

*EU JUSTICE AND
HOME AFFAIRS RESEARCH PAPERS
IN THE CONTEXT OF MIGRATION
AND ASYLUM LAW*

***BENCE KIS KELEMEN –
ÁGOSTON MOHAY (EDS.)***

INSPIRED

Innovative Solutions for
Practicality and Impact in
Refugee and Migration
Oriented Education

Co-funded by the
Erasmus+ Programme
of the European Union



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Edited by Bence KIS KELEMEN and Ágoston MOHAY

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Preface

Migration, asylum and the Area of Freedom, Security and Justice continue to be some of the most discussed and topical policy areas of the European Union.

The Erasmus+ Strategic Partnership entitled *Innovative Solutions for Practicality and Impact in Refugee and Migration Oriented Education (INSPIRED)* has aimed *inter alia* at improving the quality and relevance of legal education in the field of refugee and migration oriented education at the partner universities. It has undertaken to introduce innovative learning methods in legal education such as virtual mobility and the strategic use of information and communication technology, as well as to strengthen the quality of specialized education through international mobility and cross-border cooperation.

The research papers contained in this volume have been prepared partly by the lecturers and researchers taking part in the INSPIRED project, and partly by invited external researchers. They cover various legal and political aspects of migration and asylum related issues ranging from the anticipated effects of Brexit through the principle of non-refoulement in the practice of FRONTEX to the international responsibility of private military and security companies involved in border control operations.

The authors and editors of this book hope that the research papers contained herein can serve as valuable contributions to the academic debate on some of the most significant contemporary challenges that the European Union has to face.

The editors

Frontex and the Principle of Non-Refoulement

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The following research paper is concerned with the 2016 recast of the Frontex Regulation and its compliance with the Public International Law non-refoulement principle. It is argued that the Regulation is important for a least two reasons; its normative message can affect how helping behaviour is perceived by the residents of the European Union and its implementation can make the difference between life or death for those irregular migrants who attempt to reach Europe via the Mediterranean Sea. It offers an overview of relevant legal sources across Public International and European human and fundamental rights, then establishes that the non-refoulement principle means that no one is subjected to torture or other degrading treatment. Next it assesses whether the recast Frontex Regulation and two of its follow-on legal documents comply with the principle by way of analysing whether the legal instruments contribute to the maintenance of altruism being perceived as value and resulting Frontex procedures are adequately safeguarding the bodily integrity of the migrants confirmed. It finds that both answers are in the negative, thus the explicit use of the name of the principle in the Regulation is meaningless. At last it proposes legislative changes to remedy the breach.

Key words: Frontex, Frontex Regulation, EU, AFSJ, Security, Mediterranean Sea, Irregular Migration, Human Rights, Fundamental Rights, non-refoulement, Asylum, International Protection, External Border Management, Geneva Convention, ECHR, Hirshi, Public International Law, PIL, UN, EUCFR

1. Introduction

The European Union (EU) committed itself to a number of ambitious projects, one of the most probing of which has been the establishing of the Area of Freedom, Security and Justice (AFJS)¹ “in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border control, asylum, immigration, and the prevention and combating of crime.”²

The reasons why this project has been proven challenging are manifold. For one, it required the Union’s democratic accountability and legitimacy³ be strengthened by institutional reshaping⁴.

¹ L. Marin, Policing the EU’s External Borders: A Challenge for the Rule of Law and Fundamental Rights in the Area of Freedom, Security and Justice? An Analysis of Frontex Joint Operations at the Southern Maritime Border, *Journal of Contemporary European Research*, Vol. 7. No. 4. February 2011, pp. 468-487, p. 468.

² Art. 3(2) Consolidated Version of the Treaty of the European Union (TEU), *OJ C 326/13*, p. 5.

³ E. Guild – S. Carrera – L. D. Hertog – J. Parkin, *Implementation of the EU Charter of Fundamental Rights and its Impact on EU Home Affairs Agencies Frontex, Europol and the European Asylum Support Office*, 2011, p. 7. http://www.europarl.europa.eu/meetdocs/2009_2014/documents/libe/dv/02_study_fundamental_rights_02_study_fundamental_rights_en.pdf (26 June 2019).

⁴ Guild – Carrera – Hertog – J. Parkin *ibid.*

The challenge my paper is concerned with, however, is the apparent conflict amid the regulatory objectives listed by Article 3(2) TEU.⁵ Namely, among other scholars, Dr Moreno-Lax argues that the balance between protecting Member States' sovereignty and European Union residents' security by prevention and combating of crime and enforcing stringent means of external border control on the one hand, and consistently and successfully upholding fundamental and human rights of "those fleeing conflict and poverty"⁶ by way of external border control and asylum procedures⁷ on the other, or in other words between securitization and humanitarian objectives, have been tipped⁸ to favour the former.

Achieving equilibrium between the different AFSJ regulatory objectives by way of enacting 'appropriate measures' and subsequently implementing them is of utmost importance for no less than the following two reasons. The long established moral one is that legislation has remarkable normative significance. Both jurisprudence and social science scholarship have recognized that the ways in which legislative texts frame their regulatory subjects plays an important part in norm creation and in maintaining already existing societal values, and in our post-truth⁹ society the hotly debated topic of irregular migration is often (mis)used by politicians, such as Viktor Orbán and Matteo Salvini to bring a few examples from within the EU, in order to boost their popularity. The value of norm creation and/or preservation cannot be overstated especially on the supranational level, where the size of the population affected by legislation is much greater than that of the Member States. Furthermore, the norm underlying asylum is that of helping behaviour,¹⁰ which is all the more important to be reinforced as altruism represents a moral quality¹¹ without which a society could only be a dystopian one.

And the other, practical reason is that the implementation of external border governance¹² of the European Union and its Member States has tremendous consequences for irregular migrants. During the last decade a previously unseen number of persons have attempted to get to Europe¹³ without means to access regular migratory channels. Obtaining visas and catching flights are not usually viable options for those who "come from countries torn apart by war, generalized violence, or with repressive governments, such as Syria, Eritrea, Somalia, and Afghanistan".¹⁴ The majority of these irregular migratory flows have been observed to attempt to access the EU via the southern external border of the continent, the Mediterranean Sea¹⁵ and in

⁵ Art. 3(2) TEU.

⁶ J. Jeandesboz – P. Pallister-Wilkins, Crisis, Routine, Consolidation: The Politics of the Mediterranean Migration Crisis, *Mediterranean Politics*, Vol. 21. No. 2. 2016, pp. 316-320, p. 316.

⁷ V. Moreno-Lax, *The EU Humanitarian Border and the Securitization of Human Rights: The 'Rescue-Through-Interdiction/Rescue-Without Protection' Paradigm*, JCMS 2017 pp. 1–22, p. 1. (2017a)

⁸ R. Keyes, *The Post Truth Era: Dishonesty and Deception in Contemporary Life*, 1st edition, St Martin Press, New York 2004.

⁹ Moreno-Lax 2017a.

¹⁰ P. L. Callero – J. A. Howard – J. A. Piliavin, Helping Behavior as Role Behavior: Disclosing Social Structure and History in the Analysis of Prosocial Action, *Social Psychology Quarterly*, Vol. 50. No. 3, 1987, pp. 247-56, p. 247.

¹¹ Callero – Howard – Piliavin *ibid.* p. 248.

¹² N. Perkowski, Frontex and the convergence of humanitarianism, human rights and security, *Security Dialogue*, Vol. 49. No. 6. 2018, pp. 457–475, p. 461.

¹³ <https://www.consilium.europa.eu/en/infographics/irregular-arrivals-since-2008/> (26 June 2019)

¹⁴ <https://www.hrw.org/tag/mediterranean-crisis> (26 June 2019)

¹⁵ <https://www.hrw.org/tag/mediterranean-crisis> (26 June 2019)

recent years the Central Mediterranean route has become the most used¹⁶ as well as the deadliest one.¹⁷ Individuals frequently risk their lives on inflatable boats, dinghies, or vessels carrying too many people whilst paying extortionate amount of funds to people smugglers for this last part of the route to Europe. The sobering reality is that 597 deaths of migrants have been recorded¹⁸ in the area in 2019 alone.

Frontex is the EU agency responsible for, amongst other things, establishing “a technical and operational strategy for European integrated border management¹⁹” which, again, amongst other obligations, consists of “border control, including measures to facilitate legitimate border crossings and, where appropriate, measures related to the prevention and detection of cross-border crime, such as migrant smuggling, trafficking in human beings and terrorism, and measures related to the referral of persons who are in need of, or wish to apply for, international protection²⁰”; the correlation between the legislative text establishing it and conferring powers on the Agency and the implementation of the EBCG Regulation, Frontex operations or their omission thereof, and the words missing here? is irrefutable. A cohort of human rights lawyers went so far as to bring a case in front of the International Criminal Court accusing the EU of committing crimes against humanity due to the casualties of asylum seekers on the Mediterranean Sea²¹. They argue that “The attack against a civilian population ... implicates European Union and Member States’ officials, agents and representatives. These individuals participated in formulating the necessary policy and ensuring the implementation thereof, with the objective of pushing back migrants attempting to flee Libya between 2015 to the present day.”²²

In this paper we will not attempt to analyse why the European Union has been unable to strike a balance between its own and the Member States’ humanitarian obligations on the one hand, and protecting the safety and security of its residents on the other, which would result both in creating and maintaining societal norms and also ensuring the physical safety of migrants trying to cross the Mediterranean Sea in accordance with its AFSJ legislation and its implementation in the abstract, as this would be beyond the scope of this paper. Instead, we will look at two specific legislative measures. The paper is concerned with whether Articles 34²³ and 14²⁴ of the Frontex Regulation comply with the principle of *non-refoulement* under Public International Law (PIL) and European human and fundamental rights law. To put it differently, this paper considers whether these legislative measures contribute to the protection of the freedom, bodily integrity and the human and fundamental rights of irregular migrants attempting to reach the

¹⁶ <https://www.consilium.europa.eu/en/policies/migratory-pressures/central-mediterranean-route/> (26 June 2019)

¹⁷ <https://www.hrw.org/tag/mediterranean-crisis> (26 June 2019)

¹⁸ <https://missingmigrants.iom.int/region/mediterranean> (26 June 2019)

¹⁹ Art. 3(2) EP and Council Regulation 863/2007 of 14 September 2016 OJ L 251/19, pp. 1-76, p. 11.

²⁰ Art. 4(a) EBCGR, p. 12.

²¹ <https://www.express.co.uk/news/world/1136115/EU-news-migration-latest-International-Criminal-Court-Mediterranean-Sea-Libya-update> (26 June 2019).

²² <https://www.statewatch.org/news/2019/jun/eu-icc-case-EU-Migration-Policies.pdf> (22 June 2019).

²³ Art. 34(1) EBCGR, p. 32.

²⁴ Art. 14(2) EBCGR, p. 19.

shores of Fortress Europe²⁵ via the Mediterranean Sea as far as Frontex and the European Union is concerned.

The evaluative criteria against which the research question set out above will be answered are as follows. The first one is that Articles 34 and 14 of the Frontex Regulation must contribute to positive norm creation and/or maintaining the existing ones in respect of how irregular migration is framed by them. And the second one is that the measures being investigated must have led to such internal Frontex procedures which are designed to protect the bodily integrity of intercepted migrants.

The essay will be structured as follows. First, those measures of the wider legal context will be taken account of which are directly applicable to the enquiry, then Articles 34 and 14 of the Frontex Regulation will be introduced. Next, the paper will consider the origin and the meaning of the *non-refoulement* principle under public international and European human and fundamental rights law and it will also look at the implications the landmark case of *Hirsi*²⁶ in the European Court of Human Rights may have on Frontex operations and conduct at the Mediterranean maritime border of the EU. The essay then will move onto a critical evaluation of whether Articles 34 and 14 of the Frontex Regulation and their implementation were compliant with the *non-refoulement* principle. In the light of these discussions I will arrive at the conclusions that the Articles at the focal point of the paper are only compliant with the principle in words, which is necessary but on its own insufficient to bolster the norm of helping behaviour. Furthermore, I will find that neither the Articles in question nor the follow on soft law instruments, namely the Frontex Fundamental Rights Strategy²⁷ and the Code of Conduct for Return Operations and Return Interventions Coordinated or Organised by Frontex,²⁸ have adequate safeguards in place to protect the affected migrants' bodily integrity, and their fundamental and human rights, therefore the ways in which the Regulation can be implemented could only be unsatisfactory. Finally, legislative reforms will be proposed to address the shortcomings identified.

2. Legal Framework

It must be clear from the introduction that the legal context of the rather topical subject matter at hand is a multifaceted web of laws spanning through public international, European human and fundamental rights law, and European Union fundamental rights and AFSJ legislation. The

²⁵ S. Gallagher, Towards a Common European Asylum System: Fortress Europe Redesigns the Ramparts, *International Journal: Canada's Journal of Global Policy Analysis*, Vol. 57. No. 3. 2002, pp. 375-394, p. 375.

²⁶ *Hirsi Jamaa and Others v Italy* (App. No. 27760/09) ECtHR (2012).

²⁷ http://www.statewatch.org/observatories_files/frontex_observatory/2011-03-31-frontex-fundamental-rights-strategy.pdf (30 June 2019)

²⁸ https://frontex.europa.eu/assets/Key_Documents/Code_of_Conduct/Code_of_Conduct_for_Return_Operations_and_Return_Interventions.pdf (30 June 2019)

multifarious legal matrix will be taken account of in this order, starting with the applicable PIL measures.

The legal source of the *non-refoulement* principle is Article 33(1) of the 1951 Convention relating to the Status of Refugees²⁹ as amended by its 1967 New York Protocol³⁰ (Geneva Convention). The Geneva Convention, which has been ratified by all Member States of the European Union, but not the Union itself “defines the situations in which a State must grant refugee status to persons who apply for it, and the rights and responsibilities of those persons.”³¹ Article 1³² imposes the legal obligation on the High Contracting Parties to assess the claims of refugees for political asylum and Article 33(1)³³ of the Convention provides that “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.”³⁴

Moving onto European human rights law, Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms³⁵ (ECHR) prohibiting the subjecting of anyone to “torture or to inhuman or degrading treatment or punishment.”³⁶ will be observed to be directly relevant to my investigation. How so will be expanded on further on below. Similarly to the Geneva Convention, the ECHR has been acceded to by all of its MSs, but not the supranational organization itself.

This is noteworthy for the reason that for the lack of being a party to either Conventions one might infer that the EU is not bound by the aforementioned provisions and as a consequence neither are its Agencies. However, this understanding would be grossly inaccurate owing to the Charter of Fundamental Rights of the European Union³⁷ (EUCFR) by which all Member States as well as all EU institutions and agencies, such as Frontex, are indeed bound. By virtue of Article 18 of EUCFR³⁸ the right to asylum must be guaranteed, and “torture, cruel, inhumane and degrading treatment”³⁹ is prohibited by Article 4 EUCFR.⁴⁰

Whilst the net of EU laws applicable to external border governance is rather wide for the purposes of the enquiries at hand it is enough to take note of the Dublin and the Schengen Acquis. As long as the former denotes the body of EU laws regulating the Common European Asylum

²⁹ Art. 33(1) Convention Relating to the Status of Refugees, 189 UNTS 137. (Geneva Convention)

³⁰ Protocol Relating to the Status of Refugees, 606 UNTS 267.

³¹ Hirshi 2012, Para. 22.

³² Art. 1 Geneva Convention.

³³ Article 33(1) Geneva Convention.

³⁴ Article 33(1) Geneva Convention.

³⁵ Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, ETS 5. (ECHR)

³⁶ Art 3 ECHR.

³⁷ Charter of Fundamental Rights of the European Union, OJ 2000, C 364/01.

³⁸ Art. 18 EUCFR, p. 12.

³⁹ Art. 4 EUCFR, p. 9.

⁴⁰ Art. 4 EUCFR.

System (CEAS),⁴¹ a set of uniform immigration procedures across the EU,⁴² the 2016 recast European Border and Coast Guard Regulation⁴³ governing the competences and responsibilities of Frontex is part of the latter.

3. Articles 34⁴⁴ and 14⁴⁵ of the Recast Regulation

Until Frontex⁴⁶ was established in 2005, external border management of the EU and its Member States was largely absent of intergovernmental co-operation,⁴⁷ and supranational assistance was lacking entirely. However, following 9/11, terrorism, irregular migration, human smuggling and organized crime⁴⁸ have been framed as transnational problems tackling which were claimed to require “concerted action both at EU level and at national level between the competent law enforcement authorities, especially policy, customs and border guards.”⁴⁹

As mentioned above, the Frontex Regulation has been recast in 2016. The legislative intent underpinning the recast Regulation is argued to have been twofold. On the one hand, by virtue of the recast Regulation the original Agency established in 2005 was abolished⁵⁰ and new powers were conferred on the new Agency, also called Frontex, such as the ability to enter into working arrangements with third countries.⁵¹ And on the other hand, the fresh legislative text and its subsequent implementation by the reformed Agency were envisaged to deal with the former deficiency in having regard to the human and fundamental rights of migrants within the legislation.

Article 34 of the recast Regulation sets out the General rules⁵² under Chapter III Section 1 of the Regulation⁵³ which are devoted to the “Protection of fundamental rights and a fundamental rights strategy”⁵⁴ of the Agency. Article 34(1) requires Frontex to “draw up further, develop and implement a fundamental rights strategy”⁵⁵ in order to guarantee that the fundamental rights of the migrants are protected in the context of the operations organised or assisted by Frontex. Article 34(2) necessitates that “no person is disembarked in, forced to enter, conducted to, or

⁴¹ S. Peers, The Future of the EU Judicial System and EC Immigration and Asylum Law, *European Journal of Migration and Law*, Vol. 7. No. 3. 2007, pp. 263-274, p. 263.

⁴² S. Peers *ibid.*, p. 264.

⁴³ EBCGR 2016.

⁴⁴ Art. 34 EBCGR 2016 pp. 32-33.

⁴⁵ Art 14 EBCGR 2016, p. 19.

⁴⁶ Council Regulation 863/2007, OJ 2004 L 349.

⁴⁷ V. Moreno Lax, *Accessing Asylum in Europe: Extraterritorial Border Controls and Refugee Rights in Europe*, 1st edn., Oxford University Press, Oxford 2017, p. 153. (2017b)

⁴⁸ Moreno-Lax 2017b, p. 154.

⁴⁹ Council, The Hague Programme, OJ 2005 C 53/01, p. 13.

⁵⁰ EBCGR 2016.

⁵¹ Arts. 14(2)(c) and 14(2)(e) EBCGR 2016, p. 19.

⁵² EBCGR 2016, p. 32.

⁵³ EBCGR 2016.

⁵⁴ EBCGR 2016.

⁵⁵ Art. 34(1) EBCGR 2016, p. 34.

otherwise handed over or returned to, the authorities of a country in contravention of the principle of *non-refoulement*, or from which there is a risk of expulsion or return to another country in contravention of that principle.” By virtue of Article 34(3) the individual needs of vulnerable persons, such as children and “persons in need of international protection” are taken into account and Article 34(4) of the Regulation requires that the Agency considers certain NGO’s reports and its fundamental rights officer’s reports.

Article 14 provides for a number of practical, operational measures. By virtue of Article 14(1) of the Regulation⁵⁶ the Member States can request the Agency’s assistance in respect to their duties arising from external border control.⁵⁷ Whereas Article 14(2) of the Regulation⁵⁸ mandates Frontex to provide “technical and operational assistance for the host Member State”⁵⁹ and sets out the measures to be carried out by Frontex in a manner which is compliant with the principle of *non-refoulement*. The actions covered by the Article are as follows. Article 14(2)(a) authorizes Frontex to “coordinate joint operations”⁶⁰ with the Member States and the deployment of its Border and Coast Guard teams. Article 14(2)(b) mandates the arranging of ‘rapid border interventions’. Article 14(2)(c) allows Frontex to coordinate the activities not only of the affected Member States but that of ‘neighbouring third countries’. By virtue of Article 14(2)(d) the Agency can utilize its teams to support migration management in areas where “migratory challenge characterised by a significant increase in the number of migrants arriving at the external borders”⁶¹ occurs. Article 14(2)(e) authorizes Frontex to “provide technical and operational assistance to Member States and third countries, in support of search and rescue operations for persons in distress at sea.”⁶² Article 14(2)(f) sanctions Frontex personnel to assist domestic authorities of Member States as well as third countries. And at last, by virtue of Article 14(2)(g) the technical equipment of the Agency can be deployed.

4. How to Interpret the Principle of *Non-Refoulement*?

From the legal context above we know where the principle originates from and from Articles 34 and 14 of the Regulation it is also clear that it supposed to underpin all Frontex activities and what those tasks might be, however, what does it mean? In establishing what the principle means neither the Geneva Convention nor the Frontex Regulation are of assistance as both legal instruments omit to cater for a definition, therefore other legal sources must be visited.

UNHCR, the United Nations agency monitoring the way in which Contracting Parties apply the Geneva Convention advised that “international human rights law has established *non-refoulement* as a fundamental component of the absolute prohibition of torture and cruel, inhuman or degrading treatment or punishment. The duty not to *refoule* is also recognized as applying to

⁵⁶ Art. 14(1) EBCGR 2016, p. 19.

⁵⁷ Art. 14(1) EBCGR 2016.

⁵⁸ Art. 14(2) EBCGR 2016.

⁵⁹ Art. 14(2) EBCGR 2016.

⁶⁰ Art. 14(2)(a) EBCGR 2016.

⁶¹ Art. 14(2)(d) EBCGR 2016.

⁶² Art. 14(2)(d) EBCGR 2016.

refugees irrespective of their formal recognition, thus obviously including asylum-seekers whose status has not yet been determined. It encompasses any measure attributable to a State which could have the effect of returning an asylum seeker or refugee to the frontiers of territories where his or her life or freedom would be threatened, or where he or she would risk persecution. This includes rejection at the frontier, interception and indirect refoulement, whether of an individual seeking asylum or in situations of mass influx.”⁶³

To gain further insight of the meaning and application of the principle, the ECtHR case of *Hirshi*⁶⁴ could be of assistance. In this case the court considered and found that the Italian state violated Article 3 ECHR,⁶⁵ the prohibition of torture, when a 25 strong group of Somalian and Eritrean irregular migrants were first intercepted 35 nautical miles south of Lampedusa by the Italian Revenue Police and Coastguard then transported back to Tripoli, Libya.⁶⁶ The Strasbourg Court also held that Article 13 of the European Convention was breached by the Italian authorities. In this case the deciding judges relying on cases decided earlier summarised the meaning of the principle as follows:

“The principle of *non-refoulement*, as interpreted by the ECtHR, essentially means that States must refrain from returning a person (directly or indirectly) to a place where he or she could face a real risk of being subjected to torture or to inhuman or degrading treatment. Furthermore, States may not send refugees back to territories where their life or freedom would be threatened for reasons of race, religion, nationality, membership of a particular social group or political opinion. That obligation must be fulfilled when carrying out any border control...”⁶⁷

5. Are Articles 34 and 14 of the Regulation Compliant with the Principle of *Non-Refoulement*?

Evidently, for the EU is not a state and it is not a signatory to the ECHR, the European Court of Human Rights has no jurisdiction over the conduct of an EU Agency, therefore the *Hirshi* judgment is not enforceable in respect of the conduct of Frontex officials. Nevertheless, the Strasbourg Court’s judgment is applicable to Frontex and it has implications as to the application of the principle of *non-refoulement* to Frontex assisted interceptions and third country transfers of migrants.

What I mean is this. Firstly, the wording of Article 3 ECHR⁶⁸ is identical to that of Article 4 EUCFR,⁶⁹ both provisions prohibiting the torture of any persons. What is more, Article 19(2)

⁶³ GA Note on International Protection A/AC.96/951, 13 September 2001, Para. 16, p. 5.

⁶⁴ *Hirshi* ECtHR 2011.

⁶⁵ Art. 3. ECHR.

⁶⁶ *Hirshi* ECtHR 2011.

⁶⁷ *Hirshi* ECtHR 2011, para. 34.

⁶⁸ Art. 3. ECHR.

⁶⁹ Art 4. EUCFR, p. 9.

EUCFR⁷⁰ incorporates the principle and makes it explicit that no one should be “removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.”⁷¹

Turning to the Articles in question, it is submitted that in application of the first limb of the evaluative criteria to the legislative text, for *non-refoulement* undeniably represents a well-respected norm, Article 34 of the Regulation on the face of it is compliant with the principle, as it necessitates that Frontex personnel, whilst executing their duties, should make sure that no person could be subject to further refoulement and it even provides for an implied interpretation of the principle under Article 34(2). However, the wording of the Article is such that the requirements are not a “must”, but they merely “shall” be complied with, therefore the language might be indicative of a discrepancy between the words and the implementation of the Article.

Likewise, whether Article 34 would meet the second limb of the evaluative criteria is not straightforward either, notwithstanding the explicit requirements of the Article for two consequent legal instruments to be drafted and implemented. These are the Frontex Fundamental Rights Strategy⁷² (FRS) and the Code of Conduct for Return Operations and Return Interventions Coordinated or Organised by Frontex⁷³ (CoC). I will examine whether these instruments have outlined an adequate procedural framework in order to safeguard the bodily integrity of migrants and their access to international protection processes of the Member States.

Paragraph 13 of the FRS elucidates that the primary responsibility for ensuring that the fundamental rights of migrants during joint operations lies with the Member States. The provision is silent on what its secondary responsibility might entail. Paragraph 14 requires Frontex to ensure that the operation does not hamper the affected individuals’ rights to accessing international protection procedures, but it does not entail how. In addition, by virtue of the same paragraph one of the ‘objectives’ of Frontex is that “persons seeking protection are referred to the competent national authorities to assess their case.”⁷⁴ Again, the language used implies that upholding migrants’ rights to lodge their asylum or subsidiary protection claim is just one aim among many, and an omission to achieve it would have no consequences to the Agency. Also, the sentence could be construed to mean that only those migrants who make it explicit that they intend to seek international protection would be ‘referred to’ the appropriate domestic authorities and it leaves doubts as to the efficacy of a Frontex referral since it does not specify what referral means. Would these migrants be escorted to the representatives of the national institutions or would they be given information regarding protection procedures in languages they might not understand? By virtue of Paragraph 15 Frontex could impose corrective measures

⁷⁰ Art.19(2) EUCFR, p. 12.

⁷¹ Art.19(2) EUCFR.

⁷² http://www.statewatch.org/observatories_files/frontex_observatory/2011-03-31-frontex-fundamental-rights-strategy.pdf (30 June 2019)

⁷³ https://frontex.europa.eu/assets/Key_Documents/Code_of_Conduct/Code_of_Conduct_for_Return_Operations_and_Return_Interventions.pdf (30 June 2019)

⁷⁴ http://www.statewatch.org/observatories_files/frontex_observatory/2011-03-31-frontex-fundamental-rights-strategy.pdf (30 June 2019)

when “breaches or serious risk of breach of fundamental rights”⁷⁵ are observed during joint operations and as a last resort it could terminate the operation “if the conditions guaranteeing the respect for fundamental rights are no longer met.”⁷⁶ However, yet again the paragraph does not clarify what corrective measures, serious risk, and adequate conditions insinuate. Paragraph 18 FRS outsources the monitoring of the operations to the Member States and Paragraph 19 sketches a vague procedure for alleged human rights violations to be followed up by Frontex whether it relates to a Member State or the Agency itself.

The CoC does not make Frontex practices any more compliant with the *non-refoulement* principle. Many of its Articles are merely mirroring FRS measures. For instance, Article 10 of the CoC repeats Paragraph 14 FRS duty of referral without providing for safeguards. There are only a few notable additions, such as Article 12 of the CoC commanding Frontex officers to wear distinguishing signs, such as armbands or vests to be visibly distinct from returnees. However, this measure serves the safety of Agency officials rather than that of the migrants. Article 14 of the CoC requires the Member States to provide appropriate medical staff and suitable interpreters and by virtue of Article 8(2) all returnees’ fitness to travel should be medically examined and under Article 8(1) it is prohibited to subject those migrants to a return transfer who are not ‘fit for travel’. Therefore, it might be safe to infer that the presence of appropriate medical examiners would constitute a condition referred to by Paragraph 15 of the FRS, however, if so, this has not been made clear by either instrument. Under Article 7 of the CoC the use of coercive measures is expressly allowed albeit within narrow circumstances. Disproportionate use of force and such coercive measures which would threaten or compromise the ability to breathe are forbidden, but various restraint techniques are permissible. This Article, read in conjunction with Paragraph 19 of the FRS, gives rise to the utmost concern regarding the respect for the bodily integrity of the migrants concerned as these measures do not protect against being refouled by Frontex personnel. Hence it is clear that for lack of an appropriate procedural framework consequential to it, Article 34 of the Frontex Regulation does not meet the second limb of the evaluative criteria, therefore it falls well short of being substantively compliant with the *non-refoulement* principle.

Applying the first evaluative criterion to Article 14(2) it is submitted that although and unlike Article 34(2) it does not expand on what the principle means, it does mention it, therefore the maintaining of the norm of helping one another is at least implied. However, from applying the second evaluative criteria it is clear, that similarly to Article 14(2), for the reason of the complete absence of practical measures ensuring that throughout the operations mandated by the Article with particular emphasis on those which permit Frontex to assist or to join forces with third countries no person shall be subjected to torture or other degrading treatment, this Article also proves inadequate in terms of its compliance with the principle of *non-refoulement*.

⁷⁵ http://www.statewatch.org/observatories_files/frontex_observatory/2011-03-31-frontex-fundamental-rights-strategy.pdf (30 June 2019).

⁷⁶ http://www.statewatch.org/observatories_files/frontex_observatory/2011-03-31-frontex-fundamental-rights-strategy.pdf (30 June 2019)

Therefore, if we are going to accept the UNHCR interpretation of *non-refoulement*,⁷⁷ namely that the principle is part of the universal prohibition of torture and degrading treatment, then it also must be accepted that Frontex has been acting in violation of Articles 4 and 19(2) EUCFR⁷⁸ when it assists the Member States with such operations which comprise of interceptions and third country transfers of migrants, most notably to Libya, where due to the armed conflict being widespread⁷⁹ it is foreseeable that migrants returned to that country might be subjected to inhumane and degrading treatment or further transfers to their country of origin from which they flee. Therefore, the fear of being persecuted again, or being subjected to refoulement, is not unfounded.

In addition, should the intercepted refugees have been prevented from accessing the international protection procedures due to the transfer, the existence of an agreement with the third country following which the transfer has been carried out does not negate the fact that the Member State has violated its obligation under the Geneva Convention, therefore Frontex assisting this Member State is argued to have been aiding and abetting a PIL violation of the Member State and in addition itself breaching Article 18 EUCFR.⁸⁰ This also means that not only the compliance with the principle is not guaranteed by the MSs, Frontex and by association the EU legislative institutions, but the Member States' duty to allow migrants to access their procedures for international protection is watered down by a piece of AFSJ legislation risking the integrity of asylum procedures and the EU itself.

6. Conclusions

It is clear from the above discussions that Articles 14(2) and 34(1) of the Regulation are compliant with the principle of *non-refoulement* in words only, thus the mentioning of the principle is meaningless. As a result, these provisions of the AFSJ legislation are deficient as regards fulfilling the regulatory objectives under Article 3(2) TEU.⁸¹ What is more, this legislative *fi-asco* contributes towards the erosion of altruist behaviour in society.

Likewise, it has been demonstrated above that the extent of protection afforded to migrants attempting to reach the shores of Europe is sub-standard by way of the discussed Articles, and whilst a sweeping normative shift of the EU to making the protection of irregular migrants a priority over the war it wages on crime and terrorism is highly unlikely in the current political climate, in order to establish Frontex's substantive compliance with the *non-refoulement* principle the Regulation must be changed.

⁷⁷ AG 2011, p. 5.

⁷⁸ Arts. 4 and 19(2) EUCFR, pp. 9 and 12.

⁷⁹ <https://www.theguardian.com/world/2019/jul/03/air-strike-kill-libya-tripoli-migrant-detention-centre> (3 June 2019)

⁸⁰ Art. 18 EUCFR, p. 12.

⁸¹ Art. 3(2) TEU, p. 5.

7. Reform proposals

We propose that the Regulation be changed in the following ways. First, it should incorporate references to the relevant parts of the Dublin acquis. For instance, instead of imposing the duty on Frontex to establish its own internal procedure “for referring and providing initial information to persons who are in need of, or wish to apply for, international protection” it should refer to the relevant procedures set out by the Reception Directive.⁸² The reason for this is as follows. Whilst it is recognised that Frontex is not a Member State, its conduct is subject to the same international and European human and fundamental rights standards, therefore the Agency should be liable to comply with EU law designed to meet those standards. Second, information regarding international protection and complaint procedures should instantly be distributed to all migrants concerned by Agency personnel at the point of interception, or as soon as practicable, in a language they understand. Third, Articles 14 and 28 of the Regulation setting out the duties of Frontex in respect of assisting Member States should incorporate a clause by virtue of which Frontex be enabled to refuse to assist with such returns where it is not satisfied that the intercepted migrants will be returned to a place of safety. The threshold for the legal test of place of safety should be a robust one where the assisted Member State must prove beyond reasonable doubt that the potential for refoulement to arise is virtually non-existent. Fourth, the return of migrants to third countries, such as Libya,⁸³ where armed conflicts are widely documented by trusted sources should be expressly prohibited irrespective of any existing bi- or multilateral agreement the third country may have with one or more of the Member States or the EU. Fifth, Frontex should be given a supervisory role in respect of all third country transfers resulting from interceptions of migrants on the Mediterranean Sea, therefore the Regulation should include an Article by virtue of which the Members States would be under a legal obligation to report all of these third country transfers even if they do not require the assistance of Frontex for carrying out the particular operation. Triggered by this new article, Frontex should decide whether the destination is a place of safety. And last, the Regulation should contain a reference to Article 38 of the Procedures Directive⁸⁴ in order to afford the same safeguards to all migrants subjected to third country returns, not just those who were successful in their aim to reach mainland Europe.

⁸² EP and Council Directive 180/96 OJ 2013, pp. 137–157.

⁸³ <https://time.com/5569624/whats-happening-in-libya/> (23/06/2019).

⁸⁴ EP and Council Directive 180/96 OJ 2013, pp. 96–116.

Mobility and residence rights after Brexit: the positions of EU citizens in the UK and UK citizens in Hungary and the EU: what can we say?

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Brexit will have a fundamental effect on UK citizens living in the EU and conversely, of EU citizens living in the UK: some of the most significant consequences of Brexit will be the termination of EU citizenship for UK nationals, and the end of EU free movement and residence rights in relation to the UK for EU citizens. Understandably, both the UK and the EU27 aim to have a system in place for the post-Brexit era, but the fate of the Draft Withdrawal Agreement is still uncertain, and the withdrawal of the UK without an agreement could mean that these issues are regulated unilaterally by the parties. Our paper aims to give an overview of how mobility and residence rights of UK citizens in Hungary (and the EU) and Hungarian (and EU) citizens in the UK are to be regulated in the aforementioned scenarios.

Keywords: free movement, mobility, residence, Brexit, EU citizenship, United Kingdom, Hungary

1. Introduction: EU citizenship rights and Brexit

One of the most discussed and difficult issues the European Union (EU) faces in current times is the so-called Brexit process. As is known, the United Kingdom (UK) has notified the European Union of its intention to leave the EU in accordance with Article 50 of the Treaty on European Union (TEU). Whatever form it will take, Brexit will have a fundamental effect on UK citizens living in the EU and conversely, EU citizens living in the UK: some of the most significant consequences of Brexit will be the termination of EU citizenship for UK nationals, and the end of free movement and residence rights in relation to the UK for EU citizens.

It is worth noting that EU citizenship is a unique concept – never before has an international organization attempted to create a legal status similar to nationality. As a *sui generis* supranational community, the European Union introduced a status that had previously been limited to relations between an individual and a state. In general terms, citizenship is the legal expression of a bond between a state and an individual. Notwithstanding its subjective interpretation as

belonging or allegiance, in legal terms citizenship is a legal status awarded by the state to individuals, under conditions determined by the laws of the state. This status consists of mutual rights and obligations towards a political entity which fulfils the requirements necessary for the existence of a sovereign state.¹ The ability to determine who its citizens are (and who aren't) is a core element of states' sovereignty; citizenship law (i.e. rules regarding the granting of citizenship, naturalisation, withdrawal of citizenship, the regulation of the possibility of multiple citizenship, etc.) represents a field of law where public international law and European Union law have only limited role and influence. The concept of EU citizenship is also in line with this in the sense that it does not replace national citizenship but is additional to it² – meaning also that EU citizenship can neither be obtained nor lost separately from EU Member State citizenship.

However, before 1993, there were no EU citizens. There were nationals of the Member States with rights of free movement which depended strictly on fulfilling a particular economic or economically related status. Free movement of persons: one of the four fundamental freedoms of the EU. None of the founding documents of any of the European projects dreamt up and developed in the shadow of the Second World War – the Council of Europe, the European Coal and Steel Community, the European Economic Community – contains any mention of a European citizenship. It was not until the 1970s that European Community politicians tentatively started to float the idea of a European identity. At the 1973 Copenhagen Summit the Commission suggested the introduction of a passport union as well as special rights for citizens of Member States. Clearly, this idea did not float well at that time. A decade later, the Adonnino Committee, the Committee for a People's Europe, in French '*Europe des Citoyens*', in 1985 made many recommendations aimed at generating a European identity, its report containing numerous references to 'citizens' rights' without clarifying to what citizenship the rights under consideration were attached. Intriguingly, Section B contains a reference to 'Community citizen's [sic] rights', hinting at nascent ideas which would take shape over the following few years.

As is well known, the final few years of the 1980s were dominated by the aspiration to complete the internal market by 1992, with less energy available for attention to the Adonnino recommendations. However, the world changing events of 1989 and the consequent decision to restructure the Community as one pillar of a new European Union in the Maastricht meant that the spirit of the Adonnino inspired identity project fed into the creation of EU citizenship. Migrants' organisations might have mobilised for a citizenship of residence in the 1970s and 1980s, a debate in the European Parliament in 1991³ might have considered awarding such a citizenship to all EU residents, but the new EU citizenship was from the outset firmly grounded in member state nationality and there it has remained, the automatic added extra to Member State nationality, bundled together with the nationality of a Member State, contingent upon it,

¹ K. Hailbronner, *Nationality in public international law and European law*, 2006, p. 1. http://eudo-citizenship.eu/docs/chapter1_Hailbronner.pdf (3 June 2019).

² See Article 21 (1) TFEU.

³ European Parliament debate 150/34

indeed parasitic upon it: as UK citizens seem about to find out, dying in the absence of its host's survival.⁴

Once this unique new transnational status had been bestowed on the citizens of the Member States of the EU, the task became to identify what the new status brought to the party. Articles 20 and 21 TFEU are minimal: efficient and cryptic in equal measure, but giving little indication whether they added very much to the already existing right of free movement of persons. Citizens of the Union are nationals of the Member States: so much is clear from Article 20, and whether they like it or not, though this is never actually stated. Article 20 asserts that citizens of the Union enjoy the rights and are subject to the duties (the latter not so easy to discern) provided for in the Treaties. The rights are expounded in Articles 21-24 TFEU: to move and reside freely within the territory of the Member States, to vote and to stand in the European Parliament and municipal elections in their Member State of residence; to diplomatic and consular protection by other Member States; and to petition the European Parliament, apply to the European Ombudsman, launch Citizens' Initiatives, and to address the institutions of the EU in any of the Treaty languages. These citizenship rights are regulated at the primary law level in Articles 20-24 of the Treaty on the Functioning of the European Union as well as the EU Charter of Fundamental Rights. In our paper we will focus on free movement and residence rights, and in that regard the relevant sources of EU law are Article 21 TFEU and Directive 2004/38/EC, a.k.a. the Free Movement Directive.⁵ It is important to note that the Free Movement Directive also applies to the family members of EU citizens regardless of their nationality.⁶

Furthermore, the Court of Justice of the European Union has, especially in recent years, handed down a line of judgments of vital importance regarding EU citizenship. These rulings have *inter alia* touched upon the movement and residence rights of third-country national relatives of EU citizens,⁷ also in situations where the EU citizens themselves have not exercised their right to free movement, thus precluding the applicability of Directive 2004/38/EC.⁸ Even today, over

⁴ Proposals in December 2016 by Guy Verhofstadt, the Brexit coordinator of the European Parliament, for a new 'associate EU citizenship' status, possibly available to UK citizens after Brexit, appear to have stalled. See A. Van der Mei, Brexit and EU citizenship II: Associate EU citizenship, *Maastricht University blog*, 23/10/18 <https://www.maastrichtuniversity.nl/blog/2018/10/brexit-and-citizenship-ii-associate-eu-citizenship> (3 June 2019).

⁵ Directive 2004/38/EC of the European Parliament and of the Council on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC [OJ 2004 L 158].

⁶ As determined by Article 2 (2), for the purposes of the Directive, "family member" means: (a) the spouse; (b) the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State; (c) the direct descendants who are under the age of 21 or are dependants and those of the spouse or partner as defined in point (b); (d) the dependent direct relatives in the ascending line and those of the spouse or partner as defined in point (b).

⁷ Most notably see Case C-200/02 Kunqian Catherine Zhu and Man Lavette Chen v Secretary of State for the Home Department [EU:C:2004:307].

⁸ See among others cases C-34/09 Gerardo Ruiz Zambrano v Office national de l'emploi [EU:C:2011:124], C-434/09 Shirley McCarthy v. Secretary of State for the Home [EU:C:2011:277]; C-256/11 Murat Dereci and Others v Bundesministerium für Inneres [EU:C:2011:734] and C-133/15 H. C. Chavez-Vilchez and others v Raad van

twenty five years on from the inception of EU citizenship, it is unarguable that the central right, the golden thread weaving through EU citizenship, its life blood, is the right of free movement.

EU citizenship has at its core, then, the imperative of mobility. A status predicated on possession of the nationality of a Member State, in whose exclusive gift the jealously guarded right of bestowal of such status rests, it is one of EU citizenship's ironies and most intriguing features that most of its rights lie dormant pending movement to another Member State, which is needed for their activation: the so called 'cross border' element, which requires actual or potential movement from one Member State to another, a condition interpreted by the CJEU in various novel ways and at times attenuated beyond easy recognition.⁹ The Preamble to Directive 2004/38/EC ('the Citizens' Directive') asserts that 'Union citizenship is the fundamental status of nationals of the member states *when they exercise their right of free movement*' [italics: authors' own]. Rootedness in one Member State is the sine qua non for the prized and valuable rights bestowed on the one who uproots himself.

Of course as the Treaties have always made clear, and as the TFEU continues to make clear, the right of free movement is far from unfettered. Originally a right given to 'workers of the Member States', the economically active, it was then extended in steps, both by means of expansive CJEU interpretations and also by various free movement directives, to jobseekers, students, the retired, and those of independent means – those aspiring to be economically active, those anticipating being economically active in the future, the former economically active, and those with no need to be economically active. To boost the chances of EU nationals taking up their right to move, matching rights were granted to specified family members, and ancillary social rights provided for mobile workers and their families, particularly rights required for settlement in a new country and to address basic needs such as education and housing.¹⁰ There never was an unfettered right of free movement of persons. Therefore it should come as no surprise that when the right of free movement was elevated to become the central plank of the new status of EU citizenship, the right of free movement of the new EU citizens to move between the Member States without reservation was only granted for periods of three months at a time. To move to another Member State for longer than this, an EU citizen needed to fall clearly within one of the categories outlined above.

If a Member State leaves the European Union, its citizens will lose EU citizenship on the day that the state's membership of the EU ends. Bearing in mind the fact that EU law allows – albeit subject to conditions laid down in EU law itself – mobility and residence of EU citizens in the EU Member States, one of the most profound changes Brexit will entail is that these mobility rights will no longer be applicable. Other rights based on EU citizenship will also be impacted, though some rights granted to EU citizens under EU law also apply to non-EU citizens - the right to petition and the right to protection by the European Ombudsman are not preconditioned

Bestuur van de Sociale Verzekeringsbank and others [EU:C:2017:354].

⁹ See for example Case C-34/09, Ruiz Zambrano v Office national de l'emploi [2011] ECR I-01177.

¹⁰ Regulation 1612/68 on freedom of movement of workers within the Community. OJ L 257, 19/10/68, p. 2-12.

upon EU citizenship as they extend to any natural or legal person residing or having its registered office in a Member State as well.¹¹ Regardless, Brexit will bring especially big changes for UK citizens. Until Brexit, UK nationals are EU citizens, repositories of all of these rights, marked out by the normative status expounded in EU primary and secondary law, such status being developed by the CJEU into the ‘fundamental status’ it is ‘destined to become’.¹² After Brexit, UK nationals not holding dual nationality with another EU member state will not be EU citizens, their status as such vanishing at the stroke of 11pm on 31st October 2019 (midnight in Brussels and most of the EU27) as surely as Cinderella’s coach morphed into a pumpkin. Halloween, All Hallows’ Eve, the season of the dead and the undead. The EU citizenship of UK nationals will die away, and, not quite Midnight’s Children, they will be instantaneously reborn as third country nationals (‘TCNs’). The EU law rights of TCNs are minimal, except in the instances where they are a recognised family member of an EU citizen or, in those member states which have adopted the concept of rights for long term residence, if a TCN qualifies for long term residence.¹³ Otherwise the position is clear: whether they have any rights over and above TCNs will depend on any international agreement reached between the UK and the EU, and the national immigration law of the EU27.

Of course, the post-Brexit situation of rights granted hinges on the question of whether Brexit will happen with or without a “deal”, i.e. an international agreement between the EU and the UK, the withdrawing state. Our paper thus endeavours to take both possibilities into account – however we have to note that whilst there is a draft agreement, there is no settled agreement at the time of writing.

In any case there are currently two main possible scenarios for Brexit, on the assumption that Brexit takes place. This article will assume that Brexit will occur on 31st October 2019, since that is the default position: unless either Article 50 is revoked, or a further extension is agreed, EU law provides that, Article 50 TEU having been invoked, and an extension agreed until 31st October 2019 REF, Brexit will occur at 11pm on 31st October 2019. On this assumption, the three possible scenarios are as follows. First, that the UK leaves the EU without any deal in place to govern future arrangements between the UK and the EU (a ‘no deal’ Brexit). Secondly, that the UK leaves the EU on the terms set out in the Withdrawal Agreement (“the WA”) which has been negotiated between the EU27 and the UK. Thirdly, the UK leaves the EU on the terms of another agreement yet to be negotiated. As to the likelihood of this latter option, the EU has consistently stated that the WA will not be renegotiated whereas the Conservative candidates who are at the time of writing jockeying to replace Theresa May as Leader of the Conservative party and therefore Prime Minister assert their desire and even determination to renegotiate the

¹¹ See Articles 227-228 TFEU and Case C-145/04 Spain v United Kingdom [EU:C:2006:543], para 73.

¹² See, for example, Case C-184/99, Grzelczyk v Centre publique d’aide sociale d’Ottignies-Louvain-la-Neuve; Case C-413/99, Baumbast and R v Secretary of State for the Home Department [2002] ECR I-7091; Case C-184/02, Garcia Avello v Belgian State [2003] ECR I-11613; Case C-200/02, Zhu and Chen v Secretary of State for the Home Department [2004] ECR I-09925; Case C-147/03, Commission v Austria [2005] ECR I-5969

¹³ Council Directive 2003/109/EC concerning the status of third country nationals who are long-term residents, OJ L 16, 23/1/03.

WA. Only time will tell, but speculating as to the possible contents of any putative renegotiation is beyond the scope of this article.

As has been widely reported, the WA is subject to ratification by a vote by the UK Parliament, and at the time of writing, it has failed to secure such ratification three times. The requirement for ratification is to be found in section 13 European Union (Withdrawal) Act 2018.¹⁴ The section is lengthy and complex and has been explained and summarised by the Institute for Government as follows:¹⁵

“Section 13 of the EU Withdrawal Act says the Government will not be able to ratify the Withdrawal Agreement unless four conditions have been met:

1. The documents and an associated statement have been published.
2. ‘The negotiated Withdrawal Agreement and the framework for the future relationship have been approved by a resolution of the House of Commons on a motion moved by a minister of the Crown.’
3. A subsequent debate has taken place in the House of Lords.
4. Parliament has passed legislation to implement the Withdrawal Agreement.”

This gives Parliament a much stronger role in the ratification of the Withdrawal Agreement than under the normal parliamentary procedure for the ratification of an international treaty which is set out in the 2010 Constitutional Reform and Governance Act (“the CRAG”). Under the CRAG, Parliament has 21 sitting days to vote against the ratification of a treaty but there is no obligation on the Government to schedule time for a vote.

The Government has confirmed that the CRAG will also apply to the Withdrawal Agreement, in addition to the provisions under Section 13.¹⁶

The CRAG essentially sets out a process for the ratification of international treaties, which requires the government to lay a copy of the treaty before both Houses of Parliament for at least 21 days when Parliament is sitting, after which the treaty is deemed ratified unless there is a

¹⁴ Section 13 European Union (Withdrawal) Act 2018: <http://www.legislation.gov.uk/ukpga/2018/16/section/13> (3 June 2019).

¹⁵ See <https://www.instituteforgovernment.org.uk/explainers/parliament-meaningful-vote-brexite> (3 June 2019).

¹⁶ House of Commons Exiting the European Union Committee: Parliamentary scrutiny and approval of the Withdrawal Agreement and negotiations on a future relationship: Government Response to the Committee’s Sixth Report <https://publications.parliament.uk/pa/cm201719/cmselect/cmxeu/1641/1641.pdf> (3 June 2019).

motion to oppose such ratification. The CRAG also contains a procedure for occasions when there is such a motion in opposition.¹⁷

The authors of the present paper strongly believe that a no-deal withdrawal is not beneficial in a legal (or any other) sense for either the United Kingdom or the European Union but nevertheless it is commendable that European Commission has launched a ‘Brexit preparedness’ initiative.¹⁸ The initiative, which aims to encourage EU Member States to take legislative and other preparations necessary in order to prepare for a no-deal withdrawal scenario, is based on communications from the Commission and not legal acts, thus the preparation envisaged in them is not a legally enforceable obligation incumbent upon the Member States. The Commission’s Brexit preparedness webpage prominently addresses residence rights as well.¹⁹ In order to gather and also disseminate relevant information, the Commission has requested the EU27 to provide answers to the following questions:

- “Which approach has been (or will be) chosen for offering a continued right to stay to UK citizens in the EU (application of existing rules; ad-hoc legislation; case-by case assessment or horizontal approach?)
- Which administrative measures are foreseen/envisaged to cope with expected workload (administrative capacity; prioritisation of certain categories of persons (frequent travellers)?
- Which measures are foreseen/envisaged to reach out to UK citizens in the EU (e.g. communication, information, contacts with consulates and NGOs?)
- Planned timing as regards in particular: 1. Communication and information; 2. Accepting first applications (already before 30 March 2019?); 3. Delivery of first permits (already before 30 March with deferred entry into force?)”

The references to 30 March 2019 do of course refer to the day after the date on which it was anticipated the UK would leave the EU, until the extension until 31 October 2019 was agreed. The contents of the Commission’s initiative are in line with the repeated plea by the European Council to the Member States, Union institutions and all stakeholders to ‘step up their work on preparedness at all levels and for all outcomes.’²⁰ The issue is of a very profound practical relevance simply because of the number of people affected by it – thought the exact number is difficult to ascertain.²¹ In the British press it is often stipulated that there are approximately 1.3 million UK citizens living in the EU27, and around 3.2 million EU27 citizens living in the

¹⁷ Constitutional Reform and Governance Act 2010, ss 20-25. Available from [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/144230/Constitutional Reform and Governance Act 2010.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/144230/Constitutional_Reform_and_Governance_Act_2010.pdf)

¹⁸ European Commission: Preparing for the withdrawal of the United Kingdom from the European Union on 30 March 2019 (COM(2018) 556 final/2)

¹⁹ https://ec.europa.eu/info/brexit/brexit-preparedness/residence-rights-uk-nationals-eu-member-states_en (5 July 2019)

²⁰ European Council (Art. 50) meeting (29 June 2018) – Conclusions, para. 4

²¹ The authors suspect that the discrepancy between various data sources is at least partly due to the residency of numerous EU citizens who have utilised their free movement rights is not obvious, and that mobility oftentimes means just that – mobility without the intention to set up residence in another member state. Of course the statistical methodology applied by various data collectors is also not necessarily the same. However, proper consideration of this point and the reasons for the discrepancy is beyond the scope of this article.

UK.²² According to UK Office of National Statistics data from 2018 however, there are around 784,900 UK citizens living in the EU (excluding the UK and Ireland);²³ and the number of EU citizens resident in the UK (excluding British) was approximately 2,938,000 in 2015.²⁴ The number of Hungarian nationals living in the UK according to unofficial estimates varies between 80,000 and 150,000; official statistics by the UK Office of National Statistics put the number at 82,000 in 2015.²⁵

2. The movement and residence rights of UK citizens in Hungary (and the EU) after Brexit

2.1. Withdrawal without an agreement

On the day of Brexit, ‘the United Kingdom will become a third country. All Union primary and secondary law will cease to apply to the United Kingdom from that moment, unless a ratified withdrawal agreement establishes another date.’²⁶ This crucial change will mean that the common status of EU citizenship will no longer tie together citizens of the UK and citizens of the EU27; legally speaking UK citizens will become third country nationals. Accordingly, EU free movement law as such will cease to apply to UK citizens, and EU migration law will become applicable, including rules on border control and legal and illegal immigration in the sense of Articles 77 and 79 TFEU.

2.1.1. Visas

In terms of visa requirements, the EU rules are based on the Visa Regulation²⁷ which determines from which countries a visa is necessary to enter the European Union (i.e. to cross its external borders). The determination of the third countries whose nationals are subject to a visa requirement is made on the basis of a considered, case-by-case assessment of specific criteria encompassing among others illegal immigration, public policy and security; consideration is further

²² See e.g.: <https://www.bbc.com/news/world-europe-46841041>; as corroborated by data from Fullfact, see: <https://fullfact.org/europe/how-many-uk-citizens-live-other-eu-countries/> (3 June 2019).

²³ Office for National Statistics: Living abroad: British residents living in the EU: April 2018 <https://www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/internationalmigration/articles/livingabroad/april2018> (3 June 2019).

²⁴ Office for National Statistics: Population by Country of Birth and Nationality Report: August 2015 <https://www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/internationalmigration/articles/populationbycountryofbirthandnationalityreport/2015-09-27> (5 July 2019)

²⁵ É. Geller-Lukács – Á. Töttös – S. Illés, Free movement of people and the Brexit, *Hungarian Geographical Bulletin*, No. 4. 2016, p. 425.

²⁶ European Commission: Preparing for the withdrawal of the United Kingdom from the European Union on 30 March 2019: a Contingency Action Plan. COM(2018) 880 final.

²⁷ Regulation 2018/1806/EU of the European Parliament and of the Council of 14 November 2018 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement [OJ 2018 L 303]. The 2018 regulation is a recodification of the previous regulation from 2001 (Regulation 539/2001/EC listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement [OJ 2001 L 81]) which had been modified 18 times.

give to the EU's external relations with third countries as well as to the implications of regional coherence and reciprocity.²⁸ Under the rules introduced by the Lisbon Treaty, the visa regulation is adopted in the ordinary legislative procedure by the Council and the European Parliament.

As part of the Brexit preparedness initiative, the Commission submitted a legislative proposal to amend the EU's visa rules, proposing that UK citizens should be exempt from a visa requirement.²⁹ The Commission pointed to various factors such as geographical proximity, the link between the UK and the EU economies, the advanced level of trade and the extent of short-term movements of persons between the UK and the EU for business, leisure or other reasons; it has also pointed out that the UK is member of the Council of Europe and attaches similar importance to of human rights and fundamental freedoms as the EU does.³⁰ Reciprocity was seen as a further important consideration, since the UK had government had "declared its intention not to require a visa from citizens of the EU27 Member States for short stays for purposes of tourism and business."³¹ The preamble of the modifying regulation accordingly stresses that it is based "on the expectation that, in the interest of maintaining close relations, the United Kingdom will grant full visa reciprocity to the nationals of all Member State", and that should the UK decide to introduce visa requirements for EU citizens, the EU27 should apply the reciprocity mechanism – i.e. introduce a similar visa requirement for UK citizens – without delay.³² The modifying regulation, which has been adopted in the first reading of the ordinary legislative procedure by the Council and the European Parliament has a conditional date of entry into force: it shall enter into force on the day following that on which Union law ceases to apply to the UK.³³ As the regulation of visa requirements is made at the EU level, the abovementioned applies to Hungary as well.

2.1.2. Residence rights

At the EU level, the Commission has emphasized that it should not be the citizens who "pay the price of Brexit", and that the remaining EU Member States should take "a generous approach" to the rights of UK citizens who are already resident in their territory.³⁴ The Commission thus recommends that periods of legal residence of UK citizens in an EU27 Member State before the withdrawal date should be considered as periods of legal residence in an EU Member

²⁸ Cf. Regulation 539/2001/EC, para 5 of the preamble and Regulation 2018/1806/EU, para 3 of the preamble.

²⁹ COM(2018) 745 final.

³⁰ Ibid. p. 4.

³¹ See COM(2018) 745 final, p. 4, referencing the relevant UK government publication [HM Government: The future relationship between the United Kingdom and the European Union. July 2018, paras 76-78.] and the report of the United Kingdom's Migration Advisory Committee [Migration Advisory Committee, EEA migration in the UK: Final report. September 2018, policy recommendation 30, p. 4].

³² Regulation 2019/592/EU of the European Parliament and of the Council of 10 April 2019 amending Regulation (EU) 2018/1806 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement, as regards the withdrawal of the United Kingdom from the Union [OJ 2018 L 103I], preamble, para (8). The reciprocity mechanism is laid out in Article 7 of the current Visa Regulation.

³³ Regulation 2019/592/EU, Article 3

³⁴ European Commission *ibid.* p. 7

State in accordance with Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents: this makes it easier for UK citizens to fulfil the necessary conditions to obtain long-term resident status.³⁵

In Hungary, the Parliament – acting on a proposal from the Government – has adopted national legislation regarding the withdrawal of the UK from the EU without an agreement. Act XV of 2019, which was adopted on 19 March 2019 deals *inter alia* with residence rights of UK citizens.³⁶ The amendments incorporated into the Act enter into force on the day following the day of a no-deal Brexit.³⁷ The Act amends among others Act 1 of 2007 on the Admission and Residence of Persons with the Right of Free Movement and Residence³⁸ – one of the main Hungarian laws implementing Directive 2004/38/EC – in order to provide for a preferential treatment for UK citizens following a no-deal Brexit: in short, whereas UK citizens will be in a less favourable situation than EU citizens, they will be in a better position than other third country nationals. Of course as laid out in § 6 of the Act (by far its longest provision), if and when a no-deal Brexit happens Act II of 2007 on the Admission and Right of Residence of Third-Country Nationals will become applicable to UK citizens, albeit subject to some special preferential provisions³⁹ – most notably the Act establishes a three-year-long “grace period” for UK citizens who are residents in Hungary at the time of Brexit.

Firstly, registration certificates, residence cards and permanent residence cards will remain until the end of the period. This applies also to third country national relatives of UK citizens. Secondly, UK citizens and their third country national relatives who are residents at the time of withdrawal and possess a registration certificate, residence card or permanent residence card and have lawfully resided in the territory of Hungary continuously for at least the preceding three years will be entitled to apply for and obtain a national permanent residence permit.⁴⁰ There are some possible exceptions however, such as if a rejection ground based on Act II of 2007 [§ 33 (1) c)] is applicable or where (1) residence of the individual in question in Hungary constitutes a threat to public security or national security; or (2) the individual is subject to expulsion or exclusion from the territory of Hungary or for whom an alert has been issued in the SIS for the purposes of refusing entry; or (3) who has disclosed false information or untrue facts in the interest of obtaining the permit, or misled the competent authority [Act II of 2007,

³⁵ European Commission *ibid.* p. 8

³⁶ Magyar Közlöny (Official Journal of Hungary) 2019/50 (2019. 03. 26.). The amending legislation also concerns certain social welfare and family benefits and some questions connected to practicing law in Hungary; these issues however will not be dealt with in the framework of this paper. The text of the act is available in Hungarian at: <https://magyarkozlony.hu/dokumentumok/d428b2f52d7ada64faf7a32c2144dc875c5c92b1/megtekintes> (3 June 2019).

³⁷ See Section 9 of Act XV of 2019.

³⁸ Unofficial translation of the original act available at: <https://www.refworld.org/docid/4979ca2e2.html> (3 June 2019).

³⁹ Translation of the act available from the website of the Hungarian Office of Immigration and Asylum: http://www.bmbah.hu/images/tartalom/act_ii_of_2007_1.doc (3 June 2019).

⁴⁰ There are some possible exceptions however, such as if a rejection ground based on Act II of 2007 is applicable [Section 33 (1) c)] or where (1) residence of the individual in question in Hungary constitutes a threat to public security or national security; or (2) the individual is subject to expulsion or exclusion from the territory of Hungary or for whom an alert has been issued in the SIS for the purposes of refusing entry; or (3) who has disclosed false information or untrue facts in the interest of obtaining the permit, or misled the competent authority. [§ 33 (2)]

§ 33 (2)]. Furthermore the beneficial treatment does not apply if the UK citizens or their third country national family member have a criminal record. The beneficial provision does not apply to the third country national family member if the shared life between the UK citizen and the third country national family member does not exist anymore in reality; or in case the UK citizen has left the territory of Hungary with the intention of acquiring residence in a foreign country.⁴¹ The aforementioned national permanent residence permit needs to be applied for within three years from the date of the withdrawal. The UK citizen or the third country national family member may also apply for a so-called EC residence permit as well, in accordance with Act II of 2007.⁴²

If the permanent resident UK citizen and his/her third country national have a child, a national residence permit or an EC permanent residence permit shall be issued to the child following the reporting of the birth of the child.⁴³

2.2. *Withdrawal based on an agreement*

If the United Kingdom withdraws from the EU, the rights of UK citizens in the EU will be – or perhaps we should say ‘can be’ – regulated by the agreement. At the time of writing of this paper, it is unfortunately not clear yet whether there will be an agreement at all, and if yes, what its content will be. Thus we will take as our starting point in this regard the Draft Withdrawal Agreement⁴⁴ currently available – even though the position of the deal politically (at least in terms of the UK) is not exactly strong at the moment, it seems unlikely that its provisions on citizens’ rights would be drastically altered, bearing in mind that it would be in the interest of both parties (the UK and the EU-27) to mutually maintain the core of free movement and residence rights even post-Brexit.⁴⁵ The European Parliament has also stressed that one of the pre-conditions of its consent to a withdrawal agreement is that issues regarding citizens’ rights are properly addressed and that “the rights of EU citizens legally residing in the UK and of UK citizens legally residing in EU27 are not affected.”⁴⁶

⁴¹ Section 95 (6) as amended by Act XV of 2019.

⁴² In accordance with Section 38 (1) of Act II of 2007, an EC permanent residence permit may be issued for long-term residence in the territory of Hungary to a third-country national: a) who has lawfully resided in the territory of Hungary continuously for at least a period of five years before the application was submitted; or b) who was issued an EU Blue Card, and ba) has lawfully resided in the territory of Hungary continuously for at least a period of two years before the application was submitted, and bb) has lawfully resided in the territory of any Member State of the European Union continuously for at least five years

⁴³ Section 95 (13) as amended by Act XV of 2019.

⁴⁴ Draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, as agreed at negotiators' level on 14 November 2018 https://ec.europa.eu/commission/sites/beta-political/files/draft_withdrawal_agreement_0.pdf (3 June 2019).

⁴⁵ Notwithstanding the fact that the free movement of people and immigration in general had been at the centre of political debates and campaigns relating to the British renegotiation and referendum issue. See further E. Thielemann – D. Schade: Buying into Myths: Free Movement of People and Immigration, *Political Quarterly*, Vol. 87. No. 2. 2016, pp. 139-147 and M. Goodwin – C. Milazzo: Taking back control? Investigating the role of immigration in the 2016 vote for Brexit, *The British Journal of Politics and International Relations*, Vol. 19. No. 3. 2017, pp. 450-464.

⁴⁶ European Parliament resolution of 14 March 2018 on the framework of the future EU-UK relationship (14 March

Firstly, the Agreement sets up a transition period lasting until 31 December 2020, during which EU law remains applicable to the UK, unless otherwise provided in the Agreement – citizens’ movement and residence rights would accordingly remain the same for the aforementioned period.⁴⁷

As regards after the transition period, Part Two of the Draft Withdrawal Agreement deals with Citizens’ Rights. The agreement firstly specifies the personal scope of these provisions.

For the purposes of this section of our paper, the following persons are of relevance:

- United Kingdom nationals who exercised their right to reside in a Member State in accordance with Union law before the end of the transition period and continue to reside there thereafter;
- United Kingdom nationals who exercised their right as frontier workers in one or more Member States in accordance with Union law before the end of the transition period and continue to do so thereafter;
- family members of the persons referred to above, subject to certain conditions.⁴⁸

The main principle of the Draft Agreement is that the same substantive conditions of residence as in EU free movement law currently in force should continue to apply. United Kingdom nationals shall therefore have the right to reside in the EU27 under the limitations and conditions as set out in current EU law.⁴⁹ The same applies to UK national family members and non-UK national family members: they shall be treated in accordance with pre-Brexit EU free movement law. The Draft Agreement imposes the obligation that no host state (i.e. neither any of the EU27 nor the UK) may impose any limitations or conditions for obtaining, retaining or losing residence rights other than those provided for in the Agreement itself, and that states do not enjoy discretion in applying the limitations and conditions provided for in the Agreement, other than in favour of the person concerned.⁵⁰

To quote Steve Peers, the conditions laid out in the Draft Agreement are “generous, but not unlimited”: the right of residence is not absolute, as the EU law-based conditions need to be met, and residence is (or may be – see below) subject to the process of confirming status after Brexit (i.e. applying for “settled status” in accordance with Article 17).⁵¹ UK citizens will have the rights to enter and exit the EU27 in possession of a valid passport or national identity card;

2018), 2018/2573(RSP), para. 52

⁴⁷ Article 127 of the Draft Withdrawal Agreement

⁴⁸ Cf. Article 10 e)-f) of the Draft Withdrawal Agreement for the detailed conditions.

⁴⁹ Specifically Articles 21, 45 or 49 TFEU and in Article 6(1), points (a), (b) or (c) of Article 7(1), Article 7(3), Article 14, Article 16(1) or Article 17(1) of Directive 2004/38/EC. See Article 13 of the Draft Withdrawal Agreement.

⁵⁰ Article 12 para. 4 of the Draft Withdrawal Agreement.

⁵¹ S. Peers, The Brexit Withdrawal Agreement: Overview and First Observations, *EU Law Analysis*, 22 November 2018, <http://eulawanalysis.blogspot.com/2018/11/the-brexit-withdrawal-agreement.html> (3 June 2019).

their non-UK national family members will require a valid passport.⁵² Five years after the end of the transition period, the states may decide no longer to accept national identity cards for the purposes of entry to or exit if such cards do not include a chip that complies with the applicable ICAO standards related to biometric identification.

As for the rights of permanent residence, UK nationals, and their respective family members, who have resided legally in an EU27 Member State in accordance with EU law for a continuous period of 5 years (or for the more beneficial period specified in Article 17 of Directive 2004/38/EC), shall have the right to reside permanently in the state under the conditions set by the Free Movement Directive. Periods of legal residence or work in accordance with the Free Movement Directive before and after the end of the transition period are to be included in the calculation of the qualifying period.⁵³ It is notable that once acquired, the right of permanent residence shall be lost only through absence from the host State for a period exceeding 5 consecutive years⁵⁴, whereas under the provisions of the Free Movement Directive this would occur following a period exceeding two consecutive years.⁵⁵ Accumulation of periods is also provided for: periods of legal residence or work before and after the end of the transition period are to be included in the calculation of the qualifying period for permanent residence.⁵⁶

All of the above is essentially aimed at setting up a solution which enables UK citizens (and EU citizens in the UK as well) to rely on provisions similar to current EU free movement law, even if subject to some modifications and conditions. Article 18 of the Draft Agreement on the other hand establishes a new concept: the so-called “settled status.” According to this, EU27 states may require UK nationals, their respective family members and other persons, who reside in their territory in accordance with the Draft Agreement, to apply for a new residence status which confers the rights set out above and “a document evidencing such status which may be in a digital form.” The purpose of this procedure is to verify whether the applicant falls within the personal scope and is entitled to the residence rights as laid down in the Draft Agreement. This is an optional measure that EU27 member states (n.b. and the UK as well) *may* rely on – however if it is applied it will diverge from the principle applicable under the current Free Movement Directive⁵⁷, namely that possession of a document cannot be made precondition for the exercise of a right or the completion of an administrative formality, as entitlement to rights may be attested by any other means of proof.⁵⁸ However the Draft Agreement introduces a number of safeguards: for persons residing in an EU27 state, the deadline for submitting the application shall not be less than 6 months from the end of the transition period; the deadline is

⁵² Article 13 para. 1 of the Draft Withdrawal Agreement.

⁵³ Article 15 of the Draft Withdrawal Agreement. The continuity of residence for the purposes of acquisition of the right of permanent residence shall be determined in accordance with Article 16(3) and Article 21 of Directive 2004/38/EC.

⁵⁴ Article 15 para. 1 Draft Withdrawal Agreement.

⁵⁵ Article 16 para. 4 of Directive 2004/38/EC.

⁵⁶ Article 16 of the Draft Withdrawal Agreement.

⁵⁷ Article 25 of Directive 2004/38/EC.

⁵⁸ S. Peers, EU27 and UK citizens’ acquired rights in the Brexit withdrawal agreement: detailed analysis and annotation, *EU Law Analysis*, 13 March 2018 <http://eulawanalysis.blogspot.com/2018/03/eu27-and-uk-citizens-acquired-rights-in.html> (3 June 2019).

automatically extended if technical problems with registration arise; and further the states shall ensure that “any administrative procedures for applications are smooth, transparent and simple, and that any unnecessary administrative burdens are avoided” and that application forms are kept short, simple, user friendly and adapted to the Draft Agreement.⁵⁹ Criminality and security checks may be carried out systematically on applicants.⁶⁰

Until the end of the transition period, the restriction of the right of residence of UK citizens and family members can take place only in accordance with the Free Movement Directive; conduct following the end of the transition period however may constitute grounds for restricting the right of residence by the EU27 state in accordance with its national legislation.⁶¹ Importantly, the Draft Agreement points out that the procedural safeguards and the right to appeal as laid down in the Free Movement Directive shall apply in respect of the decisions taken by the EU27 states regarding residence rights laid down in the Draft Agreement.⁶²

Although the Draft Agreement should definitely be seen as more beneficial than a no-deal Brexit, the European Parliament and some citizens’ rights groups have noted that some categories of persons are not covered by the Draft, such as non-EU family members of an EU citizen moving to another Member State then moving back to that citizen’s home Member State or non-EU carers for minors who have not left their Member State of birth, and therefore are not covered by EU free movement law but are covered by and derive rights from the very status of EU citizenship.⁶³ A further rather significant difference from current EU law is of course that the Draft Agreement does not provide for intra-EU27 mobility rights, i.e. the right to move freely to another EU27 state for UK citizens living in the EU.⁶⁴ It has been suggested that this may be part of negotiations for the future political relationship, but at the time of writing this is purely speculative. The absence of intra-EU27 mobility rights does of course mean that entitlement to the existing EU law status of long-term resident would be that much more valuable.

3. The rights and situation of Hungarian (and EU) citizens in the UK after Brexit

As set out above, there are two possible scenarios to consider: that the UK leaves the EU without a deal (the so-called ‘no deal’ scenario) and that the UK leaves the EU with a deal. The current impasse over the Draft Withdrawal Agreement has already been set out above, but since it is the only deal ‘on the table’ so to speak at the time of writing, the authors will

⁵⁹ For the full spectrum of conditions and safeguards see Article 18 paras. a)-r).

⁶⁰ Article 18 para. p). Peers points out that this is in contrast to Free Movement Directive [Article 27(3)], which on the contrary postulates that enquiries of this kind “shall not be made as a matter of routine”. Peers, EU27 and UK citizens’ acquired rights..., *ibid.*

⁶¹ Article 20 of the Draft Withdrawal Agreement.

⁶² Article 21 of the Draft Withdrawal Agreement.

⁶³ C.-C. Cîrlig, *Brexit: Understanding the withdrawal agreement and political declaration*, European Parliamentary Research Service (PE 635.595), March 2019, p. 3.

⁶⁴ M. Morris – T. Kibasi: *The Brexit withdrawal agreement: a first analysis*, Institute for Public Policy Research, November 2018 <https://www.ippr.org/files/2018-11/brexit-withdrawal-agreement-nov18.pdf> (3 June 2019).

proceed to consider the implications for Hungarian and other EU27 citizens in the UK after Brexit if the UK leaves the EU having ratified the Draft Agreement.

3.1. 'No deal' scenario

3.1.1. The position of EU nationals living in the UK prior to Brexit Day

From Brexit Day, EU27 nationals – EU citizens – can no longer rely on EU law rights to move to or reside in the UK, and unless there is a new arrangement between the EU and the UK to grant any particular rights, the movement and residence of EU27 nationals to and in the UK will become a matter purely of UK immigration law. The UK government has already put in hand arrangements to create a new special UK law immigration status for EU27 nationals who are resident in the UK prior to Brexit Day. This status is called settled status, it has parallels in Article 18 of the Draft Agreement (see above) and it was initially trailed in June 2017.⁶⁵ The legal basis for the EU Settled Status Scheme is to be found in Appendix EU to the UK's Immigration Rules.⁶⁶ If there is no deal, settled status will exist purely as a matter of UK law and therefore is subject to change by any UK government at a future date, since UK constitutional law does not offer the possibility of entrenchment; the doctrine of parliamentary supremacy does not recognise the existence of any form of superior law which cannot be repealed either by the same parliament which originally enacted the law in question or by any future parliament.⁶⁷ The current UK government has however commented that it does not intend to do this.

Settled status under a no deal will to a large extent follow the approach to the provision of rights to EU nationals resident in the UK in the Draft Agreement. The essence of settled status is that it will permit EU27 nationals and their family members and EEA and Swiss nationals, who are, pre-Brexit Day, lawfully residing in the UK pursuant to their EU law free movement rights, to continue living in the UK after Brexit, with 'the same access as they currently do to healthcare, pensions and other benefits in the UK' which means access to the UK public services that EU citizens resident in the UK are currently permitted to access. The details are set out in the UK Home Office's Statement of Changes in Immigration Rules presented to Parliament on 11 October 2018.⁶⁸

To qualify for settled status, EU citizens will have to show the following:

⁶⁵ The UK's exit from the European Union: safeguarding the position of EU citizens living in the UK and UK nationals living in the EU, CM9464, available from <https://www.gov.uk/government/publications/safeguarding-the-position-of-eu-citizens-in-the-uk-and-uk-nationals-in-the-eu> (3 June 2019).

⁶⁶ Immigration Rules, HC1919. The Immigration Rules constitute a statement of practice to be followed in the administration of the Immigration Act 1971 for regulating the entry into and stay of persons in the United Kingdom.

⁶⁷ Though it has been suggested that there is a class of 'constitutional statutes' which can only be repealed expressly: Laws LJ in *Thoburn v Sunderland* [2003] QB 151.

⁶⁸ <https://www.gov.uk/government/publications/statement-of-changes-to-the-immigration-rules-hc-1534-11-october-2018> (3 June 2019).

- Identity: that they hold the nationality of an EU27 member state or are a qualifying family member of such a person. This is established using their passport (or for a non-EU citizen family member, their biometric residence card) on the identity verification app for the scheme, which checks their nationality and identity remotely.
- Eligibility: that they have been continuously resident in the UK for at least 6 months in any 12 month period for 5 years in a row. This is established largely by data held by the UK Inland Revenue. Those who have been resident for less time may qualify for ‘pre-settled status’.
- Suitability: they pass a criminality check against UK criminality and security databases and where appropriate against overseas criminal databases (access to relevant EU databases may be reduced after Brexit, though the UK government is keen to preserve such access).

It is worthy of comment that, contrary to what was originally indicated in the Statement of Intent, the UK government has now clarified that EU citizens will not be required to demonstrate that they have been exercising their EU Treaty rights to be eligible for settled status.⁶⁹ This is highly significant, as the Free Movement Directive requires EU citizens to hold comprehensive sickness insurance as a condition of residence in another EU member state for more than 90 days, and it has emerged that many EU citizens who have resided in the UK for a very long time have not fulfilled this requirement as they were under the impression that the UK’s universal healthcare system obviated the need for them to do so, with the result that many EU citizens long resident in the UK may not actually have been correctly exercising EU Treaty rights to reside in the UK.

Applications for the settled status scheme have been fully open since March 2019 (with trial schemes open since 28 August 2018), applications can be made online or via an app on Android tablets and smartphones (though not yet iPhones),⁷⁰ and the original fee of £65 (£32.50 for those under 16), which attracted much criticism, was withdrawn by Prime Minister Theresa May on 21st January 2019 with arrangements for fees already paid to be refunded. There are arrangements for those who find online processes difficult to avail themselves of personal assistance to deal with the application for settled status, but it is intended to be a simple and streamlined process. As the date of writing, apparently no application for settled or pre-settled status had been refused.

‘Pre-settled status’ will be available to EU citizens and their family members who arrive before Brexit Day but who will not by then have been continuously resident in the UK for five years.

⁶⁹ See, for example, PO 191401 on Immigrants: EU nationals, 19/11/18.

⁷⁰ The Guardian 29/3/19, Brexit app to work on iPhones by end 2019 – Javid, available from <https://www.theguardian.com/politics/2019/mar/29/android-brexit-app-for-eu-citizens-to-work-on-iphones-says-sajid-javid> (3 June 2019).

They will be permitted to stay until they have been continuously resident for five years, when they will be permitted to apply for settled status.

3.1.2. The position of EU citizens who arrive in the UK after Brexit day under a ‘no deal’ Brexit

Prima facie, no EU or international law rights will attach to such persons and they will be subject to UK immigration law. The Immigration and Social Security Co-ordination (EU Withdrawal) Bill 2017-19 (“the Immigration Bill”)⁷¹ has passed through the Public Bill Committee stage and in accordance with UK parliamentary procedure is due to undergo the Report Stage and Third Reading, on a day to be announced, after which, assuming it passes through these required stages, it will receive the Royal Assent and become law. The effect of the bill is to repeal free movement and associated rights which are derived from EU law, which by virtue of the European Union (Withdrawal) Act 2018⁷² will, after Brexit, have become part of UK law, and to bring EU citizens within the UK’s own domestic immigration law regime. The basic assumption is therefore that EU citizens and their family members will require permission under UK immigration law to enter the UK after Brexit Day. As the UK government has made clear, this will require very numerous and complex amendments to the Immigration Rules. These rules are unlikely all to be implemented by Brexit Day, and therefore the UK government has announced that it will introduce a new status, ‘European Temporary Leave to Remain in the UK’, to bridge the gap between Brexit Day and the new immigration rules being in position.

So what does this new and, apparently, temporary, status entail and what rights will it bestow? In essence, EU citizens (and EFTA nationals) will be permitted to enter the UK without a visa or other immigration permission for up to three months, during which time they will be permitted to work and study in the UK. They will not need to apply for this new status if they are staying in the UK for no more than three months. However, EU citizens who wish to remain in the UK for longer than this initial three month period will be required to apply for European Temporary Leave to Remain status. The process for doing so appears to be similar to the process explained above for the acquisition of settled status, namely requiring proof of identity and a declaration of criminal convictions: those who are a ‘serious or persistent criminal or a threat to national security’ will not qualify for European Temporary Leave to Remain and will be liable to deportation in accordance with the UK’s own deportation threshold.

A person holding European Temporary Leave to Remain will be permitted to remain, work and study in the UK for a period of 36 months from the date of their application. Significantly, the status is temporary, will not be extended, and does not lead to the right of settlement in the UK., either under the current ‘indefinite leave to remain’ regime, or under the new settled status regime. Persons granted this status who wish to remain in the UK after the expiry of the 36 month period will need to apply under the UK’s new, yet to be implemented, immigration rules,

⁷¹ <https://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-8532> (3 June 2019).

⁷² <http://www.legislation.gov.uk/ukpga/2018/16/contents/enacted> (3 June 2019).

for leave to remain, and the Home Office guidance ‘European temporary leave to remain’ published 28 January 2019⁷³ explicitly envisages that some EU citizens qualifying for the status will be required to leave the UK when their status expires. Precisely what the UK’s new immigration regime will permit is yet to be determined as it is currently the subject of a year long consultation period announced on 19 December 2018, but there is expected to be a single ‘skills based’ system for EU and non-EU citizens alike, prioritising those with skills and talents deemed to be needed by the UK economy.⁷⁴

3.2. The UK leaves the EU under the terms of the Withdrawal Agreement

Those negotiating the UK’s exit from the EU reached a political agreement in December 2017.⁷⁵ This was reproduced in legal language as the Draft Withdrawal Agreement and published in March 2018.⁷⁶ The common understanding of the UK and the EU on citizens’ rights is to be found in Part Two of the Draft Agreement. If eventually ratified by both the UK and the EU, the WA will be a treaty between a state and an international organisation.⁷⁷ As explained above (see the explanation about section 13 of the European Union (Withdrawal) Act 2018) UK law provides that the Withdrawal Agreement can only pass into UK law if it is passed by a majority vote in the UK Parliament. At the time of writing, it has been rejected by the UK Parliament three times, largely on the basis of the arrangements it contains for the workings of the border between Northern Ireland, which is part of the United Kingdom, and the Republic of Ireland, which is part of the EU27.

Furthermore, at the time of writing, Prime Minister Theresa May has, following the failure of her government to secure a majority in the UK Parliament to pass the Draft Agreement, stood down as leader of the Conservative party, initiating a contest for a new leader who will, in accordance with accepted political conventions in the UK, become Prime Minister. Both of the remaining candidates for leadership are committed to attempting to renegotiate the Draft Agreement, despite the EU’s consistent assertions that no renegotiation will be permitted to be undertaken. To say that the future position as regards the Draft Agreement is mired in uncertainty is therefore something of an understatement. Steve Peers has argued that citizens’ rights should be ring-fenced from the other issues which form the subject of the negotiation, so that UK nationals resident in the EU27 and EU citizens resident in the UK have legal certainty and

⁷³ <https://www.gov.uk/guidance/european-temporary-leave-to-remain-in-the-uk> (3 June 2019).

⁷⁴ HM Government, ‘The UK’s future skills-based immigration system’ December 2018 <https://www.gov.uk/government/publications/the-uks-future-skills-based-immigration-system> (3 June 2019).

⁷⁵ Joint report from the negotiators of the EU and UK government on progress during phase 1 of negotiations under Article 50 TEU on the UK’s orderly withdrawal from the EU (8 December 2017). Available at https://ec.europa.eu/commission/sites/beta-political/files/joint_report.pdf (3 June 2019).

⁷⁶ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/691366/20180319_DRAFT_WITHDRAWAL_AGREEMENT.pdf (3 June 2019).

⁷⁷ There is some doubt as to whether the Vienna Convention on Treaties would apply to it. See <https://research-briefings.parliament.uk/ResearchBriefing/Summary/CBP-8463>.

See also ‘EU Exit: Legal Position on the Withdrawal Agreement’, Cm9747 Available at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/761153/EU Exit - Legal position on the Withdrawal Agreement.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/761153/EU_Exit_-_Legal_position_on_the_Withdrawal_Agreement.pdf) (3 June 2019).

protection and continuity of rights if the UK ends up leaving the EU without a deal.⁷⁸ To date this has not happened, nor does it seem particularly likely. Michel Barnier, the EU's chief negotiator, has recently dismissed attempts by the UK's current Brexit Secretary, Stephen Barclay, to settle the question of citizens' rights in a separate agreement to protect EU and UK citizens in the event of a no deal.⁷⁹ The Draft Agreement being therefore currently the only basis available to the UK to leave the EU with a deal, the authors consider its proposals remain worth consideration. In any event, the proposals on citizens' rights being one of the least contentious parts of the Draft Agreement, in the event of a renegotiation it is probably likely that these proposals would find their way into any new agreement without any substantial change.

If the Draft Agreement is adopted in the form currently drafted, its basic provisions are as follows. It envisages two distinct time periods: a transitional period lasting until December 2020 during which time the EU acquis and any changes to it will apply in the UK. For the duration of the transitional period, the Draft Agreement provides that the UK will continue to a large extent to operate as a member state, and UK nationals to function to a large extent as EU citizens. The reservation relates to the rights of both UK nationals and the UK itself to participate in the EU's decision-making processes and governance: ie for UK nationals, the right to stand and vote in local and European parliamentary elections, and the right to participate in citizens' initiatives, and for the UK itself, to participate in the EU institutions, on the basis of the principle agreed between the negotiators of 'everything but institutions'.⁸⁰ During the transitional period, the CJEU would have continued jurisdiction in the UK in respect of EU law, including EU law relating to citizens' rights.

Following the expiry of the transitional period on 31 December 2020, citizens' rights would no longer be subject to EU law but would instead be regulated by the provisions in Part Two of the Draft Agreement. This covers EU citizens, and UK nationals who are legal residents or frontier workers, and the family members of holders of such rights. It guarantees the following rights:

- a) Title II, Chapter 1: residence rights. The right of permanent residence is granted to both categories of citizens mentioned above who have resided legally according to EU law in their host state for a continuous period of five years. This is lost after five years absence from the state of residence. There are complex provisions for deadlines by which applications for the right of permanent residence have to be submitted, but once these rights are granted pursuant to the Draft Agreement, they are for life.

⁷⁸ S. Peers, UK citizens in the EU after Brexit: Securing unilateral guarantees after a 'no deal' Brexit, *EU Law Analysis*, 3 July 2018, <http://eulawanalysis.blogspot.com/2018/07/uk-citizens-in-eu-after-brex-it-securing.html> (3 June 2019).

⁷⁹ See, for example, A. Tolhurst, Brexit Secretary urges EU to ring-fence citizens' rights even under no-deal, *Politics Home* 18 June 2019, <https://www.politicshome.com/news/uk/foreign-affairs/brexit/news/104682/brexit-secretary-urges-eu-ring-fence-citizens'-rights> (3 June 2019).

⁸⁰ Articles 6 and 123 Draft Withdrawal Agreement (Institutional arrangements).

- b) Title II, Chapter 2: rights of workers and self-employed persons. Such persons will enjoy the rights in Articles 45, 49 and 56 TFEU. This includes frontier workers though not posted workers, the latter being considered to be service providers, who are not covered by the WA. As Porchia notes, this could lead to difficulties, it often being difficult to distinguish service providers from frontier workers.⁸¹
- c) Title III, coordination of social security systems. Such provisions are based on Article 48 TFEU. This provision is meant to be ‘dynamic’ which means that changes in EU legislation on social security coordination will be incorporated into the Draft Agreement and cover those within its scope.

The above constitutes a summary only of the relevant provisions and for further detail the Draft Agreement itself should be consulted. Of concern to EU citizens in the UK however is the extent to which they can rely on rights to which they are entitled under the terms of the Draft Agreement. The Joint Report⁸² requires the UK to table a bill, the Withdrawal Agreement and Implementation Bill, to implement the Draft Agreement, that the provisions relating to citizens’ rights will have effect in primary legislation, and that they will prevail over inconsistent or incompatible legislation. Porchia⁸³ has referred to this provision as a ‘mini-supremacy’ clause; it is to be assumed that the bill would be categorised as a ‘constitutional statute’ following the cases of *Thorburn v Sunderland CC* [2002] 2 WLR 247, later upheld in *BH v The Lord Advocate (Scotland)* [2012] UKSC 24, to which the UK’s traditional doctrine of implied repeal, under which, where two Acts of Parliament conflict, as in *Ellen Street Estates v Minister of Health* [1934] 1 KB 590, the earlier is deemed repealed by implication to the extent of the conflict, does not apply.

However, along with the rest of the Draft Agreement, the fate of this requirement is far from guaranteed. The UK government, recognising the many concerns that have been expressed about the potential for future governments to downgrade the rights of EU citizens in the UK, has asserted that the EU (Withdrawal) Bill will “underpin the rights of residence in UK law and...provide a means of redress where these rights are not properly implemented or where other legislation is inconsistent with the Withdrawal Agreement”⁸⁴ and that individuals can assert their rights in the UK courts. Nevertheless, since the EU Settlement Scheme is to be legislated for the most part through the Immigration Rules, which are a form of secondary legislation, there are grave concerns about the durability of the arrangements agreed and the guarantees provided, given the ease with which secondary legislation could be changed at a future date. The Windrush scandal, which has led to the denial of residency and other rights to many

⁸¹ O. Porchia, Citizens’ rights in the post Brexit scenario. *ERA Forum*, Vol. 19. No. 4. April 2019, pp. 585-595.

⁸² Joint report from the negotiators of the EU and the UK, *ibid*.

⁸³ Porchia, *ibid*, p. 591.

⁸⁴ UK Government, White Paper on legislating for the Withdrawal Agreement, 24/7/18, paragraphs 29 and 30. Available from <https://www.gov.uk/government/publications/legislating-for-the-withdrawal-agreement-between-the-united-kingdom-and-the-european-union> (3 June 2019).

elderly people who came to the UK from the Caribbean after the end of World War 2 and made their lives there, has done nothing to assuage such concerns.⁸⁵

4. Concluding remarks

Unsurprisingly, the Brexit process is a major concern not only for the UK and the EU, but their citizens as well. Notwithstanding the legal and political questions raised at the supranational and national level, the rights and position of citizens remains one of the most crucial issues.

Despite lip service paid to prioritising citizens' rights after Brexit, the position both for EU citizens resident in the UK and UK citizens resident in the EU cannot be said to be particularly happy as things stand. What is really missing at the time of writing is any certainty. Advocate General Szpunar has put it thus: "in the absence of a withdrawal agreement [...] things being as they are, the UK will leave the EU. This is the...default position. All else may be written in the stars – and it does not look as if the stars are those of the European flag".⁸⁶ It seems very strange indeed having to imagine that EU27 citizens and UK citizens would be treated as third country nationals – although without an agreement this will become a possibility. For UK citizens, the European Travel Information and Authorization System (ETIAS)⁸⁷ will also apply for example.⁸⁸ It is no wonder that there has been a surge in UK citizens acquiring (and aiming to acquire) another EU citizenship in recent times.⁸⁹ (UK law allows dual citizenship, though many EU countries' nationality laws do not.)⁹⁰

The authors have above attempted to summarise the provisions contained about citizenship in the lengthy (599 pages) Draft Agreement which provide for some form of special, protected status for EU citizens resident in the UK and UK citizens resident in the EU. But there is no certainty that the Draft Agreement will be ratified and come into force. Indeed, given that the UK Parliament has soundly rejected it three times already, and that the politicians jostling to be elected as leader of the Conservative Party and therefore become UK Prime Minister seem intent upon attempting to demonstrate the most machismo in the Brexit negotiations, asserting their intentions to reopen the Draft Agreement, and walk away if renegotiation, something the EU denies will be possible, does not bear more and more magical fruit in a few short weeks than have proven possible to cultivate in three long years, that appears to be an understatement,

⁸⁵ See, for example, numerous articles in The Guardian newspaper: <https://www.theguardian.com/uk-news/windrush-scandal> (3 June 2019).

⁸⁶ Advocate General Szpunar, Opinion 7/8/18, case C-327/18 PPU, Minister for Justice and Equality v RO, para. 1.

⁸⁷ 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 [OJ L 236, 19.9.2018, p. 1–71].

⁸⁸ EU Commission confirms ETIAS requirement for British Citizens. <https://etias.com/articles/eu-commission-confirms-etias-requirement-for-british-citizens> (3 June 2019).

⁸⁹ Surge in Britons getting another EU nationality <https://www.bbc.com/news/uk-politics-44629193> (3 June 2019).

⁹⁰ E. Guild, Brexit and the Challenge of Citizenship: British passports for EU Citizens living in the UK? *CEPS Commentary*, 22 May 2017, https://www.ceps.eu/wp-content/uploads/2017/05/EG_CitizenshipChallengeAfterBrexit.pdf (3 June 2019).

and the future of the Draft Agreement seems precarious in the extreme. Its ratification by both the UK and the EU is a precondition of legal certainty, and if as seems not unlikely, the Draft Agreement ends up consigned to the dustbin of history, the position of EU citizens in the UK and UK citizens in the EU remains uncertain and largely dependent on the immigration laws of the country of residence, as outlined above.

Perhaps not surprisingly, suggestions have been made that citizens' rights be ring fenced in a specific, dedicated agreement, in case of a 'no-deal' Brexit, cheerful preparedness for which outcome is fast becoming a touchstone and earnest of good faith in the race in the UK to lead the Conservative party and therefore, for the time being, the UK.⁹¹ However, the EU's approach adopted to date has been to aim for one over-arching agreement in which all issues addressed stand or fall together, and a bespoke agreement on citizens' rights cannot be said to be anything other than optimistic speculation. Indeed, this was the commitment made by the European Council at the start of the negotiations, shortly after the UK triggered Article 50 TEU:

“Negotiations under Article 50 TEU will be conducted in transparency and as a single package. In accordance with the principle that nothing is agreed until everything is agreed, individual items cannot be settled separately.”⁹²

Furthermore, as noted above Michel Barnier, the EU's chief negotiator, has recently dampened any incipient hopes that the question of citizens' rights might be hived off and settled in a separate agreement to protect EU and UK citizens in the event of a no deal. It is to be hoped that in the event of a 'no deal' scenario, the position of citizens is likely to be high in the list of concerns of the EU, and the UK has already put in place arrangements summarised above, which even the hardest of Brexiteer Prime Ministers would be unlikely to attempt to unpick in a hurry. But in the absence of such or similar rights being enshrined in an international agreement between the EU and the UK, the rights of EU citizens in the UK will simply be enshrined in national UK legislation, subject to repeal if the government of the day so wishes and decides that any international opprobrium which may attach to such changes is worthwhile politically. That much of the detail of what is of necessity a very detailed issue is projected to be contained in secondary legislation which is disconcertingly straightforward to amend is a matter of grave concern. Of course, that there are approximately 1.3 million UK citizens resident in the EU does perhaps offer some reassurance. There have been many calls for both UK and EU27 citizens who heeded the clarion call afforded by EU free movement rights to contribute to the European project and exploit these rights, not to be used as bargaining chips and this is obviously morally correct. It is disappointing that even the EU appears now to be impliedly raising the spectre that the clarion call of free movement may retrospectively turn out to have been a siren call and leave UK and EU citizens at the mercy of a disparate patchwork of national immigration laws and unsure about rights to healthcare and pensions, to mention just two of the

⁹¹ Peers, S. Ending the limbo: the case for ring-fencing EU27 and UK citizens' rights after Brexit – with a proposed text, *EU Law Analysis*, 1 March 2018, <http://eulawanalysis.blogspot.com/2018/03/ending-limbo-case-for-ring-fencing-eu27.html> (3 June 2019).

⁹² European Council, Guidelines, 29 April 2017, para 2. <https://www.consilium.europa.eu/en/press/press-releases/2017/04/29/euco-brexite-guidelines/> (3 June 2019).

relevant concerns, on which they may have based their decisions to move in the first place.⁹³ How fundamental now is their status as EU citizens destined to be in the dusty arena of Article 50 negotiations?

⁹³ Tolhurst, *ibid.*

The significance of European and international efforts to end statelessness as possible methods for decreasing refugee influxes

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According to the United Nations High Commissioner for Refugees (UNHCR) there are nearly 10 million people denied citizenship, with a child being born stateless every 10 minutes. Statelessness is an emerging issue on the international fora, however regulations on the deprivation and acquisition of nationality are not satisfying and they mostly are not able to prevent or end statelessness. But why is it so important to give everyone citizenship? Citizenship can be considered rather an emotional bond with a certain country than being solely a legal relationship. Whenever an individual lacks this kind of link with a state, he would be more likely to abandon it. However, being stateless – possibly not even having any identification documents at all – makes it more difficult to be legally recognized by any other country. In the end stateless people can easily become refugees. This study aims to examine the sovereign right of states to adopt their own rules on nationality, and also to assess the European Union and international efforts and actions aiming to end statelessness, such as the latest campaign of the UNHCR, #IBelong.

Keywords: European Union, UNHCR, Statelessness, Migration, Refugees, Citizenship, Nationality, Sovereignty, human rights

1. Introduction

It is obvious to say that the international fora lacks a system yet that would be able to effectively serve the aim to reduce and end statelessness. Thus, the United Nations High Commissioner for Refugees (UNHCR) became engaged with this idea, which is also reflected by their new campaign aiming to facilitate ending statelessness by 2024.¹ The European Union also addressed statelessness – however mostly as a consequence of the major refugee crisis, that hit the continent in 2015. As a result, an Action Plan had been worked out within the framework of the European Migration Network.

Unfortunately, this goal might be somewhat unrealistic, mainly because the legal issue of statelessness is so complex – including the problem of varying national legal systems, the issue of weak enforcement of international law and of course the relevant political and social factors.²

¹ #IBelong campaign, <http://www.unhcr.org/ibelong/> (9 May 2019).

² For example, the insufficient operation of the public administrations of developing countries, like the lack of birth registration and also constant wars that lead to humanitarian crises are all considered as obstacles in the actions taken to reduce and prevent statelessness.

In my opinion, this current aim is not achievable according to the existing regulations, since it would be necessary to harmonize not only international law, but regional laws as well, such as the legislation of the European Union, which is able to influence all of the legal systems of its Member States. However, the EU is not all devoted to the protection of stateless persons, it has again listed human rights protection behind political and economic interests. Although, the Union adopted an Action Plan to address statelessness³ in 2017, which aims to first map the vulnerable groups of individuals (such as elderly, unaccompanied minors) and to accept legal guarantees on their protection, also to harmonize the concerning national provisions based on the existing good practices.⁴

But what is needed exactly to end statelessness globally? Not only common legislation across all Europe or internationally, but the reform of public administrations in the developing countries as well. To accomplish that seems very unlikely, if we also consider the fragile interior politics of those states, not to mention the question of their sovereignty and the lack of effective law enforcement at the level of international law. For a satisfying solution, an overall change of attitude of governments and world politics is crucial, but it is a very ambitious idea. What could be a real denouement however, is a more human right focused approach from the global policy makers to at least come up with initiatives that could positively discriminate those who lack citizenship and to handle the “problem” from a more practical point of view, based more on country specific provisions.

What has to be emphasized, statelessness itself is not a mere problem of the so called third world countries. Even in European Union Member States, there are many individuals to be found with „undetermined citizenship“, like for example 7 % of the Estonian population, where mostly ethnic Russians and other Russian-speaking minorities had not been awarded a citizenship after the dissolution of the USSR and eventually became stateless.⁵

In order to see the broader picture, every aspect of statelessness has to be considered and examined from the legal phenomenon of nationality to the existing good practices. It should be a well understood interest of every country to reduce the number of stateless people, since in one hand it could reduce the number of illegal migration and refugee influxes, and on the other hand also would facilitate the social welfare of the individuals, which is again favourable for the country of residence.

³ Europe: Action plan to address statelessness in the EU <https://ec.europa.eu/migrant-integration/news/europe-action-plan-to-address-statelessness-in-the-eu> (9 May 2019).

⁴ Previously there were also efforts from the European Union to extend citizenship into a whole new level by the introduction of European Union citizenship, which in fact does not substitute but complements Member State’s citizenship. The problem of statelessness can however also arise in a context relevant from the point of view of EU law – cf. in this regard Case C-135/08 Rottmann (EU:C:2010:104). For an analysis see Á. Mohay, A Rottmann ügy: újabb adalékok az uniós polgárság és a tagállami állampolgárság összefüggéseihez, *Jogesetek Magyarázata*, Vol. 2. No. 2. 2011, pp. 50-58.

⁵ UN High Commissioner for Refugees (UNHCR), *Mapping Statelessness in Estonia*, 2016, p. 16. www.refworld.org/docid/5a338b5c4.html (9 May 2019).

This study also aims to introduce a few examples how different countries has struggled to cope with statelessness or how they had been able to satisfyingly regulate the issue and hereby how stateless individuals had been converted to be contributing parts of a nation's society.

2. The right to nationality, or the international provisions aiming to reduce and prevent statelessness

The international protection against statelessness has three pillars of regulations. According to this division, the first pillar contains legal measures aiming to protect human rights of stateless persons, in the second pillar, there are regulations to reduce the number of stateless individuals, and at last the measures on ending and preventing statelessness. This study will introduce the provisions aiming to reduce and prevent statelessness by examining the goals of the latest campaign of the UNHCR and the concerning European legislation and how they might affect the emergence of major future refugee influxes. Although, the human right protection of stateless individuals⁶ is a topic that would worth an endless discussion, however it stays out of the perspective of this study.

This paper intends to highlight the links between statelessness and forced displacement, how statelessness can be considered as its risk factor and how forced displacement may contribute to increased risks of statelessness.

Provisions on stateless people include the legal sources, that contain specific regulations on statelessness, such as the international treaties, but also includes national laws related to the matter of citizenship. Moreover, this ternary classification is affected by the law of the European Union and by other regional treaties⁷ that also have impact on the international measures facilitating harmonization of the provisions of statelessness.

The most significant international document on the reduction of statelessness is the 1961 New York Convention on the Reduction of Statelessness, which declares important guarantees in order to facilitate the acquisition of citizenship.⁸ For reducing the number of stateless persons - and to finally end statelessness – the adoption of harmonized regulations on the acquisition and deprivation of nationality and ensuring such minimum standards, which cannot be ignored by any domestic laws are beyond necessary. According to the division applied here, provisions on

⁶ The most relevant treaty on the topic is the 1954 UN Convention relating to the Status of Stateless Persons, what aims to define the term stateless in line with their right protection and also declares obligations that bound stateless people in the host countries. The document does not have a taxative listing of the rights that stateless persons are entitled to, as it only declares that nothing in the Convention shall be deemed to impair any rights and benefits granted by the contracting parties to stateless persons apart from the treaty. So it states that countries who are being parties in the Convention can adopt more favourable rights, than it is already secured by the Convention, but on the other hand, minimum rights shall be provided under any circumstances according to the document.

⁷ E.g. the Council of Europe's European Convention on Nationality from 1997.

⁸ 19 EU Member States have acceded to the 1961 Convention (AT, BE, BG, CZ, DE, DK, FI, HU, HR, IE, IT, LT, LV, NL, PT, RO, SK, SE, UK). France signed it, but has not yet ratified. 8 Member States (CY, EE, EL, ES, LU, MT, PL, SI) have not acceded. https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=V-4&chapter=5&clang=en (9 May 2019).

reducing statelessness are considered in Articles 1-4 of the 1961 Convention, i.e. the measures on acquiring citizenship at birth. Grammatical interpretation of the Convention may lead us to the conclusion that it only regulates how to decrease the number of stateless individuals, but with a teleological approach – in which the UN’s efforts and goals towards human rights protection have to be considered in the first place – we should come to a conclusion, that the 1961 Convention undoubtedly aimed to end statelessness as well. It is also confirmed by the fact that there is no separate treaty aiming to end statelessness, however, it is evident that this goal is crucial according to the work of the UNHCR. Therefore, provisions that regulate the acquisition and continuation of citizenship can be considered as regulations for ending statelessness.

Article 7 of the 1989 Convention on the Rights of the Child⁹ proclaims that every child shall be registered immediately after birth and they have the right to acquire a nationality. Accordingly, the provisions of the 1961 Convention on the acquisition of citizenship should be the basis of practical implementation, which - in an ideal state - could not be bypassed by any other national legislation. However, the certain alternative provisions¹⁰ of the Convention stand as an impediment to the harmonization of national laws, since it makes possible for national legislations to decide individually when a child - who otherwise would be stateless - could automatically be granted nationality at birth, and in which manners they shall apply for one. Article 1 of the 1961 New York Convention on the Reduction of Statelessness regulates the granting of nationality at birth only as an option for national legislations, rather than make it exclusive.

Thus, the acquisition of citizenship for stateless children is theoretically secured, but in practice, during the adoption of domestic laws – since states are willing to keep this part of their sovereignty- they cannot be enforced, resulting in alternative national measures on the issue.

In order to reduce the number of stateless people, preventing statelessness could be a solution. But only and if every individual, who is being born would be granted citizenship, regardless of the nationality of the parents. In other words, the Convention should make the acquisition of citizenship at birth compulsory in case of children, and by that exclude the possibility of varying national provisions. Although, it stays out of some state’s interest to grant nationality *ex lege*, not to mention states that are not State Parties to the Convention, since they are only obliged by other international human rights standards, which otherwise could not be enforced effectively neither in international, nor in national laws.

3. International measures aiming to prevent statelessness

The United Nations High Commissioner for Refugees has aimed to end statelessness by 2024. International measures that aim to end and prevent statelessness are those that – including the

⁹ The Convention on the Rights of the Child is the only legally binding international treaty that declares a child’s right to citizenship. Over and above only Article 15 of the 1948 Universal Declaration of Human Rights (UDHR) ensures that everyone has the right to nationality, however the document has no binding force, since being a General Assembly Declaration.

¹⁰ E.g. Article 1, Paragraph 1 a) – b)

treaties on statelessness issues and even the treaties on general human rights – regulate naturalization processes, or in other words the acquisition and upholding of citizenship for persons who became stateless by various reasons. Ending and preventing statelessness is only achievable if the national provisions on naturalization – in case of children and adults too- are harmonized and if they would offer more advantageous rights for those individuals.¹¹

Before introducing the measures that were accepted in order to prevent statelessness, it is necessary to distinct what are the reasons for becoming stateless, and for a detailed description, it is essential to reveal the difference between de iure and de facto stateless.

Article 1 Paragraph 1 of the 1951 Refugee Convention defines the term stateless as someone who is not considered as a national of any state. Although the Convention does not contain any definition either of de facto nor of de iure statelessness, but the subjects encompassed by Article 1 can be identified as de iure stateless persons. The distinction of de iure and de facto stateless does not appear in any of the legally binding international documents, but there are some recommendations among “soft law” regulations like the Final Act of the Convention on the Status of Refugees and Stateless Persons, the Final Act of the 1961 Convention on the Reduction of Statelessness, or Recommendation 696/1973 of the Council of Europe on certain aspects of acquisition – which all refer to the term de facto stateless. However, sadly these soft law regulations are mostly ignored by states.¹²

De facto stateless persons do have a formal citizenship, but lack the bond towards the state of nationality - or they do have it, but have not acquired the citizenship of that state - therefore the criteria of effective nationality¹³ is not present, what is otherwise necessary to obtain nationality.¹⁴ The term de facto stateless also appears in the Final Act of a UNHCR Expert Meeting

¹¹ According to my opinion the cases of acquisition at birth are considered to reduce the number of stateless individuals, in contrary with the national provisions on advanced naturalization which aim to prevent/end statelessness.

¹² G. Gyulai, *A nemzetközi védelem nem EU-harmonizált formái Magyarországon*, p. 18. <http://helsinki.hu/wp-content/uploads/19.pdf> (9 May 2019).

¹³ The principle of „effective nationality” was declared in the Nottebohm case. Nottebohm (Liechtenstein v. Guatemala, [1955] ICJ 1) “In this case, Liechtenstein claimed restitution and compensation from the Government of Guatemala on the ground that the latter had acted towards Friedrich Nottebohm, a citizen of Liechtenstein, in a manner contrary to international law. Guatemala objected to the Court’s jurisdiction but the Court overruled this objection in a Judgment of 18 November 1953. In a second Judgment, of 6 April 1955, the Court held that Liechtenstein’s claim was inadmissible on grounds relating to Mr. Nottebohm’s nationality. It was the bond of nationality between a State and an individual which alone conferred upon the State the right to put forward an international claim on his behalf. Mr. Nottebohm, who was then a German national, had settled in Guatemala in 1905 and continued to reside there. In October 1939 — after the beginning of the Second World War — while on a visit to Europe, he obtained Liechtenstein nationality and returned to Guatemala in 1940, where he resumed his former business activities until his removal as a result of war measures in 1943. On the international plane, the grant of nationality is entitled to recognition by other States only if it represents a genuine connection between the individual and the State granting its nationality. Mr. Nottebohm’s nationality, however, was not based on any genuine prior link with Liechtenstein and the sole object of his naturalization was to enable him to acquire the status of a neutral national in time of war. For these reasons, Liechtenstein was not entitled to take up his case and put forward an international claim on his behalf against Guatemala.” <http://www.icj-cij.org/en/case/18>

¹⁴ Handbook on protection of stateless persons under the 1954 convention relating to the status of stateless persons, UNHCR, Geneva 2014, p. 5. <http://www.unhcr.org/protection/statelessness/53b698ab9/handbook-protection-stateless-persons.html?query=de%20facto> (9 May 2019).

from 2010, which had some major comments on the status of stateless persons. The document claims that de facto stateless is a person who stays outside of its country of nationality and is unable to or for valid reasons are unwilling to avail themselves to the protection of that country, where protection refers to the right for consular and diplomatic protection of the state of nationality, also implies the right to return to that country.¹⁵

Also to support the precise distinction of the two categories the UNHCR has issued guidelines on the exact interpretation of the definition of a stateless person.¹⁶ It is important because it helps to decide whether a person is stateless or a refugee, as it is vital for authorities not to confuse these categories.

The phenomenon lacks common international definitions, and the application of this concept has drawn concerns among the members of the international community, since this certain distinction could be problematic. The lack of detailed and compulsory provisions on de facto and de iure stateless persons may cause varying national provisions, which would weaken the otherwise already inefficient international law enforcement and which may have disadvantageous effects on the status of stateless individuals. In case of deficient core international provisions, without an exact definition of who can be considered as de facto or de iure stateless, hypothetically the national provision could be adopted in a way that may cause the exclusion of de iure¹⁷ stateless persons from application of the protective measures, which would make their status more insecure.¹⁸

The deprivation of citizenship – and statelessness as a possible result – is caused by different reasons, one of them being the case of de facto stateless persons. They do have “formal” citizenship, however those individuals lack “effective nationality” with the state. Altogether it creates an incomparably insecure legal status, with a least level of state protection for them. What states could do for them is to acknowledge a stateless status and to apply more advantageous measures during their naturalization process.

It also occurs that a person becomes de facto stateless because the country of origin lacks any central government – mostly as a result of wars or other exceptional conditions – preventing the state to provide diplomatic protection or to have accurate birth registration. It is now evident, that different reason could stand behind becoming de facto stateless. Why is it significant to make a distinction on de facto and de iure stateless then? When deciding on this certain status, the categories of de facto stateless persons and refugees may concur. Especially in countries

¹⁵ UNHCR, Expert Meeting - The Concept of Stateless Persons under International Law (“Prato Conclusions”), May 2010, <http://www.refworld.org/docid/4ca1ae002.html> (9 May 2019).

¹⁶ UNHCR, *Guidelines on Statelessness No. 1: The definition of ‘Stateless Person’ in Article 1(1) of the 1954 Convention relating to the Status of Stateless Persons*, HRC/GS/12/01, 20 February 2012, <http://www.unhcr.org/refworld/docid/4f4371b82.html> (9 May 2019).

¹⁷ A de iure stateless person is someone who is declared stateless according to Article 1 Paragraph 1) of the 1954 Convention Relating to the Status of Stateless Persons.

¹⁸ UN High Commissioner for Refugees (UNHCR): Expert Meeting - The Concept of Stateless Persons under International Law (“Prato Conclusions”) 2010. Section II.A. <http://www.refworld.org/docid/4ca1ae002.html> (9 May 2019).

that are facing armed conflicts, it is very common that its nationals lack any proper identification documents, and the country of origin – due to its interior malfunctions – would not be able to prove the existence of citizenship, or even to replace such documents, which preclude the affected persons from availing themselves of the rights that are secured by effective nationality.¹⁹

Therefore, among refugees many de facto stateless persons can be found, but whose status is the most vulnerable are those who would not be entitled to be granted any of the international protection statuses, neither as refugees nor as subjects of subsidiary protection, since they fall outside the scope not only of international protection, but also of the right of protection for stateless persons. For them, the acquisition of nationality is crucial, but without being considered stateless, that is hardly possible. As a conclusion, it would be essential above all to declare the definition of de facto stateless at international level, which is achievable by a more detailed and extensive regulation of the subjects of the 1954 Convention.²⁰

Factors that contribute to statelessness should be considered as significant in the actions that aim to prevent increasing statelessness. By examining those reasons, the issues that the international and national legal systems have to find solutions for in order to achieve the aim of ending statelessness could be revealed.

The first hypothetical reason of statelessness is the case of de facto stateless persons, which affects large groups of individuals. However, the most common reason for statelessness is the deprivation of nationality, which happens by denaturalization or by renunciation. In fact, other reasons can stand as grounds for statelessness as well, for instance the discrimination of minority groups in so-called successor states – when members of different ethnicities could not obtain the nationality of the country of residence, typically in Asia or in the Soviet successor states. Even more, the exclusive application of the principle of *ius sanguinis*²¹ and the conflict of legal systems using the principles *ius sanguinis* and *ius soli*²² can lead to statelessness also. In some

¹⁹ Such rights are the right to avail of diplomatic or consular protection, but also the right to obtain travel documents.

²⁰ For example, former Russian nationals in Estonia can be considered as de facto stateless persons, who were deprived their nationality after the declaration of Estonian independence in 1991, and who were not granted any other nationality since then. The issue affected more than one-third of the population, but most of those individuals obtained Estonian or other nationality – since after the dissolution of the Soviet Union Estonian citizenship was only granted *ex lege* to whom had been nationals to the country before – although many remained in the category of individuals with undefined citizenship. In 2012 such de facto stateless persons gave 7 percent of the total population. Their status is insecure even until today, and it is not clear why Estonia upholds the status of former Russians as de facto stateless, who otherwise fulfil the criteria of effective nationality. G. Mihăiță – M. Sebe: *Estonia's Non-Citizens, Citizens of the European Union*, European Institute Romania, 2015, p. 2. <https://citizens-rights.euroalter.com/wp-content/uploads/2016/01/Mihaita-and-Sebe-Estonia's-Non-Citizens-Citizens-of-the-European-Union-2015.pdf> (9 May 2019).

²¹ According to the principle of *ius sanguinis* (right of blood) children at birth (or at adoption) will automatically obtain one or both nationality of the parents, regardless of their place of birth.

²² According to *ius soli* (right of the soil or birthright citizenship) the child will obtain the nationality of the states that he/she was born in, regardless of the nationality of the parents. For example, see Article 1. Paragraph 1) a) of the 1961 Convention.

states even the poor administrative or other state practices (like impossible deadlines, high cost of the proceedings) may result in the deprivation of citizenship.²³

It is now evident that there are numerous factors that can cause statelessness, so the national and international actions aiming to eradicate statelessness may focus on how to prevent statelessness.

The legal basis for the instructions on preventing statelessness can be found in some international treaties. This section aims to introduce their effect on naturalization process, which is considered as a primary tool in preventing statelessness.

First and most important among the treaties that exclusively address statelessness issues is the 1961 New York Convention on the Reduction of Statelessness, but there is also another major document that contains measures on preventing statelessness, the 1954 Convention relating to the Status of Stateless Persons.²⁴ The 1961 Convention implies some guarantees on the deprivation of citizenship when describing the cases when signatory parties are obliged to uphold nationality, even if the state's legal systems allow renunciation, deprivation or other cases of losing nationality, or if their application would end up causing statelessness. Moreover, in Article 32 of the 1954 Convention provisions directly on naturalization can be found, however those are too general to be able to facilitate the reduction of statelessness.²⁵ The lack of detailed international provisions on naturalization means an obstacle for the provisions aiming to end statelessness, since national laws on the topic may vary.²⁶

It is crucial to have common measures on naturalization, since the acquisition of citizenship can be automatic at birth²⁷ and non-automatic, if it requires the approval of by the individual or a

²³ Á. Ambrus, Hontalanság, ENSZ egyezmények és az Egyesült Nemzetek Menekültügyi Főbiztosságának tevékenysége, *Acta Humana*, No. 37-38, 1999, pp. 11-17. Cited by K. Kisteleki, *Az állampolgárság fogalmának és jogi szabályozásának történeti fejlődése - koncepciók és alapmodellek Európában és Magyarországon*, ELTE, Budapest 2009, p. 22.

²⁴ 24 EU Member States are State Parties to the 1954 Convention (AT, BE, BG, CZ, DE, DK, ES, FI, FR, GR, HU, HR, IE, IT, LT, LU, LV, NL, PT, RO, SI, SIK, SE, UK). CY, EE, MT and PL have not yet acceded. https://treaties.un.org/Pages/ViewDetailsII.aspx?src=TREATY&mtdsg_no=V-3&chapter=5&Temp=mtdsg2&clang=en (9 May 2019).

²⁵ The regulations on naturalization in Article 32 of the UN 1954 Convention on the Status of Stateless Persons: „The Contracting States shall as far as possible facilitate the assimilation and naturalization of stateless persons. 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.”

²⁶ Also, there are provisions on naturalization in the 1961 Convention, for instance in Article 1, but those can be considered as measures on the reduction of statelessness, contrary to its Article 5 paragraph 2) - which also contains advantageous measures on the naturalization of children who born out of wedlock and lose their nationality because of recognition or affiliation, when saying that he/she should be given an opportunity to recover nationality by a written application – which is concerned as a regulation on the facilitation of national naturalization processes.

²⁷ In other words, when applying *ius soli* or *ius sanguinis*, but the 1961 also allows the acquisition of nationality upon application by children who otherwise would become stateless. The fact of birth does not grant nationality for those children, so it could be considered as a non-automatic way to obtain nationality. (Article 1. Paragraph 1) b) of the 1961 Convention on the Reduction of Statelessness: “...Nationality granted in accordance with the provisions of this paragraph shall be granted: ...upon an application being lodged with the appropriate authority, by or on behalf of the person concerned, in the manner prescribed by the national law. Subject to the provisions of paragraph 2 of this Article, no such application may be rejected. “)

state authority.²⁸ In case of naturalization, citizenship is granted upon an initiative of the individual or the state itself.²⁹ Since application is an essential part of the naturalization process, thus all types of naturalization is considered as non-automatic methods, however they are not regulated in any of the concerning international documents. The lack of international provisions heavily influence the status of stateless persons, because in such case the different domestic laws will decide. Usually, stateless persons are less-informed about the naturalization rules of a country, and very often it is not them who decide which state's nationality they would obtain.³⁰

It is very unlikely that the international community would accept common rules on naturalization processes in the near future, since states still do not want to give up even the slightest part of their sovereign rights to decide the rules of acquisition and deprivation of nationality, like it was secured in Article 1 of the 1930 Hague Convention on Certain Questions Relating to the Conflict of National laws.³¹

Articles 5-10 of the 1961 New York Convention contain the cases of „continuation“ of nationality. These provisions are aiming to ensure unified legislation in different national legal systems. The international measures undoubtedly try to ensure this goal, but the lack of precise measures always result in a conflict of national laws. The already existing rules on the uphold of nationality are significant, in terms of containing such framework of regulations, that are guarantees in the law-making processes on naturalization, and what states should always consider in order to avoid international prosecution.³² The document rules, that any change in the personal status (such as marriage, termination of marriage, legitimation, recognition or adoption) may cause the loss of citizenship only if possessing or acquiring another nationality.³³ It should however be noted that provisions on the deprivation of nationality by the change in personal status are outdated, and had mostly affected women and children.³⁴ A variety of issues have arisen over naturalization, traditionally, a naturalized citizen is expected to renounce ties

²⁸ Handbook on protection of stateless persons under the 1954 convention relating to the status of stateless persons Geneva, 2014 p. 13. <http://www.unhcr.org/protection/statelessness/53b698ab9/handbook-protection-stateless-persons.html?query=de%20facto> (9 May 2019).

²⁹ P. Sonnevend, Állampolgárság, idegenjog, in T. Kende – B. Nagy – P. Sonnevend – L. Valki, *Nemzetközi Jog*, Complex Kiadó, Budapest 2014, pp. 517-518.

³⁰ For instance, in the case of refugees arriving to the EU.

³¹ „It is for each State to determine under its own law who are its nationals....“ Convention on certain questions relating to the conflict of nationality laws, The Hague 1930, Article 1.

³² 1961 Convention on the Reduction of Statelessness Article 7. Paragraph 6): “(6) Except in the circumstances mentioned in this Article, a person shall not lose the nationality of a Contracting State, if such loss would render him stateless, notwithstanding that such loss is not expressly prohibited by any other provision of this Convention.“ However such deprivation is not expressly prohibited by any of the provisions of the Convention.

³³ 1961 New York Convention on the Reduction of Statelessness Article 5. Paragraph 1)

³⁴ There are other international provisions on women's and children's status. For example, the 1979 Convention on the Elimination of All Forms of Discrimination against Women, which says in its Article 9. that states should ensure that neither marriage to an alien, nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, if it would cause statelessness. The regulations concerning adoption, legitimation and recognition are definitely addressing the status of children. Article 7 of the 1989 Convention on the Rights of the Child contains a special measure, that enables children to acquire citizenship in all cases, and states are obliged to apply and enforce, especially when the child would otherwise be stateless.

to the old citizenship. This can be discriminatory, for instance in the past women were not allowed to naturalize on their own but had to follow their husband's nationality.³⁵

The 1961 Convention also regulates the cases of deprivation, also maintains this „right“ for states, however modern democratic states does not apply such rules in their legal systems. According to Article 8 paragraph 1), no one shall be deprived of their nationality if it would result in the loss of nationality; therefore according to the previous provisions deprivation is possible only if the affected person already has another nationality or it is likely to obtain another.

By making reservations to a treaty states can keep their rights to deprive citizenship of certain individuals even if it would cause statelessness, but only in cases declared in the Convention.³⁶

Article 9 of the Convention broadens the right protection when prohibiting states to deprive any person on racial, ethnic, religious or political grounds.³⁷

Deprivation of nationality is unilateral in terms of causing an insecure status for the individual, thus the declaration of the relevant minimum standards is essential in order to end statelessness globally.

Regulations on naturalization, on the upholding of nationality or in other words the provisions that are aiming to prevent statelessness were not accepted in any of the international treaties on general human rights. Neither the International Covenant on Civil and Political Rights contains any measures, which would facilitate the acquisition of citizenship, furthermore it only declares the right to nationality for children. As a conclusion, it can be stated that exact measure on the deprivation of nationality and on naturalization are absent from the human rights treaties of the UN, however the need for the prohibition of arbitrary deprivation has been manifested in the possibility to uphold citizenship until the individual is granted another state's citizenship if otherwise he/she would be stateless.³⁸

There is no treaty has been adopted on the topic under the scope of the UN, but there is a convention at regional level, which has major declarations on naturalization and on the uphold of citizenship. The 1997 European Convention on Nationality of the Council of Europe safeguards such principles, entitling every individual to be granted a nationality. It also addresses the need to avoid statelessness and declares the prohibition of arbitrary deprivation of nationality.³⁹ It also defines – solely at the international level of regulations on statelessness- some

³⁵ C. W. Henderson, *Understanding International Law*, Wiley-Blackwell, Chichester 2010, p. 134.

³⁶ 1961 New York Convention on the Reduction of Statelessness, Article 8 paragraphs 2)-3).

³⁷ 1961 New York Convention on the Reduction of Statelessness, Article 9: “A Contracting State may not deprive any person or group of persons of their nationality on racial, ethnic, religious or political grounds.”

³⁸ Kisteleki, *ibid*, p. 17.

³⁹ European Convention on Nationality, Article 4, paragraphs a)-c).

essential criteria – especially the term of residence – for the naturalization processes, which should be applied in national laws of the signatory parties, with no distinction.⁴⁰

The international treaties concerning human rights lack exact provisions on the acquisition of nationality for stateless persons, also advantageous measures on naturalization, however those would be crucial in order to harmonize national laws.

Even in the EU, a significant number of Member States (including Austria, France, Spain – all being important destination countries for refugees) require that stateless persons meet the same general conditions as other persons applying for citizenship.⁴¹

The upholding of nationality is declared both at international and at regional- level, but only in conventions exclusively addressing statelessness issues, however general human rights treaties of the UN still lack such provisions, a circumstance which weakens the overall international protection of the right to nationality.

4. Initiatives by UNHCR and the EU for the reduction of statelessness

4.1. UNHCR initiatives

According to UNHCR statistics, currently 12 million persons lack nationality. The role of the organization does not aim only to facilitate the right protection of those people (like providing legal aid, interpretation, and fostering the harmonization of national laws), but also the mapping of the reasons of statelessness.⁴² By that function it also sets out the directions of legislation for national law enforcements, and also reveals the modifications needed in international law.

The General Assembly of the UN appointed the UNHCR in 1995 to seek to prevent and end statelessness in cooperation with national governments and to protect the rights of stateless persons. In the framework of this the work of the UNHCR implied the adoption of the 1954 and 1961 Conventions. However, the Conventions were ratified only by a few states, resulting the malfunctions of the international system of preventing and ending statelessness; thus, it would be a future task for the UNHCR to facilitate states to access to the existing conventions.⁴³

⁴⁰ European Convention on Nationality, Article 6, paragraph 3: “Each State Party shall provide in its internal law for the possibility of naturalisation of persons lawfully and habitually resident on its territory. In establishing the conditions for naturalisation, it shall not provide for a period of residence exceeding ten years before the lodging of an application.”

⁴¹ EMN INFORM Statelessness in the EU Version 4 - 11th November 2016 p. 11. https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/networks/european_migration_network/reports/docs/emn-informs/emn-informs-00_inform_statelessness_final.pdf (9 May 2019).

⁴² For example, the conflict of laws, annexation, the regulations of marital laws, administrative procedures, discrimination, lack of birth registration, or the deprivation and acquisition of nationality.

⁴³ Key documents on the protection of stateless persons <http://www.unhcr-centraleurope.org/hu/informacioforrasok/egyezmennyek/a-hontalansaggal-kapcsolatos-egyezmennyek.html> (9 May 2019).

The latest campaign of the UNHCR, entitled “#IBelong” was launched in 2014 and it sets out to end statelessness by 2024. According to the organization, statelessness is preventable by the broad scale use of universal birth registration and by new legislations on nationality issues, but it is achievable only if governments, civil society and the agencies of the UN along with other international organizations, plus even stateless persons are all involved in the process. In order to achieve this aim, de UNHCR worked out a strategy which already resulted in the adoption of some regional documents concerning nationality and statelessness issues.⁴⁴

The strategy has a multistage structure on the actions and aims that are needed in order to end statelessness. At first, the major issues of statelessness – such as the acquisition of nationality - has to be addressed, what also needs the tight cooperation of governments and non-governmental organizations (NGOs) to be able to localize the malfunctions of domestic laws, and which also has to be considered by international lawmaking. Later on, it is necessary to set out the legal background and the best practices that ensure that every child will ex lege get nationality by birth. As a next step all gender based discrimination has to be eradicated, which mostly affects the status of women. In 2014, for example there were 27 countries that had discriminatory measures on the succession of nationality. In the fourth phase, measures have to be adopted on the acquisition, denial and deprivation securing the prevention of emerging statelessness. Even according to the UNHCR, it is also necessary to accept measures on nationality issues in case of state succession, which would happen as next, since there is no such document at international level yet. This would be followed by the adoption of measures on granting protective status to stateless refugees and on the facilitation of their naturalization.⁴⁵ At the seventh stage – which is the least achievable in my opinion – the UNHCR wants to ensure the proper functioning of birth registration in all states – not only in the states of the UN. The lack of birth registration mostly affected by the public administrations of developing countries. (The malfunctions of governments are mainly results of wars, inner conflicts, terrorism, poverty, isolation because of the extent territory of the country, or the high number of population.) The UNHCR has to find solutions for these problems, which is doubtful considering the short term that was given to end statelessness. It could be assumed for sure, that this goal will not be achieved, but as we still do not know the exact number of stateless persons who became stateless as a result of the lack of birth registration – only the number those persons who settled down or flee in another state. We can only make estimations on the number of such persons.

According to the eighth phase, every person who is entitled, should be granted identification documents, that proves the existence of nationality, so this regulation would oblige states to grant a passport or any other form – even it can be issued by a state for a national of another state, like it is issued during the asylum processes –. The next level of the strategy contains the

⁴⁴ Like the Framework for Cooperation and Regional Solidarity to Strengthen the International Protection of Refugees, Displaced and Stateless Persons in Latin America and the Caribbean – the so called Brazil Declaration – or the Abidjan Declaration of Ministers of ECOWAS Member States on Eradication of Statelessness.

⁴⁵ <http://www.unhcr.org/ibelong-campaign-to-end-statelessness.html> (9 May 2019).

need for the UNHCR to facilitate the accession of states to the Statelessness Conventions. However, the strategy does not contain any possible modification of the treaties, but it seeks to facilitate the adoption of new regional treaties regarding statelessness issues.

Finally, the increase of the number and quality of data sharing is needed, which would be a duty of NGOs and also governments, who already has data collected by its public bodies and authorities. Moreover, the work and the international cooperation of non-governmental organizations is key in information sharing, during their activities they may encounter information that is not contained in any of the state's registers.

Beyond implementing the strategy, some other tasks of UNHCR are also remarkable regarding the protection of stateless persons. The organization aims to facilitate the harmonization of regulations on statelessness by its recommendations, handbooks and by other soft law instruments, and also fosters the proper enforcement of stateless rights. The Refugee Agency is entrusted with keeping contacts with national governments, also with monitoring different tasks, like the observation of state borders. In line with the protection of stateless persons, it also aims to defend and ensure the rights of refugees and asylum seekers.

UNHCR provides legal aid (representation, editing petitions and applications, information sharing), but also keeps contact with governments and cooperates with the civil societies of states, and most significantly provides accommodation, health services for stateless persons, and facilitates their integration into host societies as well. For the success of the integration, the UNHCR often start lobby campaigns to elaborate and improve national provisions on medical, educational, social and employment rules that enable a smoother integration for refugees and stateless persons.⁴⁶

4.2. The EU's policy on statelessness issues

The European Union itself has faced the negative effects of a major refugee influx which was not necessarily managed well either. Since 2015, the EU and also the Member States has struggled with tens of thousands of people seeking refuge in Europe. The failures and insufficiency of the common European policy on migration has been clearly revealed by how the EU has tried to handle the situation, so it became evident that something has to be done. For now, the EU puts great effort on to update and renew the Common European Asylum System (CEAS), which is a legislative framework for coordinating and harmonizing the forms of international protection⁴⁷ in Member States. The "refugee situation" has divided Europe, with pros and contras from the states, however the EU has come for a certain solution when it had reached an agreement with Turkey in 2016.

⁴⁶ <http://www.unhcr-centraleurope.org/hu/mivel-foglalkozunk.html> (9 May 2019).

⁴⁷ According to Directive 2011/95/EU of the European Parliament and of the Council (OJ 2011 L 337/9), international protection means the recognition by an EU State, of a third country national or a stateless person as a refugee or as a person eligible for so called subsidiary protection.

According to this – now should be considered as historic – document as from 20 March 2016 all new irregular migrants arriving from Turkey into the Greek islands will be returned back to Turkey. Secondly, for every Syrian being returned to Turkey from Greece, another Syrian will be resettled from Turkey to the EU. During the procedure the authorities should take the UN Vulnerability Criteria⁴⁸ into account. In order to prevent the emergence of new sea or land routes for illegal migration to the EU, Turkey should take all necessary measures, and to this effect will cooperate with neighbouring states and the EU.⁴⁹ This effort – at least for a shorter term – seems to pay off and stopped most of the refugees arriving from the Arabian Peninsula. It is however, easy to adumbrate that migration will continue as more and more factors⁵⁰ would come into play initiating further mass influxes. In most cases of irregular migration statelessness is not considered as a cause for migration, yet it can accelerate the process.

4.2.1. The Agenda on Statelessness

Pursuant to Eurostat statistics in 2015 the three Member States in which the most stateless persons applied for asylum were Sweden (39%), Germany (20%), and the Netherlands (13 %).⁵¹ Those relative high percentages show that statelessness is a real thing in the EU and why it does worth the conversation has many aspects. At first, stateless persons may decide to migrate more easily, in case of refugees – especially when the reason to seek asylum is temporary – there is always a chance for voluntary return to the home country, in case of stateless this is barely an option. Although, from the EU's perspective the issue of statelessness falls outside the scope of urgency for now, it does not mean that has less significance. The number of stateless people is increasing, if states would not commit themselves to the idea of ending statelessness, and if the global political environment remains fragile, it is likely that refugee influxes will continuously affect the EU and the Member States.

As the aftermath of the 2015 refugee crisis the European Migration Network (EMN) has adopted an Action Plan on Statelessness. In December 2015, the European Council released its conclusions and the main findings were the allowance for the Asylum, Migration and Integration Fund 2014-2020 to be used to finance measures addressing stateless persons, the exchanges of good practices among Member States on the EMN platform, the necessary joint of national contact points to actively participate in the platform. The conclusions were widely welcomed

⁴⁸ The standardized criteria system for mapping vulnerability and the different thresholds has been worked out by the UN to allow and help state actors to track vulnerabilities across the refugee population and respond to the those identified. Vulnerability Assessment Framework Guidance p. 1. <https://data2.unhcr.org/en/documents/download/53708> (9 May 2019).

⁴⁹ EU-Turkey statement, 18 March 2016 <https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/> (9 May 2019).

⁵⁰ Factors like continuous wars, instable interior politics of some Arabian countries, poverty, climate change (drought, heat, floods, extreme weather).

⁵¹ <https://ec.europa.eu/eurostat/news/themes-in-the-spotlight/asylum2015> (9 May 2019).

by different actors from the fields of right protection like the UNHCR or the European Network on Statelessness (ENS⁵²).⁵³

Based on the European Council's conclusions, the Platform on Statelessness aims to implement an action plan to coordinate the mapping of vulnerable stateless persons first, with further categories of stateless individuals identified later. The EMN aims to involve the UNHCR, UNICEF, as well as NGOs to directly address the Member States' competent authorities to solve legal matters.⁵⁴ This confirms what the EU has previously expressed, namely that it wants to strengthen its role in the fight against statelessness by extending its role in both its multilateral and bilateral external agreements. One of the key directions of the relevant multilateral engagements on statelessness is to increase collaboration with UN agencies and statelessness-related NGOs, to start dialogues with other regional organisations, to exchange information on initiatives of addressing statelessness or promoting citizenship rights.⁵⁵ The EU's intentions to take these necessary actions correlates with the fact that the EU has contributed over 213 million USD to UNHCR operations only in 2013⁵⁶, so beyond intentions the EU even provides financial support for actions addressing statelessness.

According to a policy brief by the conference "Tackling Statelessness: Exchange of Experiences and Good Practices" held by the EMN National Contact Point Luxembourg, the exchange of information is crucial to enhance the avoidance and reduction of statelessness in the EU, and especially the sharing of good practices which are particularly vital in terms of childhood statelessness, including refugee children as well.⁵⁷ The Action Plan also emphasizes the need for the enhanced exchange of information and good practices to foster and develop a common approach in order to develop a Statelessness Determination Procedure (SDP) at national level in all Member States.⁵⁸

A majority of member states have administrative procedures for dealing with stateless persons, although most of them lack any legal procedures for determination, even concrete case studies show the legal vacuums, that exist when dealing with certain stateless cases. However, the effective protection of those individuals is only achievable if efficient determination procedures are disposed of. The key considerations that Member States should take into account are the

⁵² The ENS is a civil society alliance to address statelessness in Europe. It is committed to the idea of all human beings have a right to citizenship and that those who lack nationality are entitled to full protection of human rights. <https://www.statelessness.eu> (9 May 2019).

⁵³ First conclusions on statelessness <https://ec.europa.eu/migrant-integration/news/eu-wide-first-conclusions-on-statelessness> (9 May 2019).

⁵⁴ Europe: Action plan to address statelessness in the EU <https://ec.europa.eu/migrant-integration/news/europe-action-plan-to-address-statelessness-in-the-eu> (9 May 2019).

⁵⁵ Directorate-General for External Policies Policy Department: Addressing the human rights impact of statelessness in the EU's external action p. 6. http://www.europarl.europa.eu/Reg-Data/etudes/STUD/2014/534983/IPOL_STU%282014%29534983_EN.pdf (9 May 2019).

⁵⁶ <http://www.unhcr.org/539809dc0.html> (9 May 2019).

⁵⁷ Policy brief "Tackling Statelessness: Exchange of Experiences and Good Practices" <http://www.emnluxembourg.lu/wp-content/uploads/2016/03/Policy-Brief-conclusions-Statelessness-conference.pdf> (9 May 2019).

⁵⁸ Europe: Action plan to address statelessness in the EU <https://ec.europa.eu/migrant-integration/news/europe-action-plan-to-address-statelessness-in-the-eu> (9 May 2019).

followings: ensuring ex officio or facilitated access to statelessness procedures with advantages like free-of-charge interpretation and access to state founded legal aid, etc., guaranteeing rights during the procedure by avoiding the requirements of time limits and lawful stay, or securing a shared burden of proof and limited assessment, also enhancing the right to remedy. Some Member States have already implemented some good practices, like in the Baltic States of Latvia and Estonia, both having their own domestic statelessness protection frameworks. These countries have set up national legislation in order to tackle particular cases of stateless persons, mostly concerning former USSR citizens.⁵⁹ Pursuant to the data that was provided to EMN, the procedures Member States use to determine statelessness lack homogeneity which has harmful consequences especially on the most vulnerable groups of stateless persons, like unaccompanied minors.⁶⁰

In terms of the procedures, Member States also agreed that there should be a clear differentiation between the statelessness determination procedures and the asylum procedure; since those SDPs could otherwise be misused by rejected asylum seekers to avoid or to delay their return to the countries of origin. The EMN provides financial and other resources for the creation of the working space where Member States can share their best practices. The EU acknowledges that stateless individuals have acquired significant rights in certain Member States, in relation with education, health benefits and non-discriminatory labour rights, however the vulnerability of children, including unaccompanied minors should also have a remarkable focus.⁶¹ Since statelessness remained in a shared competence of the EU and Member States, the Member States' law-making are clearly limited, however the CEAS is mostly carried out by directives.⁶² Thus it is harmonized rather than unified, so national provisions are allowed to be different in each Member State. In the future however, more precise provisions on stateless issues are necessary in order to reduce statelessness in Europe. This aim is also primary in case of refugee policies by reason of preventing refugee influxes in terms of material and immaterial support to countries providing the most number of refugees. For instance, the mass number of stateless persons in some South-East Asian countries (like the Rohingyas in Myanmar⁶³) or the growing numbers of stateless in the Middle-East are all threats to the European Union. Europe was not able to handle the crisis in 2015 apart the pact with Turkey, yet a next influx would definitely challenge the EU's asylum system.

⁵⁹ Policy brief "Tackling Statelessness: Exchange of Experiences and Good Practices" <http://www.emnluxembourg.lu/wp-content/uploads/2016/03/Policy-Brief-conclusions-Statelessness-conference.pdf> (9 May 2019).

⁶⁰ EMN INFORM Statelessness in the EU Version 4 - 11th November 2016, p. 2. https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/networks/european_migration_network/reports/docs/emn-informs/emn-informs-00_inform_statelessness_final.pdf (9 May 2019).

⁶¹ Europe: Action plan to address statelessness in the EU <https://ec.europa.eu/migrant-integration/news/europe-action-plan-to-address-statelessness-in-the-eu> (9 May 2019).

⁶² Except two regulations: Regulation 604/2013/EU (Dublin III), which contains, how to decide the Member State responsible for processing the asylum claim, and Regulation 603/2013/EU (EURODAC), which was adopted on the EU's biometric asylum seeker database.

⁶³ Rohingyas are a Muslim ethnic minority group living in Western Myanmar with the estimated population about 2 million, who live as stateless for centuries now. For more see Gy. Kovács-Zsankó: Rohingyas, a Non-Existing Nation, *Pécs Journal of International and European Law*, Vol. 4. No. 1. 2017, pp. 39-48.

So far, the EU has made efforts focusing on third countries as priority country of origins. The EU's Action Plan on Human Rights and Democracy 2015-2019 addressed the issue of statelessness in relations with priority countries like ASEAN Members. It acknowledges statelessness as a result of discrimination as well as of a lack of birth registration like a primary focus; however, the emergence of stateless populations by conflict, displacement and the dissolution of states remained relevant aspects for the EU.⁶⁴ Beyond having country priorities, like Thailand, Myanmar or the Dominican Republic, the EU also has thematic priorities. The external actions on statelessness by theme include the support the UNHCR campaign to end statelessness by 2024, to combat gender discrimination in nationality laws and to promote children's right to citizenship.⁶⁵

Statelessness is an emerging issue. Not only preventing influxes, but the EU carries out actions towards the enhanced right protection of stateless persons, especially if they are asylum applicants and refugees. Certainly, the most exposed groups of stateless persons (e.g.: minors) have special emphasize in domestic and EU legal protection, mostly in regard with Member States securing citizenship for them. Legal advantages should be secured during the stateless determination procedures for refugee stateless, like certain confidentiality requirements that must be respected regardless of the type or location of the statelessness determination procedure in a State. In addition, however the EU aims to avoid the misuse of SDP, as some stateless persons may also be refugees, it could be necessary for States to consider combining statelessness and refugee determination in the same procedure.⁶⁶ It clearly shows the determination to strengthen harmonized Member States' law-making.

4.3. Member States practices as regards statelessness and refugees

The statelessness of refugees is by no means a minor issue as nearly one in ten refugees is stateless according to the UNHCR. As good practice and also as a part of a research project, Denmark and Sweden have examined the law and policy of identifying statelessness within the asylum system, and how it addresses the acceptance of refugees, how does it contribute to the situation of indefinite statelessness for stateless refugees. It is very important for states to identify stateless persons, and it is advised that refugees would be informed that they should apply to be recognised as stateless if there is a possibility of lack of citizenship.

In Denmark there is no legislation, procedural guidelines or safeguards detailing how statelessness should be determined by the Danish Immigration Service. In practice asylum seekers are registered by the immigration authorities upon arrival. In all cases the authority attempts to

⁶⁴ European Parliament resolution of 13 June 2017 on statelessness in South and South East Asia (P8_TA(2017)0247).

⁶⁵ Directorate-General for External Policies Policy Department: Addressing the human rights impact of statelessness in the EU's external action pp. 34-39. http://www.europarl.europa.eu/Reg-Data/etudes/STUD/2014/534983/IPOL_STU%282014%29534983_EN.pdf (9 May 2019).

⁶⁶ EMN INFORM, Statelessness in the EU (Version 4), 11th November 2016, p. 16 https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/networks/european_migration_network/reports/docs/emn-informs/emn-informs-00_inform_statelessness_final.pdf (9 May 2019).

ascertain the identity and nationality of the individual including whether the person is stateless. In the decision procedure the office relies on asylum-seekers' explanation and any written documents, but there is data collected on background information on conditions in countries of origin. Finally, this background information would form the basis for the ruling in asylum cases.⁶⁷

After the 2015 crisis, Sweden a relatively liberated state in terms of migration and asylum has restricted the possibility of being granted a permanent residence permit for refugees, negatively affecting the naturalization of stateless persons. Since July 2016 refugees would only receive temporary residence permits valid for three years. Due to the requirement in the Temporary Asylum Law, a permanent residence permit is needed to apply for citizenship, thus according to this regulation large number of asylum seekers who came to Sweden can only become Swedish citizens after a few years, after having been granted a permanent residence permit.⁶⁸

Both Sweden and Denmark are considered as countries with developed humanitarian and human rights protection, with a high respect towards integrating refugees. Yet, they are not moving towards an extended protection for stateless persons, even though Sweden is a top target country of stateless refugees, as mentioned above.

Altogether, access to citizenship is simplified for stateless persons in 13 Member States and 7 facilitate the naturalization by easing the required conditions.⁶⁹

V. Conclusions

There has been limited analysis on the correlation between statelessness and forced displacement (a form of collective displacement of persons, who are entitled for refugee status), however in 1993, UNHCR's Note on International Protection acknowledged that preventing and reducing cases of statelessness is vital to prevent refugee influxes. To understand the link, it is necessary to look up the definition and elements of statelessness and refugees. A stateless person lacks any nationality, but the majority of stateless persons belong to *in-situ* stateless populations, so they consider themselves as if they would be in their country of origin and are not necessarily displaced. The refugee definition⁷⁰, explicitly allows for the possibility of stateless

⁶⁷ J. Tucker, *The Indefinite Statelessness of Refugees in Denmark and Sweden: Comparing the Impacts of the Temporary Asylum Laws*, Malmö Institute for Studies of Migration, Diversity and Welfare 2017 <https://www.mah.se/upload/Forskningscentrum/MIM/Publications/WPS%2017.8%20-%20Jason%20Tucker.pdf> (9 May 2019).

⁶⁸ *Ibid.*

⁶⁹ EMN INFORM Statelessness in the EU Version 4 - 11th November 2016, p. 11. https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/networks/european_migration_network/reports/docs/emn-informs/emn-informs-00_inform_statelessness_final.pdf (9 May 2019).

⁷⁰ Article 1 of the 1951 Refugee Convention. Refugee is someone 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; 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" (emphasis added).

persons to be recognised as refugees where they face persecution in their country of origin. Although, many stateless communities are *in-situ* – they remain in the country of birth – there are many who have been forcibly displaced and became refugees. Displaced stateless people may face more difficulties exercising their rights than other refugees, who has nationality.⁷¹

In some states even discrimination and human rights violations⁷² (like children being denied access to healthcare or education, or in extreme cases, ethnic cleansing) towards stateless persons can be so severe, that it could put them at the centre of local tensions and in the end forcing them to flee their homes and to cross international borders. Citizenship is a fundamental human right that often facilitates the exercise of other human rights. The denial of citizenship itself is a serious violation of human rights, however it is often only one component of further infringements of rights or even persecution. A striking example from Cote d'Ivoire shows that how the denial of nationality can lead to force displacement and indicate a mass influx of migration. During a presidential election in 2002 the government amended the electoral regulations in such way, that it resulted in the elimination of the opponent candidate Outtara - who was of Burkinabe descent (a minority group in the country) - based on his heritage. This particular regulation directly affected not only the political participation and voting rights but housing, land and property rights for all Ivoirians. As a result, those who shared this ethnic heritage were denationalised and with no other nationality, left stateless.⁷³

Those certain discriminatory provisions made a significant amount of people moving out from their country of origin, resettling in other neighbouring countries or even in the EU. This type of deprivation of rights accelerate mass migration without a question, it is only a matter of time the EU would finally percept the harmful consequences of statelessness.

If such violations continue to happen in addition to compel stateless individuals to flee their homes, even whole stateless communities would have been encouraged to leave their country. This occurs primarily in cases where denationalization is used as a demographic tool to physically remove certain population groups from the territory through collective expulsions.⁷⁴

⁷¹ Z. Albarazi – L. Van Waas, *Statelessness and Displacement - Scoping Paper*, Norwegian Refugee Council & Tilburg University, 2015, pp. 7-10. <https://www.nrc.no/globalassets/pdf/reports/statelessness-and-displacement.pdf> (9 May 2019).

⁷² However, the extent of human rights challenges differs between countries and between different stateless groups and individuals also.

⁷³ Albarazi – Van Waas, *ibid*, pp. 12-14.

⁷⁴ This happened exactly in 1989, when the Arab-dominated government in Mauritania denationalised approx. 75,000 black Mauritians, by ideas of pan-Arabism. <https://www.refworld.org/docid/49749ce7a.html> (9 May 2019).

Sometimes statelessness may not directly be the cause for displacement, but instead, statelessness may play a circumstantial role in the displacement caused by natural disasters, large infrastructure projects or changes of domestic law concerning the right to reside. Being stateless may severely limit the coping strategies available to affected communities.⁷⁵

As we continue to reveal the real causes of statelessness, we would be able to find the proper solutions of prevention. It is crucial to address the issue before it is too late, after all, the EU's asylum system is not well prepared to cope with occasional mass migration – as the 2015 crisis has shown. Even the protection or the integration of refugees in EU Member States is secured at a different level, notwithstanding harmonised EU-level rules. Citizenship laws and also statelessness determination procedures have to be unified or at least harmonised in the EU, as different legal systems colliding may be indefinite causes for protection deficits in certain EU states. In order to provide full protection in line with international standards, the Member States have to stand up together, meaning coherent EU legislation would be highly appreciated, not excluding the high importance of practical cooperation of national authorities and bottom up initiatives of the civil society. A one-direction law-making would only be possible if Member States strengthen their cooperation in statelessness related issues, and the enhanced financing of non-governmental actions would be also welcomed. The UNHCR and the EU together may be significant parties in ending statelessness, however in the end it is up to the states to develop, implement and enforce the different necessary measures. Statelessness is a complex issue which needs to be addressed in further forums, it is not an issue of our future, but an issue of today – which would require a prompt and effective solution.

⁷⁵ Albarazi – Van Waas, *ibid*, pp. 14-15.

Extending Global African Diaspora Research: Africans in Hungary, the ‘Neglected Diaspora’

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This paper seeks to extend the academic discussion and research of the global African diaspora by drawing attention to Africans living in post-Soviet spaces. So far, both literature and foreign policies of countries of the former Eastern Bloc hardly ever made mention of this ‘neglected diaspora’. First, the paper underscores the relevance of specific research connected with African communities across Central and Eastern Europe, as well as present-day Russia. Second, it introduces the history, motivations, background and contemporary situation of the marginal but growing African population in Hungary. It will show how finally the Hungarian government implements a pragmatic foreign policy (partly) on Africa and African development co-operation. In this effort, it considers Africans who either had obtained a university degree before 1989 at a Hungarian university or came to the country during the democratic rule as true bridges: they can foster newly defined relations. The place, role and potentials of these African migrants in the unique Hungarian migration environment will also be discussed. Increased illegal migration flows towards the European Union via the Serbian–Hungarian border region of the Schengen Zone in the first half of 2015 and the policies the Hungarian government introduced in the wake of this unprecedented push makes the discussion even more topical.

Keywords: African migrations, global African diaspora, Africans in Hungary, Hungarian foreign policy towards Africa

1. Introduction

1.1. Opening thoughts on the African diaspora

“One of the accepted criteria of the study of the African Diaspora is the necessity of its focus on African and African-descended peoples.”¹ The new political, social and economic realities of our increasingly globalized interpolar world have direct effects on international migration. Considering migratory trends and tendencies from the opposite angle, migration is truly a profound feature of the global context, which is best characterized by the accelerated pace of all types of movement. As Zeleza² rightly points out, “two critical developments” can be isolated. “First, the diversification of sending and receiving countries has been growing. Second, skilled

¹ G. A. Chambers, Mapping the Study of the African Diaspora: Classic Trends, New Themes, and Disciplinary Approaches, in R. K. Edozie – G. A. Chambers – T. Hamilton-Wray (eds.), *New Frontiers in the Study of the Global African Diaspora*, Michigan State University Press, East Lansing, 2018, p 24.

² T. Zeleza: Contemporary African Migrations in a Global Context, *African Issues*, No. 1. 2012, p. 9.

migration has assumed greater importance in relation to both the actual flows” and to migration policies at all levels. “African immigrants are now part of the transnational communities that can be found in virtually all regions of the world.”³ The diasporas of Africans represent a major aspect of both international migration and the international relations of the continent. As Taylor⁴ underlines, “the very existence of the diasporas are now seriously considered by African states (and international development agencies) as important developmental assets.” Not only because of the remittances that flow back into the economies of their home countries, but also as they possess the potential of building bridges in bi- and multilateral terms between their sending countries and their chosen new countries. A number of governments of receiving countries think in this way and are pressured to foster policies that on the one hand encourage the integration of migrants, as well as contribute to mutually beneficial economic, industrial and other investment deals, together with health service-related, educational or cultural projects. Yet another group of governments tend to see migrants as threat to national identity, and therefore, support anti-immigrant policies. To be able to study and understand the African diaspora is to research on migration in general, and to study global African migrations in particular. As Chambers underlines, “contemporary political and global economic realities have brought Africans in the diaspora into more contact and communication with each other than ever before”,⁵ which confirms the very nature and existence of transnational identities in the global arena. These transnational African migrant communities are not only developmental assets for countries of origin, but also mean numerous opportunities of geopolitical positioning for countries of destination. Although Chambers is right that: “While most of the discourse on the African diaspora has centered on the Americas and the African continent, there is a growing interest in the Indian Ocean region”,⁶ basically nothing is said about the diaspora communities of Africans across post-Soviet countries. It is absolutely valid to include them in a wider academic discourse, as “the legacy of the African Diaspora in these places [too] further exposes the global scope of the dispersal”.⁷ As in any case, migration flows in different phases and streams result in the creation of a diaspora. In comparative terms, in the course of history, different regions have experienced different flows and streams, thus, it makes sense also to look at the intensity and dynamics of the development of certain African diasporas in distinct areas. According to Palmer, in general terms, “diasporic communities possess a number of characteristics. Regardless of their location, member of a Diaspora share an emotional attachment to their ancestral land, [...] tend to possess a sense of ‘racial’, ethnic, or religious identity that transcends geographic boundaries, to share broad cultural similarities, and sometimes articulate a desire to return to their original homeland.”⁸ Among the heterogeneous African diaspora communities we will use the term diaspora throughout the paper as defined by Oucho: “to denote people – usually of African descent – residing outside Africa, or within Africa in countries other than their own, as citizens and permanent or temporary residents, engaging in circulation as well as

³ M. O. Okome, African Immigrant Relationship with Homeland Countries, in J. A. Arthur et al. (eds.), *Africans in Global Migration. Searching for Promised Lands*, Plymouth, Lexington Books, 2012, p. 199.

⁴ I. Taylor: *The International Relations of Sub-Saharan Africa*, New York, Continuum, 2010. p. 13.

⁵ Chambers *ibid.* p. 29.

⁶ Chambers *ibid.* p. 31.

⁷ Chambers *ibid.* p. 31.

⁸ C. A. Palmer, Defining and Studying the Modern African Diaspora, *Africology: The Journal of Pan African Studies*, Vol. 11. No. 2. 2018, p. 216.

transnational lifestyles.”⁹ This will be applied to the not-so-known African communities living in Central and Eastern European countries.

1.2. Setting the scene for the Hungarian case

In 2015, the government of Hungary took some convincing steps in order to revitalize relations with Sub-Saharan Africa by launching its ‘Opening to the South’ foreign policy chapter. In order to achieve this, it is open to target the still relatively minor, but occasionally vocal community of immigrants and the main civic organizations that either the immigrants themselves established and manage, or are in contact with them due to various legal questions and general representation (these latter ones are Hungarian NGOs with a profile and expertise on migrants’ rights). While Hungary has been experiencing the pushing flow of irregular migrants, it also needs to get prepared for more foreign citizens choosing its territory to settle in the forthcoming decades. In fact, it needs to solve the burning demographic issue of a shrinking population, and therefore become ready for accommodating different people with different cultural and linguistic backgrounds.¹⁰ The former “emigration country” – as Sik and Zakariás¹¹ referred to it – with a traditionally very low record of internal migration is now seen as a transition country to get into the Schengen Zone of the European Union by illegal migrants from some Western Balkans countries (Kosovo, for instance) and Near Eastern countries (Syria and Iraq especially), as well as Northern Africa (or Sub-Saharan Africa via Northern African and Mediterranean routes). While this particular issue has been basically the most burning one for the country, the topic of Hungarians leaving the motherland and emigrate to other EU member states (among others) is hardly mentioned in political communication and heard in public discourse.

One of the questions this paper attempts to answer is whether or not and to what extent Hungary, being a comparatively “closed country” in Central Europe’s migration map has been managing certain aspects of international migration both from the perspective of its society and with regard to government policies. The research presented here hypothesized that younger generations are more open to the presence of immigrants and their participation in everyday life, which is an inevitable condition on the road of a more integrative society. The paper also visits the question of government policy aspirations in terms of the relevance of connecting longer-term strategic goals to the engagement and contribution of different diaspora in Hungary – in our case, the Hungarian African communities in light of a dynamic ‘global opening’ in foreign policy.

⁹ J. O. Oucho, African Diaspora and Remittance Flows: Leveraging Poverty? in A. Adepaju (ed.), *International Migration within, to and from Africa in a Globalised World*, NOMRA, Sub-Saharan Publishers, Accra, 2010, p. 140.

¹⁰ Prime Minister Viktor Orbán in his latest address to the nation (évértékelő=annual national report) on February 10, 2019, launched a new public policy to upgrade the birth rate of the country by encouraging women to give birth to more children, and therefore, meeting some pressing demands for balancing the currently shrinking population. Immigrants are not the solution, the prime minister referred to, but the method he proposed.

¹¹ E. Sik – I. Zakariás, *Active Civic Participation of Immigrants in Hungary*. Country Report prepared for the European research project POLITIS, Oldenburg, Interdisciplinary Center for Education and Communication in Migration Processes, 2005, p. 6.

The paper opens with a first section taking a closer look at the unique features of Hungary from an international migration perspective. It then moves to discuss African immigration to Hungary using primary research results from the last couple of years, an output of the projects the author and his research team managed to compile. Interview excerpts will illustrate the set of arguments, followed by a summary of a questionnaire on Hungarian youth perceptions about African immigrants. The chapter also highlights the foreign policy dimension that can be useful for a future comprehensive immigration policy (which is still missing at the moment), with particular relevance to the ongoing implementation of a new Hungarian policy of ‘global opening’ to the ever so globalized world. The prospects for a Hungarian Africa policy will also be sewn into the line of thoughts presented. The chapter finally offers a conclusion and indicates some further steps of continued research.

2. Hungary is not a country of destination for many

Although international migration has always been a characteristic feature throughout its history since the foundation of the Hungarian state in the first years of the eleventh century, migration as an issue in post-socialist Hungary has been considered as “a diaspora and security problem and mostly viewed as part of foreign policy rather than economic policy.”¹² No doubt, with regard to labor market issues, for a call for a more economy-focused approach is valid, however, understanding migration in the global era needs an interdisciplinary approach. When arguing for integration of any kind, historic, social, ethnic, linguistic, cultural and foreign relations and human rights considerations have to be taken into account for a comprehensive migration policy. This prerequisite is even more articulated when we accept the valid observation of Castles and Miller¹³ that “novel forms of interdependence, transnational society and bilateral and regional cooperation are rapidly transforming the lives of millions of people and inextricably weaving together the fates of states and societies.” In addition, policy-making in the field first draws our attention to the obvious issue of security, then, to how useful the given migrant can be for the economy of the receiving country intending to regulate migration flows.

As Juhász¹⁴ notes, the first wave of immigration to Hungary – including “scribes, foreign merchants, artisans, and agricultural settlers” – was “primarily motivated by economic considerations, as well as King Stephen the First’s (1000–1038) positive attitude towards immigration.” Since the 1880s for about a hundred years, Hungary had been an emigration country: “between 1881 and 1900, 370,000 people emigrated to America. In the 15 years that preceded the First World War the total number of emigrants reached 1.4 million.”¹⁵

¹² Á. Hárs – E. Sik, Hungary, in E. Hönekopp – H. Mattila (eds.), *Permanent or Circular Migration? Policy Choices to Address Demographic Decline and Labour Shortages in Europe*, Budapest, International Organization for Migration, 2008, p. 73.

¹³ S. Castles – M. J. Miller, *The Age of Migration. International Population Movements in the Modern World*, New York, The Guildford Press, 1998, p. 1.

¹⁴ J. Juhász: Hungary, in T. Frejka (ed.), *International Migration in Central and Eastern Europe and the Commonwealth of Independent States*, New York, United Nations, 1996, p. 69.

¹⁵ Juhász *ibid.* p. 70.

The Treaty of Versailles signed with Hungary after the world war in the Grand Trianon Palace of Versailles on June 4, 1920, resulted in the loss of more than two thirds of its original territories (72 percent) and 64 percent of the total population of the country (21 million), due to Hungary's alignment with the defeated central powers led by Germany. Coupled with the consequences of "large-scale forced resettlement movements" after the Second World War, "as a result of all these changes, on the one hand an ethnically highly homogeneous population was created on the territory of modern Hungary, on the other hand an ethnically mixed population with considerable Hungarian minorities emerged in the countries surrounding Hungary".¹⁶ The total number of Hungarians living beyond the borders of the country, the Hungarian diaspora is about 5.2 million, out of which 2.6 million ethnic Hungarians can be found in Hungary's present-day neighbors (most of them, about 1.5 million in Romania), 1.8 million in North America (most of them, about 1.5 million in the USA), and the rest all across the world.

With the Soviet bloc disintegrating at the end of the 1980s, Hungary had to face a substantial inflow of refugees and asylum seekers from the neighboring countries, but mainly from Romania and former Yugoslavia as a result of the ongoing conflicts and war on their territories. This migratory push then turned into another flow of migrants with economic and study purposes from the same countries surrounding Hungary. "The annual number of immigrants between 1988 and 1991 ranged between 23,000 and 37,000, and about 80 percent of them were ethnic Hungarians from Romania, Ukraine and Yugoslavia."¹⁷

One of the most unique features of Hungary's migration scene derives from the above tendencies, the country's historic heritage and geographic location: "the overwhelming majority of immigrants are from neighboring countries and mostly have an ethnic Hungarian background."¹⁸ Therefore, Hungarian society at large does not really have experience on a greater scale with people of faraway lands and cultures, which the population considers different "enough" from the majority society, as they had got used to receiving immigrants of European origin – mainly from the larger Hungarian cultural context. These immigrants speak no different language than the one the citizens of the motherland do, i.e. Hungarian. Up until the end of the first decade of the twenty-first century the proportion of the immigrant population – that is "foreigners who stay in the country over a year"¹⁹ – compared with the native population shows a stable 1.5 to 2 percent according to the statistics of the Hungarian Central Statistical Office (HCSO) on an annual basis.²⁰ This is considered as rather low in a country with a total population of 9.778 million, according to the 2018 HCSO data. Since 1981 Hungarian population has been steadily decreasing (see Figure 1 for the last 15 years). "The fall in the population number due to natural decrease was somewhat moderated by the positive net international migration in

¹⁶ Hárs – Sik *ibid.* p. 73.

¹⁷ Hárs – Sik *ibid.* p. 74.

¹⁸ A. Kováts – E. Sik, Hungary, in A. Triandafyllidou – R. Gropas (eds.), *European Immigration. A Sourcebook*, Aldershot, Ashgate, 2007, p. 158.

¹⁹ Kováts – Sik *ibid.* p. 159.

²⁰ The *International Migration Outlook 2012* of the OECD also confirms this figure. See OECD, *International Migration Outlook 2012*, Paris, OECD, 2012, p. 236.

the last two and a half decades. However, in the last decade, immigration surplus could compensate only less than half of the natural decrease.”²¹ Since the breakout of the 2015 ‘refugee crisis’, the Hungarian government favors a strictly anti-immigrant policy, with nation-wide campaigns including slogans such as “If you come to Hungary, you must respect our culture!”, or “If you come to Hungary, you cannot take away the jobs of the Hungarians!” As Drinóczi and Mohay underline: “The billboard campaign and the ‘national consultation’ were successful political tools used to make the Hungarian population fearful of migration, or at least develop increasingly negative attitudes thereto due to economic and security reasons.”²² After the latest landslide victory of his party at the national elections in April 2018, Prime Minister Viktor Orbán clearly stated that: “We want that Hungary remains the land of Hungarians, the country of the ‘magyars.’”

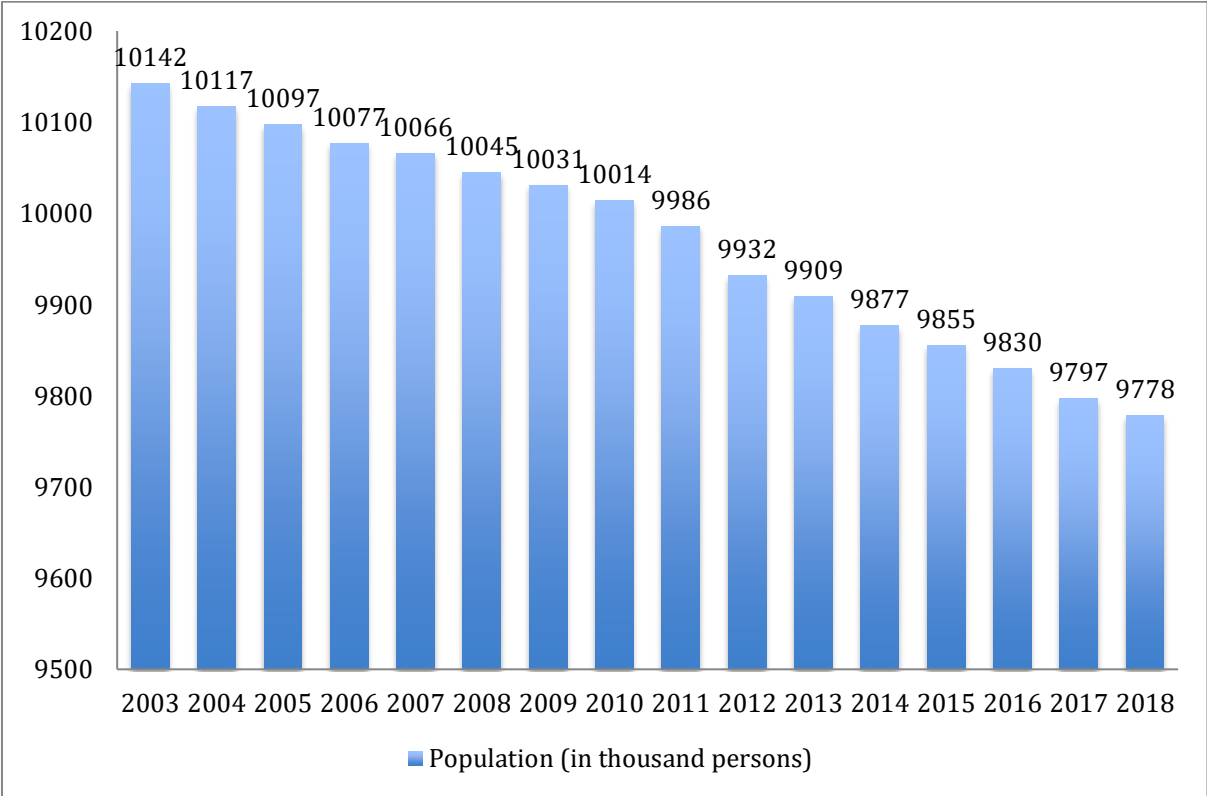


Figure 1. Demographic changes in Hungary between 2003 and 2018

Source of data: Hungarian Central Statistical Office

Hungary’s ageing and shrinking society, however, may also need immigrants – similarly to other European countries. However, in the last three years the number of legal immigrants (mainly foreigners who stay in the country for over a year, but also labor migrants who come

²¹ G. Vukovich et al. (eds.), *Population Census. I. Preliminary data*, Budapest, Hungarian Central Statistical Office, 2012, p. 7.

²² T. Drinóczi – Á. Mohay: Has the Migration Crisis Challenged the Concept of the human Rights of Migrants? The Case of Ilias and Ahmed v. Hungary, in E. Kuzelewska – A. Weatherburn – D. Kloza (eds.), *Irregular Migration as a Challenge for Democracy*, Intersentia, Cambridge, 2018, pp. 99-100.

for shorter periods) has not been on a painful increase. When the stock of this community of foreign nationals is looked at closely, for instance as in 2018, according to the figures provided by the Hungarian Central Statistical Office, most of the migrants came from Europe (64.4 percent), while 27.6 percent were from Asia (44.5 percent of the Asians are Chinese), 3.6 percent from America (57.3 percent of the Americans are from the U.S.A.), 3.6 percent from Africa, and 0.4 percent from Australia and Oceania²³

With regard to illegal migration, as Kováts and Sik²⁴ note about the tendencies of the first years of the new millennium that: “most undocumented immigrants are weekly or monthly commuters from the neighboring countries [working] in the seasonal sectors (agriculture, construction) of the informal economy.” Concerning refugees and asylum seekers, 2015-16 tendencies indicated an ever so heavy push on the borders Hungary shares with Serbia in the south and with Ukraine in the north – apart from the constant push on Italian, French, Spanish or British EU-borders. These are borders of the Schengen area of the European Union (EU), meaning the external border of the community, and therefore, here border control is the most comprehensive. Those member states – thus Hungary, too – with external EU borders had to face more challenges in recent years. The 2013 data of Eurostat, the statistical office of the European Union, showed that the number of those asking for asylum in the EU has risen by 50 percent compared with the year before. “The number asking for asylum has increased almost ten-fold compared to last year: some 17,000 by the end of October.”²⁵ As the article of EUrologus on the news portal index.hu of November 12, 2013 also suggested that experts can only guess why it is Hungary where such a huge increase had happened.²⁶ As of August 2015, more than 100,000 people reached Hungary, which was statistically the highest number ever. It seemed rather obvious that more people traveling from the Near East and North Africa decided to take the “Balkans Route” via Turkey, Greece, Romania, and even more Serbia, ending in Hungary. However, these migrants did not consider Hungary as their country of destination, but more as a transit territory toward Austria and Germany, and even farther towards the Western parts of the old continent. Hungary can still be considered not a “major destination for international migrants”.²⁷ According to a recent study investigating the refugee situation in Hungary offered a conclusion that: “Factors such as income, unemployment, trade or aid did not influence asylum-seekers in their choice of Hungary, nor did the increasing harshness of the Hungarian border, at least until the end of 2015, when the government started building a fence and significantly increased patrols along the border, nor in 2016.”²⁸ The authors of the study agreed with other scholars that many of these asylum-seekers “despite lodging their applications in Hungary, most likely view it as a transit country along their route.”²⁹ As for the numbers from the African

²³ https://www.ksh.hu/docs/hun/xstadat/xstadat_eves/i_wnvn005b.html (7 July 2019).

²⁴ Kováts – Sik *ibid.* p. 163.

²⁵ Hungary struggles with huge rise in asylum demands, *Euronews*, 14 November 2013, <https://www.euronews.com/2013/11/14/hungary-struggles-with-huge-rise-in-asylum-demands> (7 July 2019).

²⁶ Robbanás előtt a Magyar menekülthelyzet, *Index.hu*, 2013, <http://index.hu/kulfold/eurologus/2013/11/12/robbanas-elott-a-magyar-menekult-helyzet/> (7 July 2019).

²⁷ OECD *ibid.* p. 236.

²⁸ A. Tétényi – T. Barczikay – B. Szent-Iványi, Refugees, not Economic Migrants – Why do Asylum-Seekers register in Hungary? *International Migration, Special Issue*, 2018, pp. 15-16.

²⁹ Tétényi – Barczikay – Szent-Iványi *ibid.* p. 16.

continent especially, already in 2017, Hungarian authorities reported that out of a total number of 3,397 2,532 people arrived in Hungary (comparing sending countries from where at least 5 persons arrived) representing 11 countries: the majority from North Africa, mainly from Algeria (710), Algeria (1,033), Egypt (218) and Tunisia (67). (Hungarian Statistical Office, 2017) Others from Sub-Saharan African territories included: Somalis (331), Ethiopian (32), Nigerians (83), as well as people from Sierra Leone (7), Mali (14), Cameroon (15) and Sudan (22).³⁰

3. Africans in Hungary

The situation was different before the democratic changes of the early 1990s – though not substantially different. As one of the ‘closed countries’ of the Eastern Pole of the Cold War, being a satellite of the Soviet Union, Hungary did receive thousands of foreigners during the 1970s and 1980s, among which young people undertaking university studies and holding state scholarships from the friendly Hungarian state represented several African countries. When searching for academic pieces in the scholarly literature on migration from Africa to Central and Eastern European countries (CEECs), one can hardly find anything specific to set off from. The pool scarcely covers this system of connections; it is a neglected area of migration research. Most articles speak about African migration to Europe in a historical perspective, but hardly ever make mention of the former Soviet bloc, and this cannot be explained with the seemingly obvious reason of the substantially larger numbers having migrated to the more Western European states in the course of the centuries. One of the most frequently quoted papers about Africans in Hungary is Larry Olomofoe’s book chapter from 2001, which the present discussion also uses mainly because of its original sociological observations, which underline the findings of the research led by the author of the current chapter with his team between 2009 and 2013.³¹ Another important and highly relevant piece is the summary of the first results of another ongoing research in Russia led by Dmitri Bondarenko at the Institute for African Studies of the Russian Academy of Sciences. We could not agree more with Bondarenko et al.³² in pointing out that “without taking migrations to Russia [and to the post-socialist countries of Central and Eastern Europe] into serious account any research on migration processes and their consequences at the European (or wider) level would be *a priori* incomplete and imperfect.”

Concerning the geographical distribution of African immigrants in Hungary, the majority can be found in Budapest, the country’s political, financial and cultural center. In 2009 this meant about 65 percent of the total African community, in 2010 the figure was almost the same, 61 percent, and it has not substantially changed ever since. The second largest group is about 12-15 percent of the total African immigrant population staying in the Northern counties of the country. Almost all of the Africans live in larger urban settlements, mainly in the bigger university towns or in their agglomeration. As for the total numbers, Figure 2 shows the tendencies

³⁰ https://www.ksh.hu/docs/hun/xstadat/xstadat_eves/i_wnvn002b.html (7 July 2019).

³¹ I. Tarrósy, African Immigrants in Hungary: Connection with the New National Foreign Policy, *Society and Economy*, No. 2. 2014, pp. 285-305.

³² D. M. Bondarenko – E. A. Googueva – S. N. Serov – E. V. Shakhbazyan, Postsocialism Meets Postcolonialism: African Migrants in the Russian Capital, *Anthropological Journal of European Cultures*, No. 2. 2002, p. 4.

between 2001 and 2018. Up until 2000 there had been an increase of African inbound migration with over 2,600 people at its peak in 1998. Figure 3 then compares the number of Africans with the total number of foreigners in the country between 2003 and 2018.

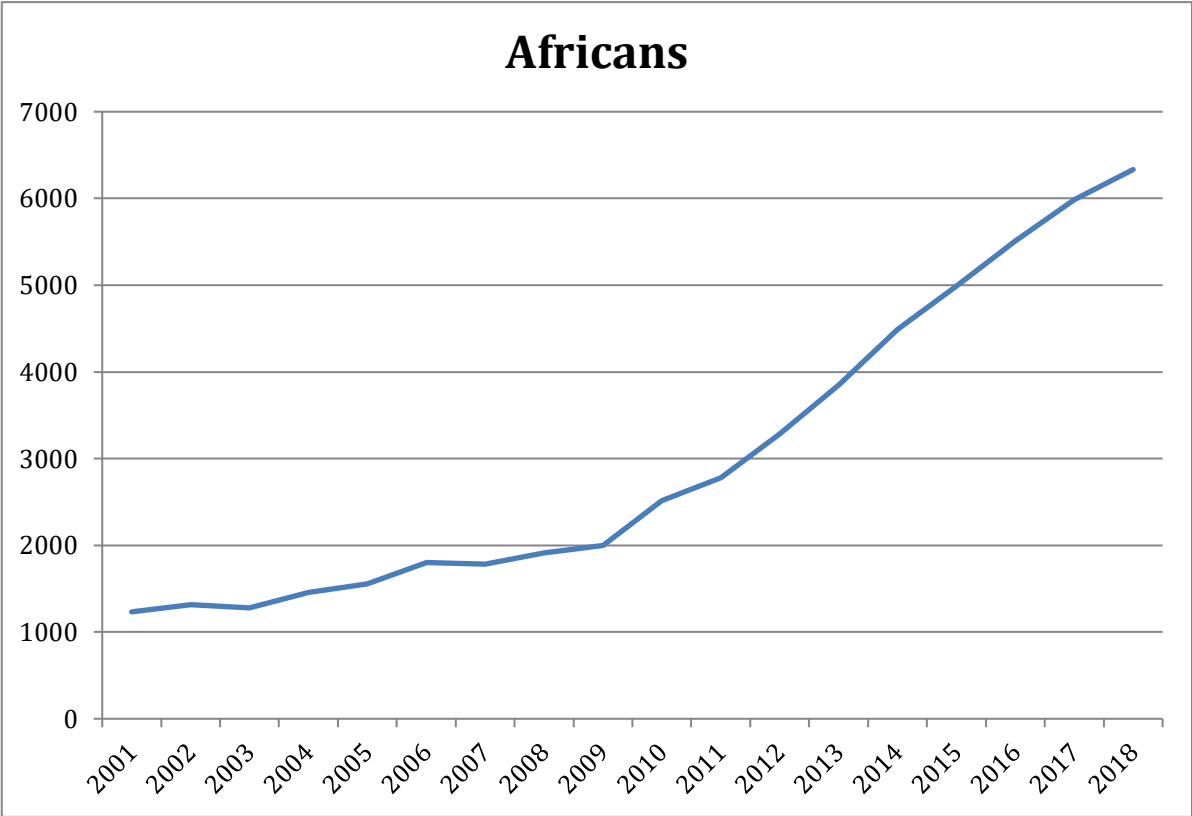


Figure 2. Number of Africans in Hungary between 1995 and 2013

Source of data: Hungarian Central Statistical Office

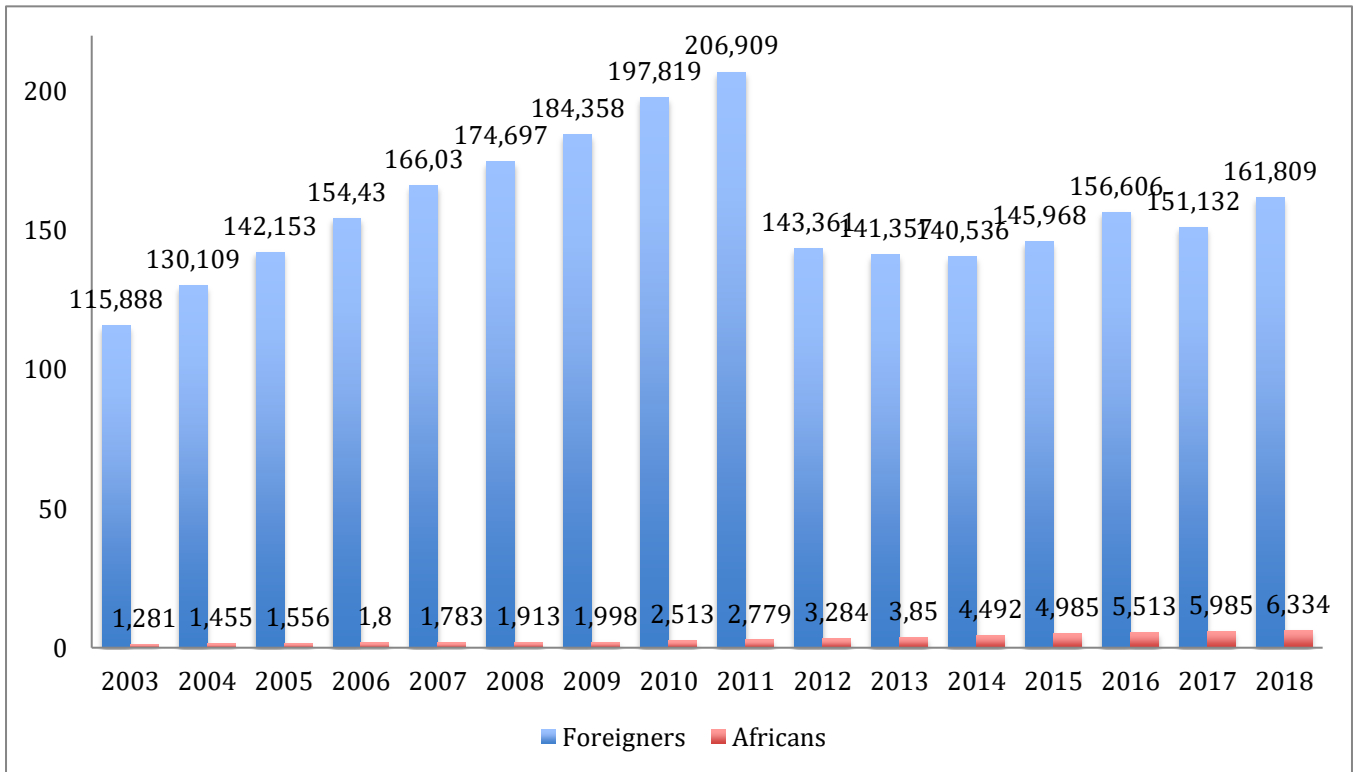


Figure 3. Number of Africans in Hungary in light of total number of foreigners between 2003 and 2018

Source of data: Hungarian Central Statistical Office

When looking at the countries of origin of legal African migrants in Hungary, a very colorful picture can be drawn as almost all the countries of the continent are represented. As Figure 4 indicates that the majority of the Africans who were staying in Hungary between 2009 and 2010 were from countries of North Africa. The real figure of this group of Africans was above 40 percent both in 2009 and 2010. As for the most populous nation in Hungary, Nigeria led the list with more than 730 people in 2010. If the goals of migration are examined, out of the total immigrant population officially requesting residence permit during the first nine months of 2012 and the same period in 2013 respectively, 921 and 1,040 Nigerians stated study-related purposes, which meant 10 percent of the total number in the study-related category (altogether 8,927 and 10,400 respectively).³³ With regard to gender statistics, more than two-thirds of all the African migrants were male. In 2017, 20.54 per cent of the African immigrants came from Nigeria and the rest from various African countries.³⁴

³³ Based on the statistics of the Office of Immigration and Nationality. Office of Immigration and Nationality, Statistics, 2013, <http://www.bmbah.hu/statisztikak.php> (7 July 2019).

³⁴ https://www.ksh.hu/docs/hun/xstadat/xstadat_eves/i_wnvn005b.html (7 July 2019).

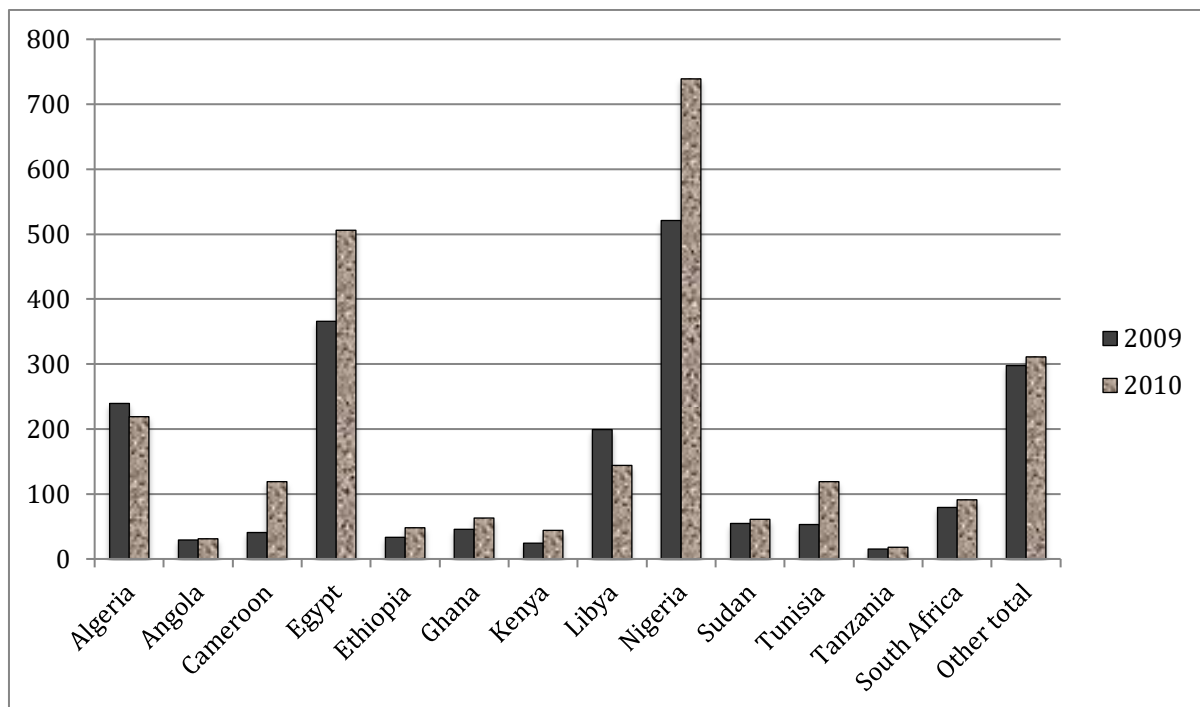


Figure 4. African immigrants according to countries of origin, 2009–2010

Source of data: Hungarian Central Statistical Office

Supporting again Bondarenko et al.,³⁵ similarly to the situation in Russia and other post-Soviet states, “Nigerians are surely most advanced in the sphere of ‘diaspora building’” in Hungary as well. Analyzing the African population in the Hungarian capital from the perspective of distinct African identities and potential conflicts, Olomofoe points out that “regional differences, i.e. ‘inter-state’, and internal ethnic/tribal differences, i.e. ‘intra-state’, are relegated to a minor position in the daily interactions”³⁶ It is relevant to talk about a ‘community’ of Africans also in Budapest, with the obvious inter-state and intra-state differences among its nationals.

As a major sector of activities, the civil sector offers the opportunities for creating a community of black people. A 2011 IDResearch survey also confirmed that legal African migrants in Hungary are active in the cultural and NGO sectors, and they take part in humanitarian and philanthropic activities – for example, make efforts to fundraise (either in financial or in-kind terms, or both) for schools, orphanages in different African countries (mostly their countries of origin). France Mutombo, a Congolese-born Adventist pastor with a Hungarian wife has been one of the most active Africans in the country.³⁷ For more than 15 years he has been running the NGO

³⁵ Bondarenko – Gogueva – Serov – Shakhbazyan ibid. p. 9.

³⁶ L. Olomofoe, Africans in Budapest: an emerging subculture? in P. Nyíri et al. (eds.), *Diasporas and Politics*, Budapest, MTA PTI, Centre for Migration and Refugee Studies, 2001, p. 63.

³⁷ The interview with France Mutombo was published in the Hungarian African Studies journal in 2009, see. “France Mutombo”, *Afrika Tanulmányok* 3(2): 56-62.

Foundation for Africa, with which he manages a school and an orphanage in Kinshasa, Democratic Republic of the Congo.³⁸ (He also arrived in Hungary to earn a university degree in the 1990s, and has become a well-known African across the country showing a positive example to the Hungarian society at large about the substantial contributions and impact immigrants can make in their chosen new home country and beyond.

Drawing upon Olomoofe,³⁹ the idea of a community of black people in Budapest “is constructed by ‘outsiders’, which hints at the existence of a racial/ethnic discourse, similarly to that about the Roma, within which black people are placed by the locals.” He argues that, “although many of these people have not encountered explicit racist behavior, implicit experiences of racism force Blacks together, creating a sense of solidarity.” All this was affirmed by many of the interviewees of an IDRsearch project. Teddy Eyassu, for instance, an Ethiopian with a PhD in International Relations from Corvinus University of Budapest was attacked by skinheads in 1992 – two years after he had arrived in the country. The case was taken to court, and Teddy asked the judge to pardon those who beat him up. After the incident he developed friendship with the former attackers. In his interview,⁴⁰ Teddy recounted the following story:

You can see other instances when Africans are offended still today. Two-three weeks ago, for example, one of the students who came to study in Budapest with a scholarship told me that he went to a pub with some friends. They saw a company there who was talking about them, which they did not understand because of their very limited Hungarian, but suddenly they heard them saying ‘néger, néger’ [meaning nigger]. Some members of that group had their cigarettes half smoked, then, threw the rest onto the shirt of one of the African boys. One of the attackers held a chair above his head intending to have a fight using it, and they all cried ‘monkey, monkey’. [...] There are atrocities, but you cannot generalize. This is truly not a feature of Hungarian society at large.

The term ‘néger’ is commonly used for black people, and as Olomoofe⁴¹ rightly underlines, “is perceived as neutral by most people.” It is in the Hungarian language, most probably deriving from centuries-long non-experience and knowledge about black people in general, that it does not have the negative connotation black people attach to it. This negative connotation is rather attached to the word ‘nigger’, which is also used in the language, but that is a very offensive term.

Among other factors, the “attitude of the natives does turn out a significant factor of migrants’ adaptation / non-adaptation”,⁴² and for any successful integration from both sides open-minded and inclusive attitudes and perceptions are desirable. A well-known media personality, Sorel-Arthur Kembe, who has appeared on numerous TV channels either as an actor in soap operas, or a reporter in talk shows, is a son of a Congolese father (from Congo-Brazzaville) and a

³⁸ I. Tarrósy, It Can Also Be Done from Central Europe – Hungarian Humanitarian Involvement in the Democratic Republic of the Congo, *CIHA Blog*, May 4, 2013, <http://www.cihablog.com/it-can-also-be-done-from-central-europe-hungarian-humanitarian-involvement-in-the-democratic-republic-of-the-congo/> (7 July 2019).

³⁹ Olomoofe *ibid.* p. 63.

⁴⁰ Also published in the Hungarian African Studies journal in 2009. See Interjú Tadasse Eyassuval, *Afrika Tanulmányok* Vol. 3. No. 3-4. 2009, p. 42.

⁴¹ Olomoofe *ibid.* p. 63.

⁴² Bondarenko – Gougueva – Serov – Shakhbazyan *ibid.* p. 12.

Hungarian mother. His father also migrated to Hungary for study purposes in 1973, and as opposed to many of his classmates who returned to their home country, he stayed and established his family. In an interview with the journal *Afrika Tanulmányok*, Sorel recalled his feelings about the atrocities he had experienced at the early 1990s: “I went through an interesting character development those days. First, I was afraid of the skinhead fellows, then, became angry with them, finally, I turned into unconcerned and rather impassive about them.”⁴³

Most scientific views on contemporary Hungarian society, which is considered as ethnically homogeneous – apart from a rising percentage of the Roma, which is the largest ethnic minority in the country – seriously calculate with xenophobia in the context of immigration. “Homogeneity and closedness are partly the explanation of the stable and relatively high level of xenophobia which has increased after the fall of Communism.”⁴⁴ As Hárs and Sik⁴⁵ report, “time series analysis of the level of xenophobia shows that one third of the Hungarian population would close Hungary’s borders (open xenophobes). [...] The opposite group (“super-liberals”) is rather small (3%). The third group (“realists”) contains approximately two-thirds of the Hungarian population and has always been the dominant group.”

Sliman Ahmed from Mauritania, who as a former socialist state scholarship holder obtained his degree in Engineering from the Budapest University of Technology in 1976, has always had a very positive view. As one of the most active NGO leaders being the president of the Sahara Foundation, he says he has a lot of Hungarian friends and supporters.

I can only say positive things. Hungarians are hospitable and helpful. I saw Africans speaking only in English and asking for help in the street, the Hungarian they approached was using his arms and legs just to offer help in showing the requested direction. [...] If I ever return to Mauritania for good I will certainly bring along with me this Hungarian mentality and culture.⁴⁶

“To us, Hungary is our second home and irrespective of the fact that we were not born here, we live here, we have our families here, and we have exactly the same problems as our Hungarian friends,” comments on his identity Josephat Rugaika, President of the Hungarian Society of Tanzanians.⁴⁷ The young NGO with its experienced management – President Rugaika came to Hungary in 1975 to earn a university degree in Chemical Engineering – wants to build on the embracing attitude that was prevailing in the 1970s among the African migrants of the time. “There were different student associations for Kenyan, Ugandan and Tanzanian students, but

⁴³ Interjú: Kembe Sorel-Arthur sportoló, műsorvezető, színész. Kembe Sorel, *Afrika Tanulmányok*, Vol 5. No. 3. 2011, p. 82.

⁴⁴ Sik – Zakariás ibid. p. 11.

⁴⁵ Hárs – Sik ibid. p. 101.

⁴⁶ Excerpt from the interview published in *Afrika Tanulmányok*. Interjú Szliman Ahmeddel, a Szahara Alapítvány vezetőjével, *Afrika Tanulmányok* Vol. 4. No. 2. 2010, p. 64.

⁴⁷ A. T. Horváth, Interjú Josephat Rugaikával, a hazánkban élő tanzániaiak doyenjével, *Afrika Tanulmányok*, Vol. 6. No. 3. 2012, p. 40.

we came together often to celebrate as a big family. This has not changed a thing; today we act in the same way. We consider, for instance, the Kenyans as our brothers and sisters”.⁴⁸

Many of the Africans who got their university education during the 1970s, 1980s and 1990s married Hungarians, and established their families in Hungary. Some of them draw our attention to another linguistic peculiarity, the outdated term ‘félvér’ (half-blood), which is still in use when referring to their children. Raymond Irambo, working today as an electrical engineer, who arrived in Hungary as another state scholarship holder from Congo-Brazzaville in 1982 feels that the Hungarian term possesses a negative connotation, in particular how it was used in kindergarten, as he remembers how the teachers uttered it when talking about his children. The majority of second-generation African-Hungarians prefer being called ‘white coffee’ to ‘half-blood’. Irambo’s children think their father is the coffee, their mother is the milk, and they are these two in one.⁴⁹

4. Foreign Policy of ‘Global Opening’⁵⁰, the potential for an ‘Africa Policy’⁵¹ and Hungarian Africans

A rather self-confident step toward the implementation of a ‘global opening’ to the rapidly changing world was taken by the Hungarian government taking office in 2010. A new position of ‘Deputy State Secretary for Global Affairs’ was established within the Ministry of Foreign Affairs, underscoring the strong intention to bring about changes in foreign policy and to reposition Hungary on the world map. A strategic document got green light after the Hungarian Presidency of the Council of the European Union was handed over to the forthcoming Troika-member Poland for the second half of 2011. In one of the most important foreign policy strategies since the political regime change, the Hungarian state clearly argues for a policy of ‘opening’ to the increasingly global and transnational world. It fosters the strategic decision about Hungary’s redefined stance on the ‘East’, including China, Russia and Central Asia, as well as the Middle East, but also on sub-Saharan Africa. In light of both a progressively evolving global ‘actorness’ of the EU on the supranational level and reaffirmed cooperation with the Visegrád countries, pursuing a stronger representation of regional interests, Hungarian foreign policy has a new perspective.

Within this context, Hungary wished to formulate its “own” ‘Africa policy’ – as one can be assured reading the policy document of global opening.⁵² Good reputation and a wide network

⁴⁸ Horváth *ibid.* p. 38.

⁴⁹ For more about Raymond Irambo and other Africans in Budapest. J. Lángh, Budapesti afrikaiak, *Afrika Tanulmányok*, Vol. 5. No. 3. 2011, pp. 155-168.

⁵⁰ I. Tarrósy – Z. Vörös, Hungary’s Global Opening to an Interpolar World, *Politeja*, No. 2. 2014, pp. 139-162.

⁵¹ I. Tarrósy – P. Morenth, Global Opening for Hungary – New Beginning for Hungarian Africa Policy, *African Studies Quarterly*, No. 1-2. 2013, pp. 77-96.

⁵² Ministry of Foreign Affairs of Hungary, *Hungary’s Foreign Policy after the Hungarian Presidency of the Council of the European Union*, Budapest, 2011, https://eu.kormany.hu/admin/download/f1b/30000/foreign_policy_20111219.pdf (7 July 2019).

of personal contacts in many countries of Africa can certainly contribute to successful implementation, if the approach goes further beyond official government rhetoric. Those young Africans who arrived in Hungary during the 1960s, 1970s and 1980s with scholarships from the Hungarian state represent “an unbreakable link between our country and the continent,” according to the introductory text of the Budapest Africa Forum held between June 6-7, 2013, celebrating the 50th anniversary of the foundation of the Organization of African Unity (OAU), predecessor of the African Union (AU). These individuals – who, as Hungarian graduates with partial Hungarian identities, or at least with the feeling of attachment to their former alma maters and Hungarian culture, also bearing the knowledge of the local language – can function as “ambassadors” to foster bilateral ties. The policy of global opening has a definite intention to do this by admitting that “Hungary needs to review how to address the problems arising from the short-comings of our network of representations in Sub-Saharan countries,” and underlining that more diplomatic representation is needed for success.⁵³ On October 29, 2013, State Secretary Péter Szijjártó informed the Hungarian News Agency MTI that Hungary reopened its embassy in Abuja.⁵⁴ Today, the country operates 6 embassies across Sub-Saharan Africa. The latest it opened was in Luanda, Angola, where after more than three decades the Hungarian Prime Minister finally paid a visit at the end of March 2019.⁵⁵

Hungary has a positive image in numerous African countries from two angles: first, it did not take part in Africa’s exploitation as a colonial power in a direct way (of course, it cannot escape from being part of the imperialist project as part of the Austro-Hungarian Monarchy), second, with many of its former products, such as the Ikarus buses or Hajdu washing machines, and even the Elzett locks and the streamlined diesel rail cars of the Ganz company can hold extra credits for refining and redefining relations. A good combination of utilizing ‘nostalgic’ feelings both of university studies and products, the resident African diaspora in Hungary representing many nations, together with a strengthened and extended network of diplomatic representations as part of a coherent and consistent government policy, is the ingredients of success in the long run. All these, however, need to be coupled with direct and immediate commitments (as in the case of the Libyan crisis) as an EU and NATO members state.

Hungary has several serious and direct security policy and geopolitical concerns and interests, as far as migration, peacekeeping or NATO duties are taken into account. In the spring of 2013, the Hungarian government took part in the French-led military operation ‘Serval’ in Mali with experts of the Hungarian Armed Forces.⁵⁶ Also for Sub-Saharan African refugees, Hungary can be a potential target-country (in hypothetical terms rather, as long as more extended diaspora linkages offer better solutions in other countries across Europe). Organized crime, international

⁵³ Ministry of Foreign Affairs of Hungary *ibid.* p. 48.

⁵⁴ <https://2010-2014.kormany.hu/en/prime-minister-s-office/news/hungary-reopened-its-embassy-in-abuja> (7 July 2019).

⁵⁵ https://hirtv.hu/hirtv_gazdasagi_hirei/szijjarto-tobb-magyar-vallalat-is-beruhazasokat-hajthat-vegre-angolaban-2478193 (7 July 2019).

⁵⁶ HVG: Magyarok Maliban: megjelent a kormányhatározat, *HVG*, 2013
http://hvg.hu/itthon/20130308_Magyarok_Maliban_megjelent_a_kormanyhatar (7 July 2019).

terrorism, AIDS and tropical diseases can all reach Hungary, too. Therefore, to contribute effectively to the stability of the region and to reduce poverty in the long run is Hungary's best interest, while at the same time, presents a crucial moral obligation as well.

One of the most heated contemporary debates in the European Union is related to the ongoing refugee crisis. It is rather for internal (national) political gains to label asylum-seekers as 'illegal economic migrants', however, the entire issue of increased international migration needs to be taken seriously, but holistically, with all its complexities. "As long as there is violence in the respective countries of origin, asylum-seekers will continue to apply for refugee status in Hungary [too]."⁵⁷ Concerning any future Hungarian Africa policy, the migrant communities and the diaspora-related ties in general certainly need to be revalued in the coming years. As an additional element, building up future connections, soft power can play a role also in the case of Hungary. Education and research are key factors in the reshaping of Hungary's African presence, which can be a basis for further cooperation in the long run. Bilateral educational, cultural, and scientific agreements have been of great importance for Hungary for decades. The new Stipendium Hungaricum⁵⁸ public scholarship programme, thus represents one of the most significant tools for the pragmatic foreign policy of Hungary and for the evolving Africa policy as well. It is basically a revitalisation of the scholarship programme of the immediate Socialist past. It was presented that a number of African countries Hungary's relations had become loose after the regime change, but according to the government, these are "easy to rebuild, as nowadays young people [from] Africa [...] who have done their studies in Hungary keep good and extremely pleasant memories of the country and are more than ready to engage in cooperation."⁵⁹ By developing the Stipendium Hungaricum programme as a soft-power tool, Hungary's main goal is to be able to develop economic relations and increase its economic strength. At the Hungarian embassies, special commercial auxiliaries and experts have been pursuing targeted activities to increase the volume of trade. The MNKH Hungarian National Trading House Cls. is also responsible for the development of economic opportunities. Moreover, further important actors of the foreign-economy government machinery, such as the Hungarian Export-Import Bank Ltd. (Eximbank), the Hungarian Export Credit Insurance Company Ltd. (MEHIB), and the Hungarian Investment Promotion Agency (HIPA) also back these efforts.

5. Conclusions

"From the 1950s through the 1980s," as Kane and Leedy⁶⁰ phrase, "migration [from Africa] to Europe followed the historical connections between colonial powers and their former colonies."

⁵⁷ Tétényi – Barczikay – Szent-Iványi *ibid.* p. 16.

⁵⁸ <http://studyinhungary.hu/study-in-hungary/menu/stipendium-hungaricum-scholarship-programme> (7 July 2019).

⁵⁹ <https://www.parlament.hu/documents/static/biz40/bizjkv40/KUB/1505201.pdf> (7 July 2019), p. 7.

⁶⁰ A. Kane – T. H. Leedy, *African Patterns of Migration in a Global Era. New Perspectives* in A. Kane – T. H. Leedy (eds.), *African Migrations. Patterns and Perspectives*, Bloomington, Indiana University Press, 2013, p. 2.

It is, however, not only because of, as they suggest, “the tightening of immigration laws in France and Britain at the end of the 1980s” that “migrants (especially refugees) began to land in countries without any colonial ties to their countries of origin.” As this paper has argued, the major political relations of the bipolar world did influence the migration of Africans toward the Eastern bloc of Europe and the Soviet Union from the 1960s up until the 1990s. Agreeing with Bondarenko et al.,⁶¹ “in the global scale the coming of the postsocialist and postcolonial worlds in such a direct touch with each other makes clearer the complex and contradictory nature of globalization,” and that of international migration as part of it.

Hungary offers a unique case for migration research. The country’s rather closed (due to the former socialist era among others) and homogenous society did not accumulate experience and knowledge about foreigners from faraway lands, for instance, from China, Vietnam, or sub-Saharan African countries. However, with the change of the political system at the end of the 1980s, the country has been encountering different flows of foreign nationals – but most of the immigrants are from Europe, and with a Hungarian ethnic background from neighboring countries. Not only the majority population, but also institutions of Hungarian public administration need to become more prepared for new groups of immigrants. This is of prime importance as the push of irregular migration, especially refugees and asylum seekers since 2015 has grown along the Schengen borders of the country (about half of its 1,400 mile-long national border). Apart from this new push, however, and as opposed to false perceptions, Hungary is still not a target for immigrants; rather a transit country. Besides, it is again an emigrant country – similarly to some previous historic periods. Recent figures show that “the proportion of adult Hungarians working abroad or choosing to live in foreign countries has tripled in the past two decades”.⁶² Hungary again is “losing its best and brightest”.⁶³

As many have said already what Kofi Annan⁶⁴ formulated as: “there can be no doubt that European societies need immigrants,” the majority of whom are “industrious, courageous and determined. [...] They are not criminals. They are law-abiding. They do not want to live apart. They want to integrate, while retaining their identity.” African immigrants in Hungary are no different from this. Although there are no exact figures about their professional composition, from surveys and NGO activities (mainly events and reports) it can be stated that a large group of them are well educated and highly qualified, many of them holding university degrees. Through their personal and organizational networks – as they are active in the NGO sector – they can make valuable contributions to Hungarian society, as well as to the development of bilateral connections and cooperation between their sending countries and the chosen new home country, in particular, to the success of the foreign policy of ‘Global Opening’ with its newest chapter on ‘Southern Opening’. The case of Budapest proves how they have constructed a

⁶¹ Bondarenko – Googueva – Serov – Shakhbazyan *ibid.* p. 17.

⁶² Survey finds number of Hungarians mulling emigration tripled since regime change. *Politics.hu*, <http://www.politics.hu/20130221/survey-finds-number-of-hungarians-mulling-emigration-tripled-since-regime-change/> (10 November 2013).

⁶³ Z. Dujisin, Hungary Losing Its Best and Brightest, *Inter Press Service*, May 23, 2013, <http://www.ipsnews.net/2013/05/hungary-losing-its-best-and-brightest/> (7 July 2019).

⁶⁴ K. Annan, Migrants can help rejuvenate Europe, *Financial Times*, January 28, 2004.

'black community', and as Olomoofe⁶⁵ observes, a "distinct 'Black Budapest sub-culture'." Even the government intends to approach and activate them to help build bridges as part of this new foreign policy doctrine.

The education of young people and efforts to include relevant information about international migration and the immigrants themselves in school curricula in the long run can be a key to clearer understanding of the complexities of migration, and to successful integration.

All these are especially relevant, as the Hungarian government has been firmly advocating a country without immigrants in the future.

⁶⁵ Olomoofe *ibid.* p. 65.

Temporary protection: Europe, Croatia and the UK

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This paper considers contemporary temporary protection in Europe using Croatia and the UK as case studies. Both countries are signatories to the 1951 Refugee convention and as member states of the EU are subject to EU law and the EU Temporary Protection directive (TPD). This paper looks at TP as a protection mechanism, the specific purposes of the TPD, its transposition into national law, and explores reasons why it has never been activated. While there are risks with a transposition stage, as a study of Croatia shows, this is not the explanation for failure to activate the TPD. One compelling perspective is that European countries, reflecting a political backlash to elevated numbers of asylum applications, the UK being but one, which is considered as in this paper, trust more national forms of temporary rights for asylum seekers than regional EU response. In considering the position of Croatia and the UK, this paper considers in the light of this perspective national law and practice on temporary rights for asylum seekers.

Key words: Temporary Protection, EU, Croatia, UK

Introduction

The first part of this paper considers the meaning of *temporary protection* (TP) at a global level through consideration of the 2014 UNHCR ‘Guidelines on Temporary Protection or Stay Arrangements’ (2014 UNHCR Guidelines).¹ The second part considers the EU formulation of TP through the adoption and operation of the 2001 TP Directive (TPD).² Transposition of this instrument is explored by using Croatia as a case study. The third part contrasts, on the one hand, the UNHCR guidelines and the TPD – linked by their emphasis on a shared regional response, with on the other hand, the notion and practice of TP at the national level with the UK as a case study. These case studies enable some observations and conclusions about contemporary perspectives on the role of TP in Europe. One conclusion is clear that despite supposed lessons from the past promoting a regional TP response, the evidence shows that in Europe states opt

¹ UNHCR, 2014 Guidelines on Temporary Protection or Stay Arrangements.

² 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 [2001] OJ L212/12. (TPD).

for national forms in preference. Various explanations can explain the failure of regional TP in Europe, which in sum, represent the strength of national interest over regional solidarity.

1. Defining and distinguishing TP

1.1. Fundamentals

TP is something other than protection under the 1951 Refugee Convention.³ A justification for this is the fact that the EU has its own TP instrument, TPD, and yet all EU states are signatories to the 1951 Convention. As explained below, the history behind the TPD explains a close relationship and to some extent overlap with protection under the 1951 Convention. Be that as it may, the two are distinct and separable.

One conundrum in distinguishing the two forms of protection is that refugee status by its nature and design is temporary. It is temporary because it is not meant to be a permanent status. As Hathaway has written, “in law, temporary protection is already the universal norm”.⁴ In making this point he was countering the assumption, particularly in Europe, that asylum leads to permanent stay in Europe. His point is that as a matter of Treaty law, taking account of the clear intent behind it, protection should not be assumed to be synonymous with permanent stay.⁵ The 1951 Convention recognizes this, for example, Article 1 C of the 1951 Convention brings to an end a states duty to protect when the cause of flight ceases to exist. On the other hand, in line with Treaty law, refugee status ends because the refugee’s status changes through the grant of permanent resident status,⁶ or, through gaining the nationality of the host state through naturalization under national law.⁷ So despite different outcomes, refugee status should always be a temporary one, without any compromise to protection of the person.

1.2. TP: a global perspective

TP has emerged as an alternative and distinct basis of protection to 1951 Convention in different regions of the globe including in Europe. As noted above given that European states are signatories to the 1951 Convention, its emergence in Europe serves to indicate its separateness from the 1951 Convention.

While TP is acknowledged globally, there is no agreed definition as it is a contested concept with both its advocates and its critics. Instead, the best level of consensus has formed around a

³ Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention) as amended by the New York Protocol of 31 January 1967.

⁴ J. Hathaway (ed.), *Reconceiving International Refugee Law*, Kluwer Law International, 1997, 2.

⁵ *Ibid.* 3.

⁶ In Croatia obtaining permanent residence rights: in the UK indefinite leave to remain.

⁷ In Croatia under the article 8 of the Law on Croatian Citizenship - Official Gazette Number 53/91, 70/91, 28/92, 113/93, 4/94, 130/11, 110/15; in the UK under the British Nationality Act 1981 s 6 and schedule 1 and immigration rules para 339BB.

set of UNHCR guidelines. These guidelines, entitled, ‘Guidelines on Temporary Protection or Stay Arrangements’⁸ were published in 2014 following a series of expert meetings which recognised developments in international law including the EU’s TPD.⁹

It is made clear in the guidelines (at para 8) that TP is not a replacement for obligations under the 1951 Convention, “TPSAs are without prejudice to the obligations of States under international law, including particularly the 1951 Refugee Convention and/or its 1967 Protocol, as well as other human rights and/or regional refugee instruments to which they are party.”

Instead they propose (at para 3) TP as a “pragmatic tool” of international protection. Within these guidelines the scope of application of TP is identified (at para 9) as a suitable response to:

- “(i) large-scale influxes of asylum-seekers or other similar humanitarian crises;
- (ii) complex or mixed cross-border population movements, including boat arrivals and rescue at sea scenarios;
- (iii) fluid or transitional contexts [e.g. at the beginning of a crisis where the exact cause and character of the movement may be uncertain, or at the end of a crisis, when the motivation for departure may need further assessment]; and
- (iv) other exceptional and temporary conditions in the country of origin necessitating international protection and which prevent return in safety and dignity.”

The numbers of people in the movement and the complexity or uncertainty of the situation are the base characteristics of TP situations in these guidelines. The impact that justifies applying the Guidelines is that the existing framework to manage the movements will not work or simply there is none. As the Guidelines (at paras 10 and 11) state:

“10. In each of these scenarios, individual status determination is either not applicable or feasible, or both.

11. In designing TPSAs, it will be important to agree on the target situations or trigger events to ensure predictability and to clarify the beneficiary category/ies.”

Whereas according to these Guidelines, TP is based around “categories, groups or scenarios”, in contrast, protection under the 1951 Convention is based upon determination of *individual* persecution.

⁸ UNHCR *ibid.*

⁹ UNHCR *ibid.* para. 2.

The other key characteristic for the application of TP as conceived in these Guidelines is that it is understood as applying as a coordinated response at either a regional or international level through some form of burden sharing, (paras 6, 8, 19 and 23).

The Guidelines recognise (at paras 8 and 20) that TP will be brought to an end because TP are “solutions-oriented and time-limited”, even if “states may agree to set extendable timeframes.” In these guidelines the ending of protection is, like the 1951 Convention, understandably countenanced on change of circumstances (cause of flight or status of persons who fled), but not by the simple fact of the passing of time. In this respect it is hard to draw a distinction with the foundational protection principle of non-refoulement under article 33 of the 1951 Convention.¹⁰

2. European TP

The 2014 Guidelines make clear (at para 8) that they are not applicable where there are pre-existing mechanisms. The EU has, since 2001, its own regional mechanism.

This is the Council Directive 2001/55 on TP (TPD).¹¹ It defines the circumstances of its application and the duration of TP. Unlike the 2014 UNCHR guidelines it sets out in hard law rights and obligations for the application of TP.

Before looking at it, it is instructive to summarise, in brief, the history leading to its adoption.

2.1. The European story

In Europe TP is associated with mass influxes. The immediate history before the adoption of the TPD, which is acknowledged in it, was the influx crisis caused by the break-up of Former Yugoslavia (FY), and notably, influxes caused by the Bosnian war (1992-5). At the beginning of the crisis in 1992, there was no EU-wide asylum system and no regional TP. Frontline states concerned by the numbers of asylum seekers from Bosnia sought support within the EU in the form of some commitment to burden sharing. A number of EU states including the UK successfully resisted this.¹² So there could be no regional response. Instead EU states responded to the influx of Bosnians at the national level. In most EU states the type of response was the same – the implementation of TP.¹³

While there was disparate practice and rules, one could say there was a common purpose behind adopting TP. One part was positive towards those fleeing to the EU, to expand the basis for protection given that it was not clear to everyone that the obligations under the 1951 Convention

¹⁰ G. Noll – S. Malström, *Report No. 22 Temporary Protection - Problems and Prospects*, Raoul Wallenberg Institute, Lund 9 May 1996, pp. 19, 23, 33,

¹¹ Council Directive 2001/55/EC of 20 July 2001.

¹² Noll – Malström *ibid.* p. 17.

¹³ Noll – Malström *ibid.* p. 33.

extended to those fleeing, en masse, war zones. The other part was a counter-balance, that their stay would be temporary with the expectation that Bosnians would return home as quid pro quo for extending protection to such numbers.¹⁴

In the end, national TP had mixed results. While most states accepted Bosnians fleeing FY on the basis of TP, the levels of protections were variable and in some states the status was subject to criticism due to its precarious nature, inadequate basic rights and because the rules were deliberately designed to prevent integration such as through prohibition on a right to work. The counter-balance measures had mixed success too in that significant numbers did not return following the end of the conflict. Germany, the most burdened state was an exception, but it was heavily criticized for pressuring returns of large numbers of Bosnians. Other states recognized that the basis for forced return was weak given the precarious situation in Bosnia following the ceasefire and recognized that on an individual basis many Bosnians had a case for refugee status under the 1951 Convention or were to be granted another form of humanitarian protection such as under the ECHR. No doubt a permanent stay outcome was easier to accept in these states as they were much less burdened than Germany.

In 1999, with the Bosnian influx over a new scare caused by a mass displacement of Kosovars in Serbia, gave EU states a second fright and thus a motivation to implement an EU level approach to asylum. Through the Treaty of Amsterdam reforms EU states agreed the structure to create a common European asylum system to manage asylum movements into and around the EU. The first piece of substantive law for this new regional approach was the TPD.

2.2. TPD

2.2.1. *The beneficiaries*

The basis for application of the TPD is “mass influx” of persons in need of protection, Article 1:

“The purpose of this Directive is to establish minimum standards for giving temporary protection in the event of a mass influx of displaced persons from third countries.”

Article 2(d) states that a mass influx is “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.”

There is no specified number or proportion to determine a “mass influx” other than it is a “large number” arriving in the EU. No formula was ever devised. Under article 2(a) risk to the functioning of the “asylum system” is identified as a particular indicator that the influx is large.

¹⁴ Noll – Malström *ibid.* p. 23.

Ultimately, determination of “mass influx” is not based on a formula or a number, it is a political judgment, and as we shall see, a decision that inevitably allows for other considerations to be taken into account.

Article 2 (c) defines displaced persons as including those

“who may fall within the scope of Article 1A of the Geneva Convention . . ., 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”.

The beneficiaries of the TP Directive are unambiguously defined as a wide category of people which contrasts with the 1951 Convention, and in this it addresses the problem of narrow interpretations of beneficiaries - individualised persecution - under the 1951 Convention. It is worth noting here that this expanded protection was adopted in subsequent EU law as the concept of *subsidiary protection* in the Qualification Directives, which is very similar to the TPD notion of “displaced persons” in that it protects those fleeing war and armed conflict. Subsidiary protection is an existent legal right unlike TP rights under the TPD, which, as we shall see presently, is dependent upon a political decision to activate it.

2.2.2. Activating the TPD

Rights and obligations under the TPD are dormant unless and until it is activated. Under article 5 the process commences with the Commission submitting a proposal, which may have been requested by a state, to the Council for a temporary protection regime for a prescribed group or groups of displaced persons. Under article 25 states are then required to indicate, “in figures or in general terms” their capacity to receive such persons. The Council (of ministers representing each state), assessing the circumstances and the scale of the movements of displaced persons, votes on the proposal. Activation is secured by a qualified majority vote.

So the TPD requires each state to pledge to accept a quota of displaced persons. Each state decides for itself the numbers it is prepared to accept. There is no obligation or formula to determine a fair share between EU states, say, based on GDP or asylum capacity. Though replying to the Commission proposal is a legal requirement, the quota system is a weak burden sharing mechanism based purely upon extant political good will. This reflects a long-standing and unresolved problem for European states to meet on a consensus for a basis for fair sharing.

This is unresolved because it fundamentally reflects a corresponding perception of loss of sovereignty over a policy area which is a particularly sensitive one in some states such as the UK.¹⁵ Following the pledges, each state would accept its self-determined quota, and provide a basis in national law for residency. The TP period is initially for one year, and can be extended to a maximum period of three years, (article 4).

The TPD provides for the basis for forced returns following the end of TP period, however this is subject to other rights or bases for protection (article 22) and the activation of TP cannot prevent a claim for asylum under 1951 Convention (article 17).

3. Transposition

As an EU directive, the TPD must be transposed, that is, put into national law by every member state to which it is addressed.¹⁶ Then, as national law, it provides rights and obligations and if necessary can be enforced in national courts. Given the large number of states which are required to transpose it, there is a risk that the transposition will not happen in some states and or it will not be effected correctly in across all states.

As evaluative studies have made clear, transposition has not been without its problems with delays to transposition in some states and gaps and deficiencies in national law in a number of states.¹⁷

The section which now follows considers the transposition of the TPD into Croatian law and in doing so demonstrates the points above that states do pick and choose what to transpose. Of course poor transposition can be detrimental to protection rights for those in need, and for states runs the risk, but not necessarily the reality, of legal action by the EU.

3.1.1. Transposing the TPD – Croatia

Croatia is the last state to have joined the EU (in 2013) and so transposed it later than most states. The Croatian Law on Foreigners (LoF)¹⁸ is the principal law transposing the provisions of the TPD. This law is consistent with the principal purpose of the Directive by linking TP in Croatia to an emergency situation in the event of a mass influx or possible mass influx of displaced persons from third countries who can not be returned to the country of origin, (Article 78 (1) of the LoF). Croatia did not opt to put into national law the optional application of Article

¹⁵ H Beirens and others, *Study on the Temporary Protection Directive Final report*, undertaken by ICF Consulting Services Limited sponsored by EU Commission, 2016, p. 6.

¹⁶ Certain EU states have the right to opt out of the TPD obligations; Denmark has done this.

¹⁷ Beirens and others *ibid.* pp. 12-13 also <http://odysseus-network.eu/wp-content/uploads/2015/03/2001-55-Temporary-Protection-Synthesis.pdf> (5 July 2019).

¹⁸ Law on Foreigners, Official Gazette Number 130/11,73/13,69/17,46/18.

7 of the TPD to extend temporary protection to additional categories of displaced persons over and above those that would be included in a Council's decision to activate.

The LoF requires, in line with the TPD that the Government takes a decision on the introduction of temporary protection on the basis of an article 5 TPD decision to activate.

According to the provisions of the LoF (Article 79(3)) TP is explicitly granted for a period of one year, with a possibility to extend protection automatically to six months and then up to one year. The LoF regulates that temporary protection may be extended for a maximum period of one further year on the basis of a decision of the Council of the European Union. So in line with the TPD, the total TP period in Croatia may extend to three years.

National provisions on exclusion from temporary protection are in accordance with the provision of Article 28 of the TPD. Thus TP will not be granted in Croatia to a person who has committed a crime against peace, a war criminal or a person who has committed a crime against humanity established by the provisions of international acts, person who committed, instigated or participated in the commission of a serious non-political criminal offence prior to arrival in the Republic of Croatia, including particularly cruel acts, even if committed with the alleged political objective, nor to a person who has committed acts contrary to the purposes and principles of the United Nations as set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations. The requirement under article 28.2 TPD that any decision on exclusion be based on proportionality has not been transposed explicitly into the LoF, though it is liable to apply being a general principle of EU law.

3.1.2. Scope of TP Rights in Croatia

One of the objectives of the TPD was to harmonize the scope of rights of persons under TP and to overcome differences in national measures. Croatia has transposed, if imperfectly, the obligations in national law regulating the right of residence, right to work, basic living resources, access to health care and education, right to family reunion and right to practice religion.

All persons enjoying temporary protection in Croatia have a right to obtain a residence permit in a form of an identity card for the duration of the protection. However the LoF does not incorporate the quasi-supplication in article 8.3 that states facilitate, if they are required, visas with a minimum of fuss.

The right to work as well as educational opportunities for adults under TP is unrestricted under article 86 of the LoF.

Access to health care for foreigners in general, including persons enjoying international protection, is problematic in Croatia because there are various restrictions and legal obstacles to access health care. In 2009 and 2013, the Council of Europe's European Committee of Social Rights

(ECSR) concluded that the situation in Croatia “was not in conformity with Article 13.4 of the European Social Charter, as it had not been established that all non-resident foreign nationals in need, whether legally present or in an irregular situation, are entitled to emergency medical and social assistance”.¹⁹ For persons under TP, article 87 of the LoF does provide for emergency medical assistance, though the requirement to provide care for “essential treatment of illness” been not been transposed. Medical assistance is provided for in national law to vulnerable groups. This is in line with article 13 of the TPD, though the LoF does not, unlike the TPD, specify the categories of vulnerable people identified in article 13.4.

The LoF grants a right to education which is actually wider in scope than the TPD: all persons under temporary protection enjoy a right to primary and secondary education, as well as re-qualification and additional education under the same conditions as Croatian citizens; however the LoF does not extend to adult education as encouraged but not mandated under art 14.2 of the TPD.

Croatia has not transposed into national legislation article 13.2 of the TPD ensuring access to basic welfare and subsistence in cases of need. Article 22(2) of the Social Welfare Act stipulates that only persons under subsidiary protection and recognized refugees have access social welfare rights. Those under TP and in need would in Croatia therefore be vulnerable and at risk of destitution.

Under the LoF accommodation rights for persons under temporary protection are weaker than the requirements set out in the TPD in that the former unlike the latter links access to accommodation to financial means.

Croatian law regulates family reunification in very general terms and without specifying who is eligible to be considered as a family member for this purpose. In relation to children, Croatian legislation has not included, as required under article 15.4, the best interests of the child principle for consideration on the eligibility for family reunification. Furthermore, the whole set of provisions under article 16 concerning the rights of unaccompanied minors have not been transposed into Croatian law. So appointment of a legal guardian for an unaccompanied minors, the provision on placement of unaccompanied minor with relatives or in foster family, and access to reception center or access to the person who looked after the child while fleeing to Croatia, have not been transposed.

The right to claim asylum under article 17 is secured in Croatian law. The LoF recognizes the right under article 92 to submit a request for international protection, though beneficiaries may

¹⁹ Fact Sheet Croatia and European Social Charter

<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680492883&format=pdf> (1 July 2019).

Conclusions XVIII-1 - Croatia - Article 13-4,

[https://hudoc.esc.coe.int/eng#{"ESCDcType":\["CON"\],"ESCStateParty":\["HRV"\],"ESCDcIdentifier":\["XVIII-1/def/HRV/13/4/EN"\]}](https://hudoc.esc.coe.int/eng#{) (1 July 2019).

not enjoy the rights of the asylum seeker until TP disappplies. Article 17(2) of the TP Directive protecting the right to an on-going claim for asylum after the end of the TP period has not been transposed into Croatian legislation.

Provisions on voluntary and forced return have been transposed. Under Croatian law the Ministry of Interior has a duty to consider relevant reports on the state of the country of origin and to take into account compelling humanitarian reasons which would render the return of individuals temporarily impossible or unreasonable. This is in line with the principles in article 22 of the TPD.

3.2. Transposition in the UK

It is worth considering briefly the UK position in relation to the TPD. Under EU law, the UK, along with Denmark and Ireland, can opt out from being bound by any measure in the area of EU asylum law. The UK has opted into much of it and opted into all of the early legislation including the TPD. Given the UK's history of resisting EU obligations in this area it is interesting to consider why the UK opted in. The reason is seemingly the view at that time of the adoption of TPD that the development of a EU approach to asylum was in the UK's national interest in that it would help shift the burden from the UK.²⁰ Between 1999-2002 the UK experienced its highest levels of asylum applications and was one of the two top receiving EU states. The TPD was transposed, late, in the UK under the authority of primary legislation, the European Communities Act 1972. To all intents and purposes the UK transposed the essential requirements of TP Directive.²¹ The transposition is split between Part 11A of the immigration rules²² made under the 1971 Immigration Act and 2005 UK Regulations made by a 2005 statutory instrument laid under the authority of the 1972 Act.²³ The immigration rules set out the legal framework for recognizing a TP situation and the beneficiaries as per the TPD, and under Immigration Rule para 355B, provides for the key right to enter and reside as a beneficiary of TP and a right to documentary proof under Rule 355E; the Rules also provide for the rights of reunification of family members and the right to work; the 2005 Regulations provide for key subsistence and social rights.

4. Europe: responding to a crisis

From around 2010 the data showed a steady increase in the overall number of asylum applications in the EU. Then suddenly in 2015 the EU was in a crisis with over 1.3 million reported application made that year, (up 110% from 2014), followed by over 1.2 million applications in

²⁰ UK government, *Review of the balance of competences between the UK and the EU: asylum and non-EU migration*, 2014, para. 3.9.

²¹ <http://dev.ulb.ac.be/assoc/odysseus/tables/data/reports/4/uk.pdf> (5 July 2019).

²² UK government website, Immigration Rules www.gov.uk/guidance/immigration-rules/immigration-rules-part-11a-temporary-protection (5 July 2019).

²³ 2005 No. 1379 Immigration: The Displaced Persons (Temporary Protection) Regulations 2005 available at www.legislation.gov.uk/uksi/2005/1379/pdfs/uksi_20051379_en.pdf (4 July 2019).

2016.²⁴ These numbers were unprecedented.²⁵ It was acknowledged as the largest migration and humanitarian crisis in Europe for decades. The majority of the migrants were considered to be fleeing war and persecution with Syrian nationals making the highest number of applications across the EU.

While the overall EU figures show the scale for the EU as a whole, the impact in individual states was markedly different as a study of the situation in Croatia and the UK shows.

Croatia has not been in its recent history a county of asylum. The numbers of applications and the recognition rate were very low prior to the accession to the EU in 2013. Then in 2015 half of one million people entered Croatia. The size and character of the movement - a mass influx of displaced persons in need of protection, seemed to reflect the circumstance for activation of the TPD, article 2(d):

“[The] arrival in the [EU] of a large number of displaced persons, who come from a specific country or geographical area [...]”

The journeys made by these people to Croatia and the asylum application made there indicate that large numbers of them were from Afghanistan, Syria and Iraq – countries with high recognition rates across the EU. However only a tiny number applied for international protection in Croatia - only 152 persons.²⁶

In 2016, the number of asylum applications rose significantly on 2015 with over 2200 applications but again these were tiny compared to the movement. The positive recognition rate for these two years was respectively 24% and 4.5%. A massive number of people entered but most left and quickly.

Not many of those who transited through Croatia reached the UK. In 2015 the number of applications was around 40,000 (up from 33,000 the previous year) and in 2016 the number went down (slightly) to 39,000 applicants. Clearly there was not a mass influx in any sense into the UK.²⁷

If we look into the asylum trends in Croatia in past ten years,²⁸ we can see strong fluctuations in the number of asylum applications and several instances in which there was sudden increase in number of asylum seekers. Between 2009 and 2016 Croatia had increase of 1409% in number

²⁴ UK House of Commons Library Briefing Paper, *Asylum Statistics* (Number SN01403 6 March 2019) <https://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN01403> (4 July 2019).

²⁵ European Commission Press release (14 August 2015), http://europa.eu/rapid/press-release_SPEECH-15-5498_en.htm (5 July 2019).

²⁶ Different sources give different figures – but all point to a tiny number compared to the flow of migrants.

²⁷ Beirens and others *ibid.* p. 2.

²⁸ Official statistics of the Ministry of Interior, <https://mup.gov.hr/UserDocsImages/statistika/2019/Tra%C5%BEitelji%20me%C4%91unnarodne%20za%C5%A1tite%20u%202019%20godini/29-04-statistika-trazitelji-1-3-2019.pdf> (1 July 2019).

of asylum applications - from 148 in 2009 to 2234 in 2016. Still, an increase in number of asylum applications of 1409% did not qualify as mass influx as defined by the EU TPD by the simple fact that neither the Croatian authorities nor European Council considered effecting the TP mechanism.

4.1. TPD – not activated, why not?

While done late in many countries, by the time of the 2015 influx crisis, most states had, if imperfectly, transposed the TPD into national law.

The 2015 crisis was without doubt a situation of mass influx into regions of the EU but not for all parts or for all states, e.g. as we have seen, not for the UK. So some states were under a great amount of pressure either because of people transiting through (e.g. Croatia), or others as destination states with significant challenges to their asylum systems and social systems being under great strain or in some cases overwhelmed.

The TPD was not activated. In fact the TPD was not even seriously considered. A number of reasons can be put forward to explain this. The problematic transposition of the TPD is symptomatic of the problem with the TPD but unlikely to be a significant cause. Nor were criticism of the activation process in the TPD likely to explain its failure.

Instead the answer surely lies with the political considerations around it and how other factors and options were considered in the response to the crisis.²⁹

In terms of the Bosnian *quid quo pro* approach: even without the TPD, EU law and through it EU states, offered protection to those fleeing conflict and war through *subsidiary protection*. The TP and TPD were not needed to expand protection.

The other side then of protecting those coming to the EU was to ensure, as far as possible, a minimal but shared commitment to hosting asylum seekers. As the design of the TPD perfectly illustrates, EU state in general have not been able to show when it matters most, a collective willingness to accept voluntarily burdens, and instead when possible they seek to minimize them. Croatia had a mass influx problem but Croatia allowed it to be solved as people were allowed to travel through to other states, helped no doubt by low recognition rates.

The UK was not willing to share the burden. It would never have considered calling for the TPD. It had learned its lessons, asylum seekers were likely to stay even under TP. Like some

²⁹ European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions a European Agenda on Migration, Brussels, 13 May 2015 COM(2015) 240 final.

other states it may have considered that triggering it would actually encourage even greater numbers to come to the EU.³⁰

For states under pressure the TPD was pointless as it gave no guarantee of burden sharing. Attempts to activate it might very well have resulted in a humiliating failure. There was simply no faith in the TPD.

Instead the EU responded through a number of policy and financial measures and through securing, though not without some resistance, new legal measures under article 78.3 the Treaty on the Functioning of the European Union for a two year period, (so temporary), of mandatory redistribution of quotas of asylum seekers from hotspots in Greece and Italy to other states. A number of front line states refused to participate, though Croatia did. The UK did not opt into these measures.

The absence of a TPD response to the 2015-16 crisis is conspicuous given its sole purpose is to provide a mechanism to respond to a mass influx into the EU. Despite this it has not been repealed and remains EU law which still could be triggered for a future influx. But given its failure in 2015-16, it is not surprising that it has been referred to as a dead letter law.³¹

4.2. National forms of TP

“Refugee status itself is increasingly becoming a temporary protection measure, rather than leading to permanent resettlement and integration.”³²

This section considers national forms of TP. In a report sponsored by the Commission evaluating the TPD, national forms of TP were acknowledged:

“Beyond [the] »classical« form of temporary protection, there are other time-limited protection statuses applied by states. While these may not be associated with mass influx situations, or entitled as “temporary protection”, in reality these protection statuses have the same practical effect as temporary protection schemes. This for example includes national protection statuses with time-limited protection for humanitarian purposes to persons who fall outside the 1951 Convention.”³³

As we have seen in relation to the Bosnian influx, resort to national forms of TP is not a new form of response in Europe. But given its mixed results and problems with it then, it raises questions why states would resort to it now or think that it will be more successful this time.

³⁰ Beirens and others *ibid.*

³¹ C. Yeo, The impact of Brexit on UK asylum law: part one, *Free Movement Blog*, 27 December 2017, www.freemovement.org.uk/impact-brexit-uk-asylum-law-part-one (5 July 2019). Beirens and others *ibid.* p. 26.

³² H. Hintjens, Nowhere to run: Iraqi asylum seekers in the UK, *Race and Class* Vol. 54. No. 2. p. 90.

³³ Beirens and others *ibid.* pp. 4. 25.

As demonstrated in this section TP is applied as an immigration measure to reduce the incidence of permanent integration. From this perspective TP is a second line of defence used by states as non-entrée policies fail. National authorities are looking again at national policies for time-limited stay as, despite some periods of reductions, the numbers of applications in Europe are seen as historically high, viewed as politically unacceptable, with a public discourse increasingly bent towards hostility, with increasing tensions and political opinion hardening.

In other words, TP in Europe is a mechanism to emphasize and help execute the national objective of reducing immigration and commitments to immigrants and asylum seekers. There is discretion here as neither international law nor EU law determines the residency status of non-nationals.³⁴ Even for signatory states to 1951 Convention there are no specific obligations to grant residency permission. A person seeking asylum and even one who has obtained recognition of her need of protection needs a legal basis in national law to stay.

4.2. UK – hostile environment

Asylum seekers like all non-nationals are subject to UK immigration control under the 1971 Immigration Act. They need permission, ‘leave’, to enter the UK and remain and they need to be able to prove it. The importance of this has been highlighted with the scandal of the ‘Windrush generation’ – the forced removal of many immigrants from the Caribbean who having been encouraged to live and work in the UK and retired there, were, as victims of government policy to reduce immigration, denied the right to continued residence, because they could not prove their right to reside.

Entry without permission is unauthorized entry. For asylum seekers, EU law, article 7 of the EU Procedures Directive 2005/85, gives the right to remain in the UK pending their claim.³⁵

The process for recognition in the UK represents a series of stages of temporary permissions. Even for those claiming and establishing refugee status under the 1951 Convention, their presence is premised on stages of temporary stay.³⁶

Unless the asylum seeker has leave to be in the UK, unlikely, her status is tolerated, legally speaking she is ‘lawfully present’ though, without leave, not ‘lawfully resident’, *Szoma v Secretary of State for the Department of Works and Pensions*.³⁷ The legal framework for such a person is covered by the Immigration Act 2016, which provides that any person who enters the UK without authorization, which includes an asylum seeker, is liable to detention but will not

³⁴ EEA nationals are an exception to this under EU law.

³⁵ The updated – recast - Procedures Directive does not apply to the UK as it did not opt to adopt it - 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 180/60 (29/6/2013).

³⁶ Beirens and others *ibid.* p. 25.

³⁷ [2005] UKHL 64.

be detained if they meet conditions for ‘immigration bail’.³⁸ This act consolidates various sources of UK law on unauthorized entry, which for asylum seekers without leave, determines their presence as ‘temporary admission’.

Under EU law, article 23 Asylum Procedures Directive 2005/85, which the UK adopted, a decision on the application for protection should normally take place within 6 months. Though there are many applications which take much longer.³⁹ A positive decision for protection alone will not itself provide a basis in national law for leave - the person still requires an administrative decision to grant a basis to be ‘lawfully’ in the country, *ST (Eritrea) v SSHD*.⁴⁰

In the UK following a successful claim, the asylum seeker, whether as a Convention Refugee or under a humanitarian basis (subsidiary protection), will normally be granted under UK immigration rules, para 335, a temporary period of stay, known as ‘limited leave’ to remain. This period is normally five years, para 339Q.

After the five-year period the person will need a new basis to remain. The current rules require that if the person meets all the conditions, she will be given a permanent right to remain in the UK known as indefinite leave to remain, ILR or ‘settlement’, Rule 339R-S. These conditions include having remained in the UK during the limited leave, conditions relating criminal convictions, and the exercise of the government’s discretion of an assessment of the desirability of allowing the person to stay.

In recent years the UK government’s change of tone and approach towards all immigrants, colloquially referred to as a “hostile environment”, has changed the expectations for the long-term status for asylum seekers and introduced doubt that it will be granted. In 2016 the UK government introduced a new policy against an automatic transition to ILR by introducing a five-year “safe return review”. In the guidance published by the government, the five-year protection period whether as a refugee or on the basis of humanitarian leave⁴¹ is presented as a “probationary period of 5 years” limited leave.⁴² While this is not a change to the law as such, it introduces risk for asylum seekers and can be seen in the light of the hostile environment policy against continued stay. The guidance states the clear premise for expectations: the policy objective in granting refugee leave is primarily to provide protection and a period of limited leave to those who need it. That is, not a permanent period. While this is not a change to UK’s obligations notably in respect for the principle of non refoulement, it does introduce risk for the UK authorities to systematically search for reason to revoke permission, through for example,

³⁸ S. 61; Schedule 10.

³⁹ UK House of Commons Library Briefing Paper, *Asylum Statistics* *ibid*.

⁴⁰ [2012] UKSC 12.

⁴¹ Immigration rules paras. 339C-H

⁴² UK Home Office, ‘Refugee Leave’ (2 March 2017) 11

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/597990/Refugee-Leave-v4.pdf (5 June 2019).

a new country review outcome. For asylum seeker it prolongs the uncertainty of their position, and the uncertainty for their future.

While there appears to be no data or research publicly available on the impact of this change in policy, concerns have been raised about its negative impact.⁴³

Conclusion

TP in its classic formulation is about addressing an emergency of mass movements of people in need of protection, and in a nutshell, doing so outside the parameters of the 1951 Convention. This is because, either states in the region where the emergency exists are not signatories, or in the region where they are, the circumstances justify a humanitarian intervention over the application of the Convention.⁴⁴

TP is an imperfect solution with risk and an uncertain legal basis – but these are its origins and probably still the attaining circumstances in which it operates. TP is despite its nomenclature fundamentally about securing admission – expanding protection at the moment of need, rather than about emphasising the duration of admission.

At least in Europe national forms of TP have a different philosophy, they are about what happens after admission. They work to emphasise the temporary nature of stay. TP is not a policy of first choice given the great difficulty around removal; but it is seen as a second line of defence when non-entrée policies have failed to deter.

At the time the TPD was adopted it could have been seen as a milestone in development of a common and strong asylum system for the EU. The adoption of the TPD may have given hope that the EU would employ a much more efficient and immediate system of protection to persons in need fleeing a range of hostile and violent circumstances in their own country of origin. Additionally, the TPD pointed to an ideal of a solidarity mechanism between EU States under which they would share the burden in a situation of a massive influx of persons in need. The TPD was not perfect but it was presented in its claims that lessons were learned and a new approach would be taken in a crisis. In short, the TPD was an attempt to provide both expanded protection and reduced obligations through burden sharing and temporary stay.

With huge influxes of persons in need from Syria, Afghanistan and Iraq in 2015, none of front line states, including Croatia, formally proposed activation of TPD. This was despite the fact

⁴³ Refugee Council, *Refugees Welcome? The Experience of New Refugees in the UK A report by the All Party Parliamentary Group on Refugees*, April 2017. A. Travis, Refugees applying to live in UK face being sent home after five years, *The Guardian*, 9 March 2017, www.theguardian.com/world/2017/mar/09/refugees-applying-to-live-in-uk-face-being-sent-home-after-five-years (5 July 2019). C. Yeo, 'Home Office ends policy of automatic settlement for refugees after five years, *Free Movement Blog*, 9 March 2017, www.freemovement.org.uk/home-office-ends-policy-automatic-settlement-refugees-five-years (1 June 2019).

⁴⁴ UNHCR *ibid.* paras.1. 3. and 8

that these states were neither willing nor able to host large numbers of asylum seekers. In the absence of burden sharing, secondary movements, from one state to another, of asylum seekers were condoned. The TPD failed as key parts of the common European asylum system collapsed. Receiving states left to their own decisions on the mid-longer term situation, turned once again to their own national policies, which as illustrated by in the UK, included a form of TP.

Could things have been different? Could activation of the TPD have saved Europe or at least ameliorated the problem? Obviously hindsight makes the assessment easier, but probably the early hopes for its success were misplaced. The lack of a hard burden sharing mechanism was a fundamental flaw and reflects the unsatisfactory and unfinished business around burden sharing. This is unresolved to this day. But perhaps even more fundamentally, the EU's own efforts to give TP a stronger and secured position ironically undermined any chance of regional TP in Europe: by becoming formalized, the TPD undermined a key premise for TP – flexibility for states to judge the political possibilities and to react, or not, as they judge all the circumstances. The resort to national policies around temporary stay reflects this – as states remain freer to respond based upon national needs. Whether these are better, bolder or more humane solutions is another question.

Private military and security companies on E.U. borders: who will take responsibility for their human rights violations? – A theoretical analysis

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This paper attempts to analyze the complex relationship of private military and security companies with the European Union and its border control. The main question it seeks to find an answer to is who will take responsibility for the conduct of such organizations. The article follows a theoretical approach however, it uses some examples from the real world. The main results of the paper are the analysis of the attributional grounds based on which the conduct of private military and security companies can be equated with state conduct.

Key words: private military and security companies, attribution, international law, European Union, border control

1. Introductory remarks

In 2015, the European Union experienced an unprecedented number of asylum seekers and migrants coming from war effected regions of the Middle East or Africa. Some refer to this phenomenon as the ‘Migration Crisis of 2015’.¹ The European Union (hereinafter: E.U.) had to find solutions to this problem, which shed light to the inherent weakness of the E.U.’s asylum system,² which was and is under significant pressure. The E.U. has been trying to find a solution to the aforementioned problems, among political ones, one can mention the E.U.’s deal with

¹ Migrant crisis: One million enter Europe in 2015, BBC News, 22 December 2015, <https://www.bbc.com/news/world-europe-35158769> (5 July 2019) See also J. Henley, What is the current state of the migration crisis in Europe? *The Guardian*, 21 November 2018, <https://www.theguardian.com/world/2018/jun/15/what-current-scale-migration-crisis-europe-future-outlook> (5 July 2019).

² 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. See also H. Beirens, Cracked Foundation, Uncertain Future – Structural weaknesses in the Common European Asylum System, *Migration Policy Institute Europe*, March 2018, https://www.migrationpolicy.org/sites/default/files/publications/CEAS-StructuralWeaknesses_Final.pdf (5 July 2019).

Turkey³ and the Italy-Libya bilateral agreement.⁴ Besides this, the E.U. adopted a comprehensive European Agenda on Migration in May 2015,⁵ which ultimately has been shaped and implemented by private military and security companies (hereinafter: P.M.S.C.) on the E.U. borders.⁶

There is no universally accepted definition for P.M.S.C.s,⁷ however one can find certain definitions both in literature⁸ and international documents.⁹ For the purposes of this article, we will use the definition in the so called ‘Montreux Document’, which was created in 2008 on the initiative of Switzerland and the International Committee of the Red Cross with the cooperation of 17 governments, the industry, academics and non-governmental organizations. The Montreux Document is a soft law collection of good practices and customary international law norms considered to be binding in connection with the activities of P.M.S.C.s.¹⁰

The Montreux Document defines P.M.S.C.s as “private business entities that provide military and/or security services, irrespective of how they describe themselves. Military and security services include, in particular, armed guarding and protection of persons and objects, such as convoys, buildings and other places; maintenance and operation of weapons systems; prisoner detention; and advice to or training of local forces and security personnel.”¹¹ The Directorate-General for External Policies of the European Union however states that a wide variety of companies supply military and security services, ranging from armaments producers to consulting firms. Within the E.U. a non-exhaustive list of services, which have been outsourced to private firms in multilateral operations, includes armed guarding and protection of persons and objects, maintenance and operation of weapons systems, prisoner detention and interrogation, intelligence, risk assessment and military research analysis, advice to or training of local forces and

³ Agreement between the European Union and the Republic of Turkey on the readmission of persons residing without authorization.

⁴ Memorandum d’intesa sulla cooperazione nel campo dello sviluppo, del contrasto all’immigrazione illegale, al traffico di esseri umani, al ctrabbando e sul rafforzamento della sicurezza delle frontiere tra lo Stato della Libia e la Repubblica Italiana, 2 February 2018.

⁵ Communication from the Commission to the European Parliament, the Council, The European Economic and Social Committee and the Committee of the Regions – A European Agenda on Migration, COM(2015) 240, Brussels, 13 May 2015.

⁶ D. Davitti, The Rise of Private Military and Security Companies in European Union Migration Policies: Implications under the UNGPs, *Business and Human Rights Journal*, Vol. 4. No. 1. 2018, p. 34.

⁷ Szalai A., A katonai megánvállalatok részvétele és jogállása a fegyveres konfliktusokban, *FÖLDrész – Nemzetközi és Európai Jogi Szemle*, 2010/1-2, p. 38.

⁸ See for example L. Cameron – V. Chetail, *Privatizing War – Private Military and Security Companies under Public International Law*, Cambridge University Press, 2013, p. 1-2. or M. Ghazi Janaby, *The Legal Regime Applicable to Private Military and Security Company Personnel in Armed Conflicts*, Springer, 2016, pp. 1-4.

⁹ See for example International Code of Conduct for Private Security Service Providers, 9 November 2010, which is a code of conduct for business enterprises, who voluntarily choose to follow the rules laid down within the document. For another definition, see Article 2 of the Draft Convention on Private Military and Security Companies (PMSCs) for consideration and action by the Human Rights Council, Report of the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination, A/HRC/12/25, 5 July 2010. It is interesting to note that how the definitions develop as the definition maker changes. For example, security services will be the main focus of the businesses, sometimes they even lose ‘military’ as an indicative, for others the military attributes are more significant.

¹⁰ The Montreux Document on pertinent international legal obligations and good practices for States related to operations of private military and security companies during armed conflict, 2008, p. 5.

¹¹ The Montreux Document, Preface 9. a)

security personnel. Although this definition is mainly used in the context of an armed conflict outside of European borders e.g. to protect the EUPOL headquarters in Afghanistan, to secure the premises of the EULEX mission in Kosovo and to guard the EUPOL mission in the Democratic Republic of Congo (DR Congo), we consider it sufficient for the security services P.M.S.C.s provide on E.U. borders as well.¹²

Most of the scholarly writing about this subject saw the light of the day within the context of an armed conflict, therefore they focused on international humanitarian law as a basis for their analysis.¹³ Some of them deals with the parallel between P.M.S.C.s and mercenaries,¹⁴ others examine the notion of direct participation in hostilities¹⁵ or the attribution of state responsibility for the actions of such business enterprises.¹⁶

On the other hand, in this article, we attempt to move beyond the armed conflict approach, and analyze the services of P.M.S.C.s from a purely human rights point of view. We have to abandon the notion of armed conflict, since Member States of the E.U. are not in an international,¹⁷ nor in a non-international¹⁸ armed conflict at least in connection with the migration crisis,¹⁹

¹² European Parliament: The Role of private security companies (PSCs) in CSDP missions and operations. Directorate-General for External Policies of the Union, Directorate B, Policy Department, 2011.

¹³ See for example M. N. Schmitt, Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees, *Chicago Journal of International Law*, Vol. 5. No. 2. 2005.

¹⁴ J. L. Gómez del Prado, The Ineffectiveness of the Current Definition of a „Mercenary” in International Humanitarian and Criminal Law, in H. Torroja (ed.), *Public International Law and Human Rights Violations by Private Military and Security Companies*, Springer, 2017, pp. 59-82.

¹⁵ N. Melzer, *Direct Participation in Hostilities*, ICRC 2009.

¹⁶ A. Foong, The Privatization of War: From Privateers and Mercenaries to Private Military and Security Companies, *Asia Pacific Yearbook of International Humanitarian Law*, Vol. 4. No. 2010.

¹⁷ Common Article 2 to all the Geneva Conventions of 1949 „In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them. The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance. Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.” Additionally it regulates „The situations referred to in the preceding paragraph include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.” Additional Protocol I to the 1949 Geneva Conventions (1977), Article 2(4)

¹⁸ Additional Protocol II to the 1949 Geneva Conventions (1977), Article 1(1). „This Protocol, which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of applications, shall apply to all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.” Furthermore „This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.” Additional Protocol II to the 1949 Geneva Conventions (1977),

¹⁹ Although one might argue that those Member States, who have been conducting military operations against the so called 'Islamic State of Iraq and the Levant' are might be in an armed conflict with that terrorist organization. See for example some of the Article 51 letters of E.U. Member States to the Security Council. See for example: Identical letters dated 25 November 2014 from the Permanent Representative of the United Kingdom of Great

while one could argue, that the situation might be characterized with ‘high risk’.²⁰ Consequently the applicable legal régime will be international human rights law.

P.M.S.C.s have been playing a three-fold role within the migration crisis. These business enterprises provide security policy research, which will at the end of the day characterize the situation as a ‘threat’ that tailored security services, arms trade and production might solve, conveniently offered by the same or other P.M.S.C.s. These organizations have significant lobby power as well.²¹ For example, P.M.S.C.s conduct operations outside of the E.U. in third countries as well, such as Libya, where their activities were linked to human rights violations.²² Within the E.U. there are no known infringements but at the same time conditions are present where non-military personnel have taken over parts of border security tasks. One of the best example is the paramilitary proto-militia of B.N.O Shipka in Bulgaria.²³

Based on the above, the question logically arises: who will be responsible for the human rights violations of P.M.S.C.s? This is the research question we attempt to answer at least partly in this paper. This paper will further explore accountability questions of P.M.S.C.s. It devolves into international law to the extent how a non-state actor’s conduct can be attributable to a state in the context of an armed conflict and in absence thereof. Finally, it touches upon questions of accountability on the national level as well. It is not the goal of this paper to find *de lege ferenda* solutions to the questions raised by P.M.S.C.s, rather than to explore their *de lege lata* responsibility, with short glances to possible new international treaties proposed in the last decade.

2. Accountability for the conduct of P.M.S.C.s

2.1. Accountability on the international level

Currently there is no available international forum, which would be able to adjudicate the human rights obligations of corporations.²⁴ There were proposals for establishing jurisdiction for the International Criminal Court in case of *delicta juris gentium* committed by corporations, but

Britain and Northern Ireland to the United Nations addressed to the Secretary-General and the President of the Security Council, S/2014/851. Letter dated 11 January 2016 from the Permanent Representative of Denmark to the United Nations addressed to the President of the Security Council, S/2016/34. Letter dated 7 June 2016 from the Permanent Representative of Belgium to the United Nations addressed to the President of the Security Council, S/2016/523. Identical letter dated 8 September 2015 from the Permanent Representative of France to the United Nations addressed to the Secretary-General and the President of the Security Council, S/2015/745. Letter dated 10 December 2015 from the Chargé d’affaires a.i. of the Permanent Mission of Germany to the United Nations addressed to the President of the Security Council, S/2015/946.

²⁰ Davitti *ibid.* p. 43.

²¹ Davitti *ibid.* p. 39.

²² Davitti *ibid.* pp. 41-44. Where Italian authorities took part in push-back operations to Libya. See also Case of Hirsi Jamaa and others v. Italy (App. no. 27765/09) Judgment of 23 February 2012.

²³ Borderline Watch. Self-Appointed Defenders of „Fortress-Europe”: Analyzing Bulgarian Border Patrols, Bell;ncat, May 17 2019, <https://www.bellingcat.com/news/uk-and-europe/2019/05/17/self-appointed-defenders-of-fortress-europe-analyzing-bulgarian-border-patrols/> (5 July 2019).

²⁴ C. Lopez, Private Military and Security Companies and Human Rights in H. Torroja (ed.), *Public International Law and Human Rights Violations by Private Military and Security Companies*, Springer, 2017, p. 92.

this initiative was later dismissed.²⁵ Only one international agreement exists, that will *de facto* establish the jurisdiction of a court of an international character over companies, which is the so called ‘Malabo Protocol’,²⁶ unfortunately it is not yet in force,²⁷ therefore we cannot talk about binding international legal norms in this field. The only way private entities, or non-state actors may be held liable before an international tribunal is therefore the case, when their conduct is attributable to a state,²⁸ unfortunately most of the time – especially in the case of P.M.S.C.s – this test cannot be met.

Before going into questions regarding accountability, it is necessary to distinguish the different ways in which private military organizations are active within the context of the E.U. First there are companies which are being hired by the E.U. or its member states for specific tasks. As discussed above, these tasks can vary from active military deployment to providing support and maintenance. We consider these organizations P.M.S.C.s. Besides these companies, there are public initiatives like the Bulgarian B.N.O. Shipka who work closely together or with the support of the authorities. On the other side of public initiatives there are some which operate without support or approval from (local) authorities. The question arises how, and to which extent governments can be held responsible and accountable for the actions and possible human right violations of these initiatives. But within the context of this article, we will not deal with these specific issues of these latter groups, although the outcome of the attribution analysis would be practically the same, with minor distinctions.

P.M.S.C.s offer a wide variety of services, some of which can be identified as state responsibility,²⁹ but does this mean that the states will be the responsible for the conduct of such organizations? We will have different answers for this question depending upon the applicability of laws. In case of an armed conflict where the governing norms are international humanitarian law, P.M.S.C.s will be directly responsible for their own conduct as non-state actors, since they also have to uphold the law of war.³⁰ The picture is different in the absence of an armed conflict, for example in a migration crisis, where solely international human rights law is applicable. Since transnational corporations, like P.M.S.C.s are not subjects of international law, only in a very limited way, thus they do not have direct legal obligations to respect human right arising from international law.³¹ Therefore, states will be responsible to protect human rights, even

²⁵ D. Scheffer, Corporate Liability under the Rome Statue, *Harvard International Law Journal*, Vol 57, 2016, p. 38.

²⁶ Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights adopted on 27 June 2014.

²⁷ The protocol will enter into force, once it has 15 ratifications. Currently it has none, only 11 signatories. See List of countries which have signed, ratified/acceded to the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights https://au.int/sites/default/files/treaties/36398-sl-protocol_on_amendments_to_the_protocol_on_the_statute_of_the_african_court_of_justice_and_human_rights_5.pdf (5 July 2019).

²⁸ Draft articles on Responsibility of States for Internationally Wrongful Acts, 2001, Article 4-11.

²⁹ F. Daza, Delimitation and Presence of PMSCs: Impact on Human Rights, in Helena Torroja (ed.), *Public International Law and Human Rights Violations by Private Military and Security Companies*, Springer, 2017, p 37.

³⁰ R. B. Atadjanov, Ensuring Compliance of Non-State Actors with Rules of International Humanitarian Law on the Use of Weapons in NIAC: A Way to Follow? *Asia Pacific Yearbook of International Humanitarian Law*, Vol 4, 2012, p 161-163.

³¹ M. N. Shaw, *International Law*, Seventh Edition, Cambridge University Press, 2014, pp. 181-183. Cf. Bruhács

from the violations of such organizations at least within their jurisdiction. Therefore, theoretically a state's responsibility for human rights violations conducted by a P.M.S.C.s can be established indirectly even in the absence of attribution if the state has the additional obligation to protect certain human rights, not simply respect them. But for the majority of cases there has to be some kind of attribution in order to find a state responsible for human rights violations conducted by someone else under international law, especially in cases of extraterritorial conduct,³² such as some aspects of handling of the migration crises. For general rules of attribution, one should look at the draft articles on responsibility of states for internationally wrongful acts, (hereinafter: A.R.S.I.W.A.) prepared by the International Law Commission, which never became a treaty, but it is generally accepted as customary international law. Although the articles on state responsibility cover the *general state responsibility* for unlawful acts, special *régimes* may apply to armed conflicts, and situations covered by international human rights law. The latter will be of paramount significance in the case of P.M.S.C. conduct on the E.U.'s borders.

2.1.1. Attribution according to general state responsibility

A state may be held responsible for actions of third parties if their conduct can be attributed to the state itself. The first rule one should consider when it comes to attribution is Article 4 of the A.R.S.I.W.A. Article 4 states that

„1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.

2. An organ includes any person or entity which has that status in accordance with the internal law of the State.”

Based on the above, the conduct of *de jure* organs of the state is automatically attributed to the state. This position is supported by the International Court of Justice, which for example in the *Armed Activities on the Territory of the Congo* found Uganda liable for the conduct of U.P.D.F. as its state organ.³³ This situation however differs from the situation as is the case with the public B.N.O. Shipka movement or that of private companies like Blackwater and therefore different types and levels of liability are in place. Currently, there are no P.M.S.C.s, which were created as organs of the state,³⁴ however there are some examples, when a state incorporated such an organization into its structure with a contract.³⁵ Although, generally speaking entering into a contractual relationship with a P.M.S.C.s does not create responsibility on the side of a state – this was supported in the Montreux Document as well³⁶ – there are exceptions where the

J., *Nemzetközi Jog I. – Általános Rész*, Dialóg Campus Kiadó, Budapest-Pécs, 2011, pp. 15-17.

³² M. Milanović, *Extraterritorial Application of Human Rights Treaties – Law, Principles and Policy*, Oxford University Press, 2011, pp. 118-229.

³³ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, I.C.J. Reports 2005, p. 168 paras. 213-214.

³⁴ Cameron – Chetail *ibid.* p. 138.

³⁵ Cameron – Chetail *ibid.* p. 140.

³⁶ The Montreux Document on pertinent international legal obligations and good practices for States related to operations of private military and security companies during armed conflict, 2008, p. 12. Part One Subpart A para

contract itself incorporates P.M.S.C.s into a state organ. For example, Papua New Guinea entered into contract with *Sandline International*, which incorporated the employees of that corporation into the state's police force, as "*Special Constables*". Other examples may be found in the case of Sierra Leone, Angola and the United Arab Emirates.³⁷ It has to be noted however, that these examples are very rare, which suggest that states prefer to use P.M.S.C.s as separate entities in order to circumvent their own legal obligations.

Another possibility for attribution under Article 4 is the so called "*de facto* state organ" exception. Based on this rule, in case a state exercises complete dependency over an organization, their actions will be also attributed to the state without further examination of the specific conduct.³⁸ This test was initially created by the International Court of Justice in the *Military and Paramilitary Activities in and against Nicaragua* case, where the conduct of the *contras* could not have been attributed to the United States in lack of complete dependency from the aforementioned state. The Court noted that as it was established earlier³⁹ that "the United States participation, even if preponderant or decisive, in the financing, organizing, training, supplying and equipping of the *contras*, the selection of its military or paramilitary targets, and the planning of the whole of its operation, is still insufficient in itself, on the basis of the evidence in the possession of the Court, for the purpose of attributing to the United States the acts committed by the *contras* in the course of their military or paramilitary operations in Nicaragua."⁴⁰ This test was used by the Court in later judgments as well, but up until this time, it has never been able to find that an organization was under complete dependence of a state, thus it operated as is *de facto* organ.⁴¹ Most recently the Court elaborated on this issue in the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* case, when it stated "to equate persons or entities with State organs when they do not have that status under internal law must be exceptional, for it requires proof of a particular great degree of State control over them, a relationship which the Court's Judgment quoted above [Nicaragua judgment] expressly described as »complete dependence.«"⁴² [Addition by the Authors]

7. "Although entering into contractual relations does not in itself engage the responsibility of Contracting States, the latter are responsible for violations of international humanitarian law, human rights law, or other rules of international law committed by PMSCs or their personnel where such violations are attributable to the Contracting State, consistent with customary international law, in particular if they are: a) incorporated by the State into their regular armed forces in accordance with its domestic legislation; b) members of organized armed forces, groups or units under a command responsible to the State; c) empowered to exercise elements of governmental authority if they are acting in that capacity (i.e. are formally authorized by law or regulation to carry out functions normally conducted by organs of the State); or d) in fact acting on the instructions of the State (i.e. the State has specifically instructed the private actor's conduct) or under its direction or control (i.e. actual exercise of effective control by the State over a private actor's conduct)."

³⁷ Cameron – Chetail *ibid.* p. 141.

³⁸ Kajtár G., *A nem állami szereplők elleni önvédelem a nemzetközi jogban*, ELTE Eötvös Kiadó, Budapest 2015, p. 212.

³⁹ *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America). Merits, Judgment. I.C.J. Reports 1986, p. 14. paras. 109-110.

⁴⁰ *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America). Merits, Judgment. I.C.J. Reports 1986, p. 14. para. 115.

⁴¹ Cameron – Chetail *ibid.* p. 144.

⁴² *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007, p. 43 para. 393.

Therefore, it safe to conclude that in general, P.M.S.C.s would be exceptionally hard to equate with *de facto* state organs in light of complete dependency. The Court in the *Nicaragua* case listed an extensive involvement of the United States with the *contras*, and it is hard to imagine whether it is possible for a state to influence a P.M.S.C. on a higher level, than it was described in the judgment. It is an interesting question, however whether it would change the overall picture, if a state *actually created* a P.M.S.C., and it would control all or the majority of its shares. The Court in the *Nicaragua* case “has not been able to satisfy itself that the respondent State [the United States] “created” the *contra* force in Nicaragua”,⁴³ [Addition by the Authors] which directly led to the conclusion that “there is no clear evidence of the United States having actually exercised such a degree of control in all fields as to justify treating the *contras* as acting on its behalf.”⁴⁴ In our opinion the creation of a P.M.S.C. together with evidence of an extensive control via ownership might lead to accepting the organization as a *de facto* organ of the state. The “direct and critical combat support”, precisely the lack of it together with the established fact that the United States did not create the *contras* also contributed to the Court’s decision of non-attribution.⁴⁵ Therefore, in case a P.M.S.C. would have been created by a state and the control over it via ownership would be tantamount to a direct intervention by combat forces of the given state or all of the P.M.S.C.’s operations reflected strategy and tactics designed by the owner state,⁴⁶ it might be argued that it is a *de facto* organ of the state. One can name the *Leonardo S.p.A.* as an example, which is the 9th largest arms company and defense contractor all over the world, and is partially owned by Italy, precisely the Italian Ministry of Economy and Finance. This ministry is also its largest shareholder.⁴⁷ Although we have no information as for the operational structure of this P.M.S.C., but it is safe to say that it is not impossible to find evidence of sufficient control in order to regard it as *de facto* state organ. Even Davitti suggest this in a footnote, by stating “[t]he fact that Leonardo S.p.A. is partially owned by the Italian Ministry of Economy and Finance has obvious legal implications in terms of state’s obligations, which distinguish this PMSC from those who are privately owned and to whom international law applies as to other non-state actors.”⁴⁸ Nevertheless, Davitti fails to elaborate more on the matter, ownership has to have certain legal effects for state obligations, therefore in our opinion for attribution as well. The lack of publicly available information makes it impossible to conduct a thorough analysis regarding this issue with other P.M.S.C.s. Despite scholars tend to mix general state responsibility with the special responsibility under international humanitarian law and cite *delicta juris gentium* cases of individual criminal responsibility for the purposes of state attribution.⁴⁹ One can also find non-ICJ case law in support of this argument. For example, the Inter-American Court of Human Rights reaffirmed this position

⁴³ Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. United States of America*). Merits, Judgment. I.C.J. Reports 1986, p. 14. para. 108.

⁴⁴ Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. United States of America*). Merits, Judgment. I.C.J. Reports 1986, p. 14. para.109.

⁴⁵ Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. United States of America*). Merits, Judgment. I.C.J. Reports 1986, p. 14. paras. 108-109.

⁴⁶ Cf. Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. United States of America*). Merits, Judgment. I.C.J. Reports 1986, p. 14. para. 108.

⁴⁷ Davitti *ibid.* p. 40.

⁴⁸ Davitti *ibid.* p. 40. note 41. It has to be noted, that the suggestion by Davitti may refer to attribution under Article 8 of the A.R.S.I.W.A. as analyzed above.

⁴⁹ See for example Cameron – Chetail *ibid.* pp. 146-147.

concerning civil patrols in the *Blake* case. During the procedure, Guatemala denied that the civil patrols reportedly responsible for grave human rights violations such as summary and extrajudicial executions and forced disappearances⁵⁰ were agents of the state⁵¹. To support this argument Guatemala referred to the lack of any remuneration or social benefits provided to members of the civil patrols, contrary to regular armed forces and that they were not subject to military discipline, moreover they performed their activities besides their regular daily jobs in their free time.⁵² The Inter-American Court refused the Guatemalan argument and declared that “at the time of the events in this case occurred, the civil patrols enjoyed an institutional relationship, with the Army, performed activities in support of the armed forces’ functions, and, moreover, received resources, weapons, training and direct orders from the Guatemalan Army and operated under its supervision.”,⁵³ which meant that their actions were attributable to the state. In accordance with the *Nicaragua* judgment, the decisive factors for the Inter-American Court were not solely the listed support for the civil patrols, rather the creation of them by a decree, by which they were legally established to fulfill missions of regular state organs.⁵⁴

Another test for *de facto* state organs applied by Cameron and Chetail. The co-authors propose that complete dependency has three criteria: i. they have to be “created” by a state;⁵⁵ and ii. cooperate with the state with a significant involvement of the latter in its operations; iii. with a very low level of autonomy in the decision-making of the organization.⁵⁶ According to the co-authors, in case of P.M.S.C.s – although not impossible – it would be very difficult to attribute their conduct to a state, since in most cases *non-state owned, private* companies retain a degree of autonomy, which renders it almost impossible to determine complete dependency.⁵⁷ At the same time Cameron and Chetail do not go into the concept of public initiatives which operate as private military organizations themselves. It is important to highlight that in our opinion in contrast to Cameron and Chetail it is irrelevant “if the goal of the PMSC as a company is above all to make a profit, even if some of its personnel are motivated by identification to a greater cause”⁵⁸ for the purposes of attribution. Firstly, individual subjective intent does not play any role in general state responsibility, secondly it is self-evident that the overall goal of a P.M.S.C. is to gain profit, but nevertheless in order to make financial gain they have to uphold their contracts which sometimes make them an instrument of state policy.

⁵⁰ Inter-American Court of Human Rights, Case of *Blake v. Guatemala*, Judgment of January 24, 1998, Mertis, para. 76.

⁵¹ Inter-American Court of Human Rights, Case of *Blake v. Guatemala*, Judgment of January 24, 1998, Mertis, para. 73.

⁵² Inter-American Court of Human Rights, Case of *Blake v. Guatemala*, Judgment of January 24, 1998, Merits, para. 74.

⁵³ Inter-American Court of Human Rights, Case of *Blake v. Guatemala*, Judgment of January 24, 1998, Merits, para. 76.

⁵⁴ Inter-American Court of Human Rights, Case of *Blake v. Guatemala*, Judgment of January 24, 1998, Merits, para. 77.

⁵⁵ Cameron and Chetail suggest that the creation might happen merely with the contract, by which the P.M.S.C. is hired. See. Cameron – Chetail *ibid.* p.149-150.

⁵⁶ Cameron – Chetail *ibid.* p. 149.

⁵⁷ Cameron – Chetail *ibid.* p. 152.

⁵⁸ Cameron – Chetail *ibid.* p. 154.

Another possibility to attribute a P.M.S.C.'s conduct to a state is Article 5 of A.R.S.I.W.A., which states that:

“The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.”

From the wording of the draft, one can argue that Article 5 applies to an “entity”, which is empowered by law to exercise elements of governmental authority.⁵⁹ This would also lead to automatic attribution, it does not require a case-by-case analysis. The first question that needs to be answered is whether a P.M.S.C. can be characterized as an “entity” in the meaning of the ARISWA. Based on the Commentary to the draft, “[the term »entity«] may include public corporations, semipublic entities, public agencies of various kinds and even, in special cases, private companies, provided that in each case the entity is empowered by the law of the State to exercise functions of a public character normally exercised by State organs, and the conduct of the entity relates to the exercise of the governmental authority concerned.”⁶⁰ [Addition by the Authors]

This definition may very well be applied to P.M.S.C.s, which is supported further by the commentary, arguing that private security firms contracted to guard prisons may be regarded as exercising the public power of detention, therefore exercising governmental authority.⁶¹ In the same vein, immigration control and quarantine – although in connection with airlines – were said to be such functions as well.⁶² Therefore, one could argue that immigration- and border control secured by P.M.S.C.s on the E.U. borders would also fall into this category. Other than these examples it is not easy to define governmental authority, nevertheless there were many attempts⁶³ to do so, since it is the *sine qua non* condition to determine attribution in connection with Article 5. From the analysis of these attempts,⁶⁴ no other conclusion can be drawn than attribution based on this article remains very limited to clearly governmental functions, the simple public function in this case is insufficient.⁶⁵

⁵⁹ An entity has to have a high degree of autonomy and the power to decide course of action it takes within the framework of the empowerment. See Cameron – Chetail *ibid.* p. 165.

⁶⁰ Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries 2001, p. 42. para. 2.

⁶¹ *Ibid.*

⁶² *Ibid.*

⁶³ Defined as “inherently state functions” see Report of the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination, A/HRC/15/25, 5 July 2010, Draft Convention Article 2 (i). On the one hand, it has to be noted that according to the draft convention “[n]o State party can delegate or outsource inherently State functions to PMSCs.” Article 4 para. 3. On the other hand such obligation cannot be found in international law, moreover the A.R.S.I.W.A. works under the assumption that state functions can be delegated such as detention to private security companies.

⁶⁴ Cameron – Chetail *ibid.* pp. 172-204.

⁶⁵ Cameron – Chetail *ibid.* p. 177.

The final method relevant regarding P.M.S.C.s for attribution is instructions, direction or control enshrined in Article 8 of the A.R.S.I.W.A.

“The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.”⁶⁶

The difficulty within this definition is the extent of a person being under the direction or control and what can be classified as instructions by a State. Of course there are many clear examples where direct orders are given but even more situations in which there is a lot of uncertainty.

Many authors, including Cameron and Chetail tend to mix this possibility for attribution with *de facto* state organs,⁶⁷ thus it is important to highlight the difference between the two paradigms. The confusion was famously inserted into academic discussion by the *Tadić* case, where the International Criminal Tribunal for the former Yugoslavia applied the *overall control* test to equate the conduct of a private entity with a state.⁶⁸ Since then, this position was highly criticized not only by scholars⁶⁹ but by the International Court of Justice in the *Genocide* case as well.⁷⁰ In a nutshell, *de facto* state organs are attributed to the state based on Article 4 of the A.R.S.I.W.A., upon the *complete dependency test*, while Article 8 offers the *effective control test* which is lower than its counterpart in Article 4, although has to be proved over the course of the operations on a case-by-case basis.⁷¹

According to the commentary of the International Law Commission, the three conduct in Article 8, namely instruction, direction and control are disjunctive criteria, therefore one has to prove only one in order to attribute a certain conduct to a state.⁷² *Instruction* is usually referred to as the decision of a state to commit an internationally wrongful act, only the implementation falls to the private entity.⁷³ *Instruction* requires a clear manifestation of the will of the state.⁷⁴

⁶⁶ A.R.S.I.W.A. Article 8

⁶⁷ Some explanation was included on page 205 as to the extent of the use of the expression “*de facto* state organ”, but later on it become clear that the authors confuse the attribution based on Article 4 and Article 8. See Cameron – Chetail *ibid.* p. 204. and 216. For another example see A. Cassese, The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia, *The European Journal of International Law*, Vol. 18. No. 4. 2007, p. 650.

⁶⁸ Prosecutor v. Dusko Tadić, Appeals Chamber Judgment of 15 July 1999, para. 120 and 131. An even looser test namely, “substantial involvement” was proposed by Griebel and Plücken. See J. Griebel – M. Plücken, New Developments Regarding the Rules of Attribution? The International Court of Justice’s Decision in Bosnia v Serbia, *Leiden Journal of International Law*, Vol. 21. No. 3. 2008, pp. 619-620.

⁶⁹ Kajtár *ibid.* pp. 217-219. M. Milanović, State Responsibility for Acts of Non-state Actors: A Comment on Griebel and Plücken, *Leiden Journal of International Law*, Vol 22. No. 2. 2009, pp. 318-319. and pp. 321-322.

⁷⁰ Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007, p. 43. paras. 402-406.

⁷¹ Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007, p. 43. para. 400.

⁷² Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries 2001, p. 48. para. 7.

⁷³ Cameron – Chetail *ibid.* p. 205.

⁷⁴ *United States Diplomatic and Consular Staff in Tehran, Judgment, I. C. J. Reports 1980*, p. 3. para. 59. „In the

Needles to say that such instruction are extremely hard to find in case of P.M.S.C.s. The contracts may include the behavior that a state requires from that private entity, but understandably it would rarely or never include instigation to commit internationally wrongful acts.⁷⁵ The state usually does not bare responsibility for conduct that contradicts or goes beyond the instructions given, unless they were too vague or general in order to mask responsibility.⁷⁶ Customarily the other two conducts, namely direction and control are dealt with together.⁷⁷ Direction and control refer to the specific operations at hand, and express the manner in which a state is involved with that given operation. If the state expressly tells the non-state actor how to behave in order to commit the unlawful act, or it has effective control over the private entity, their conduct will be attributable to the state.⁷⁸ These conducts were elaborated on by the International Court of Justice both in the *Nicaragua* and *Genocide* cases. The Court in *Nicaragua* declared that the actions of the United States were not enough to equate the *contras*' conduct with a *de facto* organ of the United States. To support this statement the Court listed many behaviors mentioned above, which would not qualify as attribution based on Article 4. The Court however went further, noting that

“All the forms of United States participation mentioned above, and even the general control by the respondent State over a force with a high degree of dependency on it, would not in themselves mean, without further evidence, that the United States directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State.”⁷⁹

This makes it clear that the listed conduct in itself not only not constitute as a *de facto state* organ, but even with the general control and a high degree of dependency it would not be enough to conclude that the United States directed the *contras* to commit unlawful acts. In the argument of the Court “[f]or this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed.”⁸⁰ Which presupposes that the state exercises this control in every operation. This interpretation is further supported by the Court in the *Genocide* case, since it stated that “[i]t must however be shown that this »effective control« was exercised, or that the State’s instructions were given, in respect of each operation in which the alleged violations occurred, not generally in respect of the overall

view of the Court, however, it would be going too far to interpret such general declarations of the Ayatollah Khomeini to the people or students of Iran as amounting to an *authorization from the State to undertake the specific operation of invading and seizing the United States Embassy*. To do so would, indeed, conflict with the assertions of the militants themselves who are reported to have claimed credit for having devised and carried out the plan to occupy the Embassy.” [Highlight by the Authors]

⁷⁵ Cameron – Chetail *ibid.* p. 206.

⁷⁶ Cameron – Chetail *ibid.* p. 207.

⁷⁷ Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries 2001, p. 47. para. 3.

⁷⁸ Cameron – Chetail *ibid.* p. 209.

⁷⁹ Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. United States of America*). Merits, Judgment. I.C.J. Reports 1986, p. 14. para. 115.

⁸⁰ Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. United States of America*). Merits, Judgment. I.C.J. Reports 1986, p. 14. para. 115.

actions taken by the persons or groups of persons having committed the violations.”⁸¹ It is interesting to note that the Court sometimes left out the ‘direction’ element in this latter judgment,⁸² although emphasizing the three different category in other places.⁸³ Based on this, according to a U.S. military personnel, in the absence of a government, or non-commissioned officer supporting every mission, the effective control is virtually non-provable,⁸⁴ which makes this attribution link very weak in connection with P.M.S.C.s. Two other issues deserve attention based on the commentary to the A.R.S.I.W.A., namely the ownership by state and extra-instructional conduct. According to the commentary, merely the creation of a corporation would not attribute its actions to the state, but in case “the State was using its ownership interest in or control of a corporation specifically in order to achieve a particular result”⁸⁵ an attribution link could be established. In our opinion, the creation of a private entity and controlling interest in it if the private entity would be unable to make decisions without the consent of the state would be enough to prove a very high degree of dependency, in order to equate their conduct to a state based on Article 4 to A.R.S.I.W.A. Therefore, this controlling interest has to be on a lower level for effective control but be exercised in connection with every unlawful operation. As for the other issue, if a non-state actor goes beyond or contrary to the instruction given to it by a state, if those instruction were lawful it “does not assume the risk that the instructions will be carried out in an internationally unlawful way.”⁸⁶ Consequently, a state will not be responsible for the conduct of a private entity if they go beyond or contrary to the authorization. But the state may very well be responsible for the ignored instructions if they were committed under the effective control of that state.⁸⁷

2.1.2. Attribution according to *lex specialis*

Although one might argue that certain *lex specialis* attribution rules exist in international humanitarian law⁸⁸ and international human rights law, based on the jurisprudence of the International Court of Justice,⁸⁹ we would argue that the general rules of attribution apply in these circumstances as well

⁸¹ Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007, p. 43. para. 400.

⁸² Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007, p. 43. para. 400. and 413.

⁸³ Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007, p. 43. para. 401 and 413.

⁸⁴ Cameron – Chetail *ibid.* p.216.

⁸⁵ Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries 2001, p. 48. para. 6.

⁸⁶ Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries 2001, p. 48. para 8.

⁸⁷ *Ibid.*

⁸⁸ Sassòli refers to this *lex specialis* responsibility in connection with Article 3 of the Fourth Hague Convention. M. Sassòli, State responsibility for violations of international humanitarian law, *International Review of the Red Cross*, Vol 84. No. 846. pp. 405-406.

⁸⁹ The Court used „human rights and humanitarian law” violations in connection with the discussion of the general rules of attribution. See Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America). Merits, Judgment. I.C.J. Reports 1986, p. 14. para. 115.

After analyzing the relevant international law for attribution, one could argue that the although there are many attributional links at the disposal of the international community to tie a P.M.S.C.s conduct to a certain (mostly the contracting) state, but all of them have difficulties hard to overcome. In our opinion perhaps, Article 5 and the delegated governmental authority is the most promising link to be exhausted in order to attribute the P.M.S.C.s conduct to states, especially in light of the E.U.'s practice with P.M.S.C.s.

2.2. Accountability on the national level

This segment only touches upon the questions of accountability of P.M.S.C.s on the national level. In general, there are three kinds of accountability for corporations under domestic law, which is different on a state-by-state basis. These three categories are: civil, criminal and administrative accountability.⁹⁰ Civil litigation against corporations, such as P.M.S.C.s is universally acceptable, on the basis of tort law.⁹¹ Although civil litigation is universally accepted, but it is indisputably very difficult at the same time, since most of the victims of P.M.S.C.s happen outside of the country of domicile of the corporation, since usually they are registered in safe and stable states, but operate in other areas. Therefore, human rights violations have to be brought against them in foreign courts, and sometimes the equality of arms is not favorable for the weaker party, since they have to fight an army of lawyers on the side of the P.M.S.C.s, behind which there is plenty of capital. Unfortunately, the case is usually the opposite on the side of the victims.⁹² Since most of the time civil litigation in these scenarios happen in a transnational context, where the plaintiffs are not nationals of the state where they file their motion, one has to find a jurisdictional link in order to sue the P.M.S.C.s. In the E.U. finding this jurisdictional link is somewhat easier than in the United States, since Brussels I regulation creates an automatic jurisdiction against E.U. companies, which comes in handy, in P.M.S.C.s litigation.⁹³ In the United States, jurisdiction may be based on the so called 'Alien Tort Statute' or A.T.S., which is a subject-matter jurisdictional clause statute from the 18th century, which were dormant until the '80s. From that point in time many claims were brought against U.S. natural and legal persons for violations of international law.⁹⁴ The case law is somewhat developed in this sense on the other side of the Atlantic. One of the most famous cases in this regard is *Kiobel v. Royal Dutch Petroleum Co.*⁹⁵ In this case a U.S. Court dismissed the claims of the victims against Shell, in lack of sufficient connection with the U.S.⁹⁶ Although this may seem to be an awful decision for victims of P.M.S.C.s this is not the case, since the court also elaborated in detail on how one can establish jurisdiction⁹⁷ and in a post-Kiobel case, which were filed against a P.M.S.C., the court found the necessary jurisdictional link, for the employees of the P.M.S.C.

⁹⁰ Lopez *ibid.* pp. 92-95.

⁹¹ Lopez *ibid.* p. 92.

⁹² Lopez *ibid.* pp. 92-93, 95.

⁹³ Lopez *ibid.* p 99.

⁹⁴ Cameron – Chetail *ibid.* pp. 627-631. In a historical context, it was aimed at creating jurisdiction for crimes like piracy. See D. Shea Bettwy, Drones, Private Military Companies and the Alien Tort Statute: The Looming Frontier of International Tort Liability, *California Western International Law Journal*, Vol 47. No. 1. 2016, pp. 5-6.

⁹⁵ *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013)

⁹⁶ Bettwy *ibid.* pp. 20-22.

⁹⁷ Bettwy *ibid.* pp. 21-23.

were U.S. citizens, and some of the relevant conduct happened in the U.S., although not the human rights violations in question.⁹⁸ It would be especially easy to find jurisdictional link concerning P.M.S.C.s contributing to the U.S. drone programs and its targeted killing policies.⁹⁹

Criminal and administrative procedures should be analyzed together. The criminal litigation of corporations wasn't possible in the early days of law development, since it stood on the principle of '*societas delinquere non potest*', which meant that corporations cannot be held liable for criminal offences.¹⁰⁰ This principle was and is very strong in a sense, that only recent legislative acts and court decisions made it possible to pierce the corporate veil for the purposes of criminal prosecution. This phenomenon happened first in the Anglo-Saxon world, which were followed later on by the continental legal system as well.¹⁰¹ Nowadays there are 3 categories of criminal prosecution. In the first, the corporation will be liable for its criminal conduct directly, therefore it is possible to convict a corporation for committing a crime, this method is prevalent in the common law world. Another category is the administrative sanctions model, which creates a quasi-criminal liability for corporations. Private entities therefore cannot be held liable for criminal conduct in a criminal law sense, but there are administrative measures, which can be used against them of similar severity as criminal sanctions. German law operates under this régime.¹⁰² The third category is Argentina's model, which makes it possible to criminally prosecute the C.E.O. or owner of the corporation for criminal conduct attributed to the private entity.¹⁰³ The Hungarian legal system uses a peculiar solution. Act CIV. of 2001 renders criminal law sanctions applicable against corporations as well, in case there is a parallel criminal prosecution against a natural person, who is sufficiently linked to the corporation.¹⁰⁴ Suspension or termination of corporate activity are among the possible sanctions offered by this piece of legislation. Therefore, Hungary uses a mixed model under which the administrative and the personal accountability models are merged. There are other mixed models, like the Dutch, which makes it possible to prosecute parallelly the corporation as well as the natural person.¹⁰⁵

⁹⁸ Bettwy *ibid.* pp. 26-27.

⁹⁹ Bettwy *ibid.* pp. 27-29. For detailed analysis of the so called „targeted killing” phenomenon see e.g. N. Melzer, *Targeted killing in International Law*, Oxford University Press, 2008. or R. Ott, *Targeted Killings and International Law – With Special Regard to Human Rights and International Humanitarian Law*, Max -Planck-Institut für ausländisches öffentliches Recht und Völkerrecht, Band 230, Springer, Heidelberg 2012. On the U.S. drone program see for example, M Sterio, The United States' Use of Drone in the War on Terror: The (Il)legality of the targeted killings under international law, *Case Western Reserve Journal of International Law*, Vol. 45. No. 1. 2012. or A. Plaw – M. S. Frickers – Carlos R Colon, *The Drone Debate – A primer on the U.S. use of unmanned aircraft outside conventional battlefields*, Roman & Littlefield, Lanham, Boulder, New York, London, 2016.

¹⁰⁰ M. Pieth – R. Ivory, Emergence and Convergence: Corporate Criminal Liability Principles in Overview, in Mark Pieth – Radha Ivory (ed.), *Corporate Criminal Liability – Emergence, Convergence, and Risk*, Springer, 2011, p. 4.

¹⁰¹ Pieth – Ivory *ibid.* pp. 8-9.

¹⁰² Lopez *ibid.* p. 93.

¹⁰³ Lopez *ibid.* p. 94.

¹⁰⁴ A jogi személlyel szemben alkalmazható büntetőjogi intézkedésekről szóló 2001. évi CIV. törvény. For analysis of this piece of legislation see Nagy Z. A., A jogi személy büntetőjogi felelősségét megállapító törvényről, *Jura*, Vol. 15. No. 1. 2009, pp. 94-101.

¹⁰⁵ B. F. Keulen – E. Gritter, Corporate Criminal Liability in the Netherlands, *Electronic Journal of Comparative Law*, Vol. 14.3. 2010, <https://www.ejcl.org/143/art143-9.pdf> (5 July 2019)

Since the aim and goal of this paper is to analyze accountability of P.M.S.C.s mostly on the international level, we would limit ourselves to conclude in light of the specific national rules that finding a private entity such as a P.M.S.C. accountable for human rights violations before national court is an option both in civil and in criminal or administrative procedures. These procedures vary significantly and the methods used in order to find the accountability are also different.

3. Conclusions

In this article, we analyzed questions related to the use of P.M.S.C.s on the E.U. borders. The main part of our analysis focused on the attributional questions of P.M.S.C.s to states on a theoretical basis. It has to be noted that not all private military organizations were examined, such as the paramilitary proto-militia of B.N.O Shipka in Bulgaria, which we might consider in a further study. The analysis therefore was limited to companies with military or security purposes, that are used or can be used on the E.U. borders to tackle the migration crisis. The article also touches upon the issues of national laws. Our main findings can be summarized in a nutshell as follows:

1. during the migration crisis, the applicable legal *régime* is international human rights law;
2. in order to establish the responsibility of a state for the conduct of a P.M.S.C. directly, one has to attribute its conduct to a state;
3. it can be concluded that in contemporary times P.M.S.C.s cannot be regarded as *de jure* state organs, consequently attribution based on this criterion is irrelevant;
4. however P.M.S.C.s might become *de facto* state organs if the state *created the company*, and it *controls the majority of its shares*, in a way, which makes it possible to *exercise complete dependency* over such an organization. This would be extremely rare, but it possible on a theoretical basis.
5. The conduct of P.M.S.C. is also attributable to a state in case the prior exercises element of *governmental authority*. The most prominent example is the management of prisons, but in our opinion this can be extended to *migration control* and *the guarding of immigration facilities such as asylum camps* as well. If one could establish that a P.M.S.C. is operating in such a manner that conduct would be certainly be attributable to a state.
6. Finally, attribution may be done based on effective control on a case-by-case basis, this would also require ownership of a P.M.S.C. since that could ensure the required control. Although we have to raise awareness to the difficulty of proving effective control in case of every operation.

7. In case of national law, within the E.U. Regulation Brussels I. establish the necessary jurisdictional link in order to start a civil litigation against a P.M.S.C. in the E.U. and the A.T.S. can be used for the same purposes in the U.S.

Towards Free Movement Rights of Third Country Nationals in the EU

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The EU is one of the leading communities as regards the free movement of persons. The EU grants the right to its citizens to move freely within its territory. The free movement of persons is a crucial expression of the EU citizens' status and is considered one of the most positive features of the integration. The EU also provides third country nationals rights to move freely within its territory albeit only under certain circumstances, thus the situation of third country nationals is often different from that of EU citizens moving between or living in Member States other than their own. Even though numerous third country nationals enjoy equal rights with Member State nationals, there are still many restrictions applicable to them. This paper aims to provide an overview of the integration of third country nationals, migration policies, the free movement rights of third country nationals, relevant legal aspects and legal migration instruments concerning the free movement of third country nationals within the EU, and also some traces of development of the relevant legal migration instruments that help understand the fundamental rights and benefit of third country nationals who wish to enter and reside within the EU for purposes of education and economic activities.

Keywords: integration of third country nationals, legal migration instruments, immigration policy, free movement rights

1. Introduction

The EU guarantees the four fundamental freedoms in its internal market, the free movement of persons is one of those fundamental freedoms, along with the free movement of goods, the free movement of services, and the free movement of capital. The free movement of persons is one of the main achievements of the European integration process¹. The concerned individuals can have economic and social benefits from the rights of free movement of persons that aim to decrease differences in skills, help to eliminate unemployment and contribute to economic growth within the EU.

Originally, the EU intended to grant rights only to workers and their families to move freely within the EU, but with the Maastricht Treaty it constituted the free movement of persons as one of the most important rights for individuals and today the EU guarantees rights for all of

¹ EMN, Synthesis – Intra-EU Mobility of third-country nationals, Home Affairs, European Commission 2013, p. 17.

its citizens and their family members to move freely within the EU territory and the free movement rights for EU citizens are considered as the general principle of non-discrimination based on nationality.

Moreover, the EU aims to foster mobility as an important element of the EU's external policy and offers a concrete framework for dialogue and cooperation between the Member States and third countries, including facilitating and organizing legal migration.² It also aims to be more attractive for third-country nationals who wish to carry out research activities in the EU and promote Europe as a whole as a world centre of excellence for studies and training.³ Thus, the EU has developed the free movement of persons not only for its citizens but for third country nationals as well – but not under the same conditions of course. Yet today third country nationals can be granted rights to freely move and reside in the Member States of the EU. Third country nationals who hold visa or residence permit issued by one of the EU Member state can freely travel within the EU territory up to three months. However, the free movement rights or the mobility rights for a period longer than three months are provided for third country nationals with only some certain categories depending on their status. These categories include Long-term Residents; Students, Researchers; Highly Skilled Workers; Posted Workers⁴; and family members of EU citizens – each of these categories have different conditions for free movement within the EU territory.

A range of different legislative acts and policies on migration at national level have been adopted by the EU member states to implement the EU legal migration Directives and to determine which specific conditions that the third country nationals are applied to.⁵ A number of EU non-discrimination laws which are of relevance for the integration of third-country nationals and legal migration Directives governing free movement of third country nationals have been adopted by the EU as well. Additionally, a number of recent developments in the legal migration field have been adopted recently: in September 2017, the EU started inter-institutional negotiations for the revision of the EU Blue Card Directive, and agreement on a number of technical points was reached. The transposition of the recast Students and Researchers Directive was commenced by Member States while the transposition of the Seasonal Workers Directive and the Intra-Corporate Transfers Directive was completed.⁶

2. EU Immigration Policy for Third Country Nationals

A common immigration policy is provided for by the Treaty on the Functioning of the European Union that the efficient management of migration flows and fair treatment of third-country nationals residing legally in Member States shall be developed at all stages. To that end,

² See Directive (EU) 2016/801, Preamble (6).

³ See Directive (EU) 2016/801, Preamble (11) and (14).

⁴ EMN INFORM, Intra-EU Mobility of Third-Country Nationals, European Commission 2013, pp. 1-3.

⁵ A. Strey – V. Fajth – T. M. Dubow – M. Siegel, *Determinants of Migration Flows within the EU*, Maastricht University 2018, p. 38.

⁶ EMN, Annual Report on Migration and Asylum 2017, European Commission 2018, p. 5.

standards on the long-term visas and residence permits to be issued by Member States, the definition of the rights of third-country nationals residing legally in a Member State, measures on the conditions of entry and residence, including the conditions governing freedom of movement and residence in other Member States were adopted by the European Parliament and the Council.⁷

2.1. Development of EU Immigration Policy for third country nationals

The EU agenda has laid down the harmonization of measures on visas, migration and asylum since the mid-1980s. The conclusion of the Single European Act (SEA) gave the impetus of integration of third country nationals in 1986, in which the free movement of persons, as one of the ‘four freedoms’ of the internal market programme, was re-considered for non-EC nationals as well.⁸ But the idea of pooling sovereignty over immigration and asylum matters was strongly opposed by many Member States fearing implications for national security.⁹ Therefore, free movement rights were granted only to EU nationals at the beginning. The issues related to the free movement of people from the extension of qualified majority voting were not included by the SEA. Moreover, in a declaration attached to the Act, the Member States maintained their right to take measures for the purpose of controlling immigration. Later in 1992, the asylum and immigration policy field were formed into an EU framework at the entry into force of the Treaty of Maastricht¹⁰. In the aftermath of the Treaty of Maastricht, a number of non-binding legal acts were adopted including a Council Resolution on family reunification and a Council Resolution on the status of long-term resident third-country nationals. However, Regulations and Directives were not possible to be adopted for this policy field at that time – that is, supranational instruments carrying direct effect.¹¹

The implementation of the Treaty of Amsterdam brought a significant change in the field of Justice and Home Affairs in 1999. A new Title IV (Articles 62 and 63) of the EC Treaty included all together the matters on visa, immigration and asylum and other policies relating to the free movement of persons, including third-country nationals¹². With the entry into force of the Treaty of Amsterdam, a common EU immigration policy was eventually developed and set up the competence to adopt legislation with regard to the position of third-country nationals¹³. A legal basis for the enactment of legislation related to the conditions of entry and residence of third-country nationals was constituted in Articles 63(3)(a) and 63(4) EC¹⁴. And in order to

⁷ See Directive 2014/66/EU, Preamble (2).

⁸ A. Wiesbrock, *Legal Migration to European Union*, Martinus Nijhoff Publishers, Leiden-Boston 2010, p. 132.

⁹ *Ibid.*

¹⁰ C. Van Mol – H. de Valk, Migration and Immigrants in Europe: A Historical and Demographic Perspective, in Garcés-Mascareñas B., Penninx R. (eds.), *Integration Processes and Policies in Europe*. IMISCOE Research Series. Springer, Cham 2016, p. 38.

¹¹ H. Staples, *The Legal Status of Third country nationals Resident in the European Union*, European monograph series 22, Kluwer Law International 1999, p. 41; and see also Wiesbrock, *ibid.* p. 134.

¹² European Parliament, IOM, *Laws for Legal Immigration in the 27 EU Member States*, International Organization for Migration Publishing, Geneva (2009), p. 19.

¹³ C. Murphey, Immigration, Integration and Citizenship in European Union Law: The Position of Third Country Nationals, *Hibernian Law Journal* Vol. 8. 2008-2009, p. 159.

¹⁴ Wiesbrock, *ibid.* p. 136.

achieve the Treaty of Amsterdam's objective of creating an area of freedom, security and justice, a five-year programme (the Tampere Programme) in the field of Justice and Home Affairs was decided by the Heads of States and Government at the Tampere European Council on 15 and 16 October 1999. The enactment of measures in four policy fields, namely (1) partnerships with countries of origin, (2) a common European asylum system, (3) fair treatment of third-country nationals, and (4) the management of migration flows were envisaged by the Tampere Presidency Conclusions¹⁵ and the basis for policy development of third country integration was elaborated by the 1999 Tampere European Council.¹⁶ The establishment of a common asylum and immigration policy and fairer treatment of third country national residents within the EU were supported by agenda of the Tampere of European Council.¹⁷ Under the Tampere agenda, the adoption of proposals for a Directive on family reunification, a Directive on long term residence and a Directive on economic migration was commenced. And in 2003, the Council Directive 2003/86/EC on the right to family reunification and the Council Directive 2003/109/EC concerning the status of third-country nationals who are long term residents were adopted.

The Hague Programme of November 2004 continued the implementation of the initiatives of the Tampere Programme¹⁸ and in a Communication of 10 May 2005 on the implementation of the Hague Programme, the development of an integrated management of the Union's external borders was set out the by European Commission under the ten policy priorities in the area of freedom, security and justice for the next five years. In 2004, the Directive relevant to the specific immigration of students, and in 2005, the Directive relevant to the immigration of researchers was adopted¹⁹ under the framework of the Hague Programme.

The Treaty of Lisbon had far-reaching consequences for the area of freedom, security and justice. The Lisbon Treaty put all aspects of justice and home affairs on a supranational level, the primary law regulation of this policy field can since be found in Title V of the Treaty on the Functioning of the Union (TFEU). Within this chapter, Article 79 TFEU provides the new legal basis for adopting measures on legal migration. Under Article 79(1) TFEU, a common immigration policy shall be developed by the Union aim to ensure, 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.²⁰

¹⁵ European Parliament, IOM, *Laws for Legal Immigration in the 27 EU Member States*, International Organization for Migration Publishing, Geneva 2009, p. 20.

¹⁶ Murphey, *ibid.* p. 158.

¹⁷ I. Goldner, *Free Movement of Third Country Nationals in the European Union: Policies, Developments and Limitations*, *Zbornik Pravnog Fakulteta u Zagrebu*, Vol. 53. No. 3-4. 2003, p. 943.

¹⁸ Á. Tóttós, *The Intra-EU Mobility Right of Third-Country Nationals in the European Union*, 151 *Studia Iuridica Auctoritate Universitatis Pécs Publicata*, No. 151. 2013, p. 243.

¹⁹ European Parliament & IOM, *Laws for Legal Immigration in the 27 EU Member States*, International Organization for Migration, Geneva 2009, p. 21.

²⁰ See Treaty on the Functioning of the European Union, Art. 79.

2.2. Integration Policies for third country nationals

The integration of third country nationals became enshrined in EU policies for the first time when the Treaty of Amsterdam came into force in 1999. Today the integration of third country nationals is remains a big challenge for the EU. Even though the legal immigration acquis covers equal treatment provisions for almost every category of third country nationals, but in practice there were significant differences. However, the EU has put great effort to develop policies for integration of third country nationals and the right of free movement. The EU's Common Agenda as the main strategy document which provided the framework for the EU integration policy implementation until 2005. In 2011, the second Agenda on Integration was adopted by the European Commission and it was in place until 2015. And in 2016, the Action Plan on Integration was adopted by the European Commission in order to support Member States in developing and enhancing their integration policy.²¹ Currently, the immigration policy to be undertaken under the Action Plan on Integration at both the EU and Member State level consists of five policy priorities aiming to strengthen and support integration of third country nationals and those priorities are: pre-departure/pre-arrival measures; education; labour market integration and access to vocational training; access to basic service; and active participation and social inclusion.²²

2.2.1. Pre-departure/pre-arrival measure

Pre-departure/pre-arrival measures are an essential feature of successful integration of third country nationals. These measures are important to prepare the resettlement of third country nationals which include pre-departure language and job-related training²³ as well as providing them information and help them to settle their new life. In this regard, the Action Plan was announced by the Commission calling for project proposal to support the measures and engage with Member States to strengthen cooperation with third countries on pre-departure measures. Furthermore, the Commission encourages Member States to promote private sponsorship programs for the resettlement of third country nationals, to consider taking part in multi-stakeholder projects for the resettlement for third country nationals, and to provide the third country nationals pre-departure information to prepare their arrival in the EU.²⁴

2.2.2. Education

²¹ European Migration Network. Understanding Migration in the European Union: Insights from the European Migration Network 2008-2018 – EMN 10 Year Anniversary Report. Brussels: European Migration Network 2018. p. 13.

²² See generally Briefing #80, The EU Action Plan on Integration of Third Country Nationals, SOLIDAR, Brussels 2016.

²³ See COM (2011) 455 final, Brussels, 20.7.2011. P. 4-5.

²⁴ See COM (2016) 37 final, p. 5-7.

Proportion of students with a migrant background is growing in most EU countries. The Member States are encouraged to recruit third country nationals as teachers or in the childcare workforce.²⁵ Third country nationals could benefit from the New Skills Agenda for Europe²⁶ which the Commission is taking action: to provide online language assessment and learning for newly arrive third country nationals; to support peer learning events on key policy measures; to support the school community in promoting inclusive education and addressing specific needs of migrant learners; to remove barriers of third country national girls and boys to early childhood education; and to support the upskilling of low-skilled and low-qualified persons. Furthermore, the Commission encourages Member States to equip teachers and school staffs with skills needed to manage diversity and promote the teacher recruitment with a third country national background, and to promote and support the participation of third country nationals' children in early childhood education and care.²⁷

2.2.3. Labour market integration and access to vocational training

Third country nationals' employment rates, of course, still remain below the average of host country citizens²⁸ and they usually work in less favorable conditions in most Member States. Also, the early integration into vocational training with a strong work-based learning dimension might prove especially effective for some third country nationals to provide them with the basis for successful integration into the labour market of the EU. In such regard, the Commission is taking actions: to develop a Skills and Qualifications Toolkits to support timely identification of skills and qualification for newly arrived third country nationals; to provide specific support for early recognition of academic qualifications of third country nationals; to launch projects promoting labour market and vocational training integration of third country nationals; and to identify best practices to promote and support third country national entrepreneurship. And moreover, the Commission encourages Member States: to support fast track insertion into the labour market of newly arrived third country nationals; to remove barriers to ensure effective access to vocational training and to the labour market for third country nationals; to assess, validate and recognize skills and qualifications of third country nationals; and open up entrepreneurship to third country nationals.²⁹

2.2.4. Access to basic services

One of the basic conditions for third country nationals to start a new life in a new society is to have access to adequate and affordable housing. Also, access to health services for third country nationals is significant in order to remove another barrier for integration. In this regard, the Commission is taking action to promote the use of EU funds for reception, housing, social

²⁵ See COM (2011) 455 final, p. 6.

²⁶ See COM (2016) 381 final, p. 10.

²⁷ See COM (2016) 377 final, p. 7-8.

²⁸ See COM (2011) 455 final, p. 5.

²⁹ See COM (2016) 377 final, p. 8-11.

infrastructure, education, and health for third country nationals; to provide funding for temporary accommodation and health facilities for newly arrived third country nationals; to promote peer reviews and sharing of best practices on how to address housing challenges; to support best practices in care provisions for vulnerable third country nationals; and to develop pilot training modules for health professionals on health for third country nationals. At the same time, the Commission encourages Member States to ensure an integrated approach, coordinating policies on housing with equitable access to healthcare, social service and employment; and to establish competence networks of health experts.³⁰

2.2.5. Active participation and social inclusion

To involve third country nationals themselves in the design and implementation of integration policies is crucial to improve their outcome of participation and integration. Integration is not only necessary to learn language, find a house or get a job, but it also means the ability to play an active role in one's local, regional and national community.³¹ In such regard, the Commission is taking actions: to promote intercultural dialogue, cultural diversity and European common values; to promote social inclusion through youth and sport; to propose greater priorities to activities dedicated to integration of third country nationals into their new host communities; to develop handbook and toolboxes for practitioners; launch project to promote participation in political, social and cultural life and sport and social inclusion. Also, the Commission encourages Member States to increase participation of third country nationals in local democratic structures, to invest in projects and measures aimed at combating prejudice and stereotypes, and to organize civic orientation programmes for third country nationals.³²

3. EU Instruments Governing Free Movement of Third Country Nationals

Third country nationals are provided free movement rights within the EU acquis only for certain categories. Indeed, third country nationals who hold a visa or residence permit issued by one of Member States of Schengen area can freely travel to one or more second Member States for a period up to three months within the Schengen area.³³ But residence for a period longer than three months in another Member State for third country nationals is governed by specific legal instruments depending on their status.³⁴

3.1. Legal instruments regarding a stay exceeding three months

³⁰ See COM (2016) 377 final, p. 11-12.

³¹ See COM (2011) 455 final, p. 6.

³² See COM (2016) 377 final, p. 12-14.

³³ S. Koppenberg – A.-N. Reyhani, *The Intra-EU Mobility of Third-Country Nationals - Legislation and Statistics in Austria*, International Organization for Migration, Country Office Vienna 2012, p. 13.

³⁴ French National Contact Point for the European Migration Network, *Intra-EU Mobility of Third-Country Nationals*, 75800 Paris Cedex 08 2013, p. 7.

The legal migration Directives governing free movement of third country nationals for a period longer than three months include:

- (1) Directive 2003/109/EC with amendment of Directive 2011/51/EU (third-country nationals who are long-term residents);
- (2) Directive 2009/50/EC (third-country national holders of an EU Blue Card in one Member for highly qualified employment);
- (3) Directive (EU) 2016/801 (third-country nationals for the purposes of research, studies, training, voluntary service, pupil exchange schemes or educational projects and au pair activity);
- (4) Directive 2004/38/EC (as regards third country national family members of EU citizens);
- (5) Directives 96/71/EC and 2014/67/EU as amended by Directive (EU) 2018/957 (posted workers).

3.1.1. Directive 2003/109/EC

On 25 November 2003, the EU adopted Directive 2003/109/EC concerning the status of third country nationals who are long-term residents.³⁵ It was the second Directive on legal migration adopted after the competence to legislate in this field at EU level was introduced by the Treaty of Amsterdam. In 1999, the European Council called for the long-term residence status of third country nationals to be established by a Directive in order to foster the integration of third country nationals in the Member States and to promote economic and social cohesion.³⁶ The Directive lays down the terms for conferring and withdrawing long-term resident status of third country national legally residing in a Member State and the terms of residence in second Member States for the third country nationals to enjoy the status³⁷. Under the Directive, third country nationals who are long-term resident are granted a secure residence status, including a set of uniform rights which are as near as possible to those enjoyed by the EU citizens³⁸ and the right to reside in other Member States under certain conditions.³⁹

Therefore, the Directive is a major step in the development of EU immigration policy. And in 11 May 2011, the scope of the Directive was extended⁴⁰ as the EU adopted Directive 2011/51/EU to amend the 2003 act, since the original version of the Directive did not apply to

³⁵ OJ L 016, 23/01/2004. p. 44 - 53

³⁶ COM (2011) 585 final, p. 2.

³⁷ Directive 2003/109/EC, Art. 1.

³⁸ Directive 2003/109/EC, Preamble (2).

³⁹ Directive 2003/109/EC, Preamble (18) and (19).

⁴⁰ OJ L 132, 19.5.2011. p. 1 - 4.

beneficiaries of international protection for third-country nationals or stateless persons as refugees or as persons who otherwise need international protection as defined in Council Directive 2004/83/EC.⁴¹

3.1.2. Directive 2009/50/EC

The EU adopted Directive 2009/50/EC a.k.a. the EU Blue Card Directive on 25 May 2009⁴² to lay down the conditions of the admission and mobility of highly qualified third country national workers and their family members for stays of more than three months in the territory of the Member States⁴³. The Directive requires Member States to harmonize entry and residence conditions throughout the EU and to provide the third country national workers a legal status and a set of rights.⁴⁴

The EU Blue Card Directive aims to make the EU more attractive to highly qualified workers from around the world and strengthen its competitiveness and economic growth.⁴⁵ Also, the Directive aims to minimize brain drain in middle-income and developing countries and to stimulate circular and temporary migration.⁴⁶ Under the Directive, third country national workers are granted rights of equal treatment enjoyed by EU citizens.

3.1.3. Directive (EU) 2016/801

Directive (EU) 2016/801 was adopted on 11 May 2016⁴⁷ to replace the two Directives on Students and Researchers with a single Directive. The recodified Directive lays down the conditions of entry and residence in the EU territory for a period exceeding 90 days of third country nationals and their family member concerning to the purposes of research, studies, training, voluntary service, pupil exchange schemes or educational projects and au pairing.⁴⁸ The Directive intends to facilitate the admission of third-country nationals to the EU for the purpose of carrying out a research activity⁴⁹ and to make the EU more attractive for third country nationals wishing to study or carry out research activity in the EU by improving and simplifying the conditions for entry and residence for third country nationals.⁵⁰

Furthermore the Directive aims to facilitate intra-EU mobility for students and researchers, inter alia by reducing the administrative burden related to mobility in Member States by setting

⁴¹ Directive 2011/51/EU, Preamble 1.

⁴² OJ L 155, 18.6.2009, p. 17–29.

⁴³ Directive 2009/50/EC, Art. 1 (a).

⁴⁴ COM (2014) 287 final, Brussels, 22.5.2014, p. 2.

⁴⁵ Directive 2009/50/EC, Preamble 7.

⁴⁶ COM (2014) 287 final, Brussels, 22.5.2014, p. 2; and See also Briefing - The EU Blue Card Directive (Implementation Appraisal), European Parliament 2015, p. 2.

⁴⁷ See OJ L 132, 21.5.2016, p. 21–57

⁴⁸ See Directive (EU) 2016/801, Art. 1 (a).

⁴⁹ See Directive (EU) 2016/801, Preamble (9).

⁵⁰ See Directive (EU) 2016/801, Preamble (14).

up a specific intra-EU mobility scheme in order to enable third country nationals who hold an authorization for the purpose of studies or research to enter, stay and carry out part of the studies or research in one or several second Member States.⁵¹ Finally, the Directive aims to ensure fair and equal treatment for researchers and students, as well as trainees, volunteers and au pairs.

3.1.4. Directive 2004/38/EC

Directive 2004/38/EC was adopted to replace inter alia Regulation 1612/68/EEC⁵². The so-called Free Movement Directive lays down the conditions governing the exercise of the right of free movement and residence by EU citizens and their family members – irrespective of nationality – within the territory of the Member States.⁵³

Directive 2004/38/EC has reinforced free movement of Union citizens by granting a (albeit conditional) right to permanent residence and strengthening the scope and nature of the set of rights attached thereto. The adoption of the Directive also means that the original status of European citizenship moves closer to a rights-based approach embraced by the economic/market-oriented rationale.⁵⁴ Under the Directive, family members of the EU citizens who are third country nationals are also granted equal rights and right of free movement and residence.⁵⁵

3.1.5. Directive 96/71/EC

Directive 96/71/EC applies to undertakings established in a Member State which post workers to a second Member States.⁵⁶ The Directive guarantees the rights and working conditions of workers who are posted and it determines that at least the minimum standards of local workers in the Member State where the worker is posted must be enjoyed by posted workers.⁵⁷

Directive 96/71/EC was enforced by the Directive 2014/67/EU.⁵⁸ Directive 2014/67/EU lays down a set of provisions, measures and control mechanisms that are necessary for better and more uniform implementation, application and enforcement in practice of Directive 96/71/EC, and it provides the measures to prevent and sanction any abuse and circumvention of the applicable rules, without prejudice to the scope of Directive 96/71/EC. The 2014 Directive also

⁵¹ See Directive (EU) 2016/801, Preamble (44) and (45).

⁵² See OJ L 158, 30.4.2004, p. 77–123

⁵³ Fact Sheets on the European Union, Free Movement of Workers, European Parliament 2019; and See also Directive 2004/38/EC, Art. 1 (a).

⁵⁴ S. Carrera – A. Faure Atger, *Implementation of Directive 2004/38 in the Context of EU Enlargement - A Proliferation of Different Forms of Citizenship?* CEPS Special Report, Centre For European Policy Studies 2009, p. 1.

⁵⁵ See Directive 2004/38/EC, Preamble (5); and European Union Agency for Fundamental Rights, Handbook on European Law Relating to Asylum, Borders and Immigration, Council of Europe, Luxembourg 2013, p. 55.

⁵⁶ See Directive 96/71/EC, Art. 1.

⁵⁷ Briefing - Posting of workers - Part of the expected Labour Mobility Package - Main instruments: Directive 96/71 and Directive 2014/67 (Implementation Appraisal), European Parliament 2015, p. 2-3.

⁵⁸ OJ L 159, 28.5.2014, p. 11–31.

aims to guarantee an appropriate protection of the rights of posted workers for the cross-border provision of services, especially the enforcement of employment terms and conditions that apply in the Member State where the service, in accordance with Article 3 of Directive 96/71/EC, is to be provided.⁵⁹

Recently in June 2018, the Directive (EU) 2018/957 was adopted to amend Directive 96/71/EC concerning the posting of workers.⁶⁰ Directive (EU) 2018/957 aims to reinforce the legal protection of posted workers, including posted workers under a temporary contract. It provides a balanced framework in connection with the freedom to provide services and the protection of posted workers. And the application of terms and conditions of employment is not prevented by the Directive being favorable to workers who are posted.⁶¹ The Member States are required fully implement the Directive until 30 July 2020.

3.2. Legal Instruments for short stay

Above, legal instruments governing free movement of third country nationals for a stay on the territory of the EU longer than three months were enumerated. On the other hand, a short stay for up to three months is covered by the uniform Schengen visas under the rules set out in the Visa Code⁶², and the uniform Schengen visa is valid, in general for tourism, for travel to and within the Member States of Schengen Area.

The Visa Code was adopted to provide full harmonization related to free movement of third country nationals for a short stay up to three months within the Schengen area. Consequently, Schengen Member States issue visas on the basis of harmonized rules which is based on the same set of criteria and the same procedure. This is the key precondition for free movement of third country nationals for a short stay within the EU in which Member States mutually recognize each other's decisions related to visa issued by any of the Schengen Member States.⁶³ And this is not only Schengen visa holders can enjoy this achievement of free movement, but long-stay visa and resident permit holders also can enjoy this free movement to other Member States for a period up to three months.

4. Free Movement Rights of Third Country Nationals within the EU

Free movement rights of third country nationals under the Directives on legal migration of the EU are not applied to all Member States of the EU, as Denmark, the UK and Ireland have negotiated opt-outs from any measures adopted under this policy.⁶⁴ But third country nationals who hold a visa or a residence permit from one of the 22 EU countries that are in the Schengen

⁵⁹ See Directive 2014/67/EU, Art. 1.

⁶⁰ OJ L 173, 9.7.2018, p. 16–24

⁶¹ See Directive (EU) 2018/957, Preamble (24).

⁶² See generally Regulation (EC) No 810/2009, pp. 1–58.

⁶³ Töttös, *ibid.* p. 241.

⁶⁴ Wiesbrock, *ibid.* p. 497.

area can move freely within the Schengen area for up to three months during a six-month period of time⁶⁵ on the basis of their visa or residence permit and a valid travel document, and subject to the presentation of supporting documents.⁶⁶ However, third country nationals of the following certain categories may reside in other Member State longer than three months.

4.1. Long-term residents

The conditions and consequences of granting long-term residence status to third-country nationals are laid down in the Long-Term Residents Directive 2003/109/EC, as amended by Directive 2011/51/EU⁶⁷. The third-country nationals who have a five-year legal and uninterrupted stay in one of the EU Member States can apply for long-term resident status.⁶⁸ The third-country nationals who are issued long-term residence permits have the right to reside in a second Member State of the European Union to perform an economic activity, to study, or to exercise any other purpose⁶⁹ for a period in excess of three months. However, the third-country nationals do need to meet a number of requirements during the five years in order to acquire the long-term resident status, such as having sufficient financial resources and sickness insurance.⁷⁰ At the same time Member States are granted the right to apply additional measures to regulate the numbers of mobile third-country nationals who are granted the right of residence.⁷¹

Third-country nationals who desire to reside in a Member State for a long-term status need to meet the required conditions before this status is granted⁷²: (1) reside in a Member State for five years immediately prior to the application; (2) have regular, sufficient and stable resources; (3) have sickness insurance; (4) comply with integration condition where Member States request; and (7) do not form a threat to public security or public policy.

4.2. Highly Skilled Workers or EU Blue Card Holders

EU Blue Card Holders are another category of the free movement for third-country nationals who are granted the rights to freely move within the EU territory⁷³ for the purpose of staying more than three months.⁷⁴

⁶⁵ The Schengen acquis - Convention implementing the Schengen Agreement, Art. 10 (1), and Art. 11 (a).

⁶⁶ EMN, Synthesis – Intra-EU Mobility of third-country nationals, Home Affairs, European Commission 2013, p. 17.

⁶⁷ European Union Agency for Fundamental Rights, Handbook on European Law Relating to Asylum, Borders and Immigration, Council of Europe, Luxembourg 2013, p. 50.

⁶⁸ Piet Jan Slot – Mielle Bulterman, Harmonization of Legislation on Migrating EU Citizens and Third Country Nationals: Towards a Uniform Evaluation Framework, *Fordham International Law Journal*. Vol 29. No. 4. 2005, p. 771.

⁶⁹ EMN, Synthesis – Intra-EU Mobility of third-country nationals, Home Affairs, European Commission 2013, p. 22.

⁷⁰ I. Doukas, Non-Discrimination on Grounds of Nationality: The Position of Third Country Nationals' within the EU, *Cambridge Student Law Review*. Vol. 4. No. 1. 2008, p. 5.

⁷¹ EMN INFORM, Intra-EU Mobility of Third-Country Nationals, European Commission 2013.

⁷² Y. Pascouau, Intra-EU Mobility: the 'Second Building Block' of EU Labor Migration Policy, *Issue Paper No. 74*, European Policy Centre 2013, p. 3.

⁷³ Pascouau, *ibid.* p. 4.

⁷⁴ EMN, Synthesis – Intra-EU Mobility of third-country nationals, Home Affairs, European Commission 2013, p. 24.

Third country nationals who hold the EU Blue Card are, after two years of legal employment, entitled to equal treatment with host Member State citizens regarding highly qualified employment.⁷⁵ According to Article 18 of the Blue Card Directive, if these migrants legally resided in a first Member State for at least eighteen months, they have rights to move to a second Member State of the European Union for a purpose of highly skilled employment. But if they desire to move to a second Member State, they must apply for another EU Blue Card⁷⁶. As soon as they enter into the second Member State, and no later than one month, they must submit an application for a new EU Blue Card, along with required documents set in Article 5 of the Directive, to the relevant authority in that second Member State.⁷⁷ When third-country nationals hold the EU Blue Card, their family members of whatever nationality have the right to accompany them⁷⁸ and they acquire an automatic general right to access the labour market.⁷⁹

Third country nationals who desire to apply for the EU Blue Card must meet the admission conditions set out in Article 5 of the Directive: (1) have a valid work contract of at least one year in the Member State concerned; (2) have a document attesting fulfilment of binding job offer as provided for in national law; (3) if professions unregulated, have the documents attesting the relevant higher professional qualifications in the occupation or sector specified in the contract; (4) have a valid travel document, an application for a visa or a visa, if required, and evidence of a valid residence permit or of a national long-term visa, if appropriate (the period of validity of the travel document to cover at least the initial duration of the residence permit may be required by Member States); (5) hold evidence of having a sickness insurance; (6) not be considered to pose a threat to public policy, public security or public health.⁸⁰

4.3. Researchers

Third-country nationals who are researchers in the EU can enjoy the free movement in the EU territory⁸¹. Researcher from third countries who hold authorization issued by one Member State of the EU for the purpose of research in the EU have the right to enter and stay in one or several second Member States of the EU in order to carry out part of the studies or research for a period of up to 180 days in any 360-day period per Member State⁸². The researchers who desire to enter and reside in a second Member States for the period of up to 180 days needs to present: (1) the valid travel document, and the valid authorization issued by the first Member

⁷⁵ European Union Agency for Fundamental Rights, Handbook on European Law Relating to Asylum, Borders and Immigration, Council of Europe, Luxembourg 2013, p. 179; and See also Council Directive 2009/50/EC, Art. 14.

⁷⁶ EMN, Synthesis – Intra-EU Mobility of third-country nationals, Home Affairs, European Commission 2013, p. 7; and See Council Directive 2009/50/EC, Art. 18.

⁷⁷ Tóttós, *ibid.* p. 247.

⁷⁸ EMN, Synthesis – Intra-EU Mobility of third-country nationals, Home Affairs, European Commission 2013, p. 25.

⁷⁹ European Union Agency for Fundamental Rights, Handbook on European Law Relating to Asylum, Borders and Immigration, Council of Europe, Luxembourg 2013, p.180

⁸⁰ See Council Directive 2009/50/EC, Art. 5.

⁸¹ EMN, Synthesis – Intra-EU Mobility of third-country nationals, Home Affairs, European Commission 2013, p. 26.

⁸² See Directive (EU) 2016/801, Art. 27 para. 1 and Art. 28 para. 1.

State covering the period of the mobility⁸³, (1) the hosting agreement in the first Member State or, if requires, a hosting agreement concluded with the research organization in the second Member State; (2) planned duration and dates of the mobility (if not specified in the hosting agreement); (3) evidence of sickness insurance; (4) evidence of sufficient resources to cover subsistence costs without having recourse to the Member State's social assistance system.⁸⁴

However, third-country national researchers are also granted the right to reside in a second Member State for more than 180 days per Member State according to Article 29 of Directive (EU) 2016/801. The third-country national researchers who desire to enter and reside in a second Member States for more than 180 days need to have or prove: (1) a valid travel document, and a valid authorization issued by the first Member State; (2) evidence of sickness insurance; (3) evidence of sufficient resources to cover subsistence costs without having recourse to the Member State's social assistance system; (4) the hosting agreement in the first Member State or, if requires, a hosting agreement concluded with the research organization in the second Member State; (5) the planned duration and dates of the mobility (if not specified in any of the documents). The Member States may either allow the researcher to stay on the territory on the basis of and during the period of validity of the authorization issued by the first Member State or the Member States may apply the procedure provided for in paragraphs 2 to 7 of Article 29 of Directive (EU) 2016/801.⁸⁵

A researcher's family members who hold a valid residence permit issued by the first Member State have a right to enter and reside in one or several second Member States in order to accompany the researcher.⁸⁶ The family member shall present: (1) the valid travel document, and the valid authorization issued by the first Member State covering the period of the mobility, (2) the planned duration and dates of the mobility; (3) evidence of sickness insurance; (4) evidence of sufficient resources to cover subsistence costs without having recourse to the Member State's social assistance system; (5) evidence that the family member has resided as a member of the family of the researcher in the first Member State.⁸⁷

4.4. Students

Third country national students who hold a valid authorization issued by the first Member State and who are covered by a Union or multilateral programme that comprises mobility measures or by an agreement between two or more higher education institutions can enter and reside in one or several second Member States of the EU for a period up to 360 days per Member State for the purpose of carrying out part of their studies in a higher education institution.⁸⁸

⁸³ See Directive (EU) 2016/801, Art. 28 para. 5.

⁸⁴ See Directive (EU) 2016/801, Art. 28 para. 6.

⁸⁵ See Directive (EU) 2016/801, Art. 29 para. 1 (a) and (b).

⁸⁶ See Directive (EU) 2016/801, Art. 30 para. 1.

⁸⁷ See Directive (EU) 2016/801, Art. 30 para. 2.

⁸⁸ See Directive (EU) 2016/801, Art. 31 para. 1.

The students who desire to enter and reside in second Member States to carry out part of their studies in a higher education institution need to present: (1) valid travel document, and the valid authorization issued by the first Member State covering the total period of the mobility; (2) evidence of carrying part of the studies carried out in the second Member State in the framework of a Union or multilateral programme that comprises mobility measures or of an agreement between two or more higher education institutions and evidence that the student has been accepted by a higher education institution in the second Member State; (3) the planned duration and dates of the mobility (if not specified under framework of a Union or multilateral programme); (4) evidence of sickness insurance; (5) evidence of sufficient resources to cover subsistence costs without having recourse to the Member State's social assistance system; (6) evidence of the fees payment charged by the higher education institution, where applicable.⁸⁹ The third-country national students do not in general differentiate between students coming from another EU Member State and students coming from the third-countries for the purpose of study with staying in second Member State longer than three months.⁹⁰

Students who hold a valid authorization issued by the first Member State but not covered by a Union or multilateral programme that comprises mobility measures or by an agreement between two or more higher education institutions are also entitled to enter and reside in one or several second Member States of the EU for the purpose of carrying out part of their studies in a higher education institution but they shall submit an application for an authorization to enter and stay in a second Member State⁹¹ for that purpose of carrying out part of their studies in a higher education institution.

4.5. Posted Workers

Service providers, undertakings have the right to provide services in another Member State and they may post their workers temporarily in order to provide those services there. Every citizen has the right to move freely to another Member State to work and reside there for purpose of posted work.⁹² And in order to obtain the permit to work and reside in another Member State for the posted work, third-country nationals must have proof of the following 1) The activity conducted prior to the service in question; 2) their residence and employment situation in the Member State from which they are coming; and 3) the service to be provided.⁹³

Those third country nationals who are lawfully working for an employer in one Member State, and who are posted by that employer to carry out work on its behalf in another Member State have right to enjoy free movement⁹⁴ under the Directive 96/71/EC as enforced by Directive

⁸⁹ See Directive (EU) 2016/801, Art .31, Para. 6.

⁹⁰ EMN, Synthesis – Intra-EU Mobility of third-country nationals, Home Affairs, European Commission 2013, p. 29.

⁹¹ See Directive (EU) 2016/801, Art. 31, para. 1.

⁹² See Directive 2014/67/EU, Preamble 2.

⁹³ French National Contact Point for the European Migration Network, Intra-EU Mobility of Third-Country Nationals, 75800 Paris Cedex 08 2013, p. 11.

⁹⁴ European Union Agency for Fundamental Rights, Handbook on European Law Relating to Asylum, Borders

2014/67/EU and amended by Directive (EU) 2018/957. Also, the protection of the right and conditions of posted workers who are third country nationals are guaranteed by the Directive. Companies posting workers are required by the current Posted Workers Directive to obey the host country's labour regulations, rules on the health, safety and hygiene, maximum work periods, minimum rest periods, minimum paid annual holidays, minimum wage, hiring out of workers, protection of pregnant women or those who have recently given birth, of children and of young people, and equal treatment between men and women and other provisions on non-discrimination.⁹⁵

4.6. Third country national family members of EU citizens

Third country nationals who are family members of EU citizens who have exercised free movement under Directive 2004/38/EC have the right to enter and reside in the territory of an EU Member State in order to accompany or join the EU citizen.⁹⁶ By the meaning of “family member” under the Directive, they are the spouse; the partner with whom the EU citizen has contracted a registered partnership; the direct descendants of age under 21 or being dependants and those direct descendants of the spouse or the partner; or the dependent direct relatives in the ascending line and those dependent direct relatives of the spouse or the partner.⁹⁷ The third country national family members of EU citizens must not be a threat of public policy, public security and public health in order to enjoy free movement rights, otherwise they can be expelled or rejected to enter and reside in an EU Member State. Third-country nationals who have such family relations with EU citizens enjoy a higher protection from expulsion compared with other categories of third-country nationals above.

For a period of up to three months, third-country national family members of Union citizens have the right to stay in the host Member State.⁹⁸ However, according to Article 7(2) of the Directive 2004/38/EC, third-country national family members of EU citizens who are employed or self-employed in the host state, or who have sufficient financial resources, or who are students and have sufficient financial resources, along with health insurance can extend residence period more than three months⁹⁹ and within a minimum period of three months of arrival, they must apply for a residence card for a period of residence of more than three months. The residence card for a third country national family member of EU citizen has a validity of five years and during this time, they may travel out of the territory of the Member State for up to six months a year or a longer for compulsory military service, or for up to twelve

and Immigration, Council of Europe, Luxembourg 2013, p. 179.

⁹⁵ U. Batsaikhan – Zs. Darvas – I. Gonçalves Raposo, *People on the move: Migration and Mobility in the European Union, Bruegel Blueprint Series*, Vol. XXVIII, Bruegel, Brussels 2018, p. 162.

⁹⁶ European Union Agency for Fundamental Rights, *Handbook on European Law Relating to Asylum, Borders and Immigration*, Council of Europe, Luxembourg (2013), p. 55; and See also Directive 2004/38/EC, Preamble (5).

⁹⁷ See Directive 2004/38/EC, Art. 2 (2).

⁹⁸ See Directive 2004/38/EC, Art. 6(2).

⁹⁹ See Directive 2004/38/EC, Art. 7(2).

consecutive months for significant reasons such as a posting in another country, study or vocational training, pregnancy and childbirth or serious illness.¹⁰⁰

Furthermore, it is very important to note that apart from the third country national family member of the EU citizen who can enjoy free movement within the EU territory, it is possible to say that the third country national relatives of the EU citizen also have right to reside in another Member State for more than three month if they have sufficient resources – compare in this regard the case law of the Court of Justice of the European Union, most notably the judgments in the cases of Zhu and Chen and Zambrano.¹⁰¹

4.7. Third-country nationals who are not covered by the EU acquis

EU Directives or proposals do not apply to all possible categories of third-country nationals. Third country nationals who are not covered by the EU migration *acquis* are subject to national immigration rules for any stay over three months, and the rights to enter and stay in a second Member State for more than three months of third country nationals who are not family members of EU citizens are governed by the national policies and legislation of each individual Member States.¹⁰²

5. Conclusion

Free movement rights of persons in the EU have been developed significantly, from free movement of workers and their family to all citizens of the EU and then to third country nationals – albeit in a limited and conditional way. As the EU aims to develop mobility rights as an important element of the external policy of the EU as well and to promote the EU as a global centre for studies and training, therefore free movement right of third country nationals within the EU territory has been provided under migration law of the EU. Third country nationals who hold a visa or residence permit issued by one of the EU Member States can freely move to one or more second Member States for a period up to three months. However, some certain categories of third country nationals are granted rights to enter and reside in one or more second Member States for a period longer than three months which are governed by specific legal migration directives of the EU.

The EU gives precedence to free movement rights of all persons, including third country nationals. The EU has always emphasized the possibility of fair treatment and the mobility of third country nationals inside the EU territory. Even though the EU has continued its effort to

¹⁰⁰ Wiesbrock, *ibid.* p. 98.

¹⁰¹ See in detail for example Á. Mohay – D. Muhvić, The legal nature of EU citizenship: perspectives from international and EU law, in T. Drinóczi – Zs. Ercsey – M. Zupan – M. Vinković (eds.), *Contemporary legal challenges: EU - Hungary – Croatia*, University of Pécs Faculty of Law, Pécs 2012, p. 169-171.

¹⁰² EMN, Synthesis – Intra-EU Mobility of third-country nationals, Home Affairs, European Commission 2013, pp. 29-30

broaden the scope and nature of free movement rights, and develop and amend legal immigration instruments to facilitate free movement within the EU territory, the free movement of third country nationals remains a big challenge for the EU since in practice there remain significant variations. Admission to enter and reside in another Member State often takes long periods of time as it does for the admission decision for entering into and residing in a first Member State. In this regard, the EU should provide a proper system of mutual recognition of administrative decisions on admission and residence of third country nationals in the legal immigration directives.

The equal treatment and the free movement rights of third country nationals within the EU are covered by the EU legal immigration instruments for almost every category of third country nationals who enter and reside in the territory of the EU. However, the EU leaves Member States the right to apply additional measures to regulate mobile third country nationals, especially with the third country nationals who hold long-term resident status. When Member States apply additional measures for third country nationals, this means that unequal treatment may occur for third country nationals. And in this respect, each Member State may develop the additional measures in different ways which can lead to difference in treatment in different Member States (in areas not covered by the relevant EU *acquis*). Furthermore, the legal migration law of the EU is quite complex and fragmented, which is why the Commission – in accordance with the Stockholm Programme – suggested the consolidation of all EU legislative instruments in the area of immigration, starting with legal migration¹⁰³, however the initiative did not yield any result.

In any case the EU has achieved much in providing mobility rights to third country nationals, yet there remain many challenges, partly due to some legal gaps in the *acquis*, and no doubt also to the politically debated nature of the migration phenomena in the EU in recent times.

¹⁰³ See Á. Mohay, The regulation of legal migration in the European Union: Achievements and challenges, in I. Tarrósy – S. Milford (eds.), *Challenges for the European Union in the Next Decade: A View from the Danube Region*, Publikon Books, Pécs 2013, p. 25-26.

The Process of Becoming a Nationality in Hungary: Vietnamese Chances*

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Minority issues became more interesting for the wider Hungarian society since a part of the Hungarian nation lives beyond the Hungarian state's borders. Inter alia to protect these Hungarian communities, several national policy options have been created from which "the vanguard of minority rights" approach seems to be at the forefront. As consequence of this policy, autochthon national and ethnic minorities are entitled to a special status in Hungary. This paper aims to respond the questions of who autochthon national minorities are under Hungarian law, and how is it possible to become such a community – in this context, the paper specifically ponders Vietnamese chances.

Keywords: *minority rights, immigration to Hungary, diaspora, Vietnam, Vietnamese community*

1. The Political Importance of Minorities in Hungary

Minority issues became increasingly important to the Hungarian political elite, and Hungarian society as the ideas of nation and nationalism emerged and spread, which topics still have crucial importance in today's Hungarian politics and even in the Hungarian society.

The exact timing of the emergence of the nation has been debated¹. However, we can state that the idea of nationalism gained momentum in the 18th century; and it is still a determining and society-shaping force. In the 18th century, the birth of nationalism stemmed from people placing the nation above all other loyalties, e.g. religion, locality and parish. French nationalism that flared up during the French Revolution (1789-1799) and the Napoleonic Wars (1799-1815) has also inspired the national feelings of defeated people.²

The awakening of nations did not evade the multinational Habsburg Empire. Hungary was a special political actor in the Empire, enjoying limited autonomy;³ however, this limited autonomy was no longer enough at the time of the Hungarian Reform Era (1825-1848). The purpose

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¹ See Gy. Csepeli – A. Örkény, *Nemzet és migráció*, ELTE-TáTK, Budapest 2017. pp. 10-12.

² P. Hahner, *A nemzeti állam és a nacionalizmus*, *Rubiconline*, http://www.rubicon.hu/magyar/oldalak/a_nemzeti_allam_es_a_nacionalizmus/ (27 January 2019).

³ Pragmatica sanctio 1723, Act X of 1791.

of the Hungarian reforms was to modernise in the same manner as Britain and France.⁴ However, the Diets of the Hungarian Reform Era did not make any real reforms. The Paris Revolution resolved the stalemate on 22nd February 1848. Lajos Kossuth formulated the main demands of the opposition on 3rd March, including the demand of an independent Hungarian national government. On 15th March, the revolution broke out in Pest, as a result of which the Court retreated and on 17th March appointed Count Lajos Batthyány as prime minister, and the new government that was founded was responsible to the Hungarian National Assembly.⁵

On 11th April 1848, Ferdinand V, King of Hungary sanctioned the April Laws passed by the last Diet (1847-1848).⁶ The April Laws realised the reform of the political and economic system of Hungary. However, the articles refer explicitly only to Hungarians, other nations or rather – based on contemporary terminology – nationalities⁷ living in Hungary are not mentioned. However, there are some references to nationalities in two articles of the April Laws. The first is Act VIII of 1848 on joint burden-sharing, in the introduction of which it was stated that “residents of Hungary and all affiliated entities” jointly bear the public burdens, i.e. not only the Hungarians but all residents. The second is Act XX of 1848 on religion; this does not speak of nations or nationalities, but the freedom of religion of different religious denominations. We can conclude, however, that in the mid-1800s the Hungarian political elite did not want to consider the nationalities living in Hungary as nations but as religious minorities.

Until 1848, the state religion in Hungary was Roman Catholicism. Act XXVI of 1790/91 on religion allowed freer religious practice for both Augustan (Lutheran) and Helvetic (Calvinist) Evangelicals. Act XX of 1848 on religion confirmed and expanded Act XXVI of 1790/91 by proclaiming freedom of religion for Unitarians and Greek non-united (Orthodox). Moreover, Roman Catholicism ceased to be a state religion in Hungary.⁸

Religion was the most definitive source of self-determination before the emergence of national ideology, thus introducing freedom of religion contributes to the exhilaration of nations, to national awakening, and preservation of nations. Thus, there is a parallel between religion and nations.

⁴ János Veliky, Reformkor – a változások kora, *Magyar Tudomány*, 2008/10, pp. 1238-1254.

⁵ R. Hermann (ed.), *1848-1849: A szabadságharc és forradalom története*, Videopont, Budapest 1996.

⁶ T. Tarján M., *1848. április 11. – V. Ferdinánd szentesíti az áprilisi törvényeket* http://www.rubicon.hu/magyar/oldalak/1848_aprilis_11_v_ferdinand_szentesiti_az_aprilisi_torvenyeket (27 January 2019).

⁷ Non-Hungarian ethnic groups living on the territory of Hungary were called nationalities. See L. Szarka, *Szlovák nemzeti fejlődés – magyar nemzetiségi politika 1867-1918*, Kalligram, Pozsony 1995.

⁸ Magyar Katolikus Lexikon, Államvallás <http://lexikon.katolikus.hu/A/%C3%A1llamvall%C3%A1s.html> (27 January 2019).

Moreover, the practice of certain religions is more typical of individual nations. For example, we know that the Orthodox religion has spread mainly among Romanians, Serbs, and Ruthenians, and the Transylvanian Saxons mainly practised the Lutheran religion.⁹

Another reason for not mentioning nationalities in the April Laws is that the first – and until 1848 the only available – census in Hungary (1784-1787) did not measure nationality data.¹⁰ However, this cannot be treated as a deficiency, because we cannot speak about the awakening of nations in the Habsburg Empire in the 1780s. Furthermore, enlightened absolutism has not given (or better still provided) an opportunity for such a survey. Moreover, the lack of accurate nationality data gave the opportunity to the Hungarian law-maker to hide the real power relations.

The epoch's spirit can be a third reason not to mention nationalities in the April Laws. According to this, the Hungarian reformers were thinking in a political nation, that is, everyone is a member of the (Hungarian) nation who lives on the territory of the country (Hungary), everyone has equal rights regardless of their mother tongue; also the nation was considered inseparable from the state. Although census data was not available on nationalities of Hungary of the 1840s, we can state that the political elite was aware of which areas of the county the different nationalities typically lived and where were they in a numerical majority compared to the Hungarian population. In the light of this, the Hungarian political elite, being afraid of the territorial unity of the country, did not have interest in recognising nationalities as individual nations or even mention as nationalities, but instead attempted to incorporate them into the ideology of political nation and handle them instead as religious minorities. In contrast, the nationalities living in Hungary – principally the Slovaks, Serbs and Romanians – represented the other, the Herder branch of national perception, that is, the existence of the nation is derived from the so-called national spirit (*Volksgeist*), which gives in itself the right to a nation to decide its destiny.¹¹

The biggest problem was caused by Section 3 of Act V of 1848 which provided that the exclusive language of legislation was Hungarian. Until that point, as the *lingua franca*, the Latin language was used in the Hungarian Diet, which was also accepted by the nationalities living in Hungary. However, with the introduction of the Hungarian language, the question arose: why the nationalities could not use their mother tongue during legislative work? The exclusive use of the Hungarian language was utterly contrary to the thinking of the linguistic-ethnic nation which was represented by the nationalities of Hungary.

Relying on the unsuccessful autonomy aspirations of nationalities – especially of Slovaks, Serbs, Romanians and Croats – and on the new regulation implemented in Austria favouring

⁹ I. Kollega Tarsoly (ed.), *Magyarország a XX. században 2. – Természeti környezet, népesség és társadalom, egyházak és felekezetek, gazdaság*, Babits, Budapest 1997.

¹⁰ D. Danyl – Z. Dávid (eds.), *Az első magyarországi népszámlálás (1784-1787)*, Központi Statisztikai Hivatal Könyvtára Művelődésügyi Minisztérium Levéltári Osztálya, Budapest 1960.

¹¹ T. Tarján M., *1849. július 28. – A magyar nemzetgyűlés Szegeden elfogadja a nemzetiségi törvényt* http://www.rubicon.hu/magyar/oldalak/1849_julius_28_a_magyar_nemzetgyules_szegeden_elfogadja_a_nemzetisegi_torvenyt/ (27 January 2019).

the nations living in the Empire, the Austrians were able to put the nationalities living in Hungary alongside them during the 1848-49 War of Independence¹². As a consequence, this series of events was both a war of independence and civil war for Hungary.

The Hungarian National Assembly committed itself to the adoption of a more progressive nationality law – which became the first democratic nationality law in the world – very late, in July 1849. There was either no time to implement it, and its content did not satisfy the leaders of nationalities. After the surrender at Világos, after the defeat of the Hungarian War of Independence on 13th August 1849, the Nationality Act could not have any effect.¹³

In the era of neo-absolutism (1849-1867) following the War of Independence, it was not only the nationalities living in Hungary that could not hope for autonomy or for rights essential to maintain a national identity but even Hungary – as part of retaliation – was deprived of its special status within the Empire. From the Habsburgs, Hungary was a conquered province, on which they ruled as they wanted. This change for Hungary and for the nationalities living in its territory by the Austro-Hungarian Compromise of 1867 which created a bipolar, dual monarchy of Austria and Hungary, broader than a real union, but narrower than a personal union.¹⁴

However, in the age of the emergence of nation-states, a multinational empire was doomed to fall. The regulation of the nationality issue has become essential.

Act XXX of 1868 has settled the Hungarian-Croatian relationship (Croatian-Hungarian Compromise). With this act, Croatia has received extensive self-government, partial autonomy: it could set up its administrative system, its national assembly and its government, and delegate representatives to the Hungarian National Assembly.¹⁵

Even in the year of the Croatian-Hungarian Compromise, the Nationality Act was adopted¹⁶, which contained the rights of non-Hungarian and non-Croatian nationalities. Three visions were formulated in connection with the draft. The first was presented by the representatives of the national minorities who wanted equality and created the concept of “country-wide nation”, which designated the six most populous nationalities living in the territory of the Kingdom of Hungary, for whom they required collective autonomy. The other two bills completely ignored the so-called minority proposal. József Eötvös, who submitted the second draft, believed that if the minority proposal were to be implemented, it would preserve the diversity of nationalities in the country, which, however, was in disappearing in Europe, so it should not be applied in the case of the Kingdom of Hungary either. The third draft was presented by Ferenc Deák, who

¹² Hermann, *ibid.*

¹³ Tarján *ibid.*

¹⁴ A. Gergely, *Az 1867-es kiegyezés* http://www.rubicon.hu/magyar/oldal/az_1867_es_kiegyezés (27 January 2019).

¹⁵ Részleges autonómiát hozott a kiegyezés, *Múlt-Kor*, 17 November 2008. https://mult-kor.hu/20081117_reszleges_autonomiat_hozott_a_kis_kiegyezés (27 January 2019).

¹⁶ Act XLIV of 1868 on the Emancipation of Nationalities.

was thinking in a political nation's concept. The nationality law of 1868 reflects the concept of Deák.

“As all the citizens of Hungary, according to the principles of the Constitution, form a nation in political terms, the indivisible, unified Hungarian nation, of which all citizens of the nation, belonging to any nationality, are equal members; moreover, this equality can only be used for the official use of a variety of languages in the country, and can only be subject to special rules, if this is required by the unity of the country, by the practical possibility of government and administration and by the accurate delivery of truth [...]”¹⁷

It is already clear from the introduction of the Nationality Act that by using the notion of political nation, the issue of nationalities has been degraded to a linguistic level. However, the Hungarian political nation of the era does not necessarily have to be interpreted by today's terminology. Following the Compromise, the Kingdom of Hungary had limited sovereignty, with no prospect to establish an independent nation-state. Consequently, Deák introduced and used the political nation's concept to replace the nation-state's institution system.¹⁸

This sort of settlement was the most progressive in Europe, but it no longer satisfied the leaders of nationalities, who were already striving to create their nation-states in the spirit of the mainstream ideology of the era, nationalism.¹⁹

The First World War and especially the peace treaty that ended it for Hungary brought a turning point in the Hungarian national concept. Following the territorial provisions of the Trianon Peace Treaty signed on 4th June 1920, historical Hungary (the so-called holy crown countries of Hungary) lost two-thirds of its territory.²⁰ As a result, a homogeneous Hungarian society has been established from a multinational, heterogeneous realm. On the other hand, Hungarian nationals got beyond the Hungarian borders. This event overturned the previously used idea of the former political nation: the Hungarian nation-state was established, but it did not include all the Hungarians. Since 1920, two strategies have been developed to solve this problem: the first is the idea of revision, the biggest wave of which lasted until the end of the Second World War, and the second is the leading position in the area of minority rights, which began in the early 1990s and continues nowadays.

In the communist period – between the two strategies –, the Communist Party became the depository of national traditions, the concept of socialist patriotism widespread.²¹ However, communism was an ideology above nationalism, above the national sense of belonging²², so the re-

¹⁷ Ibid.

¹⁸ G. Gángó, Az 1868. évi nemzetiségi törvény és következményei, *Korunk*, Vol. 20. No. 5. 2009, <http://epa.oszk.hu/00400/00458/00149/indexc26a.html> (27 January 2019).

¹⁹ Z. Györe: 1868: XLIV. törvénycikk – Egy korai próbálkozás a nemzetiségi kérdés törvényes rendezésére, *Létünk*, Vol. 22. No. 4-5. 1992, pp. 239-254.

²⁰ T. Tarján M.: 1920. június 4. – A trianoni béke aláírása

http://www.rubicon.hu/magyar/oldalak/1920_junius_4_a_trianoni_beke_alairasa (27 January 2019).

²¹ M. Mevius, Kommunizmus, nacionalizmus: mítosz és gyakorlat, *REGIO – Kisebbség, Politika, Társadalom*, Vol. 21. No. 3. 2010, pp. 3-31.

²² The issue and possible protection of Hungarians beyond borders was an intervention in the internal affairs of neighbouring countries. Gy. Földes, *Kádár János külpolitikája és nemzetközi tárgyalásai I.*, Napvilág, Budapest

annexing of the Hungarians beyond borders to Hungary was obstructed and required the creation of a new kind of Hungarian defence mechanism, which culminated after the change of regime in 1989 with the Act of 1993 on the rights of national and ethnic minorities.

In brief, this historical overview demonstrates the development of the Hungarian nation concept. Not just in Hungary but in the Central European region the ethnic-blood component of the nation remained more dominant than the concept of a political community. As a consequence of the presented historical events, ethnic ties have become more valuable than the legal bond within Hungarian society.

2. Current Legal Regulations in Hungary Regarding Autochthon Minorities – The Process of Becoming a Nationality

For further analysis, it is necessary to define precisely the following notions: nation, ethnicity, minority, national minority, ethnic minority, autochthon national/ethnic minority, immigrant national/ethnic minority and nationality.

The nation is a political concept used in two ways. On the one hand, it can be a culture nation (Kulturnation), which is a community characterised by lasting coexistence, a common historical past, territorial, economic, linguistic, cultural unity and common spiritual characteristics and values²³. On the other hand, it can be a state-nation which is a community of all citizens of a state.²⁴

Ethnicity is a historically formed group of people who are aware of their unity and their differences from other groups²⁵.

It is challenging to regulate the situation of national and ethnic minorities in a universal and even in a European level, as it is not possible to establish a uniformly agreed definition due to differences in countrywide nation perceptions.²⁶

A *minority* in itself represents a proportion which, in the case of national/ethnic minorities, means that their number is lower than that of the majority nation. The interpretation of *national and ethnic minorities* differs from country to country; thus, it is tough to create a universally usable definition of both concepts.

2015.

²³ A. Gergely – G. Gelsei – V. Gergely – V. Horváth, Nemzeti és etnikai kisebbségek, in G. Gelsei – V. Gergely – V. Horváth – M. Rácz (eds.), *A láthatatlanság vége – társadalomismereti szöveggyűjtemény*, Alapítvány a Társadalomelméleti Kollégiumért, Budapest 2004, p. 100.

²⁴ Ibid.

²⁵ Ibid, pp. 99-100.

²⁶ K. Balázs – B. Ódor (eds.), *A Nemzeti és Etnikai Kisebbségi Jogok Nemzetközi Forrásai*, HVG-ORAC, Budapest 2006.

In this field, the Council of Europe's work must be highlighted, which has created a definition for *national minorities*, but this document is not legally binding²⁷. Section 1 of Recommendation 1201 (1993) of the Parliamentary Assembly of the Council of Europe is worded as follows: "For the purposes of this Convention, the expression »national minority« refers to a group of persons in a state who:

- a) reside on the territory of that state and are citizens thereof;
- b) maintain longstanding, firm and lasting ties with that state;
- c) display distinctive ethnic, cultural, religious or linguistic characteristics;
- d) are sufficiently representative, although smaller in number than the rest of the population of that state or of a region of that state;
- e) are motivated by a concern to preserve together that which constitutes their common identity, including their culture, their traditions, their religion or their language."

About *ethnic minority*, the Cambridge Dictionary says the following: "a group of people of a particular race or nationality living in a country or area where most people are from a different race or nationality"²⁸. The two definitions do not significantly differ from each other, but the two concepts are not the same. The definition similarity stems from the fact that states interpret the concept of nation differently, so in some cases the concepts of national and ethnic minorities can be mixed.

The concept of *autochthon national/ethnic minority* can be interpreted in two ways. The first interpretation is that a given ethnic group become minority not voluntarily – not by immigration – but by particular historical circumstances (e.g. conquest, border change). However, in many cases – also in Hungary – those parts of the nation that have been living in the country for a long time are considered to be an autochthon minority, and thus they are an organic part of that society. However, this definition raises the question of how to determine the meaning of a *long time*.

The second interpretation of autochthon national/ethnic minorities practically means the problem in defining the concept of *immigrant national/ethnic minorities*. It is deducible from the

²⁷ R. B. Szaniszló, Az EU és az őshonos nemzeti kisebbségek védelme, in R. I. Szakács (ed.): *Nemzetpolitika a gyakorlatban – Kisebbségek helyzete, jogai és védelme*, SZTE ÁJTK, Szeged 2016, pp. 171-192.

²⁸ Cambridge Dictionary, Ethnic minority. <https://dictionary.cambridge.org/dictionary/english/ethnic-minority> (27 January 2019).

appellation that it is a group that has become a minority by immigration. However, it may become an autochthon national/ethnic minority after a while. The question is when will this time come.

The Council of Europe did not distinguish between immigrant and autochthon national/ethnic minorities, but it states in the definition of national minorities as follows: “[...] *group of persons in a state who: [...] maintain longstanding, firm and lasting ties with that state; [...]*”²⁹. The time criterion appears in the definition with the lack of interpretation of “longstanding”.

From Hungarian legal regulation, *nationality* is the next concept whose exact meaning must be clarified. In Hungary, on the one hand, nationality is a figure of speech used to minorities in the common language³⁰. On the other hand, it is the traditional appellation of minorities first used in the 1840s not just in the common language but also officially – as it was presented above. This appellation returned to the political and legal regulation in 2011 when the National Assembly adopted a new act on national/ethnic minorities. Act CLXXIX of 2011 no longer provides rights for national and ethnic minorities but nationalities.

Following the end of the bipolar system, the regulation of minority rights has emerged in all democratising Central and Eastern European countries, including Hungary. On 7th July 1993, the Hungarian National Assembly adopted the Act on the Rights of National and Ethnic Minorities, the purpose of which was primarily to preserve the identity of national and ethnic minorities living in Hungary and to reverse their assimilation process.³¹

At first, it has to be clarified who is a national and ethnic minority in Hungary. Act LXXVII of 1993 states: “1. (2) *For the purposes of this Act, a national and ethnic minority (hereinafter referred to as minority) is any ethnic group resident in the territory of the Republic of Hungary for at least a century, which is in numerical minority in the population of the State, its members are Hungarian citizens and has its own language, culture and traditions distinguishing itself from the other parts of the population, and at the same time it demonstrates a sense of belonging that aims to preserve all these, to protect and to express the interests of their historically established communities.*

§ 2 *The scope of this Act shall not extend to refugees, immigrants, foreign nationals and stateless persons.*”

²⁹ Section 1 of Recommendation 1201 (1993) of the Parliamentary Assembly of the Council of Europe.

³⁰ Gergely – Gelsei – Gergely – Horváth, *ibid*, p. 100.

³¹ E. Kállai – G. Varjú, A kisebbségi törvény, in T. Gyulavári – E. Kállai (eds.), *A jövővénytől az államalkotó tényezőkhig. A nemzetiségi közösségek múltja és jelene Magyarországon*, Országgyűlési Biztos Hivatala, Budapest 2010, pp. 178-204.

From this definition, it can be concluded that Hungary – in 1993 – meant only the autochthon minorities under national/ethnic minorities. The Act indicated a hundred-year residency as a temporal distinction, as “*longstanding*”.

All points of the Hungarian act are identical to the Recommendation 1201 (1993) of the Council of Europe. In both cases, the same criteria appear, such as long-term residency, citizenship, separation based on specific features, being in a numerical minority, and the need for a sense of belonging.

The Act of 1993 enumerated those ethnic groups that could and should be regarded as (autochthon) national/ethnic minorities according to the act: Bulgarian, Roma, Greek, Croatian, Polish, German, Armenian, Romanian, Ruthenian, Serbian, Slovak, Slovenian, and Ukrainian.³²

However, the Minority Act of 1993 is no longer in force. On 19th December 2011, the Hungarian National Assembly adopted a new act on the rights of national and ethnic minorities. However, the Act CLXXIX of 2011 does not talk about national and ethnic minorities, but about nationalities. The legislator has brought back the traditional terminology, which at the same time abolished the distinction between national and ethnic minorities.

In connection with the drafting of the Act of 2011, we can identify three aims. The first with which the government submitted the bill has argued that the defects and shortcomings of the Act of 1993 needed to be improved. The second reason is the protection of Hungarians beyond borders based on reciprocity: if Hungary treats the rights of nationalities living in Hungary as a particularly important issue, then it may expect similar protection for the Hungarian minorities in the neighbouring countries. The third reason was the fulfilment of the provisions of the new Fundamental Law.

However, in terms of content, we cannot find vast differences between the two Acts. The most significant difference is the exchange of notions from national/ethnic minorities to nationalities.

Section 1(1) of Act CLXXIX of 2011 defines the concept of nationality: “*For the purposes of this Act, nationality is any – resident on the territory of Hungary at least for a century – ethnic groups which is in numerical minority in the population of the State, of at least one century in the territory of Hungary, which is a minority in the population of the state, its own language and culture, traditions distinguish them from the rest of the population and at the same time it demonstrates a sense of belonging that aims to preserve all these, to protect and to express the interests of their historically established communities.*” The Hungarian concept has practically not changed regarding autochthon national and ethnic minorities. In case an ethnic group wants

³² Section 61(1) Act LXXVII of 1993.

to register as a nationality, it must meet the four criteria of the concept: (1) 100 years of residency, (2) being in numerical minority, (3) difference from the majority society on a linguistic, cultural basis, and (4) must have a sense of belonging aimed at preserving their identity.

In connection with becoming nationality, Act CLXXIX of 2011 furthermore articulates, if an ethnic group believes that they meet these requirements, then at least a thousand of Hungarian citizens declaring themselves as members of that ethnic group, having the right to vote at the elections of local government representatives and mayors³³ can initiate the registration of that ethnic group for nationality.

Further details on becoming nationality can be found in the Act CCXXXVIII of 2013. Before starting the collection of signatures, the sample of the collection sheet must be certified by the National Electoral Committee, during which it is mandatory to request the opinion of the Hungarian Academy of Sciences – this is a difference compared to the regulation of 1993, when the opinion of the Hungarian Academy of Sciences was not obligatory. If the certification has taken place and at least one thousand signatures of people declaring themselves as members of that ethnic group have been gathered, and after the National Electoral Office has approved these signatures, the initiative may be submitted to the National Assembly. The Nationality Act of 2011 is a cardinal act, so the National Assembly must vote by a two-thirds majority to enact the new nationality. However, if the National Assembly makes a contrary decision, a repeated application may be submitted after one year of the decision-making.

In summary, the following conditions must be met in order for a national/ethnic minority to be a statutory (registered) nationality in Hungary: (1) 100 years of residency must be proved, (2) the members of the ethnic group wishing to become a national minority must be Hungarian citizens, (3) the ethnic group must be in a numeric minority, but with a minimum of 1000 capita, (4) must differ from the majority society in their language, tradition, culture, (5) each of the ethnic group must have a sense of belonging, that is, ethnicity is a community.

3. Vietnamese in Hungary

Two waves can be distinguished in connection with Vietnamese immigration to Hungary. The first is the wave of the bipolar era until 1989; the second had started in the middle of the 2010s. The waves can be practically differentiated in time; all of their other features are very similar.

Diplomatic relations between Hungary and Vietnam were established in 1950³⁴; this was the beginning of official relationship-building. In 1989 the regime changes proceeded not just in Hungary but in all European socialist states, a major consequence of which was to interrupt

³³ Section XXIII of Fundamental Law says that all major Hungarian citizens, all major European Union citizens who have residency in Hungary have the right to vote at the elections of local government representatives and mayors.

³⁴ Embassy of Hungary, Hanoi. <https://hanoi.mfa.gov.hu/eng/page/diplomaciai-kapcsolatok> (27 January 2019).

connections with communist states. The European regime changing countries have turned toward Western Europe and immigration flows from the communist states such as Vietnam have stopped.³⁵ The immigration of Vietnamese and of other developing countries' students to Hungary restarted in the middle of the 2010s thanks to scholarships provided for students of developing – mostly belonging to the post-communist era – countries.³⁶

The first wave of Vietnamese immigration towards Hungary – and other communist states and the Western world as refugees – was pushed principally by wars in the South-eastern Asian region.

In 1945 in Potsdam, the USA, the UK and the USSR decided that France had to reobtain Vietnam which was its legal property. France came into its own in 1946. However, in the meantime, Vietnamese nationalism and the Vietnamese communists have strengthened with the leadership of Ho Chi Minh. They aimed to establish an independent and sovereign Vietnam. The Vietnamese Revolution and Civil War, also called the First Indochina war occurred in 1948 between the Vietnamese communists (Viet Minh) and French troops. France was exhausted after the Second World War, and the French society did not want to support fights for a colony far as Vietnam. The First Indochina war ended with French capitulation in 1954.³⁷

After the First Indochina War Vietnam has been divided: in the North, the Socialist Republic of Vietnam was proclaimed and, in the South, with the leadership of the USA, they attempted to establish a democracy with the purpose to integrate Vietnam into the capitalist world. Thus, one of the hottest spots of the Cold War was created by the leaders of the globe. The Second Indochina War (also known as the Vietnam War or as Resistance War Against America) occurred in 1955, ended in 1975 with communist victory and the reunification of the country.³⁸

In 1953, after the death of Stalin, Khrushchev took charge of the USSR. At this point, China launched its interpretation of communism which caused freezing between the USSR and China. This was the first rift within the communist bloc. In 1978 the Soviet Union and Vietnam signed the treaty of friendship and mutual assistance which appeared to China as a threat. China and Vietnam have a hostile relationship traditionally, besides the fact that Southeast-Asia is traditionally China's influence zone to which the Soviets entered³⁹. Also, in 1979 Vietnam attacked Cambodia and removed from power the Khmer Rouge which was a Chinese ally. Therefore in

³⁵ I. T. Berend, *Terelőúton. Szocialista modernizációs kísérlet Közép- és Kelet-Európában 1944-1990*, Vince Kiadó, Budapest 1999.

³⁶ Study in Hungary Scholarships. <http://studyinhungary.hu/study-in-hungary/menu/scholarships> (27 January 2019).

³⁷ A. Balogh, *Bevezetés Délkelet-Ázsia történelmébe*, ELTE Eötvös Kiadó, Budapest 2015.

³⁸ H. Kissinger, *Diplomácia*, Panem-McGraw-Hill-Grafo, Budapest 1996.

³⁹ From Vietnam's birth China played a crucial role in Vietnam's state-life. E.g. Vietnam was annexed to China between 111 BC and the 1880's AD, for 1700 years. Balogh, *ibid.*

1979 Chinese troops invaded Northern-Vietnam, where the fights lasted for three months and have ended with a Vietnamese victory.⁴⁰

Consequently, Vietnam was constantly a battlefield from the Second World War to 1979 which means 40 years of combat. The fights consumed the country and pushed it into poverty, Vietnamese people started to emigrate with the hope of a better life. Within the frameworks of the Cold War, Vietnamese inhabitants had two possibilities to leave Vietnam: as a regular migrant to a socialist state or as a refugee to the West. In connection with the purpose of this paper, the Vietnamese refugee crisis will not be presented. Thus, those Vietnamese citizens chose to be emigrated arrived at those socialist, communist countries which were more developed or instead had a better economic situation than Vietnam. This is how the Vietnamese arrived and settled in Central-Eastern Europe. Today not just Hungary,⁴¹ but Poland⁴² and the Czech Republic⁴³ have a significant Vietnamese community.

In the circumstances of the Cold War two additional incentives of Vietnamese migration have to be mentioned. The first is the ideological affinity (party state and left-wing cooperation) between these states. The second is the solidarity of the states from the same interest zone. Concerning Hungary and Vietnam, it also has to be mentioned that Hungary had sympathy for a nation which was oppressed for a long time but reobtained its independence.

The Vietnamese bipolar immigration wave to Hungary has begun in the 1960s, in the course of the foreign policy of János Kádár, General Secretary of the Hungarian Socialist Worker's Party and because of the free capacities of the Hungarian higher education.⁴⁴

After the unsuccessful Hungarian revolution and war of independence of 1956, Hungary had been isolated by the USSR and by other socialist friend states. One of the breakout possibilities was the diplomatic, economic, cultural relationship-building with the socialist, communist states of the Third World. The priority countries for Hungary were those states where the socialist revolution was in infancy, for instance: Congo, Nigeria, Tanzania, Vietnam, Cuba. Hungary signed bilateral treaties with these states' governments which treaties have consisted of Hungarian higher education scholarships for the students of the partner states. The principle of this initiative was the demonstration of Hungary's activity and friendship within the socialist bloc to the USSR.⁴⁵ One of the consequences of this particular foreign policy is that today Hungary has several non-autochthon, but national immigrant minorities who live in Hungary a long time ago and – maybe – who can be already considered as autochthon national minorities.

⁴⁰ F. Fischer, *A kétpólusú világ – 1945-1989*, Dialóg Campus, Budapest 2014.

⁴¹ Népszámlálás 2011. – 4. Demográfiai adatok, Központi Statisztikai Hivatal, Budapest 2013.

⁴² A. Grzymala-Kazłowska, The Formation of Ethnic Representations: The Vietnamese in Poland, *Sussex Migration Working Paper* No. 2. 2002, pp. 1-17.

⁴³ Joshua Project: Vietnamese in Czechia. https://joshuaproject.net/people_groups/12700/EZ (27 January 2019).

⁴⁴ Földes, *ibid.*

⁴⁵ *Ibid.*

The Hungarian foreign policy at the time was based on high-quality higher education. Hungary was able to become an attractive educational destination country for the Vietnamese government and thus for Vietnamese citizens. During the Second Indochina War (1955-1975) – under the aegis of solidarity – almost 6,000 Vietnamese students studied in one of Hungary’s university, principally in a technical major⁴⁶. Among these students some returned, some migrated forward, and some settled down in Hungary. Therefore, today, Hungary has a 3,500 capita Vietnamese community who are directly from Vietnam or who was born in Hungary but have a strong Vietnamese identity because of their parents or grandparents.⁴⁷

4. Vietnamese Chances of Becoming a Declared Minority

Since 1993, when the precise regulation of how to become an autochthon national/ethnic minority from an immigrant community living in Hungary was born, all ethnic groups trying to declare themselves as nationalities have failed, either under the 1993 or the 2011 regulations. Between 1993 and 2018, a total of 6 initiatives were taken and ended at one of the stages in the process of becoming a nationality. Of the six initiatives, only two were launched under the new Act of 2011. It is important to highlight that the Act of 1993 and the Act of 2011 do not substantially differ from each other regarding the criteria and the process of becoming a nationality.

In 2005, the Huns tried to prove that, firstly, they were not an extinct ethnic group, and secondly, that they met the criteria of the Minority Act of 1993. The Parliamentary Committee on Human Rights, Minorities and Religious Affairs did not consider the initiative suitable for the general parliamentary debate. Thus the Huns’ initiative was not discussed by the National Assembly.⁴⁸

The Jews attempted to become a national minority also in 2005. Even though the National Electoral Committee has certified the Jewish sample of the collection sheet, an objection was raised: are Jews a national minority or rather “just” a religious minority? The case was brought before the Constitutional Court, which upheld the decision of the National Electoral Committee. However, the initiators did not manage to collect the right number of signatures by the deadline of July 2006. Thus the initiative was not passed to the National Assembly.⁴⁹

The Bunjevac attempted to become a national minority in 2006. Nearly 2000 supporting signatures were collected. However, Croats, who were already a national minority in Hungary, considering the Bunjevac to be part of the Croatian nation, protested against the initiative of the

⁴⁶ Based on the interview made with László Botz, president of the Hungarian-Vietnamese Companionship and the Association of Vietnamese in Hungary. The interview is accessible at the author.

⁴⁷ Népszámlálás 2011. – 4. Demográfiai adatok, Központi Statisztikai Hivatal, Budapest 2013.

⁴⁸ T. B. Gáspár, Hunnak lenni egy életérzés, *Index*, 12. 04. 2015 <https://index.hu/belfold/0412huns> (27 January 2019).

⁴⁹ T. Dési, *Nemzetiségiék vagy „titokzsidók”? A zsidó nemzetiségi kezdeményezés (újabb) kudarca*, MTA Etnikai-Nemzeti Kisebbségkutató Intézet, 2006, https://web.archive.org/web/20110316214912/http://www.kisebbsregionkormanyzatok.mtaki.hu/adattar/cikkek/2002-2006/szombat2006_09_1.html (27 January 2019).

Bunjevac, therefore the National Electoral Committee asked the Hungarian Academy of Sciences for an opinion according to which it was not possible to perceive linguistic developmental differences between the Croats and the Bunjevac, so there was no scientific reason to declare the Bunjevac an independent national minority. The initiative was passed to the National Assembly, which rejected the initiative. Bunjevac re-attempted in 2011. Once again, they managed to collect a sufficient number of supporting signatures, but the Hungarian Academy of Sciences did not support the initiative – for the same reasons as previously –, and the National Assembly rejected the Bunjevac initiative.⁵⁰

The Szeklers submitted their initiative to the National Electoral Committee in June 2017. There were two complaints about this initiative. The first is that the Szekler initiative has been submitted with more signatures than the compulsory. The second is that the National Electoral Committee has not asked for the opinion of the President of the Hungarian Academy of Sciences. In the decision of the Curia, it was considered that more signatures than necessary should not be a ground for exclusion, and the Act does not stipulate at what stage of the procedure the Academy's opinion should be sought, but logically when the 1000 signatures are collected⁵¹. Thus, the collection of signatures could only begin after the decision of the Curia in November 2017. Following the collection of the 1000 signatures, the Hungarian Academy of Sciences stated in its opinion that the Szekler community living in Hungary did not meet the legal requirements for the recognition of nationalities⁵². The National Assembly voted on the initiative of the Szeklers on 30th October 2018, which was rejected, accepting the position of the Hungarian Academy of Sciences, according to which the identity of Szeklers is based on a territorial-community identity, but it is still part of the Hungarian nation.⁵³

The last initiators were the Russians. A sample of the Russian collection sheet was certified by the National Electoral Committee in February 2018, as a result of which the initiators could start collecting support signatures. Within the 120-day deadline, 1,000 signatures were collected and certified by the National Electoral Committee. However, the Hungarian Academy of Sciences did not recommend that the initiative was presented to the National Assembly, arguing that the Russians did not meet the 100-year-old nationality criterion⁵⁴. On 30 October 2018, the National Assembly voted on the initiative – together with the Szekler initiative –, they rejected the initiative, citing non-compliance with the criterion of nationality.⁵⁵

⁵⁰ B. Dobos – Á. Tóth, *A magyarországi bunjevacokról. Szakértői összefoglaló* <https://kisebbssegkutato.tk.mta.hu/uploads/files/archive/572.pdf> (27 January 2019).

⁵¹ A Kúria Sajtótitkársága, Tájékoztató a Kúria Knk. VII.37.689/2017. számú népszavazási ügyben meghozott döntéséről, 7 November 2017 <https://kuria-birosag.hu/hu/sajto/tajekoztato-kuria-knkvii376892017-szamu-nepszavazasi-ugyben-meghozott-donteserol> (27 January 2019).

⁵² A székelység a magyar nemzet része, Magyar Tudományos Akadémia, Budapest 2018 https://mta.hu/mta_hirei/a-szekelyseg-a-magyar-nemzet-resze-108883 (27 January 2019).

⁵³ <https://www.parlament.hu/documents/10181/1569934/ny181030.pdf/3fb01c8a-ff74-3357-3c72-5342e334dfe9> (7 July 2019).

⁵⁴ Parliamentary Paper No. H/1515

⁵⁵ Parliamentary Diary, Parliamentary Period of 2018-2020, no.35. Budapest, 30th October 2018.

Moving on to the Vietnamese, starting from the unsuccessful initiatives listed above, it will be challenging if/when they submit their initiative to be one of Hungary's nationalities.

The first, and most difficult to prove criteria, is the 100-year-old residency. Here it does not need to be proved when the first Vietnamese arrived in Hungary, but when the established, organised community, diaspora emerged. In the case of the Vietnamese, we know that they began to immigrate and settle in Hungary in the 1960s⁵⁶, but only in the early 1990s was the real Vietnamese community, or diaspora founded when the diverse Vietnamese communities began to organise themselves⁵⁷. Thus, in the best-case scenario, the Vietnamese have to wait at least 40 years for their initiative.

Hungarian citizenship and the 1,000 signatures of requirements are worth to examine at the same time. From the census of 2011, we know that 3,500 people of Hungary have declared themselves Vietnamese⁵⁸. However, it is complicated to filter out the number of Hungarians and Vietnamese citizens, as the Central Statistical Office has not published official data in this respect. We know that in 2011, 26,295 Asian citizens were in Hungary, of whom 11,829 were undoubtedly Chinese⁵⁹. Furthermore, from the data published by the Central Statistical Office, we know that more and more Vietnamese citizens immigrate to Hungary every year⁶⁰. However, the number of Hungarian citizens with Vietnamese identity cannot be accurately determined from these data, so the question cannot be answered whether they would be able to collect the appropriate number of signatures for the initiative.

The next requirement is a cultural, linguistic difference from the dominant society. In this case, there are two continents' ethnic groups, cultures and civilisations. Based on the demarcation of Huntington's civilisation theory, Hungarians belong to Western Christianity, while Vietnamese belong to the Chinese culture, that two civilisations significantly differ from each other⁶¹. The most significant impact on the Vietnamese was exercised by the Chinese during history, so they are closest to the Chinese in their culture, tradition and language⁶². In contrast, Hungary lies on the border of Western and Eastern Christianity, so these civilisations influenced mostly the Hungarian culture⁶³. It can be stated that Vietnamese are different from Hungarians in their culture, traditions and language.

⁵⁶ P. Apor, *Szocialista migráció, posztkolonializmus és szolidaritás: Magyarország és az Európán kívüli migráció, antro-pólus*, Vol. 2. No. 2. 2017, pp. 26-44.

⁵⁷ Ők is köztünk élnek – azaz vietnamiak Magyarországon. Interjú Hoang Linh-nel <http://www.asiamania.hu/azsia-blog/riportok/ok-is-koztunk-elnek-azaz-vietnamiak-magyarorszagon> (27 January 2019).

⁵⁸ Népszámlálás 2011. – 4. Demográfiai adatok, Központi Statisztikai Hivatal, Budapest 2013.

⁵⁹ Magyarországon tartózkodó külföldi állampolgárok földrészek, országok és nemek szerint (1995–).

http://www.ksh.hu/docs/hun/xstadat/xstadat_eves/i_wvn001b.html (27 January 2019).

⁶⁰ A bevándorló külföldi állampolgárok földrészek és országok szerint (2000–)

http://www.ksh.hu/docs/hun/xstadat/xstadat_eves/i_wvn005b.html (27 January 2019).

⁶¹ S. P. Huntington, *A civilizációk összecsapása és a világrend átalakulása*, Európa Könyvkiadó, Budapest 2018.

⁶² R. B. Szaniszló, Vietnam jogi kultúrája, in Zs. Fejes (ed.), *Jog és kultúra*, Szegedi Tudományegyetem Állam- és Jogtudományi Doktori Iskola, Szeged 2018, pp. 171-180.

⁶³ I. Vitányi, A kultúra szerepe a társadalomban és a demokráciában, *Beszélő Online*, 6 March 2016 <http://beszelo.c3.hu/onlinecikk/a-kultura-szerepe-a-tarsadalomban-es-a-demokraciaban> (27 January 2019).

The last criterion to prove is the sense of belonging, whose aim is to preserve the identity of the ethnic group. This can be best demonstrated through the presentation of the ethnic community's organisation activity. The Vietnamese living in Hungary have established the All for Everyone Foundation for Vietnamese living in Hungary, the Association of Vietnamese Entrepreneurs Living in Hungary, and the Cultural Foundation for Hungarian-Vietnamese Culture⁶⁴. The creation of these organisations indicates that the goal of Vietnamese living in Hungary is to create a community that can protect and develop its own identity, and even beyond, provide a kind of economic protection for itself.

5. Conclusions

As a summary of the Vietnamese nationality aspirations, three things have to be highlighted. The first is that Hungary pays particular attention to minorities living in its territory, but the determination of this status is also rigorous, so the Vietnamese – like other minorities in Hungary – are in a challenging situation if they want to have themselves acknowledged as a nationality.

The second is the fulfilment of the criteria. For at least 40 years, Vietnamese have to wait to submit their initiative. However, four decades is a very long time that can influence the Vietnamese presence in many ways. On the one hand, in 40 years, Vietnamese may no longer have to be registered as a nationality as a result of possible emigration or assimilation. Alternatively, on the other hand, this community may continue to exist and strengthen its will to become a nationality through further immigration and popularity.

A third option is a change in the Hungarian regulation, minority policy, which can even advance⁶⁵ or cause a decline in Vietnamese aspirations. It is a crucial question to what extent the political leadership in the future will be able and willing to intervene in the question of the inclusion of a new nationality. At the end of 2018, we saw that we are not there yet, as both the Szekler and the Russian initiatives failed, but that does not mean that there will be no political pressure in the future that can override a nationality criterion.

Summing up, the Vietnamese community in Hungary is not autochthon, so getting a declared minority status will be difficult for them. Although the law guarantees the status of an ethnic minority for a hundred years of settling in Hungary, i.e. in the 19th century or at the beginning of the 20th century, many attempts indicate that the Hungarian mainstream society is not open

⁶⁴ MTA Társadalomtudományi Kutatóközpont Kisebbségkutató Intézet: Migráns szervezetek Magyarországon https://kisebbségkutato.tk.mta.hu/adatbazis/migr?keyword=&f_68=Vieten%C3%A1m&f_69=&f_70=&f_72=&f_73=&f_76 (27 January 2019).

⁶⁵ A similar thing happened in the Czech Republic. See: F. Előd – D. Csurgó: Bejártuk a budapesti kínaiak zárt világát, *Index*, 19 September 2018, https://index.hu/gazdasag/2018/09/16/tarsadalom_kinaiak_budapesten_longform_kinai_negyed/ (27 January 2019).

to it. There is a lack of pluralism, which accepts the economic, cultural and migration consequences and realities of the last hundred years.

Expulsion of asylum seekers under the Dublin System as the ground of violation of Article 3 ECHR

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Article 3 of the European Convention on Human Rights consistently provides that prohibition of torture and inhuman or degrading treatment is one of the most fundamental and non-derogable human rights, even though a certain degree of lack of clarity can be found while analyzing the text of the article. To show the supremacy of this rule, the ‘sovereignty clause’ defined in the Dublin Regulation on a case by case basis has been shifted from the category of duty to the obligation imposed on the Member States if its application would result into the risk of facing torture or other forms of ill-treatment. A more detailed analysis of the Strasbourg and Luxembourg Courts case law shows that in practice the prohibition of torture is subject to different, sometimes contradictory interpretations that require the States to balance between the jurisprudence of the abovementioned institutions. The Courts introduce different standards that applicable to the cases where Article 3 might be invoked. The attempt to balance the inconsistencies in the practices of both the CJEU and ECtHR was presented in the Dublin IV Proposal and was aimed to combat the situation when transfers result in torture and inhuman or degrading treatment by obliging all Member States to get all relevant information about the asylum procedure in the safe third country before deciding to expel the person.

Keywords: *Dublin system, human rights, prohibition of torture, expulsion, extradition, Dublin IV Proposal*

1. Introduction

The prohibition of torture and inhuman or degrading treatment defined in Article 3 of the European Convention on Human Rights (hereinafter :ECHR) is one of the most fundamental non-derogable human rights that must be upheld even “in time of war or other public emergency threatening the life of a nation.”¹

The right is also expressed such international law instruments as Universal Declaration of Human Rights, International Covenant on Civil and Political Rights, Geneva Conventions of 1949 and their Additional Protocols of 1977, Convention against Torture and Other Cruel, Inhuman

¹ Article 15(1), Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5, <https://www.refworld.org/docid/3ae6b3b04.html> (6 March 2019).

or Degrading Treatment or Punishment of 1984, the 1998 Rome Statute of the International Criminal Court. United Nations Convention against Torture, for instance, defines torture as:

“An act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent of or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.”²

When considering refugees and asylum seekers as subjects for invoking the violation of Article 3 of the ECHR, it should be mentioned that there is neither right to asylum under the ECHR, nor does it include a prohibition of refoulement. The only restrictions to expulsions can be found in Article 3(1) and Article 4 of the Protocol No. 4 to the ECHR, which prohibit the expulsion of a state’s own nationals and the collective expulsion of aliens, respectively. Nevertheless, the European Court of Human Rights (hereinafter the ECtHR) has derived the prohibition of refoulement from the absolute nature of the prohibition of torture, thus increasing its importance and providing certain guidelines to solving the cases where Article 3 has been invoked.

The case *Soering v. United Kingdom* was one of the first where the Court found that extradition would amount to a violation of Article 3 and held that the Conventional territorial limit does not entail the impossibility of imposing the responsibility at all, but that the extraditing state must ensure the conditions in the destination country to be fully compatible with the Convention standards. The Court held that “the establishment of such responsibility inevitably involves an assessment of conditions in the requesting country against the standards of Article 3 ... of the Convention. Any liability under the Convention is or may be incurred, it is liability incurred by the extraditing Contracting State by reason of its having taken action which has as a direct consequence the exposure of an individual to proscribed ill-treatment.”³

In some cases extradition could amount to a violation of Article 3 “were a Contracting State knowingly to surrender a fugitive to another State where there were substantial grounds for believing that he would be in danger of being subjected to torture.”⁴

In the case *Hirsi Jamaa and Others v. Italy* where it was found that the applicants did not have access to an effective remedy, the Court extended this principle to apply also to expulsion cases and one more time underlined that the specific standard of proof required in non-refoulement is “substantial grounds that have been shown for believing that the person in question, if expelled,

² United Nations. 10 December 1984. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 1.

³ *Soering v. the United Kingdom*, 07 July 1989, para. 91.

⁴ *Soering v. the United Kingdom*, 07 July 1989, paras. 87–88.

would face a real risk of being subjected to treatment contrary to Article 3 in the receiving country”.⁵

Therefore, it can be seen that the interpretation of the ECtHR regarding the absolute nature of Article 3 contains not clearly defined concepts like “substantial grounds” and “knowingly to surrender” that on practice can grant a discretion to the Contracting States to decide what means to use in their domestic legal systems for the performance of their obligations. Nevertheless, such a discretion is not allowed by Article 3 itself and often can lead to derogation from this rule that is definitely not allowed.

2. Essential elements of Article 3 ECHR within the context of the non-refoulement principle

Not all kinds of mistreatment, even if illegal, give rise to an issue under Article 3. What distinguishes torture from other forms of ill-treatment, which include other cruel, inhuman or degrading treatment and outrages upon personal dignity, is the purposive aspect. This is reflected in the Court’s case-law, for instance in the case *Saadi v. Italy* the Court stated that the suffering or humiliation must go beyond of what is inevitable considering the form of the legitimate treatment or punishment in question for it to constitute ill-treatment prohibited by Article 3.⁶ The definition of ill-treatment is of a relative nature and depends on the personal characteristics together with the manner and method of execution of punishment.⁷

Moreover, in the case *Ireland v. the United Kingdom* the ECtHR held that the ill-treatment “must attain a minimum level of severity” in order to fall within the scope of Article 3.⁸ The evaluation of this minimum also depends on the facts of the case where the court looks at the duration of the ill-treatment, its physical or mental effects on the victim as well as the sex, age and health of the victim in some cases.⁹

In addition to the minimum level of severity, the applicant must prove that there is a “real risk” that he will be subjected to torture or inhuman or degrading treatment in the country to which he or she is going to be extradited. This concept is very vague and the Court has never provided a proper definition of the “real risk” standard, and there are not so much clarification offered for its application. The only certain limitation was stated by the Court in *Saadi v. Italy* case where the requirement to present substantial grounds in order to show that there is a real risk that the person concerned will be subjected in the destination country to treatment prohibited by Article 3.¹⁰

⁵ ECtHR, *Hirsi Jamaa and Others v. Italy*, No. 27765/09, Judgment [GC] of 23 February 2012, para. 114.

⁶ *Saadi v. Italy*, 28 February 2008, para. 135

⁷ *Tyrer v. The United Kingdom*, 25 April 1978, para. 30

⁸ *Ireland v. The United Kingdom*, 18 January 1978, para. 162.

⁹ *Ibid.* para. 162.

¹⁰ *Saadi v. Italy*, 28 February 2008, para. 140.

The Court mentions also other formulations, such as a “high likelihood” or “beyond a reasonable doubt” requirement in order to invoke the breach of Article 3.¹¹ This is a very high standard and the omission to define it was intentionally done by the Court in order to give the discretion to the states in assessing all the relevant circumstances. Such approaches can be, however, argued, since they undermine the protection under Article 3, making it too difficult for the applicant being subjected to ill-treatment to favor from it.¹²

Potential perpetrators can be a State, non-State actors, military agents or private individuals. Sometimes it is even proposed to exclude the status of perpetrator from the definition of torture. Indeed, in *H.L.R. v. France* the ECtHR stated that due to the absolute character of the norm, it is also applicable where the danger emanates from persons or groups of persons who are not public officials. However, it must be shown that the risk is real and that the authorities of the receiving State are not able to provide appropriate protection.¹³

Therefore, in order to invoke the violation of Article 3 of the ECHR, the risk of ill-treatment must be real, intentional, with a particular level of severity and have a particular humiliating or other negative influence on person’s dignity.

As far as torture and other forms of ill-treatment can be both mental and physical, except humiliation and mental suffering, the removal of an alien from a Contracting State can invoke Article 3 on the ground of health. For instance, in *N. v. the United Kingdom*, the HIV positive applicant alleged the breach of Article 3 owing to “a lack of freely available antiretroviral and other necessary medical treatment, social support or nursing care in Uganda”.¹⁴

However, in *Ahorugeze v. Sweden* the Court taking into account the high standard of Article 3, considered that the applicant’s heart problems could not be considered so serious as to raise an issue under that article and that there were no compelling humanitarian grounds against his extradition to Rwanda due to his medical condition.¹⁵

Nevertheless, the Court specified its position in the case *D. v. the United Kingdom*, mentioning that the circumstances of alleging the violation of Article 3 are very exceptional and “the decision to remove an alien who appeared to be close to death to the country where he could not obtain any nursing or medical care and had no family to care for him or provide him with even a basic level of food, shelter or social support would raise an issue under Article 3”.¹⁶

¹¹ *Azimov v. Russia*, 18 April 2013, para. 128; *Shamayev and Others v. Georgia and Russia*, 12 April 2005, paras. 338, 353; *Garabayev v. Russia*, 7 June 2007, para. 76.

¹² *E.G. v. the United Kingdom*, 31 May 2011, Joint Dissenting Opinion of Judges Garlicki and Kalaydjieva, joint dissenting opinion of judges Garlicki and Kalaydjieva.

¹³ ECtHR, *H.L.R. v. France*, No. 24573/94, Judgment [GC] of 29 April 1997, para.40

¹⁴ ECtHR, *N. v. the United Kingdom*, No. 26565/05, Judgment [GC] of 27 May 2008, para.20.

¹⁵ ECtHR, *Ahorugeze v. Sweden*, No. 37075/09, Judgment of 27 October 2011, (para.89).

¹⁶ ECtHR, *D. v. the United Kingdom*, No. 30240/96, Judgment of 2 May 1997, para. 42.

The burden of proof lies on the applicant who needs to present that he or she would face a real risk of treatment contrary to Article 3 in case of expulsion. The respondent state can present doubts about that to the Court.

However, in the case *J.K. v. Sweden*, the Court partially redistributed the burden of proof and considered that the applicant should bear the burden of proof regarding personal circumstances and the states - regarding the general situation in the country concerned, the respondent government should bear the burden of proof instead of the applicant¹⁷. Failure to do so can lead to the violation of Article 3.¹⁸ Moreover, the ability of the applicant to show that he was subjected to ill-treatment in the past (even when there are no “substantial grounds” to believe that the future risk exists) will serve a strong argument to the Court and transfer the burden of proof is transferred to the respondent government.¹⁹

When the burden of proof is met, another problem, however, emerges that is connected with the balancing rule between the risk of ill-treatment and national security.

In theory, the prohibition of torture is of an absolute nature that precludes all balancing, therefore even a small deviation is precluded in any circumstances.²⁰ Nevertheless, countries protect themselves and adopt rules regarding the entry, residence and expulsion of aliens within their jurisdiction, especially when it comes to convicted criminals or suspected terrorists that threaten national security²¹. They justify the extradition that resulted in torture by the reasons of fair balance between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights;²² national security concerns in case where the individual was suspected of terrorism;²³ economic interests of the community as a whole.²⁴

Such deviation is extremely problematic, since it creates a double standard that can allow derogation from a declared prohibition under Article 3.

There is also the question of whether the standard of proof allows for balancing. In *Saadi v. Italy*, the United Kingdom government argued that the risk of ill-treatment should be balanced with the interests of the community. The Court, however, rejected such a possibility and stated

¹⁷ *J.K. and Others v. Sweden*, 23 August 2016, paras. 96-98.

¹⁸ *S.K. v. Russia*, 14 February 2017, para. 62-63.

¹⁹ *J.K. and Others v. Sweden*, 23 August 2016, paras. 99-102.

²⁰ *Ireland v. the United Kingdom*, 18 January 1978, para. 163.

²¹ L. Enni, *Applicability of Article 3 of the European Convention on Human Rights at the Borders of Europe*, *Helsinki Law Review*, Vol. 12. No. 1. 2018, pp. 54-77, at p. 70.

²² *Soering v. the United Kingdom*, 07 July 1989, para. 89.

²³ *Chahal v. the United Kingdom*, 15 November 1996, para. 76. The Court rejected the government’s position and stated that the activities of the individual in question cannot be given any significance, however undesirable or dangerous they are and there is absolutely no room for balancing the risk of ill-treatment against the reasons for the expulsion, paras. 80-81.

²⁴ *N. v. the United Kingdom*, 27 May 2008, the state claimed not to be obliged to facilitate the medical help by offering unlimited health care to aliens within their jurisdiction as it would place too great a burden on the Contracting States, para. 44.

that violation of Article 3 could arise in case where there are “substantial grounds for believing there is a real risk of treatment prohibited by Article 3.”²⁵

The most recent case regarding such deviation of the State from the prohibition to expel people to the situation of torture was seen in the case *A.N. v. Switzerland* regarding the Dublin transfer of victim of torture to Italy. The applicant, a political prisoner, arrived to Switzerland in a distressed mental health state, which prompted his immediate hospitalization.²⁶ He applied for asylum, however the Swiss authorities decided to deport him back to Italy under the Dublin Regulation provisions.

The Committee stated the Swiss government failed to meet the standard of “substantial grounds for believing there is a real risk of treatment prohibited by Article 3 upon return to Italy”. The burden of proof was laid on the complainant who had to present that the danger of being exposed to torture is foreseeable, personal, present and real.²⁷ The Committee also considers that the State’s party failed to address the complainant’s personal experience and undertake a complete assessment of the victim’s personal risk of torture, considering his specific vulnerability and insufficient medical rehabilitation and living conditions in Italy, and found that this would amount to violation of Articles 3, 14 and 16 of the Convention against Torture.²⁸

3. Problematic aspects of Dublin III Regulation and Dublin IV Proposal in the context of prohibition of expulsion to the situation of torture

The State that expels an asylum seeker to the responsible State bears the responsibility to analyze all the information about the asylum procedure, reception conditions in the latter State in order to check whether they are in conformity with both the Convention and the Dublin system. Therefore, States must follow the approaches elaborated by both the European Court of Human Rights and the European Union’s Court of Justice (hereinafter CJEU) regarding the main elements of the non-refoulement principle, ensuring that main concepts are properly applied while dealing with the expulsion cases.

Under the Dublin III Regulation provisions, the principle of non-refoulement is expressed through the concept of safe third country and rules relating to protection of vulnerable asylum seekers, unaccompanied minors and persons with serious health problems in particular.

The concept of safe third country is defined in Article 3 of the Dublin III Regulation and prohibits to remove the person who is in seek of asylum to an intermediary country in which he or

²⁵ *Saadi v. Italy*, 28 February 2008, para. 140.

²⁶ *A.N. v. Switzerland*, communication no. 742/2016, UN Committee Against Torture (CAT), 3 August 2018, available at: <https://www.refworld.org/cases,CAT,5b964c664.html> (7 March 2019).

²⁷ *Ibid.* para. 8.4.

²⁸ *Ibid.* para. 8.6.

she might be subjected to torture or other risk of ill-treatment.²⁹ Therefore, the principle of non-refoulement also prohibits “indirect expulsions” and applies regardless of whether the intermediary country is party to the ECHR or participates in the Dublin system. The concept of safe third country under the Dublin III Regulation is, however, does not provide any further definition or explanation of the access to the procedure for examining an application for international protection. Paragraph 2 of Article 3 only mentions that the transfer of an applicant to the MS primarily designated as responsible will not be carried out if “there are substantial grounds for believing that there are *systemic flaws* in the asylum procedure and in the reception conditions for applicants in that Member State, resulting in a risk of inhuman or degrading treatment within the meaning of Article 4 of the Charter of Fundamental Rights of the European Union.”³⁰

Systemic flaws are also mentioned in the practice of the Luxembourg Court that tries to preserve the functioning of the Dublin system. In the case *N.S. v. Secretary of State for the Home Department and M.E. and others v. Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform* it was established that the threshold for inhuman or degrading treatment, within the meaning of Article 4 of the Charter is reached when the State suffers from “systemic flaws in the asylum procedure and reception conditions for asylum, resulting in, of asylum seekers transferred to the territory of that Member State.”³¹

Therefore, the sending states must ensure that the destination state is really safe, has effective system of asylum procedures and access to them, can provide all the necessary treatment for the person and good living and detention conditions until the asylum is obtained,³² otherwise the sending state would be held liable in violation of Article 3 of the ECHR.

Moreover, as the Court mentioned in the case *T.I. v. the United Kingdom*, indirect refoulement of the asylum seeker from the UK to Germany and then back to Sri Lanka³³ would also be contrary to Article 3 and the UK would be responsible to ensure that the applicant would be safe in that country as a result of its decision to expel. The same consequences would be bared by the states that expel asylum seekers to countries outside the Dublin system.³⁴ In *Hirsi Jamaa and others v. Italy*, for instance, the Court stated that even though Libya was not a party to the 1951 Refugee Convention, the Italian authorities knew or should have known that there were insufficient guarantees protecting asylum seekers from the risk of being arbitrarily returned to

²⁹ Article 3, 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 2013 L 180/31.

³⁰ *Ibid.* Article 3 para. 2.

³¹ *Joined Cases C-411/10 N. S. v. Secretary of State for the Home Department and C-493/10 M. E. and others v. Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform*, C-411/10 and C-493/10, European Union: Court of Justice of the European Union [EU:C:2011:865], para. 86.

³² ECtHR, *M.S.S. v. Belgium and Greece*, No. 30696/09, Judgment [GC] of 21 January 2011.

³³ ECtHR, *T.I. v. the United Kingdom*, No. 43844/98, Decision of 7 March 2000.

³⁴ ECtHR, *Hirsi Jamaa and Others v. Italy*, No. 27765/09, Judgment [GC] of 23 February 2012, para.156; see also ECtHR, *Abdolkhani and Karimnia v. Turkey*, No. 30471/08, Judgment of 22 September 2009, concerning the threatened expulsion from Turkey to Iraq of two Iranian nationals who had been recognized as refugees by UNHCR.

their countries of origin because of the lack of any effective asylum procedure in Libya and the impossibility of making the Libyan authorities recognize the refugee status granted by UNHCR.

In May 2016, the European Commission presented a draft proposal of Dublin IV Regulation to make the Common European Asylum System more transparent and effective.³⁵

The main elements of the Dublin IV proposal are: a new automated system to monitor the number of asylum applications received and the number of persons effectively resettled by each Member State, a reference key to determine when a Member State is under disproportionate asylum pressure and a fairness mechanism to address and alleviate that pressure³⁶. These tools are aimed to bring the fairer processing of the applications of international protection and responsibility of EU Member States.

In the field of prohibition of torture, the Proposal has not so many changes. The change was introduced regarding the para. 3 of Article 3 of Dublin III Regulation that empowered the states to send the applicant to safe third country, subject to the rules and safeguards laid down in Directive 2013/32/EU (Directive on asylum procedures).³⁷ The amended paragraph provides instead that before deciding to send the person to safe third country, the first MS shall examine the application under Article 33 of Directive 2013/32/EU. The same procedure is required for applicants that can be considered to threaten the national security or public order of the MS.³⁸

These modifications are the result of CJEU and ECtHR judgments that were connected with the violations of Article 3 of the ECHR. This policy was, however, revealed in two previous generations of Dublin Regulation that were concerned with the expulsions of asylum seekers under the Dublin system, but the problems still were faced both by Dublin II³⁹ and Dublin III Regulations.⁴⁰

³⁵ European Commission. Country responsible for asylum application (Dublin). Available at: https://ec.europa.eu/home-affairs/what-we-do/policies/asylum/examination-of-applicants_en (7 March 2019).

³⁶ Ibid. p. 4.

³⁷ 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 2013 L 180/60.

³⁸ Article 3, Proposal for a Regulation of the European Parliament and of the Council 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) COM/2016/0270 final - 2016/0133 (COD) available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016PC0270&from=EN> (7 March 2019).

³⁹ Joined Cases C-411/10 and C-493/10 M. E., para. 105. The Court stated that the obligation of a MS to respect fundamental rights while transferring according to Dublin Regulation precludes the application of a conclusive presumption that the MS, which Dublin Regulation indicates as responsible actually observes fundamental rights of the EU. Cited by J. Lenart, *'Fortress Europe': Compliance of the Dublin II Regulation with the European Convention for the Protection of Human Rights and Fundamental Freedoms*, Utrecht Journal of International and European Law, Vol. 28. No. 75. 2012, p. 17.

⁴⁰ C-695/15 PPU Shiraz Baig Mirza v Bevándorlási és Állampolgársági Hivatal [EU:C:2016:188]. The Court stated that the MS had the right to send the applicant to the safe third country only after that Member State has accepted that it is responsible (para. 53).

In *N.S. v. Secretary of State for the Home Department*, dealt by the CJEU under the Dublin II Regulation, the Court answered the question by UK and Irish courts whether the discretionary power that allows to derogate from the responsibility rules defined in Article 3(2) of the Dublin Regulation, under certain circumstances could turn into an obligation. The Court answered in the affirmative way, since “the mere ratification of conventions by a Member State cannot result in the application of a conclusive presumption that the applicant’s fundamental rights will be observed, even if ‘the Common European Asylum System is based on the full and inclusive application of the Geneva Convention and guarantees that nobody will be sent back to a place where they again risk being persecuted’”.⁴¹ Therefore, the Court proclaimed that the presumption in the Dublin II Regulation that asylum seekers will be treated in a way, which complies with fundamental rights is rebuttable and obliged the sending Member States to check all the necessary conditions before deciding to expel the person to the country of origin.

A similar conclusion was made under the Dublin III Regulation by the Court when it stated that the prohibition of inhuman or degrading treatment of Article 4 Charter corresponds to the prohibition in Article 3 ECHR, and, in accordance with Article 52(3) Charter, its meaning and scope must be the same as conferred by the ECHR.⁴² By doing this the Court imposed a positive obligation to the Member States “to verify whether the state of health of the person at issue may be protected appropriately and sufficiently by taking the precautions envisaged by the Dublin III Regulation and, in the affirmative, must implement those precautions”.⁴³ even when there are no serious grounds for believing that there are systemic failures in the asylum procedure and the conditions for the reception of applicants for asylum, a transfer in itself can entail a real risk of inhuman or degrading treatment within the meaning of article 4 of the Charter. Therefore, even though there were no systemic flaws in the Croatia, it was impossible for the Slovenia to transfer a couple and their newborn child due to the state of psychological health of the mother.

The Proposal for the fourth generation of the Dublin Regulation is aimed to combat the situation when transfers between MSs of applicants whose applications are either inadmissible or they represent a security risk by reducing the discretion of the States, decreasing their number and reducing the costs of multiple procedures and transfers.

However, despite all these useful novelties provided by the Proposal, the concept of safe third country still does not provide any further definition and relevant criteria to be used by states while deciding each particular case. The same standard of prohibition to expel when “there are substantial grounds for believing that there are systemic flaws in the asylum procedure and in the reception conditions for applicants in that Member State, resulting in a risk of inhuman or degrading treatment within the meaning of Article 4 of the Charter of Fundamental Rights of the European Union” is left by the legislator.⁴⁴ The conditions of systemic flaws are defined in

⁴¹ Joined Cases C-411/10 and C-493/10 M. E., para. 75.

⁴² Case C-578/16 PPU C. K. and others v. Slovenia [EU:C:2017:127], para. 67.

⁴³ Ibid. para. 77.

⁴⁴ See Article 3.2, Regulation (EU) No 604/2013.

the Dublin III and Dublin IV, however, Dublin rules are still interpreted in a manner that is not fully compatible with well-established human rights standards. For instance, there is still nothing said about the obligation of the sending state to receive all the relevant information about the asylum procedure rules or of the relevant practice of competent authorities in the safe third country, which may lead to ignoring the risk of chain refoulement and result into violation of the right describe in Article 3 ECHR.

Application of the Dublin system to vulnerable asylum seekers is provided with additional procedural restrictions where guarantees should correspond to their special needs and depend on the individual circumstances of the asylum seeker in a situation of special vulnerability.⁴⁵ This is particularly evident in the case *Tarakhel v. Switzerland* where the Court could not find reliable information whether an expulsion of a family with six minors to Italy would cause the risk of torture or inhuman or degrading treatment, but completely prohibited such return, based upon their extremely vulnerable position and individual risk.⁴⁶

The Dublin IV Proposal also introduces some amendments to the protection of the rights of unaccompanied minors through presenting a better definition of the best interest of the child and by setting out a mechanism for preserving those interests in all circumstances implying the transfer of the minor.⁴⁷

Under the revised Recital 20, the responsible MS would be the state where the minor lodged the first application, unless it is demonstrated that this would not be in his best interest. The rule would accelerate the determination of the responsible MS and ensure taking all the necessary measures under the asylum procedures and reception conditions Directive immediately.⁴⁸ The reason why the Proposal focuses only on the specific category of unaccompanied minors, is that the minor asylum seekers accompanied by one or both parents would not benefit of any special guarantee or procedure in the newly established Dublin system. In this case, systemic flaws test provided in Article 3 of the Dublin IV Proposal remains the only safeguard, leaving ‘individual circumstances’ test outside the Dublin system despite its recognition in the jurisprudence of the ECtHR.⁴⁹

⁴⁵ I. Krstić – B. Čučković, *Praksa Evropskog suda za ljudska prava u odnosu na primenu Dablin regulative*, *Pravni život*, No. 12. 2016, p. 114. Cited by: M. Lukić Radović – B. Čučković: Dublin IV Regulation, The Solidarity Principle and Protection of Human Rights – Step(S) Forward Or Backward? in: T. Petrašević – D. Duić (eds.), *EU Law in Context – Adjustment to Membership and Challenges of the Enlargement, EU and Comparative Law Issues and Challenges Series*, Vol. 2. No. 2. 2018, pp. 10-30, at p. 20.

⁴⁶ *Tarakhel v Switzerland* (2015) 60 EHRR 28, par. 121; see also G. Vicini, *The Dublin Regulation Between Strasbourg and Luxembourg: Re-Shaping Non-Refoulement in the Name of Mutual Trust?* *European Journal of Legal Studies*, Vol. 8. No. 2. 2015, p. 65.

⁴⁷ Proposal for a Regulation of the European Parliament and of the Council 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) COM/2016/0270 final - 2016/0133 (COD), p.15. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016PC0270&from=EN> (7 March 2019)

⁴⁸ *Ibid.* p. 17

⁴⁹ Lukić Radović – Čučković, *ibid.* p. 21.

Despite all the progressive novelties presented in the Dublin IV Proposal regarding the prohibition of torture, there is still one issue that might be argued by scholars in future, since in case the application is declared as admissible; there will be two options for the states to follow: either to continue the examination of criteria for designation of the responsible MS, which would allow the application of the take charge or take back procedures, or to become the MS responsible for examining the application.⁵⁰ Therefore, “Dublin transfers” might continue with regard, however, to ‘systemic flaws’ test.

4. Conclusion

Prohibition of torture and inhuman or degrading treatment defined in Article 3 of the European Convention on Human Rights is one of the most fundamental non-derogable human rights. Regardless of the dubious interpretations of the concepts that Article 3 contains, there should be no doubts that the right to prohibition of torture inhumane and degrading treatment is of an absolute nature and does not allow any derogations for the Member States.

There is also a presumption followed by CJEU and ECtHR case law that shifts the ‘sovereignty clause’ under the Dublin Regulation from the category of duty to the obligation imposed on the MS to take charge of the asylum seeker in cases of systemic flaws in the asylum procedure and reception conditions in the receiving member states. Therefore, this cannot be considered as discretion granted to the States if its application would result into the risk of facing torture or other forms of ill-treatment.

The ECtHR has elaborated on the certain elements of the principle of non-refoulement within the context of Article 3 of the ECHR. Therefore, the applicant must prove the existence of the real risk that might be faced in case of expulsion and these statements must be supported by the substantial grounds in order to show that the person concerned will be subjected to torture or other forms of ill-treatment prohibited by Article 3 in the receiving country.

In addition to the “real risk” standard, the Court has revised the concept of burden of proof in the most recent case law by shifting from the burden of proof that entirely lies on the applicant to sharing it between the applicant and the state, making the respondent government be responsible for providing the general situation about the asylum procedures in the country concerned.

The CJEU, in its turn, has clarified the concept of safe third country by putting additional criteria of “systemic flaws” in the asylum procedure and in the reception conditions that also show the real risk of facing inhumane or degrading treatment within the meaning of Article 4 of the Charter of Fundamental Rights of the European Union. Therefore, the sending states must ensure that the destination state is really safe, has effective system of asylum procedures and ac-

⁵⁰ Ibid. p. 23.

cess to them, can provide all the necessary treatment for the person and good living and detention conditions until the asylum is obtained , otherwise the sending state would be held liable in violation of Article 3 of the ECHR.

The inconsistencies that, however, might be found in the practices of both the Strasbourg and Luxembourg Courts, should not make Member States to decide which approach to follow, since the States should present certain level of balancing between these approaches and the protection under both sets of Human Rights standards must be ensured.

This was tried to be presented in the Dublin IV Proposal that obliged the Member States to examine the application under Article 33 of Directive 2013/32/EU before deciding to send the person to safe third country. Such an approach was present in previous generations of Dublin Regulation, however, the problems still remained.

The Proposal is aimed to combine the approaches provided by the CJEU and the ECtHR and to combat the situation when transfers between Member States by introducing the “systemic flaws” test that obliges all Member States to get all relevant information about the asylum procedure rules and practice of competent authorities in the safe third country before deciding to expel the person.

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