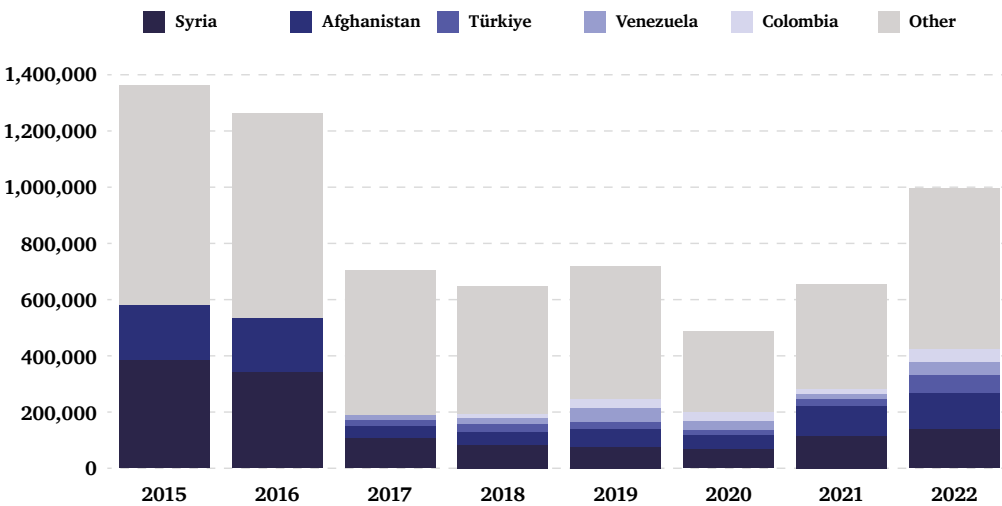
67 EU Asylum Agency, 2023, p. 82.

68 Source: Eurostat, https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Statistics_on_countries_responsible_for_asylum_applications_(Dublin_Regulation)#Decisions_on_Dublin_requests (Accessed: 30 October 2023).

Western Balkan countries. Linked to this, applications in Bulgaria (20,000) returned to the peak of 2015, and those in Romania were the highest on record (12,000).[69]

Nationals of Syria, Afghanistan, Türkiye, Venezuela, and Colombia lodged the most applications in 2022. While the record levels of 2015 and 2016 were primarily driven by applications for international protection by persons coming from Syria, Afghanistan, and Iraq, the current increase stems from a much wider range of nationalities. At lower levels, the number of applicants from India increased by more than six times to the highest level since at least 2008, with three-quarters of them applying in Austria. At the same time, citizens of Bangladesh, Georgia, Ukraine, Morocco, Tunisia, Egypt, the Democratic Republic of the Congo, Peru, Moldova, Burundi, Palestine, Belarus, Yemen, and Cuba (in descending order) also applied in unprecedented numbers.[70]

Figure 5: Applications for international protection by top countries of origin in 2022[71]

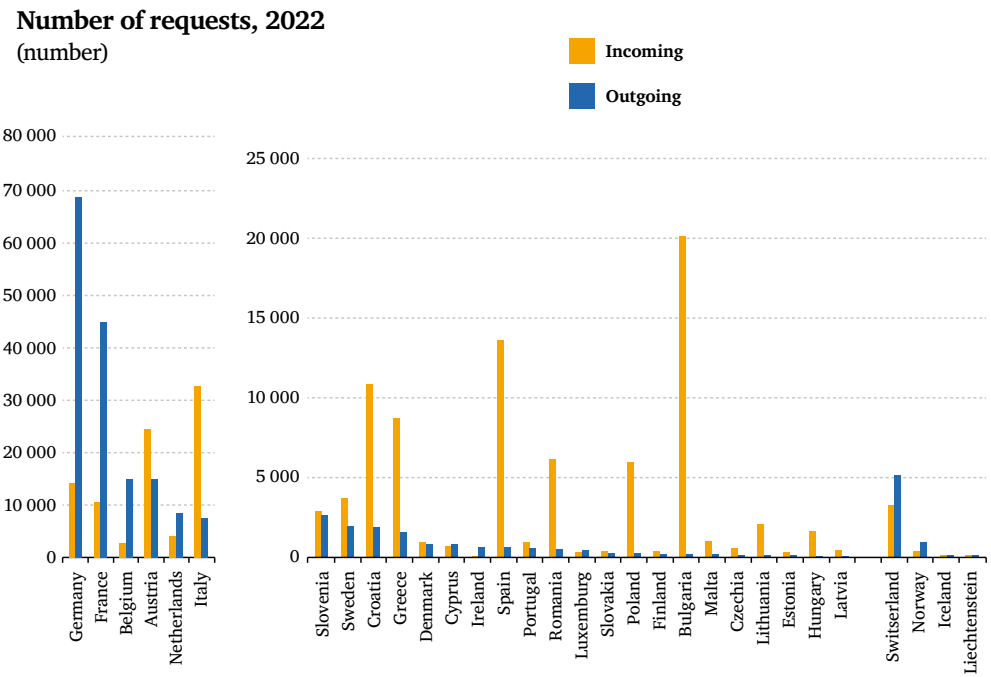


In 2022, the overall rate of positive first-instance decisions on asylum applications in the EU+ was 39%. This means that of the 646,000 decisions issued, 252,000 were positive and granted either refugee status or subsidiary protection. The rate of accepted applications was the highest since 2017. Most positive first-instance decisions granted refugee status (149,000, 59% of all positive decisions), and subsidiary

69 Ibid.
70 EUAA, 2023, p. 85.
71 Source: Eurostat. https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Statistics_on_countries_responsible_for_asylum_applications_(Dublin_Regulation)#Decisions_on_Dublin_requests (Accessed: 30 October 2023).

protection was granted in the remaining 103,000 cases (41%). Among the 20 nationalities with the highest number of first-instance decisions in 2022, Syrians had the highest rate of accepted applications (93%), followed by Ukrainians (86%) and Eritreans (84%). Other groups with relatively high rates of positive decisions were nationals of Mali (65%), Somalia (57%), and Afghanistan (51%).[72]

Figure 6: Number of incoming and outgoing requests in 2022[73]

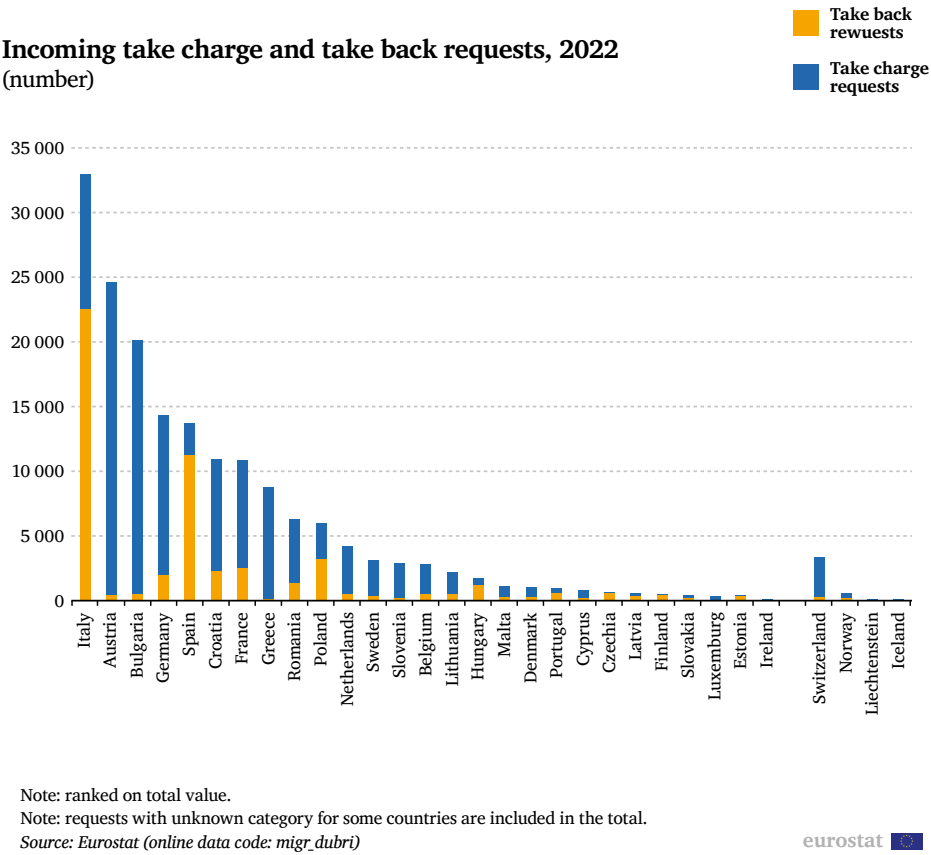


Note: the y-axis scale in the left part of the figure is around three times greater than that in the right part.
Note: ranked on outgoing.
Source: Eurostat (online data codes: migr_dubri and migr_dubro)

As Figure 6 shows, seven EU Member States sent out fewer than 200 (outgoing) requests: the three Baltic Member States (Estonia, Latvia, and Lithuania), Bulgaria, Malta, Czechia, and Hungary. Ten Member States sent 200–1,000 outgoing requests, while six Member States sent 1,000–10,000 requests. Germany (68,706) and France (44,881) sent the highest number of outgoing requests by far.

72 Ibid.
73 Source: Eurostat. https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Statistics_on_countries_responsible_for_asylum_applications_(Dublin_Regulation)#Decisions_on_Dublin_requests (Accessed: 30 October 2023).

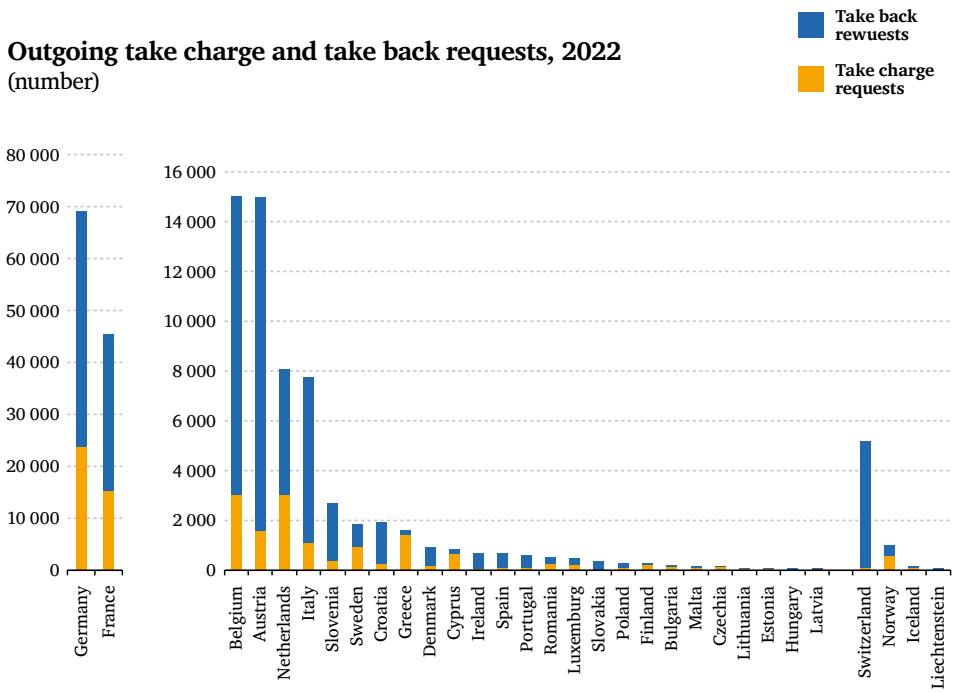
Figure 7: Incoming take charge and take back requests in 2022[74]



In 2022, 17 Member States saw more take back than take charge requests, while the reverse situation was observed in the remaining 10 Member States. The ratio of take back to take charge requests was particularly high in Greece, Austria, and Bulgaria (127, 66, and 45 take back requests for each take charge request, respectively) and to a lesser extent in Slovenia (16:1) and Luxembourg (13:1). By contrast, more than 70% of requests received in Finland (96.8%), Czechia (93.8%), Estonia (92.1%), Spain (81.8%), and Hungary (71%) were take charge requests.

74 Source: https://ec.europa.eu/eurostat/statistics-explained/index.php?title=File:Fig3_Incoming_take_charge_and_take_back_requests,_2022_(number).png.

Figure 8: Outgoing take charge and take back requests in 2022[75]



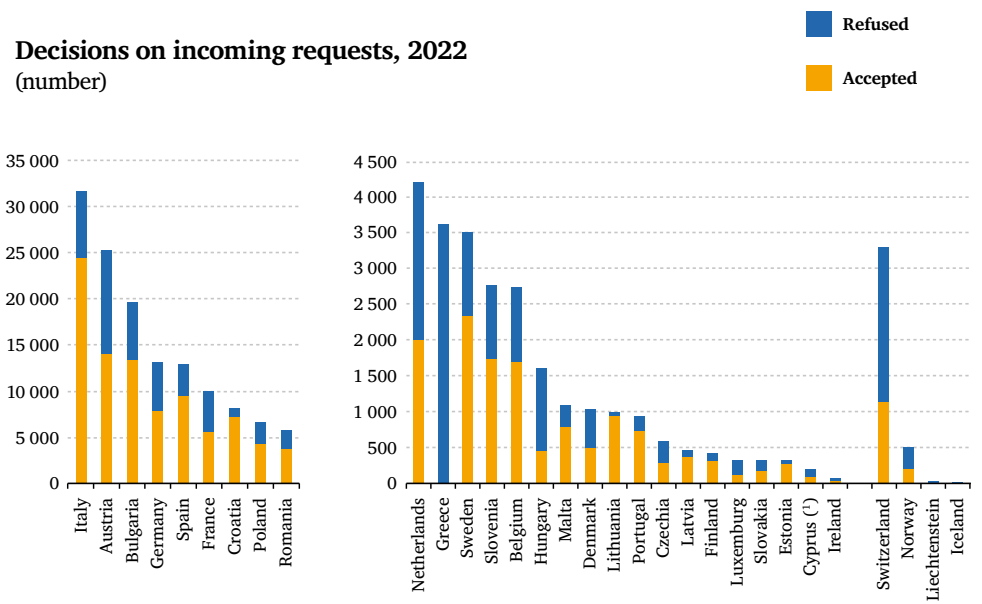
Note: ranked on total value. The y-axis scale in the left part of the figure is four and half times greater than that in the right part
Note: requests with unknown category are included in the total.
Source: Eurostat (online data code: migr_dubro)

eurostat

In 2022, the pattern of more take back than take charge requests was observed in 17 EU Member States, while the reverse situation was seen in the remaining countries. The ratio of take back to take charge requests was particularly high in Slovakia, Ireland, and Hungary. By contrast, 90.8% of requests sent from Czechia were take charge requests, with this share reaching 91.1% in Finland, 94.4% in Latvia, and 97.1% in Lithuania.

75 Source: https://ec.europa.eu/eurostat/statistics-explained/index.php?title=File:Fig6_Outgoing_take_charge_and_take_back_requests,_2022_(number).png.

Figure 9: Decisions on incoming requests in 2022[76]



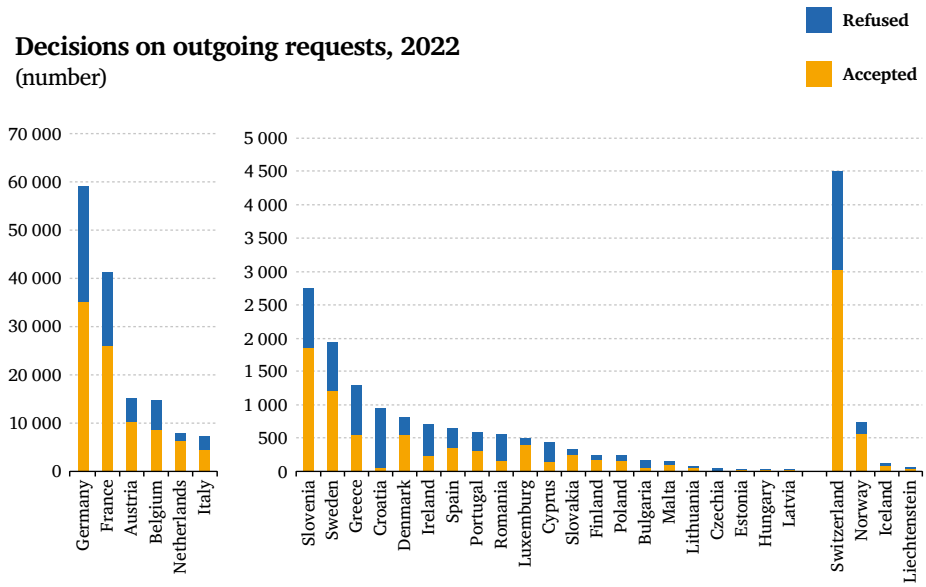
Note: the y-axis scale in the left part of the figure is eight times greater than that in the right part.
Note: ranked in total value
(1) 2021 data.
Source: Eurostat (online data code: migr_dubdi)

eurostat

The number of decisions on incoming or outgoing requests is related to the number of requests (excluding re-examination requests), although the decision on a particular request may be made in a different calendar year, especially if decisions are delayed. In 2022, Italy (31,749) and Austria (25,210) made the highest number of decisions on incoming requests, with Italy accepting 77% of the requests it received and Austria 55.4%. Another 15 EU Member States made more than 1,000 decisions on Dublin requests in 2022. Among the remaining nine Member States for which data are available, Ireland made the fewest decisions.

76 Source: https://ec.europa.eu/eurostat/statistics-explained/index.php?title=File:Fig10_Decisions_on_incoming_requests,_2022_(number).png.

Figure 10: Decisions on outgoing requests in 2022[77]



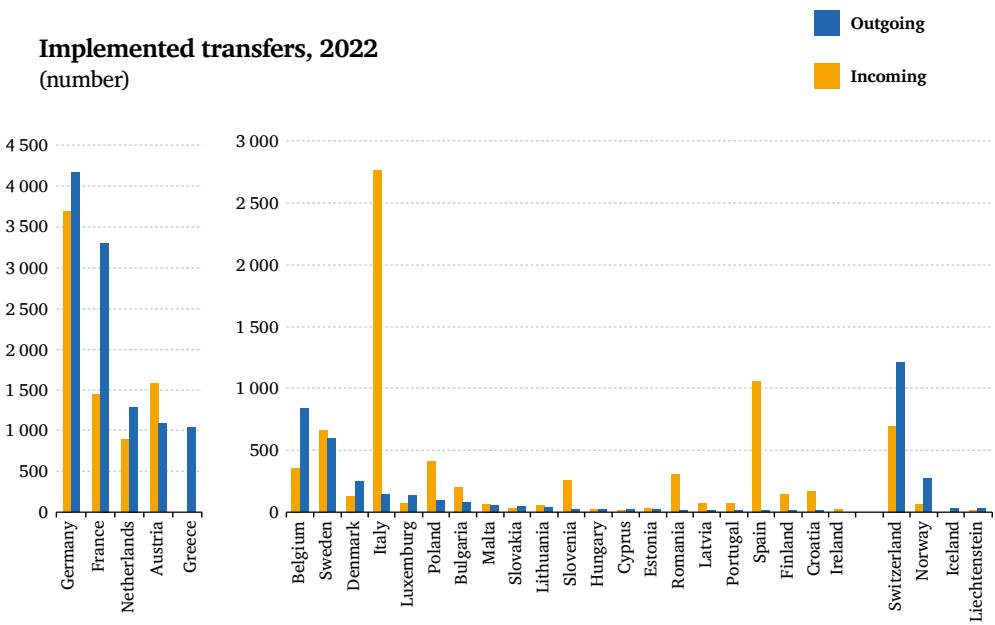
Note: the y-axis scale in the left part of the figure is around ten times greater than that in the right part.
Note: ranked in total value.
Source: Eurostat (online data code: migr_dubdo)

eurostat

Looking at decisions on outgoing requests in 2022, Germany (59,059) and France (41,399) received the highest number of decisions. Another seven EU Member States received at least 1,000 decisions on their outgoing Dublin requests in 2022. Among the 18 remaining Member States that received fewer than 1,000 decisions on their requests and for which data are available, Czechia, Hungary, and the Baltic Member States received less than 100 decisions on their outgoing requests.

77 Source: https://ec.europa.eu/eurostat/statistics-explained/index.php?title=File:Fig11_Decisions_on_outgoing_requests,_2022_(number).png.

Figure 11: Transfers implemented in 2022[78]

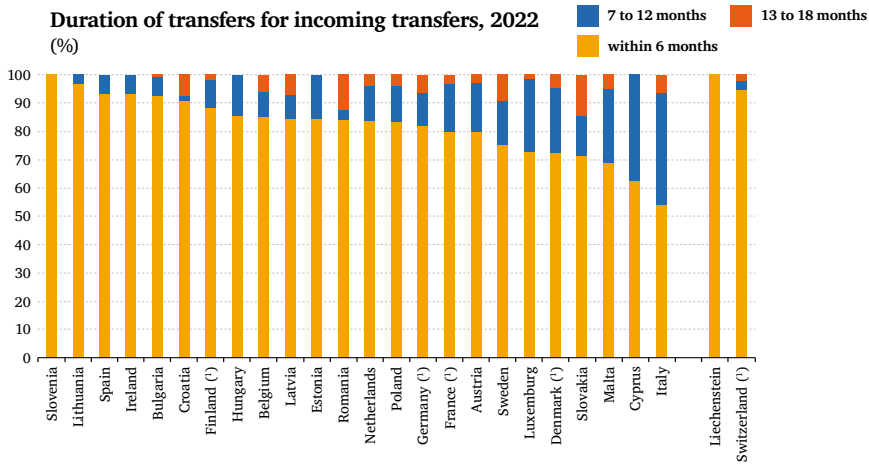


Note: no incoming and outgoing transfers for Czechia reported in 2022.
Note: the y-axis scale in the left part of the figure is greater than that in the right part.
Ranked on outgoing
Source: Eurostat (online data codes: migr_dubti and migr_dubto)

The final stage of the Dublin procedure, in case of acceptance of the request, is the actual transfer of responsibility for an asylum applicant from the requesting EU Member State to the Member State responsible. This implies the physical transfer of the concerned person from the requesting Member State to a partner country that has accepted the responsibility to take back or take charge of that person. In 2022, Germany (4,158) and France (3,311) recorded the highest numbers of outgoing transfers, followed by the Netherlands (1,285) and Austria (1,084). Germany (3,699) also recorded the highest number of incoming transfers by far, followed by Italy (2,763), Austria (1,574), and France (1,453), while Sweden, the Netherlands, and Spain also recorded more than 500 incoming transfers each. Czechia had no incoming or outgoing transfers recorded for 2022. The largest absolute differences between the numbers of incoming and outgoing transfers were recorded in France (1,858) and Greece (1,037) among Member States with more outgoing transfers, and in Italy (2,623) and Spain (1,057) among those with more incoming transfers.

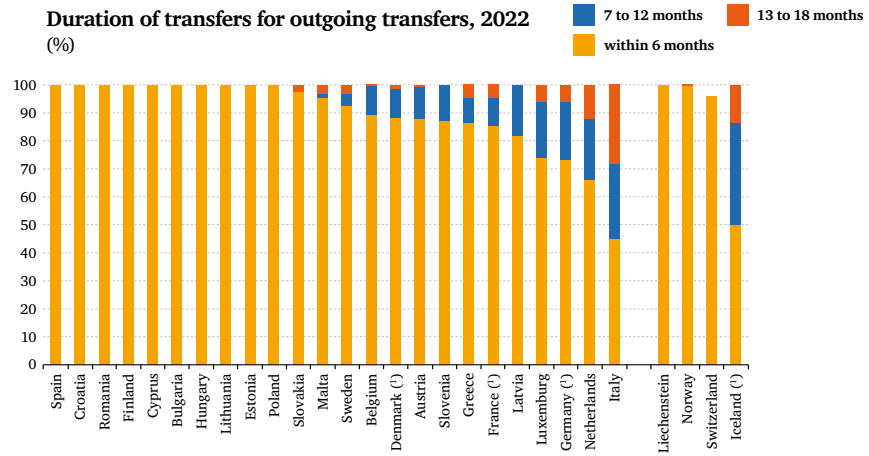
78 Source: https://ec.europa.eu/eurostat/statistics-explained/index.php?title=File:Fig12_Implemented_transfers,_2022_(number).png.

Figure 12: Duration of incoming transfers in 2022[79]



Note: no incoming and outgoing transfers for Czechia reported in 2022.Portugal had no incoming transfers for wich the duration was known. Greece, Czechia and Iceland had no incoming transfers.
(1) Excluding number of transfers for which the duration is not known
Ranked on outgoing
Source: Eurostat (online data codes: migr_dubti)

Figure 13: Duration of outgoing transfers in 2022[80]



Note: Portugal had no incoming transfers for which the duration was known. Ireland and Czechia had no outgoing transfers.
(1) Excluding number of transfers for which the duration is not known.
Source: Eurostat (online data code: migr_dubto)

79 Source: https://ec.europa.eu/eurostat/statistics-explained/index.php?title=File:Fig13_Duration_of_transfers_for_incoming_transfers,_2022_(%25).png.
80 Source: https://ec.europa.eu/eurostat/statistics-explained/index.php?title=File:Fig14_Duration_of_transfers_for_outgoing_transfers,_2022_(%25).png.

Figures 12 and 13 provide an analysis of the speed with which applicants were transferred, based on the time lag between a decision being made and the person actually being transferred. Data are compiled for three durations, corresponding to the various possibilities for the timing of transfers, as laid down in the Dublin III Regulation. According to the regulation, the applicant's transfer from the requesting EU Member State shall be carried out in accordance with the national law of the requesting Member State and at the latest within six months of acceptance of the request; this time limit may be extended up to a maximum of one year if the transfer could not be carried out due to the imprisonment of the concerned person, or up to a maximum of 18 months if the concerned person absconds.

In 2022, all incoming transfers were completed in Slovenia within six months. Moreover, in all Member States, at least half of all incoming transfers were completed within six months. Italy had the greatest share of transfers, completed within 7–12 months (39.7%), while Slovakia and Romania had the largest shares of transfers—14.3% and 12.4%, respectively—completed within 13–18 months. For outgoing transfers, Italy reported the least share of outgoing transfers completed within six months: 45% of its 140 outgoing transfers. In fact, in 10 Member States, all (100%) outgoing transfers were implemented within six months.

5. Identification of major shortcomings, reform efforts, and proposals for *de lege ferenda* solutions

Although the Dublin system has evolved over a long period of time and has undergone many changes, it became apparent soon after Dublin III's adoption that it was not without problems. The need for a fundamental reform of the Dublin system has been discussed for many years, and the various refugee crises have only highlighted the fact that the system is dysfunctional. The practice whereby the state of first arrival is most often responsible for the asylum application has placed a burden on coastal states in particular (i.e. states at the EU's borders, notably Greece and Italy). As a result, these states not only lack sufficient facilities for the increased number of asylum seekers[81] but also prolong decision-making procedures, leading to migrants trying to travel illegally within the EU.

Since 2009, the European Parliament has consistently called for a binding mechanism for the fair distribution of asylum-seekers among all EU Member States.[82] In its resolution of 12 April 2016 on the situation in the Mediterranean and the need for a

81 Lack of accommodation capacity as well as lack of professional staff, officials, and others.

82 See European Parliament resolutions of 25 November 2009, 11 September 2012, 9 October 2013, 23 October 2013, 17 December 2014, 29 April 2015, and 10 September 2015.

holistic EU approach to migration, the European Parliament clarified its position on the reform of the Dublin system:

> The criterion that it is the Member State of first entry that is responsible for the examination of a claim for international protection should be revised.
> One option for a fundamental overhaul of the Dublin system would be to establish a central collection of applications at Union level – viewing each asylum-seeker as someone seeking asylum in the Union as a whole and not in an individual Member State – and to establish a central system for the allocation of responsibility for anyone seeking asylum in the Union.
> Such a system could provide for certain thresholds per Member State relative to the number of arrivals, which could conceivably help in deterring secondary movements, as all Member States would be fully involved in the centralised system and no longer have individual responsibility for allocation of applicants to other Member States. Such a system could function on the basis of a number of Union "hotspots" from where Union distribution should take place.
> Any new system for allocation of responsibility must incorporate the key concepts of family unity and the best interests of the child.[83]

The *Evaluation of the Implementation of the Dublin III Regulation – Final Report* (2016), which was prepared for the European Commission, also revealed fundamental shortcomings.[84] First, the capacity of Member States is not considered; the Dublin III Regulation does not address situations wherein disproportionate pressure is put on Member States. Furthermore, it was found that many Member States inform applicants only in general terms or the information is outdated. Regarding the criterion of family ties, it was found that different Member States use substantially different evidence for these criteria. The main evidence is usually written proof of family ties (e.g. marriage or birth certificate), which is usually not in the applicant's possession and is very difficult to obtain. Different practices have also been observed in the case of detention, which often leads to legal uncertainty. Indeed, some states use detention from the start of the Dublin procedure, while others use it only when the concerned Member State has accepted the transfer request. Although all Member States have collectively introduced judicial remedies and set a reasonable time limit for lodging an appeal, the "reasonable time limit" varies considerably from one Member State to another. The total number of take charge and take back requests was found to have almost quadrupled from 2008 to 2014. Finally, the research showed that, e.g. almost one in four applicants had previously submitted an application in other Member States in 2014, implying that the Dublin system is failing to fulfil its main role.[85]

83 European Parliament, 2019, p. 3.
84 European Commission DG Migration and Home Affairs, 2016, pp. 1–84.
85 Ibid.

Therefore, the first attempt at reform was in 2016 with a draft regulation of the European Parliament and Council establishing criteria and mechanisms for determining the Member State responsible for assessing an application for international protection submitted by a third-country national or stateless person in one of the Member States—the so-called *Dublin IV*.[86] This regulation was intended to be part of a broader reform of the entire CEAS, which aims to reduce irregular migration flows into the EU and become the main protection model for the future.

The most significant changes proposed compared to Dublin III were as follows: Dublin IV should have established a collective redistribution mechanism. If a country faced a disproportionate number of asylum applications above a set benchmark, all new applicants in that country (regardless of nationality) would be redistributed across the EU until the number of applications falls below the benchmark again. Regarding creation of a special pre-procedure, when examining an application, a Member State had the obligation (not only the possibility) to check whether the applicant comes from a so-called "safe third country" or has already applied for asylum in another country. If so, the applicant was returned to that country. Dublin IV introduced a new obligation for applicants for international protection to remain in the Member State responsible for their application (together with appropriate consequences for non-compliance). Shorter time limits were set for sending relocation requests, sending replies, and carrying out relocations of asylum seekers between Member States. Finally, greater safeguards were set for unaccompanied minors, broadening the definition of family members.

The three key changes proposed by Dublin IV were as follows:

5.1. Automated registration and monitoring system

The development of a new automated registration and monitoring system was proposed. It would consist of a central system, a national interface in each Member State, and communication infrastructure between the central system and national interface. The automated system would record each asylum application made in the EU as well as the number of people each Member State effectively resettles. The central system would be run by a newly proposed EU Agency for Asylum.

86 Proposal for a Regulation of the European Parliament and of the Council on the European Union Agency 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 (recast). Brussels 4. 5. 2016 COM(2016) 270 final 2016/0133 (COD).

5.2. Determination of a Member State being under disproportionate asylum pressure

A reference key was proposed to show the indicative share of the total number of asylum applications made in the EU that each Member State would receive if they were allocated according to a country's size and wealth. This reference key would be based on two criteria with equal weighting: size of the population and total gross domestic product of a Member State. Comparing the reference share to the actual distribution of asylum claims would help determine when one Member State is responsible for a disproportionate amount of asylum applications compared with the other Member States. Resettlements would be included under the number of asylum applications, to acknowledge the importance of efforts to implement legal and safe pathways to Europe.

5.3. Fairness mechanism

It was proposed that a fairness mechanism[87] should be applied when Member States are confronted with a disproportionate number of asylum applications. If the number of asylum applications made in a Member State is above 150% of the reference share, the fairness mechanism will be triggered automatically. All new asylum applications made after the mechanism's triggering will be relocated across the EU. If a Member State decides not to accept the allocation of asylum applicants from a Member State under pressure, a "solidarity contribution" of €250,000 per applicant would have to be made. New arrivals to Member States benefiting from the fairness mechanism would be relocated across the EU until the number of applications falls back below 150% of the country's reference share.[88]

In November 2017, the European Parliament decided to launch inter-institutional negotiations. In June 2018, the European Council stated that there is still no consensus on the reform of the Dublin Regulation. Finally, the Dublin IV Regulation was not adopted.

In September 2020, the European Commission presented a new *Pact on Migration and Asylum,* based on in-depth consultations with multiple state and non-state stakeholders. This pact is a set of several legislative and non-legislative measures related to EU asylum and migration policies,[89] primarily targeting irregular migration.[90] The main objective of this reform is to create a common framework for a comprehensive approach to migration and asylum management, increase the efficiency of the system, and achieve greater resilience to migration pressures through a set of proposals. It also aims to remove, or at least minimise, the factors encouraging

87 Potužák, 2021, pp. 201–206. For more details, see Jankuv, 2019, pp. 263–264.
88 Votočková and Chmelíčková, 2016, pp. 34–47.
89 Brouwer et al., 2021, p. 21.
90 Komínková, 2020, pp. 1-5.

migration and consequently secondary movements. Finally, it aims to combat abuses of the current system and better support the most affected EU Member States. The first successful step in the implementation of the pact was the creation of the EU Asylum Agency (EUAA), which became operational in January 2022, replacing the European Asylum Support Office. The remaining proposals are still under negotiation.[91]

The key to the Dublin system is the "Asylum and Migration Management Regulation" (AMMR), which was proposed in 2020 to replace the Dublin III Regulation, which had proved to be unworkable. However, the changes in relation to the Dublin III Regulation are minimal, as the AMMR only adds a few new criteria for the relocation of asylum seekers.[92] The main novelty is the solidarity mechanism. While this mechanism is intended to be mandatory, as it requires all Member States to share responsibility, it is also flexible, as states can choose from several solidarity options, such as relocation, sponsorship of returns, or other forms of contributions. In practice, this may look like the state of first entry still initiating the Dublin procedure on arrival to determine the state responsible for the person's application. While most often the state of first entry will remain responsible throughout, if that state is under pressure, other Member States are expected to support it by relocating asylum seekers and refugees to their territory, sponsoring returns, or providing financial and operational resources. This mechanism is quite controversial across states, and its final form is still heavily debated.[93]

In June 2022, the EU Council adopted its general approach on the proposal for the revision of the Schengen Border Code.[94] The discussion at the EU Council was informed by the European Commission's report on the state of Schengen. The report set a list of priority actions for 2022–2023 at the national and European levels, including, e.g. implementing the new information technology architecture and interoperability for border management; making full use of cross-border cooperation tools; ensuring systematic checks of all travellers at the external borders; and adopting the revised Schengen Border Code.[95]

Together with the *State of Schengen Report*, the European Commission presented a policy document to launch a multiannual strategy for integrated border management, that is, coordinated efforts at the national and international levels among authorities and agencies responsible for border management at the EU's external borders.[96]

91 EUAA, 2023, p. 31–33.
92 Guibert, Milova and Movileanu, 2021, pp. 1–6.
93 Ibid.
94 European Commission's Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders, Strasbourg, 14 December 2021, COM(2021) 891 final 2022.
95 European Parliament, 2022, pp. 1–3.
96 European Commission's Policy document developing a multiannual strategic policy for European integrated border management in accordance with Art. 8(4) of Regulation (EU) 2019/1896. Brussels, 24 May 2022, COM(2022), 303 final.

With the active work of the French and Czech Presidencies of the Council of the EU and under the coordination of the European Commission, considerable progress was made in 2022 towards advancing the reform package. In the first semester of 2022, the French Presidency advocated for a gradual approach to adopt the reform package, with cumulative increments of commitment by Member States in both areas of solidarity and responsibility. As a result, in June 2022, the EU Council adopted negotiating mandates on the Screening and Eurodac Regulations.[97] Agreement was also reached by 21 countries on the implementation of the Voluntary Solidarity Mechanism, paving the way for further progress on the AMMR. The mechanism, which is voluntary and spans one year, provides for expressions of solidarity to Member States experiencing particular pressure in their asylum and reception systems through relocations, financial contributions, and other measures of support.

At the level of the European Parliament, in 2022, the rapporteurs presented draft reports on all legislative proposals included in the Pact on Migration and Asylum and on the recast Return Directive. With the pact being one of the top priorities, in September 2022, the European Parliament and the rotating Presidencies of the Council of the EU reached political agreement on a joint roadmap for negotiations between co-legislators to adopt the legislative proposals before the end of the 2019–2024 legislative period.

The roadmap[98] provides the framework for negotiations on the Eurodac, Screening, Asylum and Migration Management, Crisis and Force Majeure, and the Asylum Procedure Regulations, and for finalising the Union Resettlement Framework, recast Reception Conditions Directive, and recast Qualification Directive, for which provisional agreements were previously reached between the European Parliament and EU Council. The roadmap also provides new impetus for reaching an agreement on the proposal for a recast Return Directive. Following agreement on the roadmap, in December 2022, the European Parliament and EU Council reached an agreement on the reception conditions for applicants for international protection, thus endorsing the outcome of the negotiations reached in 2018.

In June 2023, the Council of the EU reached an agreement on key asylum and migration laws. The EU Council took a decisive step towards modernisation of the EU's rulebook for asylum and migration. It agreed on a negotiating position on the Asylum Procedure Regulation and AMMR. This position will form the basis of negotiations by the EU Council Presidency with the European Parliament. What are the main points of this agreement?

The Asylum Procedure Regulation establishes a common procedure across the EU that Member States need to follow when people seek international protection.[99] It streamlines the procedural arrangements (e.g. duration of the procedure) and sets standards for the rights of the asylum seeker (e.g. provision of the interpreter

97 EUAA, 2023, p. 31–33.
98 European Parliament, 2022, pp. 1–3.
99 Council of the EU, 2023a, pp. 1–3.

service and the right to legal assistance and representation). The regulation also aims to prevent abuse of the system by setting out clear obligations for applicants to cooperate with the authorities throughout the procedure. The Asylum Procedure Regulation also introduces mandatory border procedures to quickly assess at the EU's external borders whether applications are unfounded or inadmissible. The total duration of the Asylum and Return Border Procedure should be not more than six months. To carry out border procedures, Member States need to establish the adequate capacity, in terms of reception and human resources, required to examine an identified number of applications at any given moment and enforce return decisions. The adequate capacity of each Member State will be established based on a formula that considers the number of irregular border crossings and refusals of entry over a three-year period.[100]

The modifications proposed in relation to the Dublin rules are also very important: *The AMMR* should replace, once agreed, the current Dublin III Regulation.[101] The Dublin Regulation sets out rules determining which Member State is responsible for examining an asylum application. The AMMR will streamline these rules and shorten time limits. For example, the current complex takes back procedure aimed at transferring an applicant back to the Member State responsible for his or her application will be replaced by a simple take back notification.

To balance the current system whereby a few Member States are responsible for most asylum applications, a new solidarity mechanism is being proposed that is simple, predictable, and workable. The new rules combine mandatory solidarity with flexibility for Member States as regards the choice of individual contributions. These contributions include relocation, financial contributions, and alternative solidarity measures such as deployment of personnel or measures focusing on capacity building. Member States have full discretion as to the type of solidarity they contribute. No Member State will ever be obliged to carry out relocations.[102]

There will be a minimum annual number of relocations from Member States where most persons enter the EU to Member States less exposed to such arrivals. This number is set at 30,000, while the minimum annual number for financial contributions will be fixed at €20,000 per relocation. These figures can be increased where necessary, and situations where no need for solidarity is foreseen in a given year will also be considered. To compensate for a possibly insufficient number of pledged relocations, *responsibility offsets* will be available as a second-level solidarity measure, in favour of Member States benefitting from solidarity. This means that the contributing Member State will take responsibility for examining an asylum claim by persons who would, under normal circumstances, be subject to a transfer to the Member State responsible (benefitting Member State). This scheme will become mandatory if relocation pledges fall short of 60% of the total needs identified by

100 Ibid.
101 Council of the EU, 2023b, pp. 1–149. p
102 Council of the EU, 2023a, pp. 1–3.

the EU Council for the given year or do not reach the number set in the regulation (30,000).[103]

The AMMR also contains measures aimed at preventing abuse by the asylum seeker and avoiding secondary movements (when migrants move from the country in which they first arrived to seek protection or permanent resettlement elsewhere). The regulation, for instance, sets obligations for asylum seekers to apply in the Member States of first entry or legal stay. It discourages secondary movements by limiting the possibilities for a cessation or shift in the responsibility between Member States, thus reducing the possibility for the applicants to choose the Member State where they submit their claim.[104]

While the new regulation should preserve the main rules on determination of responsibility, the agreed measures include modified time limits for its duration: The Member State of first entry will be responsible for the asylum application for a duration of two years. When a country wants to transfer a person to the Member State that is actually responsible for the migrant and this person absconds (e.g. when the migrant goes into hiding to evade a transfer), responsibility will shift to the transferring Member State after three years. If a Member State rejects an applicant in the border procedure, its responsibility for that person will end after 15 months (in case of a renewed application).[105]

6. Conclusion

It can be concluded that both the Common Asylum Policy and the Dublin system itself have been undergoing a relatively complicated evolution for several decades. This is quite logical, as the issue of asylum and migration affects many sensitive areas of national policies, and individual states often try to defend their own interests (economy, security, etc.). Nevertheless, we can observe a sustained effort to address the migration situation, moving from national, repressive solutions to a common EU-wide asylum policy based on respect for fundamental principles and values, as well as cooperation and mutual solidarity. The legal form of the instruments dealing with this area (from conventions to regulations and directives) can also be seen to be evolving in a positive direction. In the context of the historical excursus, regular evaluation of the effectiveness of the Common Asylum Policy and the Dublin system itself, and the EU's efforts to reflect on and remedy the shortcomings identified so

103 Ibid.

104 Council of the EU: Proposal for a Regulation of the European Parliament and of the Council on asylum and migration management, 2023b, pp. 1–149. Available at: https://data.consilium.europa.eu/doc/document/ST-10443-2023-INIT/en/pdf. (Accessed: 30 October 2023).

105 Council of the EU, 2023a, pp. 1–3.

as to make the system operational and meet its objectives, can also be positively highlighted.

Despite these efforts, however, the current Dublin system is subject to legitimate criticism, as analysed in more detail above. The key shortcomings, summarised simply and concisely, are as follows: (1) The Dublin system places an uneven burden on individual Member States in terms of processing applications for international protection. This has several negative consequences (for both the applicants themselves and those Member States, e.g. Italy and others). (2) Individual Member States do not apply the existing rules uniformly, or there are significant differences in application practices (e.g. detention, remedies, informing of applicants, and time limits). This often leads applicants to try to circumvent the Dublin rules and seek the "most appropriate" state to process their own application.

What is the solution to this current situation, which we can basically be described as a "dysfunction" of the Dublin system? As highlighted above, reform efforts in relation to the current Dublin III started in 2015–2016 and are still not over. I consider it important that the protection of family unity and minors is further strengthened, that the principle of non-refoulement is strongly considered, and that the fundamental rights of applicants for international protection are respected. Furthermore, greater emphasis should be placed on the same level of application of the Dublin system in all Member States so that there are no unjustified differences. In this respect, supervision in this area should also be strengthened. Finally, in relation to the Member States, I consider it crucial that agreement be reached on a mutual solidarity mechanism. The idea is that the burden of deciding on applications for international protection and the other aspects involved should be evenly distributed between the individual states. In this respect, I am very positive about the current progress in the reform package, and I believe that it will eventually be adopted and will thus help improve the situation regarding asylum and migration in Europe, or indeed the whole world.

At the very end it is necessary to add the latest news: In 2024, all negotiations and reform efforts resulted in the adoption of The Pact on Migration and Asylum. On 10 April 2024, the European Parliament voted in favor of the new rules on migration, followed by their formal adoption by the Council of the EU, on 14 May 2024. The Pact is expected to enter into force in June 2026.

References

Battjes, H., Brouwer, E. (2015) 'The Dublin Regulation and Mutual Trust: Judicial Coherence in EU Asylum Law?', *Review of European Administrative Law*, 8(2), pp. 183–214; https://doi.org/10.7590/187479815X14465419060505.

Boccardi, I. (2002) *Europe and refugees: towards an EU asylum polic*. Kluwer Law International.

Brouwer, E., Campesi, G., Carrera, S., Cortinovis, R., Karageorgiou, E., Vedsted-Hansen, J., Vosyliute, L. (2021) *The European Commission's legislative proposals in the New Pact on Migration and Asylum*, July 2021. [Online]. Available at: https://www.europarl.europa.eu/RegData/etudes/STUD/2021/697130/IPOL_STU(2021)697130_EN.pdf. (Accessed: 30 October 2023).

Danish Refugee Council (2001) *The Dublin Convention: Study on its Implementation in the 15 Member States of the European Union*. Denmark.

Davis, K. (2021) 'The European Union's Dublin Regulation and the migrant crisis', *Washington University Global Studies Law Review*, 19(2), pp. 259–287.

ECRE (2006) Report on the application of the Dublin II Regulation in Europe, 2006. Available at: https://ecre.org/wp-content/uploads/2016/07/ECRE-ELENA-Report-on-the-Application-of-the-Dublin-II-Regulation-in-Europe-_March-2006.pdf (Accessed: 30 October 2023).

European Commission (2000) *Commission staff working paper: Revisiting the Dublin Convention* [Online]. Available at: https://www.statewatch.org/media/documents/semdoc/assets/files/commission/SEC-2000-522.pdf (Accessed: 6 September 2024).

European Commission (2001) *Commission staff working paper: Evaluation of the Dublin Convention* [Online]. Available at: https://aei.pitt.edu/40061/1/SEC_(2001)_756.pdf (Accessed: 6 September 2024).

European Commission DG Migration and Home Affairs (2016) *Evaluation of the Implementation of the Dublin III Regulation – Final Report.* [Online] Available at: https://home-affairs.ec.europa.eu/system/files/2020-09/evaluation_of_the_implementation_of_the_dublin_iii_regulation_en.pdf (Accessed: 30 October 2023).

European Parliament (2019) *Reform of the Dublin system*. [Online] Available at: https://www.europarl.europa.eu/RegData/etudes/BRIE/2016/586639/EPRS_BRI(2016)586639_EN.pdf. (Accessed: 30 October 2023).

European Parliament (2022) *Revision of the Schengen Borders Code*. Available at: https://www.europarl.europa.eu/RegData/etudes/BRIE/2022/729390/EPRS_BRI(2022)729390_EN.pdf. (Accessed: 30 October)

EUAA (2023) *Asylum Report 2023: Annual Report on the Situation of Asylum in the European Union*. Luxembourg: Publications Office of the European Union. [Online] Available at: https://euaa.europa.eu/asylum-report-2023 (Accessed: 30 October 2023); https://doi.org/10.2847/82162.

Gil-Bazo, M., T. (2015) 'The safe third country concept in international agreements on refugee protection', *Netherlands Quarterly of Human Rights*, 33(1), pp. 42–77. Available at: https://www.unhcr.org/sites/default/files/legacy-pdf/59c4be077.pdf. (Accessed: 30 October 2023), https://doi.org/10.1177/016934411503300104.

Guibert, L., Milova, M., Movileanu, D. (2021) *The New Pact on Migration and Asylum: A Brief Summary and Next Steps*. 89 Initiative The first European think-do tank [Online]. Available at: https://89initiative.com/the-new-pact-on-migration-and-asylum/. (Accessed: 30 October 2023).

Hailbronner, K. (2000) *Immigration and Asylum Law and Policy of the European Union*, Kluwer Law International; https://doi.org/10.1163/9789004482623.

Horková, D. (2016) 'Čo by mal prinésť Dublin III?' in Giertl, A. (ed) *Aktuálne otázky migrácie z pohľadu medzinárodného práva s osobitným zreteľom na Chartu základných práv Európskej únie*, pp. 97–112.

Huybreghts, G. (2015) 'The Schengen Convention and the Schengen acquis: 25 years of evolution', *ERA Forum*, 16(3), pp. 379–426; https://doi.org/10.1007/s12027-015-0402-3.

Chmelíčková, N. (2008) 'Společný evropský azylový systém-aktuální vývoj' in Jílek, D., Pořízek, P. (eds.) *Společný evropský azylový systém: transpozice směrnic*, Brno: Veřejný ochránce práv, pp. 11–15.

Jankuv, J. (2019) 'Nariadenie Dublin IV a súvisiace zmeny azylového systému Európskej únie' in Košičiarová, S. (ed.) *Aktuálne otázky azylového práva I.* Zborník príspevkov z česko-slovenskej vedeckej konferencie 6. november 2018, Bratislava. Trnava: Právnická fakulta, Trnavskej univerzity v Trnave, pp. 239–276.

Jurman, M. (2005) 'Dublinské řízení u nás', *Právní rádce*, 13(6), pp. 42–45.

Jurníková, J. (2016) 'Několik poznámek k budování společného evropského azylového systému' in Jurníková, J., Králová, A. (eds.) *Společný evropský azylový systém v kontextu uprchlické krize.* Brno: Masarykova univerzita, Právnická fakulta, pp. 9–19.

Kindt, E., J. (2013) *Privacy and Data Protection Issues of Biometric Application: A Comparative Legal Analysis*, Dordrecht: Springer; https://doi.org/10.1007/978-94-007-7522-0

Kloth, K. (2000) 'The Dublin Convention on Asylum: an Introduction', in Marinho, C. (ed.) *The Dublin Convention on Asylum: its Essence, Implementation and Prospects*, Maastricht: European Institute of Public Administration, pp. 7–16; https://doi.org/10.54648/352835

Komínková, M. (2020) 'Nový pakt pro migraci a azylu – obsah a postoje aktérů'. *Euroskop,* 30 October 2020. [Online]. Available at: https://euroskop.cz/2020/10/30/novy-pakt-pro-migraci-a-azyl-obsah-a-postoje-akteru/ (Accessed: 30 October 2023).

Kosař, D., Molek, P., Honusková, V., Jurman, M., Lupačová, H. (2010) *Zákon o azylu: komentář.* Wolters Kluwer.

Kotzeva, A., Murray, L., Tam, R., Burnett, I. (2008) *Asylum and human rights appeals handbook*. Oxford: Oxford University Press; https://doi.org/10.1093/oso/9780199289424.001.0001.

Marinho, C., Heinonen, M. (1998) 'Dublin after Schengen: Allocating Responsibility for Examining Asylum Applications in Practice', *EIPASCOPE,* 1998/3, pp. 1–12.

Moreno-Lax, V. (2012) 'Dismantling the Dublin System: M. S. S. v. Belgium and Greece', *European Journal of Migration and Law*, 14(1), pp. 1–31; https://doi.org/10.1163/157181612X627652.

Moses, L. (2016) The Deficiencies of Dublin: 'An Analysis of the Dublin System in the European Union', *Jackson School Journal – University of Washington*, 6(3), pp. 7–15.

Pazderová, V. (2012) 'Dublinský systém – klauzule suverenity, in Jílek, D., Pořízek, P. (eds.) *Aktuální právní problémy azylového a cizineckého práva*, pp. 322–342.

Peers, S. (2014) 'Reconciling the Dublin system with European fundamental rights and the Charter', *ERA Forum*, 15(4), pp. 485–494; https://doi.org/10.1007/s12027-014-0365-9.

Peers, S. (2015) *EU Justice and Home Affairs Law*. Oxford: Oxford Academic; https://doi.org/10.1093/acprof:oso/9780198776833.003.0001.

Pikna, B. (2012) *Evropský prostor svobody, bezpečnosti a práva, prizmatem Lisabonské smlouvy*. Praha: Linde, a. s.

Potužák, D. (2021) 'Reforma společného evropského azylového systému – nařízení Dublin IV.' in Vostrá, Z. (ed.) *Nestandardní bezpečnostní situace ve státě – ústavní, evropský a mezinárodní pohled,* pp. 191–213; https://doi.org/10.24132/ZCU.2021.09228.191-213.

Roots, L. (2015) 'The New EURODAC Regulation: Fingerprints as a Source of Informal Discrimination', *Baltic Journal of European Studies*, 5(2), pp. 108–129; https://doi.org/10.1515/bjes-2015-0016.

Svobodová, N. (2017) 'Společný evropský azylový systém', *Ludek Niedermayer*, 1 November 2017. [Online]. Available at: https://www.niedermayer.cz/z-medii/articles/spolecny-evropsky-azylovy-system. (Accessed: 30 October 2023).

Thomas, R. (2005) 'Biometrics, International Migrants and Human Rights', *European Journal of Migration,* 7(4), pp. 377–411; https://doi.org/10.1163/157181605776293255.

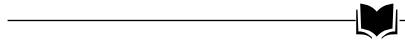
Council of the EU (2023a) *Migration policy: Council reaches agreement on key asylum and migration laws.* Press release, 8 June 2023. [Online] Available: https://www.consilium.europa.eu/en/press/press-releases/2023/06/08/migration-policy-council-reaches-agreement-on-key-asylum-and-migration-laws/?utm_source=dsms-auto&utm_medium=email&utm_campaign=Migration+policy%3a+Council+reaches+agreement+on+key+asylum+and+migration+laws (Accessed: 30 October 2023).

Council of the EU (2023b) *Proposal for a Regulation of the European Parliament and of the Council on asylum and migration management and amending Council Directive (EC) 2003/109 and the proposed Regulation (EU) XXX/XXX* [Asylum and Migration Fund] – General approach [Online]. Available: https://data.consilium.europa.eu/doc/document/ST-10443-2023-INIT/en/pdf (Accessed: 7 September 2024).

European Parliament (2022) *Joint Roadmap of the European Parliament and Rotating Presidencies of the Council on the organisation, coordination, and implementation of the timeline for the negotiations between the co-legislators on the CEAS and the New European Pact on migration and asylum* [Online]. Available at: https://www.europarl.europa.eu/resources/library/media/20220907RES39903/20220907RES39903.pdf (Accessed: 30 October 2023).

CHAPTER X

Division of Competences and Responsibilities Between EU Institutions/ Agencies and Member States for Border Management



Gregor Maučec

Abstract

In the European Union (EU), border control and surveillance have emerged as significant policies for managing migration. The EU's action at the external borders is based on a combination of migration securitisation and externalisation of border management policies. The EU follows a 'shared competence' and 'shared responsibility' for developing an integrated European border management system in the context of migration control. This chapter examines the division of internal and external competences and responsibilities between EU institutions/agencies and national authorities of member states concerning border management and migration. Further, it analyses the intensity and scope of the EU's intervention in this area along with its limitations. The European integrated border management is crucial for improving migration management and is conducted within a multi-level governance system with binding rules and various actors. This raises concerns regarding the exact allocation of competences and corresponding obligations and responsibilities conferred on each of them. The Schengen Borders Code (Regulation (EU) 2016/399) and the European Border and Coast Guard Regulation (Regulation (EU) 2019/1896) are the primary legally binding instruments, which specify common (supranational) rules governing the movement of persons across EU borders and highlight how member states manage their borders serving a common interest within

Gregor Maučec (2024) 'Division of Competences and Responsibilities Between EU Institutions/Agencies and Member States for Border Management'. In: Anikó Raisz (ed.) *Migration and Central Europe. Challenges and Legal Responses,* pp. 369–438. Miskolc–Budapest, Central European Academic Publishing.

https://doi.org/10.54237/profnet.2024.armace_10

an increasingly harmonised substantive and institutional framework. Although, the rules relating to the management of EU external borders continue to evolve in the context of the Schengen *acquis*, member states retain their own competences and responsibilities regarding border control and entry to their territories concerning the maintenance of legal and public order and national security. However, the member states are required to exercise their competence in this field in compliance with the objectives and acts of the EU's border management and migration *acquis* and policies, ensuring full respect for fundamental rights.

Keywords: European Integrated Border Management, European Border and Coast Guard (Frontex) Agency, member states' border authorities, border management – migration regime nexus, fundamental rights, Court of Justice of the EU

1. Introduction

As part of the comprehensive and harmonised approach to migration of the European Union (EU),[1] the European Commission came up with the first multiannual strategic policy document ('Communication from the Commission to the European Parliament and the Council') in March 2023 to provide a shared policy framework and guidance for implementing an effective European integrated border management (EIBM) system for 2023–2027, with a view to ensuring effective control of the EU's external land and sea borders.[2] This communication by the European Commission is built around the vague concepts of (1) "shared responsibility" at the EU's external borders between the EU institutions/agencies, as well as national authorities of the EU Member States responsible for border management,[3] and (2) a "well-defined

1 The EU's comprehensive approach to migration combines increased external action; mutually beneficial comprehensive partnerships with countries of origin and transit; addressal of the root causes of migration; opportunities for legal migration, more effective protection of EU external borders; resolute fighting of organised crime, human trafficking, and smuggling; instrumentalisation of migration as a hybrid threat; and stepping up of returns. European Council, 2023, p. 9.

2 Communication from the Commission to the European Parliament and the Council establishing the multiannual strategic policy for European integrated border management, COM/2023/146 final.

3 The doctrine of shared responsibility (which has not yet been developed into applicable international law) pertains to situations and cases in which multiple states and/or international organisations are responsible for the same or different violation(s) of international law simultaneously. These tenets thus apply *mutatis mutandis* to shared responsibility between the EU and its Member States. As the EU has its own legal personality and obligations, it is also independently responsible for the violation of its treaty obligations. The EU's responsibility does not automatically mean that its Member States can also be held accountable solely because of their EU membership. The basic principle under international law is that the legal personality of the EU protects its Member States from accountability, unless agreed otherwise. For example, the simple fact that Greece, Italy, and France are EU Member States does not mean that these Member States are also automatically legally

division" of competence and work among them. However, there is lack of clarity—in legal terms—regarding the content of tasks and the scope of mandate and responsibilities that each of these institutions/agencies/authorities is competent or obliged to exercise in the context of border enforcement and migration control.

Member States' "sovereignty clauses" for the surveillance and control of their external borders prevent the EU from fully exercising its power in this area. Since the conferral of competence to the EU on border management and related migration issues does not result in Member States losing their own competence and responsibility in this domain that is particularly sensitive for them, several legally complex questions arise. The main question—What is the division of competence and responsibility between the EU institutions/agencies and the Member States' authorities on migration-inclusive border management issues?—raises further sub-questions. For example, what issues can be regulated by the EU, and are there any issues to be handled solely by the Member States and their pertinent authorities? Related to that is the question of whether there are any overlapping or even duplicating efforts among such institutions and agencies, and are there loopholes in implementing the EIBM arising from an improper division of their work and responsibilities? If so, how can they be remedied? Another crucial question is what border agency/authority/body and in what cases is to be held responsible for possible violations or inadequate compliance with the applicable EU norms and standards, including fundamental rights provisions, in implementing EIBM. To answer these (sub)questions, this chapter discusses not only the specific tasks related to border management but also, in much broader terms, the division of competences as regards legislative tasks and implementation in the field of migration and border management.

These obscurities stem partly from the fact that the EU migration policy is implemented at different levels (national, European, and international), in different countries (Member States and third countries), and in different forms (from formal and legally binding to informal and non-binding) and degrees of cooperation, which results in the so-called hybrid operations with shared control.[4] Often, various parties are involved in border control, which can result in complex and ambiguous relationships between them when executing border management operations. Given the involvement of different parties, border management operations can be simultaneously subject to multiple legal frameworks and operational plans.[5] Thus, in practice, their roles, tasks, and powers may not always be properly coordinated.

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responsible for violations by EU institutions and agencies of the relevant international and EU law concerning border management and migration; however, a certain degree of their involvement is required, in accordance with the doctrine of attribution. See in this regard, among others, Advisory Council on Migration, 2022, pp. 10–11; Nedeski, 2021, pp. 139–178; Paasivirta, 2016, pp. 159–177; Nollkaemper, 2012–2013, pp. 359–438; Nollkaemper and Plakokefalos, 2017, p. 1108; Ryngaert, 2015, pp. 502–517; Wessel and Dekker, 2015, pp. 293–318; Brölmann, 2015, pp. 358–381.

4 Advisory Council on Migration, 2022, p. 7.

5 Ibid.

This may lead to undue shifting, failure to enforce, or overstepping by the involved institutions/agencies/authorities regarding their legal powers or responsibility (by acting *ultra vires*, that is, beyond their legal power or authority) in the field of border management and migration. There is also a tendency of Member States, and even EU institutions/agencies, to turn a blind eye to violations of international standards and European values, including pushback practices,[6] at the EU's external borders and to pass the buck.[7] The mutual contestation of competence and responsibility coupled with some practical obstacles and lack of clarity about to whom victims can turn if their rights are violated undermine the effective functioning of EU border management and migration law as well as adequate legal protection and access to justice.

Considering such shifting of blame for serious abuses onto each other; fuzziness in the delimitation between competences, tasks, and responsibilities of EU institutions/agencies and national authorities in the safeguarding and management of the EU's external borders; and the need for proper coordination amongst all key players at the EU and Member State level, this chapter examines the division of their work, competences, and accountability (for any violation of international and EU obligations), thereby paying particular attention to also ensuring an effective EU migration regime. In so doing, the chapter addresses the main legal issues and controversies arising from the distinctive roles and complex interplay between different national and European authorities in shaping and developing a migration-inclusive and integrated European border regime by discussing the legal architecture underlying the management and safeguarding of EU borders. This contribution thus focuses on the competence distribution and apportionment implied by this legal and institutional framework, as well as the extent of obligations binding on each concerned player—the pertinent EU institutions/agencies and their own officials or the Member States' authorities responsible for the management of their borders. This chapter also discusses the relevant and more recent jurisprudence of the Court of Justice of the EU (CJEU) to further clarify the division of work and scope of obligations, powers, and procedures under the applicable EU legal framework for the above actors involved in the EU integrated border management. Lastly, the chapter offers some major conclusions by answering the above research (sub)questions.

6 Pushbacks, which are often associated with violence, are regarded as contrary to international and EU law, as they involve the refusal or return of migrants by the Member States without such migrants being given the opportunity to apply for asylum. Consequently, such practices violate the international legal prohibitions of collective expulsions and *refoulment*. Notorious examples include institutionalised pushback practices at borders in Greece and Polish and Lithuanian border guards' sending back to Belarus a vast majority of migrants from Belarus who reached the EU's external borders in 2021. Moreover, Croatian pushbacks are often characterised by violence against migrants and their deliberate humiliation. Bochenek, 2023, pp. 1–2.

7 Advisory Council on Migration, 2022, p. 4 and p. 6.

2. Competencies and responsibilities on border management in the area of freedom, security, and justice

This work's purpose is not to trace back the development of the EU legal framework regulating border management and migration control, as other authors have already provided a historical overview of this evolvement.[8] Instead, this chapter focuses on the existing (supranational) EU norms and applicable standards that impose legal obligations on border authorities/agencies at the Member State and EU levels and also authorise them to make decisions and appropriately (re)act when carrying out border management activities. Therefore, it can be said that, since the mid-1990s, significant legal measures have been taken at the supranational level towards introducing an integrated EU border regime and developing common EU standards and rules in the overall area of border surveillance and control with a view to more effectively manage the external borders of the EU and ensure the uniform (high) level of their safeguarding. However, the Member States have retained their own competences and responsibilities in the area of border safeguarding and entry to their territories as an expression of their sovereignty.

For our discussion, some caveats must be made regarding the main subject of our inquiry and that need to be considered to properly understand and address the vast fragmentation regarding institutions/agencies/authorities in terms of competences and responsibilities for border management and migration in the EU. First, it should be noted that not all EU Member States are also members of the Schengen area, which establishes a unified system of external border controls and allows persons to move freely across borders within that area. One EU Member State—Cyprus (which already applies Schengen rules at its external borders)—is legally obliged to join the Schengen area in the future; moreover, since 31 March 2024, there are no longer border checks on persons at the EU's internal air and maritime borders between Bulgaria and Romania and other countries in the Schengen area, based on Decision (EU) 2024/210 (adopted by the Council of the EU on 30 December 2023).[9] Following this first step, the Council of the EU should take a further step to establish a date for lifting checks at the internal land borders between Bulgaria and Romania and their neighbouring Schengen states (Greece and Hungary). Ireland maintains an opt out, thus remaining outside the Schengen area. Denmark participates in the Schengen system but as a matter of public international law and not within the supranational legal system of the EU. Moreover, Denmark can opt into Schengen's developing measures by implementing these measures in domestic legislation. As regards all Title V measures of the Treaty on the Functioning of the EU (TFEU), building on the Schengen *acquis*, Denmark can decide within six months of their

8 See Fink, 2022, pp. 408–435, 407–409; Geddes and Scholten, 2016, pp. 144–147.

9 Council Decision (EU) 2024/210 of 30 December 2023 on the full application of the provisions of the Schengen acquis in the Republic of Bulgaria and Romania, OJ L, 2024/210, 4.1.2024.

adoption whether to apply them in its national law, in which case, those measures will bind Denmark and the other participating Member States.[10] While the Schengen *acquis* does apply to most EU Member States, the Schengen system also extends beyond the external borders of the EU to non-EU states (the so-called "Schengen Associated Countries" that joined the intergovernmental Schengen cooperation), including Iceland, Liechtenstein, Norway, and Switzerland. This implies that not all EU Member States are bound by all the different pieces and instruments of EU law in the field of border management, asylum, and migration. It has also been shown that Ireland and Denmark are the EU Member States that have most often opted out of these supranational instruments and rules.[11] Consequently, national border authorities' scope of competences and degree of corresponding obligations and responsibilities vary among different EU Member States, as does the extent of their cooperation with the relevant EU agencies.

Second, as the chapter concentrates on the determination and apportionment of (shared) competences and responsibilities of the border actors of different Member States and the EU, it does not consider the role of third countries (non-EU states) and non-state actors (e.g. private entities, security providers, and military companies supplying training, know-how, or equipment for joint operations) with which the EU and Member States may collaborate in the implementation of the Schengen *acquis*. Moreover, the chapter does not address the powers and responsibilities shared between the EU bodies/agencies themselves, such as those arising from the cooperation of the European Border and Coast Guard (EBCG) Agency (or "Agency" hereafter) with other agencies working in the area of freedom, security, and justice, including the EU Agency for Law Enforcement Cooperation, EU Agency for Asylum, and EU Agency for the Operational Management of Large-Scale IT Systems in the Area of Freedom, Security and Justice. These aspects of border management and migration, though interesting and relevant in themselves, are left to other researchers' examination and may as such provide a fertile ground for their future inquiries.

Third, the body of EU law regulating the management of the EU's external borders involves rules that can be grouped, by their content, into two sets. The first group of rules concerns border checks, migration, and asylum—based on Chapter 2, Title V (Area of Freedom, Security and Justice) TFEU—such as the Asylum Procedures Directive (recast) and Return Directive.[12] The second set of these rules pertains to measures of police and criminal justice cooperation—grounded in Chapters 4 and 5, Title V TFEU—such as the exchange of Personal Name Records of Air Passengers

10 Denmark has consistently applied this option to measures concerning border controls and visas. Peers, 2016, p. 89.

11 EU Agency for Fundamental Rights, 2020, p. 15.

12 Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), OJ L180/60; Directive 2008/115/EC of the European Parliament and Council on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ L348/98.

under the Directive on the use of passenger name record data.[13] This chapter is mainly concerned with the former group of legal provisions and, in a narrow sense, Schengen rules that are mostly confined to the regulation of EU external border management (including the Schengen Borders Code and EBCG Regulation as the principal legal sources in this particular area).[14]

Fourth, as the shared competences and responsibilities of EU institutions/agencies and Member States for the management of EU external borders and migration are both internal and external, this work considers both these dimensions when discussing their division.

2.1. Management of the EU's external borders and the area of freedom, security, and justice

One objective common to the Member States and assigned to the EU is the establishment of a common external border management policy. Art. 3(2) of the Treaty on EU (TEU) calls for 'appropriate measures with respect to external border controls' (in addition to asylum, immigration, and the prevention and combat of crime) to offer EU citizens an area of freedom, security, and justice without internal borders in which the free movement of persons is ensured. Therefore, the EU aims to establish common standards for controls at its external borders and to gradually put in place a European integrated system for managing them.

Chapter 2, Title V, Part 3 of the TFEU, on the area of freedom, security, and justice, is devoted to policies on border checks, asylum, and immigration. It spells out the objectives pursued and confers on the EU the competence to reach them. The EU's competence regarding the exercise of controls on crossing its external borders was originally conferred upon it by the Maastricht Treaty of 1992, within the former third pillar, and was placed within Community competence by the Treaty of Amsterdam of 1997. Schengen *acquis* for external borders was thus incorporated into the EU legal order by the Treaty of Amsterdam. The Treaty of Lisbon, as the EU constitutional treaty, clarified the division of competences between the EU and its Member States, including in the area of freedom, security, and justice, where the EU has a shared competence (Art. 4(2)(j) TFEU). Details of its objectives and the methods for its exercise are set out in Title V Part 3 TFEU. The EU's competence concerning both external borders' management and migration issues falls within the area of freedom, security, and justice.

13 Directive (EU) 2016/681 of the European Parliament and of the Council on the use of passenger name record (PNR) data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime, OJ L119/132.

14 Regulation (EU) 2016/399 of the European Parliament and of the Council on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) (codification) [2016], OJ L77/1; Regulation (EU) 2019/1896 of the European Parliament and of the Council on the European Border and Coast Guard and repealing Regulations (EU) 1052/2013 and (EU) 2016/1624 [2019], OJ L295/1.

2.2. Development of EIBM

According to Art. 67(2) TFEU, which covers the general provisions concerning the area of freedom, security, and justice, the EU shall develop a common policy on external border control. Similarly, Art. 77(1) TFEU stipulates that the EU shall develop a policy with a view to

> … (a) ensuring the absence of any controls on persons, whatever their nationality, when crossing internal borders; (b) carrying out checks on persons and efficient monitoring of the crossing of external borders; and (c) the gradual introduction of an integrated management system for external borders.[15]

Art. 77(2) TFEU also states that

> *…the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures concerning: (a) the common policy on visas and other short-stay residence permits; (b) the checks to which persons crossing external borders are subject; (c) the conditions under which nationals of third countries shall have the freedom to travel within the Union for a short period; (d) any measure necessary for the gradual establishment of an integrated management system for external borders; and (e) the absence of any controls on persons, whatever their nationality, when crossing internal borders.*[16]

These provisions do not, in any way, affect the Member States' competence regarding the geographical demarcation of their borders in accordance with international law.[17]

It should be highlighted that use of the term "common policy" above is not neutral, and this expression does not imply sole competence on the part of the EU. However, it reflects the political will to pursue a comprehensive integration process and arrange a division of competences between the EU and its Member States directed towards increasingly favouring the latter. This political desire is now spelled out in the EU founding treaty—the Treaty of Lisbon—and odds are that it will facilitate the exercise of the EU's competence and its justification in terms of the principle of subsidiarity.[18] However, in a field as sensitive as the control of their borders and access to their territory, Member States are reluctant to permit the loss of their competence. The same is also true of migration issues. Member States' competence in this sphere will thus have to co-exist with that of the EU. In this sense, a common

15 Consolidated version of the Treaty on the Functioning of the European Union, Official Journal C 326, 26. 10. 2012, pp. 1–390.
16 Ibid.
17 Art. 77(4) TFEU.
18 Neframi, 2011, p. 6.

external border management policy implements a process of division of competences through the intervention of the EU and Member States, with the ultimate objective of transferring the exercise of the competence 'where neither the scope nor the date may be set in advance'.[19]

In the field of external border management, the EU aims to develop and implement EIBM at the national and EU levels as a compensation measure for the free movement of persons within the EU. EIBM is commonly defined as coordination and cooperation among all relevant authorities and agencies at the EU and Member States' level that are involved in border management activities to ensure effective and coordinated border management at the EU's external borders, thus attaining the objective of open but well controlled and secure borders. Such an EU policy on the integrated management of external borders is a key feature of the area of freedom, security, and justice. EIBM is also central to improving the management of migration, with the goal to manage the crossing of external borders efficiently and address migratory challenges and potential future threats at the EU's external borders, thereby helping address serious cross-border crime and ensure high-level internal security within the EU. At the same time, the actors involved in border management must act with full respect for fundamental rights and in a manner that safeguards the free movement of persons within the EU.

The EBCG Agency, with its headquarters in Warsaw, Poland, supports EU Member States and Schengen-associated countries in the management of the EU's external borders. The Agency is a centre of excellence for border control activities at the EU's external borders, sharing intelligence and expertise with all Member States and neighbouring non-EU countries. Its officers stand together with national authorities to safeguard the Schengen area as they perform various tasks such as surveilling the border, fighting cross-border crime, and assisting in return operations. The origins of the EBCG Agency date back to 1999 when the European Council on Justice and Home Affairs started taking steps towards further strengthening cooperation in the area of border management. This led to the creation of the External Border Practitioners Common Unit—a group composed of members of the Strategic Committee on Immigration, Frontiers, and Asylum and heads of national border control services. The Common Unit coordinated national projects of Ad-Hoc Centres on Border Control. Their role was to oversee EU-wide pilot projects and implement common operations regarding border management.[20] In 2004, the European Council decided to go a step further in improving the Common Unit's procedures and working methods. Following the adoption of Council Regulation (EC) 2007/2004, the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the EU (Frontex) was established. Regulation (EC) 2007/2004 was later repealed by Regulation (EU) 2016/1624, establishing the EBCG Agency. EBCG Agency's mandate was amended most recently with the coming into force of

19 Constantinesco, 1974, p. 287.
20 Frontex, no date b.

Regulation (EU) 2019/1896.[21] This regulation provides the EBCG Agency a reinforced mandate and increased competences compared to Regulation (EU) 2016/1624, such as the EBCG Standing Corps.[22]

The Member States' national authorities responsible for border management, including the coast guard—insofar as they carry out maritime border surveillance operations and any other border control tasks—and the EBCG Agency, share the responsibility to implement EIBM, but in so doing, they assume different roles and tasks. While Member States retain the primary responsibility for the management of their sections of the external borders in their own and all Member States' interests, the EBCG Agency supports the application of EU measures relating to the management of external borders by providing technical and operational assistance and by reinforcing, assessing, and coordinating the actions of Member States that implement those measures. The EBCG Agency is prohibited from supporting any measure or being involved in any activity related to controls at internal borders.[23] Thus, e.g. the Member States are obliged to deploy appropriate staff and resources in sufficient numbers to ensure an efficient, high, and uniform level of control at their external borders ,[24] whereas the EBCG Agency's supportive role includes providing technical expertise, personnel, equipment, and financial resources to the Member States in their management of external borders. However, the EBCG Agency is fully responsible and accountable for any decision it makes and for any activity for which it is solely responsible under Regulation (EU) 2019/1896.[25]

3. EU's objectives on border management issues

Knowing what the EU may or may not do on border management issues is a matter of the objectives conferred upon it in the Treaty of Lisbon. The objectives pursued by the EU in this area are expressed in Art. 77(1) TFEU, including the absence of border controls between Member States, strengthened and efficient control of EU's external borders, and gradual introduction of an integrated system for the management of external borders. Obviously, these objectives are part of the wider objective of offering EU citizens an area of freedom, security, and justice without internal borders to ensure the free movement of persons .[26] In other words, these

21 Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624, OJ 2019 L 295.
22 Frontex, no date b.
23 Art. 7(4) of Regulation (EU) 2019/1896.
24 Art. 15 of Regulation (EU) 2016/399.
25 Art. 7(4) Regulation (EU) 2019/1896.
26 Art. 3(2) TEU and Art. 67(1) TFEU.

objectives express the ultimate objective of the EU's action, which can also be seen from the various "soft law" acts and instruments—that is, management of borders across Europe in a manner that ensures open but well controlled and secure borders. The EU competences on border management issues express the allocation of the above objectives, which affect sensitive spheres within which the Member States wish to retain their competences. Therefore, the EU can only pursue these objectives indirectly, through support of and respect for national competences.

4. Nature and exercise of the EU's competence related to border management issues

To achieve its objectives concerning EIBM, the EU may act, pursuant to Art. 77(2) TFEU, in the following areas: (1) common policy on visas and other short-stay residence permits; (2) checks to which persons crossing external borders are subject; (3) conditions under which nationals of third countries shall have the freedom to travel within the EU for a short period; (4) any measure necessary for the gradual establishment of an integrated management system for external borders; and (5) absence of any controls on persons, whatever their nationality, when crossing internal borders.

Importantly, the Treaty of Lisbon expanded the EU's competence in these areas in the sense that the EU's exercise of the shared competence leads to the Member States' loss of competence, to the extent covered by the common rules. Yet, a distinction should be drawn between the internal and external competence of EU institutions/agencies as regards the above spheres.

4.1. EU's internal competence

Internally, the EU has a shared normative competence but also an operational competence involving support and coordination.

4.1.1. Normative competence

Within the context of the border management policy, the EU may adopt legislative acts in the form of regulations, directives, or decisions in accordance with the ordinary legislative procedure, or pursuant to a special legislative procedure. On border management issues, legislative acts are adopted jointly by the European Parliament and Council of the EU in accordance with the ordinary legislative procedure[27]. The ordinary legislative procedure applies to the adoption of any measure

27 Art. 294 TFEU.

referred to in Art. 77(2) TFEU, covering the common policy on visas, checks of persons crossing external borders, gradual establishment of EIBM, and absence of any controls on persons crossing internal borders. In this context, it is worth noting that Art. 68 TFEU emphasises the role of the European Council in defining the general guidelines to guide intervention by the institutions. Under that provision, 'the European Council shall define the strategic guidelines for legislative and operational planning within the area of freedom, security and justice'.

The issue of the nature and extent of the competences of the EU and its institutions arises during the adoption of legislative acts, which contain the essential components of normative activity. Is should be noted, however, that pursuant to Art. 290 TFEU, legislative acts may provide for the European Commission's adoption of delegated acts to supplement or amend certain non-essential elements of the legislative act.[28] The following remarks are particularly relevant regarding the adoption of legislative acts. The area of freedom, security, and justice is, according to Art. 4(2)(j) TFEU, a principal area in which shared competence applies between the EU and Member States. Similarly, Art. 2(2) TFEU provides that

> When the Treaties confer on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the Union has not exercised its competence. The Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence.

Classifying the EU's competence as shared in the sphere of border management furthers the Member States' competence in several ways.

First, a normative action by the Member States is not ruled out as the Member States retain their normative competence, which is exercised as long as the EU does not act or, in the event of intervention by the EU, as long as the common rules allow the states room for manoeuvre.

Second, legislative intervention by the EU concerning border management in the context of migration must be justified in terms of the principle of subsidiarity. This follows from Art. 5(3) TEU:

> Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.

28 In this regard, the following is an example of the limits of the European Commission's power to supplement non-essential elements of the Schengen Borders Code regarding border surveillance: CJEU, *European Parliament v. Council*, C-355/10, ECLI: EU: C: 2012: 516.

The Member States' national parliaments and the CJEU monitor whether the principle of subsidiarity is duly respected.

According to the declaration in relation to the delimitation of competences, EU institutions may choose to repeal a legislative act, 'in particular better to ensure constant respect for the principles of subsidiarity and proportionality'.[29] The Treaty of Lisbon thus provides for the possibility of shared competence being given back to the Member States. Furthermore, The EU's competence on border management and related migration issues is an approximating or harmonising competence. EU institutions adopt common rules and standards through EU regulations or directives, which Member States have a duty to apply automatically and uniformly (EU regulations) or transpose them (EU directives). Member States may pass their own laws on issues not covered by EU regulations or directives and may also derogate from the common rules, if the EU directives allow this.

Fourth, EU institutions' legislative intervention must always respect fundamental rights (including when granting derogations to the Member States), in accordance with EU law, international law, and the European Convention on Human Rights. This was also confirmed by the CJEU's ruling in *European Parliament v Council of the European Union*.[30] In this case, the CJEU examined the validity of Directive 2003/86 on family reunification. It looked at the possible derogations Member States may avail, in relation to the fundamental rights of third-country nationals, notably the principle of non-discrimination and the right to family life. The CJEU referred to the general principles of Community law as a source of obligations for EU institutions, while considering the 1966 United Nations (UN) International Covenant on Civil Political Rights, 1989 UN Convention on the Rights of the Child, 1950 European Convention on Human Rights, and 2000 EU Charter of Fundamental Rights (not yet a legally binding instrument at that time). The CJEU held that while none of the derogating provisions may be regarded as conflicting with the rights at issue, it is for the national courts to monitor the intervention of the Member States.

Fifth, provisions of the EU founding treaties do not confine the EU's shared competence on border management and related migration challenges to the approximation or harmonisation of the Member States' laws and regulations. If there is no specific provision in the EU founding treaty, application of the principle of proportionality comes into play as regards the intensity of the EU's intervention. In this respect, Art. 5(4) TEU specifies that 'under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties'. EU institutions are accordingly required to 'apply the principle of proportionality as laid down in the Protocol on the application of the principles of subsidiarity and proportionality' .[31] The EU's acts undertaken in the area of border management and migration must thus be justified in terms of the principle of

29 Neframi, 2011, p. 12.
30 ECJ, 27 June 2006, C-540/03, ECR p. I-5769.
31 Art. 5(4) TEU.

proportionality, which can be monitored by the courts. If more intensive intervention by the EU is justified as necessary to achieve the objectives pursued within the framework of the competences conferred upon EU institutions, the EU founding treaties do not preclude the EU's intervention through regulations.[32] Finally, EU institutions have exercised their shared normative competence, pursuant to Art. 77(2) TFEU, particularly through the adoption of regulations.

4.1.2. Coordination, complementary, and support competence

In addition to being normative, the EU's shared internal competence is also operational, with support, coordination, and complementary actions. Art. 4(2)(j) TFEU—which stipulates that the competences shared between the EU and Member States apply to the area of freedom, security, and justice—does not constitute a provision conferring competence.[33] Provisions conferring competence in this area fall within Title V of Part 3 TFEU, which implies that this title may include special provisions as compared to Title I of Part 1 TFEU, which includes Art. 4(2)(j) TFEU. Title V relates to the categories and areas of the EU's competence and aims to clarify the division of competences.

Moreover, the operational competence of coordination is also exercised in administrative cooperation. Art. 74 TFEU provides that 'The Council shall adopt measures to ensure administrative cooperation between the relevant departments of the Member States in the areas covered by this Title, as well as between those departments and the Commission'. Such measures must be justified in terms of the principles of subsidiarity and proportionality. In addition, under Art. 70 TFEU, the Council of the EU may, on a proposal from the European Commission, adopt measures

> … laying down the arrangements whereby Member States, in collaboration with the Commission, conduct objective and impartial evaluation of the implementation of the Union policies referred to in this Title by Member States' authorities, in particular in order to facilitate full application of the principle of mutual recognition.

Such measures can be seen as an example of the duty of sincere cooperation incumbent upon the Member States in accordance with the first paragraph of Art. 4(3) TEU: 'Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties'.

With regard to return operations and return interventions, the EBCG Agency may provide technical and operational assistance to competent authorities of the Member States, without entering into the merits of return decisions, which remain the sole responsibility of the Member States, and in accordance with the respect for

32 Neframi, 2011, p. 12.
33 Triantafyllou, 2005, p. 31.

fundamental rights, general principles of EU and international law including for international protection, and the principle of non-refoulement and children's rights.[34]

4.2. EU's external competence

The EU has an implied external relations power to conclude treaties, even if it does not have express external powers. However, the EU's external powers become exclusive once an issue in its internal law has been fully harmonised.[35] The Treaty of Lisbon confers on the EU an explicit external competence to conclude readmission agreements with third countries. Pursuant to Art. 79(3) TFEU,

> The Union may conclude agreements with third countries for the readmission to their countries of origin or provenance of third-country nationals who do not or who no longer fulfil the conditions for entry, presence or residence in the territory of one of the Member States.

Given that the EU's competence in the area of freedom, security, and justice is a shared competence, in the absence of a specific reference in Art. 79(3) TFEU, its competence to conclude readmission agreements is also shared. This implies that Member States may also conclude readmission agreements with third countries. However, according to Art. 216(1) TFEU, the EU may conclude an international agreement where the EU treaties so provide. Therefore, the EU may exercise its competence to conclude a readmission agreement independent of its Member States.[36] As regards issues other than the readmission of third-country nationals residing illegally in the EU, the EU may conclude an international agreement, acting alone, when its external competence is exclusive. Given the shared nature of the EU's internal competence on border management, the related migration issues, and reluctance of the Member States to cede their competence to the EU, the conditions for the EU's implicit external exclusive competence are not met.

In exercising external border controls, the EU's external competence is addressed by a special provision in the EU treaties. Protocol (No 23) on external relations of the Member States with regard to the crossing of external borders, which is annexed to the TEU and TFEU, considers the need of Member States to ensure effective controls at their external borders, in cooperation with third countries where appropriate. This protocol specifies that

34 Art. 48(1) of Regulation (EU) 2019/1896.

35 Peers, 2016, p. 161.

36 Neframi, 2011, p. 14. The EU Readmission Agreements are intended to supersede earlier legally binding bilateral readmission agreements concluded by Member States to the extent that their provisions are incompatible with those of EU Readmission Agreements. This also is a consequence of shared competence between the EU and its Member States in this area.

> The provisions on the measures on the crossing of external borders included in Article 77(2)(b) of the Treaty on the Functioning of the European Union shall be without prejudice to the competence of Member States to negotiate or conclude agreements with third countries as long as they respect Union law and other relevant international agreements.[37]

It has been argued that Protocol No. 23 should be interpreted to mean that Member States retain external power as long as the issue is not fully harmonised by the EU internal legislation. Put differently, EU external power in this matter is not exclusive by nature *(a priori*) but can only become exclusive by exercise.[38] Accordingly, this Protocol cannot be conceived as precluding the adoption of EU rules that regulate Member States' exercise of their external competence in connection with border controls.

Regulation (EU) 2016/399 (the Schengen Borders Code), which contains specific provisions on Member States' bilateral agreements as regards border crossing, shared border crossing points, maritime traffic, rescue services, etc., may serve as an example of the rule that, even where EU external powers are exclusive, the EU can always choose to authorise its Member States to exercise some external powers to a limited extent. As to the EU's exercise of its external competence in the area of border management, the EU has concluded several treaties with Schengen Associated Countries (Norway, Switzerland, Iceland, and Lichtenstein) solely or largely on the issue of border controls; these treaties dealt with further participation of these countries in the EBCG Agency, the EU's border funds programme, and the relevant European Commission's committees. These treaties are applicable alongside various Schengen association agreements that also concern border controls and other border management-related issues.

In addition to the possibility of Member States entering into agreements with third countries concerning measures on the crossing of EU external borders, the EU's cooperation with third countries (non-EU countries) on border management issues is carried out mainly through activities of the EBCG Agency. Regulation (EU) 2019/1896 broadened the EBCG Agency's mandate in several areas, including cooperation with third countries. Pursuant to Art. 73 of this regulation, the EBCG Agency may cooperate with the authorities of third countries competent in spheres falling within its mandate.[39] This EBCG Agency's cooperation with third countries covers all areas of the Agency's operational work, including information exchange, risk analysis, joint operations, return, training, research, and innovation. It can be divided roughly into three types of cooperation: (1) operational cooperation and

37 Consolidated version of the Treaty on the Functioning of the European Union, Protocol (No 23) on external relations of the Member States with regard to the crossing of external borders, OJ C 202, 7. 6. 2016, pp. 303–303.

38 Peers, 2016, p. 162.

39 Fink and Rijpma, 2022, pp. 408–435, 422–424; Coman-Kund, 2019, pp. 34-58; Ekelund, 2019, pp. 79–99; Coman-Kund, 2018, pp. 178–193; Fink, 2012, p. 20.

assistance, (2) technical assistance through the launch and financing of different projects in third countries, and (3) return cooperation. The following is a brief outline of each of these three types of the EBCG Agency's cooperation with non-EU countries.

For the execution of operational and technical cooperation, the EBCG Agency may negotiate and, upon approval by the European Commission, conclude working arrangements with the relevant authorities of third countries that contain provisions on the nature, scope, and purpose of the cooperation, as well as on the respect for fundamental rights and protection of data as required by EU and international law. While these arrangements do not constitute international agreements and are thus not legally binding under public international law for the parties concerned, they represent the highest level of the EBCG Agency's commitment to third countries for long-term technical and operational cooperation within its remit. At the time of this writing, the EBCG Agency has concluded working arrangements with 19 national authorities (Albania, Armenia, Azerbaijan, Belarus, Bosnia and Herzegovina, Canada, Cape Verde, North Macedonia, Georgia, Kosovo, Moldova, Montenegro, Nigeria, the Russian Federation, Serbia, Turkey, Ukraine, the United Kingdom, and the United States) as well as with two regional organisations (Commonwealth of Independent States Border Troop Commanders Council and the Mediterranean Regional Response Initiative Regional Centre in Western Balkans).[40]

Operational cooperation may also include the reception of third state staff or deployment of EU staff within the third state. By deploying the European standing corps, as well as technical equipment, the Agency supports both EU and non-EU countries in various border and migration management tasks, including border control (border surveillance and border checks), identification and registration of migrants, screening and debriefing, and support in carrying out coast guard activities. Joint operations may thus serve as a useful tool to assist third countries managing disproportionate migration flows, detect and prevent cross-border crime, contribute to the development of European cooperation on coast guard functions, and learn common EU border management standards and practices as part of their daily work.[41] Third states regularly participate in joint operations through the exchange of observers .[42] The EBCG Agency may also deploy Liaison Officers to non-EU countries to facilitate cooperation between the border management authorities of the host country and the Agency across various areas of the Agency's mandate, including contribution to the prevention of irregular migration and facilitation of returns.[43]

Another important aspect of operational cooperation between the EBCG Agency and third countries is the status agreements that allow the Agency to operationally assist third states on the ground in the framework of a joint operation. Status agreements provide the legal framework through which the EBCG Agency can assist non-EU

40 Frontex, no date a.
41 Frontex, 2021, p. 8.
42 Art. 78(2) of Regulation (EU) 2019/1896.
43 Art. 77 of Regulation (EU) 2019/1896.

countries in border management and deploy EBCG teams, standing corps officers, and other staff taking part in operations on their territory in full respect for their national sovereignty, along with patrol cars, helicopters, and other technical equipment to help detect criminal activities such as migrant smuggling; human trafficking; committing document fraud; and smuggling stolen vehicles, illegal drugs, weapons, and excise goods. These agreements are initiated and negotiated by the European Commission, with authorisation of the Council of the EU and consent of the European Parliament. They govern, *inter alia*, the scope of the operation, tasks, and executive powers of the team members; civil and criminal liability of the authorities involved; and the possibility for individuals to lodge complaints for alleged fundamental rights violations.[44] Subject to prior conclusion of a status agreement between the EU and the third country concerned, the EBCG Agency may carry out deployments and joint operations on its territory. Such a cooperation between the EU and third countries is an important element of the EIBM concept. The new mandate enables the EBCG Agency to assist those countries with a status agreement throughout their territory and not only in the regions bordering the EU, as was the case with the Agency's previous mandate. Unlike working arrangements, status agreements allow the EBCG Agency staff to exercise certain executive powers in third countries, such as border checks and registration of persons.

Status agreements allowing for joint operations can now be concluded with a wider range of countries and are no longer limited to the EU's neighbouring countries. Thanks to status agreements, the EBCG Agency can assist the third countries concerned with managing migratory flows, countering illegal immigration, and tackling cross-border crime. At the time of this writing, status agreements have been negotiated, are in force, or are pending signature with Albania, Bosnia and Herzegovina, Moldova, Montenegro, North Macedonia, and Serbia.[45] The status agreements with Bosnia and Herzegovina, Montenegro, and Serbia are being renegotiated to make full use of the EBCG Agency's reinforced role under Regulation (EU) 2019/1896. Cooperation with Western Balkan countries, including through the deployment of the EBCG

44 Art. 73(3) of Regulation (EU) 2019/1896. Rijpma, 2017, pp. 591–592.

45 Albania (agreement in force as of 1 May 2019 and new enhanced agreement under negotiation), Bosnia and Herzegovina (new enhanced agreement under negotiation), Moldova (agreement in force as of 1 November 2022), Montenegro (new enhanced agreement signed, provisionally applied as of 1 July 2023), Republic of North Macedonia (agreement in force as of 1 April 2023), Serbia (agreement in force as of 1 May 2021 and new enhanced agreement under negotiation); Council of the EU and the European Council, 2023; Agreement between the European Union and the Republic of North Macedonia on operational activities carried out by the European Border and Coast Guard Agency in the Republic of North Macedonia, OJ L 61, 27.2.2023, pp. 3–19; Agreement between the European Union and the Republic of Moldova on operational activities carried out by the European Border and Coast Guard Agency in the Republic of Moldova, OJ L 91, 18.3.2022, pp. 4–21; Status Agreement between the European Union and the Republic of Serbia on actions carried out by the European Border and Coast Guard Agency in the Republic of Serbia, OJ L 202, 25.6.2020, pp. 3–15; Status Agreement between the European Union and Montenegro on actions carried out by the European Border and Coast Guard Agency in Montenegro, OJ L 173, 3.6.2020, pp. 3–11; Status Agreement between the European Union and the Republic of Albania on actions carried out by the European Border and Coast Guard Agency in the Republic of Albania, OJ L 46, 18.2.2019, pp. 3–10.

Agency staff, is crucial for early detection and prevention of irregular migration movements and other migration challenges on the Western Balkans route. The EU's conclusion of status agreements with Western Balkan countries can strengthen the protection of the EU external borders and contribute to efforts by countries in the Western Balkans to block smugglers from using their territories as transit stages. In July 2022, the EU also started negotiations to conclude status agreements with Mauritania and Senegal.

Border management teams from the EBCG standing corps deployed under a status agreement remain, at all times, under the command and control of the authorities of the host country. Any deployment under a status agreement requires the consent of the host country, EBCG Agency and, where applicable, any neighbouring EU Member States. An operational plan, negotiated between the EBCG Agency and the relevant authority of the host country, needs to be made for each joint operation (i.e. an initiative to tackle illegal immigration or cross-border crime, or provide technical and operational assistance at the borders of the country concerned with an EU Member State) or rapid border intervention (i.e. an initiative to respond quickly to specific and disproportionate challenges on the borders of the country concerned with an EU Member State) on the territory of the country concerned. Such an operational plan needs to set out in detail the description and assessment of the situation and operational objectives; geographical scope of the action and description of tasks; composition of teams and other relevant staff; any technical equipment to be deployed; cooperation with other agencies, non-EU countries and international organisations; and respect for fundamental rights, including personal data protection.[46] Members of a border management team have the authority and powers necessary for border control as set out in the operational plan. They operate under instructions from and in the presence of relevant authorities of the country concerned and may, under certain conditions, carry and use weapons. They also receive an accreditation document confirming their identity and right to work under the operational plan.

An operational activity under a status agreement can also be suspended or terminated. The EBCG Agency's executive director is required to withdraw financing from, suspend, or terminate an operational activity if, e.g. an operational plan is not being properly implemented or the executive director considers that there have been serious violations of fundamental rights or international protection obligations related to the activity concerned or such breaches are likely to continue. In such cases, either party—the EU or the third country concerned—may suspend or terminate the status agreement in writing.[47]

Generally, joint operations conducted on the territory of third states under the status agreements follow the same principles as within the EU. The third states' border authorities have the power to issue instructions to all border management personnel, including officers deployed by the EBCG Agency, whereas the Agency only retains

46 *Frontex status agreements with non-EU countries,* 2023.
47 Ibid.

the power to communicate its views on the instructions issued to the third countries' border authorities or to suspend or terminate the joint operation altogether .[48] However, Melanie Fink and Jorrit J. Rijpma[49] pointed out that it is necessary to take appropriate measures to arrange the accountability issues or mechanism with regard to possible fundamental rights violations occurring in the implementation of joint operations; this is because the EU's control over border management standards and practices in third states is significantly more limited than that over Member States, as the latter must adhere to the Schengen, immigration, and asylum *acquis* and can be held accountable before the CJEU if they violate or do not comply with these rules. Such precautionary measures may include a prior respect for fundamental rights screening of the third country concerned by the EBCG Agency and EU Member States, establishing additional monitoring mechanism(s), and specifying where and how victims can seek a remedy if their rights have been violated. Otherwise, the EBCG standing corps under the third state's command may risk being involved in fundamental rights violations that cannot always be redressed within the EU legal system.[50]

Besides the physical operational presence of the EBCG Agency's personnel in the territory of third countries, the Agency may assist non-EU countries by launching and financing targeted technical assistance projects in these countries, thereby utilising various European Commission funding instruments. In this second type of international cooperation, the EBCG Agency aims to support the development of sustainable border and migration management solutions in priority non-EU countries through a set of tailored activities. The EBCG Agency develops its technical assistance work through EU-funded projects, its own funded technical assistance activities, and the provision of external support to EU-funded programmes. The EBCG Agency's technical assistance in these projects may thus involve training, capacity building, and exchanging information, as well as purchasing small equipment for border management.[51] In this context, the EBCG Agency tends to ensure that its technical assistance action complements the EU's overall external relations policies. While each technical assistance project focuses on a different priority region and topics, all project activities address specific needs of the beneficiary countries and support them in building their capacities in border security and management. These projects contribute to building trust, developing structured partnerships, and exchanging good practices in the domain of integrated border management, as well as laying the foundation for strategic cooperation or building on already established functional relationships between the national authorities of relevant third countries and the EBCG Agency.[52]

The third type of cooperation between the EBCG Agency and third counties' authorities is working together on returns. The EBCG Agency acts as a key partner

48 Arts. 43(1–2) and 46 of Regulation (EU) 2019/1896.
49 Fink and Rijpma, 2022, pp. 408–435, 424.
50 Ibid.
51 Ibid.
52 Frontex, 2021, p. 14.

in not only assisting EU Member States in returning non-EU nationals but also delivering technical and operational assistance to non-EU countries. Indeed, effective implementation of returns requires cooperation with third countries' authorities in each phase of the return process. This is why the EBCG Agency offers its support in the identification procedure, workshops, study visits, seminars, and dedicated training courses focusing on return operations and return monitors, who play a key role in ensuring full compliance of return operations and return interventions with the EU fundamental rights standards.[53] The aim of the return cooperation activities is to enhance the involved non-EU countries' knowledge and understanding of EU procedures on return, readmission, and reintegration, as well as to develop an integrated return management system in line with the best EU standards and in full respect of fundamental rights along the different procedures. Moreover, the EBCG Agency is establishing its Reintegration Programme to include reintegration services for (non-)voluntary returnees from all EU Member States along with return counselling and capacity-building projects.[54]

Relevant authorities of third countries generally participate only in pre-return activities—that is, identification of third-country nationals subject to return procedure and the acquisition of travel documents .[55] However, in "collecting return operations", a third country of return can provide the means of transport and return escorts .[56] Given that the EBCG Agency's role is limited to coordinating the return and ensuring the presence of a forced return monitor, making sure the third country authority's conduct towards non-EU nationals subject to the return procedure is fundamental-rights compliant may be particularly challenging for the Agency.[57] The function of a Return Coordinator was created under the New Pact on Migration and Asylum. The first EU Return Coordinator was appointed in March 2022 to establish an effective and common European return system by coordinating actions between the EU and EU Member States.[58] The Return Coordinator works closely with the High-Level Network for Returns, which consists of senior representatives from institutions responsible for returns in Member States and Schengen Associated Countries, the EBCG Agency, and the EU Agency for Asylum. The High-Level Network for Return supports the Return Coordinator with coherent and consistent implementation of the EU return policy by identifying priority activities to develop national frameworks, improve administrative and technical capacities to carry out returns, and enhance cooperation between EU Member States and the EBCG Agency.[59]

53 However, it is worth noting that the EBCG Agency's assistance in return operations does not extend to, e.g. offering return flights from third countries to countries of origin.
54 Frontex, 2021, p. 9.
55 Art. 48(1)(a)(i)–(ii) of Regulation (EU) 2019/1896.
56 Art. 50(3) of Regulation (EU) 2019/1896.
57 For the same view, see also Fink and Rijpma, 2022, pp. 408–435, 424.
58 The European Commission appointed Ms Mari Juritsch as the first EU Return Coordinator.
59 European Commission, no date.

4.3. EU's responsibility for border management activities at the EU's external borders and in third countries

As the EBCG Agency exercises the EU's external competence in third countries through its activities, it also bears the responsibility for such actions, including those involving fundamental rights violations. Given that border management is essentially a delicate activity involving fundamental rights, border management staff and other competent authorities need to protect and promote fundamental rights and uphold the highest professional and behavioural standards in border management in their daily work. This holds true for border control and surveillance performed both solely by Member States' and through EBCG Agency-assisted operations. Particularly sensitive cases regarding the fundamental rights of migrants and refugees include their death or disappearance at Europe's land and sea borders,[60] denial of entry into the Member States' territory to individuals, pushbacks of migrants or their forcible return to their country of departure, and detention of asylum seekers.

Notwithstanding certain improvements and developments in showing respect for the human rights of those who arrive at the EU's external borders, the growing number of people crossing the EU's external borders or attempting to enter the EU in an unauthorised manner pose a wide range of fundamental rights challenges for integrated border management. EU law also requires border management activities to strictly and fully respect the right to seek asylum.[61] Control of the EU's external land and sea borders is a joint responsibility of all EU Member States. However, when human rights violations occur in the operationalisation of this border management, what has happened and who exactly is responsible for what act are not always clear.[62] Moreover, such incidents often take place in rather inaccessible locations, such as in military zones or at sea during border control and surveillance.

Frequently, various actors are involved in border control and management, which may entail highly complex and ambiguous relationships between the players when carrying out joint operations. The multilevel governance system characteristic of the EU integrated border management thus raises several concerns and complex

60 The issue of respect for the right to life at European borders has also come before the European Court of Human Rights (ECtHR). The ECtHR rendered three significant judgments in the cases against Greece, Croatia, and Hungary, clarifying aspects of the right to life under Art. 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms with regard to deaths of migrants at borders and failure of the competent authorities to take all reasonable measures to prevent the loss of lives in the event of a shipwreck. ECtHR, *M.H. and Others v. Croatia*, Nos. 15670/18 and 43115/18, 18 November 2021; *Safi and Others v. Greece*, No. 5418/15, 7 July 2022; *Alhowais v. Hungary*, No. 59435/17, 2 February 2023.

61 Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders, OJ 2016 L 77 (Schengen Borders Code), Article 4; Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624, OJ 2019 L 295 (Frontex Regulation), Article 80.

62 Advisory Council on Migration, 2022, p. 3.

questions, notably in cases in which the EBCG Agency plays a role, such as who is to be held accountable and to what extent if fundamental rights are violated or not respected in such joint border management activities— the Member States, third countries, the EBCG Agency, or all of them?

This section addresses these questions mainly from the perspective of the EBCG Agency's obligations and responsibility concerning fundamental rights protection, whereas the Member States' obligations and responsibilities in this area are more thoroughly discussed in section 6. It should first be noted that, unlike the Member States, the EU and its institutions/agencies (including the EBCG Agency) cannot be brought before national courts or before the European Court of Human Rights (ECtHR) for alleged fundamental rights violations. This is because the EU is not a party to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). This will of course change when the EU accedes to the ECHR, as envisaged by Art. 6(2) TEU. However, as we shall see below, victims of such violations can bring a case before the CJEU, provided that some stringent requirements are met. Over the past few years, the EU Agency for Fundamental Rights (FRA) observed a gradual backsliding in fundamental rights protection when it comes to the management of EU's external borders.[63] Likewise, many recent reports issued by the UN and Council of Europe bodies, national human rights institutions, and civil society organisations have shown persistent and serious fundamental rights violations against migrants and refugees at the EU's external land and sea borders.[64] These reports indicate that the seriousness and intensity of reported fundamental rights abuses in connection with border management have increased considerably in recent years, with more and more border locations in several Member States involved in such human rights incidents (including verbal and physical violence against migrants, ill-treatment of migrants, failure to rescue migrants at sea, people arriving at the EU's external borders stripped of their clothing and their property stolen, forced separation of families, summary expulsion of those seeking asylum, non-compliance with the principle of non-refoulement during joint operations, and inadequate handling of the deteriorating detention conditions within the Member States).[65] Many of these incidents go unreported. More worryingly, the victims of these fundamental rights violations also include vulnerable persons and unaccompanied children. The increase in irregular arrivals to the EU and the ways in which some of these arrivals have occurred have led to other negative developments that affect the respect of fundamental rights in enforcing border control and managing migration. Low-ranking staff without full border guard training and military personnel have begun to patrol

63 FRA, 2023a, p. 9.

64 See UN Refugee Agency (UNHCR), 2022b; UN Human Rights Council, 2021, pp. 13–14; Office of the UN High Commissioner for Human Rights (OHCHR), 2022d; UN Security Council, 2023, p. 16; UN Committee on the Rights of the Child (CRC Committee), 2022, p. 13; CRC Committee, 2022; CRC Committee, 2018; Council of Europe and Group of Experts on Actions against Trafficking in Human Beings, 2023, p. 30.

65 Mungianu, 2016; see also Human Rights Watch, 2011.

borders and apprehend new arrivals. It is not impossible for this work to be done by private contractors in the near future. However, EU border management standards require border control staff, particularly those that may use coercive measures, to have a high degree of specialisation and professionalism, as well as a diverse skill set, including in fundamental rights protection.

The EBCG Agency must strictly adhere to the Charter of Fundamental Rights of the European Union,[66] the ECHR,[67] and relevant instruments of international and human rights law, including the 1951 Convention relating to the Status of Refugees and its 1967 Protocol.[68] Fundamental rights are integrated into the EBCG Agency's Codes of Conduct,[69] the Common Core Curricula for border guards,[70] and more specialised trainings, such as courses designed specifically for sea or land border surveillance officers or forced-return monitors to enhance their understanding of fundamental rights and enable them to identify potential violations of these rights. While these guidelines, instructions, courses, and trainings are certainly welcome and may help increase the level of human rights protection in common border management activities, they do not resolve the major challenge of how to ensure the EBCG Agency's responsibility for violation of fundamental rights, nor do they provide any specific guidance on how to divide or allocate such a human rights accountability between the EBCG Agency and the border authorities of Member States and third countries. Because joint border management operations, by nature, involve multiple public actors from different jurisdictions and because of the specific role the EBCG Agency plays in these operations, it is very challenging to determine which actor is responsible for what.[71]

It is one of the principles of Regulation (EU) 2019/1896 [72] that members of the border management teams seconded or deployed by the Member States or EBCG Agency are to be treated equal to the border staff of the host Member State with regard to their civil liability (for any damage caused by them during their operations) and criminal liability (for any criminal offences that might be committed against or by them) under national law. However, as regards the disciplinary authority, the team members remain subject to the disciplinary measures of their home Member State, and the home Member State 'shall provide for appropriate disciplinary or other measures in accordance with its national law regarding violations of fundamental rights or international protection obligations in the course of any operational activity by the Agency' .[73] An important question, in this context, is what the possibility is

66 Charter of Fundamental Rights of the European Union, OJ C 326, 26.10.2012, pp. 391–407.
67 Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 005).
68 Convention Relating to the Status of Refugees, 28 July 1951, UNTS, vol. 189, p. 137; Protocol Relating to the Status of Refugees, 31 January 1967, UNTS, vol. 606, p. 267.
69 Frontex, 2020, p. 1.
70 Frontex, 2019, p. 4.
71 Fink, 2018; Fink, 2020, p. 532.
72 Arts. 84 and 85 of Regulation (EU) 2019/1896.
73 Art. 43(5) of Regulation (EU) 2019/1896.

that individuals whose fundamental rights have been affected can hold the EBCG Agency to account. Given that the EBCG Agency is the special agency of the EU, it cannot be held accountable before the courts of Member States or third countries, international judicial institutions, or settlement bodies. Thus, the only direct remedies available to individuals are those provided for in the EU legal order.[74] Another major obstacle in trying to hold the EBCG Agency liable for fundamental rights violations is that, generally, very little information on the Agency's activities is available to the wider public. This lack of transparency regarding the work of the EBCG Agency makes it difficult to work out the Agency's exact role and contribution when dealing with such incidents and situations.[75]

Art. 111 of Regulation (EU) 2019/1896 obliges the EBCG Agency to establish and further develop an independent and effective complaints mechanism to monitor and ensure respect for fundamental rights in all the activities of the Agency. According to this article, a special complaints procedure must be available to individuals who consider themselves victims of fundamental rights violations that occurred during border management operations in which the EBCG Agency took part, including a joint operation, pilot project, rapid border intervention, migration management support team deployment, return operation, return intervention, or operational activities of the Agency in a third country. Any persons who are directly affected by the actions or failure to act on the part of the staff involved in such EBCG Agency actions and who consider that their fundamental rights have been violated because of these actions or failure to act (e.g. failure to refer persons who inquired about international protection to the relevant authorities), may submit a written complaint to the Agency. This complaint mechanism was set up in 2016 following the adoption of 'The Agency's Rules on the Complaints Mechanism' by the Executive Director of the EBCG Agency.[76]

It follows from Art. 111 of Regulation (EU) 2019/1896 and Arts. 1 and 3 of the Rules on Complaints Mechanism that the fundamental rights officer is responsible for handling the complaints procedure, in particular, reviewing the admissibility of complaints, registering admissible complaints, and forwarding all registered complaints to the Executive Director of the EBCG Agency and forwarding complaints concerning members of the teams to the home Member State and their relevant authorities or bodies competent for border management, return, and fundamental rights. If a registered complaint pertains to a staff member of the EBCG Agency, 'the fundamental rights officer shall recommend appropriate follow-up, including disciplinary measures, to the Executive Director and, where appropriate, referral for the

74 Fink and Rijpma, 2022, pp. 408–435, 426.

75 Ibid.

76 Executive Director Decision No R-ED-2016-106 of 6 October 2016 on the Complaints Mechanism, Annex 1 'The Agency's Rules on the Complaints Mechanism', 6 October 2016. In 2022, this Executive Director's decision was replaced by the following decision of the Management Board: Management Board Decision 19/2022 of 16 March 2022 adopting the Agency's rules on the complaints mechanism, Annex 1 'The Agency's Rules on the Complaints Mechanism', 16 March 2022.

initiation of civil or criminal justice proceedings in accordance with this Regulation and national law'.[77] Substantive decisions concerning complaints are then made by the Executive Director who must ensure the appropriate follow-up and, within a determined timeframe, report back to the fundamental rights officer regarding the findings and implementation of disciplinary and other appropriate measures taken by the EBCG Agency in response to a complaint.

The complaints procedure is a bit different when a registered complaint concerns a team member from a host Member State or another participating Member State, including a seconded member of the teams or seconded national expert. In such a case, the home Member State must 'ensure appropriate follow-up, including disciplinary measures, referral for the initiation of civil or criminal justice proceedings as necessary, and other measures in accordance with national law'.[78] Then, the Member State in question must make a substantive decision and report back to the fundamental rights officer within a determined time period with the findings and follow-up to the complaint. The EBCG Agency must follow up on the matter, and the fundamental rights officer needs to inform the Agency's Executive Director and management board if the relevant Member State does not report back or its response is inconclusive. If such a member of the border management teams is found to have violated the obligations on international protection or fundamental rights during a common border management operation, the Member State concerned must, upon the EBCG Agency's request, remove that member immediately from the Agency's activity or the standing corps.[79]

The possibility of submitting free of charge a written communication containing allegations of fundamental rights violations, addressed to the EBCG Agency by any person of any age affected by the actions or failure to act of any person involved in an Agency activity, is indeed a significant step forward in safeguarding the respect for fundamental rights in all the EBCG Agency's activities and holding the Agency responsible for such violations. However, while this complaints mechanism of the EBCG Agency, set out in Art. 111 of the Regulation (EU) 2019/1896, is independent of other possible remedies (whether administrative or judicial), it is by nature an administrative (i.e. non-judicial) procedure that is internal to the EBCG Agency, thus raising concerns about its independence. Therefore, it cannot be seen as providing for an effective remedy and access to an independent and impartial adjudicative body within the meaning of Art. 47 of the Charter of Fundamental Rights of the EU.

In addition to the complaints mechanism outlined above, Art. 112 of Regulation (EU) 2019/1896 provides for interparliamentary cooperation in the field of EU border management issues, while considering that the specific nature of the EBCG is composed of the EBCG Agency on the one hand and Member States' competent national authorities on the other hand; this ensures that the scrutiny functions of the

77 Art. 111(6) of the Regulation (EU) 2019/1896.
78 Art. 111(7) of the Regulation (EU) 2019/1896.
79 Art. 111(8) of the Regulation (EU) 2019/1896.

respective parliaments (European Parliament's control over the Agency's work and the national parliaments' control over their national border authorities' work) are effectively exercised. This is also in accordance with the EU's core functional treaties and national laws of Member States, which provide that the European Parliament and national parliaments may cooperate within the meaning of Art. 9 of Protocol No 1 on the Role of National Parliaments in the European Union annexed to the TEU and TFEU. Moreover, the EBCG Agency must transmit its annual activity report to the national parliaments.

As previously highlighted, unlawful conduct by the EBCG Agency as a specialised EU body may lead to the EU being responsible under international law. In the public international law, entities with international legal personality are responsible for violations of their obligations or their non-compliance with them. Thus, a crucial question arising in our context is whether the EU can be said to have that kind of international legal personality. The most obvious way for an international organisation or entity to acquire legal personality is to include a specific mention to that effect in its constituent instrument. This was done explicitly for the EU with the Treaty of Lisbon. More specifically, Art. 47 TEU specifies that 'The Union shall have legal personality'. However, the fact that the EU has an international legal personality does not in any way authorise it to legislate or act beyond the competences conferred upon it by the Member States in the founding treaties.[80] Moreover, some legal and political scholars pointed out that legal personality can also be implicitly conferred to an international organisation or entity.[81] This view has been long accepted in public international law and also confirmed by the International Court of Justice (ICJ) in its advisory opinion on the UN.[82] All this implies that the EU's responsibility arises for any action or omission that can be attributed to its institutions, bodies, offices, and agencies, including the EBCG Agency, and constitutes a breach of the EU's international obligation, thus qualifying as an internationally wrongful act.[83]

Attribution of conduct to the EU and/or its institutions/bodies/offices/agencies may be particularly challenging when it comes to border management activities and

80 Declaration concerning the legal personality of the European Union.

81 For further developments on this point, see de Schoutheete and Andoura, 2007, pp. 3–7; Brownlie, 2003, p. 649; Dailler and Pellet, 2002, p. 596.

82 ICJ, 1949, p. 174. In its advisory opinion, the ICJ held that the UN was intended to exercise functions and rights that could only be explained based on the possession of a large measure of international legal personality and the capacity to operate upon the international plane. According to the ICJ, the UN had the capacity to bring a claim and give it the character of an international action for reparation of the damage caused to it. The ICJ further declared that although, according to the traditional rule, diplomatic protection must be exercised by the national state, the UN is an international organisation and, as such, should be considered in international law as possessing the powers that, even if they are not expressly stated in the UN Charter, are conferred upon it as being essential to the discharge of its functions. These ICJ findings concerning the international legal personality of an international institution are fully applicable to the EU, although the EU is to be regarded as a *sui generis* international entity rather than a typical international organisation.

83 Pellet, 2010, p. 6.

joint operations coordinated by the EBCG Agency because of various actors involved in such activities and operations. The Draft Articles on the Responsibility of International Organizations provide in Art. 7 that

> The conduct of an organ of a State or an organ or agent of an international organization that is placed at the disposal of another international organization shall be considered under international law an act of the latter organization if the organization exercises effective control over that conduct.[84]

This text indicates that in assigning the responsibility to the EU as a *sui generis* international entity in a situation in which the Member States put their organs at the disposal of the EU, a crucial question arises: Who effectively controlled the course of conduct that resulted in a breach of the EU's international obligation? Normally, the host state (a Member State or third country) gives operational instructions in the EBCG Agency's operations and activities, except for large vessels and other military-type equipment, over which the contributing Member States maintains some components of command and control.[85] This entails that fundamental rights violations or other breaches of international obligations occurring during such common operations are usually attributable to the Member States or third countries hosting or contributing to these activities. By way of illustration, the previous executive director of the EBCG Agency, Fabrice Leggeri, made an unprecedented decision in January 2021 to suspend the Agency's activities at the Hungarian external borders when this Member State's disregard for EU law and human rights was certified by the CJEU. This move of the EBCG Agency was intended to remedy its already compromised reputation amid increasing concerns about its involvement in scandals and allegations concerning maladministration and human rights violations at the EU's external borders.[86]

Another important example is a recent decision issued by the European Ombudsman following its inquiry into the *Adriana* shipwreck tragedy in June 2023.[87] The incident led to public concern about the role and responsibilities of the EU in protecting lives in the context of its migration and border policies. Given that the EBCG Agency, through its joint operations and surveillance activities, is often involved to some extent in the response to maritime emergencies, it is understandable that public disquiet extends to its role. In response to the Pylos tragedy, the European Ombudsman thus decided to open an own-initiative inquiry. While the inquiry found that the EBCG Agency had followed the applicable rules and protocols, it also revealed shortcomings in how the Agency reacts in maritime emergency situations in which it becomes involved, in the context of either its joint maritime operations or

84 International Law Commission, 2011, p. 3.
85 Art. 82(4) of Regulation (EU) 2019/1896.
86 Gatta, 2021.
87 European Ombudsman, 2024.

separate multipurpose aerial surveillance activities. Moreover, the inquiry demonstrated the need for greater clarity on roles and responsibilities and, crucially, on the nature of the EBCG Agency's cooperation with national border authorities. There are, however, certain limited and specific circumstances in which fundamental rights violations committed during common border management activities may be attributable to the EBCG Agency and, consequently, the EU. These circumstances include, e.g. the EBCG Agency's operational plan not respecting fundamental rights, the Agency compelling the host Member State or third country to issue certain instructions that violate fundamental rights or international protection obligations, or the Agency entirely bypassing the border authorities of the host Member State or third country by giving (*ultra vires*) instructions to the deployed border management staff and assets, thereby exceeding the scope of powers given to it by EU law.[88]

The EBCG Agency may also be held accountable for its complicity in committing human rights violations, whether or not the violation in question is attributable to it. In other words, the Agency has a positive obligation to ensure compliance with the EU fundamental rights law in common border management actions by taking all reasonable measures to protect individuals from the risk of fundamental rights violations the Agency is or should be aware of.[89] This positive obligation to protect is explicitly placed on the EBCG Agency in Art. 80 of Regulation (EU) 2019/1896, which requires that, in performing its tasks, the Agency should guarantee that the fundamental rights are complied with. This means that the EBCG Agency must make reasonable efforts to ensure that its standing staff, and all other participants in common border management operations, always act in line with the fundamental rights and the relevant EU and international law in performing their tasks and exercising their powers. Moreover, the law of international responsibility also includes rules on the international organisation's derivative responsibility. Art. 14 of the Draft Articles on the Responsibility of International Organizations provides certain requirements for aid or assistance, giving rise to the international responsibility of an aiding or assisting international organisation.[90] The first condition is that an international organisation that aids or assists a state or another international organisation in the commission of an internationally wrongful act by that state or another organisation does so with knowledge of the circumstances of the internationally wrongful act. If the assisting or aiding international organisation is unaware of the circumstances in which its aid or assistance is intended to be used by the Member States, third countries, or other international organisation, it bears no international responsibility. The second requirement for the international responsibility of an international organisation is that the aiding or assisting international organisation only incurs its

88 Fink, 2018, pp. 111–139.

89 On positive human rights obligations in the context of the European Convention on Human Rights, see *inter alia* Mowbray, 2004, pp. 1–96; Xenos, 2012, pp. 57–140; Lavrysen, 2016, pp. 45–130.

90 International Law Commission, 'Report of the Sixty-Third Session: Articles on the Responsibility of International Organizations' (UN Doc A/66/10, 2011).

responsibility if the act in question would be internationally wrongful if committed by that international organisation itself, thus linking the international organisation's responsibility to the breach of an obligation that was binding on the international organisation when the organisation contributed significantly to such a breach.

The EU may avoid its derivative responsibility for wrongful acts committed by the border authorities of Member States or third countries because the EBCG Agency provides aid and assistance to them in the context of joint border management operations by concluding with them a memorandum stating the following: (1) If the EBCG Agency has reason to believe that the border management authorities and staff of Member States or third countries are involved in such joint operations are violating human rights law, international humanitarian law, and/or refugee law and if, despite the EBCG Agency's intercession with the national border authorities and staff of the Member States third countries in question, the Agency has reason to believe that such violations are still being committed, then the Agency may not lawfully continue to support that border management operation and must cease its participation completely. (2) The EBCG Agency may not lawfully provide logistic or service support to any such border management operation if it has reason to believe that the national border management units involved are violating any of those bodies of law. This follows directly from the EU's obligations under the customary international law and the EU Charter of Fundamental Rights and other international legal instruments to uphold, promote, and encourage respect for human rights, international humanitarian law, and refugee law.[91]

It is possible that the EU—alongside Member States or third countries—incurs international responsibility for fundamental rights violations and breaches of international protection obligations during the EBCG Agency's border management activities at the EU's external borders and in third countries; however, the major challenge remains the absence of any effective enforcement mechanism. The possibility of enforcing international responsibility through a doctrine of diplomatic protection under the law of state responsibility, that is, enforcing claims against other states or international organisations by an individual's state of nationality,[92] will most likely be inapplicable to situations wherein individuals were forced to leave their state of nationality or left their state of nationality by irregular means. An obvious exception to this general regime under international law is the provision contained in Art. 34 ECHR guaranteeing to individuals a right to directly invoke the responsibility of state parties to the ECHR, including all EU Member States, for the human rights violations they suffered. This means that individuals claiming to be victims of fundamental

91 See in this regard the European Ombudsman's recent conclusions related to the Pylos tragedy. The European Ombudsman suggested that, where national authorities are failing to fulfil their search and rescue obligations adequately or are otherwise involved in fundamental rights violations and/or where national authorities are constraining the search and rescue role and capacity of the EBCG Agency, this should lead the Agency's Executive Director to reconsider whether the Agency should continue its activities in that Member State. European Ombudsman, 2024.

92 Crawford, 2013, p. 570.

rights violations committed by the EU Member States' national border authorities in carrying out joint border management operations can turn to the ECtHR, provided that they have exhausted all domestic remedies in accordance with the generally recognised rules of international law. When the EU accedes to the ECHR and thus becomes its party (as mandated by Art. 6(2) TEU), the same will also apply to individual applications against the EU.

4.4. EBCG Agency's responsibility under EU law

As for the EBCG Agency's liability under EU law, there are two possibilities for holding the Agency judicially accountable through individual complaints. The first avenue involves an action for annulment where the CJEU may review the legality of the acts of EU bodies/offices/agencies, including those performed by the EBCG Agency, that are intended to produce legal effects vis-à-vis third parties and annul those not in compliance with EU law.[93] Because of strict rules on legal standing and the required legally binding nature of the acts in question,[94] these provisions in the TFEU will only rarely be applicable to the situations and cases of wrongful acts committed in the context of EU border management. Typically, violations of EU border management, asylum, and migration laws involve non-legal, physical, or factual acts, such as preventing persons from entering the territory of an EU Member State or pushing them back after they have entered one of the EU Member States. Such conduct cannot usually be reviewed by the CJEU under the title of action for annulment. One possible exception to this is a violation of border management rules (e.g. a fundamental rights violation) that is inherent in the adopted operational plan and therefore may potentially be challenged under the action for annulment.[95]

The second type of procedure available to individuals in challenging the EBCG Agency's controversial border management activities is to bring action before the CJEU for damages.[96] When it comes to non-contractual liability, the EBCG Agency is required to,

> …in accordance with the general principles common to the laws of the Member States, make good any damage caused by its departments or by its staff in the performance of their duties, including those related to the use of executive powers.

93 Art. 263 TFEU.

94 Art. 263 TFEU provides the following:
Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures.

95 Lehnert, 2014, pp. 339–340.

96 For a more detailed analysis of this possibility, see Fink, 2018; Fink, 2020, p. 532.

This is based on Art. 97(4) of Regulation (EU) 2019/1896. This provision elaborates on Art. 340(2) TFEU, which provides for the EU's non-contractual liability in the event of any damage caused by its institutions or staff in performing their duties. According to the CJEU's settled jurisprudence, three conditions need to be met cumulatively to hold the EU accountable: (1) unlawfulness of the conduct that is a subject of complaint, (2) harm suffered by the victim, and (3) existence of a causal link between the unlawful conduct and damage caused.[97] These principles apply *mutatis mutandis* to the non-contractual liability incurred by the EU, within the meaning of Art. 340(2) TFEU, because of the unlawful conduct of and damage caused by one of its agencies, such as the EBCG Agency. The EU Agencies, including EBCG Agency, are required to make good such damage under EU Law. The CJEU's qualifies the conduct in question as "unlawful" based on two criteria: (1) the infringed rule must be intended to confer rights on individuals, and (2) the infringement thereof must be sufficiently serious.[98] These two criteria can be considered to have met if the EU authorities 'manifestly and gravely disregard the limits on their discretion', such as if a particular EU authority violates its legal obligations because it failed to exercise due care and diligence.[99] In adjudicating such cases, the CJEU thus considers the extent of discretion the authority concerned enjoys, clarity of the line that distinguishes its lawful act from unlawful conduct, and how reprehensible overstepping that boundary by the given authority was in a particular case.[100]

Arguably, acts of fundamental rights violations that most often occur in the context of border management activities, such as loss of life, torture, and other inhuman or degrading treatment or punishment, as well as unlawful *refoulement*, reach this relatively high threshold of sufficient seriousness because of their gravity alone. Indeed, many fundamental rights violations that happened during border control and border management operations were interpreted by the ECtHR, CJEU, and EU FRA as being of a particularly serious nature. This includes judicial findings in cases such as *Hirsi Jamaa and Others v. Italy* (concerning application of the prohibition of *refoulement* and collective expulsions to operations on the high seas);[101] *N.D. and N.T. v. Spain* (concerning the qualification of immediate forcible returns of large numbers of migrants at land borders);[102] *Commission v. Hungary* (concerning the requirements for effective access to asylum procedures);[103] and the most recent case of *WS and Others v. European Border and Coast Guard Agency (Frontex)* in which the General Court of the EU (a constituent court of the CJEU that first hears actions taken against EU institutions/bodies/agencies by individuals and Member

97 CJEU, *Lütticke v. Commission*, C-4/69, ECLI: EU: C: 1971: 40, para. 10.
98 CJEU, *P – Bergaderm and Goupil v. Commission*, C-352/98, ECLI: EU: C: 2000: 361, para. 42.
99 CJEU, *P – Bergaderm and Goupil v. Commission*, C-352/98, ECLI: EU: C: 2000: 361, para. 43.
100 These points are developed further by Fink, 2018, pp. 244–267.
101 ECtHR, *Hirsi Jamaa and Others v. Italy*, App no. 27765/09, 23 February 2012.
102 ECtHR, *N.D. and N.T. v. Spain*, App nos. 8675/15 and 8697/15, 13 February 2020.
103 CJEU, *Commission v. Hungary*, C-808/18, ECLI: EU: C: 2020: 1029.

States) rendered a landmark judgment on the EBCG Agency's obligations regarding the protection of fundamental rights and ensuing non-contractual liability of the Agency for not respecting these obligations in the context of joint operations and pilot projects carried out by the Agency or joint return operations coordinated by the Agency.[104] This latter case involved action for damages brought by several Syrian refugees against the EBCG Agency after they were returned from Greece to Türkiye (Turkey) despite expressing their desire while on a Greek island to lodge an application for international protection. Thus, following a joint return operation carried out by the EBCG Agency and Greece, they were ultimately transferred to Türkiye. Since their complaints to the EBCG Agency's Fundamental Rights Officer concerning their transfer to Türkiye were not successful, they decided to bring a claim for compensation before the General Court of the EU. In their action, they claimed that they sustained both material and non-material damage because of the EBCG Agency's alleged unlawful conduct before, during, and after the return operation. The applicants moreover alleged in the present case that, because the Agency violated its obligations relating to the protection of fundamental rights in the context of the return operation—notably, the principle of *non-refoulement*, right to asylum, prohibition of collective expulsion, rights of the child, prohibition of degrading treatment, right to good administration, and right to an effective remedy—they were unlawfully returned to Türkiye and could not obtain the international protection to which they were otherwise entitled.

However, in its judgment, the CJEU dismissed these allegations of the applicants, holding that the EBCG Agency, given the absence of its power to assess the merits of return decisions or applications for international protection, cannot be held liable for any damage related to the return of these refugees to Türkiye. Regarding return operations, the CJEU explained that the Agency's role is limited to the provision of technical and operational support to the Member States, while the assessment of the merits of return decisions and the examination of applications for international protection fall within the exclusive competence of the Member States. According to the CJEU, the EBCG Agency's alleged conduct could not have directly caused the damage allegedly suffered by the Syrian refugees in Türkiye and Iraq, nor their feelings of anguish connected with, *inter alia*, the return flight to Türkiye. Consequently, the CJEU concluded that the applicants failed to provide evidence showing a sufficiently direct causal link between the harm invoked and the conduct of which the EBCG Agency was accused.

104 CJEU, *WS and Others v. Frontex*, T-600/21, ECLI:EU:T:2023:492, judgment of the General Court (Sixth Chamber), 6 September 2023.

5. Limits on action by EU institutions/agencies in the area of border management and migration control

In accordance with the principle of conferred competence, the EU is required to act within the limits of the powers conferred on it by the Member States. The competences conferred on the EU may be increased or reduced only by amendment of the EU founding treaties following the ordinary procedure for revision, that is, by representatives of the Member States' governments meeting in an Intergovernmental Conference.[105] Furthermore, while endorsing the settled jurisprudence of the CJEU, the Treaty of Lisbon, through its flexibility clause,[106] does not allow any expansion of the EU's powers. As clearly stated in the Declaration on Art. 352 TFEU, this clause

> … cannot serve as a basis for widening the scope of Union powers beyond the general framework created by the provisions of the Treaties as a whole and, in particular, by those that define the tasks and the activities of the Union. In any event, this Article cannot be used as a basis for the adoption of provisions whose effect would, in substance, be to amend the Treaties without following the procedure which they provide for that purpose.[107]

Pursuant to Title V (Area of Freedom, Security, and Justice) in Part 3 (Union Policies and Internal Actions) TFEU, and in particular Arts. 77 and 79 TFEU, which define the EU's tasks and activities concerning management of borders and migration in the EU, the EU's powers may not be exercised beyond the limits specified in these provisions. The objective of developing an integrated management system for the EU's external borders and common policies on visas and immigration needs to be combined with respect for the competence explicitly reserved for Member States under the treaties on which the EU is founded (section 5.1). However, the action of EU institutions/agencies on border management and migration control is not limited by only the explicit reservation of Member States' competence, as it must also comply with the principle of conferred competences and speciality (section 5.2). Next, there are limits on the action of EU institutions/agencies in connection with their external activities (section 5.3). Finally, the action of EU institutions/agencies action concerning border management and migration may also be limited territorially (section 5.4).

5.1. Explicit reservation of Member States' competence

The exercise of EU's competence in relation to border management and migration control does not affect Member States' competence concerning the integration of

105 Declaration in relation to the delimitation of competences, para. 3.
106 Art. 352 TFEU.
107 Declaration on Art. 352 of the TFEU.

legal migrants,[108] that is, third-country nationals residing legally in their territories;[109] determination of the number of third-country nationals admitted to their territory to seek work; or the preservation of law and order and safeguarding of internal security in the Member States.

5.1.1. Immigration for employment purposes and border management

With the Treaty of Lisbon, a new provision was introduced that constitutes a reservation on Member States' competence relating to the admission of third-country nationals for employment purposes: 'This Article shall not affect the right of Member States to determine volumes of admission of third-country nationals coming from third countries to their territory in order to seek work, whether employed or self-employed'.[110] Therefore, this is an important provision in the context of border control and migration management, as it provides for the reservation of competence by Member States to determine the volume of admission of third-country nationals coming from third countries and entering the EU for the first time. The inclusion of this specific provision in the Treaty of Lisbon has a lot to do with the Member States' objectives and competences in connection with employment and economic policy as a particularly sensitive issue, as well as with their fears regarding increased application of the ordinary legislative procedure and the qualified majority in the area of (economic) immigration.

It should be noted that the reservation of Member States' competence relates only to third-country nationals coming from a third country who already have work contracts or employment arrangements,[111] and not to persons coming from another Member State, even Member States that are not covered by the EU immigration policy. This reservation of Member States' competence also does not relate to access to employment for those who have already been or are to be admitted on some other legal basis, such as family reunification.[112]

5.1.2. Maintenance of law and order and safeguarding of internal security

The Member States' essential functions, such as ensuring their territorial integrity, maintaining law and order, and safeguarding national security, must be respected by the EU. Title V (Area of Freedom, Security and Justice) TFEU does not affect 'the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security'.[113] Thus,

108 Art. 79(4) TFEU.
109 For a more detailed account of this specific aspect of the competences reserved for the Member States, see Neframi, 2011, pp. 16–17.
110 Art. 79(5) TFEU.
111 Peers, 2008, p. 245.
112 Neframi, 2011, pp. 18–19.
113 Art. 72 TFEU.

in line with the sole responsibility of each Member State for its national security,[114] Member States have a right to temporarily, and as a means of last resort, reinstate internal border controls—that is, checks at borders between Member States.[115] If there is a serious threat to public policy or internal security in a Member State, that Member State may exceptionally reintroduce border control at all or specific parts of its internal borders for a limited period. However, the scope and duration of such an exceptional and temporary reintroduction of internal border control must not exceed what is strictly necessary to respond to the serious threat.[116]

This reservation of Member States' competence does not limit the EU's legislative competence but, rather, its operational competence.[117] Given that the adoption of measures to implement the EU's legislative acts falls within the Member States' competence, exercise of the EU's operational competence is confined to providing support and coordinating Member States' actions.[118] Importantly, Art. 72 TFEU does not exclude all forms of control. The CJEU pointed out that, in accordance with the principle of sincere cooperation,[119] Member States are required to exercise their competence with regard to the maintenance of public order and internal security so as not to hamper the full effect of the provisions of the EU founding treaties in other areas, including the EU internal market, EU citizenship, and freedom of movement.[120] In another case, the CJEU clarified that it is not enough for a Member State to merely rely on interests in connection with the maintenance of law and order and the safeguarding of internal security; a Member State must also prove that recourse to that derogation is necessary to exercise its responsibility on those matters.[121]

During the refugee crisis and the COVID-19 pandemic, several Member States, including Germany, Austria, France, Sweden, and Denmark, reintroduced checks at the internal borders under Arts. 25 and 29 of Regulation (EU) 2016/399 for reasons of national security (in the case of Member States invoking the overall security situation in the EU, as well as the secondary movement of refugees and other migrants within the EU) or public order (in the case of Member States' COVID-19 restriction measures). These internal border controls have remained in place for a prolonged period. For example, Austria has kept border controls on its southern borders with Slovenia and Hungary *de facto* continuously since September 2015, and they have been prolonged multiple times based on five different articles in Regulation (EU) 2016/399. The core question for our analysis is whether such a prolonged reintroduction of border checks at EU internal borders violates the spirit, if not the letter, of

114 Art. 4(2) TEU.
115 Arts. 25–35 of Regulation (EU) 2016/399.
116 Art. 25 of Regulation (EU) 2016/399.
117 Peers, 2008, p. 224.
118 Neframi, 2011, p. 19.
119 Art. 4(3) TEU.
120 CJEU, *Commission v France*, Case C-265/95, [1997] ECR I-6959.
121 CJEU, *Commission v. Poland and Others*, Joined Cases C-715/17, C-718/17 and C-719/17E-CLI:EU:C:2020:257, para. 143.

EU law, particularly the relevant provisions of Regulation (EU) 2016/399. This issue was first addressed by the French Constitutional Court, where the French highest administrative judge ruled that if there are "new" or "renewed" threats, checks at the internal borders can remain in place beyond the time limits set out in Regulation (EU) 2016/399.[122]

Recently, the CJEU also pronounced judgment on the lawfulness of reintroducing internal border controls. In its preliminary ruling concerning the prolonged reinstatement of checks at Austrian internal borders, the CJEU restrictively interpreted the exceptions to the rule of open borders within Schengen area and stated that Member States can reintroduce border controls at EU internal borders only under strict conditions.[123] This is because the CJEU considers the free movement of persons without internal border controls 'one of the main achievements' of the EU.[124] Therefore, the CJEU pointed out that by no means can such a temporary reintroduction of internal border control in exceptional circumstances jeopardise the principle of the free movement of people.[125] Obviously, the present case also involved high political significance reflected in the tension between, on the one hand, the sovereignty arguments invoked by the Member States concerning their internal security and, on the other hand, the importance of a Schengen area without internal borders while pursuing the principle of free movement of persons within the larger project of European integration.[126] The CJEU ruled in favour of the applicant and the European Commission, confirming that the pertinent provisions of Regulation (EU) 2016/399 need to be construed as forbidding prolonged border controls such as those in place in Austria and some other Member States.

Drawing on a teleological interpretation of the provisions in question, the CJEU noted that Regulation (EU) 2016/399 must be seen as part of the broader framework balancing free movement of persons, public policy, and national security. In the light of the fundamental importance of free movement of persons among the objectives of the EU referred to in Art. 3 TEU,[127] the CJEU concluded that the possibility for Member States to reintroduce border controls must be regarded as an exception, which must be interpreted strictly and narrowly. A more extensive or looser interpretation that allows border controls based on the same threat to be extended beyond six months would, in view of the CJEU, lead to a potentially unlimited reintroduction

122 Conseil d'État [Council of State], Decision No. 415291, 28 December 2017, para. 7; Conseil d'État [Council of State], Decision No. 425936, 16 October 2019, para. 7.

123 CJEU, *N.W. v. Landespolizeidirektion Steiermark* and *N.W. v. Bezirkshauptmannschaft Leibnitz*, Joined Cases C-368/20 and C-369/20, 26 April 2022, ECLI:EU:C:2022:298.

124 CJEU, *N.W. v. Landespolizeidirektion Steiermark* and *N.W. v. Bezirkshauptmannschaft Leibnitz*, Joined Cases C-368/20 and C-369/20, 26 April 2022, ECLI:EU:C:2022:298, paras. 65 and 74.

125 CJEU, *N.W. v. Landespolizeidirektion Steiermark* and *N.W. v. Bezirkshauptmannschaft Leibnitz*, Joined Cases C-368/20 and C-369/20, 26 April 2022, ECLI:EU:C:2022:298, para. 74.

126 Cebulak and Morvillo, 2022, para. 4.

127 CJEU, *N.W. v. Landespolizeidirektion Steiermark* and *N.W. v. Bezirkshauptmannschaft Leibnitz*, Joined Cases C-368/20 and C-369/20, 26 April 2022, ECLI:EU:C:2022:298, para. 89.

of EU internal borders, thus undermining free movement of persons in the EU.[128] In the legislative context, the CJEU found the system of time limits provided in Regulation (EU) 2016/399 to be clear and precise, stating that the limit of six months laid down in Art. 25(4) of this regulation is absolute.

While the CJEU pointed out that the maximum period of six months referred to in Art. 25(4) of Regulation (EU) 2016/399 may be applied afresh only where the Member State concerned can demonstrate 'the existence of a new serious threat affecting its public policy or internal security', it only perfunctorily touched upon the substantive question of what constitutes such a "new threat". This may require the Member States to provide significant materials, such as studies, statistics, and reasoning, to justify the existence of the new threat.[129] In the present case, it seems that the Republic of Austria failed to demonstrate the existence of a new threat, as required by Art. 25 of Regulation (EU) 2016/399, which would have justified triggering anew the periods provided for in this article. Therefore, its internal border controls may be perceived as incompatible with Regulation (EU) 2016/399 and, consequently, contrary to EU law. However, this is a matter to be determined by the referring court of a Member State.[130]

The CJEU's considerations in this judgment that are most important for our discussion pertain to the question of whether the Member States can directly rely on EU primary law, more specifically Art. 72 TFEU, to reintroduce or prolong internal border controls. As one of the intervening parties, Germany relied upon the line of argument that 'when exceptional circumstances so justify, the Member States may invoke Art. 72 TFEU in order to derogate from the provisions of the Schengen Borders Code setting maximum total durations for the reintroduction of temporary internal border control'.[131] Germany maintained that the migration crisis was something that was not envisioned by the secondary EU legislation; thus, it resorted to the exceptions of national security interests provided for in EU treaty law. While recognising that Member States have a sovereign competence to define their essential security interests and adopt appropriate national measures to ensure their internal and external security, the CJEU recalled that a Member State's decision or national measure concerning internal border control that is adopted to protect national security or maintain public policy cannot render EU law inapplicable and exempt that Member State from its obligation to comply with EU law.[132]

128 CJEU, *N.W. v. Landespolizeidirektion Steiermark* and *N.W. v. Bezirkshauptmannschaft Leibnitz*, Joined Cases C-368/20 and C-369/20, 26 April 2022, ECLI:EU:C:2022:298, para. 66.

129 Cebulak and Morvillo, 2022, para.14.

130 CJEU, *N.W. v. Landespolizeidirektion Steiermark* and *N.W. v. Bezirkshauptmannschaft Leibnitz*, Joined Cases C-368/20 and C-369/20, 26 April 2022, ECLI:EU:C:2022:298, paras. 79–82.

131 CJEU, *N.W. v. Landespolizeidirektion Steiermark* and *N.W. v. Bezirkshauptmannschaft Leibnitz*, Joined Cases C-368/20 and C-369/20, 26 April 2022, ECLI:EU:C:2022:298, para. 83.

132 CJEU, *N.W. v. Landespolizeidirektion Steiermark* and *N.W. v. Bezirkshauptmannschaft Leibnitz*, Joined Cases C-368/20 and C-369/20, 26 April 2022, ECLI:EU:C:2022:298, para. 84. See also *B.K. v. Republika Slovenija (Ministrstvo za obrambo)*, C-742/19, 15 July 2021, ECLI:EU:C:2021:597, para. 40.

Art. 72 TFEU states that Title V TFEU does not affect the exercise of responsibilities incumbent upon Member States regarding the maintenance of law and order (*ordre public*) and safeguarding of internal security. According to the settled case law of the CJEU, this derogation provided for in Art. 72 TFEU must be interpreted strictly. This implies that Art. 72 cannot be interpreted in a sense that it confers on Member States the power to 'depart from the provisions of EU law on the basis of no more than reliance on the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security'.[133] Moreover, the CJEU held that the relevant provisions of Regulation (EU) 2016/399 (including Arts. 25 and 29) are

> … part of the comprehensive framework – established by the EU legislature in the exercise of the competences conferred upon it by Article 3(2) and (6) TEU and Article 5(1) and (2) TEU in conjunction with Article 4(2)(j) and Article 77(2)(b) and (e) TFEU – governing the way in which the Member States exercise the responsibilities incumbent upon them for the purpose of the maintenance of public policy and the safeguarding of internal security.[134]

This legislative framework is intended to strike a fair balance, as envisaged in Art. 3(2) TEU, between, on the one hand, the EU's objective to offer its citizens an area of freedom, security, and justice without internal borders, in which the free movement of persons is ensured, and, on the other hand, the Member States' essential national security and public policy interests pursued through adopting appropriate measures with respect to external border controls, asylum, immigration, and prevention and combat of crime. In creating and adopting the relevant provisions of Regulation (EU) 2016/399, the EU legislature, in view of the CJEU, took due account of the exercise of the responsibilities incumbent upon Member States regarding public policy and internal security threats; at the same, the EU legislature limited Member States' ability to interfere with the freedom of movement by temporarily reintroducing internal border control (in exceptional situations and under strict conditions) to strike a balance between the various interests at issue.[135] Finally, the CJEU reminded the European Commission of its oversight powers (under Art. 27(4) of Regulation (EU) 2016/399) as regards the necessity or proportionality of the Member States' planned reintroduction of internal border controls by issuing its opinion to that effect. The CJEU also cautioned both the European Commission and Member States to exercise

133 CJEU, *N.W. v. Landespolizeidirektion Steiermark* and *N.W. v. Bezirkshauptmannschaft Leibnitz*, Joined Cases C-368/20 and C-369/20, 26 April 2022, ECLI:EU:C:2022:298, para. 86. See also *Commission v. Hungary* (Reception of applicants for international protection), C-808/18, 17 December 2020, EU:C:2020:1029, paras. 214 and 215).

134 CJEU, *N.W. v. Landespolizeidirektion Steiermark* and *N.W. v. Bezirkshauptmannschaft Leibnitz*, Joined Cases C-368/20 and C-369/20, 26 April 2022, ECLI:EU:C:2022:298, para. 87.

135 CJEU, *N.W. v. Landespolizeidirektion Steiermark* and *N.W. v. Bezirkshauptmannschaft Leibnitz*, Joined Cases C-368/20 and C-369/20, 26 April 2022, ECLI:EU:C:2022:298, para. 89.

the powers conferred upon them by Regulation (EU) 2016/399 (notably, Art. 27) regarding the exchanges of information; opinions; consultations; and, where appropriate, mutual cooperation, with a view to maintaining the balance between the freedom of movement and public security.[136]

While the CJEU in its judgment took a principled stance on the elimination of internal border controls within the Schengen area based on clear legal commitments of Member States to an area without internal borders, it left some aspects of the strict interpretation of exceptions to the principle of free movement of persons unclear. This left room for Member States to claim and demonstrate, within the parameters of EU law, the existence of a new threat, as well as the necessity and proportionality of their internal border controls to justify their reintroduction or prolongation. These blanks may be filled by future decisions of the national courts, CJEU, or European Commission. It thus remains to be seen what course the subsequent case law of the Member States and CJEU will take and whether it will uphold the CJEU's approach in this recent prominent ruling that exceptions to the rule of open borders within Schengen area need to be interpreted narrowly. This means that border controls within Schengen should be exceptional, regardless of the nationality or legal status of a person crossing the EU internal borders.

5.2. Compliance with the principle of conferral and speciality

In addition to the reservations of Member States' competence enshrined in the Treaty of Lisbon, exercise of the EU's competence in connection with border management and related issues of migration must not encroach on areas that are not covered by Arts. 77 and 79 TFEU. This question is particularly interesting as regards the adoption of criminal penalties. Moreover, the EU's competence in connection with border management and related migration issues is exercised only when the main objective of the action taken is one of the objectives listed in Arts. 77 and 79 TFEU, even if the exercise of the EU's competence may affect third-country nationals on some other legal basis.[137]

The EU's integrated border management system aims to, *inter alia*, ensure effective implementation of the rules for crossing the EU's external borders. The Schengen Borders Code (Regulation (EU) 2016/399) contains provisions on the entry conditions and modalities of border checks, as well as the rules on refusal of entry. External borders may only be crossed at designated (official) border crossing points during opening hours .[138] Member States are accordingly required to introduce effective, proportionate, and dissuasive penalties for violations of these rules in their

136 CJEU, *N.W. v. Landespolizeidirektion Steiermark* and *N.W. v. Bezirkshauptmannschaft Leibnitz*, Joined Cases C-368/20 and C-369/20, 26 April 2022, ECLI:EU:C:2022:298, paras. 91-92.

137 Neframi, 2011, p. 20.

138 Art. 5(1) of Regulation (EU) 2016/399.

national legislations.[139] This obligation is without prejudice to the Member States' international protection obligations. These express provisions respectively reflect the underlying effective sanctions principles of EU law and the exemption of refugees from penalties for irregular entry, as set out in Art. 31 of the 1951 Geneva Convention relating to the status of refugees (which exempts refugees who enter or stay in the EU without authorisation from penalties, under certain circumstances). It should be highlighted that these provisions do not require Member States to criminalise irregular (unauthorised) border crossing.[140] Generally, EU law is silent on the criminal law aspects of irregular migration apart from specific obligations to criminalise the trafficking, smuggling, and employment of irregular migrants, which do not require criminalisation of the irregular migrants themselves.[141] Another exception to this general regulation is the limitation on imposing custodial penalties on irregular migrants which, according to the CJEU, is inherent in the Returns Directive (Directive 2008/115/EC on common standards and procedures in Member States for returning illegally staying third-country nationals).[142]

Two EU legal instruments were adopted to more effectively prevent and combat illegal migration and human trafficking, including unauthorised entry, transit, and residence in the EU. Both instruments constitute the development of provisions of the Schengen *acquis*. They are intended to approximate existing legal provisions, particularly (1) the precise definition of the infringement in question and cases of exemption, which are subjects of Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit, and residence, and (2) minimum rules for penalties, liability of natural and legal persons, and jurisdiction, which are subjects of the Council of the EU framework Decision of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit, and residence.[143] The latter instrument provides the framework for measures relating to the liability of both natural and legal persons. They are to be used for combating the aid of illegal immigration, both in connection to unauthorised crossing of EU external borders in the strict sense and for sustaining networks that exploit human beings; the purpose of the directive is to provide a definition for the facilitation of illegal immigration and consequently for rendering more effective the implementation of the framework decision to prevent that offence.

Arts. 1(a) and (b) of Directive 2002/90/EC require each Member State to adopt appropriate sanctions on

139 Art. 5(3) of Regulation (EU) 2016/399.

140 This issue is further discussed in the subsequent chapters of this study.

141 Peers, 2016, p. 119.

142 CJEU, C-61/11 PPU, *El Dridi* [2011] ECR I-3015, 28 April 2011; C-430/11, *Sagor*, ECLI:EU:C:2012:777.

143 Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence, OJ L 328, 5 December 2002, pp. 17–18; 2002/946/JHA: Council framework Decision of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence, OJ L 328, 5 December 2002, pp. 1–3.

> any person who intentionally assists a person who is not a national of a Member State to enter, or transit across, the territory of a Member State in breach of the laws of the State concerned on the entry or transit of aliens
>
> and
>
> any person who, for financial gain, intentionally assists a person who is not a national of a Member State to reside within the territory of a Member State in breach of the laws of the State concerned on the residence of aliens.

Instigation, participation, and attempt to commit such an offence are also punishable under this directive,[144] and Member States must take the measures necessary to ensure that they are subject to effective, proportionate, and dissuasive sanctions. The EU's competence to establish minimum rules and standards on the definition of criminal offences and sanctions in areas of serious crime, including trafficking in human beings and people smuggling, is otherwise covered by the provisions on judicial cooperation in criminal matters .[145] The CJEU has stressed that adoption of effective, proportionate, and dissuasive sanctions by Member States is crucial for effective application of EU law. The EU's acts, adopted in accordance with its competence in various areas, including competence in connection with border management and related migration, may provide a framework for Member States' competence by requiring them to adopt such penalties and indicating the type of penalty to be adopted.[146] This also implies that the EU's intervention may not interfere with the Member States' competence in criminal matters, in the absence of harmonisation according to Art. 83 TFEU.[147]

In accordance with the principle of speciality, the choice of legal basis for the EU's action in connection with third-country nationals that legally reside within the EU is also important for determining the scope of the EU's competence in the area of border management and migration. This choice will depend on the principal objective of the EU's action.[148] TFEU contains specific provisions regulating international trade in services, such as Art. 56 TFEU on the prohibition of restrictions on freedom to provide services that may apply to third-country nationals who provide services and are established within the EU. International trade in services falls within the EU's competence in connection with the common commercial policy,

144 Art. 2 of Directive 2002/90/EC.

145 Art. 83 TFEU.

146 CJEU, *Commission v Council*, Case C-176/03, [2005] ECR I-7879. See also Communication from the Commission to the European Parliament and the Council on the implications of the Court's judgment of 13 September 2005 (Case C-176/03, *Commission v Council*), COM (2005) 583 final, 23 November 2005. Hagenau-Moizard, 2009, p. 205.

147 Neframi, 2011, p. 20.

148 Kohler and Engel, 2007, pp. 5–10.

and Art. 207 TFEU confers exclusive competence on the EU[149] covering trade in services. As a result, the EU's competence concerning the adoption of an act designed to regulate international trade (and not being based on Art. 79 TFEU) includes not only conclusion of international agreements but also adoption of the EU's unilateral legislative acts; this is not the case for the EU's competence in connection with migration exercised under Art. 79 TFEU for third-country nationals planning to stay and move freely within the EU for some time.[150]

5.3. Limits on the EU's external action

The EU's external competence in connection with border management and migration is not an exclusive competence (section 4.2). Accordingly, the possibilities for the EU to exercise its competence at international level are limited, as border management and migration issues are covered by a framework for the global exercise of external competences. Moreover, when the EU acts within the framework of a global approach to border management and related migration issues, combined with matters on which it has exclusive competence, it cannot simply ignore the limits of its competence. Consequently, the European Commission cannot act beyond its mandate when, e.g. the EU exercises its competence in connection with development cooperation that covers border management and migration matters. This is because of the horizontal nature of global approach to the EU's international action, which does not entail any extension of the EU's competences.[151] The EU's external action in relation to border management and migration is thus circumscribed by the reservation of Member States' competences, including in areas in which the EU has exclusive competence. For instance, an international agreement on services, which the European Commission intends to negotiate and conclude under the common commercial policy and for which the EU has exclusive competence, cannot contain provisions regarding an area or matter on which competence is reserved for the Member States[152] or an area or matter excluded from harmonisation .[153]

5.4. Territorial limits

From the territorial perspective, the substantive scope of the EU's competence in the area of border management and immigration is limited by the exempt position of Ireland and Denmark, which covers the whole area of freedom, security, and justice. Under Protocols Nos. 19, 21, and 22 of the Treaty of Lisbon, these two Member States are free to choose whether to participate in acts in connection with the EU's policies

149 Art. 3(1)(e) TFEU.
150 Neframi, 2011, p. 21.
151 Ibid.
152 Art. 79(5) TFEU.
153 Art. 79(4) TFEU.

on border management and migration. More specifically, Ireland may opt in pre-adoption or post-adoption of the relevant act, while Denmark does not have the possibility of opting in, but may join the implementation of such an act by concluding an international agreement with the EU. However, neither Ireland nor Denmark is treated in the same manner when the EU adopts acts relating to third-country nationals within other competences, as clarified in section 5.2. Given the EU's shared competence in the area of border management and migration, establishment of enhanced cooperation as regulated by Art. 20 TEU, and Arts. 326–334 TFEU may also be considered. In such a case, the EU's acts relating to the management of borders and (il)legal immigration, adopted in the context of enhanced cooperation, will be binding only on Member States that are parties to the acts in question. Such cooperation must be open at any time to all Member States, in accordance with Art. 328 TFEU. Accordingly, other (non-participating) Member States may choose to join enhanced cooperation later.[154]

6. Obligations/responsibilities of Member States' border authorities within the EU's internal competence framework

Pursuant to Art. 291(1) TFEU, Member States are required to adopt all measures of national law necessary to implement legally binding acts of the EU. This means that, in accordance with the principle of indirect administration, competence for implementing acts of the institutions is reserved for the Member States. The only exceptions to this rule are cases where the EU has operational competence under the founding treaties and where implementing powers may be conferred on the European Commission as enshrined in Arts. 291(2) to (4) TFEU. In addition to the principle of indirect administration, the Member States's adoption of measures is also an expression of the principle of sincere cooperation.[155]

Art. 4(3) TEU imposes on the Member States an obligation to 'take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union'. According to the same provision, the Member States must 'refrain from any measure which could jeopardise the attainment of the Union's objectives'. The Member States are thus obliged to implement as well as comply with the common rules and principles when exercising their own competences.[156]

154 Neframi, 2011, p. 21.
155 Neframi, 2011, p. 22.
156 Ibid.

6.1. Obligation of implementation

The Member States have an obligation to take the necessary implementation measures when the EU adopts common rules by exercising its competence. Such an implementation of EU common rules may take the form of legislative measures (in the case of transposition of directives) or administrative measures (in the case of application of regulations). At any rate, the national courts of Member States are responsible for appropriate judicial implementation of common rules, which means that they must always ensure the effective application of EU law (as required by the principle of primacy) even when, e.g. national law is contrary to EU law. Moreover, Member States' obligation of implementation involves the requirement for adapting the national rules of procedure to meet the requirements of effective judicial protection (as required by the principle of effectiveness).[157]

In transposing EU directives into national legislations of Member States, particular questions may arise because of the nature of that action. In accordance with Art. 288 TFEU, Member States are free to choose the form and methods to be pursued to achieve the result required by a particular directive. In border control, management of new arrivals, illegal border crossings into the EU (i.e. irregular or undesired entry into the territory of the Member States), and (ir)regular migration, the EU's action does not cover the whole area but is currently limited to a higher or lower degree of harmonisation of national provisions. Therefore, Member States must either take the necessary administrative measures in directly applying several regulations related to EU border management[158] or adopt measures to transpose the

157 Neframi, 2011, p. 22.

158 These include Regulation (EU) 2016/399; Regulation (EU) 2019/1896; Regulation (EU) 2017/458 of the European Parliament and of the Council of 15 March 2017 amending Regulation (EU) 2016/399 as regards the reinforcement of checks against relevant databases at external borders; Council Regulation (EU) 2022/922 of 9 June 2022 on the establishment and operation of an evaluation and monitoring mechanism to verify the application of the Schengen *acquis*, and repealing Regulation (EU) No 1053/2013; Regulation (EU) 2018/1862 of the European Parliament and of the Council of 28 November 2018 on the establishment, operation and use of the Schengen Information System (SIS) in the field of police cooperation and judicial cooperation in criminal matters, amending and repealing Council Decision 2007/533/JHA, and repealing Regulation (EC) No 1986/2006 of the European Parliament and of the Council and Commission Decision 2010/261/EU; Regulation (EU) 2018/1860 of the European Parliament and of the Council of 28 November 2018 on the use of the Schengen Information System for the return of illegally staying third-country nationals; Regulation (EU) 2017/2226 of the European Parliament and of the Council of 30 November 2017 establishing an Entry/Exit System (EES) to register entry and exit data and refusal of entry data of third-country nationals crossing the external borders of the Member States and determining the conditions for access to the EES for law enforcement purposes, and amending the Convention implementing the Schengen Agreement and Regulations (EC) No 767/2008 and (EU) No 1077/2011; Regulation (EU) 2018/1240 of the European Parliament and of the Council of 12 September 2018 establishing a European Travel Information and Authorisation System (ETIAS) and amending Regulations (EU) No 1077/2011, (EU) No 515/2014, (EU) 2016/399, (EU) 2016/1624 and (EU) 2017/2226; Regulation (EU) 2019/817 of the European Parliament and of the Council of 20 May 2019 on establishing a framework for interoperability between EU information systems in the field of borders and visa and

relevant EU directives (notably those pertaining to legal and illegal migration and to the return of third-country nationals)[159] within the framework of their institutional autonomy. Regulations have general application, are binding in their entirety, and are directly applicable in all Member States after their entry into force (i.e. they do not need to be mediated into national law by implementing measures). However, in the case of directives (which are also an act of general application and binding as to the result to be achieved in the Member States to whom they are addressed), national authorities have the power to choose the transposing acts to achieve the objectives set by the directives, but they are nevertheless bound to respect the principle of effectiveness. Once adopted by the EU institutions in accordance with the EU treaties, the directives must be transposed by the Member States so they become law in the Member States. The CJEU held that the transposition of directives requires the adoption of legally binding acts by the Member States.[160] This obligation

amending Regulations (EC) No 767/2008, (EU) 2016/399, (EU) 2017/2226, (EU) 2018/1240, (EU) 2018/1726 and (EU) 2018/1861 of the European Parliament and of the Council and Council Decisions 2004/512/EC and 2008/633/JHA; Regulation (EU) 2019/816 of the European Parliament and of the Council of 17 April 2019 establishing a centralised system for the identification of Member States holding conviction information on third-country nationals and stateless persons (ECRIS-TCN) to supplement the European Criminal Records Information System and amending Regulation (EU) 2018/1726; Regulation (EU) No 656/2014 of the European Parliament and of the Council of 15 May 2014 establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union; Regulation (EC) No 1931/2006 of the European Parliament and of the Council of 20 December 2006 laying down rules on local border traffic at the external land borders of the Member States and amending the provisions of the Schengen Convention; Regulation (EC) No 767/2008 of the European Parliament and of the Council of 9 July 2008 concerning the Visa Information System (VIS) and the exchange of data between Member States on short-stay visas (VIS Regulation); and Regulation (EU) No 515/2014 of the European Parliament and of the Council of 16 April 2014 establishing as part of the Internal Security Fund, the Instrument for financial support for external borders and visa and repealing Decision No 574/2007/EC.

159 These include, among others, Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals; Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof; Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast); and Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence. Two notable exceptions from this directive-oriented approach to regulating migration issues at the EU level are 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 (recast) and Regulation (EU) 2019/818 of the European Parliament and of the Council of 20 May 2019 on establishing a framework for interoperability between EU information systems in the field of police and judicial cooperation, asylum and migration and amending Regulations (EU) 2018/1726, (EU) 2018/1862 and (EU) 2019/816.

160 CJEU, Case C-531/03, *Commission v Germany*, ECLI:EU:C:2005:159, 10 March 2005.

of transposition is therefore incumbent on the Member States. As such, the Member States' obligation of transposition does not affect the division of responsibilities for border management and migration between the Member State and its regional or local authorities. Moreover, Member States are required to adopt measures to transpose directives within the period prescribed in the directives themselves (generally two years).

If a Member State does not transpose a directive in question or transposes it incorrectly, it fails to fulfil its obligations, and the European Commission may, in accordance with Arts. 258–260 TFEU, initiate and bring infringement proceedings against that Member State before the CJEU. Non-enforcement of the judgment against the Member State concerned can lead to a new conviction by the CJEU, which may result in a fine (financial penalty). This equally applies to cases where the obligation to adopt the necessary measures is a matter for the local and regional authorities, as the EU is required to respect the Member States' 'national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government'.[161] However, if a Member State fails to transpose a directive within the prescribed period or transposes it incorrectly, individuals may still rely on sufficiently clear, precise, and unconditional provisions of such a directive against that Member State in proceedings before the national courts. In *El Dridi*,[162] the CJEU interpreted Arts. 15 and 16 of Directive 2008/115/EC (the Return Directive), on detention for the purpose of removal, as being unconditional and sufficiently precise so as not to require any other specific elements for Member States to be able to implement them.

Similarly, in March 2011, the French Conseil d'État delivered a compelling opinion concerning the non-transposition of the Return Directive into French law within the prescribed period, in which it took the view that a Member State may be unable to rely on the derogations provided in this directive if it has not been transposed.[163] The French Conseil d'État held that the directive's provisions in question, on the period prescribed for voluntary departure, were sufficiently precise and unconditional to have a direct effect in national law, and foreign nationals contesting deportation orders may therefore rely directly upon them. According to the French Conseil d'État, the French national legislation should have defined, applying objective criteria, the concept of "flight risk" featuring in the Return Directive, which enables the period prescribed for voluntary departure to be shortened or cancelled. The Conseil d'État explained that as long as French law does not contain any such definition, France (as the EU Member State) could not invoke that risk to justify reduction or cancellation of that period. In this context, it is also worth noting that individuals who have suffered loss or injury caused by the Member State's failure to adequately implement or transpose common rules may bring an action for damages

161 Art. 4(2) TEU.
162 CJEU, C-61/11 PPU, *El Dridi* [2011] ECR I-3015, 28 April 2011.
163 EC, avis MM. J. et T., n°345978 et 346612.

against the Member State in question before the national court, under the conditions established by the CJEU in *Francovich*.[164] In this judgment, the CJEU allowed individuals, under certain conditions, to have the possibility of obtaining compensation from a Member State for its insufficient or delayed transposition of a directive.

6.2. Obligation of compliance

When the Member States' jurisdiction is not affected by the exercise of the EU's competence in connection with the management of borders and migration, they may adopt national measures that go further than the EU legislative framework. However, national measures must always comply with the minimum rules of the EU legal framework within which they are adopted (section 6.2.1.), with the EU's fundamental rights provisions (section 6.2.2.), and with some other EU norms (section 6.2.3.). In accordance with the CJEU's case law, the national courts of Member States are required to refuse the application of any national provision that is contrary to the provisions adopted by the EU or where there is divergence between a domestic legal rule and EU legal rule, even if the application of the national rule is ordered by the domestic constitutional court.[165] This requirement arises from the legal principle of primacy (supremacy or precedence) as one of the basic principles of EU law, according to which EU law has priority over any contravening national law, including the constitution of a Member State itself. In other words, rules of national law, even those of a constitutional order, may not be allowed to undermine the unity and effectiveness of EU law.

6.2.1. Respect for the minimum rules

EU directives set minimum standards, often in recognition of the fact that the legal systems in some Member States have already set higher standards in regulating certain areas or subject matters. Thus, Member States have the right to set higher standards than those set in the directive. For example, the Return Directive (Directive 2008/115/EC) allows Member States to adopt or maintain provisions that are more favourable to illegally staying third-country nationals. However, this directive does not allow Member States to apply stricter rules in the area covered by it. This view was also confirmed by the CJEU's judgments in *El Dridi*, *Achughbabian*, and *Affum*. All three cases were referred to the CJEU concerning the imprisonment of third-country nationals in return procedures for the crime of irregular entry or stay.

164 CJEU, *Andrea Francovich and Danila Bonifaci and others v Italian Republic*, Joined Cases C-6/90 and C-9/90, [1991] ECR I-5357.

165 CJEU, Case 106/77, *Amministrazione delle Finanze dello Stato v Simmenthal SpA*, [1978] ECR 629; CJEU, Case C-409/06, *Winner Wetten GmbH v Bürgermeisterin der Stadt Bergheim*, Judgment of the Court (Grand Chamber) of 8 September 2010.

In *El Dridi*,[166] The CJEU had to examine whether the criminal detention sanction could be regarded as a measure necessary to implement the return decision within the meaning of Art. 8(1) of the Return Directive or, on the contrary, a measure compromising the implementation of that decision. Given the circumstances of the case, the CJEU held that the criminal detention sanction was not compatible with the objective of the directive—to return a person to his or her country of origin in line with fundamental rights; as such, the sanction did not contribute to the removal of the third-country national from the Member State in question. According to the CJEU, when the obligation to return is not complied with within the period for voluntary departure, Member States need to pursue the enforcement of the return decision in a gradual and proportionate manner, using the least coercive measures possible and with due respect for fundamental rights. It follows from this CJEU decision that the Return Directive precludes national rules that provide for a prison sentence to be imposed on illegally staying third-country nationals on the sole ground that they remain, without valid grounds, on the Member State's national territory, contrary to an administrative order to leave that territory within a given period. While the Member States have criminal jurisdiction to adopt coercive measures to dissuade third-country nationals from staying illegally in their territory, the exercise of this criminal jurisdiction must not impede the achievement of the objectives pursued by the Return Directive and deprive it of its effectiveness.[167]

In a similar vein, the CJEU considered in *Achughbabian* whether the principles established in *El Dridi* also applied to a third-country national's imprisonment sentence for the offence of unlawful entry or stay in the territory of a Member State.[168] The CJEU interpreted the Return Directive as meaning that it does not preclude a Member State from classifying unlawful stay as an offence, laying down criminal sanctions to deter and prevent such a violation of the national residence rules, or imposing detention while determining whether or not the stay is legal. The CJEU clarified that the situation of detention being imposed before or during the return procedure is covered by the Return Directive, and, therefore, such a detention must pursue the removal. The CJEU found in this case that the minimum rules in the Return Directive were not respected by the Member State concerned because the criminal detention would not pursue the removal. According to the CJEU, the imposed detention would impede the application of the common standards and procedures set out in the Return Directive and delay the return of a third-country national, thereby undermining the effectiveness of the Return Directive. Similarly, the CJEU decided in *Affum* that the Return Directive precludes national legislation prescribing

166 CJEU, C-61/11 PPU, *El Dridi* [2011] ECR I-3015, 28 April 2011, para. 59.
167 CJEU, C-61/11 PPU, *El Dridi* [2011] ECR I-3015, 28 April 2011, para. 55.
168 CJEU, C-329/11, *Achughbabian v. Prefet du Val-de-Marne* [GC], 6 December 2011, paras. 37–39 and 45.

imprisonment for unlawful stay, as it would thwart the application of the return procedure and delay the return.[169]

Although the Member States have certain discretion in applying acts on border management issues and migration adopted for harmonising their laws and regulations (particularly, when that margin of discretion is explicitly provided by way of derogation), they must respect the minimum rules and not act in a manner that could undermine the effectiveness of such rules.[170] If a national court reviewing the legality of a Member State's measure is in doubt about whether the given measure complies with the minimum rules, it may or even must (depending on a particular case) refer the matter to the CJEU to give a preliminary ruling on the interpretation of the relevant EU legal provisions under Art. 267 TFEU. According to Art. 23a of Protocol No. 3 on the Statute of the CJEU, references for a preliminary ruling relating to border management and migration may be dealt with under an urgent procedure. It is also important to note that, according to the CJEU's ruling in *Inter-Environnement Wallonie*, Member States, in accordance with the principle of sincere cooperation,[171] must not adopt national measures that are incompatible with the directives' provisions, even before the period for their transposition has expired.[172]

6.2.2. Respect for fundamental rights

EU Member States are state parties to numerous international human rights treaties, including the Convention Relating to the Status of Refugees; European Convention on Human Rights; International Covenant on Civil and Political Rights; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; and various international instruments relating to maritime law, which include the obligation to search, rescue, and save lives at sea (e.g. the UN Convention on the Law of the Sea and the International Convention for the Safety of Life At Sea). Therefore, Member States are required to guarantee the human rights enshrined in these treaties. The scope of their obligations under human rights conventions, such as the European Convention on Human Rights, is defined by their jurisdiction. This implies that if a Member State does not have jurisdiction, there is no obligation to guarantee the rights specified in such a convention, and no accountability can thus be incurred by that Member State either. If international human rights obligations are violated while controlling and protecting the EU's external borders, a Member State, the EU, or both can be held accountable by victims for an internationally wrongful act. For this to be the case, however, the violation of such obligations must be attributable to that Member State and/or the EU (e.g. if the EBCG Agency is involved in the violation) under international law. Moreover, the Member States are

169 CJEU, C-47/15, *Sélina Affum v. Préfet du Pas-de-Calais* [GC], 7 June 2016.
170 Neframi, 2011, p. 24.
171 Art. 4(3) TEU.
172 CJEU, Case C-129/96, *Inter-Environnement Wallonie ASBL v. Région wallonne*, [1997] ECR I-7411.

bound by EU law, including European border management, asylum and migration legislation, and the EU Charter of Fundamental Rights.

In implementing EU rules concerning border management and migration, the competent Member States' authorities are thus required to apply their margin of discretion in a manner that ensures full respect for fundamental rights. This requirement is enshrined in Art. 67(1) TFEU: 'The Union shall constitute an area of freedom, security and justice with respect for fundamental rights'. Thus, the CJEU pointed out in *European Parliament v. Council of the European Union* that the exercise of Member States' jurisdiction, within the leeway Member States, is provided under the Directive on family reunification (Council Directive 2003/86/EC on the right to family reunification) and is subject to judicial review as far as the respect for fundamental rights is concerned.[173] Because of the risk that Member States—as a result of implementing this directive's provisions that allow Member States to apply derogations—may adopt or maintain national laws that do not respect fundamental rights, the CJEU is required to review such national legislations.

Pursuant to Art. 72 TFEU, the CJEU's review must consider the Member States' competence to adopt measures concerning the maintenance of law and order and the safeguarding of internal security. The judicial review is conducted based on the principle of proportionality, with the CJEU examining whether the national measure is appropriate considering the objective to be achieved, whether it is necessary, and whether it maintains a balance between the interests. In the *El Dridi* judgment, the CJEU stated that where the Return Directive (Directive 2008/115/EC) allows Member States to adopt measures of various kinds, the choice of the national measure that imposes most restrictions on the rights and freedoms of the illegally staying third-country national must comply with the principle of proportionality.[174]

The national court—in which the Member State's acts are contested—must primarily review the respect for the principle of proportionality. Depending on the case, the national court may or must refer a question for preliminary ruling by the CJEU, which has jurisdiction to interpret the minimum rules laid down by the directives and, consequently, the indirect framework for the Member States' discretionary actions.[175] In connection to this, the CJEU ruled in *Aziz Melki and Sélim Abdeli* (the case concerned the rules relating to the priority question of constitutionality) that national rules on constitutionality review must be interpreted in accordance with EU law.[176] This interpretation by the CJEU also implies that national provisions relating to the review of the constitutionality of laws or regulations of Member States with implications for human rights and fundamental freedoms must not affect the possibility

173 CJEU, C-540/03, *European Parliament v. Council of the European Union*, [2006] ECR I-5769, 27 June 2006, paras. 62–65.

174 CJEU, C-61/11 PPU, *El Dridi* [2011] ECR I-3015, 28 April 2011, para. 41.

175 Neframi, 2011, p. 25.

176 CJEU, Joined Cases C-188/10 and C-189/10, *Aziz Melki and Sélim Abdeli*, [2010] ECR I-5667, 22 June 2010.

or, as the case may be, the obligation of the national court to refer cases for preliminary ruling by the CJEU.

Art. 51(1) of the Charter of Fundamental Rights of the EU provides that, besides EU institutions, EU Member States are also bound to comply with the charter whenever applying or implementing EU law. In the field of border management and migration, Member States thus have an obligation to implement EU law in full compliance with the rights and requirements of the EU Charter, which has the same legal value as the EU treaties. In areas not covered by EU law, Member States must comply with the rights protected by the European Convention on Human Rights and other international human rights and refugee law instruments to which they are party. EU law instruments regulating border management and related migration issues and establishing the set of rules that regulate the functioning of the Schengen area—Regulation (EU) 2016/399 (Schengen Borders Code), Regulation (EU) 2022/922 (Schengen Evaluation and Monitoring Mechanism), and Regulations (EU) 2021/1148 and (EU) 2021/1060 (which regulate EU funding for border management)—contain several clauses and safeguards intended to protect fundamental rights. They underline the need to comply with the fundamental rights contained in the EU Charter of Fundamental Rights that are more often at stake in border management and migration control. However, many of these safeguards still need to be activated to their full extent.

The Member States must ensure that the fundamental rights are respected and protected in law and practice. This means, first, that their national legal systems must fully incorporate the requirements and safeguards flowing from EU law, the European Convention on Human Rights, and international human rights and refugee law. Likewise, Member States' national integrated border management strategies must adequately reflect fundamental rights. According to the most recent FRA report on the fundamental rights situation in the Member States,[177] immigration, borders, and asylum legislation in Latvia, Lithuania, Poland, Hungary, and Spain is inadequate as it allows the border authorities, in certain circumstances, to redirect third-country nationals who entered these Member States' territory in an unauthorised manner to the neighbouring country they came from, without assessing whether such a removal violates the principle of *non-refoulement*. Finnish and Estonian migration and asylum laws can also be considered highly problematic in this regard.[178]

More importantly, the fundamental rights guarantees and national strategies must be implemented and enforced by border management authorities and staff in Member States when carrying out border checks and controls at the EU's external borders in their daily work.[179] The recent FRA report identifies various inappropriate practices pursued by several Member States' border authorities and guards

177 FRA, 2023b, p. 150.

178 Ibid.

179 The EU's external sea borders has additional safeguards deriving from the international law of the sea, while at airports in the EU, the international civil aviation law, as well as EU instruments on passenger name records and advanced passenger information, contain further protective provisions.

that violate fundamental rights of migrants, refugees, and asylum seekers at these Member States' borders.[180] The Member States' border guards and other competent authorities must take all necessary measures to ensure that fundamental rights are effectively protected and promoted while also upholding the highest professional and behavioural standards in border management. They should pay particular attention to vulnerable persons attempting to cross the EU's external borders and, accordingly, adjust their behaviour and attitude when interacting with people who may have special needs, including children, victims of human trafficking or other violent crime, pregnant women, people with medical conditions, and persons with disabilities. Border management authorities and staff in the Member States should also be aware of and respect the mandate and powers of independent national, European, and international monitoring bodies of fundamental rights and refugee protection agencies, as well as other organisations present at the borders. They should grant them access to information, documents, and people in accordance with relevant laws. Independent and regular monitoring at external borders can help identify fundamental rights risks before violations may occur. Moreover, effective protection of fundamental rights requires systematic reporting of any violations, particularly those constituting serious crimes; prompt and effective investigation of all allegations; and effective and dissuasive sanctions when human rights and international protection violations occur in carrying out border management activities.

Notwithstanding some improvements and promising practices in border management- and migration-related fundamental rights issues across the EU, the Member States can and need to do more in terms of properly managing migration flows and further improving human rights protection for all asylum seekers, refugees, and other migrants arriving at their borders or present in their territory. Shortcomings, flaws, and obstacles persist in their laws, policies, practices, and attitudes. For example, although the law is very clear, deaths and disappearances of those trying to cross the Mediterranean Sea remain highly disturbing.[181] The Member States' obligation to save lives of migrants attempting to reach the EU borders requires them to deploy the necessary search and rescue capacities.[182] Member States must also

180 The cases include Greek, Cyprian, Latvian, Lithuanian, Polish, Hungarian, Croatian, Bulgarian, and Spanish border practices and incidents. FRA, 2023b, pp. 150–151.

181 In 2022, the International Organization for Migration recorded 3,168 deaths or disappearances at the EU's land and sea borders. FRA, 2023a, p. 10.

182 As far as the respect for the right to life at the Member States' borders is concerned, the ECtHR issued important judgments against three EU Member States: Croatia, Greece, and Hungary. ECtHR, *M.H. and Others v. Croatia*, Nos. 15670/18 and 43115/18, 18 November 2021; *Safi and Others v. Greece*, No. 5418/15, 7 July 2022; *Alhowais v. Hungary*, No. 59435/17, 2 February 2023. In *Safi and Others v. Greece*, the ECtHR concluded that the national authorities had not done all that could reasonably be expected of them to prevent the loss of lives. This is the first time the ECtHR applied this positive obligation, flowing from Article 2 ECHR, to a maritime search and rescue operation concerning asylum seekers. In its ruling, the ECtHR also noted shortcomings in national investigation proceedings and reiterated relevant safeguards for a thorough and effective investigation of such incidents.

provide adequate legal pathways to those seeking asylum, strengthen their monitoring of migrants' fundamental rights violations, and provide victims of human rights abuses meaningful access to justice.

Because of the growing number of people crossing or attempting to cross the EU external borders in an unauthorised or irregular manner, EU institutions and Member States decided to ensure effective and strict control of the EU external land and sea borders. Secondary EU law requires that the Member States' border management must respect the right to seek asylum and obligations related to access to international protection, particularly the principle of *non-refoulement*, and fundamental rights .[183] However, recent years have seen a significant growth in seriousness and intensity of reported fundamental rights abuses in connection with the Member States' border management.[184] When refugees and other migrants unlawfully cross, or try to cross, the EU's external borders, they experience rights violations in several Member States. Civil society actors who defend the rights of asylum seekers and other migrants and who work in the vicinity of the Member States' borders face hostile attitudes, investigations, intimidations, attacks, and increasing pressure from the Member States' authorities. In some Member States (including Greece, Hungary, and Italy), members of non-governmental organisations even encounter legal proceedings and other major restrictions on their work.[185]

Another major barrier in implementing border management-linked human rights norms is that victims of fundamental rights violations reported at the EU borders—which also involve allegations of criminal conduct, such as ill-treatment, people stripped of their clothes, failure to assist people in danger, or theft of personal belongings—do not find redress in national courts of Member States.[186] While the fundamental rights violations reported from the EU's external borders are serious, recurrent, and widespread, only a few cases are reported, recorded, and investigated by the Member States' national justice systems. In the absence of proper investigation, adjudication, and redress, a climate of impunity seems to prevail. Although the Member States have an undeniable sovereign right to control the entry of non-nationals into their territory, while exercising border control, they still have a duty to protect the fundamental rights of all people under their jurisdiction, irrespective of their nationality and legal status. Under EU law, this also includes providing access to asylum procedures. International and European human rights law requires that an effective remedy be available to all those who have an arguable claim that their rights have been breached by the national (border) authorities.[187]

The Member States thus have an obligation to establish dedicated mechanisms for lodging administrative and judicial complaints through which migrants, asylum

183 Art. 4 of Regulation (EU) 2016/399; Art. 80 of Regulation (EU) 2019/1896.
184 FRA, 2023a, p. 10.
185 European Commission, 2022a, p. 21; European Commission, 2022b, p. 29; European Commission, 2022c, p. 25.
186 FRA, 2023a, p. 11.
187 Art. 13 ECHR and Art. 47 Charter of Fundamental Rights of the EU.

applicants, and refugees can submit allegations of human rights violations at the Member States' borders. Where arguable complaints of violations of fundamental rights are made, Member States have a duty to carry out an effective investigation into those allegations.[188] According to the jurisprudence of the ECtHR, competent national authorities are required to carry out an effective official investigation in cases involving alleged violations of Art. 2 (on the right to life) and Art. 3 (on the prohibition of torture or inhuman or degrading treatment or punishment) of the European Convention on Human Rights. This implies that such an investigation must be prompt, expeditious, and capable of leading to the identification and punishment of those responsible for fundamental rights violations.[189]

Despite continuing reports of fundamental rights violations at borders on a large scale, the number of national judicial cases remains low.[190] The reasons for such an unsatisfactory situation are various and may include limited interest or fear on the part of victims in filing a case; lack of evidence; and difficulties in producing evidence of events taking place at sea, in military zones, or during the hours of darkness in forests.[191] Between July 2021 and February 2023, the ECtHR ruled in several cases that human rights were violated at the EU's land or sea borders.[192] In some of these cases, the ECtHR also found that no remedy had been available to the applicants at the national level.[193] At the same time, the ECtHR is increasingly handling proceedings regarding interim measures to prevent irreparable harm and has granted most of these requests.[194]

The Schengen Evaluation and Monitoring Mechanism oversees Member States' implementation of the EU legal rules that constitute the Schengen *acquis*. These evaluations also cover fundamental rights-related matters of border management in the Member States. As a result of the mechanism's evaluation, evaluation reports of inspections, including recommendations, are drawn up. Thus, Italy was recently urged

188 FRA, 2021a, p. 2; FRA, 2020, p. 2.

189 ECtHR, *Mocanu and Others v. Romania*, Nos. 10865/09, 45886/07 and 32431/08, 17 September 2014, paras. 315–326.

190 However, in a recent criminal case that resulted in a conviction, the Rome Tribunal found two Italian officers guilty of manslaughter because they failed to act in response to a shipwreck in 2013, in which over 200 people drowned. As the crime has since been declared to be time-barred, the officers were not punished. Italy, Rome Tribunal, Decision No. 14998, 16 December 2022.

191 FRA, 2023a, p. 11.

192 ECtHR, *M.H. and Others v. Croatia*, Nos. 15670/18 and 43115/18, 18 November 2021; *Safi and Others v. Greece*, No. 5418/15, 7 July 2022; *H.K. v. Hungary*, No. 18531/17, 22 September 2022; *Shahzad v. Hungary*, No. 12625/17, 8 July 2021; *Alhowais v. Hungary*, No. 59435/17, 2 February 2023; *D.A. and Others v. Poland*, No. 51246/17, 8 July 2021; *A.B. and Others v. Poland*, No. 42907/17, 30 June 2022; *A.I. and Others v. Poland*, No. 39028/17, 30 June 2022; *T.Z. and Others v. Poland*, No. 41764/17, 13 October 2022.

193 ECtHR, *Alhowais v. Hungary*, No. 59435/17, 2 February 2023, paras. 71–72; *D.A. and Others v. Poland*, No. 51246/17, 8 July 2021, paras. 39–41; *A.B. and Others v. Poland*, No. 42907/17, 30 June 2022, paras. 22–24; *A.I. and Others v. Poland*, No. 39028/17, 30 June 2022, paras. 25–27; *T.Z. and Others v. Poland*, No. 41764/17, 13 October 2022, paras. 12–15.

194 FRA, 2023a, p. 12; ECtHR, 2022, pp. 1–2.

to address reception gaps in Lampedusa,[195] while Greece was recommended to investigate allegations of ill-treatment at its external EU borders and strengthen fundamental rights-related aspects of its border management governance structure.[196] Apart from the Schengen Evaluation and Monitoring Mechanism, national human rights monitoring at some Member States' borders has proved to play an important role. Specifically, Member States' human rights institutions and ombudsmen (including the Greek Ombudsman, Polish Commissioner for Human Rights, and Spanish Ombudsman) have contributed to the investigations of fundamental rights violations at these countries' borders and/or referred individual cases to the national courts.[197]

Fundamental rights monitoring at EU external borders should be carried out systematically and regularly by the Member States with such borders for a range of their border management activities. These include border surveillance; apprehensions at land, sea, and air borders; and operation of referral mechanisms, including in the event of mass arrivals. To this end, Member States should establish or strengthen their national independent mechanisms to monitor fundamental rights compliance at their borders, in accordance with the European Commission's proposed screening regulation.[198] Such national independent monitoring mechanisms should examine how all these border management activities are carried out by Member States. They should consider and evaluate whether all people at the border are being treated with dignity, whether national border authorities and guards pay particular attention to vulnerable people, whether living conditions in initial reception facilities and immigration detention centres are adequate, whether those whose fundamental rights have been violated at the Member State's borders have access to effective judicial remedies, and what the fundamental rights implications are of implementing contingency plans in the event of mass arrivals at the Member State's border.[199]

To ensure that these national monitoring mechanisms are truly independent, full independence of the national entity monitoring fundamental rights at the Member State's borders should be guaranteed in law to allow for the mechanism to be free of any undue external influence. That is, national border-monitoring mechanisms should be free of any institutional affiliation with the Member States' authorities responsible for border and migration management. These mechanisms should have a relatively broad thematic mandate: They should be competent to monitor the actual implementation of fundamental rights safeguards during border checks and border surveillance within the meaning of Regulation (EU) 2016/399 (the Schengen Borders

195 Recommendation 15 in Council of the European Union, 2022b, p. 2.

196 Recommendations 2 and 24 in Council of the European Union, 2022a, para. 24 p. 8.

197 Hellenic Parliament, Standing Committee on Public Administration, Public Order and Justice, 2022, pp. 12–26; Polish Commissioner for Human Rights, 2023, paras. 1–5. The Spanish Ombudsman's recommendations are available from Defensor del Pueblo, 2022, para. 1.

198 Proposal for a Regulation of the European Parliament and of The Council introducing a screening of third country nationals at the external borders and amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817 (COM/2020/612 final).

199 FRA, 2022, p. 1.

Code) and at initial registration of new arrivals at or in proximity to EU external borders; they should have unhindered access to observe all border operations at any time; and they should be able to access remote border surveillance, monitor apprehensions, and inspect all designated reception areas and detention facilities.[200] So far, no EU Member State has taken any step towards setting up such a new and special fundamental rights monitoring mechanism, except for Croatia (through a pilot project by the Ministry of the Interior of the Republic of Croatia, which led to the conclusion in November 2022 of the cooperation agreement to implement an independent monitoring mechanism for the protection of fundamental rights in the actions of police officers of the Ministry of the Interior in the area of border surveillance, irregular migration, and international protection) and Greece (where the Greek National Commission for Human Rights set up a mechanism for recording incidents of informal forced [summary] returns).[201] Such fundamental rights monitoring and incident recording mechanisms are certainly meaningful as they can significantly increase transparency in the Member States' border management activities.[202]

Moreover, migrants are often turned back at EU internal borders—that is, borders between the Member States. Member States in southern Europe and along the Balkan route have increasingly used intra-EU bilateral readmission agreements (agreements between two Member States) to pass back to a neighbouring Member State migrants that they have apprehended in connection with the migrants' irregular crossing of an EU internal border.[203] Member States are allowed to do so under Art. 6(3) of the Return Directive (Directive 2008/115/EC) for migrants in an irregular situation, provided that a readmission agreement existed before 2009. However, for asylum applicants, the transfer procedure set out in Regulation (EU) No 604/2013 (the Dublin III Regulation) must be applied.[204] In this context, some rulings of the courts in France, Italy, and Slovenia reaffirmed the duty to respect the right to asylum and the principle of *non-refoulement* in intra-EU situations as well.[205] These judicial decisions also highlighted the importance of respecting individuals' rights to be heard and to

200 FRA, 2022, p. 5.

201 FRA, 2023a, p. 13.

202 For example, the Greek National Commission for Human Rights' mechanism recorded 50 incidents involving apprehension or interception of asylum seekers and their subsequent summary return to the Turkish side of the border. The mechanism also revealed that such incidents were frequently accompanied by ill-treatment of refugees and other migrants, deprivation or destruction of their identity documents, and other serious fundamental rights violations. It is, however, difficult to figure out whether the reports on these incidents at the Greek-Turkish border were referred to the competent judicial authorities for criminal investigation. FRA, 2023a, p. 13.

203 FRA, 2023a, p. 37.

204 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 (recast).

205 FRA, 2021b, p. 161; France, Council of State, 7th Chamber, No. 440756, 8 July 2020, paras. 2 and 12 (concerning a mother from the Central African Republic and her child passed back to Italy in May 2020); Italy, Court of Rome (Tribunale Ordinario di Roma), Judgment No. 56420/2020, 18

be formally notified of decisions taken against them, in accordance with the general principles of EU law.

Furthermore, the European Commission, as the guardian of EU treaty law, may bring infringement proceedings against the Member States where, for instance, there is sufficient evidence that their authorities are responsible for pushbacks or other ill-treatment of migrants at their borders. However, the European Commission may be reluctant to pursue infringement proceedings against certain Member States that disregard refugee protections and border management-related human rights safeguards. Nevertheless, as the Greek government failed to investigate and address well-documented allegations of fundamental rights violations at its border, including continued violent pushback of people seeking asylum towards Turkey and the blatant disregard for EU asylum safeguards, the European Commission finally triggered an infringement procedure against Greece in January 2023 for its systematic breach of EU law in its treatment of people seeking asylum in the EU.[206] The European Commission's action to hold the Greek authorities accountable for their human rights violations against refugees and migrants by exposing people seeking asylum on its territory to suffering and abuse could result in the European Commission taking Greece to the CJEU if Greece does not comply with its obligations under EU law before it is referred to the CJEU and ultimately imposing financial sanctions on Greece.

6.2.3. Respect for EU norms other than provisions on border management and migration

Other EU law rules still have an important impact on border management and migration issues, notably in the area of free movement law as well as data protection law and association agreements.[207] In accordance with the principle of sincere cooperation ,[208] Member States are required not to take national measures that may thwart the achievement of the EU's objectives. Similarly, in exercising the competences reserved for them, Member States must not undermine the rules and principles of EU law. Accordingly, the Member States' margin for intervention in border management, migration, and asylum matters must not affect the application of more specific provisions concerning the situation of third-country nationals, such as those relating to EU citizenship or freedom of movement.[209] For example, the CJEU held in *Gerardo Ruiz Zambrano* that Art. 20 TFEU on the rights of citizens of the EU precludes a Member State from refusing to grant residence and work permits to third-country national parents, upon whom their minor children, who are EU citizens,

January 2021 (concerning a Pakistani national informally pushed back to Slovenia); Slovenia, Supreme Court, VSRS Judgment I U p 23/2021, 9 April 2021. See also ASGI, 2020, p. 1–8.

206 OXFAM International, 2023.

207 Peers, 2016, pp. 97–102.

208 Art. 4(3) TEU.

209 Neframi, 2011, p. 25. See also Barbou des Places, 2010, pp. 341–356. CJEU, Case C-294/06 *Payir and Others v. Secretary of State for the Home Department*, [2008] ECR I-203, 24 January 2008.

are dependent. The CJEU explained that such a refusal would have the effect of depriving the EU citizen children of the genuine enjoyment of the substance of the rights conferred upon them by their status as EU citizens.[210] In another case (*Metock*), the CJEU held that Member States could not make the right to live together under the Citizens' Rights Directive (Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States) conditional on matters such as when and where the marriage had taken place or on the fact that the third-country national spouse had previously been lawfully resident in another Member State.[211]

7. Obligations/responsibilities of Member States' authorities within the EU's external action framework

The Member States' competent authorities have an obligation to implement international agreements relating to border management and migration that are concluded by the EU (section 7.1.). Moreover, they have an obligation to facilitate the EU's exercise of its competence (section 7.2.).

7.1. Obligation to implement international agreements

The EU may, in certain cases, conclude an international agreement with one or more third countries or international organisations.[212] Such agreements concluded by the EU are binding upon not only EU institutions but also its Member States.[213] Thus, the EU's international agreements constitute common rules, which the Member States must implement. In the case of their non-implementation, a Member State fails to fulfil its obligations and is subject to sanction by the CJEU. The Member States' competence in connection with border management and migration is affected by the conclusion of status agreements (see section 4.2) and readmission agreements by the EU. Member States are required, in accordance with the principle of sincere cooperation, to implement these agreements, which supersede any prior Member States' agreements.

Moreover, the Member States' competence in connection with border management and migration must not hinder the implementation of international agreements concluded by the EU, which relate to the free movement of third-country

210 CJEU, C-34/09, *Gerardo Ruiz Zambrano v. Office national de l'emploi (ONEm)* [GC], 8 March 2011.
211 CJEU, Case C-127/08, *Metock and Others v. Minister for Equality, Justice and Law Reform* [2008] ECR I-6241, 25 July 2008, paras. 53–54 and 58.
212 Art. 216(1) TFEU.
213 Art. 216(2) TFEU.

nationals.[214] Third countries may be associated to the EU through the conclusion of association agreements foreseen in Art. 217 TFEU: 'The Union may conclude with one or more third countries or international organisations agreements establishing an association involving reciprocal rights and obligations, common action and special procedure'. Art. 217 TFEU thus provides a very flexible legal basis, allowing for various privileged relations by the EU with third partners. Notwithstanding the broad scope of Art. 217 TFEU, almost all EU association agreements are concluded as "mixed agreements", which implies that besides the EU, its Member States are also involved as parties in their own right.[215] This means that EU association agreements are binding on the Member States as a whole, regardless of the division of competences between the EU and its Member States.[216] Hence, the reservation of Member States' competence in connection with entry, border crossing, and immigration for employment purposes cannot preclude the implementation of EU association agreements, which include provisions on the rights of the partner country's nationals.[217]

7.2. Support for international action by Member States

The exercise of Member States' external competence must not undermine the EU internal common rules. Pursuant to the principle of sincere cooperation in Art. 4(3) TEU, Member States need to facilitate the EU's tasks in carrying out its mission. This entails that the requirement of compliance in the exercise of Member States' internal competence applies equally to the Member States' international activities.[218] As regards the conclusion of readmission agreements and agreements with third countries concerning measures on crossing the EU's external borders (which must respect EU law and other relevant international agreements), the obligation entails providing a framework for the exercise of Member States' competence. In the context of the local border traffic regime in particular, Member States may conclude bilateral agreements with their neighbouring non-EU countries to ease the crossing of EU external borders for border residents who frequently need to cross these borders (e.g. holders of local border traffic permits). When the EU has not exercised its competence in connection with the partner country in question, Member States may also conclude readmission agreements. Mere obtaining of a negotiating mandate from the Council of the EU by the European Commission does not deprive Member States of their competence. However, as the CJEU pointed out in *Commission v. Luxembourg* and *Commission v. Germany*, Member States have a duty to closely cooperate with

214 Thym and Zoeteweij-Turhan, 2015.

215 For a comprehensive study of the law and practice of EU association agreements, see Van Elsuwege and Chamon, 2019. In this context, Nedeski distinguished between two types of shared obligations in mixed agreements to unravel who can be held responsible in case of a violation of such agreements: the EU, the Member State(s) concerned, or both. Nedeski, 2021, pp. 139–178.

216 Neframi, 2010, p. 171.

217 Peers, 2018, p. 53.

218 Neframi, 2011, p. 27.

and assist the European Commission, in accordance with the principle of sincere cooperation .[219]

In exercising their shared competence in matters of border management and migration at the international level (i.e. within other multilateral fora, such as the UN, Council of Europe, and Organisation for Economic Co-operation and Development), Member States must ensure, in accordance with the principle of sincere cooperation, unity of the EU's international representation by presenting a common position of the EU.[220] However, this does not constitute the Member States' obligation of a result unless the EU acts autonomously when dealing with border management and related migration matters at the international level.

8. Conclusion

As presented in this chapter, the relationship between the EU and its Member States—in terms of their shared competences and responsibilities in the area of border management as a key part of regulating migration phenomenon—is rather complicated. This chapter aimed to provide thorough insights into the complex issues surrounding the division of competences and responsibilities shared between EU institutions/agencies and the Member States' authorities in developing and implementing an EU common and integrated border management regime as an integral component of the wider EU migration framework. Considering the continuously expanding role and mandate of the EU in border management matters, the consequent potential legal implications for Member States themselves, and the impact of EU actions on refugees and other migrants, EIBM remains organised around multi-level administrative governance.

Clearly, the control of the EU's external borders serves the legitimate purpose of verifying the right of a migrant to enter EU territory. At the same time, Member States have retained their sovereign right to control the entry of non-nationals, including third-country nationals, into their territory while exercising border control, particularly when the maintenance of their law and order and safeguarding of their internal security may be at risk. Member States' national interests thus get in the way of a genuinely effective and thorough EU's asylum and migration policy, including border management, in line with binding international standards. As a result, the EU policy in these areas is not yet sufficiently approached as a joint task for all Member States.

219 Art. 4(3) TEU ;CJEU, Case C-266/03 *Commission v. Luxembourg*, [2005] ECR I-4805, 2 June 2005; CJEU, Case C-433/03 *Commission v. Germany*, [2005] ECR I- 6985, 14 July 2005.

220 Neframi, 2011, p. 26.

As the Member States' competence in the sphere of common external border management co-exists with that of the EU, Member States' national authorities responsible for border control also share their responsibility with the EBCG Agency to implement EIBM. Member States keep the primary responsibility for managing their sections of the external borders and for issuing return decisions, whereas the EBCG Agency supports the implementation of EU measures relating to the management of external borders and return operations by providing coordination as well as technical and operational assistance. The EU's shared competence in connection with the migration policy, including management of external borders, is both internal (normative and operational) and external (various types of agreements with third countries). However, the EU's powers and the tasks and activities of its institutions/agencies concerning management of borders and migration in the EU may not be exercised beyond the limits specified in the relevant provisions of the Treaty of Lisbon. These limits are linked to (1) the competence explicitly reserved for Member States under the EU Treaties, (2) the principle of conferred competences and speciality, (3) the EU's external action, and (4) certain territorial aspects (e.g. the exempt position of Member States such as Denmark and Ireland).

Given that the EU has its own legal personality with its own obligations, it is also independently responsible for the violations of its treaty obligations, including border management-related human rights abuses. At the same time, Member States are also responsible for border governance in the territory under their jurisdiction and for any border management activities and operations in other places where they exercise authority or effective control over an area, place, individual, or transaction. The transnational nature of some Member States' actions in the context of governing the EU's external borders does not exempt them from complying with and implementing their international and human rights obligations (both negative and positive), nor from their responsibility. In certain cases, the accountability of multiple Member States may be implicated, such as on the high seas or elsewhere when they act extraterritorially. Moreover, Member States cannot—by (partially) "outsourcing" a certain task, such as border control or border surveillance, to the EU institutions and agencies—shift away from their own obligations and responsibilities. They may be held accountable for what their own national border management staff have done or failed to do.

Under international human rights treaties, such as the European Convention on Human Rights, Member States also have a positive obligation to act and report on the human rights situation and violations at the EU's external borders. Even if individual Member States are helping implement a joint migration policy in an EU context, they are still individually responsible for ensuring the legal protection of those whose rights are being violated, and for actively striving for a mechanism that will prevent the violation of fundamental rights at the EU's external borders wherever possible. According to the ECtHR case law, Member States remain responsible under the European Convention on Human Rights, and these individual obligations apply alongside their joint actions (e.g. common border management operations) in an EU

context. In addition, it has been argued that Member States act as the management of the EU (the European Council) and can also be jointly responsible in this role.[221]

There continue to be shortcomings in the existing system of legal protection at the EU's external borders. These involve both obstacles in terms of access to national and European courts and flaws in monitoring mechanisms. As things stand, the legal remedies against actions of the EBCG Agency available to individuals remain inadequate. Likewise, proceedings before national courts are usually lengthy or insufficiently effective. Therefore, significant efforts need to be made towards improving the effectiveness of legal protection as part of the rule of law at the EU level, eliminating the ongoing practice of pushbacks, pullbacks, ill-treatment of migrants, and other serious human rights violations at the external EU borders, as well as towards preventing such unacceptable practices wherever possible in the future. In the same vein, Member States should take concrete steps to ensure effective monitoring of external border controls and the functioning of individual complaints procedures. However, this can only be achieved by sufficient political will and maturity, which is currently lacking in most Member States. Achieving major progress in this area requires not only joint responsibility and action of Member States with external EU borders with the European Commission, but also appropriate contributions of all other Member States.

221 Advisory Council on Migration, 2022, p. 11.

References

Bibliography

Advisory Council on Migration (2022) *EU Borders are Common Borders: Member States' Responsibility for Human Rights Protection at the EU'S External Borders*. The Hague: Advisory Council on Migration.

ASGI (2020) 'Riammissioni informali' dei cittadini stranieri alla frontiera terrestre italo-slovena, lettera aperta dell'ASGI al Governo e ad UNHCR Informal Readmissions of Foreigners at the Italian–Slovenian Land Border', *ASGI*, 3 August 2020 [Online]. Available at: https://www.asgi.it/wp-content/uploads/2020/08/nota-ASGI-su-risposta-gov-italiano-su-interpellanza_intestata_da-pubblicare.pdf (Accessed: 19 September 2024).

Barbou des Places, S. (2010) 'Droit communautaire de la liberté de circulation et droit des migrations. Ou est la frontière?' in Rodrigues, S. (ed.) *L'Union européenne: Union de droit, Union des droits, Mélanges en l'honneur de Philippe Manin,* Pedone, pp. 319–334.

Bochenek, M. G. (2023) 'The Persistent, Pernicious Use of Pushbacks against Children and Adults in Search of Safety', *Laws*, 12(3), pp. 1–30; https://doi.org/10.3390/laws12030034.

Brownlie, I. (2003) *Principles of Public International Law,* Sixth edn. Oxford: Oxford University Press.

Brölmann, C. (2015) 'Member States and International Legal Responsibility: Developments of the Institutional Veil', *International Organizations Law Review*, 12(2), pp. 358–381; https://doi.org/10.1163/15723747-01202005.

Cebulak, P., Morvillo, M. (2022) 'Schengen Restored: The CJEU Sets Clear Limits to the Reintroduction of Internal Border Controls', *VerfBlog*, 5 May 2022 [Online]. Available at: https://verfassungsblog.de/schengen-restored/ (Accessed: 14 May 2024), https://doi.org/10.17176/20220505-182415-0.

Coman-Kund, F. (2018) *European Union Agencies as Global Actors: A Legal Study of the European Aviation Safety Agency, FRONTEX and EUROPOL*. First edn. Routledge research in EU law .London:Routledge. https://doi.org/10.4324/9781351136860.

Coman-Kund, F. (2019) 'The Cooperation between the European Border and Coast Guard Agency and Third Countries According to the New Frontex Regulation: Legal and Practical Implications' in Herwig C. H. Hofmann, Ellen Vos and Merijn Chamon (eds.), *The External Dimension of EU Agencies and Bodies: Law and Policy.* Edward Elgar Publishing. https://doi.org/10.4337/9781788973755.00009.

Constantinesco, V. (1974) *Compétences et pouvoirs dans l'Union européenne*, LGDJ.

Council of Europe and Group of Experts on Actions against Trafficking in Human Beings (2023) *Report Concerning the Implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Greece*. Strasbourg: Secretariat of the Council of Europe Convention on Action against Trafficking in Human Beings (GRETA and Committee of the Parties) Council of Europe.

Council of the European Union (2022a) *Council Implementing Decision Setting Out a Recommendation on Addressing the Deficiencies Identified in the 2021 Evaluation of Greece on the Application of the Schengen Acquis in the Field of Management of the External Borders, 8184/22,* Council of the European Union, 12 April 2022 [Online]. Available at: https://www.statewatch.org/media/3147/eu-com-greece-schengen-eval-draft-council-decision-com-2022-99.pdf (Accessed: 19 September 2024).

Council of the European Union (2022b) *Council Implementing Decision Setting Out a Recommendation on Addressing the Deficiencies Identified in the 2021 Evaluation of Italy on the Application of the Schengen Acquis in the Field of Management of the External Borders, 8431/22*. Council of the European Union, 26 April 2022 [Online]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CONSIL:ST_7787_2022_INIT (Accessed: 19 September 2024).

Council of the EU and the European Council (2023) *Border management: agreements with non-EU countries* [Online]. Available at: https://www.consilium.europa.eu/en/infographics/border-management-agreements-third-countries/ (Accessed: 14 September 2023).

Crawford, J. (2013) *State Responsibility: The General Part*, Oxford University Press. https://doi.org/10.1017/CBO9781139033060.

CRC Committee (2022) *Concluding Observations on the Combined Fourth to Sixth Periodic Reports of Greece*. Geneva: CRC Committee.

Dailler, P., Pellet, A. (2002) *Droit International Public*, Seventh edn. Paris: LGDJ.

Defensor del Pueblo (2023). *Actuaciones y medidas de los Cuerpos y Fuerzas de Seguridad del Estado en Melilla*. [Online]. Available at: https://www.defensordelpueblo.es/resoluciones/actuaciones-y-medidas-de-los-cuerpos-y-fuerzas-de-seguridad-del-estado-en-melilla/ (Accessed: 13 October 2023).

de Schoutheete, P., Andoura, S. (2007) 'The Legal Personality of the European Union', *Studia Diplomatica*, 60(1), pp. 3–7.

ECtHR (2022) 'Update on Interim Decisions Concerning Member States' Borders with Belarus' *ECtHR*, 21 February 2022 [Online]. Available at: https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=003-7264687-9892524&filename=Update%20on%20interim%20decisions%20concerning%20member%20States%E2%80%99%20borders%20with%20Belarus.pdf (Accessed: 19 September 2024).

Ekelund, H. (2019) "Normative Power Frontex?": 'Assessing Agency Cooperation with Third Countries' in Herwig C. H. Hofmann, Vos, E., Chamon, M. (eds.) *The External Dimension of EU Agencies and Bodies: Law and Policy*. Cheltenham: Edward Elgar Publishing. https://doi.org/10.4337/9781788973755.00012.

European Commission (no date) *The EU Return Coordinator* [Online]. Available at: https://home-affairs.ec.europa.eu/policies/migration-and-asylum/irregular-migration-and-return/eu-return-coordinator_en (Accessed: 17 May 2024).

European Commission (2022a) '2022 Rule of Law Report: Country Chapter on the Rule of Law Situation in Greece' *European Commission*, 13 July 2022 [Online]. Available at: https://commission.europa.eu/document/download/d8b54bd4-dbb3-413c-b80f-5cd0a2bd2734_en?filename=21_1_194014_coun_chap_greece_en.pdf (Accessed: 19 September 2024).

European Commission (2022b) '2022 Rule of Law Report: Country Chapter on the Rule of Law Situation in Hungary' *European Commission*, 13 July 2022 [Online]. Available at: https://commission.europa.eu/document/download/5ca0f861-b4d4-412d-bd7d-dbe3582af1c1_en?filename=40_1_193993_coun_chap_hungary_en.pdf (Accessed: 19 September 2024).

European Commission (2022c) '2022 Rule of Law Report: Country Chapter on the Rule of Law Situation in Italy' *European Commission*, 13 July 2022 [Online]. Available at:https://commission.europa.eu/document/download/a2aca05d-989f-4849-93cb-c449c021cfd2_en?filename=29_1_194038_coun_chap_italy_en.pdf (Accessed: 19 September 2024).

European Council (2023) European Council meeting (14 and 15 December 2023) – Conclusions [Online] Available at: https://www.consilium.europa.eu/media/68967/europeancouncilconclusions-14-15-12-2023-en.pdf (Accessed: 17 May 2024).

European Ombudsman (2024) 'Decision on how the European Border and Coast Guard Agency (Frontex) complies with its fundamental rights obligations with regard to search and rescue in the context of its maritime surveillance activities, in particular the Adriana shipwreck (OI/3/2023/MHZ)' *European Ombudsman*, 26 February 2024. [Online]. Available at: https://www.ombudsman.europa.eu/sl/decision/en/182665 (Accessed: 18 May 2024).

Fink, M. (2012) 'Frontex Working Arrangements: Legitimacy and Human Rights Concerns Regarding "Technical Relationships", *Utrecht Journal of International and European Law,* 28(75), pp. 20–35.; https://doi.org/10.5334/ujiel.v28i75.31.

Fink, M. (2018) *Frontex and Human Rights: Responsibility in 'Multi-Actor Situations' under the ECHR and EU Public Liability Law.* Oxford: Oxford University Press.

Fink, M. (2020) 'The Action for Damages as a Fundamental Rights Remedy: Holding Frontex Liable' *German Law Journal,* 21(3), pp. 532–548; https://doi.org/10.1017/glj.2020.20.

Fink, M., Rijpma, J.J. (2022) 'The management of the European Union's external borders' in Tsourdi, E. De Bruycker, P. (eds.) *Research Handbook on EU Migration and Asylum Law.* Cheltenham: Edward Elgar Publishing, pp. 408–435; https://doi.org/10.4337/9781786439635.00029.

EU Agency for Fundamental Rights (FRA) (2023a) *Asylum and Migration: Progress Achieved and Remaining Challenges, Overview 2015 – March 2023.* Luxembourg: Publications Office of the European Union.

FRA, Council of Europe (2020) *Fundamental rights of refugees, asylum applicants and migrants at the European borders* [Online] Available at: https://fra.europa.eu/en/publication/2020/fundamental-rights-refugees-asylum-applicants-and-migrants-european-borders (Accessed:18 May 2024).

FRA, Council of Europe (2020) *Handbook on European law relating to asylum, borders and immigration* [Online] Available at: https://fra.europa.eu/en/publication/2020/handbook-european-law-relating-asylum-borders-and-immigration-edition-2020 (Accessed: 18 May 2024).

EU Agency for Fundamental Rights (FRA) (2020) *Handbook on European Law Relating to Asylum, Borders and Immigration – Edition 2020.* Luxembourg: Publications Office of the European Union.

FRA, Council of Europe and European Union Agency for Fundamental Rights (2021) *European standards on legal remedies, complaints mechanisms and effective investigations at borders* [Online] Available at: https://fra.europa.eu/en/publication/2021/legal-remedies-borders (Accessed:18 May 2024).

FRA, European Union Agency for Fundamental Rights (2024) *Establishing national independent mechanisms to monitor fundamental rights compliance at EU external borders, practical guidance.* Publications Office of the European Union [Online] Available at: https://fra.europa.eu/en/publication/2024/border-rights-monitoring (Accessed: 19 September 2024).

FRA (2021) 'European Standards on Legal Remedies, Complaints Mechanisms and Effective Investigations at Borders', *FRA*, 9 July 2021 [Online] Available at: https://fra.europa.eu/sites/default/files/fra_uploads/coe-fra-2021-effective-remedies-european-borders_en.pdf (Accessed: 19 September 2024).

FRA (2020) 'Fundamental Rights of Refugees, Asylum Applicants and Migrants at the European Borders', *FRA*, 27 March 2020 [Online] Available at: https://fra.europa.eu/sites/default/files/fra_uploads/fra-coe-2020-european-law-land-borders_en.pdf (Accessed: 19 September 2024).

FRA, Publications Office of the European *Union* (2023) *Asylum and Migration: Progress Achieved and Remaining Challenges, Overview 2015 – March 2023* [Online] Available at: https://fra.europa.eu/en/publication/2023/migration-progress-challenges (Accessed: 18 May 2024).

FRA, European Union Agency for Fundamental Rights (2023) *Fundamental Rights Report* [Online] Available at: https://fra.europa.eu/en/publication/2023/fundamental-rights-report-2023 (Accessed: 18 May 2024).

Frontex (no date a) Beyond EU borders: Working arrangements [Online] Available at: https://www.frontex.europa.eu/what-we-do/beyond-eu-borders/working-arrangements/ (Accessed: 14 September 2023).

Frontex (no date b) *Who we are* [Online] Available at: https://www.frontex.europa.eu/about-frontex/who-we-are/tasks-mission/ (Accessed: 17 May 2024).

Frontex: Beyond EU borders, European Border and Coast Guard Agency (2021) [Online] Available at: https://www.frontex.europa.eu/assets/Publications/General/Beyond_EU_borders_2021.pdf (Accessed: 18 May 2024).

Frontex (2020) *Code of Conduct Applicable to All Persons Participating in Frontex Operational Activities*. Luxembourg: Publications Office of the European Union.

Frontex (2019) *Common Core Curriculum – For Border and Coast Guard Basic Training in the EU – A Guide to the Modifications from the CCC 2012 to the CCC 2017*. Luxembourg: Frontex.

Frontex: Common core curriculum – For border and coast guard basic training in the EU – A guide to the modifications from the CCC 2012 to the CCC 2017 (2019) [Online] Available at: https://op.europa.eu/en/publication-detail/-/publication/ccaed831-3978-11e9-8d04-01aa75ed71a1/language-en (Accessed: 18 May 2024).

Frontex (2021) *Beyond EU borders* [Online] Available at: https://www.frontex.europa.eu/assets/Publications/General/Beyond_EU_borders_2021.pdf (Accessed: 9 September 2024).

Gatta, Francesco Luigi (2021) 'Between Rule of Law and Reputation: Frontex's withdrawal from Hungary' *VerfBlog*, 8 February 2021 [Online] Available at: https://verfassungsblog.de/between-rule-of-law-and-reputation (Accessed: 18 May 2024).

Geddes, A., Scholten, P. (2016) 'Towards Common EU Migration and Asylum Policies?' in Aguilera, N. (ed.) *The Politics of Migration and Immigration in Europe*, First edn. SAGE Publications. https://doi.org/10.4135/9781473982703.

Haguenau-Moizard, C. (2009) 'Sanction nationale du droit communautaire: sanctions effectives, proportionnées, dissuasives' in Dutheil de la Rochère, J. (ed.) *L'exécution du droit de l'Union européenne*, Bruylant.

Hellenic Parliament, Standing Committee on Public Administration, Public Order and Justice (2022) 'Discussion on the Annual Report (2021) of the Ombudsman' Hellenic Parliament, 18 May 2022 [Online] Available at: https://www.theioi.org/downloads/avbpd/The%20Greek%20Ombudsman%20-%20Special%20report%20-%20Return%20of%20third%20country%20nationals%202022%20-%20EN.pdf (Accessed: 13 October 2023).

ICJ (1949) 'Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion of 11 April 1949', *ICJ Reports*, 11 April 1949 [Online] Available at: https://www.icj-cij.org/sites/default/files/case-related/4/004-19490411-ADV-01-00-EN.pdf (Accessed: 19 September 2024).

International Law Commission (2011) 'Report of the Sixty-Third Session: Draft Articles on the Responsibility of International Organizations (UN Doc A/66/10)' *International Law Commission*, 26 April to 3 June and 4 July to 12 August 2011 [Online] Available at: https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_11_2011.pdf (Accessed: 19 September 2024).

Kohler, C., Engel, J-C. (2007) 'Le choix approprié de la base juridique pour la législation communautaire: enjeux constitutionnels et principes directeurs', *Europe,* 1, pp. 5–10.

Lavrysen, L. (2016) *Human Rights in a Positive State: Rethinking the Relationship between Positive and Negative Obligations under the European Convention on Human Rights,* Cambridge: Intersentia. https://doi.org/10.1017/9781780685311.

Lehnert, M. (2014) *Frontex und operative Maßnahmen an den europäischen Außengrenzen Verwaltungskooperation – materielle Rechtsgrundlagen – institutionelle Kontrolle*, Baden-Baden: Nomos. https://doi.org/10.5771/9783845255521.

Mowbray, A. (2004) *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights*, Oxford: Hart Publishing.

Mungianu, R. (2016) *Frontex and Non-Refoulement: The International Responsibility of the EU*, Cambridge University Press. https://doi.org/10.1017/CBO9781316459904.

Nedeski, N. (2021) 'Shared Obligations and the Responsibility of an International Organization and Its Member States: The Case of EU Mixed Agreements' *International Organizations Law Review,* 18(2), pp. 139–178; https://doi.org/10.1163/15723747-18010005.

Neframi, E. (2010) *L'action extérieure de l'Union européenne*, LGDJ.

Neframi, E. (2011) *Division of competences between the European Union and its Member States concerning immigration*, European Parliament.

Nollkaemper, A., Jacobs, D. (2011) 'Shared responsibility in international law: a conceptual framework', *Michigan Journal of International Law*, 34, pp. 359–438; https://doi.org/10.2139/ssrn.1916575.

Nollkaemper, A., Plakokefalos, I. (2017) *The practice of shared responsibility in international law*. Cambridge: Cambridge University Press. https://doi.org/10.1017/9781316227480.002.

Paasivirta, E. (2016) 'The Responsibility of Member States of International Organizations: A Special Case for the European Union?' in Barros, A. S., Ryngaert, C., Wouters, J. (eds.) *International Organizations and Member State Responsibility: Critical Perspectives*, Leiden: Brill, pp. 159–177; https://doi.org/10.1163/9789004319806_010.

Peers, S. (2008) 'Legislative Update: EU Immigration and Asylum Competence and Decision-Making in the Treaty of Lisbon' *European Journal of Migration and Law*, 10(2), pp. 219-247; https://doi.org/10.1163/157181608X317354.

Peers, S. (2008) 'EU Migration Law and Association Agreements' in Martenczuk, B., Van Thiel, S. (eds.) *Justice, Liberty, and Security,* Brussels: University Press, pp. 53–88.

Peers, S. (2016) *EU Justice and Home Affairs Law: Volume I: EU Immigration and Asylum Law, Fourth* edn. Oxford University Press. https://doi.org/10.1093/acprof:oso/9780198776833.003.0002.

Pellet, A. (2010) 'The Definition of Responsibility in International Law' in Crawford, J., Pellet, A., Olleson, S. (eds.) *The Law of International Responsibility*. Oxford: Oxford University Press, pp. 3–16.

Polish Commissioner for Human Rights (2023) 'Śmierć w lesie przy granicy z Białorusią. Interwencje RPO', *Polish Commissioner for Human Rights*, 19 January 2023 [Online] Available at: https://bip.brpo.gov.pl/pl/content/interwencja-rpo-straz-graniczna-prokuratura-smierc-granica-bialorus (Accessed: 13 October 2023).

Rijpma, J. (2017) 'External Migration and Asylum Management: Accountability for Executive Action Outside EU-territory' *European Papers*, 2(2), pp. 571–596; http://doi.org/10.15166/2499-8249/169.

Ryngaert, C. (2015) 'The Responsibility of Member States of International Organizations', *International Organizations Law Review*, 12(2), pp. 502–517; https://doi.org/10.1163/15723747-01202012.

Thym, D., Zoeteweij-Turhan, M. (2015) *Rights of Third-Country Nationals under EU Association Agreements: Degrees of Free Movement and Citizenship*, Boston-Leiden: Brill.

Triantafyllou, D. (2005) *La Constitution de l'Union européenne*, Brussels: Bruylant.

UN Refugee Agency (UNHCR) (2022b) 'UN Refugee Agency Warns of Increasing Violence and Human Rights Violations at European Borders' *UNHCR*, 21 February 2022 [Online] Available at: https://www.unhcr.org/news/news-releases/news-comment-unhcr-warns-increasing-violence-and-human-rights-violations (Accessed:19 September 2024).

UN Human Rights Council (2021) *Report on Means to Address the Human Rights Impact of Pushbacks of Migrants on Land And Sea – Report of the Special Rapporteur on the Human Rights of Migrants*, Geneva: UN Human Rights Council.

OHCHR (2022d) 'UN Experts Urge More Action to Ensure Dignity, Equity and Justice for Migrants, Refugees and Asylum Seekers of African Descent' *OHCHR*, 30 August 2022 [Online] Available at: https://www.ohchr.org/en/statements/2022/08/un-experts-urge-more-action-ensure-dignity-equity-and-justice-migrants-refugees (Accessed: 19 September 2024).

OXFAM International (2023) *European Commission launches infringement proceedings against Greece* [Online] Available at: https://www.oxfam.org/en/press-releases/european-commission-launches-infringement-proceedings-against-greece (Accessed: 29 October 2023).

UN Security Council (2023) *United Nations Operation in Cyprus : Report of the Secretary-General*. New York: UN Security Council.

UN Committee on the Rights of the Child (CRC Committee) (2022) *Concluding Observations on the Combined Fifth and Sixth Periodic Reports of Cyprus*. Geneva: CRC Committee.

Van Elsuwege, P., Chamon, M. (2019) *The meaning of 'association' under EU law: A study on the law and practice of EU association agreements*, European Union.

Wessel, R. A., Dekker, I. F. (2015) 'Identities of States in International Organizations' *International Organizations Law Review,* 12(2), pp. 293-318; https://doi.org/10.1163/15723747-01202002.

Xenos, D. (2012) *The Positive Obligations of the State under the European Convention of Human Rights*. London: Routledge. https://doi.org/10.4324/9780203807811.

Legal sources

Charter of Fundamental Rights of the European Union, OJ C 326, 26.10.2012, pp. 391–407.

Code of Conduct Applicable to All Persons Participating in Frontex Operational Activities, European Border and Coast Guard Agency (Frontex), Luxembourg: Publications Office of the European Union, 2020.

Communication from the Commission to the European Parliament and the Council establishing the multiannual strategic policy for European integrated border management, COM (2023) 146 final.

Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 005).

Convention Relating to the Status of Refugees, 28 July 1951, UNTS, vol. 189, p. 137.

European Ombudsman, Decision on how the European Border and Coast Guard Agency (Frontex) complies with its fundamental rights obligations with regard to search and rescue in the context of its maritime surveillance activities, in particular the Adriana shipwreck (OI/3/2023/MHZ), 26 February 2024, Available at: https://www.ombudsman.europa.eu/sl/decision/en/182665 (Accessed 18 May 2024).

Protocol Relating to the Status of Refugees, 31 January 1967, UNTS, vol. 606, p. 267.

Online sources

EU borders are common borders: Member States' responsibility for human rights protection at the EU's external borders (2022) *Policy Brief, ACVZ publication*.

Frontex status agreements with non-EU countries (2023) EUR-Lex [Online]. Available at: https://eur-lex.europa.eu/EN/legal-content/summary/frontex-status-agreements-with-non-eu-countries.html (Accessed: 14 September 2023).

The EU's Dirty Hands: Frontex Involvement in Ill-Treatment of Migrant Detainees in Greece (2011) *Human Rights Watch, www.hrw.org,* 21 September 2011 [Online] Available at: https://www.hrw.org/report/2011/09/21/eus-dirty-hands/frontex-involvement-ill-treatment-migrant-detainees-greece (Accessed: 25 September 2023).

CHAPTER XI

Schengen Area and Mass Migrations: The End of a Dream?

Frane Staničić

Abstract

The idea of Schengen as a vast area without (inner) borders has been active since 1984. For a long time, the idea of a "borderless Europe" thrived because external borders of the Schengen area were adequately protected. However, after 2005, when it was said that Schengen had come to epitomise freedom, security, and European success, the first cracks in the mutual trust among the Member States began appearing and became obvious in 2011 during the French-Italian row when France introduced border controls with Italy. The migrant crisis in 2015 with the reintroduction of numerous (and long lasting) inner border controls showed how the Schengen area is in reality fragile. This chapter deals with the current situation in the Schengen area and tries to show whether Schengen can survive as an undisputedly important achievement in the process of Europeanisation. However, while coping with the shortcomings of Schengen and establishing stronger and more efficient controls on the external border, protection of individual human rights must not be neglected.

Keywords: Schengen, Schengen Border Code, migrations, border controls, human rights.

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1. Introduction

What is Schengen, and what it is about? I feel this question should be the focus of this chapter. The idea of Europe without (inner) borders is a noble one, but global developments and those within the European Union (EU) itself challenge this idea significantly. These developments include, for example, "temporary" suspensions of Schengen that last for years and politicians' statements that Schengen is not working.[1] This is the state of the world (and the EU) in which we live because of the unprecedented influx of migrants towards and through the outer border of the EU and increasing problems within the Member States regarding integration of migrants into their respective societies.[2] There are, of course, disagreements between Member States, such as on the migration and asylum policies and their development. Therefore, what is Schengen, and what is it about? Or even better—what should Schengen be, and what it should be about? What is the role of Schengen rules in the framework of EU law? What happened over time that we walked the path from the 2005 proclamation that 'Schengen had come to epitomise freedom, security, and European success'[3] to 'Schengen is not working'? Schengen rules were set as a tool for combating unlawful (irregular) migrations and ensuring that only individuals that meet the set conditions for entry are admitted into the EU. This was and is necessary to ensure a Europe without inner borders. Two principal theories of European integration—intergovernmentalism and neofunctionalism—consider the abolition of border controls in the Schengen area as a key area of integration.[4] However, freedom to travel across the continent without the hassle of checks at internal borders is linked with the need to provide greater security[5] (at the external border).[6] The debordering process is one of the main achievements of EU regional integration, although it has also stirred up anxieties among the population that revolve around transnational crime and irregular migration as well as loss of identity.[7] Now, even EU institutions—which have traditionally been seen as defenders of the free movement—have expressed criticism regarding open borders.[8] In light of recurrent

1 Skaro, 2023.

2 A recent Eurobarometer survey, 'Integration of Immigrants in the European Union', shows that the citizens feel that integration is crucial for migrants. European Commission, 2022b, p. 5.

3 Luc Frieden, then President of the EU Justice and Home Affairs Council, on when celebrating the 20th anniversary of the signing of the Schengen agreements in Luxembourg. See in Zaiotti, 2011, pp. 537–538.

4 Salomon and Rijpma, 2023, p. 282.

5 In Saarbrücken and Schengen, the main objective was to make easier the cross-border formalities from the perspective of completion of the internal market. This aim was boosted in 1987 by the Single European Act. However, the fall of the Berlin Wall in 1989 and the end of the Cold War changed the overall perspective by highlighting the need for more security-related measures as part of Schengen cooperation. De Capitani, 2014, p. 106.

6 Zaiotti, 2011, p. 538.

7 Gülzau, 2023, p. 786.

8 Ibid.

crises, several Member States have reinstated internal border controls to compensate for the perceived risks evoked by unwanted immigration, terrorism, and the spread of COVID-19.[9] Moreover, public perception of migration also has had a role in building legal regulation for migration. Some find that public discourse on the impact of migration, in which media outlets themselves have played an important role, have spun out of control. Media attention towards immigration has increased significantly, and negatively valenced frames have become dominant in EU Member States during the past two decades.[10] Namely, citizens regard the absence of border controls as a threat to the working of the national way of life, to which their customs, traditions, and morals are linked.[11] Some link migrations to negative domestic outcomes, such as rising labour market competition and crime. One main issue with the implementation of Schengen rules is the simultaneous protection of individuals' human rights, especially the right to asylum. Therefore, security measures at external borders have long been a highly contested issue. An additional question has arisen because of the increased number of reinstated border controls between Member States and the fear this could mean the end of Schengen. However, the future fate of the Schengen area is, in reality, a story about mutual trust. Member States must reaffirm their mutual trust, which means that inner Member States must be convinced that external Member States can control the external border in a manner that safeguards their inner counterparts as well. When and if this is achieved, we will no longer talk about whether Schengen faces the danger of failure.

2. History of the Schengen area

The project of establishing an area without internal borders has been at the core of European integration since the Treaty of Rome.[12] The so-called "Schengen area" now covers more than 4,300,000 km^2, stretching from the Arctic to the shores of the Mediterranean. Within it, almost 420 million people can cross the internal borders of 27 European countries.[13] The Schengen system was originally developed outside the European Community framework. It found its origins in an intergovernmental arrangement[14] between representatives of five Member States—France, Germany, Belgium, Luxemburg, and the Netherlands—aimed at advancing

9 Ibid.
10 See in Karstens, 2020, p. 45.
11 Karstens, 2020, p. 48.
12 Salomon and Rijpma, 2023, p. 288.
13 De Capitani, 2014, p. 102.
14 The Schengen acquis—Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany, and the French Republic on the Gradual Abolition of Checks at their Common Borders, 14 June 1985.

more quickly towards the objective of lifting the internal border controls between them.[15] A key document on abolishing border controls in the 1980s was the 1985 white paper titled, 'Completing the Internal Market'by the European Commission (or "Commission" hereafter).[16] Controls at the internal borders between EU Member States have been formally abolished since the entry into force of the Convention Implementing the Schengen Agreement (CISA) on 26 March 1995.[17] Moreover, since the implementation of the Treaty of Lisbon, objectives of Schengen cooperation have also been detailed in Art. 77 of the Treaty of the Functioning of the EU. The link between the freedom of movement and abolition of internal border checks on the one hand and the notion of European citizenship on the other is now grounded in Art. 21 of the Treaty on the Functioning of the EU, in Art. 45 of the Charter of Fundamental Rights of the EU; it is again detailed in Art. 77 of the Treaty of the Functioning of the EU.[18]

The Schengen Convention is the best-known legal document in relation to cooperation under Schengen. The document is officially known as the CISA, but it is often referred to as the Schengen Convention. The original Schengen Agreement dates from 1985 and aimed at abolishing checks at the common borders between participating countries. The CISA itself was signed on 19 June 1990.[19] During the early period of cooperation under Schengen, the EU started to develop a justice and home affairs policy. As a result, it became necessary to amend the Schengen Convention even during early cooperation under Schengen.[20] After 1990, the prevention and combat of irregular migration and establishment of a Europe-wide mechanism to deal with asylum seekers—as foreseen in 1990 by the Dublin Convention and CISA itself—also became priorities within the European Communities' framework.[21]

At the time of its integration into the EU, the Schengen area comprised 10 countries, while the five Nordic countries were in the process of integration.[22] Evolution of the Schengen Convention since the integration of cooperation under Schengen within the EU has been subject to two different forces: further development of the Schengen acquis and disappearance of the elements that were not considered essential.[23] The first step was taken in 1992 when the Maastricht Treaty created the EU, and in 1997, EU Member States decided to integrate Schengen cooperation into

15 Carrera, Colombi, and Cortinovics, 2023, p. 18.
16 The Single European Act was adopted to enable the completion of the internal market as envisaged by the white paper. It inserted Art. 8a into the European Economic Community Treaty, which defined the internal market as 'an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty' See Salomon and Rijpma, 2023, p. 289.
17 Salomon and Rijpma, 2023, p. 281.
18 De Capitani, 2014, p. 103.
19 Huybreghts, 2015, p. 380.
20 This was done by the Dublin Convention of 15 June 1990 and the Bonn Protocol of 26 April 1994. Huybreghts, 2015, p. 380.
21 De Capitani, 2014, p. 107.
22 Huybreghts, 2015, p. 381.
23 Huybreghts, 2015, p. 383.

the objective of developing the EU as an area of freedom, security and justice, as foreseen by the Treaty of Amsterdam.[24] With the entry into force of the Treaty of Amsterdam on 1 May 1999 the Council of the EU (or "Council" hereafter) defined the Schengen acquis with Council Decisions 1999/435/EC19[25] and 1999/436/EC.[26] After ratification by the five founding countries, development of the Schengen Agreement can be divided into two periods. The first period is from 1985 to 1997. The second period is from 1997 to the present.[27] The Schengen area also expanded after each enlargement of the EU, although some new Member States cannot meet part of the requirements of a Schengen state and may need to wait until these conditions are satisfied.[28] One must mention one landmark decision of the Court of Justice of the European Union (CJEU)—the *Wijsenbeek* case[29]—in which the court distinguished between the existence and exercise of the free movement rights of citizens. It clearly stated that the exercise, and not the existence, of citizens' free movement rights presupposes EU legislation on external borders.[30] The CJEU thus recognised, albeit implicitly and subject to the conditions of flanking measures, such a right to free movement based on the provision on EU citizenship. It also upheld the distinction between free movement rights in the market and political spheres. By connecting the latter to the abolition of border controls, the court created a link between the Maastricht Treaty's intergovernmental third pillar on justice and home affairs and its supranational community pillar and confirmed the link between the abolition of border controls and EU citizenship.[31] The Treaty of Amsterdam had entered into force on 1 May 1999 and incorporated the abolition of border controls into the EU legal order. It did so in two ways.[32] First, the Treaty of Amsterdam incorporated the Schengen acquis into EU law through Protocol No. 2,[33] and second, it established a link between citizens and the Schengen acquis by including the area of freedom, security, and justice as an objective of the EU into the treaty framework.[34] The Lisbon Treaty further elevates the political dimension of free movement in two ways: It

24 De Capitani, 2014, p. 107.

25 Council Decision of 20 May 1999 concerning the definition of the Schengen acquis for the purpose of determining, in conformity with the relevant provisions of the Treaty establishing the European Community and the Treaty on European Union, the legal basis for each of the provisions or decisions which constitute the acquis; OJ L 176, 10 July 1999.

26 Council Decision of 20 May 1999 determining, in conformity with the relevant provisions of the Treaty establishing the European Community and the Treaty on European Union, the legal basis for each of the provisions or decisions which constitute the Schengen acquis; OJ L 176, 10 July 1999.

27 Wang, 2016, p. 701.

28 Ibid.

29 Wijsenbeek, Case C-378/97 of 21 September 1999. See also case C-85/96, *María Martínez Sala v. Freistaat Bayern*, 1998 E.C.R. I-02691.

30 Salomon and Rijpma, 2023, p. 296.

31 Ibid.

32 Ibid.

33 Protocol No 2 annexed to the Treaty of Amsterdam, Protocol integrating the Schengen acquis into the framework of the European Union, Art. 2, 1997; OJ (C 340) 93.

34 Salomon and Rijpma, 2023, p. 297.

proclaims that the area of freedom, security, and justice does not constitute internal frontiers and explicitly links the area to EU citizenship.[35]

The Schengen Borders Code (SBC)[36] regulates the functioning of the "borderless area." Member States have abolished internal border controls and relocated border enforcement to the external border and other ports of entry (e.g. airports).[37]

Since its creation, Schengen cooperation has focused on the exchange between Member States through the Schengen Information System (SIS) of alerts dealing with information considered relevant in cross-border cooperation.[38] It also contains alerts on missing persons, particularly children, as well as information on certain property, such as banknotes, cars, vans, firearms, and identity documents, that may have been stolen, misappropriated, or lost.[39]

3. SBC as a barrier for illegal migration and reintroduction of temporary border controls

Cornelisse[40] nicely stated that crises serve as litmus tests—they can bring to light hidden frailties and institutional flaws of any arrangement, but alternatively, they may testify to the resilience and strengths of a system. The normal functioning of Schengen was usually taken for granted and as a reason for maintaining the absence of border controls.[41] It was widely accepted that, even in the case of a massive influx of migrants, Schengen could be maintained through the strict application of its working provisions.[42] However, migrations showed their detrimental effect on the concept of a "borderless Europe" as early as 2011 with the now-famous

35 Salomon and Rijpma, 2023, p. 300. See also Joined cases C-412/17 and C-474/17, *Bundesrepublik Deutschland v. Touring Tours und Travel GmbH and Sociedad de Transportes SA*, ECLI:EU:C:2018:1005, Judgment of 13 December 2018.

36 Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) (codification); OJ L 77, 23.3.2016.

37 Gülzau, 2023, pp. 785–786.

38 De Capitani, 2014, p. 103.

39 It is worth noting that the decision about whether put a particular alert on the SIS is still at the discretion of each Member State (Art. 94 of CISA). This means that information of a similar nature may undergo a differing assessment in accordance with the security policies of each state. It is worth noting that since its creation, the SIS has been built on a strong data protection regime (Arts. 102–118 of CISA) with a Joint Supervisory Body that has recently been replaced by the European Data Protection Supervisor in cooperation with national data protection authorities. De Capitani, 2014, p. 105.

40 Cornelisse, 2019, p. 741.

41 European Commission, 2013, p. 3.

42 Ceccorulli, 2019, p. 305.

French-Italian governments' controversy.[43] As Schengen is often cherished as one of the most precious achievements of European integration in research, media, and political discourse, this dispute caused a stir around Europe.[44] However, instead of launching infringement proceedings against both governments, and despite evidence showing the incompatibility of both the Italian and French governments' actions with EU Schengen rules, the European Commission decided to propose a new legislative package under the title 'Schengen Governance Package' in mid-2011.[45] The reform, despite the hesitation of some EU Ministries of Interior, was successfully adopted in 2013. It essentially meant securing a stronger EU supervisory approach or more EU-level checks and balances and evidence-based decision-making over the previous EU Member State Ministries' intergovernmental-driven model; this previous model had so far prevailed in the Schengen governance as regards the rules and practices covering internal border checks and evaluation of Schengen acquis's implementation.[46]

It should be mentioned that, during the nine years preceding 2015 and the migrant crisis, Member States reintroduced border controls a total of 40 times; in the following five years—September 2015 to October 2020—this number rose to 237.[47] In the *State of Schengen Report 2022*, the European Commission reported that internal border controls between Schengen states have been reintroduced more than 280 times since September 2015.[48] This shows that the Schengen system has been put to test by various crises, which have led to *ad hoc* political discussions around Schengen. It has become more evident than ever that the achievements of Schengen should not be taken for granted. All recent challenges have placed the spotlight on the need to take decisive steps to improve the Schengen area's governance structure so as to safeguard its well-functioning.[49]

In September 2015, Germany, Austria, Denmark, Sweden, and Norway decided to reintroduce checks at internal borders. The reintroduction of border checks was

43 Following an increase in the number of unauthorised entries by nationals of some North African countries considering emerging tensions and instability during what came to be known as the "Arab Spring," the Italian authorities started issuing humanitarian residence permits allowing beneficiaries to move freely inside the Schengen area, and in the first instance to France. This provoked a diplomatic row between the two Schengen countries, with the French government reacting by unilaterally reintroducing internal border controls with Italy. See Carrera, Colombi, and Cortinovics, 2023, p. 19, and, especially, Zaiotti, 2013.

44 Votoupalova, 2019, p. 75.

45 Carrera, Colombi, and Cortinovics, 2023, p. 19.

46 Carrera, Colombi, and Cortinovics, 2023, p. 20.

47 Salomon and Rijpma, 2023, p. 282.

48 European Commission, 2022a, p. 10.
Of course, a special crisis arose with the COVID-19 pandemic. During March–June 2020, border checks at internal borders were often applied as a first aid measure, and 17 Member States reintroduced border checks in an (unsuccessful) attempt to contain the further spread of COVID-19. European Commission, 2021, p. 11.

49 European Commission, 2022a, p. 1.

interpreted as the dislocation of the Schengen area and as a "Schengen crisis."[50] In France, before the "migrant crisis" reached its peak, French authorities decided to reinforce controls at its southeast border with Italy in June 2015.[51] During the 2015–2021 period, Schengen area saw persistent border checks at internal borders in six Member States (France, Austria, Germany, Sweden, Denmark, and Norway), which repeatedly prolonged these border checks due to different threats (migration, terrorism, and shortcomings at the external borders). These border checks were prolonged repeatedly despite evolution of the situation: relevant circumstances had changed (e.g. change in migratory patterns removing the pressure from some border sections and evolution of terrorist threats towards the "single wolf" type), the intensity of specific threats decreased considerably (with the number of irregular migrants currently at a level comparable to the period preceding 2015/2016 which, together with other measures taken in related areas, should reduce the problem of secondary movements), and counter-measures were adopted at the EU and national levels to reinforce the external borders.[52]

Uncontrolled migratory inflows indeed tested the EU, revealing an unwillingness among the Member States to coordinate actions. Accordingly, normalisation of the Schengen area and lifting of temporary internal border controls started to become the Commission's key priorities.[53] The Commission pointedly noted that 'it is a strong external border which allows us to free up our internal borders through the Schengen area, and to guarantee free movement of people'.[54] The rapidly worsening situation in the following months was reflected in the Commission's documents urging Member States to fully and immediately implement the already agreed upon provisions. In response to the exceptionally high winter migratory inflows into the EU, especially Greece, it became much more urgent that the EU and Member States accelerate the implementation of the hotspot system and relocation scheme to alleviate the burden on frontier states, facilitate the return of irregular migrants, and improve national reception capacities.[55]

The new SBC provisions significantly reduced the margin of manoeuvre for EU Member States to have the discretion in unilaterally reintroducing—and indefinitely prolonging—internal border controls and derogating free movement. Similarly, the new Schengen Evaluation and Monitoring Mechanism (SEMM) provided an EU-wide-model, led this time by the European Commission. It consists of a professionalised assessment and peer-to-peer evaluation system going far beyond the previous intergovernmental or Member States-led SEMM. The previous SEMM was in the exclusive hands of the EU Justice and Home Affairs Council, where the Commission participated exclusively as an observer, and the European Parliament

50 Colombeau, 2020, p. 2258.
51 Colombeau, 2020, p. 2259.
52 European Commission, 2021, p. 16.
53 Ceccorulli, 2019, p. 308.
54 European Commission, 2015, p. 13.
55 Ceccorulli, 2019, p. 309.

was completely excluded.[56] The post-2013 shapes of the SBC and SEMM secured stronger EU supervision and substantially diminished the discretion of Member States' Ministries of Interior and the EU Justice and Home Affairs Council in the overall functioning of Schengen governance. Crucially, the European Parliament and EU democratic accountability were also "winners" during the 2011–2013 legislative Schengen reform. For instance, in reintroducing internal border controls, EU Member States committed to keeping the European Parliament informed and notified of the key elements and evidence justifying the legitimacy of derogating the Schengen border free mobility under Arts. 27, 28, and 29 of the SBC. Moreover, the Parliament acquired the status of de facto co-legislator on this and any subsequent SEMM legislative reforms.[57]

3.1. Reintroducing border controls between Member States: Legal regulation

The function of Schengen and the main principle of the SBC is ensuring no border controls between Member States. Internal border controls have been abolished within the Schengen area, but states have retained the right to reinstate temporary border controls in case of serious threats to public policy or internal security. Namely, the Commission has repeatedly stated that abolition of internal border controls cannot come at the expense of security.[58] Therefore, effective removal of internal controls is only possible through tightening of the common external border. This has compelled Schengen frontier states to assume the responsibility for controlling the EU's common external border on behalf of the other Schengen states.[59] Yet, the European Commission equally realised that safeguarding the freedom of movement must not compromise a Member State's ability to deal with serious threats to the public policy or security. Consequently, to ensure the acceptance and functioning of Schengen, provisions were made that allowed Member States the ability, in exceptional circumstances, to reintroduce border controls when a threat to the public policy or internal security arose.[60]

For a long time, such internal border controls were only reintroduced for specific events such as political meetings or sports events, and only for a few days.[61] Art. 25 of the SBC provides that a Member State may reintroduce border controls at its internal borders when there is a serious threat to public policy or internal security in a Member State. Of course, this measure was construed as a temporary (as

56 Carrera, Colombi, and Cortinovics, 2023, p. 20.
57 Carrera, Colombi, and Cortinovics, 2023, p. 21.
58 European Commission, 2018.
59 Ceccorulli, 2019, p. 304.
60 Ibid.
61 Gülzau, 2023, p. 786.

short as possible in duration) measure of last resort.[62] The SBC distinguishes between foreseen threats, such as major sporting events or political gatherings, in Art. 25 and unforeseen circumstances, such as terrorist attacks, in Art. 28.[63] In the case of foreseen threats, the initial period of reintroducing controls is a maximum of 30 days and can be prolonged to a maximum of six months; in situations that are urgent, the initial period is up to 10 days, with the possibility of prolonging it to a maximum of two months (see Art. 28). Art. 29 of the SBC must be mentioned as it also allows for temporary reinstation of internal border controls. Namely, it prescribes that if the overall functioning of the area without internal border control is put at risk because of persistent serious deficiencies relating to external border control, the Council may recommend that one or more Member States decide to reintroduce border control at all or at specific parts of their internal borders. This can last for a period of up to six months. This period may be prolonged, no more than three times, for a further period of up to six months if the exceptional circumstances persist.

According to the SBC, Member States must notify the European Commission when they plan to conduct border checks at an internal border. The SBC also requires Member States to report the duration, scope, and reason for the reintroduction of temporary border controls.[64] These notifications have been publicly available[65] since 2006.[66]

Some authors believe that the failure to lift internal border controls translates into a lack of meaningful evidence and objective data on the actual scope of the issues at stake, with no sound claim regarding the reached or expected impacts of asylum seekers' intra-EU mobility or why some of them actually constitute 'serious threats to public policy and security'[67]. Moreover, they find that there is still a noticeable shortage of evidence about the actual reasons for reintroducing internal borders controls and their effects in the latest notifications.[68] In addition, it was true that the Commission has been extremely reluctant in using its supervisory powers to protect borderless travel in Europe, although the SBC itself states that if the

62 However, the option of suspending Schengen was viewed as a last resort of limited duration. It was also recognised that, independent of a Member State's ability to exert effective control on the external border, crossing of the external border by an uncontrollable influx of third-country migrants could cause 'unexpected and significant' secondary movement of irregular immigrants. This may constitute a serious threat for the EU or some Member States. In this circumstance, reintroduction of internal border controls, though as a last resort, would be a feasible policy option. Ceccorulli, 2019, pp. 304–305.

63 Salomon and Rijpma, 2023, p. 284.

64 Gülzau, 2023, p. 787.

65 From October 2006. European Commission, 2024, pp. 1-35.

66 Although several European leaders have questioned the tenability of the Schengen rules or openly called for their overhaul, 26 Member States generally notified the Commission and Council and sought to justify the reinstatement of controls under the existing derogation grounds. In their notifications, Member States invoke related but slightly different public policy and internal security concerns and, thereby, alternate between different exception grounds. In addition, Member States maintain that the reintroduction of border controls cannot be limited to the temporal limitations of the SBC in case of prolonged threats. Salomon and Rijpma, 2021, p. 286.

67 Carrera, Colombi, and Cortinovics, 2023, p. 30.

68 Ibid.

Commission has doubts about the necessity or proportionality of reintroducing border controls, it 'shall issue an opinion to that effect'.[69] The Commission conducted its first systematic evaluation of the reinstatement of border controls in 2021 and presented its proposal for an amendment in the SBC in late 2021.[70]

The CJEU ruled in April 2022[71] that Art. 25(4) of the SBC must be interpreted as precluding temporary reintroduction of border control at internal borders by a Member State based on Art. 25 and 27 of the SBC if the reintroduction exceeds the maximum duration of six months, as set in Art. 25(4), and no new threat exists that justifies applying afresh the periods provided for in Art. 25. It also ruled that Art. 25(4) of the SBC must be interpreted as precluding national legislation by which a Member State obliges person, on pain of penalty, to present a passport or identity card upon entering the territory of that Member State via an internal border, when reintroduction of the internal border control in relation to which that obligation is imposed is contrary to that provision.

However, as can be seen in Annex 1 of this chapter, Member States extend border controls notwithstanding the cited judgement of the court, and the Commission has not opened infringement procedures.[72] However, maybe the answer is in what Zaiotti wrote: In order to go beyond the instrumental vision of agency advocated by the mainstream literature on political myth-making, it is necessary to stress the practical aspect of social reality over the symbolic/ideational.[73] It is also worth noting that European spaces are not restricted to what is included in the EU integration project.[74] For example, Europeanised spaces such as the Single Market and Schengen, in addition to promoting the idea of deeper EU integration, foreground the incomplete nature of this process (the Single Market extends beyond the borders of the EU, and not all EU members are in Schengen, and some Schengen members are not part of the EU).[75]

4. Commission's 2021 proposal for amendments to the SBC

In her State of the Union 2020 address, President von der Leyen announced a new strategy for the future of Schengen with a view to restore the four freedoms 'in full and as fast as possible'.[76] In the Pact on Migration and Asylum, the Commission

69 Salomon and Rijpma, 2021, p. 286.
70 See European Commission, 2021, pp. 150-160.
71 Joined Cases C-368/20 and C-369/20 *Landespolizeidirektion Steiermark* (C-368/20), *Bezirkshauptmannschaft Leibnitz* (C-369/20), 26 April 2022.
72 Schacht, 2022.
73 Zaiotti, 2011, p. 556.
74 Rumford, 2006, p. 133.
75 Rumford, 2006, p. 138.
76 European Commission, 2021, p. 5.

announced the establishment of a dedicated Schengen Forum to stimulate more concrete cooperation and re-build trust between all relevant stakeholders of the Schengen area.[77] The revision of the SBC will particularly consider the lessons learnt from the lack of sufficient support among Member States for the 2017 proposal.[78] The Commission detected two main problems in the Schengen area: (1) border checks at internal borders that are long-lasting and applied against an abstract threat or used as a first aid measure and (2) discrepancies in the application of the measures at the external borders.[79] The Commission feels that Member States utilise insufficient compensatory measures for the absence of border controls at internal borders, especially when new measures other than border checks are available.[80] Further, discrepancies in the application of travel restrictions at external borders undermine the trust and impact their credibility with third countries.[81] Therefore, the Commission prepared its draft of amendments to the SBC in 2021. In it, the Commission stated that the EU may consider taking measures to address the problems identified, in accordance with the principle of subsidiarity, to reinforce the overall security and trust among Member States as prerequisites of the area without controls at internal borders, as well as ensure the ability of persons and goods to move freely across borders.[82] The goal of this change in legislation is to ensure that persons and goods can move freely without unjustified or disproportionate hurdles within the Schengen area. The objectives to be achieved are the creation of a contingency plan for Schengen, application of mitigating measures and specific safeguards for cross-border regions, uniform application of measures at the external borders particularly in case of a threat to public health, increased use of compensatory measures to address the identified threats, and lifting of long-lasting border checks at internal borders.[83]

77 Ibid.

78 The 2017 proposal aimed at extending the time limits applicable for the reintroduction of internal border controls in exchange for stronger procedural safeguards. It provided for an increase in the time limit for temporary reintroduction of border controls at internal borders in case of foreseeable threats to up to one year, with prolongation periods of up to six months. In contrast, a new consultation procedure was foreseen, in which the Commission would have the power to take a stance on the necessity and proportionality of the checks. European Commission, 2021, p. 6.

79 European Commission, 2021, p. 8.

80 The use of new technologies, police checks, cross-border police cooperation, and Advanced Passenger Information in the future can achieve the same objectives as the border checks put in place by Member States, while being more effective in this respect. European Commission, 2021, p. 18.

81 European Commission, 2021, p. 21

82 European Commission, 2021, p. 33.

83 European Commission, 2021, pp. 34–35.
The Commission opted for a targeted amendment of the SBC that would concern (1) developing a new procedure of "contingency planning for Schengen," applicable in case of any serious threat to several or all Member States; (2) creating the possibility of adopting restrictions on non-essential travel into the EU for third country nationals in a situation of a serious threat, particularly to public health, at the external borders; (3) developing the concept of a "last resort measure" in the context of temporary reintroduction of border checks at internal borders in more detail compared to the current rules, which includes better clarifying which measures are considered as not equivalent to border checks and therefore admissible below the threshold of Art. 25 to 29 of the SBC and

The SBC would also be amended to establish a balance between the use of both border checks and compensatory measures at internal borders. To that end, the amendment should bring more clarity to the concept that border control at internal borders shall only be reintroduced as a "last resort measure." In this context, intensification of police checks supported by new technologies would be explicitly mentioned as a necessary element of the risk assessment to demonstrate that border checks are indeed the last resort measure. Moreover, the catalogue of measures that can be used in the areas of internal borders without being considered as equivalent to border checks would be reviewed to address some recurring questions concerning police checks and reflect the upcoming developments, particularly regarding the use of Advanced Passenger Information.[84]

5. Role of Frontex and Schengen

Frontex was founded based on Council Regulation (EC) 2007/2004 of 26 October 2004,[85] which led to the establishment of the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union. This regulation was repealed by Regulation (EU) 2016/1624 of 14 September 2016,[86] establishing Frontex, the European Border and Coast Guard Agency. Since its first intervention along the West African coast in 2006, the agency has fuelled and institutionally profited from the incessant depiction of migration movements towards Europe as crisis-inducing phenomena, and it has positioned itself as the central crisis response mechanism in Europe.[87] It has the task to efficiently manage the crossing of external borders. This includes addressing migratory

clarifying the conditions of using new technologies at internal borders and their vicinity; (4) limiting the side effects of any border checks by providing for the application of mitigating measures where appropriate as part of the obligation to ensure proportionality, particularly as concerns border regions; (5) introducing an obligation to prepare a risk assessment in case of reintroduction of border checks at internal borders; and (6) providing the Commission with better tools to be aware of the decision-making process in Member States and the actual use of reintroduced border checks (modified rules on notifications and reports on the reintroduction of border checks). European Commission, 2021, p. 40.

84 European Commission, 2021, p. 42.

85 Council Regulation (EC) No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union; OJ L 349, 25. November 2004.

86 Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC; OJ, L 251, 16 September 2016.

87 Perkowski, Stierl, and Burridge, 2023, p. 124.

challenges and potential future threats at those borders, thereby contributing to addressing serious crime with a cross-border dimension, and ensuring high-level internal security within the EU, while having full respect for fundamental rights and safeguarding the free movement of persons within the EU.[88] Its role changed dramatically after the migrant crisis in 2015. It can be said that the refugee crisis was a critical juncture in the evolution of Frontex. It allowed the Commission to propose more sovereignty-encroaching measures than ever before.[89]

Frontex performs numerous duties set forth in Art. 8 of the Regulation on Frontex. Two new powers in the 2016 regulation are especially important. First, Frontex is granted a supervisory power it did not have before in the form of vulnerability assessments.[90] The agency now carries out a yearly assessment of each Member State's capacity and border vulnerabilities. This is 'a major innovation'.[91] Second, a Member State's failure to comply with Frontex's vulnerability assessment recommendations may trigger an intervention by the agency. The so-called right to intervene[92] gives Frontex the power to deploy border guards to a Member State if functioning of the Schengen area is threatened—subject to a Council decision.[93]

6. Relation between the SBC and right of asylum

The SBC regulates border checks and, to a lesser extent, border surveillance along the EU's external borders. It lays down the entry conditions third-country nationals must satisfy to be allowed entry to the Schengen area.[94] The SBC provides for derogation from the entry conditions for three categories of persons.[95] One of these categories is third-country nationals whose entry may be authorised on humanitarian grounds or because of international obligations. Under Art. 14(1) of the SBC, a third-country national who does not satisfy the entry conditions under Art. 6(1) and does not belong to any category of persons referred to in Art. 6(5) should be refused entry into the territories of Member States. However, the refusal of entry should be without prejudice to the application of special provisions concerning the right of asylum and international protection. Further, Art. 4 provides that when applying the SBC, Member States should act in full compliance with relevant EU law, including the Charter of Fundamental Rights of the EU; relevant international

88 Art. 1 of the Regulation on Frontex.
89 Fjørtoft, 2022, p. 564.
90 Art. 13 of the Regulation on Frontex.
91 Fjørtoft, 2022, p. 557.
92 Art. 19 of the Regulation on Frontex.
93 Ibid.
94 Art. 6(1) of the SBC.
95 Art. 6(5) of the SBC. See European Council on Refugees and Exiles, 2021, p. 14.

law, including the Convention Relating to the Status of Refugees; obligations related to access to international protection, particularly the principle of non-refoulement; and fundamental rights. Moreover, Art. 3(a) stresses that the SBC applies without prejudice to the rights of refugees and persons requesting international protection, particularly regarding non-refoulement. Hence, Member States cannot refuse entry to a person requesting international protection without assessing whether or not they are in need of protection.[96] To ensure this, the Eurodac[97] system is very important. This system was envisaged in the late 1990s, as the Commission started to prepare the "Eurodac" project, a European Union initiative to use biometrics (specifically finger printing) for controlling illegal immigration and border crossings by asylum seekers.[98] This system was somewhat controversial from the beginning, as some argued that the obligation to surrender one's biometric data violates certain human rights.[99] Nevertheless, the Eurodac regulation[100] was adopted by the Council of the European Union in 2000 and came into force on 15 January 2003.[101] Especially after the Syrian crisis, efficient border management through better use of information technology (IT) systems and technologies was a top policy priority for the Commission at this stage. By making full use of these systems, the EU wanted to not only improve border management but also reduce irregular migration and return illegally staying third-country nationals.[102] Of course, data must only be used

96 Ibid.

97 European Asylum Dactyloscopy Database

98 Van der Ploeg, 1999, p. 295.

99 Van der Ploeg, 1999, p. 301. Queiroz 2019, p. 159.

100 Now in force: Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 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 and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice (recast); OJ L 180, 29.6.2013.

101 The basic application is a combination of biometric identification technology and computerised data processing. The central unit, managed by the European Agency for the Operational Management of Large-Scale IT Systems in the Area of Freedom, Security and Justice, contains an automatic fingerprint identification system that receives data and replies "hit/no hit" to the Member State's national authorities that are responsible for the quality of data and security of its transmission. The database contains information on three categories of persons who (1) seek asylum, (2) cross borders irregularly, or (3) are found to stay "illegally" within the EU territory. Collectable data include fingerprints of all persons aged 14 years and above, dates of collection, sex, place and date of the application for asylum or of apprehension, reference number, date of transmission to the Central Unit, and user identification of the person who transmitted the data. Data on asylum seekers are compared against data in the database and stored for 10 years. Data on irregular border crossers are stored for 18 months. Fingerprints of the third category of individuals are checked against previous asylum applications but are not stored. Bredström, Krifors, and Mešić, 2022, p. 69.

102 Queiroz, 2019, p. 158.

for legitimate purposes, equivalent to a 'ban on aimless data collection'.[103] Additionally, these legitimate purposes must be specified before collection, and use or disclosure of the data must be compatible with the specified purposes. Finally, the principle of purpose limitation entails that data should not be retained for any period longer than necessary with regard to the purpose for which they were collected and stored.[104] As some authors say, it is clear that the EU's migration policy is far from achieving its pivotal objectives demonstrated in the European Agenda on Migration: (1) reduction in the incentives for irregular migration, (2) border management for saving lives and securing the external border, (3) Europe's duty to protect with a strong common asylum policy, and (4) a new policy on legal migration.[105] On the one hand, asymmetric integration of the asylum policy led to complete "Europeanisation" of Schengen rules on the elimination of physical controls at internal borders, while on the other hand, a "substantive" asylum policy remains firmly in the Member States' hands. Therefore, some authors believe that it is a flawed structural setting that enables Member States to 'compete as to how to most effectively divert the burden of migrants onto other states and free ride on their efforts'.[106] Accordingly, they call for a transfer of competences from the Member States to the EU and the establishment of a centralised EU institution governing the Common European Asylum System. Of course, this idea would be, in the present circumstances, very difficult to achieve. However, it is obvious that changes are needed to ensure the survival of the Schengen area, which is endangered because of many "temporary" border controls on the inner borders. Another issue is the problem tied to the strengthening of external borders and reintroduction of inner border controls—the protection of individual human rights of immigrants. Namely, all immigrants have the right to life and human dignity; they cannot be arbitrarily detained; they have the right of asylum and the right to private and family life; and the principle of non-refoulement must be observed. Immigrants also have the right to enter or leave the Schengen area when they meet the prescribed conditions.[107] Especially, observance of the non-refoulment principle and the possibility to ask for asylum are important when considering strengthening border controls. This is because this obligation may be triggered when national border guards try to prevent migrants from reaching the territory of a state—sometimes by returning them to their point of departure.[108]

103 Queiroz, 2019, p. 163.
104 Ibid.
105 Nikolić and Pevcin, 2021, p. 251.
106 Ibid.
107 See Wouters and Ovadek, 2021, pp. 465–481.
108 Wouters and Ovadek, 2021, p. 477.

7. Conclusion

Schengen evolved from a 'coordinated solo effort' by France and Germany in 1984.[109] By 2005, it evolved, as mentioned above, into an institute to epitomise 'freedom, security, and European success'[110]. It was almost taken for granted that free movement and "Europe without borders" will be a lasting success. However, the change in migration influx into the EU showed, as early as 2011, that Schengen area is highly vulnerable and that the joint trust among Member States is very fragile. This is also why the Schengen Member States kept a firm grip on issues of border controls and national security, which touch upon the very core of national sovereignty.[111] This can be vividly seen through the mechanism of reoccurring reestablishment of border controls at inner borders. This phenomenon is obviously the reaction of Member States to the problems occurring at the external border, which is, in their opinion, not performing its function. Of course, one should not neglect the political aspect of tensions between Member States regarding the path EU is (or should be) following. However, it must be said that the abolition of controls at internal borders does not mean that the EU, as a legal space, constitutes an abstract and borderless space that, in contrast with Member States' legal orders, is not based on territory.[112] Quite the contrary: The abolition of internal border controls goes hand in hand with the establishment and fortification of a common external border and, thus, constitutes a common bounded space that is more than the mere sum of Member States' territories. The abolition of internal border controls thus constitutes an essential element of the EU's territorial claim and EU law's territorial grounding.[113] This, of course, means that the external border must provide sufficient security so the Member States do not feel that their national security is endangered by the lack of border controls on the inner borders. The objective of safeguarding national security was interpreted by the CJEU in 2020 in *Quadrature du Net*.[114] The court said that Art. 4(2) of the Treaty on European Union provides that national security remains the sole responsibility of each Member State. This responsibility corresponds to the primary interest in protecting the essential functions of the state and fundamental interests of the society; it also encompasses the prevention and punishment of activities capable of seriously destabilising the fundamental constitutional, political, economic, or social structures of a country and particularly capable of directly threatening the society, population, or state itself, such as terrorist activities (para. 135). However, it is important to

109 Gülzau, 2023, p. 787.

110 Luc Frieden, then President of the EU Justice and Home Affairs Council, on when the celebrationg of the 20th anniversary of the signing of the Schengen agreements in Luxembourg. See in Zaiotti, 2011, pp. 537–-538.

111 Gülzau, 2023, p. 788.

112 Salomon and Rijpma, 2023, p. 304.

113 Ibid.

114 Joined Cases C-511/18, C-512/18, and C-520/18, *La Quadrature du Net and Others v. Premier ministre and Others*, ECLI: EU:C:2020:791, Judgment of 6 October 2020.

highlight that any measure taken by a Member State must comply with the basic criteria set forth in Art. 52 of the EU Charter on Fundamental Rights (para. 136). From this we can see that it is impossible to separate the legal and political when talking about the function of Schengen and the implementation of SBC. Scholars focus on the dichotomy between states' selfish interests, which are represented by re-impositions of border control, and the EU approach and solidarity; however, the related legislation, practical initiatives, and political discourse demand a more nuanced analysis, since sovereignty is a very complex phenomenon that can be strengthened and restricted simultaneously.[115] However, Schengen rules can be a tool for ensuring the rule of law while protecting the right of asylum in individual cases. It just needs to be fine-tuned, and Member States are responsible for its implementation in a proper manner. As Votoupalova suggested, the emphasis should not be on the dichotomy between selfish states and a common EU approach or between solidarity and national interests, as the two sides in both dichotomies are in reality compatible.[116] However, as was said above, Schengen is based on the notion of mutual trust among Member States. Therefore, inner Member States must be able to trust that external Member States will adequately protect the external border. When and if this comes to pass, there will no longer be any reason (once again) to keep the now in place inner border controls. I believe that this is in the interest of all Member States.

115 Votoupalova, 2019, p. 90.
116 Votoupalova, 2019, p. 91.

References

Bredström, A., Krifors, K., Mešić, N. (2022) 'Border Reconfiguration, Migration Governance, and Fundamental Rights: A Scoping Review of EURODAC as a Research Object', *Social Inclusion*, 10(3), pp. 68–81; https://doi.org/10.17645/si.v10i3.5398.

Carrera, S., Colombi, D., Cortinovics, R. (2023) 'An Assessment of the State of the EU Schengen Area and its External Borders A Merited Trust Model to Uphold Schengen Legitimacy', *EU Policy Department for Citizens' Rights and Constitutional Affairs Directorate-General for Internal Policies*.

Ceccorulli, M. (2019) 'Back to Schengen: the collective securitisation of the EU free-border area', *West European Politics*, 42(2), pp. 302–322; https://doi.org/10.1080/01402382.2018.1510196.

Colombeau, S.C. (2020) 'Crisis of Schengen? The effect of two 'migrant crises' (2011 and 2015) on the free movement of people at an internal Schengen border', *Journal of Ethnic and Migration Studies*, 46(11), pp. 2258–2274; https://doi.org/10.1080/1369183X.2019.1596787.

Cornelisse, G. (2019) 'What's Wrong with Schengen? Border Disputes and the Nature of Integration in the Area Without Internal Borders', *Common Market Law Review*, 51, pp. 741–770; https://doi.org/10.54648/COLA2014060.

De Capitani, E. (2014) 'The Schengen system after Lisbon: from cooperation to integration', *ERA Forum*, 15, pp. 101–118; https://doi.org/10.1007/s12027-014-0344-1.

Eurobarometer survey 'Integration of Immigrants in the European Union', June 2022. [Online]. Available at: https://europa.eu/eurobarometer/surveys/detail/2276 (Accessed: 27 May 2024).

European Commission (2013) *Third Biannual Report on the Functioning of the Schengen Area*, Brussels, 31 May 2013. [Online] Available at: https://home-affairs.ec.europa.eu/system/files/2020-09/third_biannual_report_on_the_functioning_of_the_schengen_area_en.pdf. (Accessed: 27 May 2024).

European Commission (2015) *Managing the Refugee Crisis: Immediate Operational, Budgetary and Legal Measures, under the European Agenda on Migration*, Brussels, 23 September 2015. [Online] Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52015DC0490. (Accessed: 27 May 2024).

European Commission (2018) *Migration and Home Affairs: Border Crossing* [Online] Available at: https://home-affairs.ec.europa.eu/policies/schengen-borders-and-visa/border-crossing_en (Accessed: 27 May 2024).

Fjørtoft, T. N. (2022) 'More power, more control: The legitimizing roleof expertise in Frontex after the refugee crisis', *Regulation and Governance*, 16, pp. 557–571. https://doi.org/10.1111/rego.12373.

Gülzau, F. (2023) 'A "New Normal" for the Schengen Area. When, Where and Why Member States Reintroduce Temporary Border Controls?', *Journal of borderlands studies*, 38(5), pp. 785–803. https://doi.org/10.1080/08865655.2021.1996260.

Huybreghts, G. (2015) 'The Schengen Convention and the Schengen acquis: 25 years of evolution', *ERA Forum*, 16, pp. 379–426. https://doi.org/10.1007/s12027-015-0402-3.

Karstens, F. (2020) 'How public discourse affects attitudes towards Freedom of Movement and Schengen', *European Union Politics*, 21(1), pp. 43–63. https://doi.org/10.1177/1465116519874880.

Nikolić, B. and Pevcin, P. (2022) 'How to improve sustainability of the Schengen agreement on open borders?', *International Migration*, 60, pp. 244-257. https://doi.org/10.1111/imig.12850.

Perkowski, N., Stierl, M and Burridge, A., 'The evolution of EUropean border governance through crisis: Frontex and the interplay of protracted and acute crisis narratives', *Environment and Planning D: Society and Space*, 41(1), pp. 110–129. https://doi.org/10.1177/02637758231152478.

Queiroz, B.M. (2019) 'The Impact of EURODAC in EU Migration Law: The Era of Crimmigration', *Market and Competition Law Review,* 3(1), pp. 157-183. https://doi.org/10.7559/mclawreview.2019.318.

Rumford, C. (2006) 'Rethinking European Spaces: Territory, Borders, Governance', *Comparative European Politics*, 4(2-3), pp. 127–140. https://doi.org/10.1057/palgrave.cep.6110089.

Salomon, S. and Rijpma, J. (2023) 'A Europe Without Internal Frontiers: Challenging the Reintroduction of Border Controls in the Schengen Area in the Light of Union Citizenship', *German Law Journal*, 24, pp. 281-209; https://doi.org/10.1017/glj.2021.60.

Schacht, K. (2022) 'Schengen states extend border checks, ignoring EU court', *DW*, 17 November 2022. [Online] Available at: https://www.dw.com/en/schengen-states-extend-border-checks-ignoring-eu-court/a-63747406 (Accessed: 27 May 2024).

Skaro, K. (2023) Slovenski ministar jucer: 'Schengen ne funkcionira' Grlic Radman danas: 'Ovo nije suspenzija Schengena', *Telegram*, 20 October 2023. [Online] Available at: https://www.telegram.hr/politika-kriminal/slovenski-ministar-jucer-schengen-ne-funkcionira-grlic-radman-danas-ovo-nije-suspenzija-schengena/ (Accessed: 12 November 2023).

Van der Ploeg, I. (1999) 'The illegal body: `Eurodac' and the politics of biometric identification' *Ethics and Information Technology*, 1, pp. 295–302. https://doi.org/10.1023/A:1010064613240.

Votoupalova, M. (2019) 'The Wrong Critiques: Why Internal Border Controls Don't Mean the End of Schengen', *New Perspectives*, 27(1), pp. 73–99. https://doi.org/10.1177/2336825X1902700104.

Wang, S. (2016) 'An Imperfect Integration: Has Schengen Alienated Europe?', *Chinese Political Sciences Review*, 2016/1, pp. 698–719; https://doi.org/10.1007/s41111-016-0040-0.

Wouters, J. and Ovadek, M. (2021) '*The European Union and Human Rights*', Oxford: Oxford University Press. https://doi.org/10.1093/oso/9780198814177.001.0001.

Zaiotti, R. (2011) 'Performing Schengen: myths, rituals and the making of European territoriality beyond Europe', *Review of International Studies*, 37, pp. 537–556. https://doi.org/10.1017/S026021051000032X.

Zaiotti, R. (2013) 'The Italo-French Row Over Schengen, Critical Junctures, and the Future of Europe's Border Regime', *Journal of Borderlands Studies*, 28(3), pp. 337–354. https://doi.org/10.1080/08865655.2013.862912.

Council Decision of 20 May 1999 concerning the definition of the Schengen acquis for the purpose of determining, in conformity with the relevant provisions of the Treaty establishing the European Community and the Treaty on European Union, the legal basis for each of the provisions or decisions which constitute the acquis, OJ L 176, 10 July 1999.

Council Regulation (EC) No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, OJ L 349, 25. November 2004.

European Commission (2021) 'Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders', Strasbourg, 14 December 2021. [Online] Available at: https://www.statewatch.org/media/3015/eu-com-schengen-borders-proposals-sbc-amendments-ia-swd-2021-462.pdf. (Accessed: 27 May 2024).

European Commission (2022) 'Communication From the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions -- State of Schengen Report', Brussels, 24 May 2022. [Online] Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022DC0301 (Accessed: Accessed: 27 May 2024).

Protocol No. 2 annexed to the Treaty of Amsterdam, Protocol Integrating the Schengen acquis Into the framework of the European Union, Art. 2, 1997 O.J. (C 340) 93.

Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) (codification), OJ L 77, 23.3.2016.

Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC, OJ, L 251, 16 September 2016.

Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 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 and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice (recast), OJ L 180, 29.6.2013.

C-85/96, *María Martínez Sala v. Freistaat Bayern*, 1998 E.C.R. I-02691.

Joined cases C-412/17 and C-474/17, *Bundesrepublik Deutschland v. Touring Tours und Travel GmbH and Sociedad de Transportes SA*, ECLI:EU:C:2018:1005, Judgment of 13 Dec. 2018.

Joined Cases C-511/18, C-512/18 and C-520/18, *La Quadrature du Net and Others v. Premier ministre and Others*, ECLI: EU:C:2020:791, Judgment of 6 Oct. 2020.

Wijsenbeek, Case C-378/97 of 21 September 1999.

Annex 1
Notifications of the Temporary Reintroduction of Border Control[117]

Current Temporarily Reintroduced Border Controls

Austria	03/11/2023 – 22/11/2023	High migratory pressure and increase in apprehensions in the Western Balkans, extensive secondary migration, pressure on the asylum reception system, threat of human smuggling; border with Slovakia
Slovakia	04/11/2023 – 23/11/2023	Intensified migration pressure along the Balkan route, serious threat to the internal security and public order, high rate of illegal migration; internal border with Hungary.
Czechia	03/11/2023 – 22/11/2023	Significant increase in illegal secondary migration; increase in activity of organised groups of smugglers; deterioration of the migration and security situation at the EU's external borders; internal borders with Slovakia.
Poland	03/11/2023 – 22/11/2023	Intensified migration pressure along the Balkan route; border with Slovakia.
Italy	31/10/2023 – 19/11/2023	Raise of the threat of violence within the EU following the attack on Israel, risk of possible terrorist infiltration, constant migratory pressure by sea and by land, increase in the Central Mediterranean migratory flow; land border with Slovenia.
Slovenia	31/10/2023 – 19/11/2023	Threats to public order and internal security in the EU, the situation in the Middle East and in Ukraine, recent terrorist attacks in some Member States, increased security risks due to organised crime in the Western Balkans and violent extremism, risk of infiltration in mixed migration flows; internal borders with the Republic of Croatia and Hungary.
Austria	28/10/2023 – 16/11/2023	High migratory pressure, extensive secondary migration, increase in trafficking along the illegal migration routes; border with Czechia.
Germany	26/10/2023 – 14/11/2023	Migratory situation via the Eastern Mediterranean route, the Balkan region and through the Eastern route, increase in human smuggling; land borders with Poland, Czechia and Switzerland.

117 https://home-affairs.ec.europa.eu/policies/schengen-borders-and-visa/schengen-area/temporary-reintroduction-border-control_en State of affairs on 8 November 2023.

Denmark	12/11/2023 – 11/05/2024	Significant threat to public policy and internal security by terrorists and organized crime, threat of espionage from foreign state intelligence, uncertainty in Europe due to the Russian invasion of Ukraine, increase in irregular migration; may extend to all internal borders (land, sea and air), with a focus on the Danish-German land border and Danish ports with ferry connection to Germany.
Norway	12/11/2023 – 11/05/2024	Threat to critical on-shore and off-shore infrastructures, foreign intelligence services threat in Norway; ports with ferry connections to the Schengen area.
Germany	12/11/2023 – 11/05/2024	Increase in irregular migration, Russia's war of aggression against Ukraine, the security situation exacerbated by terrorist groups in the Middle East, strain on the asylum reception system, increase in human smuggling; the land border with Austria.
Austria	12/11/2023 – 11/05/2024	Pressure on the asylum reception system, high migratory pressure at the EU's external border to Türkiye and the Western Balkans, threat of arms trafficking and criminal networks due to the war in Ukraine, human smuggling; borders with Slovenia and Hungary.
Sweden	12/11/2023 – 11/05/2024	Islamist terrorist threat, recent threats by terrorist organisations, statements by state actors, serious threat to public policy and internal security; all internal borders (exact borders to be determined).
France	01/11/2023 – 30/04/2024	New terrorist threats and external borders situation; internal borders.
Austria	12/05/2023 – 11/11/2023	Pressure on the asylum reception system, high migratory pressure at the EU's external border to Türkiye and the Western Balkans, threat of arms trafficking and criminal networks due to the war in Ukraine, human smuggling; land borders with Hungary and Slovenia
Sweden	12/05/2023 – 11/11/2023	Islamist terrorist threat; all internal borders (exact borders to be determined)
Germany	12/05/2023 – 11/11/2023	Increase in irregular migration from Türkiye through the Western Balkans, strain on the asylum reception system, human smuggling; the land border with Austria

Denmark	12/05/2023 – 11/11/2023	Islamist terrorist threat, organised crime, smuggling, Russian invasion of Ukraine, irregular migration along the Central Mediterranean route; land border with Germany and ports with ferry connections to Germany (during 3/08/2023-22/08/2023, at all internal borders)
Norway	12/05/2023 – 11/11/2023	Threat to critical on-shore and off-shore infrastructures, Russian intelligence threat in Norway; ports with ferry connections to the Schengen area

CHAPTER XII

Returning of Irregular Migrants and Legal Certainty in Specific Central European States: A Comparative Perspective

Mateusz Tchórzewski

Abstract

The study is dedicated to the question of returning irregular migrants from the point of view of issues related to legal certainty. The topic is approached from a comparative perspective considering chosen Central European states: Hungary, Poland, Slovakia, the Czech Republic, Croatia, Slovenia, and Romania. These countries are characterised by distinct approaches to addressing irregular migration. The study juxtaposes and analyses these approaches. A concise analysis of the notion of legal certainty is conducted. It emphasizes the importance of ensuring predictability from the point of view of affected migrants. The study then discusses the relevant pieces of legislation that regulate the situation of migrants in these particular states. Court decisions, including selected judgements of national constitutional and administrative courts as well as specific judgements of the Court of Justice of the European Union and the European Court of Human Rights, are considered. Certain tensions, related to the relationship between national law and the law of the European Union, can be observed in some instances. These tensions may be seen as detrimental from the point of view of realising the principle of legal certainty and should be addressed by either modifying the EU's policies regarding migration or by granting Member States more discretion in terms of managing the aforementioned issue. This need is a result of divergent circumstances and related attitudes which exist in different states. These circumstances include, but are not limited to, the coercive engineered migration

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which should be viewed in the broader context of the security situation in Northern and Central Europe.

Keywords: returning irregular migrants, legal certainty, migration crises.

1. Introduction

The issue of migration is undoubtedly one of the main challenges faced by European states. It is difficult to overestimate its effects, in terms of both advantages and possible disadvantages, on the affected countries' societies and economies. Nevertheless, whereas legal (regulated or purposefully unregulated) migration is, as a rule, beneficial for the affected states and societies, illegal migration may be, depending on the specific context, problematic and, in some circumstances, even dangerous from the perspective of the affected states' societies.

When considering issues related to laws that regulate migrations, the interests of migrants should be considered with due attention to different categories of migrants. In particular, the situation of economic migrants should be differentiated from the situation of refugees.

The interests of migrants should also be considered, to a certain degree, from the point of view of the capabilities of receiving states and societies. This issue, if not accounted for, may have important negative consequences for the actual protection of migrants' rights. This can occur through, *inter alia*, practices conducted by states that themselves follow international standards regarding migrant protection. This includes *sui generis* outsourcing, where immigrants may be stopped before they can reach the areas where an effective system of human rights protection is in place. It may be carried out by states that do not abide by human rights protection standards, with implicit consent or even support from states that themselves guarantee high standards in terms of human rights protection. This means that certain states that abide by the international human rights protection standards may, in reality, contribute to violating them by proxy.

The notion of legal certainty should be considered crucial from the perspective of the aforementioned issues. The possibility of predicting what actual treatment and legal circumstances a migrant will face is a key issue for such persons, as their situation is in itself characterised by significant levels of uncertainty. This uncertainty stems from, amongst other things, being away from familiar and naturally understandable environments. This uncertainty is further exacerbated by the status of irregular migrants. Being able to predict how one's situation will be treated in such contexts is highly relevant from the point of view of migrants' legitimate interests, as it is a condition for effective planning of actions related to migration. This statement

appears to be true regardless of the migrants' motivations and situation and is especially relevant from the point of view of returning a migrant.

This text focuses on the issue of legal certainty in relation to returning irregular migrants, approached from a comparative perspective. This perspective considers a number of Central European states, that is Hungary, Poland, Slovakia, Czech Republic, Croatia, Slovenia, and Romania. These countries share certain important social, economic, and cultural characteristics that stem from, amongst other things, sharing a communist past. It is noteworthy that these communist systems were, in most cases, largely dependent on a third country (the Soviet Union) that could dictate to them, according to its own interests, crucial aspects of both foreign and domestic policies. Another relevant similarity can be observed here—the aforementioned nations were, to varying degrees,[1] also subject to foreign imperial rule before the 20th century. At the same time, the relevant states are members of the European Union (EU). These commonalities allow for a sufficient degree of similarity to conduct effective legal comparative work. The historical conditions outlined above may contribute to relatively limited degrees of trust in extranational intervention, even if said intervention comes from an institution in which the given state voluntarily participates.

Said countries also form a continuous geographic space that is largely situated on the fringes of the EU. This signifies that, as a group, they may be considered an area with identifiable similarities in their objective situations. This makes a comparative analysis relevant from both the theoretical and practical points of view.

Additionally, several of them were or are subject to extraordinary circumstances—migration crises that, from the perspective of this chapter, can be typified into two categories: the refugee-migrant crisis[2] and artificial migration crisis (coercive engineered migrations).[3] The question of legal certainty in such contexts takes on additional complexity, as it may be argued that the existing EU framework and regional international law struggle with effectively addressing issues stemming from the abovementioned circumstances.

1 The character of this imperial rule varied for different nations over time. Examples include the Kingdom of Hungary within Austro-Hungary after the compromise of 1867 and the Kingdom of Poland under Russian rule during 1815–1832. Each of these respectively serves as an example of a very substantial autonomy within historical borders and a relatively limited autonomy exercised on only a portion of the historical territory.

2 Such events are often identified as a migration crisis. It is important to note that migrants do not constitute a homogenous or single group. See Hammond, 2015, p. 3. The refugee migration created friction between certain EU member states and was asymmetrical, especially in Central European countries. This asymmetry was seen as a significant reason for diverse interests in different EU countries, which makes implementation of a coherent EU policy particularly difficult. See Karolewski and Benedikter, 2018, p. 113.

3 This term refers to cross-border movements of populations that are created intentionally to induce pression from target states. It is noted that, in this context, doubts may arise about whether states facing such hostile policies should be able to derogate from their obligations related to expulsion. See Huttunen, 2022, abstract.

2. Issue of legal certainty in national, EU, and international law

This part of the chapter discusses the general notion of legal certainty. The definitions and implications formulated in the contexts of both national and EU law are considered.

It must be noted the legal certainty (the principle of legal certainty) is very complex, has a rich and deep history, and is evolving. Therefore, it is discussed here in a concise manner from the point of view of the subject matter.

Emergence of the principle of legal certainty is being attributed to the 19th-century German *Rechtsstaat*, which is considered a more state-based approximation of the rule of law.[4] Legal certainty is formally seen as the possibility of foreseeing the effects of one's behaviour, and legal security can be considered as additionally including material elements such as the social minimum for each citizen.[5] The following elements of legal certainty, in the context of judicial application of the law, can be pointed out: predictability of whether a decision will be issued, predictability of the issued decision's content, and predictability of the issued decision's consequences.[6]

From the point of view of the subject matter, it is particularly relevant to discuss the notion of legal certainty as understood by the judicature. The notion of legal certainty is referred to in case law of the Polish Constitutional Court, Polish Supreme Administrative Court, and Polish Supreme Court. In its judgement of 21 October 2023,[7] the Polish Supreme Administrative Court stated that the national court is obliged to guarantee efficient protection of a person, that is, the resolution of a case while considering the demands posed by the principles of legal certainty (protection of legitimate expectations) and non-retroactivity of the law. The court stated that legal certainty, in the European cultural sphere, is perceived as an important value that is fundamental to the legal systems built upon the principle of the rule of law.

4 It is argued that the nature of this principle, as interpreted by the Court of Justice of the EU, can be understood by dwelling into the past. The political logic of the principle of legal certainty, which favours the political order, was arguably the first to emerge. From Antiquity to the Middle Ages, the need to ensure law's stability and accessibility is argued to have ensured the effectiveness of rules established by authorities rather than the protection of individuals. The three other logics, which are argued to have particular impacts on the development of the principle of legal certainty, include the Cartesian logic, theory of social contract, and development of individual rights. Montesquieu connected the Cartesian logic of legal certainty with its subjective logic. The 19th century is said to have continued the quest for certainty initiated by the scientific revolution. This century also set the stage for the German *Rechtsstaat,* French *État de droit*, and theorisation of the older English rule of law, which have in common the idea of a political power that guarantees individual rights and is subjected to legal principles such as legal certainty. In the 20th century, some scientific discoveries, such as Heisenberg's principle of certainty, undermined the claims of legal certainty. See Meerbeeck, 2016, pp. 276–279.

5 Spyra, 2006, cited in Wojciechowski, 2014, p. 10.

6 These were pointed out by J. Wróblewski. See Wojciechowski, 2014, p. 27.

7 No. I FSK 1104/22, Lex no 3484894.

Case law of the Polish Supreme Administrative court further postulated considering the principles of legal certainty, protection of acquired rights, and protection of legitimate expectations on the ground of the law's application.[8] In its judgement of 28 March 2023,[9] the Polish Supreme Court stated that the principle set out in Art. 2 of the Constitution of the Republic of Poland[10] results in the necessity to ensure legal security of the individual, legal certainty, predictability of statutory law, and loyalty of the state towards citizens. These should contribute to building individuals' trust in the state. The legal security of citizens should be understood not only formally as the predictability of the public authorities' actions, but also as an effective protection of individuals' life and interests. The Polish Supreme Court also stated in the judgement of 15 February 2023[11] that the principle of a democratic state ruled by law is expressed by, amongst other things, the necessity to ensure legal certainty. In this context, it was highlighted that extraordinary proceedings, which serve to overturn final court judgements, should be applicable only to the most important and evident faults of judgement as well as faults that materialise within the appropriate proceedings.

The principle of legal certainty has been the subject of several judgements of the Court of Justice of the EU (CJEU). In the judgement of 24 July 2023, the CJEU stated that

> That fundamental principle of EU law requires, on the one hand, that the rules of law be clear and precise and, on the other, that their application be foreseeable for those subject to the law, in particular where they may have adverse consequences. That principle constitutes an essential element of the rule of law, which is identified in Article 2 TEU both as a founding value of the European Union and as a value common to the Member States.[12]

In the judgement of 28 March 2017,[13] the CJEU stated that the principle of legal certainty, being a fundamental principle of EU law, requires rules to be clear and precise to allow individuals to ascertain their rights and obligations without a doubt so they may act accordingly.

Legal certainty in the context of EU law has an important dimension—the relationship between EU law and the law of Member States. This relationship can be categorised as clear from the point of view of EU law. However, from the point of

8 Judgment of the Polish Supreme Administrative Court from 2 July 2019, I FSK 119/17, Lex 2703336 and, *inter alia,* judgement of the Polish Supreme Administrative Court from 24 March 2021, FSK 2099/19, Lex no. 3209271.

9 No. II NSNc 85/23, Lex no. 3512802.

10 According to Art. 2 of the Polish Constitution, the Republic of Poland is a democratic state ruled by law that realizes the principle of social justice.

11 No. II NSNc 16/23, Lex no. 3490779.

12 Case no. C-107/23 PPU, ECLI:EU:C:2023:606, para. 114.

13 Case no. C-72/15, ECLI:EU:C:2017:236, para. 161.

view of the law of Member States, this relationship has a certain degree of ambiguity in some instances and is not altogether clear. Conflicts within these dimensions may be detrimental to the realisation of the principle of legal certainty. In the judgement of 19 November 2019,[14] the CJEU stressed that the principle of the primacy of EU law establishes the pre-eminence of EU law before the law of Member States and requires all their bodies to provide full effect to various EU provisions. At the same time, the law of a Member State cannot undermine the effect accorded to these provisions in the territories of those states. The national courts must, to a maximal extent, interpret national law in line with the requirements of EU law. If it is impossible to interpret national law in compliance with the requirements of EU law, the appropriate national court should give full effect to the provisions of EU law and, if necessary, refuse to apply any conflicting provisions of national law. In the judgement of CJEU of 24 June 2019,[15] the court stressed that the principle according to which national law must be interpreted in conformity with EU law requires that the entirety of domestic law must be considered, and the methods of interpreting the law, recognised by domestic law, must be applied to ensure that the EU law is fully effective. At the same time, a national court cannot validly argue that it is impossible for it to interpret the national law in a manner consistent with EU law because such a provision has consistently been interpreted in a manner incompatible with EU law[16] or has been applied in such a way by national authorities.

3. Returning irregular migrants in specific Central European countries and legal certainty

3.1. Hungary

The issue of legal certainty in relation to the returning of irregular migrants has certain idiosyncrasies in respect to Hungary. One of them is that Hungary was one of the states particularly affected by the 2015 migration-refugee crisis. Another important issue, from the point of view of the principle of legal certainty, focuses on the tensions between Hungary and the EU. These idiosyncrasies also include the fact that the CJEU deems Hungary to have broken EU law in relation to, *inter alia*, Hungary's policy regarding migration. In the judgement of 17 December 2020,[17] the

14 Cases nos. C-585/18, C-624/18, and C-625/18, ECLI:EU:C:2019:982, paras. 158–160.

15 Case no. C-573/17, EU:C:2019:530, paras. 77 and 79.

16 See also CJEU judgments of 8 November 2016, case no. C-554/14, EU:C:2016:835; and of 6 November 2018, case no. C-684/16, EU:C:2018:874.

17 Case no. C-808/18, ECLI:EU:C:2020:1029, paras. 288 and 289.

CJEU brought up the principle of legal certainty. It stated that the provisions of the directive (EU law) must be implemented with unquestionable binding force. At the same time, said provisions should be implemented with the appropriate specificity, precision, and clarity needed to satisfy the requirement of legal certainty under which the concerned persons must be enabled to ascertain the full extent of their rights. Moreover, if a Member State lays down detailed rules that govern the exercise of these persons' right to remain in its territory, as enshrined in appropriate EU law, such rules must be defined with sufficient clarity and in a precise manner so that the applicant for international protection can ascertain the exact extent of that right and that it is possible to assess whether such rules are compatible with EU law.

It has been stated that Hungary was attempting to avoid a large number of migrants transiting through its territory while allegedly misusing the EU asylum framework, which, arguably, was not designed for such movements. Generally, while some lower courts of Hungary may be considered more open to the influence of the CJEU and the European Court of Human Rights (ECtHR), Hungary's Constitutional Court has taken a more sovereigntist position, and the government is reluctant to implement crucial judgements of the CJEU and ECtHR.[18] In this context, Hungary is said to have raised the idea of diverging from the main conception of the present EU framework and not allowing asylum applications to be submitted on the EU territory as a rule; the aim is to eliminate factors giving rise to abuse.[19] It was further stated that although legal standards that were in force in the EU have their roots in the Geneva Convention, the European asylum law has evolved *via* the layering of a legal superstructure onto the Geneva Convention. Judicial and legislative actions, accumulating over decades, caused the European asylum system to be, in certain ways, more permissive compared to other major democratic jurisdictions.[20]

It should be noted that the Hungarian Constitutional Court stated that joint exercise of competences through the institutions of the EU may not lead to lower levels of protection of the fundamental rights compared with that required by the Fundamental Law. The Hungarian Constitutional Court further held that if the joint exercise of competences, which takes place through the institutions of the EU, is incomplete, Hungary is to have a right, in accordance with the presumption of reserved sovereignty, of exercising the relevant non-exclusive field of competences of the EU, until the aforementioned institutions take the necessary measures from the point of view of ensuring the effectiveness of the joint exercise of competences.[21] Another position of the Hungarian Constitutional Court merits attention. In this position, the court stated that protection of Hungary's inalienable rights to determine its territorial unity, population, form of government, and structure of the state is to be considered a part

18 Polgári and Nagy, 2021, cited in Töttős, 2023, p. 360.
19 Töttős, 2023, p. 360–361.
20 Šimonák and Sheu, 2021, cited in Töttős, 2023, p. 361.
21 Töttős, 2023, p. 352.

of its constitutional identity.[22] The notion of constitutional identity is argued to have been created against external, especially EU, law.[23] It should be added that the Hungarian version of the identity review mechanisms was classified as one that reveals a clear tendency towards hard conflict between the national courts and the CJEU.[24] At the same time, the Hungarian Constitutional Court stated that it is not in a position to assess if the incomplete effectiveness of the joint exercise of competences was resolved in a specific case, nor was it able to take a position on whether a CJEU judgement can lead to a situation where foreign nationals become a part of Hungary's population. This was to be judged by an appropriate authority charged with applying the law rather than the Hungarian Constitutional Court itself. It was also stressed that an abstract interpretation of the Fundamental Law must not have the goal of reviewing the judgements of the CJEU, and that the procedure of the Hungarian Constitutional Court did not extend to the review of the primacy of EU law.[25]

Conflicts between the Hungarian national law and EU law, as well as related tensions between the national constitutional courts and, in particular, the CJEU, especially when connected with substantial political tensions between the EU and a Member State, should be considered substantially detrimental from the perspective of realising the principle of legal certainty. Such tensions seem to exist in Hungary, most importantly in terms of law, but also in terms of the related political tensions. These uncertainties do not seem to be completely offset by certain ambiguities that appear to be present in the relevant jurisprudence of the Hungarian Constitutional Court.

3.2. Poland

The issue of the principle of legal certainty, in the context of returning irregular migrants, is particularly complex in Poland for several reasons.

The first factor that merits consideration is that Poland is an example of an EU Member State that is subject to a very specific form of migration; this form can be defined as hostile, artificial migration and is defined in the literature as coercive engineered migration.[26] Such migration can be described as a systematic policy implemented by a hostile state to put pressure on the targeted state to obtain political or economic concessions. Moreover, these policies should be considered here in the broader context of clearly formulated, very serious military threats aimed at Poland by states implementing said policy.[27] These threats put the lives of Poland's inhab-

22 Ibid.
23 Várnay, 2022, cited in Töttős, 2023, p. 353.
24 Spieker, 2020, cited in Töttős, 2023, p. 353.
25 Töttős, 2023, p. 353.
26 Huttunen, 2022, abstract.
27 This is connected to the real danger of using coercive engineered migration as part of broader activities aimed at legitimising or facilitating military aggression. It should also be noted that, based on the historical examples, coercive engineered migrations used as a tool to obtain different types of concessions may be seen as instruments with reasonable probability of resulting in success

itants in very real danger. Only some of the EU Member States face such threats. This may contribute to a divergence between Member States regarding the measures seen as necessary and legitimate to adequately address said threats.

At the same time, Poland is affected by the refugee-migrant crisis, and its reaction thereto is one of the reasons for its ongoing tensions with the EU. The results of the recent parliamentary elections may have significant effects on the dynamics of the relations between Poland and the EU.

Additionally, the conflict between Poland and the EU is not limited to the aforementioned issues. Another field thereof is the validity of the status of certain judges within Poland's judiciary branch.[28] This includes, but is not limited to, the controversial status of several judges of the Polish Constitutional Court. Therefore, an additional layer of difficulties in relation to the principle of legal certainty is created, as specific judgements of certain Polish courts may be controversial in terms of their validity.

The circumstances outlined above make the issue of legal certainty especially relevant within Poland's current legal circumstances, including in the context of returning irregular migrants.

In the context of this subject matter, the Constitution of the Republic of Poland provides, in Art. 56, that foreigners shall have the right of asylum in the Republic of Poland in accordance with the principles specified by statute. Furthermore, foreigners in the Republic of Poland who seek protection from persecution may be granted the status of a refugee in accordance with international agreements to which the Republic of Poland is party.

or partial success. Such instances include Libya obtaining financial aid from the EU (defined as a partial success, 2006); Nauru obtaining financial aid from Australia (defined as a success, 2004); North Korea obtaining financial aid as well as political support from China (defined as a success, mid 1990s), Albania obtaining food aid, financial credits, and other assistance from Italy (defined as a success, 1990–1991); Vietnam obtaining political-diplomatic recognition as well as aid (defined as a success, 1989–1990s); East Germany obtaining financial aid from Sweden (defined as a success, 1984–1985); East Germany obtaining aid, technical assistance, and border fixity from West Germany (defined as a success, 1983–1986); Honduras obtaining military aid, training, and a security pact from the United States (defined as a success, early 1980s); Thailand obtaining financial aid from the United States and France (defined as a success, 1982); and Haiti obtaining financial and military aid from the Unites States (defined as a success, 1979–1981). See Greenhill, 2010, pp. 120–121.

28 In this context, the decision of 14 February 2023, no. I FSK 2040/22, Lex no. 3487409, of the Polish Supreme Administrative Court merits attention. It was connected to the status of a judge who was nominated in a procedure that was controversial as to its validity. The scope of this work does not allow for a more in-depth analysis of this controversy or its roots. Nevertheless, it was argued before the court that, among other things, the controversial status of judges makes such judges uncertain about their future if the government in power at the time of the ruling were to lose power. Consequently, such judges were argued to support the current government's "propaganda." The Supreme Administrative Court decided that the particular circumstances of this judge can lead one to assume that there may be an infringement of the standards of independence and impartiality. Factors such as him previously being a judge of the Provincial Administrative Court and his evaluation by a judge of the Supreme Administrative Court, as well as the opinion of the president of the Provincial Administrative Court in Poznan (his candidacy was deemed to be exceptional), were considered dully.

Rules that govern the entry of foreigners into Polish territory and their transit therethrough, as well as their stay and departure, are regulated by the Act of 12 December 2013 on Foreigners.[29] Moreover, rules that govern the granting of protection to foreigners in the territory of the Republic of Poland can be found in the Act of 13 June 2003 on Granting Protection to Foreigners Within the Territory of the Republic of Poland.[30] Particular proceedings take place based on the Code of Administrative Proceedings,[31] which applies insofar as the provisions of the Act on Granting Protection to Foreigners Within the Territory of the Republic of Poland do not state otherwise.

A foreigner is defined by Art. 3 point 2 of the Act on Foreigners as any person who does not have Polish citizenship. It is not relevant whether the person possesses a citizenship of another state or is stateless.[32] Foreigners can apply for a refugee status based on Art. 13 para. 1 of the Act on Granting Protection to Foreigners Within the Territory of the Republic of Poland if, because of a well-founded fear of persecution in the state of origin based on race, religion, nationality, political beliefs, or membership of a specific social group, they cannot or are not willing to benefit from the protection of that state.[33] Grant of a refugee status has grounds when there exist well-founded reasons to conclude the possibility of persecution. The term "possibility" means that persecution may take place, although it is not certain or probable, and the requirement to establish "reasonable grounds" indicates the need to establish both objective and realistic indications of a risk of persecution.[34] Based on Art. 15 of the Act on Granting Protection to Foreigners Within the Territory of the Republic of Poland, a foreigner who does not meet the conditions for granting the status of a refugee is granted subsidiary protection if the return to the country of origin may put the foreigner at risk of a real danger of incurring serious harm[35] due to the following reasons: (a) death penalty; (b) torture or inhumane or humiliating treatment or penalty; or (c) serious and individualised threat to life or health caused by a general use of violence against the civilian population in a situation of an international or internal military conflict.

Additionally, according to Art. 106 para. 1 of the Act on Granting Protection to Foreigners Within the Territory of the Republic of Poland, foreigners who are arriving en masse to the territory of the Republic of Poland and have left their country of origin or specific geographic area because of a foreign invasion, war, civil war,

29 Journal of Laws 2023, item 519, consolidated text, as amended.

30 Journal of Laws 2022, item 1264, consolidated text, as amended.

31 Act of 14 June 1960 Code of Administrative Procedure (consolidated text Journal of Laws of 2023, item 775 as amended).

32 Ryszka, 2023, p. 243.

33 The status of a refugee is also granted, based on Art. 13 subsection 2 of this legal act, to a minor born in the territory of Poland who is a child of a foreigner who was granted the status of a refugee in Poland.

34 Chlebny, 2006, p. 53, cited in Ryszka, 2023, p. 244.

35 Additionally, the given person must not be willing or able to benefit from protection in the country of origin.

ethnic conflicts, or blatant infraction of human rights can be granted temporary protection in the territory of the Republic of Poland without regard to whether their arrival was spontaneous or as a result of an aid granted to them by the Republic of Poland or international community.

It is important to note that the traffic at border crossing points with the Russian Federation, Republic of Belarus, and Ukraine has been suspended since 15 March 2020 until further notice.[36] This was done based on the Ordinance of the Minister of Internal Affairs and Administration of 13 March 2020 on the Temporary Suspension or Restriction of Border Traffic at Certain Border Crossing Points (Ordinance on the Temporary Suspension).[37] This ordinance was issued based on Art. 16 para. 3 point 2 of the Act of 12 October 1990 on the Protection of the State Border.[38] Art. 3 para. 2a of the Ordinance on the Temporary Suspension allows for turning back to the state border line certain persons who are found to be at a border crossing point where the border traffic was suspended or restricted or outside the territorial scope of the border crossing point. The ruling of the Provincial Administrative Court in Białystok of 13 April 2023[39] merits attention in the context of the aforementioned legal act. The court stressed that the institutions of subsidiary protection have the aim to ensure that a decision obligating the return of a person will not be executed if, upon returning, that person would be threatened by the dangers pointed out by the relevant legal provisions. The court also indicated that the necessity for EU Member States to follow the non-refoulement principle stems not only from the legislative activities related to the implementation of relevant directives, but also directly from the primary law of the EU. Furthermore, the secondary EU law, having the rank of a regulation (which has a general character, is binding in its entirety, and is directly applicable in all EU Member States), directly mandates respecting the non-refoulment principle while applying the regulations affecting the flow of persons through the internal and external borders of Member States. The court concluded that neither national law nor circumstances (including the migration crisis on the EU external border, which was caused by external factors) can justify not respecting the principle of non-refoulment. This includes circumstances wherein foreigners are crossing the borders of the Republic of Poland by illegal means. According to the court, interpretation of the non-refoulment principle should aim for a balance between the necessity of protecting the state border and respecting the rights of foreigners, which stem from specific provisions of the international and EU law. The court further stated that a state authority's application of a provision of a lower rank while ignoring the statutory, EU, and international law constitutes a breach of law.

36 Ukraine was later excluded from the list of affected countries.
37 Journal of Laws 2020, item 435, as amended.
38 Journal of Laws 2022, item 295, as amended.
39 Judgment of the Provincial Administrative Court in Białystok of 13.04.2023, II SA/Bk 145/23, Lex No 3546573.

Another noteworthy issue related to legal certainty is regarding the relocation of migrants between different EU Member States. In this context, the CJEU judgement of 2 April 2020[40] merits attention. It was stated therein that

> In this connection, according to settled case-law of the Court of Justice, although it is for the Member States to adopt appropriate measures to ensure law and order on their territory and their internal and external security, it does not follow that such measures fall entirely outside the scope of EU law. As the Court has already held, the only articles in which the Treaty expressly provides for derogations applicable in situations which may affect law and order or public security are Art. 36, 45, 52, 65, 72, 346 and 347 TFEU, which deal with exceptional and clearly defined cases. It cannot be inferred that the Treaty contains an inherent general exception excluding all measures taken for reasons of law and order or public security from the scope of EU law. The recognition of the existence of such an exception, regardless of the specific requirements laid down by the Treaty, might impair the binding nature of EU law and its uniform application.

Furthermore, it was pointed out that

> … although Art. 72 TFEU provides that Title V of the Treaty is not to affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security, it cannot be read in such a way as to confer on Member States the power to depart from the provisions of the Treaty based on no more than reliance on those responsibilities.

In the Polish context, tensions between EU law and national law, as well as complex tensions within the Polish legal system, are detrimental from the point of view of realising the principle of legal certainty.[41]

3.3. Slovakia

In the Slovak Republic, Act no. 404 of 21 October 2011 on Residence of Foreigners is the legal basis for the procedure of returning irregular migrants for whom a decision of returning has been made. This legal act regulates reasons, as well as

40 Case nos. C-715/17, C-718/17, and C-719/17, ECLI:EU:C:2020:257, paras. 143, 145.

41 Moreover, recent changes in the Polish political landscape seem to indicate the possibility of a change in the dynamics of the aforementioned tensions. This is because of the results of recent parliamentary elections in Poland. It is noteworthy that the probable new parliamentary majority is unlikely to be able to overturn the expected presidential veto as regards the relevant changes in statutory law. As a result, assuming a lack of a compromise between major political actors, certain tensions within the Polish law and between the Polish law and EU law may persist. It is worth highlighting that the relevant practices of state authorities as well as the content of statutory law are largely determined by political factors.

the forms and means, of realising the return of a migrant. The form of the return is contingent on the assessment of a given situation and status of the third-country national at a given moment of time. To identify the optimal form of return, state authorities can check a given person by using the Slovak Information Service, examining the given person's testimony, and considering cooperation with Member States of the EU or non-governmental organisations.[42] The return process depends on issues such as the security situation in the EU, migration flows, and situation in the country of intended return (country of origin of the third-country nationals). Hence, the return process must be comprehensively adapted to the aforementioned circumstances. The Act on Residence of Foreigners defines administrative expulsion as a decision of the police, according to which the foreigner does not have or has lost the right to stay in the territory of the Slovak Republic and is under obligation to leave its territory. Slovak law also defines the reimbursement of the costs of the administrative expulsion and obstacles for such expulsion, which are correlated with the international obligations to which Slovakia is bound in terms of asylum law (principle of non-refoulement) and human rights.[43] It should be noted that the decision regarding administrative expulsion is executed by the police if (among other things) (a) the third-country national fails to depart within the time period proscribed in the decision regarding the administrative expulsion; (b) the administrative decision regarding the expulsion does not impose the period for departure; (c) the third-country national is to be returned to the territory of a different state in accordance with an international agreement (readmission agreement); (d) the third-country national is unable to leave for the reason of not having any valid travel documents, or (e) the third-country national fails to leave the country under the assisted voluntary return within the period specified in the decision regarding administrative expulsion or intentionally avoids the assisted voluntary return upon notification by the organisation conducting the assisted voluntary return programme.[44]

It is worth highlighting that, according to statistics in the context of Slovakia, the biggest proportion of irregular migration does not involve illegal crossing of the external (internal) border but rather an unlawful presence in its territory. Additionally, statistical data suggest that Slovakia remains a transit state.[45]

Moreover, it is important to note in the context of the Slovak Republic that the legal remedies available in relation to detention can be characterised as very limited. The affected person may file a claim with an administrative court in accordance with Act no. 162 of 21 May 2015 Administrative Procedure Code,[46] thus seeking an annulment of both the detention decision and the decision on extending the detention. It is also possible to file a claim with an administrative court regarding an

42 Elbert, 2024.
43 Elbert, 2024.
44 Elbert, 2024.
45 Elbert, 2024.
46 Zákon č. 162/2015 Z.z. Správny súdny poriadok.

administrative expulsion. Additionally, all foreigners must have access to legal aid provided by institutions such as the Centre for Legal Aid (Centrum právnej pomoci) or non-governmental organisations, which include the Human Rights League (Liga za ľudské práva) and Slovak Humanitarian Council (Slovenská humanitná rada).[47] Slovakian law further stipulates that detention of an asylum seeker should be a measure that is applied very rarely. The authorities, however, have repeatedly re-detained persons with the status of an asylum seeker after their application for asylum. The relevant practices were subject to judicial review. Analysis of the specific judgements suggests that the authorities strongly refer to insufficient information in justifying their decisions. It is worth noting that the authorities adapt their practices to the judicial decisions as soon as relevant judgements come into force.[48]

3.4. Czech Republic

From the point of view of Czech law and returning of irregular migrants, the two most relevant pieces of legislation are the Act on the Residence of Foreigners in the Territory of the Czech Republic[49] and the Act on Asylum.[50] Additionally, the case law of the Constitutional Court of the Czech Republic has a significant impact on the interpretation of the relevant legislation.[51]

It is worth noting that, in response to a preliminary question formulated by the Czech Supreme Administrative Court, the CJEU has taken a position according to which

> … Article 2(n) and Article 28(2) of the Dublin III Regulation, read in conjunction, must be interpreted as requiring that the objective criteria underlying the reasons for believing that an applicant may abscond must be established in a binding provision of general application. In any event, settled case-law confirming a consistent administrative practice on the part of the Foreigners Police Section, such as in the main proceedings in the present case, cannot suffice.[52]

In respect to the relation between Czech law and EU law, and the possible tensions related thereto, it is noteworthy that the Czech Constitutional Court was the first (among the constitutional courts of EU Member States) to describe a decision of the CJEU as ultra vires and, thus, as one that cannot be given effect in the Czech Republic. This took place in the Constitutional Court judgement of 31 January 2012[53]

47 Elbert, 2024.
48 Elbert, 2024.
49 Act no. 326/1999 Coll., on the Residence of Foreigners in the Territory of the Czech Republic.
50 Act no. 325/1999 Coll., on Asylum.
51 Zorková, 2023, p. 367.
52 Judgment from the 15 March 2017, case no. C-528/15, ECLI:EU:C:2017:213, para. 45.
53 Case no. Pl. ÚS 5/12.

(the Holubec judgement).[54] This case was connected to a long-lasting dispute between the Czech Constitutional Court and Czech Supreme Administrative Court related to the issue of pensions in the context of the breakup of Czechoslovakia. There existed a dispute between these courts in terms of their prerogatives. Czech administrative courts disagreed with the case law of the Czech Constitutional Court. This resistance was taken up by the Czech Supreme Administrative Court, acting as the highest judicial entity in terms of administrative justice. This conflict led the Czech Supreme Administrative Court to involve the CJEU by deciding, after requesting and receiving a reply from the CJEU, that the rule established by the Czech Constitutional Court does not apply as a result of its conflict with EU law. Moreover, the Czech Supreme Administrative Court acknowledged its judicial opponent to be the supreme guardian of the Constitution and, as such, to have the right to declare that relevant CJEU case law exceeded the powers delegated to the EU. The Czech Constitutional Court consequently ruled that, in particular circumstances, the CJEU has departed from the powers the Czech Republic vested to the EU.[55] This may *de facto* mean that the Czech Constitutional Court, in very specific circumstances, attributed to itself the right to decide upon the limits of the prerogatives of the CJEU. Such an approach can be deemed problematic from the point of view of the EU's internal legal cohesion, particularly in terms of the uniform understanding of (the content of) its law. However, the Czech literature pointed out that the significance of the Holubec judgement should be considered marginal from the point of view of the relationship between the Czech national law and EU law. This is because said ruling has its origins in the political as well as judicial circumstances of the Czech Republic, rather than being a coherent and future-oriented contribution meant to shape the Czech Constitutional Court's position regarding EU law.[56] The Czech literature on the subject also pointed out that the Czech Constitutional Court is, as a rule, open to the transfer of powers from the Czech state to the EU. At the same time, the court is said to respect the primacy of the EU law. However, it monitors this transfer and expresses its preparedness to intervene if the EU were to exceed its limits or threaten the essential requirements of the Czech Republic as a democratic state governed by the rule of law. The Czech Constitutional Court also stated that it cannot imagine under what circumstances such an intervention could occur.[57] This is relevant from the point of view of potential tensions between the EU and Czech national law, which can be observed in certain other states of the region and can have a detrimental effect from the perspective of realising the principle of legal certainty. Regarding the Czech Republic, the jurisprudence of its Constitutional Court suggests the possibility of a future conflict between the Czech national and EU law.

54 Otta, 2023, p. 219.
55 Otta, 2023, p. 221.
56 Otta, 2023, pp. 219–220.
57 Otta, 2023, p. 235.

The aforementioned jurisprudence seems to cautiously reserve, so to speak, the possibility of such a conflict in the future without realising it at a given time.

3.5. Croatia

Croatian legislation that regulates issues related to migration and asylum were developed following the EU and Schengen *acquis communautaire* based on the Constitution of the Republic of Croatia.[58] Art. 26 of the Croatian Constitution states that aliens are equal to the citizens of Croatia before the courts, governmental agencies, and other bodies vested with public authority. The most important piece of legislation regulating the consequences for irregular entry or stay of third-country nationals in Croatia is the Aliens Act.[59] The asylum system is regulated by the International and Temporary Protection Act.[60]

The main authority charged with general implementation of the migration and asylum policies in Croatia is the Ministry of the Interior. The Croatian Ministry of the Interior is a unified, hierarchical organisation characterised by high degree of subordination of lower-tier organisational units to the higher organisational units, as well as by a centralised organisational model.[61] Relevant decisions of competent authorities may be subject to judicial review by an administrative court and, under certain conditions, to an appeal to the High Administrative Court. Additionally, if there is a violation of the constitutional rights of an individual, a constitutional complaint may be filed with the Croatian Constitutional Court.[62] Decisions of competent authorities regarding the refusal of aliens' right to enter, stay, or reside are considered to be administrative acts and, as such, are regulated by the provisions of the General Administrative Procedure Act.[63] Said act has a general character and is applicable to all proceedings regarding any administrative matter. It is also important to note that other, specialised laws regulate certain procedural issues differently than the aforementioned act. In such cases, the General Administrative Procedure Act must be respected and applied as a subsidiary source of law on any issue that is not regulated by specialised legislation concerning migration and asylum. As already mentioned, in cases where no appeal against a given administrative decision is available, there is a possibility of initiating an administrative dispute before an administrative court. In circumstances proscribed by law, a claim postpones the enforcement of a decision. However, it is possible that the court will decide that a claim is to have an effect of postponing an enforcement of a decision if such enforcement would cause damage to the claimant that would be difficult to repair and if the postponement is not

58 Official Gazette, no. 56/1990, 135/1997, 113/2000, 28/2001, 85/2010—consolidated text, 5/2014.
59 Official Gazette, no. 133/2020, 114/2022, 151/2022.
60 Official Gazette, no. 70/2015, 127/2017, 33/2023.
61 Lalić Novak, 2024.
62 Lalić Novak, 2024.
63 Official Gazette, no. 47/2009, 110/2021.

contrary to the public interest.[64] An appeal is not available for a decision regarding an expulsion or return. However, there is a possibility of initiating an administrative dispute. Such dispute may also be initiated regarding a ban on entry and stay, as well as a decision to revoke a ban on entry and stay. There is also a possibility of initiating administrative disputes against decisions related to accommodation in a centre (detention). It is worth adding that a regular, *ex officio* judicial review is being conducted of the lawfulness of extensions of detention decisions.[65] In most available cases, the courts confirmed the administrative decisions issued by the competent authorities. It was often stated in this context that the decision issuing authority correctly established the existence of circumstances indicating the risk of avoiding the obligation to leave the Republic of Croatia.[66] The apparent complacency of courts in this regard is being described as a shortcoming in addition to the issue of access to legal remedies in the return procedures (lack of legal skills and knowledge of Croatian language being essential barriers in terms of access to courts) and the issue of lack of transparency in the functioning of the Croatian Ministry of the Internal Affairs (the ministry being the main competent authority for issues related to the prevention of irregular crossings of the state border and stay in the state's territory).[67]

In terms of ECtHR decisions related to Croatia, which fall within the scope of this study, *M.H. and Others v. Croatia*[68] as well as *Daraibou v. Croatia*[69] merit particular attention. In the former case, the issue was centred on the death of a minor who was an Afghan national and died from being hit by a train after being ordered by the Croatian authorities to return to the territory of Serbia after, allegedly, being refused asylum. This case also involved the detention of applicants who were seeking international protection. The court found that the Croatian authorities' investigation into the death should be considered ineffective. Furthermore, the detention of children was considered a form of ill treatment. It was additionally argued that some applicants were subject to collective expulsion from Croatia and that the Croatian state impeded the possibility of effective exercise of the applicants' rights, which included restricting their access to a lawyer. It was also highlighted, in the respect of the detention of children, that the detention lasted for a prolonged time period (compounded by the applicant children's perception of the situation as never-ending) because of Croatian authorities' failure to act within the required timeframe. Such treatment was viewed as one that could be sufficiently severe to engage Art. 3 of the European Convention on Human Rights. The court also stated that a violation of Art. 5, insofar as the possibility of applying less coercive measures of detention, was possible. The overly lengthy proceedings before the administrative courts, which have

64 Lalić Novak, 2024.
65 Lalić Novak, 2024.
66 Lalić Novak, 2024.
67 Lalić Novak, 2024.
68 Application nos. 15670/18 and 43115/18, 18 November 2021.
69 *Daraibou v. Croatia*, application no. 84523/17, 17 January 2023.

dealt with relevant asylum applications as well as reviewed the validity of concerned detentions, was also criticised. The court further stated that

> … it is of the utmost importance for the effective operation of the system of individual petition instituted by Article 34 that applicants or potential applicants be able to communicate freely with the Court without being subjected to any form of pressure from the authorities to withdraw or modify their complaints.[70]

The case of *Daraibou v. Croatia* concerned a situation wherein the border police found the applicant together with three other persons in a truck with Croatian licence plates. It was found these persons had entered the territory of Croatia clandestinely by avoiding border control. They were taken to a police station and searched. No dangerous objects were found on them. Afterwards they were arrested. After interviewing them, the police issued decisions ordering their expulsion. Their readmission was announced to the Serbian police as it was established that they had entered the Croatian territory via Serbia. Meanwhile, they were accommodated in an immigrant detention facility. The standard of their accommodations was questionable as they were located in a basement, in premises that measured about 9 m^2 and did not have a toilet or running water. The room was under video surveillance. The persons in question effectively disabled the video surveillance and started an intense fire within the premises. The fire spread across the room and part of the corridor, resulting in loss of electricity for the entire facility. Eight police officers entered the basement trying to rescue the detainees. The fire brigade and an ambulance were called. One of the persons died, whereas the applicant and two other detainees were taken out of the detention room and moved to the hospital. They were all severely injured. Some time later, two other detainees died from injuries sustained in the fire. The applicant recovered and was released from the hospital. It was found that the personnel responsible for supervising the detainees had not noticed the preparation or starting of the fire, which was in breach of their duties. Moreover, several cigarette stubs were found on the premises where the migrants were accommodated, indicating that they had been smoking. The officers were suspended from service. The First-Instance Disciplinary Court found one of the officers responsible for serious breach of duty and, considering mitigating circumstances such as the fact he had put his own life in danger to save the detainees, he was fined. The other officer was acquitted. Some time later, the applicant filed for asylum in Croatia, but his asylum request was subsequently refused. After a period of time, an investigation was opened in respect of the applicant based on a reasonable suspicion that he, together with three other detainees, had caused a fire by throwing flammable material into a pile with careless disregard of the possibility of starting a dangerous fire; thus, he had negligently endangered lives as well as property of substantial value, with his actions resulting in the death of three persons. The applicant

70 See para. 319 of the abovementioned decision and the case law cited therein.

appealed against the decision to open the aforementioned investigation and was subsequently expelled from Croatia to Morocco and was prohibited from re-entering the European Economic Area for a set period of time. Afterwards, the applicant's appeal against the decision to open an investigation in respect to him was dismissed by the Croatian court, which concluded that the available evidence confirms the reasonable suspicion that the applicant indeed committed a criminal offence. The investigation was then terminated as the applicant had left Croatia and his whereabouts were unknown. The applicant, relying on the substantive and procedural aspects of Arts. 2 and 3 of the European Convention on Human Rights, complained that the Croatian state was responsible for not preventing the fire that occurred in the detention centre, as a result of which he had suffered severe, life-threatening injuries. He also argued to no effective investigation was carried out in that respect. The court considered that this case should be examined under both the procedural and substantive limbs of the European Convention on Human Rights. The applicant argued that he did not have an effective remedy at his disposal. Furthermore, he argued that due to the lack of an effective criminal proceedings, he had not been in an effective position to take advantage of any available remedy, as the ability to elucidate the facts of the case was often solely in the hands of Croatian state officials or authorities. He further stated that he was unable to lodge a constitutional complaint because there had been no final decision on his rights or obligations. He did not, at any point of time, have the status of a victim; hence, he could not successfully pursue his interests at the Croatian Constitutional Court as a victim. Additionally, said Constitutional Court's practice in relevant matters had not been consistent, and, in any event, its decision could not have changed his status in terms of criminal proceedings. The ECtHR stated that

> As regards the applicant's complaint under the substantive limb of Art. 2 of the Convention, the Court reiterates that the burden of proof to show that there had existed an available and effective domestic remedy both in theory and in practice for the applicant's Convention grievances lies on the Government …. It notes in this connection that the decision of the Constitutional Court referred to by the Government concerned a complaint under the State's negative obligation not to expose the complainants to inadequate conditions of detention, whereas the applicant's complaint in the present case related to the authorities' positive obligation to prevent a life-endangering fire in a detention facility. The two situations are therefore not identical, as the Government seemed to suggest …. In any event, the said decision was adopted a year after the applicant had lodged his application with the Court; given the circumstances, the Court sees no reason to depart from the general rule on exhaustion of domestic remedies …. In view of the above, the Court considers that the Government did not succeed in showing that, at the time of the lodging of his application with the Court on 19 December 2017, a constitutional complaint constituted an effective remedy concerning positive obligations of the State under Article 2 of the Convention.

It also stated that

> … even where it is not established that the authorities knew or ought to have known about any such risk, there are certain basic precautions which police officers and prison officers should be expected to take in all cases in order to minimize any potential risk to protect the health and well-being of the arrested person.[71]

It was decided that the complaint was admissible, and that there had been violations of Art. 2 of the European Convention on Human Rights under both its substantive and procedural limbs.

3.6. Slovenia

The Slovenian literature highlighted that the return procedure in the Republic of Slovenia is strongly linked to the international protection procedures because of the large number of foreigners illegally entering the territory of the Republic of Slovenia and expressing their intention to apply for international protection.[72]

The competent authority, in a single procedure (as set out in Art. 49 of the Law on International Protection),[73] first assesses the conditions for granting refugee status and, if they are not met, the conditions related to granting of subsidiary protection status. The competent authority can either grant the application for international protection and the status of a refugee or subsidiary protection status, or reject the application as unfounded (in ordinary proceedings) or as manifestly unfounded (in accelerated proceedings). The primary source of information regarding the situation of the relevant country, within the decision-making process related to granting of international protection, is the asylum seeker. Such persons must credibly point out as well as explain the circumstances that may be decisive from the point of view of a given application.[74]

The removal of a foreigner from the territory of the state in an enforcement action which results from an issued and enforceable decision. This means that the affected person is brought to the state border and sent across it or handed over to the authorities of a third country. Removal may be applied only to foreigners who (a) failed to leave the country within the time limit set for their voluntary return, b) were not granted an extension of the time limit for their voluntary return, (c) were subject to a ban on entry, and (d) were subject to the secondary sanction of expulsion from the country.[75]

71 See paras. 68 and 84 of the aforementioned decision.
72 Žiga and Hacin Valič, 2023, p. 336.
73 Official Journal of the Republic of Slovenia, no. 16/17, officially consolidated text.
74 Žiga and Hacin Valič, 2023, p. 325.
75 Žiga and Hacin Valič, 2023, p. 329.

3.7. Romania

According to the Romanian Asylum Law, persons seeking international protection as a result of fear of persecution or serious harm in their country of origin enjoy certain rights and, at the same time, are required to fulfil certain obligations in terms of the asylum process. These rights include the (a) right to assistance by a lawyer during the asylum procedure, (b) right to being informed, (c) right to the access to an interpreter, (d) right to being contacted and assisted by a non-governmental organisation or the United Nations High Commissioner for Refugees, and (e) right to access their personal asylum file and request its copies.

The obligations in this respect include the obligations to (a) be photographed as well as fingerprinted, (b) provide true and complete information regarding one's identity and reasons for seeking protection, (c) provide the available documents regarding the given person's identity, (d) hand over other relevant documents, (e) participate in the asylum interviews, and (f) not leave the country irregularly.[76]

The general principle of non-refoulement is being applied in Romania. However, it is affected by certain exceptions in cases concerning so-called "undesirable" persons. The category of the so-called "undesirable" persons includes situations wherein classified information or "well-founded indications" suggest(s) that a foreigner, who is an asylum seeker or a person with a refugee status, intends to commit terrorist acts or other national security concerns are involved.[77] At the same time, Romanian law does not provide for a special remedy against a decision concerning a refusal of entry. However, such decisions may be challenged before administrative courts possessing territorial jurisdiction over a given area.[78]

From the point of view of legal certainty and returning of irregular migrants, while considering that Romania is an EU Member State, certain decisions of Romania's Constitutional Court merit attention. In Decision no. 406 related to the status and regime of refugees in Romania,[79] the Romanian Constitutional Court stated that it

> … has repeatedly ruled on the provisions of art. 5 point 2 of Government Ordinance no. 102/2000 regarding the status and regime of refugees in Romania, ruling, for example, by Decision no. 321 of April 18, 2006, published in the Official Monitor of Romania, Part I, no. 402 of May 9, 2006, that they do not contravene the provisions of art. 22 of the Constitution nor those of art. 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms, regarding the prohibition of torture.

In the context of the relationship between Romanian law and EU law, the Constitutional Court of Romania has taken a position according to which,

76 Lazăr, 2023, pp. 176-177; Lazăr, 2024.
77 Lazăr, 2024.
78 Lazăr, 2024.
79 Official Monitor, Part I no. 511 of 13 June 2006, cited in Nicu, 2024.

> … through the acts of transfer of some attributions to the structures of the European Union, they do not acquire, through its capacity, a "super-competence", a sovereignty of their own. In reality, the member states of the European Union have decided to jointly exercise certain powers that, traditionally, belong to the field of national sovereignty. It is obvious that in the current era of the globalization of humanity's problems, interstate developments and inter-individual communication on a planetary scale, the concept of national sovereignty can no longer be conceived as absolute and indivisible, without the risk of unacceptable isolation.[80]

In another decision related to the aforementioned issue,[81] the Constitutional Court of Romania stated that

> Therefore, by joining the legal order of the European Union, Romania accepted that, in the fields where the exclusive competence belongs to the European Union, regardless of the international treaties it has concluded, the implementation of the obligations resulting from them to be subject to the rules of the European Union. Otherwise, it would lead to the undesirable situation that, through the international obligations assumed bilaterally or multilaterally, the member state would seriously affect the competence of the Union and, practically, substitute it in the mentioned fields. That is why, in the field of competition, any state aid falls under the purview of the European Commission, and the procedures for contesting it belong to the jurisdiction of the Union. Therefore, in the application of art. 11 para. (1) and art. 148 para. (2) and (4) of the Constitution, Romania applies in good faith the obligations resulting from the act of accession, not interfering with the exclusive competence of the European Union and, as established in its jurisprudence, by virtue of the compliance clause included in the text of art. 148 of the Constitution, Romania cannot adopt a normative act contrary to the obligations to which it committed itself as a member state. Of course, all the previously shown have a constitutional limit, expressed in what the Court qualified as "national constitutional identity."

This stance of the Romanian Constitutional Court does not seem conducive to circumstances in which substantial tensions arise, in terms of the relationship between the national law of a Member State and EU law, with all the consequences of these tensions in the field of legal certainty.

80 Decision no. 148 of 16 April 2003, published in the Official Monitor of Romania, Part I, no. 317 of 12 May 2003, cited in Nicu, 2024, in press.

81 Decision no. 64 of 24 February 2015, published in the Official Monitor of Romania, Part I, no. 286 of 28 April 2015, cited in Nicu, 2024, in press.

4. Conclusions

It can be argued that considering the legitimate interests of affected states is also in the interest of irregular migrants, as it serves to safeguard the long-term functioning of the international (European) system of human rights protection. If affected states cannot sufficiently protect their legitimate economic, social, political, and geopolitical interests within the system of human rights protection (conversely, if these legitimate interests are not sufficiently addressed within the framework of the EU), then, in the long term, the functioning of the very system can be threatened. The threats to its existence (and effectiveness) can stem from electoral backlash that can put in power governments hostile to effective mechanisms of human rights protection. Another threat can be posed by a practice by which governments that formally abide by human rights standards may be incentivised to prevent migrants from ever reaching their borders via formal cooperation or collusion with states that do not respect such standards. As a result, migrants may never reach areas where they can enjoy the protection of their rights, thus being effectively deprived of them. Finally, artificial migrations can be used as a hostile policy, conducted by a non-abiding state and aimed at putting coercive pressure on an abiding state. The latter practice can be especially dangerous as, if tolerated, it incentivises further similar activities that may create the possibility of non-abating intensive artificial migration. If such intensive artificial migration is not addressed, it may not only create certain social tensions (which intense migrations typically do in the short term), but also pose a significant threat to the very security of a given state while also serving as a tool of intimidation at the disposal of authoritarian governments.

From the point of view of legal certainty, it is important to highlight the issue of certain national courts questioning or diverging from the positions taken by the CJEU, particularly in the context of the effective primacy of EU law over national law. This relates to instances of national courts considering it their prerogative to be the final authority regarding the actual content (meaning) of EU law (most notably the treaties). It should also be noted that the linguistic and, perhaps more importantly, cultural differences that exist between different Member States of the EU may cause the understanding of particular sources of EU law to differ substantially in reality. This may be attributed to nuances in the legal cultures of particular states, as well as to issues connected to the translation and implementation of legal acts and CJEU case law. These difficulties may exist even when the formal status of appropriate legal acts and case law is not being questioned. If national courts independently diverge from the positions adopted by the CJEU, there may be different positions related to the formal content of EU law. This may impact the effectiveness of EU law and, at the same time, significantly decrease legal certainty in terms of both the legal systems of particular Member States and the EU as a whole.

The problem outlined above adds additional layers of legal uncertainty. Law, by its very definition, cannot guarantee absolute certainty, but it should serve to maximise it to the highest possible degree. Natural deficiencies that manifest within

the law[82] may be exacerbated by conflicts between national courts (Member States) and the CJEU (the EU) related to primacy and the actual content of the law. These conflicts may become chronic. As a result, for a protracted time period, there may exist a significantly decreased degree of legal certainty that may extend, but may not be limited, to areas of law that regulate migration. This area of law seems particularly susceptible to the abovementioned problem, as it is also highly politicised and connected to some of the vital interests and dilemmas of the affected states and societies. This situation can be remedied in at least two ways. The first is the EU's adoption of a framework that will effectively address the issue of migration in a way that is acceptable from the point of view of the interests and values of Member States. If such a solution were to be adopted, the risk of EU legal framework's fragmentation is likely to decrease. The second direction involves giving the Member States more discretion in terms of choosing the way of dealing with the controversial challenges they face. This may reduce the incentive for the realisation of tensions between the legal systems of Member States and the EU.

It should be added that the realisation of the principle of legal certainty is not the only value that should be considered in the context of legal issues related to migrations and migrants' rights. Other values, including effectiveness of the law and national security, should also be considered when deciding in what circumstances decreased legal certainty may or should be tolerated. The need to pursue the realisation of the principle of legal certainty should be balanced with, in particular, the need to ensure both basic national security and effectiveness of the law.

82 These may include issues such as questionable quality of the legislation, contexts of different pieces of legislation contradicting each other, lack of uniformity in terms of case law created by national courts, and excessively high pace of changes within the law.

References

Bibliography

Chlebny, J. (2006) 'Ustalanie okoliczności faktycznych w sprawie o udzielenie cudzoziemcowi ochrony', *Zeszyty Naukowe Sądownictwa Administracyjnego*, 2006/6, pp. 52–63.

Greenhill, K. M. (2010) 'Weapons of Mass Migration: Forced Displacement as an Instrument of Coercion', *Strategic Insights,* 9(1), pp. 116–159; https://doi.org/10.7591/9780801458668.

Grote, R., Morales Antoniazzi, M., Paris, D. (2021) *Research Handbook on Compliance in International Human Rights Law*, Cheltenham: Edward Elgar Publishing.

Hammond, T. G. (2015) 'The Mediterranean Migration Crisis', *Foreign Policy Journal*, 19 May 2015. [Online]. Available at: https://www.foreignpolicyjournal.com/2015/05/19/the-mediterranean-migration-crisis/ (Accessed: 19 October 2023).

Huttunen J. (2022) *Coercive engineered migration and the prevention of entry of asylum seekers – a choice between two evils for the receiving European States*, Helsinki: University of Helsinki.

Lalić Novak, G. (2024) 'Return policies for irregular migrants and rejected asylum seekers in Croatia', *Central European Journal of Comparative Law,* 5(1) (in press).

Lazăr, I. (2023) 'Considerations Regarding the Legal Regime and Theory of Illegal Migration in Romania', *Law, Identity and Values*, 3(2), pp. 157–186; https://doi.org/10.55073/2023.2.157-186.

Lazăr, I. (2024) 'Some Considerations on the Practical Issues Related to Illegal Migration in Romania', *Central European Journal of Comparative Law,* 5(1) (in press).

Karolewski, I. P., Benedikter, R. (2018) 'Europe's refugee and migrant crisis: Political responses to asymmetrical pressures', *Politique Européenne*, 60, pp. 98–132; https://doi.org/10.3917/poeu.060.0098.

Elbert, L. (2024) 'Irregular Migrants in the Slovak Republic: Return and Readmission', *Central European Journal of Comparative Law,* 5(1) (in press).

Meerbeeck, J. V. (2019) 'The Principle of Legal Certainty in the Case Law of the European Court of Justice: From Certainty to Trust', *European Law Review*, 1(41), pp. 276–279.

Nicu, A. L. (2024) 'The Practice of the Constitutional Court of Romania Concerning Migration and Refugee Affairs', *Central European Journal of Comparative Law* 5(1) (in press).

Otta, Š. (2023) 'The Practice of National Constitutional Courts Concerning Migration and Refugee Affairs – The Czech Republic', *Law, Identity and Values*, 3(2), pp. 211–237; https://doi.org/10.55073/2023.2.211-237.

Polgári, E., Nagy, B. (2021) 'The chances of observing human rights in an illiberal state: diagnosis of Hungary' in Grote, R., Morales Antoniazzi, M., Paris, D. (eds.) *Research Handbook on Compliance in International Human Rights Law*, Cheltenham: Edward Elgar Publishing; https://doi.org/10.4337/9781788971126.00013.

Ryszka, J. (2023) 'Irregular Migration in Poland and the Importance of Readmission Agreements in Theory and Practice', *Law, Identity and Values*, 3(2), pp. 239–263; https://doi.org/10.55073/2023.2.239-263.

Spieker, L. D. (2020) 'Framing and managing constitutional conflicts: How to stabilize the modus vivendi between the Court of Justice and national constitutional courts', *Common Market Law Review*, 57(2), pp. 361–398; https://doi.org/10.54648/COLA2020031.

Spyra, T. (2006) *Granice wykładni prawa. Znaczenie językowe tekstu prawnego jako granica wykładni*, Warszawa: Wolters Kluwer Polska.

Šimonák, V., Scheu, H. C. (2021) 'Back to Geneva: Reinterpreting Asylum in the EU', *European View*, 20(1), pp. 237–238; https://doi.org/10.1177/17816858211061792.
Žiga, T., Valič, P. H. (2023) 'The Republic of Slovenia's Return Procedures for Irregular Migrants and Asylum Applicants in Theory and Practice', *Law, Identity and Values*, 3(2), pp. 311–342; https://doi.org/10.55073/2023.2.311-342.
Töttős, Á. (2023) 'Hungary's Policy and Practice on Illegally Staying Migrants', *Law, Identity and Values*, 3(2), pp. 343–363; https://doi.org/10.55073/2023.2.343-363.
Várnay, E. (2022) 'The Hungarian sword of constitutional identity', *Hungarian Journal of Legal Studies*, 63(2), pp. 79–106; https://doi.org/10.1556/2052.2022.00380.
Wojciechowski, M. (2014) *Pewność prawa*, Gdańsk: Wydawnictwo Uniwersytetu Gdańskiego.
Zorková, E. (2023) 'Theory and Practice of Returning Irregular Migrants in the Czech Republic', *Law, Identity and Values*, 3(2), pp. 365–384; https://doi.org/10.55073/2023.2.365-384.

Judgements of the Court of Justice of the European Union

Judgement of the Court of Justice of the European Union of 24 July 2023, case no. C-107/23 PPU, ECLI:EU:C:2023:606.
Judgement of the Court of Justice of the European Union of 17 December 2020, case no. C-808/18, ECLI:EU:C:2020:1029.
Judgement of the Court of Justice of the European Union of 2 April 2020, case nos. C-715/17, C-718/17 and C-719/17, ECLI:EU:C:2020:257.
Judgement of the Court of Justice of the European Union of 19 November 2019, case no. C-585/18, C-624/18 and C-625/18, ECLI:EU:C:2019:982.
Judgement of the Court of Justice of the European Union of 24 June 2019, case no. C-573/17, ECLI:EU:C:2019:530.
Judgement of the Court of Justice of the European Union of 6 November 2018, case no. C-684/16, ECLI:EU:C:2018:874.
Judgement of the Court of Justice of the European Union of 28 March 2017, case C-72/15, ECLI:EU:C:2017:236.
Judgement of the Court of Justice of the European Union of 8 November 2016, case no. C-554/14, ECLI:EU:C:2016:835;

Judgements of the European Court of Human Rights

Judgement of the European Court of Human Rights of 17 January 2023, Daraibou v. Croatia, application nos. 84523/17.
Judgement of the European Court of Human Rights of 18 November 2021, M.H. and Others v. Croatia, application nos. 15670/18 and 43115/18.

Judgements of Polish courts

Judgement of the Supreme Court of 28 March 2023, no. II NSNc 85/23, Lex no. 3512802.
Judgement of the Supreme Court of 15 February 2023, no. II NSNc 16/23, Lex no. 3490779.
Judgement of the Polish Supreme Administrative Court of 21 October 2023, no. I FSK 1104/22, Lex no. 3484894.
Judgement of Supreme Administrative Court of 14 February 2023, no. I FSK 2040/22, Lex no. 3487409.

Judgement of the Supreme Administrative Court from 24 March 2021, no. FSK 2099/19, Lex no. 3209271.
Judgment of the Supreme Administrative Court from 2 July 2019, I FSK 119/17, Lex no. 2703336.
Judgment of the Provincial Administrative Court in Białystok of 13 April 2023, no. II SA/Bk 145/23, Lex no. 3546573.

Legal sources

Act no. 162 of 21 May 2015 Administrative Procedure Code Zákon č. 162/2015 Z.z. Správny súdny poriadok.
Act on the Residence of Foreigners in the Territory of the Czech Republic, no. 325/1999 Coll., on Asylum.
Act of 12 December 2013 on Foreigners, Journal of Laws 2023, item 519, consolidated text, as amended.
Act of 13 June 2003 on Granting Protection to Foreigners Within the Territory of the Republic of Poland, Journal of Laws 2022, item 1264, consolidated text, as amended.
Act of 12 October 1990 on the Protection of the State Border, Journal of Laws 2022, item 295, as amended.
Act of 14 June 1960 Code of Administrative Procedure, consolidated text Journal of Laws of 2023, item 775 as amended.
Aliens Act, Official Gazette, no. 133/2020, 114/2022, 151/2022.
Constitution of the Republic of Croatia, Official Gazette, no. 56/1990, 135/1997, 113/2000, 28/2001, 85/2010, consolidated text, 5/2014.
Decision no. 64 of February 24, 2015, Official Monitor of Romania, Part I, no. 286 of April 28, 2015.
Decision no. 406 related to the status and regime of refugees in Romania, Official Monitor, Part I no. 511 of 13 June 2006.
Decision no. 148, Official Monitor of Romania, Part I, no. 317 of May 12, 2003.
General Administrative Procedure Act, Official Gazette, no. 47/2009, 110/2021.
International and Temporary Protection Act, Official Gazette, no. 70/2015, 127/2017, 33/2023.
Law on International Protection, Official Journal of the Republic of Slovenia, no. 16/17, officially consolidated text.
Ordinance of the Minister of Internal Affairs and Administration of 13 March 2020 on the Temporary Suspension or Restriction of Border Traffic at Certain Border Crossing Points (hereinafter: the Ordinance on the Temporary Suspension, Journal of Laws 2020, item 435, as amended.

CHAPTER XIII

Migration Based on Refugee Deals Across the World: Comparisons with the EU-Turkey Deal

Ľudmila Elbert

Abstract

Refugee deals are increasingly prevalent as states attempt to transfer their obligations under the Refugee Convention. The EU-Turkey deal, originally in the form of the Statement, is the most discussed deal within the European states, however, it is not the only deal considering the status of the refugees. This study aims to examine various refugee deals and compare them with the EU-Turkey deal. The comparative elements are based on the Michigan Guidelines on Protection Elsewhere, which defines basic pre-conditions for compliance with state´s obligations under the Refugee Convention within the arrangements with third states. Therefore, this study discusses the legal nature of selected refugee deals, their compliance with the international refugee law and human rights law, and the necessity for safeguards. The analysis reveals that each arrangement is different. Although all refugee deals aim to strengthen the border security of states and prevent human-trafficking, they have different objectives for transferring asylum seekers, different modus operandi, and impacts on human (and refugee) rights of the asylum seekers. A significant finding is that each asylum case should be assessed individually to ensure that the rights of particular person guaranteed by particular states are not infringed.

Keywords: human rights, migration, Refugee Convention, refugee deal, safeguards, third state

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1. Introduction

The EU-Turkey refugee deal was adopted as the EU-Turkey statement. The form of this deal differs from similar arrangements across other regions of the world, such as North and South American and Oceania. Accordingly, to clarify and reflect the fact that the terminology is not legally correct, this article uses the term "refugee deal" to refer to arrangements regarding the responsibilities of State Parties of the UN Convention Relating to the Status of Refugees (1951) (the Refugee Convention).[1]

The EU-Turkey deal was not the first and only refugee deal. European States have had opportunities to be inspired by other refugee deals in addressing their international obligations. Along these lines, the European Union had a chance to learn from previous refugee deals and their ineffectiveness, as well as violations of asylum law and the rights of asylum seekers or humans as such. In particular, participants in future deals should take note of the negative legal implications that such agreements have already had for human rights.

Refugee deals (i.e. offshore asylum policies or cooperative asylum arrangements) play a huge role in border control regimes in several states. Notably, outsourcing asylum to a third country has become a global trend since the 9/11 terrorist attacks; specifically, this strategy has been used to achieve greater border control and security. Outsourcing states provide funding for asylum systems and border control, including for the transit or diversion of asylum seekers by third countries. For example, the EU has provided funding to countries such as Albania, Libya, Niger, Tunisia, and Turkey to help them work with asylum seekers before they reach Europe. Similarly, the United Kingdom (UK) is planning to provide funding to Rwanda to support the transfer of migrants arriving in the UK by boat.

Despite their intended purpose, as highlighted by the United Nations High Commissioner for Refugees (UNHCR),[2] refugee deals that involve transferring asylum seekers to third countries can exacerbate issues of human trafficking and various forms of exploitation. The UNHCR therefore provides alternatives to such transfers, including resettlement programmes, family reunification measures, and humanitarian visas. There are also serious concerns regarding breaches of international legal obligations related to the principle of non-refoulement. Specifically, such breaches may occur when a State Party bound to the Refugee Convention sends a refugee with a well-founded fear of persecution back to their country of origin or to another State in which the refugee may be unsafe. In most cases, asylum seekers are not able to secure regular, safe transportation to a potential country of asylum, especially the UK.[3] Moreover, transferred asylum seekers have no access to effective judicial pro-

1 United Nations High Commissioner for Refugees (UNHCR) (2010) 'Convention and Protocol Relating to the Status of Refugees' UNHCR. December [Online]. Available at: https://www.unhcr.org/media/convention-and-protocol-relating-status-refugees (Accessed: 30 November 2023).

2 *UN Expert Urges UK to Halt Transfer of Asylum Seekers to Rwanda*, 2022.

3 Morrison, 2022.

tection and due process. In 2021, the UNHCR stated in its Annex to the UNHCR Note on the Externalization of International Protection[4] that policies and practices for the externalisation of international protection to avoid responsibility or to shift burdens are contrary to the Refugee Convention and principles of international cooperation and solidarity. Such policies include unilateral or cooperative measures to intercept or prevent the arrival of asylum seekers and the processing of asylum claims in or by a third State without adequate safeguards that shift the burden of international protection to other States.

Whether we are talking about externalizing, offshoring, outsourcing, or regionalizing asylum and migration management or cooperative asylum arrangements that shift the responsibility of asylum, we are always talking about some form of refugee deal. In Europe, the topic of migration is primarily of a political nature. Notably, the topic of migration is often misused or even abused by States even if they are barely affected by the so-called 'migration crisis'.

From a legal point of view, we need to differentiate between refugee law and migration law. Although both areas of law deal with state border crossings, they are not the same. The rules of migration and refugee law are only connected when the migrant is in the position of a refugee (per the conditions established in the Refugee Convention) and is crossing the borders of a particular State in order to seek protection. The rules of refugee law are not applicable when the migrant does not qualify as a refugee. Therefore, the rules of refugee law and migration law need to be distinguished. Refugee and asylum law aim to protect human rights and humanity in general; meanwhile, migration law aims to protect the security and economy of the State.[5] The validity of refugee law for a particular migration case is determined based on which category of "foreigner" the person in question falls into.[6] Regarding this terminology, we must differentiate between the terms "migrant" and "refugee", which refer to two distinct statuses of person from the point of view of refugee and asylum law. A "migrant" is a broad status applicable to persons seeking better living conditions abroad; meanwhile, a "refugee" is a status applicable to persons seeking international protection against persecution in their countries of origin. In the case of the massive influx of migrants to European states, this difference in terminology often did not apply given a lack of border controls (for better or worse in terms of the protection of the refugees).[7] It is appropriate here to make clear that the UNHCR's mandate situates the status of "refugee" as covering not only persons with a well-founded fear of persecution on certain grounds, but also other large groups of persons without the protection of their country of origin. An essential element in this delineation of refugee status is the crossing of international borders to flee conflicts; human rights violations; breaches of international humanitarian law; or

4 UNHCR, 2021, p. 1–3.
5 Scheu, 2016, p. 21.
6 Scheu, 2016, p. 25.
7 Scheu, 2016, pp. 26–27.

serious harm based on political, social, or economic reasons and changes in one's home country.[8]

Any offshoring asylum arrangement mainly impacts migration based on existing refugee policies—border States are not able to determine whether incoming persons are refugees or economic migrants without further examining their status on these terms. One of the prerequisites for permitting the transfer of refugees to a third country is the fulfilment of the elements of effective protection.[9] According to the UNHCR,[10] effective protection is especially important in the context of the secondary movements of refugees and asylum seekers. The blanket designation of a state as safe may lead to a situation in which the individual circumstances of an asylum seeker's position make her/his country unsafe for her/him. Such persons have no obligation under international law to seek international protection at the first effective opportunity, but also have no right to choose which country will examine their claim for international protection (e.g. asylum).

In applying any measure to transfer refugees to a third country, a State should be aware of its obligations according to international law and the specific circumstances of the case at hand. Regarding the assessment of effective protection for transferred persons in a third country, the UNHCR[11] recommends the evaluation of several elements as critical factors in relation to the third country, including (not exhaustively) whether: a) there is any risk that the transferred person will be subjected to torture or cruel, inhuman, or degrading treatment or punishment; b) there is respect for fundamental human rights following applicable international standards; c) there is any risk that the third country would send the transferred person to another country without effective protection; d) the third state has explicitly agreed to readmit the transferred person as an asylum seeker or a refugee; e) the actual practice of the third country is in compliance with the international refugee instrument and basic human rights instruments, with particular attention to its compliance with the Refugee Convention (regardless of whether the third country is a State Party to the Refugee Convention); and f) the third country grants the person access to fair and efficient procedures for the determination of refugee status. In general, if refugees enjoy the fundamental human rights common for citizens and foreigners, these rights are generally assured, due process of law is acknowledged, and measures of appeal and judicial review permit examination of the merits and legality of administrative decisions, the country is recognised as providing sufficient protection to refugees.[12]

The measures for transferring refugees to a third country are based on other concepts of protection. To ensure the implementation of such international legal obligations, academics gathered at the Colloquium on Challenges in International Refugee

8 Goodwin-Gill and McAdam, 2011, p. 49.
9 Foster, 2007, p. 224.
10 UNHCR, 2003.
11 Ibid.
12 Goodwin-Gill and McAdam, 2011, p. 393.

Law in 2007 and prepared the Michigan Guidelines on Protection Elsewhere.[13] The guidelines refer to situations in which a State acts on the basis that the protection needs of a refugee should be considered or addressed somewhere other than in the territory of the State where the refugee has sought, or intends to seek, protection. It reflects the minimum requirements imposed by international law within the implementation of the protection elsewhere policies, particularly those related to the possibility of the implementation of the protection elsewhere practices (legitimacy), respect for refugee rights, and safeguards.

The purpose of this chapter is to comparatively analyse refugee deals from different parts of the world, such as Europe, America, and Australia in light of these requirements. Ultimately, this chapter aims to identify the elements of protection elsewhere policies. The article is divided into four sections. The first section outlines examples of refugee deals from different parts of the world and their legal natures. The second section examines the safe third country concept and compliance with refugee rights based on the Refugee Convention (especially the principle of non-refoulement). The third section discusses safeguards from the view of particular refugee deals. The fourth section deals with the failure of solidary between States and the possibilities related to future refugee deals.

2. Refugee deals

In recent decades, many State Parties to the Refugee Convention adopted various measures to fight smuggling and human trafficking; however, in practice, they did so to discourage persons from seeking protection as refugees in developed countries. Although such measures differ (e.g. from visa requirements to deportation chains), their purpose is the same: to prevent persons from accessing the opportunity to be granted protection in the territory of the State in which they are seeking protection (in relation to all refugees or certain categories) based on a transfer to a third country in which the person will find protection.[14]

This phenomenon related to refugee deals is not new. At the beginning of the 20th century, Palestine—under American and British mandates—used visa restrictions, naval interceptions, island detention centres, and other practices to block the arrivals of Jews fleeing Europe, which continued throughout the atrocities of World War II. Meanwhile, countries such as the Dominican Republic and Ecuador welcomed Jewish refugees to gain political and economic support. Earlier, during World

13 *Colloquium on Challenges in International Refugee Law: The Michigan Guidelines on Protection Elsewhere*, 2007, pp. 207–221; para. 11 et seq.

14 Foster, 2007, p. 224.

War I, Armenians, Greeks, and Russians sought protection as refugees through the Nansen Office and Intergovernmental Committee of Refugees.[15]

Today, refugee deals are referred to as "cooperative asylum arrangements". In this context, the responsibility for asylum shifts from the State in which the refugee seeks protection mostly to developing countries. Although these arrangements differ, they all externalise the basic functions of border control in relation to asylum processing and protection[16] to a third country.

2.1. The EU-Turkey deal

In the EU legal system, the Dublin III Regulation is the main legal tool used to determine which country is responsible for making decisions about asylum applications.[17] Such determinations should be based on the following criteria (in hierarchical order): family considerations, the recent possession of a visa or residence permit in a Member State, and whether the applicant has entered the EU irregularly or regularly.[18] During the massive influx of migrants, the Dublin III Regulation placed the responsibility for asylum applications on EU Member States based on the criterion of the first entry; this placed huge pressure on States such as Greece, Italy, Slovenia, and Hungary. The asylum systems of these countries were overburdened and contested, giving rise to reforms across the whole Common European Asylum System based on the principle of solidarity and the fair sharing of the responsibility for examining asylum applications.[19] This is the subject of this part of the chapter.

In response to massive migration flows from countries in the Middle East, Asia, and Africa, which peaked in 2015, EU Member States started to look for solutions to the high numbers of migrants coming to Europe day after day. These high rates of incoming migrants were due to issues such as armed conflict in Syria; drought across the Middle East; imbalances in security in Pakistan and Afghanistan; the persecution of Rohingya people in Myanmar; war, conflicts, and uninhabitable conditions in central African states (Sahel); and very low living standards in these countries. Additionally, asylum seekers were also coming to Europe from the countries of their first asylum, such as Turkey or Jordan, which had the highest numbers of asylum seekers.[20] The main issue was that the high number of incoming migrants could not be processed by the relatively low number of migration office staff in EU Member States, especially these on the outer side of the Schengen borders.

15 Morris, 2023.
16 Tan, 2022.
17 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 (recast), OJ L 180, 29.6.2013, pp. 31–59.
18 European Commission, 2020.
19 Ibid.
20 Banulescu–Bogdan and Fratzke, 2015.

In 2015, the EU-Turkey deal, in the form of the EU-Turkey statement, was adopted.[21] The statement was published in the form of a press release on the European Council website, which clarifies the commitments of both parties. Turkey's main commitment was the readmission of every irregular migrant from Greece based on the rules of international and EU law (especially the prohibition of collective expulsion and the principle of non-refoulement), which was based on the main goal of ending the suffering of migrants and maintaining public order. Greece's commitment was to ensure that every migrant arriving to Greece would be duly registered and that Greek authorities would individually process every asylum application. If migrants did not apply for asylum or their applications were unfounded or inadmissible, they would be returned to Turkey at the cost of the EU. The EU-Turkey deal established that for every Syrian migrant returned from Greece to Turkey another Syrian would be resettled from Turkey to the EU based on the UN Vulnerability criteria.[22] Therefore, the EU-Turkey deal did not apply to every irregular migrant, but only Syrian refugees.

The EU-Turkey deal had very limited positive consequences. Notably, although migrants' incomes declined immediately following the adoption of the EU-Turkey deal, this trend did not last a long time. Specifically, statistics[23] show that the numbers of migrants coming to European countries have increased annually, including after the adoption of the EU-Turkey deal. The EU-Turkey deal also led to the partial closing of Turkey's borders with European countries, which positively impacted the workload of asylum systems in Greece and Italy.[24] However, the change in migration routes put more pressure on the asylum systems of Spain and France. Broadly, the EU-Turkey deal mainly changed migration routes, leading to routes that were much more dangerous than those that stretched through Turkey.[25]

The EU-Turkey deal has been the subject of much discussion. It was originally announced as a non-binding statement—a political agreement between the members of the European Council, the heads of States or governments of the Member States, and Turkey. The legal obligations of each party were not considered. (The legal review was part of the judicial review by the European Court of Justice ("ECJ"), which is detailed below in the discussion of safeguards).

2.2. The US-Canada deal

In December 2002, the United States and Canada adopted a bilateral agreement for cooperation in the examination of refugee status claims from nationals of third countries (the "US-Canada deal")[26] as part of the Smart Border Action Plan. This

21 European Council, 2016.
22 See, UNHCR, 2016, p. 7–26.
23 Eurostat, 2023.
24 European Commission, 2018, p. 30.
25 European Council, 2023; Frontex, 2023.
26 Government of Canada, 2002.

deal was designed to enhance the States' sharing of responsibility for refugee status claims. As Macklin[27] stated, the deal has two components. First, the readmission component, which establishes that the country of last presence shall accept the return of an asylum seeker from the receiving country, the refugee determination, which maintains that the Party that ultimately admits the asylum seeker shall also adjudicate the refugee claim. This Party should also prevent chain refoulement or the refugee in orbit problem, in which the claimant moves from one country to another until she/he returns to her/his country of origin without a refugee determination process.

According to the aim of the document, we can compare the US-Canada deal to the Dublin Regulation in EU law. The purpose of the US-Canada deal is to ensure that refugee claimants can access a refugee status determination system. Responsibility for determining the refugee status claim rests on the receiving country rather than the country of last presence. The receiving country determines that the refugee claimant a) has in its territory at least one family member with refugee or lawful status, b) has in its territory at least one family member aged at least 18 years old with a pending and eligible claim for refugee status, c) is an unaccompanied minor, or d) arrived to its territory with valid visa or other admission document or without being required to obtain a visa by only the receiving country. Just after the final determination of refugee status, the country of last presence may be required to accept the return of the refugee status claimant (Art. 4 of the US-Canada deal). Notably, the purpose of the Dublin Regulation is to ensure access to the asylum procedures and the examination of the application by a clearly determined EU Member State depending on the age of the claimant, legal presence of her/his relatives in EU Member States, family unification, possession of a valid residence document of visa, or irregular crossing of the EU Member State's border. The difference between these agreements is in the legal nature of the US-Canada deal, which is an international treaty governed by the rule of the international law, especially the Vienna Convention on the Law of Treaties.

2.3. The UK-Rwanda deal

In April 2022, the UK's Home Office[28] announced the signing of the Migration and Economic Development Partnership with Rwanda.[29] For the provision of an asylum partnership arrangement, a memorandum of understanding between the UK and Rwanda[30] was adopted in April 2022. With this memorandum, the UK sought to

27 Macklin, 2003, p. 3.

28 Home Office and The Rt Hon Priti Patel MP, 2022.

29 Home Office, 2023b.

30 Memorandum of Understanding between the government of the United Kingdom of Great Britain and Northern Ireland and the government of the Republic of Rwanda for the provision of an asylum partnership arrangement (13 April 2022). Home Office; updated by the Addendum to the Memorandum of Understanding from 6 April 2023. Home Office, 2023a.

officially tackle illegal migration and break the business model of people-smuggling gangs. The goal of the UK-Rwanda deal was to relocate asylum-seekers arriving to the UK to Rwanda, where their asylum claims would be processed. This relocation strategy would mainly be applied when the applicant in question would be considered inadmissible to the asylum system because she/he passed through or has a connection with the safe country.[31] In such a case, the applicant's claim for international protection would be rejected and the applicant would be given the option to stay in Rwanda or return to her/his country of origin. The UK-Rwanda refugee deal is a part of the New Plan for Immigration in the United Kingdom. This plan was introduced in response to the collapse of the UK's asylum system under the pressure of high numbers of irregular migrants to the UK. According to the UK government, the purpose of the deal is to fight irregular migration to the UK, including smuggling via small boats across the Channel, and to help those in the need of the protection. As a State Party to the Refugee Convention and other major human rights conventions, Rwanda has already been providing help to refugees, mainly from Burundi and the Democratic Republic of Congo.[32]

The UK-Rwanda deal is interesting from the legal point of view. Specifically, it is notable that is a "memorandum of understanding" rather than a treaty. Further, the memorandum (as well as its Addendum) explicitly states near the end of its introduction that it is not binding at the level of international law. However, the memorandum contains obligations for both its Parties (point 16). According to Goddard,[33] this deal may have been designed as a memorandum of understanding because this style of agreement does not have to be presented to Parliament prior to being ratified.

However, the memorandum of understanding was the subject of a review by the International Agreements Committee of the House of Lords[34] published in October 2022. In the view of the Committee, this memorandum of understanding may breach Art. 31(1) of the Refugee Convention, which precludes penalisation for the irregular crossing of borders; Art. 33 of the Refugee Convention, which regulates the non-refoulement principle; and Art. 3 of the European Convention on Human Rights (ECHR), which covers the right to be free from torture, inhuman, or degrading treatment. Moreover, the Committee pointed out that Rwanda is not a State Party of the ECHR. Because the memorandum of understanding is non-legally binding, its commitments are not subject to judicial review, and it does not open onto dispute resolutions involving outside entities, neither individuals nor the Parties to the arrangement can ensure the rights of those affected are protected once they have been transferred to Rwanda. Further, as suggested above, because the agreement takes the form of a

31 Williams, 2022.
32 Home Office, 2022.
33 Goddard, 2023.
34 House of Lords, 2022.

memorandum of understanding, Parliament did not have an opportunity to consider the agreement's compatibility with the UK's obligations under international law.

The memorandum may have been inspired by the EU-Turkey deal, which was also adopted in a form that prevents it from being subject to a review from the legal point of view by the affected individuals. While State actions based on refugee deals may be contested by individuals, refugee deals themselves cannot. Notably, the actions of the European Court of the Human Rights (ECtHR) were decisive in the implementation of both the EU-Turkey and UK-Rwanda deal. The deals may also be differentiated in terms of judicial review—the ECJ dismissed claims for the annulment of the EU-Turkey deal without any deeper consideration of its compatibility with EU and international law, while the UK Supreme Court considered the legal aspects of the UK-Rwanda deal and legal obligations of the UK (for more details on this matter, see the below discussion on safeguards).

2.4. The Australia-Nauru deal

The history of the Australian government's policy on offshore processing may be traced to the Pacific Solution policy. This policy was based on the Tampa Affair, during which the Australian government blocked the MV Tampa, a Norwegian freighter, from entering Australia after it had rescued 433 asylum seekers at sea. The asylum seekers were taken on board Australian naval vessels and transferred to Nauru for detention and processing in offshore centres.[35] Nauru is not the only country to which asylum seekers have been transferred; Australia also has such arrangements with the Manus Island in Papua New Guinea and Christmas Island. Generally, Australia automatically sends asylum seekers arriving by boat to Nauru or Manus Island, where they await the determination of their refugee status. Primarily, these asylum seeks come from the Middle East or South Asia. If their processing is successful, the migrants receive refugee visas and basic resettlement support to live and work on the islands.

Given that Australia's arrangement with Nauru remains in effect, this part discusses the Australia-Nauru deal adopted in August 2012 in the form of a memorandum of understanding. The purpose of this deal was to establish the transfer of asylum seekers who had arrived in Australia by sea without valid visas to Nauru to await the assessment of their asylum claims in accordance with Nauru's legislation. If the asylum seekers were recognised as refugees, they could settle in Australia. As of July 2013, Australia announced that any asylum seeker who arrived by sea without authorisation would not be settled in Australia even if she/he was eventually determined to be a refugee. Therefore, in August 2013, Australia and Nauru signed another memorandum of understanding[36] under which Nauru committed to allowing individuals in need of international protection to settle within its territory. This

35 Baker, 2019.
36 Republic of Nauru and the Commonwealth of Australia, 2013.

memorandum contains obligations for Nauru in relation to non-refoulement, mainly to allow for the assessment of refugee status or to permit it to be made.[37] However, in 2021, a new memorandum of understanding[38] was signed between Australia and Nauru for an unlimited period of time.[39] Although the arrangement with Papua New Guinea ended in 2021, there are more than one hundred people left without permanent residency or citizenship, and Nauru is expected to continue to host refugees in the future. According to Refugee Council,[40] on October 2023, there were still 2 people on Nauru from previous transfers and 11 people detained in the regional processing centre after being transferred in September.

With this memorandum of understanding, Australia transferred its responsibilities based on the Refugee Convention to Nauru. The UNHCR[41] points out that an arrangement agreed upon by two Contracting States to the Refugee Convention does not extinguish the legal responsibility of the transferring State (Australia) for the protection of asylum seekers affected by the arrangements. Accordingly, Australia and Nauru have shared and joint responsibility to ensure the compatibility of the treatment of all transferred asylum seekers with obligations under international law, especially the Refugee Convention.

Meanwhile, this arrangement also has a huge impact also on host communities in Nauru. The Nauruan government received more than USD 3 billion from Australia between 2001 and 2022. Further, industries responsible for the asylum procedures and the resettlement of the refugees in Nauru have provided employment for many local residents. To further improve local conditions, Australia has also supported development in Nauru by constructing a new hospital, school, courthouse, and road system.[42] The Australia-Nauru refugee deal is therefore a good example of how refugee deals can help local communities in the receiving state.

3. Third Countries' Relations to the Refugee Convention

The relation of a third country to the Refugee Convention is crucial. The Michigan Guidelines state that the protection elsewhere policies are compatible with the Refugee Convention as long as they ensure that refugees enjoy the rights guaranteed by the Convention in the receiving State. Such a State does not have to be a Party of the Refugee Convention; however, a so-called "sending" (or "offshoring")

37 UNHCR, 2015, p. 1.
38 Republic of Nauru and the Government of Australia, 2021, pp. 1–5.
39 Doherty, 2021.
40 Refugee Council of Australia, 2023.
41 UNHCR, 2015, p. 2.
42 Morris, 2023.

state has to make an empirical assessment that refugees will enjoy the rights based on the Refugee Convention.

As Foster[43] pointed out, one problem may be the obligation of the State Parties of the Refugee Convention *to cooperate with the UNHCR* to facilitate its duty to supervise the application of the provisions of the Refugee Convention. If a State transfers a refugee to a third country as non-State Party of the Refugee Convention, it breaches its cooperation obligation in relation to the UNHCR and has no authority to supervise the positions of the refugees in such a third country. Moreover, the State Parties of the Refugee Convention are obligated to submit to the jurisdiction of the International Court of Justice in relation to any dispute between parties to the Convention, which cannot be transferred to a third country that is not a State Party of the Convention. Therefore, a third country receiving refugees from a sending State has to be a Party of the Convention to fulfil the international obligations of the sending State.

The Refugee Convention covers several refugee rights, such as non-discrimination (Art. 3), religion (Art. 4), movable and immovable property (Art. 13), artistic rights and industrial property (Art. 14), the right of association (Art. 15), access to the courts (Art. 16), rationing (Art. 20), education (Art. 22), administrative assistance (Art. 25), freedom of movement (Art. 26), identity papers (Art. 27), fiscal charges (Art. 29), non-penalisation for illegal entry or presence (Art. 31(1)), freedom form constraints on movement unless shown to be necessary and justifiable (Art. 31(2)), protection against refoulement (Art. 33), and consideration for naturalisation (Art. 34). However, in order to consider the ability of a State to transfer refugees in accordance with the protection elsewhere policy, the sending State must ensure that the third State (as receiving State under the Refugee Convention) respect the right of the refugee not to be removed or expelled to a country where their life or freedom would be threatened on account of her/his race, religion, nationality, membership in a particular social group, or political opinion (*principle of non-refoulement*)".

The determination of refugee status does not make a person a refugee; the State Party to the Refugee Convention only confirms the status already held by a person who meets the requirements of refugee status. Refugees are entitled to the rights guaranteed by the Refugee Convention—not only Art. 33 (non-refoulement), but also other rights—as soon as they are under the jurisdiction of the State Party or present within its territory. If the state party wants to transfer its protective responsibilities under the Refugee Convention to another state, it needs to make sure that every right is respected in that country—not just the right of protection against the risk of refoulement.[44] Along these lines, the UK-Rwanda deal has been criticised by the UK Supreme Court.[45] The Supreme Court of Israel has already ruled that Rwanda has

43 Foster, 2007, p. 241.
44 Hathaway and Foster, 2014, pp. 40–41.
45 United Kingdom: Supreme Court, 2023.

not respected the right to settle of those who were transferred to its territory per the Rwanda-Israel deal and who were at risk of refoulement.[46]

The preamble of the Refugee Convention expressly states the commitments of State Parties to assure refugees the widest possible exercise of fundamental rights and freedoms, with a clear catalogue of their rights. Therefore, Hathaway and Foster[47] are of the opinion that it would surely be antithetical to the Convention's very essence to read it as allowing a State Party to forcibly expel a refugee to a State known not to deliver those rights. Moreover, within the concept of effective protection, the obligation of non-refoulement is not the only one. As the High Court of Australia[48] observed, the transferred refugee may have none of the other rights which Australia (the contracting State) is bound to accord to persons found to be refugees… Thus when the (State) Act speaks of country that provides protection…it refers to provision of protection of all the kinds which parties to the Refugee Convention and Protocol are bound to provide to such persons. Those protections include, but are not limited to, protection against refoulement.

The reasoning behind such measures related to the transferring of refugees to third country is based on the fact that Refugee Convention does not provide the positive right to be granted asylum. The protection mechanism of the Refugee Convention depends on the principle of non-refoulement,[49] but it does not explicitly obligate a State to grant asylum or another form of protection on its territory. The Refugee Convention also only covers very limited exceptions to the principle of non-refoulement. Art. 33 (2) states that the benefit of non-refoulement may not be claimed by a refugee who constitutes a danger to a) the security of the country in which he is on the reasonable grounds or b) the community of that country based on the conviction by a final judgment of a particularly serious crime. Such an exemption should be applied with the greatest caution and with consideration for the circumstances of the case.[50]

Notably, during the 1970s, a consensus at a Nansen Symposium affirmed the notion of non-rejection at the frontier within the principles of non-refoulement and a general recognition of the principle of provisional admission as a minimum requirement.[51] However, this is not in the content of the final version of the Refugee Convention. Foster[52] underlines that a State should pay special attention to *indirect refoulement*, the possibility that the third State—while itself a safe third country—may in fact return the refugee to the country of origin where the well-founded fear of persecution exists. This can be also the case when the third country is a State Party

46 Ibid.
47 Ibid, p. 49.
48 See: Hathaway and Foster, 2014, p. 43; High Court of Australia: *Plaintiff M70/2011 v Minister for Immigration and Citizenship*, point 119.
49 Art. 33 of the Refugee Convention.
50 UNHCR, 1977.
51 Goodwin-Gill and McAdam, 2011, p. 364.
52 Foster, 2007, p. 244.

of the Refugee Convention but with a more restrictive approach to interpretation or procedure based on geographical or other limitations to the application of the Refugee Convention (e.g. Turkey). In order to avoid the risk of indirect refoulement, the sending state applying the protection elsewhere policy must ensure that any refugee to be transferred to the third country will have the right to enter that State and apply for protection under the Refugee Convention.[53]

In light of the statement of the UNHCR office in the introductory note, the Convention and Protocol are status- and rights-based instruments built on numerous fundamental principles—mainly, the principles of non-discrimination,[54] non-penalisation,[55] and non-refoulement.[56] In Duarte's opinion,[57] all these principles were violated by the EU-Turkey deal. Specifically, a) this deal was designated mainly in relation to Syrian refugees, which constitutes discrimination based on the country of origin, and while all refugees were to be returned by the EU to Turkey, only Syrians could benefit from EU protection through resettlement;[58] b) in Greece and Italy, as well as Turkey, concentrated refugees in facilities and camps experienced inhuman conditions, including the militarisation of these areas and according penalties, as well as border "pushbacks";[59] and c) reports suggest that forced returns[60] occurred, that Turkey and Greece did not allow refugees to apply for asylum (the asylum procedure is crucial for distinguishing between an irregular migrant and asylum seeker), and that Turkey sent refugees, including unaccompanied children and pregnant women, back to Syria, where armed conflict was ongoing.[61]

Because Turkey is not an EU we cannot presume that it will apply and guarantee rights in compliance with EU law. Even the European Commission[62] expressed the need for changes to provisions within Greek and Turkish domestic legislation according to procedural safeguards, as inconsistencies in the States' domestic legislation had been established before the EU-Turkey deal. This shows that the EU representatives had to be aware of Turkey's struggles with the protection regime for migrants and refugees. The conclusion that Turkey cannot be considered a third safe country is also based on the fact that it still applies[63] relevant geographical limitations related to the Refugee Convention based on which it has no obligations

53 Foster, 2007, p. 250.
54 Art. 3 of the Refugee Convention.
55 Art. 31 of the Refugee Convention.
56 Art. 33 of the Refugee Convention.
57 Duarte, 2020, pp. 279 et seq.
58 Hathaway, 2016b.
59 Smith, 2023; Greece's pushback of migrants on boats is also subject to judicial review by the European Court of Human Rights. See, for example, Cossé, 2022.
60 Poon, 2016, p. 1196.
61 See, for example, Hardman, 2022.
62 Communication from the Commission to the European Parliament, the European Council and the Council: Next operational steps in EU-Turkey cooperation in the field of migration (Brussels, 16.3.2016, COM (2016)166), p. 3.
63 Hathaway, 2016b.

to non-European refugees. Meanwhile, Turkey adopted the EU-inspired Law on Foreigners and International Protection[64] in 2013, which brought a new legal framework for asylum to Turkey and introduced obligations for Turkey in relation to all persons in need of international protection.

Along these lines, Turkey provides several types of protection. First, it provides permanent protection through refugee status for applicants coming from Europe based on the Refugee Convention and its geographical limitation in Turkey (Art. 61). Second, it provides two forms of international protection for non-Europeans;[65] namely: a conditional refugee status for persons under direct personal threat (until the completion of the refugee status determination process, see Art. 62) and subsidiary protection for persons coming to Turkey from countries where a general situation of violence prevails (Art. 63). Art. 91 regulates "temporary protection" for foreigners forced to leave their countries and unable to return, who arrived at or crossed Turkey's borders in masses to seek urgent and temporary protection, and whose international protection requests cannot be individually assessed. Specific conditions for temporary protection are governed by Turkey's temporary protection regulation,[66] according to which Syrian refugees who have arrived at or crossed Turkey's borders as part of the mass influx or individually after 28 April 2011 may enjoy only temporary protection (Art. 1). Notably, individual applications for international protection are not processed during the implementation of temporary protection; this means that applicants coming from non-European states cannot gain refugee status.[67]

In 2018, the Directorate General of Migration Management took on responsibility for determining status and registering applicants for international protections, replacing the UNHCR. In 2021, the Directorate transformed into the Presidency of Migration Management.[68] According to the fulfilment of Turkey's obligations under the Refugee Convention, Turkey and the UNHCR concluded a Host Country Agreement, which entered into force in 2018.[69]

Regarding the process of identifying effective protection elements, we need to examine the status of the third country. Designating a third country as a safe first country of asylum or a safe third country authorises a person claiming refugee status to be sent to such a country either en route to her/his final destination or as her/his final destination.[70] One of the clearest legal definitions of a safe third country is found in the asylum procedures directive.[71] Art. 35 defines the safe first country

64 Turkey, 2013.
65 Heck and Hess, 2017, p. 43.
66 UNHCR, 2014, Interim provisions, provisional art.1.
67 Heck and Hess, 2017, p. 41.
68 *Country Report: Introduction to the Asylum Context in Türkiye*, 2023.
69 UNHCR, 2018, p. 2.
70 Hathaway, 2016a, p. 295.
71 Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), OJ L 180, 29.6.2013, pp. 60–95.

of asylum as the country in which the person has already been recognised as a refugee or otherwise enjoys sufficient protection. Further, Art. 38 defines the safe third country as the country in which the competent authorities are satisfied that a person seeking international protection will be treated in accordance with the following five principles: 1) no threats to life and liberty on account of race, religion, nationality, membership of particular social group, or political opinion; 2) no risk of serious harm; 3) respect for the principle of non-refoulement in accordance with the Refugee Convention; 4) the prohibition of removal, in violation of the right to freedom from torture and cruel, inhuman, or degrading treatment as laid down in international law; and 5) it is possible to request refugee status within the scope of protection conferred by the Refugee Convention.

In any case, in negotiating the EU-Turkey deal, the EU assumed Turkey to be a safe third country. Tunaboylu and Alpes[72] point to the conditions of the EU-Turkey deal according to which an asylum seeker should be returned from Greece to Turkey: a) she/he does not apply for asylum or withdraws her/his application, b) she/he chooses an assisted return, c) her/his application for asylum is assessed negatively, and d) she/he is inadmissible according to the formal conditions in Greece. For Member States to declare an asylum application inadmissible, they first must examine whether Turkey may be considered a safe first country of asylum or a safe third country; otherwise, the application would be rejected without consideration of its substance. Based on the conditions of the EU-Turkey deal, the asylum applications submitted by a person arriving through Turkey may be declared inadmissible and rejected if such a person already enjoys protection in Turkey as the first country of asylum and if such a person was able to apply for protection in Turkey as a safe third country. Both these concepts are applicable for non-Turkish nationals. The concept of the safe third country is crucial for the purposes of the EU-Turkey deal and the return of non-Turkish nationals, while the concept of the safe country of origin is decisive in the case of Turkish nationals' return to Turkey from Europe.[73]

Although Turkey is working on its asylum system in light of EU law, its applicability and execution remain questionable. Humanitarian organisations[74] are pointing out reports of forced deportations covered by forcibly signed documents for voluntary returns to home countries, detentions without access to lawyers, denial of access to phones or their confiscation, and very poor conditions at detention centres, according to which Greece stopped the deportation[75] of some Syrian refugees to Turkey with the reasoning that it is not a safe country.

In relation to the US-Canada deal, both the United States and Canada are considered safe third countries. Both States are Parties only to the universal definition

72 Tunaboylu and Alpes, 2017.

73 For a deeper examination see, Elbert, 2023, p. 100 et seq.

74 *Turkey 'Safe Country' Sham Revealed as Dozens of Afghans Forcibly Returned Hours after EU Refugee Deal*, 2016.

75 Gkliati, 2017, pp. 217–219.

of the refugee based on the Refugee Convention. While the national legislation of the United States generally aligns with the Convention, the United States' practices differently situate asylum seekers and refugees. The status of a refugee may be granted to a person located on the territory of another State, with a US official making a selection according to quotas and humanitarian needs. The status of asylum may be granted to a person who applies for protection in the United States or at a border. While the status of a refugee may not be withdrawn, the status of asylum may be withdrawn when the situation in the applicant's country of origin improves.[76]

Hathaway[77] points to the EU's implementation of the concept of the "super safe third country", known as an institute which allows refugees to be sent with no risk assessment to states bound by the Refugee Convention and the ECHR, which judges whether States are observing their provisions and using formal asylum procedures. Moreover, in Australia, refugee claims are not addressed based on whether the person seeking protection can be sent to another State to which she/he will be admitted with no chance of being persecuted based on the Refugee Convention and no real chance of refoulement to her/his country of origin.[78] In this case, the principle of non-refoulement is not even considered in relation to the cases of the refoulement of the transferred refugee by the so-called "receiving State" to the other country or the country of origin. It also does not require the accession of the asylum applicant to a refugee status determination procedure in the receiving country, which does not have to be the State through which the applicant came to Australia.[79]

Nauru has been a State Party to the Refugee Convention and its Protocol since 28 June 2011. In accordance with this accession, Nauru adopted the Refugees Convention Act, which established and governs a national legal framework for refugee status determination and complementary protection within Nauru's legislation. It also established an independent merit review tribunal, which enables individuals to access judicial review. The Secretary for justice and border control is responsible for determination procedures and makes decisions on the basis of recommendations by Refugee Status Determination Officers.[80] Based on Nauru's asylum seekers act and immigration regulations, asylum seekers are provided with regional processing centre visas for a maximum of three months and have to remain in the areas defined by visas or service providers. On basis of the UNHCR's findings,[81] asylum seekers are practically deprived of their liberty in closed places of detention and are not individually assessed. This procedure is contrary to the principle of non-penalisation under the Refugee Convention. In regional processing centres, children are also detained; this is also contrary to the Convention on the Rights of the Child, to which Nauru is a State Party. When an asylum seeker is determined to be a refugee, she/he is granted

76 Honusková, 2011, p. 149.
77 Hathaway, 2016a, p. 295.
78 Ibid.
79 Ibid.
80 UNHCR, 2015, p. 2.
81 Ibid.

a temporary settlement visa to remain in Nauru for up to five years, but does not have access to all the rights based on the Refugee Convention. Further, per the 2013 memorandum of understanding, the asylum seeker is not granted the possibility of settling in Australia and is therefore exposed to being transferred to a third country (e.g. Cambodia, New Zealand).[82] However, due to gross violations of human rights in detention centres in Nauru, Australia's example demonstrates that externalising asylum and migration management has huge human costs and may lead to rights violations.[83]

4. Safeguards

The State Parties of the Refugee Convention have been trying to minimise their protective responsibilities in accordance with their obligations for refugees. The transfer of refugees to a third country may lead to a denial of the right to independent judicial review or the possibility of obtaining refugee status. As every State has its own legislation and refugee status determination procedure, every externalisation of a State's obligations according to the Refugee Convention should occur under a specific examination of the possible legal reviews of such deals and determination procedures in the third (receiving) country.

As Foster[84] pointed out, the country in which a person seeks refugee protection has the *primary responsibility for considering the claim* and the burden of proving that it would be safe to transfer responsibility to a third country. The sending State is responsible for ensuring that such a transfer is carried out in accordance with its obligations under the Refugee Convention and other human rights instruments. Additionally, there must be a *sufficient opportunity for the review of the transfer decision or appeal* to ensure the refugee can challenge the validity of the transfer decision before an *independent and impartial judicial body established by law before the decision* is enforceable. The right to an effective remedy is crucial for the enforcement of the refugee rights.

The basic precondition for the effective remedy is a formal arrangement between the sending and receiving States, which takes the form of a written agreement covering their obligations. Foster[85] recommends that the best practice for the implementation of the protection elsewhere policy involves a written agreement that obligates the receiving State a) to respect the status of the refugee according to Art. 1 of the Convention; b) to provide transferred refugees rights guaranteed by

82 Ibid, pp. 6, 8.
83 Laganà, 2018, p. 3.
84 Foster, 2007, p. 281.
85 Foster, 2007, pp. 283–284.

the Refugee Convention; c) to ensure the ability of transferred refugees to notify the UNHCR of any alleged breach of the responsibilities of the receiving state; d) to grant the UNHCR the right to be present in its territory and to enjoy access to transferred refugees in order to monitor the compliance of the receiving state with its responsibilities; and e) to abide by the procedure for the settlement of any dispute regarding the interpretation or implementation of the agreement. Based on formal or informal arrangements between the sending and receiving States, the obligations of the sending State outlined in the Refugee Convention do not end.[86] The sending State remains obligated to monitor the practice of the receiving State, including its respect for refugee rights in its treatment of transferred refugees.

The Michigan Guidelines points out the obligations of the sending State when the receiving State fails to ensure that the transferred refugee receives the benefits outlined in the Refugee Convention. In such a case, the sending State's original obligation to the refugee is no longer met by transferring the responsibility for protection to the receiving State; the sending State should ensure the return and readmission of the refugee to its territory and ensure the respect of her/his rights according the Refugee Convention (points 12–14 of the Guidelines).

In the case of the EU-Turkey deal, the whole instrument was the subject of judicial review—first by the General Court of the European Union[87] (General Court) and then by the ECJ[88]—based on claims of rights violations related to the actions of the EU Member States and EU institutions in accordance with the EU-Turkey deal. The General Court examined the legal form of the EU-Turkey deal based on the application of a Pakistani national, who fled Pakistan based on his fear of persecution and serious harm to this person according to assassination attempts designed to prevent him—as an only son—from inheriting his parents' property. On 19 March 2016, he entered Greece by boat from Turkey. In April 2016, he submitted an application for asylum to the Greek authorities to avoid having to return to Turkey and being expelled back to Pakistan. The applicant asked the General Court to annul the agreement between the European Council and Turkey. In response, the European Council explained that the EU-Turkey statement was only the result of an international dialogue between the Member States and Turkey and had not been intended to produce legally binding effects in light of the Vienna Convention on the Law of Treaties. The statement was simply a political agreement between the members of

86 As the ECHR stated in its decision TI v United Kingdom (appl. no. 43844/98):
…The Court finds that the indirect removal in this case to an intermediary country, which is also a Contracting State, does not affect the responsibility of the United Kingdom to ensure that the applicant is not, as a result of its decision to expel, exposed to treatment contrary to Article 3 of the Convention'.

87 Order of the General Court of the European Union of 28 February 2017 (*NF vs. European Council* (T-192/16, EU:T:2017:128), *NG vs. European Council* (T-193/16, EU:T:2017:129) and *NM vs. European Council* (T-257/16, EU:T:2017:130)).

88 Order of the Court of 12 September, *NF and Others vs. European Council*, Joint cases C-208/17 P to C-210/17 P (ECLI:EU:C:2018:705).

the European Council, the heads or governments of Member States, the president of the European Council, and the president of the Commission.

On the basis of Art. 263 of the TFEU, which gives the Court the power to review the legality of an act by an EU institution and order its annulment, the General Court stated that the Court does not have the power to review the legality of the acts of national internal bodies or the heads of EU Member States or governments and consequently has no power to review the legality of the international agreement concluded by the EU Member States; accordingly, it dismissed the action.[89] One may argue that the Court did not take into account that the European Commission itself presented the EU-Turkey deal (statement) as an "EU-Turkey agreement" on its website[90] as well as the fact that under international law the formal designation of the instrument is not decisive, but the content of the instrument and intent of the parties. Moreover, the EU-Turkey deal contained the commitments of every party. Consequently, the applicant sought the annulment of the General Court's order. He claimed to set aside the order under appeal and to refer the case back to the General Court for adjudication with a direction for it to accept jurisdiction. However, the appeal only contained general, vague, and confused statements and assertions regarding the breach of the EU law principles and did not contain specific indications of the points of the appealed decision and legal arguments in support of the annulment. Based on the failed conditions for the admissibility of the appeal, the ECJ dismissed the appeal as manifestly inadmissible. For the appeal to be admissible, it would have had to precisely indicate its contested elements and the legal arguments that specifically supported it.

Idriz, Leino-Sandberg, and Wyatt[91] point out that the EU-Turkey deal is part of a broader EU-Turkey cooperation initiative based on the EU-Turkey Readmission Agreement,[92] which forms the legal basis for the EU's exclusive competence to cooperate with Turkey in the field of readmission. Consequently, the EU-Turkey deal must be considered part of the implementation of the EU-Turkey Readmission Agreement. Based on Art. 3 (2) of the TFEU, once the EU had exercised its competence, Member States were not allowed to conclude any agreement in that particular area or take any action leading to acts with legal effects. However, the EU-Turkey deal and the commitments of Turkey, Greece, and EU institutions are absolutely doing so.

The US-Canada deal is based on the general rule that refugee claimants must apply for international protection in the country (i.e. the United States or Canada) they enter after leaving their country of origin. This rule is an integral part of national Canadian law. Under Sec. 101(1)(e) of the Immigration and Refugee Protection Act (IRPA),[93] refugee status claims are ineligible for consideration in Canada if the

89 For a full examination of the orders, see Elbert, 2023, p. 94.
90 European Commission, 2016.
91 Idriz, 2017, p. 4; Leino-Sandberg and Wyatt, 2018.
92 Agreement between the European Union and the Republic of Turkey on the readmission of persons residing without authorisation, OJ L 134, 7.5.2014, pp. 3–27.
93 Immigration and Refugee Protection Act (S.C. 2001, c. 27), 2001.

claimant came directly or indirectly to Canada from a country designated by the Immigration and Refugee Protection Regulations (IRPR)[94] as a safe third country (e.g. according to Sec. 159.3 of the IRPR, the United States). Such a designation depends on the country's compliance with the criteria for aligning with the principle of non-refoulement. In this case, if the claimant came from such a designated country, their refugee status claims would be ineligible for consideration in Canada.

This rule was reviewed by a newer judgment; namely, the Supreme Court of Canada's decision of *Canadian Council for Refugees v. Canada* (Citizenship and Immigration), 2023 SCC 17 of 16 June 2023, no. 39749.[95] The appellants were refugee claimants who had arrived in Canada in 2017 from the United States. The legal bases of their claims were fears of gender-based persecution and sexual violence committed by gangs and oppression in their countries of origin. However, because they had arrived at land ports of entry from the United States, they were eligible to claim refugee protection in Canada. The applicants challenged the validity of the Sec. 159, 3 of the IRPR. In their view, the designation of the United States as a safe third country violated the Charter of Rights and Freedoms.[96] Their first argument was based on the violation of Sec. 7 of the Charter of Rights and Freedoms according to returns of refugees to the United States without further consideration of whether this respects their rights under international law, especially in relation to the principle of non-refoulement and detention. The second argument was based on the violation of Sec. 15 according to the fact that women facing gender-based persecution are often denied refugee status in the United States and face the risk of refoulement.

As the decisions of the Federal Court and Federal Court of Appeal were not in line with opinions of the applicants, the case was brought to the Supreme Court of Canada. Although the Supreme Court dismissed the appeal for the claim regarding Sec. 7 and returned the appellant's claim about Sec. 15 to the Federal Court for determination, Justice Kasirer considered the contested violation of Sec. 7 of the Charter. In his opinion, the designation of the United States as a safe third country did not breach Sec. 7 of the Charter. He was aware that refugee claimants in the United States faced the risk of detention and was also aware of some of the conditions of detention. However, the legislation outlines how Canada may consider refugee status claims when being found ineligible under the scheme would threaten an applicant's liberty or security. These parts of the legislation are called "safety valves". Based on humanitarian and compassionate or public policy grounds, safety valves may exempt a claimant from being forced to return (e.g. Art. 6 of the US-Canada Agreement states that either Party may at its own discretion examine any refugee status claim made to that Party where it determines that it is in its public interest to do so). Administrative decision-makers determine the appropriate deployment of these safety

94 Immigration and Refugee Protection Regulations (SOR/2002-227), 2002.
95 Supreme Court of Canada, 2023a.
96 Part 1: Canadian Charter of Rights and Freedoms, Constitution Act, 1982.

valves on an individual basis while the legislation itself remains valid.[97] Ultimately, this case shows that the US-Canada deal was adopted in the form of an international agreement according to the Vienna Convention on the Law of Treaties and has been implemented in Canadian legislation to ensure its proper execution.

In contrast, the UK-Rwanda deal was presented by the UK representatives as non-legally binding instrument according to the rules of national, not international, law. Based on the UK-Rwanda deal, an applicant with an inadmissible asylum claim will be removed to Rwanda where her/his asylum claim will be processed. The admissibility of asylum applications is based on whether the applicant passed through a safe third country before making an onward journey to the UK—if this is the case, the applicable is inadmissible. If the application for asylum is successful in Rwanda, the applicant will not be able to return to the UK; however, she/he may settle in Rwanda as a refugee. If her/his application for asylum is unsuccessful, the applicant will be removed from Rwanda to a country where she/he has a right to reside or to a third country.[98] To date, there have been no removals of asylum seekers to Rwanda—this is mostly a consequence of the legal reviews of the ECtHR[99] and UK High Court.[100]

The mechanisms of human rights protection can verify the compliance of the national measures adopted for the implementation of refugee deals with State obligations based on international law. For example, the UK-Rwanda deal is considered to violate international law, as the ECtHR stopped the first flight of migrants before its take off.[101] In June 2022, the ECtHR, in *N.S.K. v. the United Kingdom*, granted an urgent interim measure under Rule 39 of the Rule of Court that the applicant should not be removed to Rwanda until three weeks after the delivery of the final domestic decision in his ongoing judicial review proceedings. The ECtHR expressed concerns that asylum seekers transferred from the UK to Rwanda would not have access to fair and efficient procedures for the determination of their refugee status and that the determination of Rwanda as a safe third country was insufficient. Here, the serious risk of treatment is predicated on the fact that Rwanda, as a non-contracting party to the ECHR, is not bound by the same rules as the UK and there is an absence of any legal enforceable mechanism for the applicant's return to the UK in the case of successful merits challenge before domestic courts.[102] This ECtHR decision was criticised by UK officials as well as Ekins and the Judicial Power Project[103] as it was ruled before the decision of the UK Supreme Court without fulfilling the basic condition for the

97 Supreme Court of Canada, 2023b.
98 Goddard, 2023.
99 ECtHR: *N.S.K. v. the United Kingdom* (application no. 28774/22 of 14 June 2022, formerly *K.N. v. the United Kingdom*).
100 *AAA and others v. Secretary of State of the Home Department*, [2022] EWHC 3230 (Admin), 19 December 2022.
101 *N.S.K. v. the United Kingdom*.
102 Gower, Butchard, and McKinney, 2023, p. 40.
103 Etkins and the Judicial Power Project, 2022, p. 40.

admissibility of the application—the exhaustion of domestic legal remedies. The ECtHR has been accused of breaking the principle of subsidiarity and acting against its primary responsibility for considering the UK's compliance with relevant obligations related to rights. Moreover, the UK has no opportunity to contest the decision.

In December 2022, the High Court decided by combined judgment in cases properly considered first by the Home Office that it was lawful for the UK Government to make arrangements for relocating asylum seekers to Rwanda. Among other conclusions, the High Court confirmed that a) the Home Secretary had conducted a thorough examination before designating Rwanda as a safe third country for asylum seekers, relying on all relevant and generally available information as well as assurances about the Rwandan asylum system given in the memorandum of understanding, b) it conforms with Art 31. of the Refugee Convention to declare asylum claims inadmissible and send the person to a safe third country (it does not constitute a penalty), and c) even if the so-called "Rwanda policy" primarily affects young men from certain countries, the legitimate objective is the protection of refugees from exploitation by gangs organising small boat crossings, which does not constitute unlawful discrimination.[104]

On 15 November 2023, the UK Supreme Court found[105] that Rwanda is not a safe third country for asylum seekers as it does not have the practical ability to properly determine asylum claims. Agreeing with the Court of Appeal, the Supreme Court confirmed that there are substantial grounds for believing that the asylum seekers transferred to Rwanda would face a real risk of being returned to their home country where they could face ill-treatment, which would break the principle of non-refoulement.[106] While Rwanda maintains an open door policy for refugees fleeing conflicts in neighbouring countries, asylum claims are mainly processed by the UNHCR for resettlement to third countries as part of the emergency transport mechanism for asylum seekers from Libya. The rest of the asylum claimants are permitted to stay in Rwanda in UNHCR camps but cannot access a precise formal asylum determination process by Rwandan authorities (point 77 of the Judgment). The Supreme Court was also inspired by the Israel-Rwanda agreement from 2013, under which persons from Eritrea and Sudan who sought asylum in Israel were removed to Rwanda to have their claims processed. The Israel-Rwanda agreement explicitly stated that the deportees would enjoy human rights and freedoms, the principle of non-refoulement would be upheld, and deportees would be able to file a request for asylum. However, such transferred asylum seekers were routinely moved from Rwanda to Uganda. On this basis, the Israeli Supreme Court ruled the programme unlawful in April 2018 (points 95–97 of the Judgment).

104 Etkins and the Judicial Power Project, 2022, p. 41–42.

105 United Kingdom Supreme Court: *AAA (Syria) & Ors, R* (on the application of) v Secretary of State for the Home Department [2023] UKSC 42 (15 November 2023).

106 McDonnell, 2023.

The UK-Rwanda refugee deal is likely based on the experience of Australia, where nearly all asylum seekers have been removed to neighbouring countries to have their claims processed.[107] However, the UK-Rwanda deal compels serious reflection on the relation between the UK and Rwanda and the real reasons for this partnership—it was not so long ago that the UK expressed serious concerns about the situation in Rwanda given extrajudicial killings, enforced disappearances, and torture.[108] Such an examination is important as many other States, such as Denmark, are now considering the same policy in relation to Rwanda.[109] The UK-Rwanda deal is qualitatively distinct from other arrangements, such as the Dublin system or US-Canada deal, as it involves the transfer of persons to Rwanda, a country outside the UK's region and with lower protection standards than the UK.[110]

5. The failure of solidarity and the future of refugee deals

We are witnessing an increasing failure of State solidarity in solving global challenges related to migration. Economically developed states are closing their borders and trying to externalise issues of migration flows to other (neighbouring) states. One good example is the failed solidarity between EU Member States.

The massive exodus of (mainly) Syrian refugees from the Middle East that peaked in 2015 caused panic across the EU. Most of EU Member States were and still are afraid of the permanent and radical weakening of their culture, religion, security, and other systems as a result of refugees settling in their countries. On the other hand, Turkey—the state with the biggest numbers of incoming refugees—is affected by the very high expenses associated with hosting refugees and very limited international support. Given that these conditions are difficult to sustain politically and economically, it is no surprise that Turkey has sought to cooperate with the EU—especially in light of the potential revival of its accession to the EU and the visa liberalization process.[111]

At the end of the day, there are complaints on both sides of the deal. Turkey complains about the very slow and limited availability and distribution of EU funds,[112] even though the EU is not the only organisation helping Turkey with the migration

107 Morrison, 2022.

108 Foreign, Commonwealth & Development Office and Julian Braithwaite, 2021.

109 Ministry of Foreign Affairs and International Cooperation, Republic of Rwanda, and Ministry of Foreign Affairs of Denmark, no date, p. 1.

110 Tan, 2022. According to the reports of the Human Rights Watch, Rwanda is perpetrating the extraterritorial acts of repression against dissenting persons, including those who sought international protection. Human Rights Watch, 2023.

111 Kirişci, 2021.

112 See, for example, *Turkey Says EU Financial Offer on Migrants is 'Unacceptable',* 2015; Spicer, 2019.

crisis.[113] Others criticise the EU for its failure to liberalize visas processing for Turkish nationals as well as for Turkey's stalled accession to the EU. On the other hand, EU leaders have criticised Turkish president Recep Tayyip Erdogan for repeatedly threatening to open Turkey's borders.[114]

The EU-Turkey deal was born into a difficult situation. The different positions of EU Member States resulted in the failure of EU asylum policy reform, which was based on a system of redistributing migrants and asylum seekers across Member States. The Council of the EU adopted two relocation decisions[115] to help Italy and Greece with the massive flow of third-country nationals to their territory. These decisions established detailed rules for the relocation of up to 160 000 asylum seekers. Oppositions to such reforms were voiced by certain states in Central and Eastern Europe. For example, Slovakia and Hungary considered such decisions unlawful. However, on 6 September 2017, the ECJ ruled that their actions of the Slovakia and Hungary were inadmissible and on 2 and 3 December 2015 annulled the relocation decisions.[116] The Court pointed out that the relocation measures were crisis-management measures at the EU level designed to ensure that the fundamental right to asylum according to Art. 18 of the Charter of Fundamental Rights of the European Union would be exercised properly. The relocation mechanism was necessary and proportionate to the need to help Italy and Greece handle the consequences of the migration crisis.[117]

Despite the ECJ's ruling, some EU Member States decided not to comply with the Relocation decisions. They opted not to indicate the numbers of persons that they would accept and consequently did not support Italy and Greece by relocating applicants to their territories for the individual assessment of their applications for international protection. Consequently, in December 2017, the Commission commenced procedures against Poland, the Czech Republic, and Hungary for their failure to fulfil obligations under Art. 258 of the TFEU and claimed that their asylum policies did not comply with EU law. The case was based on the countries' policies against asylum seekers who were held in transit zones in conditions similar to detention without the possibility to claim asylum.[118]

113 For example, *10 Years On, Turkey Continues Its Support for an Ever-Growing Number of Syrian Refugees*, 2021; IOM, 2017-2024; UNHCR and UNDP, 2023.

114 Boffey, 2020; Petrequin, 2020; Timur and Nordland, 2016; *Erdogan Threatens to Open Europe Gates for Refugees*, 2019; Smith and Busby, 2020.

115 Council Decision (EU) 2015/1523 of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece, OJ L 239, 15.9.2015, p. 146–156 (no longer in force) and the Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece, OJ L 248, 24.9.2015, p. 80–94 (no longer in force).

116 Judgment of the Court of Justice of 6 September 2017: Joint cases C-643/15 and C-647/15 *Slovak Republic and Hungary vs. Council of the European Union* (ECLI:EU:C:2017:631).

117 CJEU, 2019.

118 *Hungary Asylum Policies 'Failed' to Fulfill EU Obligations*, 2020.

The ECJ decided all three cases in a joint proceeding by a judgment of 2 April 2020.[119] Firstly, the Court assessed the admissibility of the cases based upon the arguments of the EU Member States. Regarding the argument that the contested decisions are no longer valid, the Court ruled that a State's failure to fulfil its obligations is admissible if the Commission confines itself to asking the Court to declare the existence of the alleged failure; particularly when the period of the application of the contested decision definitively expired and it is no longer possible to remedy the alleged failure (paras. 57–60). The fulfilment of the resulting obligation is a question of the rule of law (para. 65) as Member States did not comply with the obligations even after the pre-litigation procedure. If the Court accepted such objections, the whole meaning of the infringement procedures and values of the EU would be ruined (para. 70). Besides the Court's assessments, the Member States' main argument that they acted in response to their concerns for their own public order and security was the most important. The Court pointed out that Member States cannot simply refer to the existence of concerns related to public order and security with the intention to derogate from their obligations without proving that it is necessary to do so. Furthermore, relocation decisions included the possibility to deny relocation if a particular applicant had a risky profile or to conduct additional security checks with the Europol or Greek and Italian authorities. Such dangers to national security or public order had to be individualised (paras. 159–161, 185). A Member State cannot ignore its obligations based on the excuse that the Relocation decisions had a malfunctioning and ineffective nature due to Italy and Greece's cooperation. The spirit of solidarity and the Relocation decisions' binding power did not allow Member States to derogate their obligations on the grounds of their own assessment of the effectiveness of the Relocation decisions' mechanisms. The practical difficulties of the implementation of the Relocation decisions should have been resolved in the spirit of cooperation and mutual trust between the Member States (para. 164). Poland, the Czech Republic, and Hungary had failed to indicate at regular intervals an appropriate number of applicants for international protection who could be relocated to their territories.[120]

The ruling of the Court was, for the most part, in agreement with the view of the General Advocate Sharpston,[121] who likewise provided her opinion that the legitimate interest in preserving social and cultural cohesion could have been effectively safeguarded by other, less restrictive measures than States' unilateral and complete refusal to fulfil their obligations under EU law (para. 227). She used the example of other Member States facing issues with these relocation obligations (Austria,

119 Judgement of the CJEU of 2 April 2020: Joined Cases C-715/17, C-718/17, and C-719/17 *European Commission vs. Republic of Poland and Others* (ECLI:EU:C:2020:257).

120 Art. 5 (2) of the Council Decision (EU) 2015/1523 and Art. 5(2) of the Council Decisions (EU 2015/1601) and subsequently Arts. 5 (4) to (11) of both decisions. For more, see CJEU – Joint Cases C 715/17, C718/17, and C719/17 *Commission v Poland*, *Hungary and the Czech Republic*. CJEU, 2020.

121 Opinion of Advocate General Sharpston delivered on 31 October 2019. *European Commission v Republic of Poland and Others*. Joint Cases C-715/17, C-718/17 and C-719/17 (ECLI:EU:C:2019:917).

Sweden) and that have applied for and obtained temporary suspensions under Relocation decisions. The General Advocate was of the opinion that the decisions of these countries respected the principle of solidarity (para. 235). She also underlined other principles; for instance, she pointed to the principle of the rule of law according to which States are obliged to comply with their own obligations (para. 241); the duty of sincere cooperation, which entitles every Member State to expect other Member States to comply with their own obligations regarding due diligence (para. 245); and the principle of solidarity, which sometimes implies the necessity of sharing burdens (para. 251).

These decisions are a good example of the opinions of some EU Member States unwilling to contribute to the resolution of the migration crisis. The main countries that are reluctant to accept and resettle refugees are the "V4": Slovakia, the Czech Republic, Poland, and Hungary. While their reasons may vary, some may be of social nature or related to a fear of the unknown, which is a natural consequence of living without any contact with different cultures and ethnicities for a long time during socialism. Despite the imperfections of the EU-Turkey deal, the ECJ's proceeding on the failure to fulfil obligations based on the Relocation decisions showed that EU institutions are indeed trying to support the equal implementation of law across Member States.

The EU-Turkey deal was negotiated with an aim to stop migration flows into the Europe and to alleviate the massive pressures on the facilities of frontline countries. Since the EU-Turkey deal did not solve the problem of the massive numbers of irregular migrants already present on the territories of EU Member States and can hardly be called a success, a new mechanism for sharing the responsibility for asylum procedures is urgently needed. This is especially true for frontline States—that is, States of entry for thousands of irregular migrants waiting for their asylum procedures to start. Today, the EU is going through the process of improving of its migration policies. The European Council is currently preparing and negotiating a new asylum procedure regulation[122] to streamline procedural arrangements and establish the rights of asylum seekers in all EU Member States.

A new regulation, if adopted, would replace the current "Dublin Regulation decisive" for States responsible for examining asylum applications. New rules would be an improvement; in particular, they would shorten the time limits. They would also yield a new solidarity mechanism based on the flexibility of EU Member States in regard to their individual contributions, including relocation, financial contributions, or alternative solidarity measures (e.g. deployment of personnel or measures for capacity building). However, no Member State would be obliged to carry out relocations. Meanwhile, financial contributions would be fixed at EUR 20 000 per relocation, which may increase. These funds would go to the common EU fund managed by the Commission to finance projects aimed at addressing the root causes

122 Council of the EU, 2023.

of migration.[123] These new rules and regulations form part of the so-called "New Pact on migration and asylum" of 23 September 2020,[124] and facilitate the creation of more sustainable migration and asylum regulations and policies based on solidarity, responsibility, and respect for human rights.

Among the changes already brought by the new pact include the successful replacement of the European Asylum Support Office by the European Union Agency for Asylum.[125] According to Art. 51 of the EUAA Foundation Regulation, the Agency shall set up a complaints mechanism to ensure the respect of fundamental rights within all of the Agency's activities, which may be considered a step towards the protection of human rights. Although the process is still ongoing, the European Council on Refugees and Exiles[126] analysed the Pact on Migration and Asylum and concluded that new procedures would be harder and longer and create more opportunities for smugglers who would be able to adapt to the new rules.

During the European Council summit of the EU interior ministers on 8 June 2023, the agreement was endorsed by 21 of the EU's 27 Member States. The agreement represents the position of the negotiations on the asylum procedure regulation and on the asylum and migration management regulation and forms the basis for the Council presidency negotiation with the European Parliament.[127] Bulgaria, Malta, Lithuania, and Slovakia abstained from voting. Only Poland and Hungary opposed the plan; however, as we have already stated, these countries have historically opposed the relocation of migrants and asylum seekers. Although the ECJ ruled in 2020 that Poland, Hungary, and the Czech Republic had violated EU law by refusing to take in refugees under a previous quota system, Prague recently voted in favour of the new pact.[128] Meanwhile, Poland still resists any ideas of shared relocations of refugees. The Polish government has criticised the adoption of a new migration agreement by a majority vote rather than through unanimity; as Grodecki stated, 'There is no solidarity without unity'. In his opinion, the forced acceptance of migrants and high penalties for refusing their entry are not a basis for solidarity.[129] However, the rules of the New Pact for migration and asylum would not change the Dublin Regulation primary rule (i.e. that the first country of arrival is responsible for the assessment of the asylum applications); accordingly, the Mediterranean nations will continue to be disproportionately burdened.[130] It appears that the agreement has a long way to go before it is accepted by every Member State and thus codified as a part of EU law.

123 Fox, 2023.
124 European Commission, 2020; European Commission, 2024.
125 *European Union Agency for Asylum*; Based on the *EUAA Foundation Regulation (EU):* Regulation (EU) 2021/2303 of the European Parliament and of the Council of 15 December 2021 on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010, OJ L 468, 30.12.2021, pp. 1–54.
126 Woollard, 2023.
127 Council of the EU, 2023.
128 Tilles, 2023.
129 Ibid.
130 *New EU Migrant Plan Abandons Refugee Quotas for 'Mandatory Solidarity'*, 2020.

6. Conclusion

As an expression of the protection elsewhere policies, each refugee deal has sought to strengthen the security of State borders and prevent human trafficking. However, in practice, refugee deals may lead to massive breaches of refugee rights. Thus, such deals raise questions about their legality, including their compliance with international law—especially the Refugee Convention—as well as questions regarding States' responsibility for wrongful acts as they try to share or escape responsibility for the protection of refugees. As the Refugee Convention does not expressly cover protection elsewhere policies, we cannot conclude that it prohibits such policies regarding the transfer of refugees to a third country. However, the Refugee Convention does oblige States to fulfil refugee protection obligations as they are responsible under international law for their actions. In any case, the sending State has to assess the compliance with the rights guaranteed by the Refugee Convention within the receiving State, monitor it, and ensure the right to legal remedy in relation to the proposed transfer before it is enforceable. As the above analysis shows, many refugee deals do not comply with international law— especially refugee law.

Regarding the compliance of refugee deals with the obligations of the sending (offshoring) State under the Refugee Convention, it is important for the State to fulfil the elements of the concept of effective protection elsewhere, the possibility of its implementation, respect for refugee rights, and safeguards for the right of legal remedy. First, the legitimacy of the refugee deal and the possibility of its implementation are based on the precondition that the refugee deal is of a right and clear legal nature. Based on the analysis, we can conclude that only the US-Canada deal has a right and clear legal nature in accordance to the rules of international law. Second, most existing refugee deals address transfers based on the precondition that a particular third country is safe for all refugees, which is not sufficient. The protection elsewhere policies should be based on the assessment of the circumstances of individual refugees and refugees should be able to challenge a transfer decision in every individual case. Based on the rules of state responsibility for wrongful acts, States need to be aware that any conduct, act, or omission amounting to a direct or indirect breach of the non-refoulement principle under the jurisdiction of the State may qualify as an internationally wrongful act that violates Art. 33 of the Refugee Convention. The example of the Australia-Nauru refugee deal shows that the regime in the third country may lead to immense human suffering, from inhuman treatment to years of indefinite detention, in spite of the fact that Nauru is a Party of the Refugee Convention according to which its own national asylum law was adopted. More important are the ways in which the receiving State applies the rules of human rights and asylum law, which must comply with the sending State's obligations.

The UN Special Rapporteur on trafficking persons, Siobhán Mullally, warned[131] that transferring asylum seekers to third countries does not prevent or combat human

131 *UN Expert Urges UK to Halt Transfer of Asylum Seekers to Rwanda,* 2022.

trafficking but instead pushes desperate people into riskier and more dangerous situations. It is important to ensure that asylum seekers have a right to a suspensive appeal and a personal interview, with detention used only as a last resort; further, protection measures should align with the best interests of the child.[132] In conclusion, we have to agree with Laganà[133] that any form of extraterritorial processing of asylum claims leads to the detention of asylum seekers and migrants in very low living conditions for indefinite periods of time with very limited or no access to judicial reviews of or appeals against the detention itself or asylum or return decisions. The presented refugee deals have led to such conditions for refugees, which are contrary to the obligations of States under international human rights law (e.g. the prohibition against torture and cruel, inhuman, or degrading treatment, the right to family life and privacy). However, refugee deals have also a huge impact on the living conditions of asylum seekers and their mental health (especially given their according inability to move beyond particular facilities). Additionally, refugee deals also impact host communities. Countries which have agreed to outsource asylum arrangements to so-called "receiving countries" are often criticised as cruel abusers of refugees seeking to benefit from related financial supports.[134]

Thirdly, the safeguards for the legal remedy need to be settled. One of the basic differences between Australia and the European States is that all European States are bound by the ECHR. In 2012, the ECtHR ruled that Italy's policy of returning asylum seekers and migrants intercepted in the Mediterranean Sea to Libya between 2008 and 2009 was illegal.[135] Therefore, European States may not stop migrant boats at sea and escort asylum seekers to a third country for processing. However, no regional judicial body can hold Australia responsible for violating international refugee law or human rights law according to the principle of non-refoulement. Attempts to avoid breaches of the ECHR currently consist of strengthening the capacity of local coast guards to pull migrants, rather than pushed back, without possibility to set foot on any European ship as European territory and therefore be non-returnable.[136]

However, as the case of the UK-Rwanda refugee deal shows, it is very important to ensure the impartiality, independence, and expertise of judicial reviews of the balance State power. The biggest legal limitation of the refugee deals—especially in the case of the EU-Turkey statement and the memorandums of understanding between the UK and Rwanda and Australia and Nauru—is that they do not allow those transferred to third countries to access a judicial review. The advantage for legal certainty within the European region is the review by the ECtHR, which power has territorial limitation only to territories of state parties.

132 UNHCR, 2023.
133 Laganà, 2018, p. 7.
134 Morris, 2023.
135 ECtHR: Case of *Hirsi Jamaa and others v. Italy* (Application no. 27765/09).
136 Laganà, 2018, p. 3.

As the refugee deals depend on the third states, every sending (offshoring) country should be aware that countries that have agreed to host offshore facilities may be under pressure from domestic public opinion and national courts to revoke those agreements.[137] Although States use refugee deals to fight irregular migration, including economic migrants, they should look for other ways to deal with irregular migration while still fulfilling their obligations in the field of the refugee law. The US's approach to work visas provides a good example of how to lower the number of economic migrants without externalising responsibility for refugees. Since 1995, 20 000 work visas have been issued to Cubans by the US and approximately 3 000 refugees have been recognised annually. During this period, the rate of irregular Cuban migrants coming to the US has dropped from more than 38 000 to a few hundred annually.[138] While this scenario may not be ideal for every State, it offers an example of a good practise.

The examined refugee deals confirm that States, especially those in the EU, did not learn from previous deals leading to the breach of human and refugee rights. Following the example of the UK-Rwanda refugee deal, the EU announced the adoption of a political agreement in form of a memorandum of understanding[139] in 2023 for a comprehensive partnership package[140] with Tunisia. While the memorandum's official purpose was to fight smugglers, it was primarily motivated by the fact that the journey from Tunisia to Italy was the main migration route for irregular migrants from the Ivory Coast, Guinea, and Egypt to Europe. Notably, Tunisia is not considered a safe third country—not only due to concerns over the decline of democracy, but also to the criminalisation of the irregular entry, stay, and exit of foreigners and arbitrary detentions of the migrants from the rest of the Africa.[141] Ultimately, no lessons have been learned by the EU. To ensure compliance with the rules of international refugee law and prevent infringements on the rights of particular persons guaranteed by particular states, it is crucial that every asylum claim is assessed individually.

137 Ibid.
138 Laganà, 2018, p. 4.
139 *Memorandum of Understanding on a Strategic and Global Partnership between the European Union and Tunisia*, 2023.
140 *The European Union and Tunisia Agreed to Work Together on a Comprehensive Partnership Package,* 2023.
141 Seibert, 2023.

References

Baker, N. (2019) 'A History of Australia´s offshore detention policy', *SBS News,* 20 February 2019. [Online]. Available at: https://www.sbs.com.au/news/article/a-history-of-australias-offshore-detention-policy/t7laorxvj (Accessed: 30 November 2023).

Banulescu–Bogdan, N., Fratzke, S. (2015) 'Europe's Migration Crisis in Context: Why Now and What Next?', *Migration Policy Institute,* 24 September 2015. [Online]. Available at: https://www.migrationpolicy.org/article/europe%E2%80%99s-migration-crisis-context-why-now-and-what-next (Accessed: 30 November 2023).

Boffey, D. (2020) 'EU and Turkey Hold 'Frank' Talks Over Border Opening for Refugees', *The Guardian*, 9 March 2020. [Online]. Available at: https://www.theguardian.com/world/2020/mar/09/turkey-erdogan-holds-talks-with-eu-leaders-over-border-opening (Accessed: 30 November 2023).

CJEU (2019) 'Press Release No. 13/19, 31 October 2019, Advocate General's Opinion in Cases C-715/17 *Commission v Poland*, C-718/17 *Commission v Hungary* and C-719/17 *Commission v Czech Republic*', *CJEU,* 31 October. [Online]. Available at: https://curia.europa.eu/jcms/upload/docs/application/pdf/2019-10/cp190133en.pdf (Accessed: 30 November 2023).

CJEU (2020) CJEU – Joint Cases C 715/17, C718/17, and C719/17 *Commission v Poland*, *Hungary and the Czech Republic*', *European Database of Asylum Law*, 2 April 2020 [Online]. Available at: https://www.asylumlawdatabase.eu/en/content/cjeu-joined-cases-c-71517-c71817-and-c71917-commission-v-poland-hungary-and-czech-republic-2 (Accessed: 30 November 2023).

Communication from the Commission to the European Parliament, the European Council and the Council: Next operational steps in EU-Turkey cooperation in the field of migration (Brussels, 16.3.2016, COM (2016)166).

Cossé, E. (2022) 'European Court Slams Greece Over Deadly Migrant Pushback Inquiry on Pushbacks Is Urgently Needed'*, Human Rights Watch,* 8 July 2022. [Online]. Available at: https://www.hrw.org/news/2022/07/08/european-court-slams-greece-over-deadly-migrant-pushback (Accessed: 30 November 2023).

Council of the EU (2023) 'Migration Policy: Council Reaches Agreement on Key Asylum and Migration Laws' *Council of the European Union*, 8 June 2023. [Online]. Available at: https://www.consilium.europa.eu/en/press/press-releases/2023/06/08/migration-policy-council-reaches-agreement-on-key-asylum-and-migration-laws/ (Accessed: 30 November 2023).

Doherty, B. (2021) 'Australia signs deal with Nauru to keep asylum seeker detention centre open indefinitely', *The Guardian,* 24 September 2021. [Online]. Available at: https://www.theguardian.com/australia-news/2021/sep/24/australia-signs-deal-with-nauru-to-keep-asylum-seeker-detention-centre-open-indefinitely (Accessed: 30 November 2023).

Duarte, M. (2020) *EU-Turkey Refugee Deal: Buck-Passing and Bargaining on Human Lives at Risk*? [Online]. Available at: https://www.academia.edu/99257368/EU_Turkey_Refugee_Deal_Buck_Passing_and_Bargaining_on_Human_Lives_at_Risk (Accessed: 30 November 2023).

Elbert, Ľ. (2023) 'Pros and Cons of the EU–Turkey Refugee Deal and Why the Cons Prevail'*, Law, Identity and Values*, 3(2), pp. 89–109; https://doi.org/10.55073/2023.2.89-109.

European Commission (2016) 'Implementing the EU-Turkey Agreement – Questions and Answers', *European Commission,* 20 April 2016. [Online]. Available at: https://ec.europa.eu/commission/presscorner/detail/en/MEMO_16_1494 (Accessed: 30 November 2023).

European Commission (2018) 'The Changing Influx of Asylum Seekers 2014-2016', *European Commission, Migration and Home Affairs*, 15 August 2018. [Online]. Available at: https://home-affairs.ec.europa.eu/whats-new/publications/changing-influx-asylum-seekers-2014-2016_en (Accessed: 30 November 2023).

European Commission (2020) 'Country Responsible for Asylum Application (Dublin Regulation', *European Commission: Migration and Home Affairs*, 2020. [Online]. Available at: https://home-affairs.ec.europa.eu/policies/migration-and-asylum/common-european-asylum-system/country-responsible-asylum-application-dublin-regulation_en (Accessed: 30 November 2023).

European Commission (2020) 'New Pact on Migration and Asylum', *European Commission*, 23 September 2020. [Online]. Available at: https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/promoting-our-european-way-life/new-pact-migration-and-asylum_en (Accessed: 30 November 2023).

European Commission (2024) 'What is the New Pact on Migration and Asylum of the EU?', *European Commission*, 21 May 2024. [Online]. Available at: https://home-affairs.ec.europa.eu/policies/migration-and-asylum/pact-migration-and-asylum_en#what-is-the-pact-on-migration-and-asylum (Accessed: 30 November 2023).

European Council (2016) 'EU-Turkey Statement', *Council of the EU and the European Council*, 18 March 2016. [Online]. Available at: http://www.consilium.europa.eu/en/press/press-releases/2016/03/18-eu-turkey-statement/ (Accessed: 30 November 2023).

European Council (2023) 'Infographic – Migration Flows: Eastern, Central and Western Routes: Yearly Irregular Arrivals (2015-2023)', *Council of the European Union and the European Council*, 30 November 2023. [Online]. Available at: https://www.consilium.europa.eu/en/infographics/migration-flows-to-europe/ (Accessed: 30 November 2023).

Etkins, R., the Judicial Power Project (2022) 'The Strasbourg Court's Disgraceful Rwanda Intervention', *The Law Society Gazette*, 15 June 2022. [Online]. Available at: https://www.lawgazette.co.uk/commentary-and-opinion/the-strasbourg-courts-disgraceful-rwanda-intervention/5112790.article (Accessed: 30 November 2023).

Eurostat (2024) 'Asylum and First Time Asylum Applicants – Annual Aggregated Data (Up To 30.11.2023)', *Eurostat*, 30 November 2023. [Online]. Available at: https://ec.europa.eu/eurostat/databrowser/view/TPS00191/default/table?lang=en (Accessed: 30 November 2023).

Foreign, Commonwealth and Development Office, Julian Braithwaite (2021) '37th Universal Periodic Review: UK Statement on Rwanda', *UK Government*, 25 January 2021. [Online]. Available at: https://www.gov.uk/government/speeches/37th-universal-periodic-review-uk-statement-on-rwanda (Accessed: 30 November 2023).

Foster, M. (2007) 'Protection Elsewhere: The Legal Implications of Requiring Refugees to Seek Protection in Another State', *Michigan Journal of International Law*, 28(2), pp. 223–286.

Fox, B. (2023) 'EU Ministers Reach 'Historic' Deal on Migrant Relocation', *Euractiv*, 9 June 2023. [Online]. Available at: https://www.euractiv.com/section/migration/news/eu-ministers-reach-historic-deal-on-migrant-relocation/ (Accessed: 30 November 2023).

Frontex (2023) 'Monitoring and Risk Analysis', *Frontex*, 30 November 2023. [Online]. Available at: https://www.frontex.europa.eu/what-we-do/monitoring-and-risk-analysis/migratory-map/ (Accessed: 30 November 2023).

Gkliati, M. (2017) 'The EU-Turkey Deal and the Safe Third Country Concept before the Greek Asylum Appeals Committees', *Movements*, 2017, 3(2), pp. 213–224.

Goddard, J. (2023) 'UK-Rwanda asylum agreement: Why is it a memorandum of understanding and not a treaty?', *House of Lords Library,* 26 January 2023. [Online]. Available at: https://lordslibrary.parliament.uk/uk-rwanda-asylum-agreement-why-is-it-a-memorandum-of-understanding-and-not-a-treaty/ (Accessed: 30 November 2023).

Goodwin–Gill, G.S., McAdam, J. (2011) *The Refugee in International law.* Oxford: Oxford University Press.

Government of Canada (2002) 'Agreement between the Government of Canada and the Government of the United States of America for cooperation in the examination of refugee status claims from nationals of third countries, known as the Safe Third Country Agreement (STCA)', *Government of Canada*, 5 December 2002. [Online]. Available at: https://www.canada.ca/en/immigration-refugees-citizenship/corporate/mandate/policies-operational-instructions-agreements/agreements/safe-third-country-agreement/final-text.html (Accessed: 30 November 2023).

Gower, M., Butchard, P., McKinney, CJ. (2022) 'The UK-Rwanda Migration and Economic Development Partnership', *House of Commons Library*, 15 November 2022. [Online]. Available at: https://researchbriefings.files.parliament.uk/documents/CBP-9568/CBP-9568.pdf (Accessed: 30 November 2023).

Hardman, N. (2022) 'Turkey: Hundreds of Refugees Deported to Syria: EU Should Recognize Turkey Is Unsafe for Asylum Seekers', *Human Rights Watch*, 24 October 2022. [Online]. Available at: https://www.hrw.org/news/2022/10/24/turkey-hundreds-refugees-deported-syria (Accessed: 30 November 2023).

Hathaway, J. C. (2016a) *The Rights of Refugees under International law.* Cambridge: Cambridge University Press.

Hathaway, J.C. (2016b) 'Three Legal Requirements for the EU-Turkey Deal: An Interview with James Hathaway', *Verfassungsblog,* 9 March 2016. [Online]. Available at: https://verfassungsblog.de/three-legal-requirements-for-the-eu-turkey-deal-an-interview-with-james-hathaway/ (Accessed: 30 November 2023).

Hathaway, J. C., Foster, M. (2014) *The Law of Refugee Status*, Cambridge: Cambridge University Press.

Heck, G., Hess, S. (2017) 'Tracing the Effects of the EU-Turkey Deal: The Momentum of the Multi-Layered Turkish Border Regime', *Movements*, 3(1), pp. 35–56.

Home Office (2023a) 'Memorandum of Understanding from 6 April 2023', *UK: Home Office*, 6 April 2023. [Online]. Available at: https://www.gov.uk/government/publications/memorandum-of-understanding-mou-between-the-uk-and-rwanda/addendum-to-the-memorandum-of-understanding (Accessed: 30 November 2023).

Home Office (2023b) 'Factsheet: Migration and Economic Development Partnership', *UK: Home Office*, 14 April 2023. [Online]. Available at: https://homeofficemedia.blog.gov.uk/2022/04/14/factsheet-migration-and-economic-development-partnership/ (Accessed: 30 November 2023).

Home Office (2023c) 'Memorandum of Understanding between the government of the United Kingdom of Great Britain and Northern Ireland and the government of the Republic of Rwanda for the provision of an asylum partnership arrangement', *UK: Home Office*, 13 April 2023. [Online]. Available at: https://www.gov.uk/government/publications/memorandum-of-understanding-mou-between-the-uk-and-rwanda/memorandum-of-understanding-between-the-government-of-the-united-kingdom-of-great-britain-and-northern-ireland-and-the-government-of-the-republic-of-r (Accessed: 30 November 2023).

Home Office and The Rt Hon Priti Patel MP (2022) 'World First Partnership to Tackle Global Migration Crisis', *UK Government*, 14 April 2022. [Online]. Available at: https://www.gov.uk/government/news/world-first-partnership-to-tackle-global-migration-crisis (Accessed: 30 November 2023).

Honusková, V. (2011) *Definice uprchlíka a její výklad a aplikace v současném mezinárodním právu*. Praha: Univerzita Karlova.

House of Lords (2022) 'International Agreements Committee: 7th Report of Session 2022–23: Memorandum of Understanding between the UK and Rwanda for the Provision of an Asylum Partnership Arrangement', *International Agreements Committee*, 18 October 2022. [Online]. Available at: https://committees.parliament.uk/publications/30322/documents/175339/default/ (Accessed: 30 November 2023).

Idriz, N. (2017) 'The EU-Turkey statement or the ´refugee deal´: the extra-legal deal of extraordinary times?', *T.M.C. Asser Institute for International and European Law*, 1 December 2017. [Online]. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3080881# (Accessed: 30 November 2023).

IOM (2017-2024) *Refugee response operations* [Online]. Available at: https://turkiye.iom.int/refugee-response-operations (Accessed: 30 November 2023).

Kirişci, K. (2021) 'As EU-Turkey Migration Agreement Reaches the Five-Year Mark, Add a Job Creation Element', *Brookings*, 17 March 2021. [Online]. Available at: https://www.brookings.edu/blog/order-from-chaos/2021/03/17/as-eu-turkey-migration-agreement-reaches-the-five-year-mark-add-a-job-creation-element/ (Accessed: 30 November 2023).

Laganà, G. (2018) 'Does Offshoring Asylum and Migration Actually Work? What Australia, Spain, Tunisia and the United States can teach the EU', *Open Society European Policy Institute*, September 2018. [Online]. Available at: https://www.opensocietyfoundations.org/uploads/3c397d87-5348-41de-9e92-d1a2108dabb1/does-offshoring-asylum-and-migration-actually-work-20180921.pdf (Accessed: 30 November 2023).

Leino-Sandberg, P., Wyatt, D. (2018) 'No Public Interest in Whether the EU-Turkey Refugee Deal Respects EU Treaties and International Human Rights?', *European Law Blog*, 28 February 2018. [Online]. Available at: https://europeanlawblog.eu/2018/02/28/no-public-interest-in-whether-the-eu-turkey-refugee-deal-respects-eu-treaties-and-international-human-rights/ (Accessed: 30 November 2023).

Macklin, A. (2003) '*The Value(s) of the Canada-US Safe Third Country Agreement*', *The Caledon Institute of Social Policy* December 2003. [Online]. Available at: https://maytree.com/wp-content/uploads/558320703.pdf (Accessed: 30 November 2023).

McDonnell, E. (2023) 'UK Supreme Court Finds UK-Rwanda Asylum Scheme Unlawful', *Human Rights Watch*, 15 November 2023. [Online]. Available at: https://www.hrw.org/news/2023/11/15/uk-supreme-court-finds-uk-rwanda-asylum-scheme-unlawful (Accessed: 30 November 2023).

Ministry of Foreign Affairs and International Cooperation, Republic of Rwanda, Ministry of Foreign Affairs of Denmark, *Joint statement on bilateral cooperation* [Online]. Available at: https://uim.dk/media/11242/faelles-erklaering.pdf (Accessed: 30 November 2023).

Morris, J. (2023) 'As Nauru Shows, Asylum Outsourcing Has Unexpected Impacts on Host Communities', *Migration Information Source,* 29 August 2023. [Online]. Available at: https://www.migrationpolicy.org/article/nauru-outsource-asylum (Accessed: 30 November 2023).

Morrison, J. (2022) 'Why Business Might Thwart the UK Government's Rwanda Asylum Export Plan', *Institute for Human Rights and Business,* 13 May 2022. [Online]. Available at: https://www.ihrb.org/other/governments-role/

why-business-might-thwart-the-uk-governments-rwanda-asylum-export-plan (Accessed: 30 November 2023).

Petrequin, S. (2020) 'Tensions Between EU and Turkey Escalate over Erdogan Insults', *The Associated Press (AP News),* 26 October 2020. [Online]. Available at: https://apnews.com/article/turkey-emmanuel-macron-recep-tayyip-erdogan-france-europe-6b12b46b33a77094c5c91a544f2a017f (Accessed: 30 November 2023).

Poon, J. (2016) 'EU-Turkey Deal: Violation of, or Consistency with, International Law?' *European papers*, 1.

Refugee Council of Australia (2023) *Offshore processing statistics, Refugee Council of Australia* [Online]. Available at: https://www.refugeecouncil.org.au/operation-sovereign-borders-offshore-detention-statistics/2/ (Accessed: 30 November 2023).

Republic of Nauru and the Commonwealth of Australia (2013) 'Memorandum of Understanding between the Republic of Nauru and the Commonwealth of Australia, Relating to the Transfer to and Assessment of Persons in Nauru, and Related Issues', *Government of Australia*, 3 August 2013. [Online]. Available at: https://www.dfat.gov.au/sites/default/files/nauru-mou-20130803.pdf (Accessed: 30 November 2023).

Republic of Nauru and the Government of Australia (2021) 'Memorandum of Understanding between the Republic of Nauru and Australia on the Enduring Regional Processing Capability in Republic of Nauru', *Government of Australia*, 20 October 2021. [Online]. Available at: https://www.dfat.gov.au/sites/default/files/mou-nauru-enduring-regional-processing-capability-sep-2021.pdf (Accessed: 30 November 2023).

Scheu, H. Ch. (2016) 'Vymezení migračního práva vůči azylovému právu' in Pítrová, L. et al. (ed.) *Aktuální právní aspekty migrace.* Praha: Leges, pp. 21–27.

Seibert, L. (2023) 'Tunisia: No Safe Haven for Black African Migrants, Refugees', *Human Rights Watch*, 19 July 2023. [Online]. Available at: https://www.hrw.org/news/2023/07/19/tunisia-no-safe-haven-black-african-migrants-refugees (Accessed: 30 November 2023).

Smith, H. (2023) 'Greek Government Under Fire After Video Shows 'Pushback' of Asylum Seekers', *The Guardian*, 19 May 2023. [Online]. Available at: https://www.theguardian.com/world/2023/may/19/greek-government-under-fire-after-video-shows-pushback-of-asylum-seekers (Accessed: 30 November 2023).

Smith, H., Busby, M. (2020) 'Erdoğan Says Border Will Stay Open as Greece Tries to Repel Influx', *The Guardian,* 29 February 2020. [Online]. Available at: https://www.theguardian.com/world/2020/feb/29/erdogan-says-border-will-stay-open-as-greece-tries-to-repel-influx (Accessed: 30 November 2023).

Spicer, J. (2019) 'Turkish Official Says EU Should Boost Funding of Syrian Refugees', *Reuters,* 14 December 2019. [Online]. Available at: https://www.reuters.com/article/us-eu-turkey-refugees-funds-idUSKBN1YI0D0 (Accessed: 30 November 2023).

Supreme Court of Canada (2023a) *Canadian Council for Refugees v. Canada (Citizenship and Immigration), 2023 SCC 17* [Online]. Available at: https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/19957/index.do (Accessed: 30 November 2023).

Supreme Court of Canada (2023b) 'Case in Brief: Canadian Council for Refugees v. Canada (Citizenship and Immigration)', *Supreme Court of Canada*, 12 June 2023. [Online]. Available at: https://www.scc-csc.ca/case-dossier/cb/2023/39749-eng.aspx (Accessed: 30 November 2023).

Tan, N. F. (2022) 'Externalisation of asylum in Europe: Unpacking the UK-Rwanda Asylum Partnership Agreement', *EU Immigration and Asylum Law and Policy* blog, 17 May 2022. [Online]. Available at: https://eumigrationlawblog.eu/externalisation-of-asylum-in-europe-unpacking-the-uk-rwanda-asylum-partnership-agreement/ (Accessed: 30 November 2023).

Tilles, D. (2023) 'Poland Condemns EU Migration and Asylum Pact Agreed by European Council', *Notes from* Poland.com*,* 9 June 2023. [Online]. Available at: https://notesfrompoland.com/2023/06/09/poland-condemns-eu-migration-and-asylum-pact-agreed-by-european-council/ (Accessed: 30 November 2023).

Timur, S., Nordland, R. (2016) 'Erdogan Threatens to Let Migrant Flood into Europe Resume', *The New York Times*, 25 November 2016. [Online]. Available at: https://www.nytimes.com/2016/11/25/world/europe/turkey-recep-tayyip-erdogan-migrants-european-union.html (Accessed: 30 November 2023).

Tunaboylu, S., Alpes, J. (2017) 'The EU-Turkey deal: what happens to people who return to Turkey?', *Forced Migration Review,* February 2017. [Online]. Available at: https://www.fmreview.org/resettlement/tunaboylu-alpes (Accessed: 30 November 2023).

UNHCR (1977) 'Executive Committee Meetings: Note on Non-Refoulement (Submitted by the High Commissioner) EC/SCP/2', *UNHCR*, 23 August 1977. [Online]. Available at: https://www.unhcr.org/publications/note-non-refoulement-submitted-high-commissioner (Accessed: 30 November 2023).

UNHCR (2003) 'Agenda for Protection: Summary Conclusions on the Concept of "Effective Protection" in Context of Secondary Movements of refugees and Asylum- Seekers, Lisbon Expert Roundtable, 9 and 10 December 2002', *UNHCR*, 9 and 10 December 2002. [Online]. Available at: https://www.unhcr.org/sites/default/files/legacy-pdf/3e5f323d7.pdf (Accessed: 30 November 2023).

UNHCR (2010) 'Convention and Protocol Relating to the Status of Refugees', *UNHCR*. December 2010. [Online]. Available at: https://www.unhcr.org/media/convention-and-protocol-relating-status-refugees (Accessed: 30 November 2023).

UNHCR (2014) 'Türkiye: Temporary Protection Regulation', *UNHCR*, 22 October 2014. [Online]. Available at: https://www.refworld.org/docid/56572fd74.html (Accessed: 30 November 2023).

UNHCR (2015) 'Submission by UNHCR for the OHCHR Compilation Report, Universal Periodic Review: 2nd Cycle, 23rd Session: The Republic of Nauru', *UNHCR*, March 2015. [Online]. Available at: https://www.refworld.org/pdfid/563860c54.pdf (Accessed: 30 November 2023).

UNHCR (2016) 'UNHCR-IDC Vulnerability Screening Tool – Identifying and Addressing Vulnerability: A Tool for Asylum and Migration Systems', *UNHCR*, 2016. [Online]. Available at: https://www.unhcr.org/media/unhcr-idc-vulnerability-screening-tool-identifying-and-addressing-vulnerability-tool-asylum (Accessed: 30 November 2023).

UNHCR (2018) 'Operational Update: Turkey', *UNHCR*, 2018. [Online]. Available at: https://www.unhcr.org/tr/wp-content/uploads/sites/14/2019/02/UNHCR-Turkey-Operational-Highlights-2018-Final.pdf (Accessed: 30 November 2023).

UNHCR (2021) 'Annex to UNHCR Note on the Externalization of International Protection (2021) refworld: Global Law & Policy Database', *UNHCR*, 28 May 2021. [Online]. Available at: https://www.refworld.org/pdfid/60b115b64.pdf (Accessed: 30 November 2023).

UNHCR (2023) 'The Dublin Regulation: 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', *UNHCR,* 2023. [Online]. Available at: https://www.unhcr.org/media/28986 (Accessed: 30 November 2023).

UNHCR, UNDP (2023) *Regional Refugee and Resilience Plan (3RP) in response to the Syria crisis in Turkey* [Online]. Available at: https://www.3rpsyriacrisis.org/ (Accessed: 30 November 2023).

United Kingdom: Supreme Court (2023) 'R (on the Application of AAA (Syria) and Others) (Respondents/Cross Appellants) v Secretary of State for the Home Department (Appellant/ Cross Respondent)' *UNHCR*, 15 November 2023. [Online]. Available at: https://www.refworld.org/jurisprudence/caselaw/uksc/2023/en/147465 (Accessed: 30 November 2023).

Williams, C. (2022) 'Why the Migration and Economic Development Partnership between The U.K. And Rwanda Could Have Devastating Consequences', *The Organization for World Peace*, 30 July 2022. [Online]. Available at: https://theowp.org/reports/why-the-migration-and-economic-partnership-between-the-u-k-and-rwanda-could-have-devastating-consequences/ (Accessed: 30 November 2023).

Woollard, C. (2023) 'Migration Pact Agreement Point by Point', *European Council of Refugees and Exile*, 9 June 2023. [Online]. Available at: https://ecre.org/editorial-migration-pact-agreement-point-by-point/ (Accessed: 30 November 2023).

10 Years On, Turkey Continues Its Support for an Ever-Growing Number of Syrian Refugees (2021) *The World Bank*, 22 June 2021. [Online]. Available at: https://www.worldbank.org/en/news/feature/2021/06/22/10-years-on-turkey-continues-its-support-for-an-ever-growing-number-of-syrian-refugees (Accessed: 30 November 2023).

Colloquium on Challenges in International Refugee Law: The Michigan Guidelines on Protection Elsewhere (2007) *Michigan Journal of International law*, 28(2), pp. 207–221.

Country Report: Introduction to the asylum context in Türkiye (2023) *Asylum Information Database*, 14 July 2023. [Online]. Available at: https://asylumineurope.org/reports/country/turkiye/introduction-asylum-context-turkiye/ (Accessed: 30 November 2023).

Erdogan Threatens to Open Europe Gates for Refugees (2019), *France 24*, 7 November 2019. [Online]. Available at: https://www.france24.com/en/20191107-erdogan-threatens-to-open-europe-gates-for-refugees (Accessed: 30 November 2023).

European Union Agency for Asylum [Online]. Available at: https://euaa.europa.eu/ (Accessed: 30 November 2023).

Hungary Asylum Policies ‚Failed' to Fulfill EU Obligations (2020) *Deutsche Welle*, 17 December 2020. [Online]. Available at: https://www.dw.com/en/hungary-asylum-policies-failed-to-fulfill-eu-obligations/a-55970205 (Accessed: 30 November 2023).

Immigration and Refugee Protection Act (S.C. 2001, c. 27) (2001) [Online]. Available at: https://laws.justice.gc.ca/eng/acts/i-2.5/ (Accessed: 30 November 2023).

Immigration and Refugee Protection Regulations (SOR/2002-227) (2002) [Online]. Available at: https://laws.justice.gc.ca/eng/regulations/SOR-2002-227/page-21.html#h-688089 (Accessed: 30 November 2023).

Memorandum of Understanding on a Strategic and Global Partnership between the European Union and Tunisia (2023) *European Commission*, 16 July 2023. [Online]. Available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_23_3887 (Accessed: 30 November 2023).

New EU Migrant Plan Abandons Refugee Quotas for ‚Mandatory Solidarity' (2020) *TRT World*, 2020. [Online]. Available at: https://www.trtworld.com/europe/new-eu-migrant-plan-abandons-refugee-quotas-for-mandatory-solidarity-12753522 (Accessed: 30 November 2023).

The European Union and Tunisia Agreed to Work Together on a Comprehensive Partnership Package (2023) *European Neighbourhood Policy and Enlargement Negotiations*, 11 June 2023. [Online]. Available at: https://neighbourhood-enlargement.ec.europa.eu/news/european-union-and-tunisia-agreed-work-together-comprehensive-partnership-package-2023-06-11_en (Accessed: 30 November 2023).

Turkey 'Safe Country' Sham Revealed as Dozens of Afghans Forcibly Returned Hours after EU Refugee Deal (2016) *Amnesty International*, 23 March 2016. [Online]. Available at: https://www.amnesty.org/en/latest/press-release/2016/03/turkey-safe-country-sham-revealed-dozens-of-afghans-returned/ (Accessed: 30 November 2023.

Turkey Says EU Financial Offer on Migrants is 'Unacceptable' (2015) *Firstpost*, 16 October 2015. [Online]. Available at: https://www.firstpost.com/world/turkey-says-eu-financial-offer-on-migrants-is-unacceptable-2471966.html (Accessed: 30 November 2023).

UK: Abandon Rwanda Asylum Transfer Plan (2023), *Human Rights Watch*, 10 October 2023. [Online]. Available at: https://www.hrw.org/news/2023/10/10/uk-abandon-rwanda-asylum-transfer-plan (Accessed: 30 November 2023).

UN expert urges UK to halt transfer of asylum seekers to Rwanda (2022) *UN News*, 17 June 2022. [Online]. Available at: https://news.un.org/en/story/2022/06/1120722 (Accessed: 30 November 2023).

Legal sources

AAA and others v. Secretary of State of the Home Department, [2022] EWHC 3230 (Admin), 19 December 2022.

Addendum to the Memorandum of Understanding from 6 April 2023.

Agreement between the European Union and the Republic of Turkey on the readmission of persons residing without authorisation.

Agreement between the Government of Canada and the Government of the United States of America for cooperation in the examination of refugee status claims from nationals of third countries, known as the Safe Third Country Agreement (STCA).

Canadian Charter of Rights and Freedoms, Constitution Act, 1982.

Canadian Council for Refugees v. Canada (Citizenship and Immigration), 2023 SCC 17.

Canada: Immigration and Refugee Protection Act (S.C. 2001, c. 27).

Canada: Immigration and Refugee Protection Regulations (SOR/2002-227).

CJEU – Joint Cases C 715/17, C718/17 and C719/17 *Commission v Poland, Hungary and the Czech Republic*, 2 April 2020.

Council Decision (EU) 2015/1523 of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece (OJ L 239, 15.9.2015, pp. 146–156).

Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece (OJ L 248, 24.9.2015, pp. 80–94).

Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) (OJ L 180, 29.6.2013, pp. 60–95).

ECtHR: Case of *Hirsi Jamaa and others v. Italy* (application no. 27765/09).
ECtHR: *N.S.K. v. the United Kingdom* (application no. 28774/22 of 14 June 2022).
Eitan – *Israeli Immigration Policy Center et al. v. The Israeli Government et al.*, HCJ 8425/13, HCJ 7385/13, Israel: Supreme Court, 22 September 2014.
EU-Turkey statement, 18 March 2016.
HIGH COURT OF AUSTRALIA: *Plaintiff M70/2011 v Minister for Immigration and Citizenship.*
Judgment of the CJEU of 2 April 2020: Joint Cases C-715/17, C-718/17 and C-719/17 *European Commission vs. Republic of Poland and Others* (ECLI:EU:C:2020:257).
Judgment of the Court of Justice of 6 September 2017: Joint cases C-643/15 and C-647/15 *Slovak Republic and Hungary vs. Council of the European Union* (ECLI:EU:C:2017:631).
Memorandum of Understanding between the government of the United Kingdom of Great Britain and Northern Ireland and the government of the Republic of Rwanda for the provision of an asylum partnership arrangement (13 April 2022).
Memorandum of Understanding between the Republic of Nauru and the Commonwealth of Australia, relating to the transfer to and assessment of persons in Nauru, and related issues (3 August 2013).
Memorandum of Understanding between the Republic of Nauru and Australia on the Enduring Regional Processing Capability in Republic of Nauru (20 October 2021).
Memorandum of Understanding on a strategic and global partnership between the European Union and Tunisia (16 July 2023).
Opinion of Advocate General Sharpston delivered on 31 October 2019. *European Commission v Republic of Poland and Others*. Joint Cases C-715/17, C-718/17 and C-719/17 (ECLI:EU:C:2019:917).
Order of the Court of 12 September, *NF and Others vs. European Council*, Joint cases C-208/17 P to C-210/17 P (ECLI:EU:C:2018:705).
Order of the General Court of the European Union of 28 February 2017 *NF vs. European Council* (T-192/16, EU:T:2017:128), *NG vs. European Council* (T-193/16, EU:T:2017:129) and *NM vs. European Council* (T-257/16, EU:T:2017:130).
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 (recast), OJ L 180, 29.6.2013, pp. 31–59.
Regulation (EU) 2021/2303 of the European Parliament and of the Council of 15 December 2021 on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010 (OJ L 468, 30.12.2021, pp. 1–54).Turkey: *Law on foreigners and international protection*, Law No: 6458, Acceptance Date: 4/4/2013.
R (on the application of AAA (Syria) and others) (Respondents/Cross Appellants) *v Secretary of State for the Home Department* (Appellant/Cross Respondent), United Kingdom: Supreme Court, 15 November 2023.
Turkey: *Temporary Protection Regulation,* 22 October 2014.
Turkey: *Law on Foreigners and International Protection*, Law No: 6458, Acceptance Date: 4/4/2013', *UNHCR*, 11 April. [Online]. Available at: https://www.unhcr.org/tr/wp-content/uploads/sites/14/2017/04/LoFIP_ENG_DGMM_revised-2017.pdf (Accessed: 30 November 2023).
United Kingdom Supreme Court: *AAA (Syria) & Ors, R* (on the application of) v Secretary of State for the Home Department [2023] UKSC 42 (15 November 2023).

CHAPTER XIV

Migration Challenges – Differing Answers?

Anikó Raisz

Abstract

This chapter provides an overview of the present book, whose contributions cover different topics related to migration and its role in Eastern Central Europe, while drawing conclusions from the various perspectives provided by the authors. While it is essential to have a holistic view of the legal, political, economic, social, and moral approaches towards migration, it is just as important to see the starting points as well as the real-life experiences when it comes to assessing the situation. Hence, this chapter touches upon various aspects: from roots and terminology issues, through national constitutional, legal, and institutional solutions, to responses given to the phenomenon by the United Nations, the Council of Europe, and the European Union.

Keywords: migration, refugee, Eastern Central Europe, national law, EU law, Council of Europe, United Nations

1. Introduction: Migration? – What is it that we are talking about?

There is hardly a topic in international law that is more controversial today than the question of migration. What is migration? It is people displacing themselves, changing their place of residence, and, therefore, an issue that has existed throughout human history. Why is it then such a difficult issue today? What makes

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it so topical that other fields of international law struggle to achieve the same level of relevance?

The answer lies buried in human history and the key word is sovereignty. As humankind lives in well-established societies with distinct state borders, human displacement has become a question of sovereignty.

For as long as states have existed, these sovereign entities have claimed the right to determine *who* lives on their territory. Population being one of the three constituting elements of a state,[1] it is obviously a factor no sovereign may overlook. Change of population, even partially, may seriously affect the state itself. A certain fluctuation in population is, however, natural and acceptable, as international law itself accepts people other than 'nationals' or 'citizens', such as migrant workers, refugees, or stateless persons, as belonging to the population of a given state. To which category someone belongs is not only important from the individual's point of view, but also for the state, as certain of its attributes are adapted to this factor, as seen for instance in the social (and legal) structures of certain states around the Persian Gulf.

Europe (and Eastern Central Europe within) on the other hand have seen a different phenomenon in the past years (more than a decade, to be precise). And never before has it been so important to use the terminology so exactly as it is now.[2]

As shown in Professor Marcin Wielec's chapter, the appropriate use of terminology may be the key to finding appropriate solutions to the challenges, as confusing the terms 'refugee', 'asylum-seeker', and 'migrant' may lead to the mismanagement of situations. He highlights the necessity of developing 'precise mechanisms to control migration and refugee processes, so that they are under strict control and conducted in a predictable and safe manner'.[3] It is essential to be aware of the consequences, not only from the states' perspective but also from the individual's.

When analysing the different state regulations, it is clear that states have legal solutions corresponding to the 'country's specificities, traditions and needs'.[4] The international framework – the United Nations, Council of Europe, European Union – shall build on the essential cooperation principle and shall guide the states by providing a universally or regionally feasible framework.[5] When it comes to the EU rules in force, it is essential to distinguish between the primary and the secondary law.

In the EU, it is especially important to properly ascribe the rights of migrants and refugees[6] as due to the idea of European citizenship as well as the technical facilitations of the Schengen area, an internal freedom that exists for almost all the citizens of the relevant Member States in a way that is practically unknown anywhere else in

1 See the differences between Jellinek's and Hegel's theories; see Hegel, 2011, and Jellinek, 1980, and among others von Bernstorff, 2012, pp. 660 et seq.
2 Goodwin-Gill and McAdam, 2021, pp. 15–53.
3 See Wielec, 2024, p. 22.
4 Ibid.
5 Aldea, 2018, pp. 141–148; D'Amato, 2015, cited in Burchardt and Michalowski, 2015, pp. 285–301; Doliwa-Klepacka, 2021, pp. 9–21; Eisenstadt, 1953, p. 1.
6 Hathaway, 2021, pp. 173–192.

the world. Under such circumstances, it is more than relevant for the Member States to be able to distinguish between lawful and unlawful residents.

To deal with this situation properly, a number of legislative acts have been adopted in the European Union, the majority as secondary law sources, regulations and directives paving the way for detailed rules on harmonising both migration and asylum-related legislation.[7]

Professor Wielec also draws attention to the fact that while national legal orders provide a clear legal definition of 'refugees', based on the idea of international protection, a similar definition for the term 'migrant' is difficult to find.[8]

Global issues like migration need also global answers, or at least that is what international lawyers would suggest. Hence, in my view, scrutinising the global institutions that strive to assist states in solving challenges related to international migration is a worthwhile endeavour.

The mission of the IOM – the International Organization for Migration –, an inter-governmental organisation that is part of the United Nations system, is to 'promote human and orderly migration for the benefit of all',[9] an honourable mission, especially from a legal point of view, referring to 'order'. Looking at the IOM's promotional video,[10] aimed at informing the general public, we are told that migration 'creates new opportunities', 'promotes learning', 'empowers the economy', 'fosters exchange', 'builds empathy', and 'drives action'. While many of these claims seem valid, two questions arise: a. whether there are other factors connected to migration worth talking about, and b. what exactly is meant by 'migration' in this message.

As to the latter, an obvious answer offers itself as the IOM itself declares that 'migrant' is an

> umbrella term, not defined under international law, reflecting the common lay understanding of a person who moves away from his or her place of usual residence, whether within a country or across an international border, temporarily or permanently, and for a variety of reasons. The term includes a number of well-defined legal categories of people, such as migrant workers; persons whose particular types of movements are legally-defined, such as smuggled migrants; as well as those whose status or means of movement are not specifically defined under international law, such as international students.

This obviously broad definition of 'migrants' has its advantages when it comes to defining the tasks of the international organisation itself. However, when it comes to the presentation of the topic of migration in general, such an approach may easily cause concern, not least from a legal point of view. Among those concerns is the

7 See Wielec, 2024.
8 See Wielec, 2024.
9 International Organization for Migration, no date.
10 International Organization for Migration, 2023.

fact that it cannot be allowed to appear as if international law were being used to promote the smuggling of people. Another concern is the interesting legal confusion that arises given that this definition also encompasses the term 'refugee'.

The fact that international students are regarded as migrants is inasmuch understandable as practice and experience shows that many students who pursue their studies abroad remain in that country instead of returning to their country of origin. However, their inclusion in the definition may only be justified if we regard it as reflecting an institutional desire to have the broadest margin of action possible; interestingly, their inclusion in the definition may account for some of the claims in the abovementioned IOM promotional video, as certain 'advantages' of migration are only relevant to the category of international students (and none of the other categories under the IOM definition). According to the European Commission, in the EU for instance, the granting of residence permits by the end of 2022 included the following reasons: 35% for family reasons (practically family reunification), 20% work, 15% asylum, 4% education, and 26% for other reasons, including 'permits issued for the reason of residence only, permits issued to victims of trafficking of human beings and unaccompanied minors, as well as permits … not covered by the other categories'.[11]

The IOM describes migration as 'part of the solution' (the video does not define exactly what it is a solution to; presumably it could apply to anything), but their starting point refers to only one type of 'migration' under their own definition, namely that of international students,[12] while the consequences drawn from it and promoted are general.

For Europe at least, statistics are available as evidence of the advantages of migration. According to the European Commission, again in 2022, in an EU labour market of 193.5 million persons aged from 20 to 64, 9.93 million were non-EU citizens, corresponding to 5.1% of the total.[13] At the same time, the employment rate in the EU in 2022 among the working-age population was higher for EU citizens (77.1%), than for non-EU citizens (61.9%). An important factor is also to see the sectors where people are employed: 9.1% of non-EU citizens work in construction, while 6.6% is the proportion of EU citizens. The employment rate of non-EU citizens is almost the double of EU citizens in administrative and support service activities: 7.6% versus 3.9%. This is even more the case in accommodation and food service activities, where 11.3% of non-EU citizens were employed as opposed to 4.2% of EU citizens. An even more striking difference is visible in the case of domestic work which accounts for 5.9% of non-EU citizens and a mere 0.7% of EU citizens. According to the Commission, non-EU citizens are over-represented in many occupational

11 European Commission, 2024.

12 The video promotes a specific trademark as a good example, incidentally also claiming it to be a 'sustainable' trademark – but that would bring us to another set of questions as to the role of international organisations in general.

13 European Commission, 2024.

groups (such as cleaners and helpers; personal service or care workers; construction workers (excluding electricians); workers in mining, manufacturing, and transport; food preparation assistants; and agricultural, forestry, and fishery workers) and under-represented in others (such as teaching professionals; business and administration associate professionals; clerical and administrative workers; science and engineering associate professionals; business and administration professionals; and health professionals). These data are telling, both economically and socially, especially if we also take into consideration the fact that the value of the remittances paid by migrant workers is constantly increasing.[14]

2. International answers to the phenomenon

2.1. The United Nations

The movement of people and peoples across borders has been known from the very beginning of human history. The *ius gentium* of Roman times or de Vitoria's and Grotius's recognition of the free movement of persons are examples of potential answers to the phenomenon, while at the same time voices such as Pufendorf and Wolff called for the protection of state sovereignty.

As the world faced the first international refugee challenges of modern times during and after World War I, it became obvious that international responses, especially within the framework of widespread international cooperation, i.e. the League of Nations, were necessary. The international documents adopted in that era[15] as well as the Nansen passports issued in 1922–1938 were signs of common efforts to effectively address the challenges. During and after World War II, the situation became even worse. With more people on the move and a large part of the world in flames or recovering from conflict, a solution within the newly established framework of the United Nations was needed. After individual solutions focused on specific problem areas (UNRWA, UNRRA, etc.), the 1951 Convention relating to the Status of Refugees was adopted.[16] As the world's refugee situation began to change significantly from the 1950s on, it became evident that an amendment, specifically an enlargement of scope, was needed. This was achieved with the 1967 Protocol relating to the Status of Refugees.[17] Hence, the territorial (Europe) and time-related limitations (1 January 1951) disappeared.

14 According to IOM, the value of remittances paid globally by migrants and diaspora were as high as 647 million USD in 2022. See https://www.iom.int/data-and-research

15 See particularly the 1933 Convention relating to the International Status of Refugees (Convention of 28 October 1933 relating to the International Status of Refugees, League of Nations, Treaty Series Vol. CLIX No. 3663).

16 Convention relating to the Status of Refugees, Geneva, 28 July 1951, UNTS, vol. 189.

17 Protocol relating to the Status of Refugees, New York, 31 January 1967, UNTS, vol. 606, p. 267.

In her chapter, Nóra Béres assesses this Convention: how it was adopted and its effect. Noting that its ratification by 147 State Parties shows that this instrument is widely accepted, Béres – referring to Chetail – highlights that it creates a 'fragile balance between the competence of States to control the access of aliens to their territory and the protection of the most vulnerable people fleeing from gross human rights violations'.[18]

For our region, it is of key importance that the threats that served as the main reason for the existence of the convention remained at least partly in place; it was the 1956 Hungarian Revolution that made the world first realise that the actions of regimes like the communist one could well lead to further influxes of refugees, and, hence, it was worth preparing an international institutional framework to deal with this.

In her assessment, Béres also refers to recent critics who wish to see the Convention amended to correspond more to current challenges. For instance, critics point out that the Convention's approach is persecution-centred, whereas they claim that in modern times, a typical driver of forced migration is violence not driven by persecution. An additional factor is that the procedures involved in dealing with the fast-increasing numbers are burdensome for states.[19]

When assessing the Convention's historical context, Béres emphasises that it focuses more on state obligations than on individual rights, pointing out that at the time of its adoption, no human rights convention was in place, only the Universal Declaration of Human Rights.[20] At the same time, refugee status is declaratory; hence, although not constituted by the decision of the individual state's refugee authority, it definitely depends on it. The states were always only willing to accept a certain amount of refugees and not assume 'unlimited and indefinite commitments in terms of all refugees for the future'.[21] As she states, '[s]imply put, the definition of the term 'refugee' was tailored to individual political refugees, not mass influxes of migrants'.[22] Béres also assesses the inclusion, exclusion, and cessation clauses, and refers to the growing number of internally displaced persons, an ever-growing concern for the international community, but, *per definitionem*, outside the scope of the Convention. Quoting the Supreme Court of Canada, Béres confirms that the system has built-in limitations, as 'the international community did not intend to offer a haven for all suffering individuals'.[23] As to the content of the protection, the non-refoulement principle is assessed, as well as the diverging interpretations of the rights provided for refugees.

In my view, when assessing Article 31 of the Convention, it should be noted that when deciding about illegal entry, the rule still remains that the states may refer to

18 See Béres, 2024, p. 87; quoting Chetail, 2019, p. 169.
19 See Béres, 2024.
20 United Nations General Assembly Resolution 217 (III) A, 10 December 1948. The European Convention on Human Rights had already been signed, but it only came into force in 1953.
21 See Béres, 2024, p. 90.
22 Ibid.
23 Béres, 2024, p. 98.

the existence of safe third countries. The practice in this regard corresponds to the text of the Convention, even if some consider it too restrictive. As noted beforehand by various authors and even courts, this restricted scope of the refugee regulation was a deliberate decision made by the states. It would be arbitrary and *contra legem* to interpret Article 31[24] as if the word 'directly' could be understood flexibly. Flexibility in interpretation is allowed inasmuch as it does not circumvent the legal requirement of a very restricted acceptance of illegal entry, which may be any form not using the designated entry opportunities with legal documents.

2.2. The Council of Europe

In his chapter, Gyula Fábián draws attention to the fact that matters of national defence do not fall within the scope of the Council of Europe's framework. Hence, if a state considers migration to be an issue of national defence, the Council of Europe's competence may be avoided.[25] However, the issue does arise, in relation to the rule of law but above all within the framework of defending human rights, predominantly in cases before the European Court of Human Rights. Furthermore, asylum, refugee, and immigration-related topics arise in the Committee of Ministers and the Parliamentary Assembly, as well as the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, the Commissioner for Human Rights, or the Council of Europe Special Representative for Migration and Refugees.[26]

Fábián analyses[27] the conventions and treaties signed within the framework of the Council of Europe on migration and related topics. These include the European Agreement on the Abolition of Visas for Refugees[28], signed in 1959, a treaty to facilitate the movement of refugees lawfully residing in one of the member states. The treaty was signed by approximately half of the Council of Europe member states. Maybe there is a reason that the 1970 treaty on the repatriation of minors only came into force in 2015, and[29] only a quarter of the Council of Europe member states are parties to the European Convention on the Legal Status of Migrant Workers.[30] Fábián draws the conclusion that the Council of Europe member states lack 'enthusiasm'

24 'Convention, Article 31, 1. The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorisation, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence'.

25 See Statute of the Council of Europe, London 5.5.1949, European Treaty Series – No. 1, https://rm.coe.int/1680a1c6b3, Article 1d).

26 See Fábián, 2024.

27 Ibid.

28 European Agreement on the Abolition of Visas for Refugees, Strasbourg, 20.IV.1959, CETS No. 31.

29 European Convention on the Repatriation of Minors, The Hague, 28 May 1970, CETS No. 71.

30 European Convention on the Legal Status of Migrant Workers, Strasbourg, 24.XI.1977, CETS No. 93.

about ratifying too many related international treaties.[31] Hence, we may also conclude that their reservation is a key factor when analysing the existing legal obligations of the states vis-à-vis migration.

When assessing the soft law documents, he concludes that the Parliamentary Assembly, starting from 2002, dared to touch upon a much wider range of issues than the Committee of Ministers, even if in a restrained way.[32] Its resolutions also concern issues such as migration-related crimes (in both senses: where migrants are victims or criminals), voluntary returns, and large-scale arrivals.

Turning to the case-law of the European Court of Human Rights, Fábián draws attention to the fact that the first judgment concerning migration was adopted in 1985, the first declaring a violation only in 1988,[33] and that this jurisprudence has, according to some authors, serious shortcomings.[34]

He assesses Protocol No. 4[35] to the European Convention on Human Rights,[36] in which the Council of Europe made direct reference to the issue of migration for the first time. Afterwards, Protocol No. 7, as amended by Protocol No. 11 in its Article 1.2, again refers to a possible justification of an expulsion 'in the interests of public policy or on grounds of national security' in the case of an alien legally residing in a state, again a sign of the balancing of interests.

Since then, the European Court of Human Rights has produced several factsheets giving an overview of the jurisprudence concerning migration and asylum: accompanied migrant minors in detention, unaccompanied migrant minors in detention, migrants in detention, 'Dublin' cases, and collective expulsion of aliens are among the main categories touched upon by the European Court of Human Rights. The competence that gave rise to such a vast jurisprudence results from Articles 53 and 55 of the ECHR.

Fábián even comes to the conclusion that the fundamental rights – guaranteed by the ECHR – 'are used by the ECtHR as a barrier to Member States in the field of migration'.[37] He argues that although 'the right to control the entry, stay, and expulsion of non-nationals belongs to the Member States', this is limited by the rights present in the ECHR and the jurisprudence of the ECtHR.[38] The fields he names as

31 Ibid.

32 Ibid.

33 *Abdulaziz, Cabales and Balkandali v United Kingdom* App nos 9214/ 80, 9473/ 81, and 9474/ 81 (ECtHR, 28 May 1985); *Berrehab v the Netherlands* App no 10730/ 84 (ECtHR, 21 June 1988). See Fábián, 2024.

34 See Fábián, 2024, quoting Dembour in Çalı, 2021, p. 19.

35 Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms securing certain rights and freedoms other than those already included in the Convention and in the First Protocol thereto, Strasbourg, 16.IX.1963. (CETS No. 46).

36 Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4.XI.1950 (CEST No. 5), as amended by the provisions of Protocol No. 15 (CETS No. 213) as from its entry into force on 1 August 2021 and of Protocol No. 14 (CETS No. 194) as from its entry into force on 1 June 2010.

37 Fábián, 2024, p. 144.

38 Fábián, 2024, p. 145.

typical examples are the principle of non-refoulement, family reunification, and the issues concerning personal liberty, be it limitation or deprivation. He also examines the jurisprudence concerning Article 2 (right to life) and 3 (prohibition of torture, inhuman or degrading treatment).

The relevant Eastern Central European jurisprudence includes not only cases from the period after 2015, the latest big migration wave,[39] but even from before. Conflicts like the Chechen war or the conflicts in Ingushetia have provided cases.[40] Fábián highlights that criticism of the Hungarian Government Decision No 191/2015 that had declared Serbia a safe third country fails to take into account that states shall not interfere with the internal affairs of other states. He argues that when the Court requires the Member States to 'monitor' the neighbouring states and not only trust multilateral information, it explicitly requires that. Moreover, when a 'chain return' leads to another EU Member State (i.e. Greece), another EU Member State cannot regard it as unsafe.[41]

In general, the ECtHR – correctly – notes that if there is no procedure by which a claim for international protection can be examined, this itself constitutes a violation of Article 3.[42] And when coming to qualification of the refusal to allow entry, it was considered by the Court to be a collective expulsion.[43]

An Article 2 (right to life) violation was even declared – procedurally – for a tragic death on Serbian territory of a child whose family was denied access to Croatia.[44] Here, Fábián misses that any circumstances other than those establishing Croatia's responsibility were taken into consideration: neither the individual decisions (travelling further and further through safe third countries) nor the Schengen member state obligation to prevent illegal entry into the territory of the European Union.

However, a Bulgarian case highlighted one of the most relevant issues (even if the ECtHR denied that it had any bearing on the specific case[45]): the preparedness of the states – especially those on the external Schengen borders – to face such a massive scale of migration. The ECtHR's answer from the human rights perspective is, however, very simple: citing the absolute nature of Article 3, the Member States

39 See e.g. ECtHR, *Ilias and Ahmed v. Hungary* [GC], no. 47287/15, 21 November 2019; *Sh.D. and Others v. Greece, Austria, Croatia, Hungary, North Macedonia, Serbia and Slovenia*, no. 14165/16, 13 June 2019, Final 13 September 2019; *M.H. and Others v. Croatia*, nos. 15670/18 and 43115/18, 18 November 2021. There are also clear cases of potential political asylum, like *D v. Bulgaria*, no. 29447/17, 20 July 2021.

40 See ECtHR, *M.G. v. Bulgaria*, No. 59297/12, 25 March 2014, Final 25 June 2014; *M.A. and Others v. Lithuania*, No. 59793/17, 11 December 2018; *M.K. and Others v. Poland*, Nos. 40503/17, 42902/17 and 43643/17, 23 July 2020.

41 See Fábián, 2024.

42 See *M.K. and Others v. Poland*, nos. 40503/17 and 2 others, 23 July 2020, 14 December 2020.

43 I.e. a violation of Article 13 in conjunction with Article 3 of the Convention and Article 4 of Protocol No. 4.

44 *M.H. and Others v. Croatia*, nos. 15670/18 and 43115/18, 18 November 2021.

45 *S.F. and Others v. Bulgaria*, no. 8138/16, 7 December 2017. See furthermore *M.S.S. v. Belgium and Greece,* No. 30696/09, 21 January 2011, *M.M. v. Bulgaria*, no. 75832/13, 8 June 2017.

cannot be exempt from the obligations deriving from it, even in the case of a massive influx of migrants. This is an answer which, from a purely ethical and hypothetical point of view, is more than logical, but is not necessarily helpful in real life.

Frequent disputes have arisen as a result of the so-called 'transit zones' at the border of Hungary where people could register their asylum applications but could not leave the zone into Hungary (but were free to leave it into Serbia). In my view, qualifying an establishment from where everyone is free to leave (and where all the paperwork could be carried out in relation to the asylum application) a 'detention' raises certain questions (especially as there was no question of Serbia not being a safe country.) This is true not only with regard to such a massive influx of migrants, but also in general as to whether it is ideal to interpret Article 5 (right to liberty) in this regard. Wanting to enter somewhere we are not entitled to cannot *per se* be considered a human right, although the jurisprudence seems to have turned in this direction.[46]

Referring to the judgment in *T. K. and others v. Lithuania*,[47] Fábián explicitly refers to the downside of the ECtHR trends: placing an extreme burden of proof on the national authorities practically encourages asylum seekers to present untrue facts.[48] In the case in question, the assessment of the allegations made by the national authorities was deemed less trustworthy than reports by NGOs or US institutions. It is always questionable to allow reports from institutions without formal legal responsibility to override the authorities' actions (for which there is always responsibility).

Fábián comes to similar conclusions when addressing the issues of liberty and security.[49] The mass arrival of asylum seekers places the states in difficult situations where they nevertheless should avoid arbitrariness. Detention – if applied, and according to the guide on the ECtHR's official case-law on immigration – is allowed in the case of expulsion or extradition as well as before granting entry. Reasonable timeframes and appropriate conditions are among the requirements set for the states.

In *Mikolenko v. Estonia*,[50] where detention in a guarded facility lasted almost four years, it is no surprise that the ECtHR found a violation in this regard, as in many cases concerning a wide range of European countries and different detention timeframes.[51] Fábián also highlights the fact that in the view of the ECtHR, 'not even national security interests or the fight against terrorism can be successfully invoked by Member States before the Court'.[52] Furthermore, as others have also commented in relation to *O.M. v. Hungary*,[53] he is critical of the absoluteness of the applicants'

46 See among others *R.R. and Others v. Hungary*, no. 36037/17, 2 March 2021.
47 *T.K. and Others v. Lithuania*, no. 55978/20, 22 March 2022.
48 See Fábián, 2024.
49 Ibid.
50 *Mikolenko v. Estonia*, no. 10664/05, 8 October 2009.
51 See among others *Longa Yonkeu v. Latvia*, no. 57229/09, 15 November 2011. *M and Others v. Bulgaria*, no. 41416/08, 26 July 2011 or *Singh v. the Czech Republic*, no. 60538/00, 25 January 2005.
52 See Fábián, 2024, p. 159.
53 *O.M. v. Hungary*, no. 9912/15, 5 July 2016.

claims if they concern alleged homosexuality or political opinion. The Court namely found that the authorities did not sufficiently consider the individual circumstances of the applicant when – before granting the applicant refugee status – they put him in detention when he could not produce any document whatsoever to support his identity, nationality, etc.[54]

While, obviously, and especially in a genuine emergency situation, it may easily happen that a person seeking protection does not have valid papers in his or her possession, it may also seem at least reasonable for the authorities to try to establish the circumstances of the case and not accept the claims of the applicant right away without any proof. We may conclude that these cases show the difficult side of human rights: how hard it is to find balance between the different interests. These difficulties should not, however, allow the state to ignore its responsibilities to protect its people.

This is even more the case when we look at a situation like that described in *Al Husin v. Bosnia and Herzegovina*,[55] where the authorities could not effectuate an expulsion (even though they contacted approximately forty countries for help) and where the authorities considered Mr. Al Husin to be a threat to national security. Given that it eventually became obvious that no expulsion could take place, and at the same time spending eight years detained in an immigration centre is considered to be contrary to the Convention, the question arises: what then? What is the civilised way to manage such a situation that also conforms with the requirements of the ECHR? According to the Court, his release would have been the only option. Also, in the same sense, in cases related to the right to an effective remedy, according to the ECtHR the grounds of national security (even when there is a suspicion of terrorism) are set aside when there is a real risk that a person awaiting expulsion may risk prohibited treatment if extradited.[56] But does that not make the term 'national security' purely symbolic and useless?

With regard to detention, a violation of the right to a private life (family life) was also declared (see *Bistieva and other v. Poland*)[57] even though the Court acknowledged that the state had no other way of preventing the family from fleeing again from the authorities (as the family had previously done).[58] It seems that when the best interests of the child are being taken into account, no other interest of the state may prevail; hence, authorities cannot justify detention even when they lack any other instrument with which to convince the applicants to follow the rules.

In relation to the right to a fair trial, migration-related aspects can arise on various occasions, as the grounds for violation of the relevant Article 6 of the ECHR include – among many others – conviction in absentia, which can happen on a

54 See Fábián, 2024.
55 *Al Husin v. Bosnia and Herzegovina* (no. 2), no. 10112/16, 25 June 2019.
56 See *Auad v. Bulgaria*, no. 46390/10, 11 October 2011, Fábián, 2024.
57 *Bistieva and Others v. Poland*, no. 75157/14, 10 April 2018.
58 See Fábián, 2024.

massive scale in cases where applicants have long disappeared from the country they lodged the appeal in.[59]

A specific issue arising out of the EU context is how the ECtHR relates to internal EU migration affairs. In the jurisprudence of the ECtHR, there is a significant group of cases called the Dublin cases in which the ECtHR has always shown a somewhat critical approach towards the inner system of the EU and its member states, who try to coordinate their movements in providing different status of protection.[60] As in the European Union, the so-called Dublin system determines which member state is responsible for examining the asylum application presented in one member state by a third-country national.[61]

2.3. The EU and Member States

After examining the international context, the attention moves towards the most successful example of regional cooperation, the EU and its member states.

Bartłomiej Oręziak's first chapter describes the division of competences between the EU and member states, key to understanding the debates surrounding this topic as well as the possible ways for the future. He also discusses the eventual extensions of competences of the EU (also via the CJEU) not covered by the sovereign states' conferral. Giving an overview of the situation, he emphasises that the area of security and justice – where border checks, asylum, and immigration policies belong – is a shared competence. Apart from the aforementioned principal of conferral, this field is also covered by the principles of subsidiarity and proportionality. The analysis also addresses the question of 'whether the exercise of competences by the EU, considering the scale or effects of the proposed action, will lead to better achievement of those objectives'.[62]

Oręziak's second chapter focuses on the role of the constitutional courts of the Eastern Central European region and assesses the division of EU and member state competences from the perspectives of those courts, as they are the key to understanding the member states' attitude towards EU legislation. Assessing the relevant jurisprudence of the national constitutional courts in Czechia, Croatia, Hungary, Poland, Romania, Serbia, Slovakia, and Slovenia (as they all have one), the author places the key questions at the centre of the discussion. Out of the eight constitutional courts, seven have already expressed themselves in general (regarding the

59 See Fábián, 2024.

60 See European Court of Human Rights, 2022.

61 Despite the critics of 'too much coordination', as shown in the *Shiksaitov v. Slovakia* judgment (*Shiksaitov v. Slovakia*, Applications nos. 56751/16 and 33762/17, Judgment ECtHR from 10 December 2020) among others, the sole fact that someone received refugee status in a member state does not exclude the legal possibility that this person can be extradited to the country of origin by another member state whose territory the refugee entered (see Fábián, 2024). See Chetail, 2019, p. 902; Çalı, Bianku, and Motoc, 2021; Breitenmoser and Marelli, 2017, pp. 190–191.

62 Oręziak, 2024a, p. 197.

interpretation of legal principles) or specifically (concerning the interpretation of specific provisions) on migration and asylum matters. Apart from that, Oręziak elaborates on the jurisprudence of these courts based on how each constitutional court discusses the relationship with EU law, whether it does express itself at all, and if so, how it considers that relationship. According to Oręziak, the Polish, Hungarian, Croatian, and Romanian constitutional courts argue that national law (at the constitutional level, hence, basically, the constitution), including the competences of the national constitutional court, is above EU law. The Slovakians claim the opposite, while the Slovenian constitutional court has not yet expressed itself on the issue (neither has the Serbian court, for obvious reasons, Serbia not yet being a member of the European Union). The Czech constitutional court reserved the right to act in constitutional identity-related cases, when essential elements like 'fundamental rights and freedoms of individuals, principles of democracy, people's sovereignty, the separation of powers, and the concept of the rule of law' are touched upon.[63]

Apart from the general EU-national law question, the constitutional courts' asylum and migration jurisprudence is also analysed by Oręziak, coming to the conclusion that in the Eastern Central European region the constitutional courts expressing strong opinions in concrete cases are those of Croatia, Hungary, Romania, and Serbia, while Poland's constitutional court has also expressed strong opinions but only in an unspecific manner. The other three national constitutional courts either have not yet expressed themselves on the issue of migration in the EU context or have addressed the issue with a certain degree of reservation (hence leaving themselves room for manoeuvre).[64]

3. Migration and demographic issues

Dalibor Đukić's first chapter examines the impact of migration on the demographic and religious landscapes of Europe in general and Central European states in particular.[65] He assesses the often-heard argument that migration is capable of resolving Europe's main demographic challenges, such as population growth (i.e. that the fertility rate falls well below the necessary 2.1 – 1.46, to be exact, ranging from 1.08 in Malta to 1.79 in France)[66] or the workforce shortages.

63 See Oręziak, 2024b, p. 236. See furthermore Androvičová, 2017, pp. 197–220; Beznec and Jure, 2023, pp. 1–15; Geddes and Andrew, 2016, p. x; Follesdal, 2013, pp. 37–62; Garben, 2020, pp. 429–447; O'Sullivan and Delia, 2020, pp. 272–307; Öberg, 2017, pp. 391–420.

64 See Berkes, 2023, pp. 9–32; Cvikl and Flander, 2023, pp. 51–88; Širicová, 2023, pp. 111–132; Ofak, 2023, pp. 187–210; Otta, 2023, pp. 211–238; Syryt, 2023, pp. 283–310.

65 See furthermore Afonso et al., 2019, pp. 91-137; Bean and Brown, 2015, pp. 76-93; Héran, 2023, pp. 78–129; Willekens, 2015, pp. 13–44.

66 See Eurostat, 2024.

Going deeper into the demography of migration, it soon becomes clear that the social opportunities of legal and illegal migrants differ enormously, the latter basically confined to worse paid jobs, earning lower incomes, lack or only enjoying lower levels of health protection, etc.

When giving an overall picture of the region's demographic situation, Đukić shows that while in the EU the percentage of foreign-born inhabitants is 13 percent, in Poland and Hungary this stands at only 3 and 6.5 percent, respectively even though their number has doubled in the past few years.[67] It is worth noting that these numbers exclude the (large) numbers of Ukrainian refugees, excessively present in these two countries in the past two years. While the Polish and Hungarian absolute numbers are low, Slovenia (whose rate only rose by 28 percent in the past few years) registers at 14 percent, a little bit above the EU average but quite different from the Eastern Central European average: the Czech Republic and Slovakia have 4.3 and 4.2 percent respectively.

Concerning migration attributes, it is clear that contrary to the events of 2015–2016, 40 percent of migrants now come for family unification purposes. Another interesting statement is that the migrants tend to concentrate in the capital and urban areas within each country. According to Vaclav Smil, a Canadian professor cited by Đukić,

> In 1900 Europe (excluding Russia) had nearly 20 percent of the world's population and accounted for roughly 40 percent of the global economic product; 100 years later it had less than 9 percent of all people and produced less than 25 percent of the global output…By 2050 its population share will slip to about 6 percent of the global total, and its share of global economic product may be as low as 10 percent.[68]

For the sake of demographic sustainability in Europe, it is worth noting that the 2022 population increase was due to positive net migration, and deaths surpassed live births. As Đukić concludes, '[w]hile immigration can gloss over the real demographic problems, it is insufficient to generate a lasting and sustainable population growth'.[69] On the other hand, unlike a controlled number, a large influx of migrants does not drive migrants to adopt the ideas, values, and practices of the accepting country. The question or 'primary concern' remains therefore, how the eventual positive effects of migration can be harnessed in European countries without those countries losing their cultural and religious identity. And as Fargues (cited by Đukić) states, immigration alone will not be enough for Europe to maintain its global influence: nation-building and a (wise) enlargement are also crucial.[70]

67 See Đukić, 2024a.
68 Smil, 2005, pp. 605–643, p. 609; see Đukić, 2024a, p. 269.
69 Đukić, 2024a, p. 272.
70 Đukić, 2024a.

As to the question of population structure (ageing population), the result of the analysis is clear: replacement migration cannot actually curb ageing, it can only work as a spiral: constantly inviting more and more migrants in order to replace the simultaneously ageing migrants themselves).[71]

When it comes to the changing attitudes towards migration, Franje Staničić draws attention in his first chapter to the criticisms that the previous systems faced, whether the Treaty of Maastricht or the Treaty of Amsterdam: ineffectiveness and lack of transparency were the most frequently mentioned shortcomings.[72] When analysing the answers given by the Commission to the migration challenge during 2014–2015, especially the communication 'A European Agenda on Migration', the four main areas were: reducing incentives for illegal migration, saving lives and securing external borders, implementing a strong asylum policy, and developing a new policy on legal migration.[73] Staničić assesses the missed opportunities concerning the Temporary Protection Directive.[74] Furthermore, in the first Dublin system, he perceives the rule of first entry as a punishment of the member state responsible for letting the asylum seeker, legally or illegally, enter its territory.[75] He also comes to the conclusion that 'during the Syrian crisis it became obvious that the Dublin system does not work'.[76] He considers that emphasising better cooperation among member states in many aspects would ameliorate the situation.

Staničić draws attention to the fact that immigration is regarded as an important issue in the EU: in fact, approximately 4 out of 10 EU citizens see immigration as the most important issue. The targeted Eurobarometer surveys show that citizens are only partly content with the integration processes or with the results of their national governments' actions in this regard; only a fifth of EU citizens regard immigration as an opportunity, whereas 38 percent see it more as a problem, and 31 percent equally as a problem and an opportunity.[77]

4. Safe third countries

As discussed by Đukić in his second chapter, the 'safe third country' concept has been disputed over the past decades. Apart from the safe country of origin, which is the least disputed aspect, the chapter also discusses the European safe country concept, apart from the actual safe third country concept. He draws attention to the

71 Đukić, 2024a.
72 Staničić, 2024a.
73 Ibid.
74 Temporary Protection Directive 2001/55/EC1, OJ L 212, 7.8.2001.
75 Staničić, 2024a.
76 Staničić, 2024a, p. 294.
77 Staničić, 2024a.

fact that the majority of EU member states use the 'safe country of origin' concept, including all Central European countries, apart from Poland, in certain cases with modifications.[78] As to the safe third country concept, in EU law, the safe third country concept may be used only with regard to certain principles; for instance, that when applying the concept, the life and liberty of the concerned person is not threatened based on factors such as race, religion, nationality, membership of a particular social group, or political opinion; there should be no risk of serious harm; the Geneva Convention's non-refoulement principle prevails; and effective remedy. As Đukić mentions, the concept can be used in different ways: 'this methodology involves a case-by-case evaluation of the country's safety for a particular applicant and/or may include the national designation of countries considered generally safe'.[79]

Đukić also briefly addresses the jurisprudence of the European courts in this regard, as well as Turkey's special position and the change of attitude towards the Turkish asylum system, when it became required after the massive influx of migrants.

While we must agree that here again a balanced approach must prevail, we nevertheless have to acknowledge that, especially in the framework of mass migration, a concept like that of safe third countries is vital in order to be able to handle asylum applications appropriately and with international cooperation.

5. The Schengen area and migration

As described in Staničić's second chapter, the noble idea of an (inner) borderless Europe has faced its challenges in recent years. These challenges came along with the phenomenon of mass migration, starting with the reintroduction of border controls between Italy and France, but actually increasing after 2015. More and more states have reintroduced border controls and the originally 'interim' measures have actually endured for years, showing how essential external border control of the EU is to having a fully functioning Schengen system, remembering that the Schengen area can be regarded as a key area of integration.[80]

Analysing the reintroduction of border controls in numerous Schengen countries, Staničić comes to the conclusion that the states reacted this way to ameliorate 'the risks evoked by unwanted immigration, terrorism, and the spread of the

78 Đukić, 2024b.
79 Đukić, 2024b, p. 310.
80 Staničić, 2024b.

coronavirus'.[81] Staničić concludes that in order for Schengen to survive, Member States have to reaffirm their mutual trust.[82]

The Schengen aspects of illegal migration are even more interesting as the 'area of freedom, security and justice' is based on the idea of Union citizenship and free movement within an area without internal borders. Hence, when the Schengen principles are challenged during times of 'risk', it becomes clear that illegal migration has direct effects on the freedom and security of EU citizens.

Concerning the everyday handling of illegal migration, the operation of the Schengen Information System (SIS) is of utmost importance. With this cross-border cooperation the Member States have the opportunity to easily exchange relevant information.

Staničić draws attention to the fact that while border controls were introduced only 40 times between 2006 and 2015, this happened 280 times between 2015 and 2022.[83] Among the EU Member States, five (France, Austria, Germany, Sweden, and Denmark) introduced permanent border controls between 2015 and 2021. Staničić analyses this situation in light of the initial legal regulation on Schengen and the 2021 proposal of the Commission aimed at lifting these permanent controls. When assessing the situation, Staničić concludes that in relation to the Frontex system, the crisis situation 'allowed the Commission to propose more sovereignty-encroaching measures than ever before'.[84]

It is worth reading this chapter together with the chapter on the Dublin system. Reading about the states with the most ingoing (Germany, France, the Netherlands, Austria) and outgoing (Germany, Italy, Austria, France, Sweden) transfers as well as the top five application-receiving countries (Germany, France, Spain, Austria, Italy),[85] the correlation with those member states who have introduced permanent border controls is more than evident.

6. The Dublin system

Another system that is closely related to migration is the Dublin system. As a system designed to handle the legal questions related to asylum, it is essentially a mechanism which designates the state responsible for examining and deciding on a foreigner's application for international protection irrespective of where the

81 Staničić, 2024b, p. 441.
82 Staničić, 2024b.
83 Ibid.
84 Staničić, 2024b. See furthermore Colombeau, 2020, pp. 2258–2274; De Capitani, 2014, pp. 101–118; Šabić, 2017.
85 Frumarová, 2024.

application was lodged.[86] As the Dublin system only includes a minimum standard of rules, and no complete harmonisation, there are significant differences between the member states. While preserving the sovereignty of the member states and thus giving space to the different institutional or procedural solutions, it aims to provide a minimum level of protection to people applying for international protection as well as to hinder the so-called secondary movement or 'asylum shopping' by these people within the European Union. The Dublin set of rules constantly evolves,[87] and also includes the CJEU's previous jurisprudence in the legislation.[88] The objective shall be to maintain the exclusive competences of the member states and at the same time respond to challenges like illegal migration, thereby correcting shortcomings that may arise. The new challenges, however, have had a significant impact on the member states and restrictive measures appeared as a result. As asylum seekers, regardless of whether their claims are legitimate or not, have favourite routes, there are states which, based on their geographic location, receive far more applications than others. The safe third country concept is there to ease this burden.

The Dublin III system, established in 2013 – and the system currently functioning as of 2024 – tried to find answers to the challenges of the previous years and improve efficiency, while maintaining the same principles. A significant novelty is, however, that the authorities have to conduct personal interviews with the asylum seekers. The main documents of the Common European Asylum System (CEAS) are the Dublin Regulation (Dublin III), the Qualification Directive,[89] the Procedural Directive,[90] and the Reception Directive,[91] as well as Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 concerning the establishment of 'EURODAC' for the comparison of fingerprints.[92]

Katerina Frumarová's chapter contains useful information as to the scale of applications lodged throughout Europe. For 2022, 996,000 applications were lodged in the EU+ countries (39% of them successful in the first run), in addition to about 3.9 million beneficiaries of temporary protection.[93] Considering the migration policies as well as the geographical and economic situation of the given countries, the take-back and take-charge statistics draw an interesting picture of Europe.

86 Ibid.
87 Ibid.
88 Staničić, 2024b.
89 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.
90 Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection.
91 Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection.
92 Battjes and Brouwer, 2015, pp. 183–214; Davis, 2021, pp. 259–287; Peers, 2014, pp. 485–494.
93 Frumarová, 2024.

In my view, however, although the reforms of the Dublin system aimed to adapt to the new situation and achieved partial success, they gave rise to serious debates based on serious shortcomings. For instance, the capacity of the member states was never taken into account; the system places uneven burdens on member states in every sense; the aspect of border protection was in fact (and despite efforts made in this regard) not considered to be of at least the same importance; and, last but not least, the entire system, including its guiding – very noble – principles, was not designed for mass migration situations. The latest answers given to these issues not only lacks full support from the member states (see, for instance, Hungary's position), but raises serious issues of subsidiarity. With regard to the past decade's experience, this is also a point where EU legislation on paper and in practice might significantly differ from each other. Nevertheless, the (latest) new deal's reality check comes after this chapter has been closed and this volume published.

7. The border control – shared competences

The European border management system is a shared competence between the member states and the EU as regards the migration control context. Apart from the Schengen Borders Code Regulation, the European Border and Coast Guard Regulation (Regulation (EU) 2019/1896) is the other most relevant legally binding instrument on the common rules of border crossings. The Commission communication on European Integrated Border Management[94] is based on two principles: shared responsibility and well-defined division.[95] As Gregor Maučec states, although the Member States confer competence on the EU in border management and related migration issues, it does not result in the Member States losing their competence and responsibility in this regard.[96] Ever since the mid-1990s significant legal measures have been taken in order to introduce an integrated EU border regime and develop common EU standards and rules in the overall area of border surveillance/control. The objective has been to become more effective in managing the external borders of the EU and ensure the uniform level of their safeguarding,[97] while at the same time maintaining the Member States' competences. Although there are authors who do not consider border controls part of the migration policy,[98] I do consider it to be an integral part of the whole picture.

94 Communication from the Commission to the European Parliament and the Council establishing the multiannual strategic policy for European integrated border management, COM (2023) 146 final.
95 See Maučec, 2024.
96 Ibid.
97 Ibid.
98 See Neframi, 2011, cited by Maučec, 2024.

While the division of competences – treated in Maučec's chapter[99] – is rather complex, a few highlights are worth noting here as well. For instance, the fact that in this regard the principles of subsidiarity and proportionality prevail, or that the Treaty of Lisbon confers on the EU an explicit external competence to conclude readmission agreements with third countries (while maintaining the member states' competence to do so as well). As Maučec argues,

> [g]iven the shared nature of the EU's internal competence on border management and related migration issues and the reluctance of the Member States to cede their competence to the EU, the conditions for the EU's implicit external exclusive competence are not met.[100]

In addition, the CJEU states that the flexibility clause[101] cannot serve as a basis to widen the powers of the Union.[102] Furthermore, in the practice of joint operations or where the member states put their organs at the disposal of the EU, the classical question of international law as to control arises.

The challenge lies in the fact that the rules of border management operation, including the fundamental rights perspective, have not been designed to deal with mass migration. A member state requires different resources at the external border of the Schengen zone depending on whether a few people or thousands arrive every day. If the state on the external border takes its duties arising out of the Schengen Code seriously, only those whose rights have been proven shall cross the border. Ignoring this obligation or being required to ignore it for whatever reason is not only against the mutual trust principle governing the whole Schengen area, but would also exceed the competences transferred to the EU under the Treaty on the Functioning of the European Union. Just to give an example: of the 1,321,600 EU-wide applications during 2015, Germany received 476,510, Hungary 177,135, Sweden 162,450, and Austria 88,160.[103] These numbers would equal the size of the third-biggest city in Hungary, the fourth-biggest in Sweden, the seventh-biggest in Austria, and the sixteenth-biggest in Germany. The system is not able to manage such a huge volume of applications, especially as the cooperation of the asylum seekers – to wait for the results in the country of application – is lacking. As a result, proceeding with that number of applications while letting the applicants remain within the borders of the given state constitutes a clear threat to the Schengen objectives. It is therefore a challenge to dissuade third-country nationals from staying illegally in the territory of the Member States within the framework of EU law: while Member States may adopt coercive measures, even detention, during the return procedure (if it is to be

99 See furthermore Cebulak and Morvillo, 2022; Ekelund, 2019; Fink and Rijpma, 2022, pp. 408–435; Nedeski, 2021, pp. 139–178.
100 Maučec, 2024, p. 383.
101 Article 352 Treaty on the Functioning of the European Union.
102 Maučec, 2024.
103 Központi Statisztikai Hivatal, 2016.

followed by removal), finding a balance with the Return Directive at the scale after 2015 is at least questionable.[104]

8. Returning irregular migrants

Mateusz Tchórzewski distinguishes in his chapter between the numerous forms of migration, drawing attention to the consequences this phenomenon has for the societies of the affected states. He goes into detail regarding the individual situations of Eastern Central European states, assessing not only the legal framework but also the practice in a fact-based approach. The question of appropriate clarity arises as to the content of EU legislation in this regard, especially the fact that the EU asylum framework was not designed for such movements, and, above all, is more permissive than that of other major democratic jurisdictions.[105] Concerning Hungary, Tchórzewski draws attention to the fact that the Hungarian Constitutional Court took a sovereigntist position, stating that 'joint exercise of competences through the institutions of the European Union may not lead to lower levels of protection of fundamental rights than that which is required by the Fundamental Law', as well as that the inalienable right of Hungary to determine 'its territorial unity, population, its form of government as well as the structure of the state are to be considered a part of its constitutional identity'.[106] He also discusses the issue of artificial migration vis-à-vis Poland, the available remedies in Slovakia, the Constitutional Court judgment in the Czech Republic that declared a CJEU[107] decision as ultra vires, the structure of the Croatian constitutional jurisdiction and its expulsion-related jurisprudence, Slovenia's single procedure of removal, and the Romanian Constitutional Court's judgment of 'national constitutional identity'.

Tchórzewski highlights the risks that arise if the 'affected states will not have the possibility to sufficiently protect their legitimate economic, social, political, and geopolitical interests'. In his words, 'the functioning of the very system may be threatened', so it is not an issue to be ignored. Addressing the issue of legal uncertainty, he predicts two potentially successful options: either taking into account the views and values of the Member States, or leaving the Member States more room for discretion.[108]

104 See Maučec, 2024.
105 See Tchórzewski, 2024.
106 Tchórzewski, 2024, p. 551.
107 Court of Justice of the European Union.
108 See furthermore Huttunen, 2022; Karolewski and Benedikter, 2018, pp. 98–132.

Based on the moderate success of returning illegal migrants, it is worth taking a look at the EU-Turkey refugee deal. The EU has similar arrangements with other regions of the world, but, due to the events of the 2015 migration crisis, it was ready to learn from the ineffectiveness of previous experiences. Assessing the UNHCR's position, Ludmila Elbert does not avoid the major concerns, drawing attention to the difference between migration law and refugee law. Apart from the EU-Turkey deal, the effectiveness of which is put into another light by Elbert, other deals are examined for comparison, e.g., the US-Canada deal, the UK-Rwanda deal, and the Australia-Nauru deal. There is a reason that a specific subchapter is devoted to issues like the non-refoulement principle, the relationship between the UNHCR and the member states, and the safe-third-country concept. This last is the core of the EU-Turkey deal, enabling EU member states to declare an asylum application inadmissible without examining its substance if Turkey is regarded as a safe third country. Elbert also examines the actual practice involved in this deal, as well as in the other agreements mentioned.[109]

In my view, it is quite obvious that attitudes towards migration differ in the various European countries. Simply putting aside reality and pretending that only two countries in the EU face a massive influx of migrants, or that the new deals can be flawlessly applied without regard to the actual costs, is no solution to the problem: the rules in force in 2015, at a European and a global level, bore absolutely no relation to a phenomenon which resembled more closely a world war situation than the kind of situations either the Geneva Convention or the Dublin system were designed to cover. Deals like the EU-Turkey deal are an example of the *ad hoc* solutions found by states (not only in Europe, but around the world) to a chain of events which was far more complex, and hence should have been addressed differently: the lack of success, therefore, does not lie in the individual solutions themselves, but in the lack of strategic thinking.

9. Conclusions

What makes migration such an important question these days? More than a decade has passed since the Arab Spring and the subsequent influx of people fleeing the region for Europe, as well as an unprecedented influx of immigrants from various other parts of the world. It soon turned out that the existing EU rules – adopted for obvious humanitarian reasons but in quite different circumstances – created tensions between those states first receiving the arrivals and the other EU member states. It also soon turned out that there are limits to solidarity and huge differences

109 Heck and Hess, 2017, p. 35–57.

in attitudes towards migration, differences that have given rise to serious political disputes.

In the meantime, more than two years ago now, war broke out in the direct neighbourhood of the European Union, with neighbouring countries still receiving tens of thousands of refugees every day. But apart from the tragedy and the horror of this war, something else also came to light: these countries, almost exactly those the loudest in resisting uncontrolled entry for migrants, and thus accused of being 'inhuman', behaved more humanely than many others before when faced with a situation of actual war. With no safe third country in sight, they are hosting or caring for millions of real refugees, i.e. people fleeing directly from an actual war, a fact that is very clear from a legal point of view (facts are stubborn things), although less known outside the region of Eastern Central Europe.

What do we have here then? A clash of different interpretations? Or a typical conflict of European integration: the clash of different theories as to the present and the future of the European Union? The answer is simple: a little bit of both. The art of law is that we try to first create and then implement rules that should (but never ever can) cover all situations in life. Hence, there is always a room for interpretation. But in certain cases, there comes a point when it has to be admitted: common sense requires us to rethink the situation and either create another rule or admit that the solution lies outside of the *territoire* of law.

In my view, the authors to this volume try to familiarise us with the different questions related to migration law. They highlight the importance of not confusing concepts: migrants are not refugees, instruments created for a certain number of asylum applications are not necessarily – well, in fact, simply not – suitable to deal with a tenfold, hundredfold, or thousand-fold increase in numbers. At the same time, the countries of the Eastern Central European region, as well as the international community as a whole, take the individual aspects of this phenomenon very seriously: taking a stance in helping at the source, in the country of origin (see for instance the Hungary Helps programme), as well as respecting the human rights requirements. In this regard, we see the efforts of the various institutions defending the human rights of potential asylum seekers or the extensive jurisprudence of the European Court of Human Rights (which, for obvious reasons, is less qualified to seek a balance between sovereignty and concurring human rights perspective), as well as the (to the holistic approach more perceptive) national Constitutional Courts.

The challenge lies in approaching the issue from farther: realising that it is probably one of the biggest challenges the European Union has ever faced, because it has brought to the surface disruptions which were not evident beforehand, created mistrust within the community, put third country interests and the influence of EU countries in a different perspective, and because it questions achievements like Schengen – one of the most precious values of European integration for the countries and the peoples of Eastern Central Europe, previously for decades under Soviet oppression.

The first step in solving the dispute is to understand it. As Sándor Márai wrote: '*One can get closer to reality and the facts by using words, questions, and answers*'. It is also the mission of this volume: to contribute to a better understanding of the region through presenting the different aspects of the issue of migration from an Eastern Central European perspective.

References

Bibliography

Afonso, O., Gil, P.M., Neves, P.C., Sequeira, T.N. (2019) 'Demographic Change, Wage Inequality, and Technology' in: Bucci, A., Prettner, K., Prskawetz, A. (eds.) *Human Capital and Economic Growth*, Cham: Palgrave Macmillan; https://doi.org/10.1007/978-3-030-21599-6_4.

Androvičová, J. (2017) 'Human Rights Discourse on Migration–the Case of Slovakia', *Journal of Modern Science,* 4(35), pp. 197–220; https://doi.org/10.13166/jms/84821.

Battjes, H., Brouwer, E. (2015) 'The Dublin Regulation and Mutual Trust: Judicial Coherence in EU Asylum Law?', *Review of European Administrative Law*, 8(2), pp. 183–214; https://doi.org/10.7590/187479815X14465419060505.

Bean, F.D., Brown, S. K. (2015) 'Demographic Analyses of Immigration' in Brettell, C. B., Hollifield, J. F. (eds.) *Migration theory: Talking across disciplines*, Third edition, New York: Routledge.

Berkes, L. (2023) 'The Practice of the Hungarian Constitutional Court on Asylum', *Law, Identity and Values*, (2), pp. 9–32; https://doi.org/10.55073/2023.2.9-31.

Béres, N. (2024) 'The 1951 United Nations Convention Relating to the Status of Refugees: Contemporary Theory and Practice' in Raisz, A. (ed.) *Migration and Central Europe. Challenges and Legal Responses*. Miskolc–Budapest: Central European Academic Publishing; pp. 83–119; https://doi.org/10.54237/profnet.2024.armace_2.

von Bernstorff, J. (2012) 'Georg Jellinek and the Origins of Liberal Constitutionalism in International Law', *Goettingen Journal of International Law,* 4(3), pp. 659–675.

Beznec, B. and Jure G. (2023) 'New migration policies and innovative practices. Slovenia between bordering and inclusion', *Innovation: The European Journal of Social Science Research*, 2(36), pp. 1–15; https://doi.org/10.1080/13511610.2022.2071240.

Bhabha, J. (2002) 'International Gatekeepers? The Tension between Asylum Advocacy and Human Rights', *Harvard Human Rights Journal*, 15(1), pp. 151–181.

Breitenmoser, S., Marelli, G. (2017) 'Die neueste Rechtsprechung des EGMR und des EuGH zu Fragen des Migrationsrechts sowie zu Schengen und Dublin', *Swiss Review of International and European Law*, 27(2), pp. 190–191.

Çalı, B., Bianku, L., Motoc, I. (2021) Migration and the European Convention on Human Rights, *Oxford University Press*; https://doi.org/10.1093/oso/9780192895196.001.0001.

Cebulak, P., Morvillo, M., Schengen Restored: The CJEU Sets Clear Limits to the Reintroduction of Internal Border Controls, VerfBlog, 5 May 2022, [Online] Available at: https://verfassungsblog.de/schengen-restored/, (Accessed: 31 July 2024).

Chetail, V. (2014) 'Are Refugee Rights Human Rights? An Unorthodox Questioning of the Relations between Refugee Law and Human Rights Law' in Rubio-Marín, R. (ed.) *Human Rights and Immigration*. First edn. Oxford: Oxford University Press, pp. 19–72; https://doi.org/10.1093/acprof:oso/9780198701170.003.0002.

Chetail, V. (2019) *International Migration Law.* First edn. Oxford: Oxford University Press; https://doi.org/10.1093/law/9780199668267.001.0001.

Chetail, V. (2019) 'Sovereignty and Migration in the Doctrine of the Law of Nations: An Intellectual History of Hospitality from Vitoria to Vattel', *The European Journal of International Law*, 27(4), pp. 901–922; https://doi.org/10.1093/ejil/chw059

Colombeau, S.C. (2020) 'Crisis of Schengen? The effect of two 'migrant crises' (2011 and 2015) on the free movement of people at an internal Schengen border', *Journal of Ethnic and Migration Studies*, 46(11), pp. 2258–2274; https://doi.org/10.1080/1369183X.2019.1596787.

Cvikl, L., Flander, B. (2023) 'Asylum and Refugee Issues in the Case Law of the Constitutional Court of the Republic of Slovenia', *Law, Identity and Values*, 3(2), pp. 51–87; https://doi.org/10.55073/2023.2.51-87

D'Amato, G. (2015) 'How Foreigners Became Muslims: Switzerland's Path to Accommodating Islam as a New Religion' in Burchardt, M., Michalowski, I. (eds.) *After Integration. Islam und Politik*, pp. 285–301; https://doi.org/10.1007/978-3-658-02594-6_15

Davis, K. (2021) 'The European Union's Dublin Regulation and the migrant crisis', *Washington University Global Studies Law Review*, 19(2), pp. 259–287.

De Boer, T. (2015) 'Closing Legal Black Holes: The Role of Extraterritorial Jurisdiction in Refugee Rights Protection', *Journal of Refugee Studies,* 28(1), pp. 118–134; https://doi.org/10.1093/jrs/feu024.

De Capitani, E. (2014) 'The Schengen system after Lisbon: from cooperation to integration', *ERA Forum*, 15, pp. 101–118; https://doi.org/10.1007/s12027-014-0344-1.

Doliwa-Klepacka, A. (2021) 'The New Pact on Migration and Asylum as a Response to Current Migration Challenges-Selected Issues', *Bialystok Legal Studies*, 26(1), pp. 9–21; https://doi.org/10.15290/bsp.2021.26.01.01.

Đukić, D. (2024a) 'Impact of Migration on the Demographic and Religious Landscapes of Central European Countries: Legal Perspectives' in Raisz, A. (ed.) *Migration and Central Europe*. Challenges and Legal Responses. Miskolc–Budapest: Central European Academic Publishing. pp. 261–284; https://doi.org/10.54237/profnet.2024.armace_6.

Đukić, D. (2024b) 'The Concept of Safe Third Country with Special Regard to the Greek Safe Third Country Declaration' in Raisz, A. (ed.) *Migration and Central Europe*. Challenges and Legal Responses. Miskolc–Budapest: Central European Academic Publishing. pp. 305–324; https://doi.org/10.54237/profnet.2024.armace_8.

Eisenstadt, S.N. (1953) 'Analysis of Patterns of Immigration and Absorption of Immigrants', *Population Studies*, 7(2), p. 167–180; https://doi.org/10.2307/2172030.

Ekelund, H. (2019) "Normative Power Frontex?": Assessing Agency Cooperation with Third Countries' in Hofmann, H. C. H., Vos, E., Chamon, M. (eds.) *The External Dimension of EU Agencies and Bodies: Law and Policy*, Edward Elgar Publishing, pp. 79–99; https://doi.org/10.2307/2172030.

Elbert, L. (2024) 'Migration Based on Refugee Deals Across the World: Comparisons with the EU–Turkey Deal' in Raisz, A. (ed.) *Migration and Central Europe. Challenges and Legal Responses*. Miskolc–Budapest: Central European Academic Publishing. pp. 491–530; https://doi.org/10.54237/profnet.2024.armace_13.

Fábián, Gy. (2024) 'The Practices of the Council of Europe and the European Court of Human Rights From a Central European Perspective Regarding Questions on Migration' in Raisz, A. (ed.) *Migration and Central Europe. Challenges and Legal Responses*. Miskolc–Budapest: Central European Academic Publishing. pp. 121–185; https://doi.org/10.54237/profnet.2024.armace_3.

Fargues, P. (2011) *International Migration and Europe's Demographic Challenge*. San Domenico di Fiesole: European University Institute.

Fink, M., Rijpma, J.J. (2022) 'The management of the European Union's external borders' in Tsourdi, E., De Bruycker, P. (eds.) *Research Handbook on EU Migration and Asylum Law*, Cheltenham: Edward Elgar, pp. 408–435; https://doi.org/10.4337/9781786439635.00029.

Fitzpatrick, J. (1996) 'Revitalizing the 1951 Refugee Convention', *Harvard Human Rights Journal*, 9(1), pp. 229-253.

Follesdal, A. (2013) 'The principle of subsidiarity as a constitutional principle in international law', *Global Constitutionalism*, 2(1), pp. 37–62; https://doi.org/10.1017/S2045381712000123.

Frumarová, K. (2024) '(Non)Functionality of the Dublin System' in Raisz, A. (ed.) *Migration and Central Europe*. Challenges and Legal Responses, Miskolc–Budapest: Central European Academic Publishing. pp. 325–367; https://doi.org/10.54237/profnet.2024.armace_9.

Gammeltoft-Hansen, T. (2011) *Access to Asylum: International Refugee Law and the Globalisation of Migration Control*, First edn. Cambridge: Cambridge University Press; https://doi.org/10.1017/CBO9780511763403.006.

Garben, S., (2020) 'From sneaking to striding: Combatting competence creep and consolidating the EU legislative process', *European Law Journal*, 26(5-6), pp. 429–447; https://doi.org/10.1111/eulj.12408.

Geddes, A. and Andrew T. (2016) 'In the shadow of fortress Europe? Impacts of European migration governance on Slovenia', *Croatia and Macedonia, Journal of Ethnic and Migration Studies*, 4(42), pp. 587–605; https://doi.org/10.1080/1369183X.2015.1102041.

Goodwin-Gill, G. S. (2003) 'Article 31 of the 1951 Convention Relating to the Status of Refugees: Non-Penalization, Detention, and Protection' in Feller, E., Türk, V., Nicholson, F. (eds.) *Refugee Protection in International Law*, First edn. Cambridge: Cambridge University Press, pp. 185–252; https://doi.org/10.1017/CBO9780511493973.011.

Goodwin-Gill, G. S., McAdam, J. (2021) *The Refugee in International Law*, Fourth edn. Oxford: Oxford University Press; https://doi.org/10.1093/law/9780198808565.001.0001.

Hathaway, J. C. (2021) *The Rights of Refugees under International Law*, Second edn. Cambridge: Cambridge University Press; https://doi.org/10.1017/9781108863537.004.

Hegel, G. W. F. (2011) Grundlinien der Philisophie des Rechts oder Naturrechts und Staatswissenschaft im Grunsrisse (1832-1845), Twelfth edn; 333.

Helton, A. C. (1994) Forced Migration: 'A Need for New Approaches by the International Community', *Fordham International Law Journal*, 18(1), pp. 1623-1636.

Héran, F. (2023) 'Demography and Migration: The Wildcard in Population Dynamics' in Brettell, C. B., Hollifield, J. F. (eds.) *Migration Theory: Talking Across Disciplines*, Fourth edition, New York and London: Routledge, pp. 78-129; https://doi.org/10.4324/9781003121015-3.

Huttunen J. (2022) 'Coercive engineered migration and the prevention of entry of asylum seekers – a choice between two evils for the receiving European States', *HELDA*, Helsinki: University of Helsinki.

Jager, G. (2001) 'On the History of the International Protection of Refugees', *International Review of the Red Cross*, 83(843), pp. 727-737; https://doi.org/10.1017/S1560775500119285.

Jellinek, G. (1980) Die rechtliche Natur der Staatenverträge: Ein Beitrag zur juristischen Construction des Völkerrechts, 3.

Karolewski, I. P., Benedikter, R. (2018) 'Europe's refugee and migrant crisis: Political responses to asymmetrical pressures', *Politique Européenne*, 60, pp. 98-132; https://doi.org/10.3917/poeu.060.0098.

Lambert, H. (2016) *International Refugee Law*, First edn. London: Routledge. https://doi.org/10.4324/9781315092478.

Lauterpacht, E., Bethlehem, D. (2003) 'The Scope and Content of the Principle of Non-Refoulement: Opinion' in Feller, E., Türk, F., Nicholson, F. (eds.) *Refugee Protection in International Law: The UNHCR's Global Consultations on International Protection*. First edn. Cambridge – New York – Geneva: Cambridge University Press, pp. 87–177; https://doi.org/10.1017/CBO9780511493973.008

Maučec, G. (2024) 'Division of Competences and Responsibilities Shared Between EU Institutions/Agencies and Member States' Authorities in the Context of Border Management and Migration' in Raisz, A. (ed.) *Migration and Central Europe*. Challenges and Legal Responses. Miskolc–Budapest: Central European Academic Publishing. pp. 369–438; https://doi.org/10.54237/profnet.2024.armace_10.

Molnár, T. (2016) 'The Principle of Non-Refoulement under International Law: Its Inception and Evolution in a Nutshell', *Corvinus Journal of International Affairs*, 1(1), pp. 51-61.

Nedeski, N. (2021) 'Shared Obligations and the Responsibility of an International Organization and Its Member States: The Case of EU Mixed Agreements', *International Organizations Law Review*, 18(2), pp. 139–178; https://doi.org/10.1163/15723747-18010005.

Ofak, L. (2023) 'The Case Law of the Constitutional Court of Croatia Concerning Migration and Asylum Issues', *Law, Identity and Values*, 3(2), pp. 187–210; https://doi.org/10.55073/2023.2.187-209.

Oręziak, B. (2024a) 'Limits and Use of EU Competences: General Considerations in the Context of Policies on Border Checks, Asylum, and Immigration' in Raisz, A. (ed.) *Migration and Central Europe*. Challenges and Legal Responses. Miskolc–Budapest: Central European Academic Publishing. pp. 187–211; https://doi.org/10.54237/profnet.2024.armace_4.

Oręziak, B. (2024b) 'Migration and Refugee Affairs: Role of Constitutional Court in Poland, Hungary, the Czech Republic, Slovakia, Serbia, Croatia, Slovenia and Romania' in Raisz, A. (ed.) *Migration and Central Europe*. Challenges and Legal Responses. Miskolc–Budapest: Central European Academic Publishing. pp. 213–260; https://doi.org/10.54237/profnet.2024.armace_5.

O'Sullivan, C., Delia F. (2020) 'The Recast Reception Conditions Directive and the Rights of Asylum Seekers with Disabilities: Opportunities, Challenges and the Quest for Reform', *European Journal of Migration and Law*, 22(2), pp. 272–307; https://doi.org/10.1163/15718166-12340077.

Otta, Š. (2023) 'The Practice of National Constitutional Courts Concerning Migration and Refugee Affairs – The Czech Republic', *Law, Identity and Values*, 3(2), pp. 211–238; https://doi.org/10.55073/2023.2.211-237.

Öberg, J. (2017) 'Subsidiarity as a Limit to the Exercise of EU Competences', *Yearbook of European Law*, 2017/36, pp. 391–420; https://doi.org/10.1093/yel/yew027

Peers, S. (2014) 'Reconciling the Dublin system with European fundamental rights and the Charter', *ERA Forum*, 15(4), pp. 485–494; https://doi.org/10.1007/s12027-014-0365-9.

Šabić, S.Š. (2017) The Relocation of Refugees in the European Union, Implementation of Solidarity and Fear, *Heinrich-Böll-Stiftung*, Zagreb.

Širicová, L.G. (2023) 'The Practice of the Slovak Constitutional Court Concerning Migration and Refugee Affairs', *Law, Identity and Values*, 8(2), pp. 111–132; https://doi.org/10.55073/2023.2.111-132.

Smil, V. (2005) 'The Next 50 Years: Unfolding Trends', *Population and Development Review*, 31(4), pp. 605–643; https://doi.org/10.1111/j.1728-4457.2005.00091.x.

Staničić, F. (2024a) 'Change in Attitudes Towards Migrations' in Raisz, A. (ed.) *Migration and Central Europe*. Challenges and Legal Responses, Miskolc–Budapest: Central European Academic Publishing. pp. 285–303; https://doi.org/10.54237/profnet.2024.armace_7.

Staničić, F. (2024b) 'Schengen Area and Mass Migrations – The End of a Dream?' in Raisz, A. (ed.) *Migration and Central Europe*. Challenges and Legal Responses, Miskolc–Budapest: Central European Academic Publishing. pp. 439–462; https://doi.org/10.54237/profnet.2024.armace_11.

Syryt, A. (2023) 'Issues Relating to Migration and Refugees in the Constitution of the Republic of Poland and the Jurisprudence of the Constitutional Tribunal', *Law, Identity and Values*, 3(2), pp. 283–309; https://doi.org/10.55073/2023.2.283-309.

Tchórzewski, M. (2024) 'Returning of Irregular Migrants and Legal Certainty in Specific Central European States: A Comparative Perspective' in Raisz, A. (ed.) *Migration and Central Europe*. Challenges and Legal Responses, Miskolc–Budapest: Central European Academic Publishing. pp. 463–489; https://doi.org/10.54237/profnet.2024.armace_12.

Wielec, M. (2024) 'Beyond Borders: A Comparative Analysis of "Migrant" and "Refugee" Protections in International and EU Law' in Raisz, A. (ed.) *Migration and Central Europe*. Challenges and Legal Responses. Miskolc–Budapest: Central European Academic Publishing. pp. 19–82; https://doi.org/10.54237/profnet.2024.armace_1.

Willekens, F. (2015) 'Demographic Transitions in Europe and the World' in Matthijs, K., Neels, K., Timmerman, C., Haers, J. (eds.),*Population Change in Europe, the Middle-East and North Africa: Beyond the Demographic Divide*, First edn. London and New York: Routledge, pp. 13–44; https://doi.org/10.4324/9781315601496.

Zimmermann, A., Mahler, C. (2011) 'Article 1A para 2 (Definition of the Term "Refugee")' in Zimmermann, A. (ed.) *The 1951 Convention relating to the Status of Refugees and its 1967 Protocol: A Commentary*, First edn. Oxford: Oxford University Press, pp. 281–465. https://doi.org/10.1093/actrade/9780199542512.001.0001.

Online sources

European Commission (2024) Statistics on migration to Europe, 11 April 2024. [Online]. Available at: https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/promoting-our-european-way-life/statistics-migration-europe_en (Accessed: 31 July 2024).

European Court of Human Rights, (2022) Dublin Cases, January 2022. [Online]. Available at: https://www.echr.coe.int/documents/d/echr/FS_Dublin_ENG (Accessed: 31 July 2024).

Eurostat (2024) Fertility Statistics, February 2024. [Online]. Available at: https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Fertility_statistics (Accessed: 20 July 2024).

International Organization for Migration (2023) Migration is part of the solution, 15 December 2023. c

International Organization for Migration (no date), Who we are. [Online]. Available at: https://www.iom.int/who-we-are (Accessed: 25 January 2024).

Központi Statisztikai Hivatal (2016) 'Menekültek a világban', *Statisztikai Tükör*, 25 July 2016. [Online]. Available at: https://www.ksh.hu/docs/hun/xftp/stattukor/menekult15.pdf (Accessed: 31 July 2024).