CHAPTER XIV

Migration Challenges – Differing Answers?

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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.

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