

*STUDENT RESEARCH PAPERS  
ON JUSTICE AND HOME AFFAIRS  
IN THE EUROPEAN UNION*

**INSPIRED**

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

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



# STUDENT RESEARCH PAPERS ON JUSTICE AND HOME AFFAIRS IN THE EUROPEAN UNION

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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.

In this spirit, the INSPIRED project has organized two Intensive Programmes (one in Opatija, Croatia and one in Vilnius, Lithuania) for students of the partner universities. The research papers contained in this volume have been prepared by the students taking part in these Intensive Programmes – they have been reviewed and selected for publication by the participating lecturers of the project.

The editors hope that these research papers will also encourage other students to look deeper into the complex legal issues surrounding migration and asylum in the European Union.

*The editors*

# Current Trends in the Application of the principle of non-refoulement in the Practice of the ECtHR

RIČARDAS DOBROVOLSKIS, GABRIELĖ VIDUOLYTĖ

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*Non-refoulement is one of the cornerstones of asylum law, its proper application is one of the most crucial prerequisites to achieving the goals of international law on asylum. This paper looks at the jurisprudence of the European Court of Human Rights as regards the non-refoulement principle and aims to highlight some of its characteristic elements.*

*Keywords: refugee status; principle of non-refoulement; principle of non-refoulement on the high seas; fundamental human rights.*

## 1. Introduction

The free movement of persons is one of the greatest achievements of the project of European integration. The implementation of the Schengen Agreement in 1995 starts a new part of the history of the EU.<sup>1</sup> With this benefit came lots of obligations concerning asylum and immigration. Basically, such situations took huge proportions when the conflicts in the Middle East began and left Europe with thousands of refugees.<sup>2</sup> The term 'refugee' is often interpreted more broadly than its legal definition, including all people who flee their homes and seek asylum for damage. In this context, one can name those who can force someone to flee to security, including war or civil conflict, domestic violence, poverty and natural or man-made disasters, and that is not an exhaustive list. If a state does not satisfy a person's request for refugee status and such a decision is not based on general principles and legislation governing such procedures, the expulsion of the alien back from the country from which he or she arrived may adversely affect that person's life on the grounds that he or she is at risk in the country of origin a real life threat that violates Article 3 of the ECHR, which prohibits "torture, inhuman or degrading treatment or punishment."<sup>3</sup> The Refugee Convention also regulates the principle of non-refoulement in Article 33, but recognizes people as refugees only if they move from their country to persecution for their race, religion, nationality, membership in a particular

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<sup>1</sup> The Schengen area and cooperation.

<https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=LEGISSUM:l33020&from=EN>

<sup>2</sup> K. C. Do Monte Vilar: The closing borders and refugees violations of human rights. IED Research Project: "Migration, borders control and solidarity: Schengen at stake?" [https://www.iedonline.eu/download/2016/schengen/DO-MONTE-VILAR.pdf?fbclid=IwAR3\\_byRfFHF5VNEMR382SBXzoAzQrj\\_ukW8dUzLcJQ-szzkFBD AeoQLZ7xg](https://www.iedonline.eu/download/2016/schengen/DO-MONTE-VILAR.pdf?fbclid=IwAR3_byRfFHF5VNEMR382SBXzoAzQrj_ukW8dUzLcJQ-szzkFBD AeoQLZ7xg)

<sup>3</sup> Convention for the Protection of Human Rights and Fundamental Freedoms. Rome, 4.XI.1950. Article 3 – Prohibition of torture. No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

social group or political opinion.<sup>4</sup> This article will focus on the above-mentioned international documents and their application in court practice and evaluation.

## 2. Practical aspects of the principle of non-refoulement

From the beginning of the application of the legislation to the case-law, it appears that the Refugee Convention contains clear exceptions to the prohibition of expulsion and non-return of recognized refugees and asylum seekers, although they apply only in exceptional circumstances. “This interpretation of Article 3 of the ECHR can serve as a useful “safety net” for refugees or asylum-seekers considered by UNHCR to be wrongly denied or deprived of international protection. It must also be noted that by adopting this position the Court consequently provides protection from expulsion or extradition in situations where the exclusion clauses of Article 1F of the 1951 Convention would apply to deny refugee status. The ECHR has no such limitations and the Contracting parties must then always secure the rights guaranteed under Article 3 “however heinous the crime allegedly committed”.<sup>18</sup> By extension, Article 3 ECHR is also potentially relevant in cases raising issues under Articles 1C or 1D of the 1951 Convention.”<sup>5</sup>

Also, like it was stated in the case *Bader and Kanbor v. Sweden* “an issue may arise under Articles 2 and 3 of the Convention if a Contracting State deports an alien who has suffered or risks suffering a flagrant denial of a fair trial in the receiving State, the outcome of which was or is likely to be the death penalty.<sup>6</sup> The Court noted that the Swedish Government had obtained no guarantee from the Syrian authorities that Mr. Bader’s case would be re-opened and that the public prosecutor would not request the death penalty at any retrial. In those circumstances, the Swedish authorities would be putting Mr. Bader at serious risk by sending him back to Syria. The Court considered that Mr. Bader had a justified and well-founded fear that the death sentence against him would be executed if he was forced to return to his home country. Moreover, since executions are carried out without any public scrutiny or accountability, the circumstances surrounding his execution would inevitably cause Mr. Bader considerable fear and anguish while he and the other applicants would all face intolerable uncertainty about when, where and how the execution would be carried out.<sup>7</sup> It should be up to the country in which the applicant is seeking for an asylum to check if the evidence are concrete or not. Basically the applicant has to show his concern that his life or health is in danger due to an unfair trial. In this case Sweden did not check all necessary circumstances and if the applicant were deported back to his country of origin a violation of article 3 of ECHR might occur. In this case, the main factor was the threat of the death penalty, which is a denial of basic human rights; it violates one of the fundamental principles of universally recognized human rights law that states must

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<sup>4</sup> 1951 Convention relating to the Status of Refugees.

<sup>5</sup> European Court of Human Rights. *Chahal v. United Kingdom*, Judgement of 15 November 1996, Appl. No. 22414/93, Reports of Judgments and Decisions 1996-V.

<sup>6</sup> European Court of Human Rights. *Bader and Kanbor v. Sweden*, No 13284/04, Judgment of 8 November 2005.

<sup>7</sup> *Ibid.*

recognize the right to life. The UN General Assembly<sup>8</sup>, a representative institution of recognized states, called for an end to the death penalty, and human rights organizations agree that its imposition violates fundamental human rights standards. Therefore, it could be argued that the countries to which foreigners are subjected to the death penalty in their country of origin should be particularly careful and as detailed as possible with the information provided by the applicant for refugee status, so as not only to violate fundamental human rights, but also to respect the principle of non-refoulement the alien is in real danger in his country of origin.

The principle of non-refoulement fully applies on the high seas, where EU Member States' authorities remain liable for their conduct. Therefore, they have an obligation to assess the situation in the state of envisaged disembarkation and refrain from disembarking people if the third country lacks an asylum system or if the returned people would be at risk of ill-treatment or refoulement. Otherwise, EU Member States become accountable for refoulement. Regulation (EU) reminds EU Member States of their non-refoulement obligation.<sup>9</sup> This obligation is triggered whenever they "are aware or ought to be aware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that third country amount to substantial grounds for believing that the asylum seeker would face a serious risk of being subjected to inhuman or degrading treatment or where they are aware or ought to be aware that that third country engages in practices in contravention of the principle of non-refoulement".<sup>10</sup>

States not uncommonly seek to intercept unauthorised arrivals on the high seas. Ordinarily some opportunity is given for people to make asylum claims, and some examination is made of the claims. The issue was raised in stark terms in the US in 1993 when the US Supreme Court decided 8 to 1 that Article 33(1) does not have extraterritorial effect.<sup>11</sup> The Court relied on textual arguments including that "return" in Article 33(1) referred to the defensive act of resistance or expulsion at the border rather than to transporting a person to a particular destination. The Court concluded: The drafters of the Convention and the parties to the Protocol ... may not have contemplated that any nation would gather fleeing refugees and return them to the one country they had desperately sought to escape; such actions may even violate the spirit of Article 33; but a treaty cannot impose un contemplated extraterritorial obligations on those who ratify it through no more than its general humanitarian intent.<sup>12</sup> Because the text of Article 33 cannot reasonably be read to say anything at all about a nation's actions toward aliens outside its own territory, it does not prohibit such actions.

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<sup>8</sup> Resolution adopted by the General Assembly on 18 December 2014 [on the report of the Third Committee (A/69/488/Add.2 and Corr.1)] 69/186. Moratorium on the use of the death penalty.

<sup>9</sup> Regulation (EU) No 656/2014 establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union.

<sup>10</sup> Ibid.

<sup>11</sup> Chris Sale, Acting Commissioner, Immigration and Naturalization Service, et al v Haitian Centers Council, Inc, et al, 509 US 155, United States Supreme Court, 21 June 1993

<sup>12</sup> Ibid.

In the case *Hirsi Jamaa and Others v Italy*<sup>13</sup>, Somali and Eritrean migrants travelling from Libya who had been intercepted at sea by the Italian authorities and sent back to Libya. Returning them to Libya without examining their case exposed them to risk of ill-treatment and amount to collective expulsion. There had been two violations of Article 3 of the Convention because the Applicants had been exposed to the risk of ill-treatment in Libya and of repatriation<sup>14</sup> to Somalia or Eritrea. In its judgment, the Court took into account the fact that the situation in Libya was known and there were no difficulties in its examination at the time of the facts, the Italian authorities had to or should have known that they would violate the provisions of the Convention when adopting such decisions. In addition, the fact that the Applicants have been unable to apply for asylum explicitly does not justify dismissing Italy from its obligations under the Convention and bilateral agreements. The Court drew attention to the obligations of States arising from international refugee law, including the principle of 'non-refoulement'.

The principle of non-refoulement constitutes the cornerstone of international refugee protection. It is enshrined in Article 33 of the 1951 Convention, which is also binding on States Party to the 1967 Protocol.<sup>5</sup> Article 33(1) of the 1951 Convention provides: "No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his [or her] life or freedom would be threatened on account of his [or her] race, religion, nationality, membership of a particular social group or political opinion."<sup>15</sup> According to this case, it can be argued that the principle of non-refoulement for any State action taken outside the state should lead to the conclusion that an individual prohibition on the assessment of asylum applications and the related expulsion of the ban is not limited to land and state, but also to the open sea. Under the 1951 Refugee Convention, non-refoulement not only refers to returns or expulsions of people who are already within a host state's territory, but also encompasses rejection at the borders.<sup>16</sup>

The UN High Commissioner for Refugees (UNHCR) has indeed stressed that the principle of non-refoulement applies equally on a state's territory, at a state's borders, and on the high seas.<sup>17</sup> It is clear from the case-law that the principle of non-refoulement in the high seas is still being developed on the basis of the above cases. And for an alien who is detained on the high seas, his request to be granted refugee status will depend more on the state of regulation in this matter. However, states that apply for refugee status still need to assess that the applicant does not violate the general principles, along with the principle of non-refoulement, which is a real threat in his country of origin.

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<sup>13</sup> European Court of Human Rights. *Hirsi Jamaa and Others v Italy* (GC), Application No. 27765/09.

<sup>14</sup> The 1969 OAU Refugee Convention does establish explicitly that the "voluntary character of repatriation shall be respected in all cases" and that no refugee shall be repatriated against his or her will (Art. 5 of the OAU Convention).

<sup>15</sup> 1951 Convention relating to the Status of Refugees.

<sup>16</sup> Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol.

<sup>17</sup> Report of the United Nations High Commissioner for *Refugees*. General Assembly. Supplement No. 12 (A/53/12).

### **3. Applicability and inapplicability of article 3 of ECHR**

In the case *M.A and Others v. Lithuania*<sup>18</sup>, M.A. that has a Russian nationality and lived in Chechen Republic, was tortured by the Russian Security services. After refusing to become an informer, he and his family in April 2019 left their home in the Chechen Republic and travelled to Belarus with the intention of seeking asylum in Poland. M.A. made three attempts in crossing the border between countries and were denied on the basis that they do not have valid visas or residence permit although all three times they wrote the word “azul” that is often used by Chechen asylum seekers to mean “asylum” on the refusal decisions. Every time they received a denial in Lithuanian or English and when their legal stay expired in 10 July 2017 and they returned to Russia, the applicant was detained and reported to be beaten. In January 2018 the applicants managed to submit the asylum applications in Poland where they also stated that by failing to initiate asylum proceedings and returning them to Belarus, the Lithuanian authorities exposed them to a real risk of torture or inhuman treatment in Russia, in violation of Article 3.

The court stated that in the circumstances of this case, the central question to be answered is not whether the applicants faced a real risk of ill-treatment in Chechnya, but whether the Lithuanian authorities carried out an adequate assessment of the applicants’ claim that they would be at such a risk before returning them to Belarus on the three occasions. The Government stated that the applicant did not submit any asylum applications at the border, but during the first attempt to enter Lithuania the applicants had written the word “azul” meaning asylum, on all seven decision forms which they had been given to sign, also the court reiterated that neither Lithuanian nor international law required asylum applications to be lodged in a specific form and emphasized the importance of ensuring adequate interpretation for asylum-seekers at the border. Furthermore, the Court found that there was not any assessment at all whether it was safe to return the applicants (a family with five very young children) to Belarus. Therefore, the Court held that the failure to allow the applicants to submit asylum applications and their removal to Belarus on 16 April, 11 May and 22 May 2017, in the absence of any examination of their claim that they would face a real risk of return to Chechnya and ill-treatment there, amounted to a violation of Article 3 of the Convention.

The main problem in the Lithuanian case was that, basically the authorities did absolutely nothing to prevent the violations of M.A. and his family’s rights, nor they did try to see if the person met the required conditions. In the case *Saadi v. The United Kingdom* “The Court therefore sees no reason to modify the relevant standard of proof, as suggested by the third-party intervener, by requiring in cases like the present that it be proved that subjection to ill-treatment is “more likely than not”. On the contrary, it reaffirms that for a planned forcible expulsion to be in breach of the Convention it is necessary – and sufficient – for substantial grounds to have been shown for that there is a real risk that the person concerned will be

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<sup>18</sup> European Court of Human Rights. Case of *M.A. and Others v. Lithuania*. Application no. 59793/17

subjected in the receiving country to the treatment prohibited by Article 3)”<sup>19</sup> The Lithuanian authorities did nothing to investigate M.A. and his family’s case and did not examine if there were any risk for M.A. and his family to return to his home country. From the moment Lithuanian authorities denied M.A and his family’s request, they were condemned to return to Russia were there human rights (that are laid down in article 3 of ECHR) were violated.

In the case of X v. The Netherlands<sup>20</sup> on 6 July 2012 the applicant left his home in Salouin (Morocco), where he had been living with his parents, in the Netherlands. He went to the Netherlands to visit his family but overstayed his tourist visa, which was valid until 24 August 2012. During his stay in the Netherlands he lived with his brother and the latter’s family in Amsterdam. On 15 October 2014 the applicant was arrested on suspicion of having committed acts in preparation of terrorist offences and placed in police custody. When the applicant’s was placed in immigration detention, he maintained that he had sufficiently established that he would face a real risk of being subjected to treatment contrary to Article 3 of the Convention if he were expelled to Morocco, given that the Moroccan authorities must be considered to be aware of his conviction for terrorism related crimes in the Netherlands, his association with a dismantled Moroccan militant cell loyal to the Islamic State and his asylum application in the Netherlands. The ECtHR relied upon available country of origin information on Morocco, such as the findings of the UN Working Group on Arbitrary Detention and the observations of the UN Human Rights Committee, and affirmed that ill-treatment and torture by the police and the security forces still occur, particularly in the case of persons suspected of terrorism or of endangering State security.

Nevertheless, the Court does not find there to be a general and systematic practice of torture and ill-treatment, which is to be determined based on the specific situation of the person concerned. In the applicant’s case, while it must be assumed that the Moroccan authorities are aware of the nature of the applicant’s conviction in the Netherlands, nothing in the case materials indicate that the Moroccan authorities have ever taken any steps demonstrating an interest in the applicant, or that the Moroccan judicial authorities would fail to respect the principle of *ne bis in idem* by prosecuting the applicant in Morocco as a terrorist because of his conviction in the Netherlands.<sup>21</sup> Therefore, the Court found that the assessment by the domestic authorities was adequate and sufficiently supported by reliable and objective material and that the applicant’s removal to Morocco would not result in a violation of Article 3 ECHR. As it is written in Article 33 of 1951 Refugee convention “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.”<sup>22</sup> If Morocco would have shown any interest in the

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<sup>19</sup> European Court of Human Rights. Case of Saddi v. Italy. (Application no. 37201/06)

<sup>20</sup> European Court of Human Rights. Case of X v. The Netherlands. Application no. 14319/17.

<sup>21</sup> Ibid.

<sup>22</sup> 1951 Convention relating to the Status of Refugees.

applicants case, and there would be statements that his life maybe in danger, the we could assume the violation of above mentioned article and the violation of article 3 of ECHR.

#### **4. Conclusion**

The State and the applicant for refugee status must cooperate throughout the asylum process in order to assess every circumstance that may give rise to refugee status due to the real danger in the country of origin and to ensure that the principle of non-refoulement is not violated.

In order to avoid violation of the fundamental human rights and the principle of non-refoulement of aliens, States must also share responsibility and co-operate in exchanging or sharing supplementary information with regard to an applicant for refugee status until his / her application is examined and the decision taken.

The principle of non-refoulement on the high seas, based on case-law which is not comparatively large, suggests that each state must rely on its own rules on granting refugee status, if that country has such a possibility, but above all that protection must be given to fundamental human rights, that is to protect the third country national or stateless person from a real threat.

The state must take all measures to ensure that a person applying for refugee status has every opportunity to present the circumstances of the request and information supporting them, who also needs personal cooperation. In addition, the State must use all means to verify the information and to avoid violation of the principle of non-refoulement or other rules of international custom.

# Challenges of the European Blue Card System

**MIRABELLA KITTI NEZDEI, KRISZTINA HOSSZÚ**

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*The migration is a common topic in the public nowadays. There are illegal and legal migrants too, in this paper we would like to show our views in connection with one type of the legal migration: the European Blue Card System. The so-called Blue Card Directive is a combination of residence and work permits for people with high qualifications and can be classified as third-country nationals. We would like to show the Directive itself, the problems related to that and the questions in connection with the reform, which is undeniably timely – as you will see in the paper.*

*Keywords: European Union law, blue card system, blue card directive, legal migration, third country nationals, labour market, highly qualified workers, intra-EU movement*

## **1. Introduction**

Nowadays, migration is a common topic in the public. When people hear the word "migrant", their first thought is that, a migrant is a person who is trying to cross borders without papers, who is considered to be an illegal immigrant according to the law. It is important to note, however, that not only this type of migration – the illegal – exists, we can also talk about legal migration. The migration is legal, if it happens through recognizable, authorized channels, so if all legal conditions are fulfilled.<sup>1</sup> There are a number of such channels and options, which the European Union dealing with. Migration has a significant effect on society, and it has brought many troubles with itself, for example terrorist attacks. The European Union also has ambitions in this regard, because the EU also wants to strengthen their external borders as well. However, it is not the only one problem that it is currently dealing with, because there is a growing lack of labour force in the European Union every year, especially the lack of highly qualified workers. This is why making a flexible and well-functioning system is very important. The European Union's aspiration for this struggle is called the Blue Card System, which is made for highly qualified third-country nationals. We would like to present the problems and shortcomings of the system in this study and also, we want to present about the proposed revisions to the system.

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<sup>1</sup> [https://ec.europa.eu/home-affairs/content/legal-migration\\_en](https://ec.europa.eu/home-affairs/content/legal-migration_en) (20 March 2019).

## 2. Background

The Treaty on the Functioning of the European Union reads as follows:

The European Union is developing a common immigration policy aimed at for example the effective management of migratory flows at all stages of their treatment, to ensure fair treatment for third-country nationals who are legally resident in a Member State.<sup>2</sup>

In view of the above, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures concerning entry, stay visas, rules on the issuance of long-stay visas and long-term residence permits by Member States, including family reunification purposes.

It also lays down the rights of third-country nationals legally residing in one of the Member States, including the conditions governing the free movement and residence in other Member States.<sup>3</sup>

According to the Hague Programme (2004)<sup>4</sup>, legal migration has an important role in the strengthening of the knowledge-based European Economy; this also needs a so-called “guided migration”<sup>5,6</sup> As stated by Roberto Mangabeira Unger: “...with the knowledge economy suggests a new criterion of what makes the most advanced practice of production most advanced. In one sense, it is the practice of production that is closest to the mind, and especially to the part of our mental life that we call the imagination. In another sense, this most mindful practice is the one that, among all available forms of economic activity, most intimately and continuously connects our experiments in using and transforming nature and our experiments in cooperating.”<sup>7</sup>

The Council invited the Commission to present a policy plan on legal migration, including admission procedures that are able to adapt quickly to fluctuations in demand for migrant labour on the labour market.<sup>8</sup>

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<sup>2</sup> Treaty on Functioning of the European Union, Art. 79 (1)

<sup>3</sup> Treaty on Functioning of the European Union, Art. 79 (2).

<sup>4</sup> <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2005:053:0001:0014:EN:PDF>

<sup>5</sup> Guided migration allows people to travel to Europe in an organized way. This is an opportunity for them to not to turn to human smugglers or traffickers.

<sup>6</sup> See Á. Mohay, *A nemzetközi migráció jogi aspektusai, különös tekintettel a legális migráció szabályozására az Európai Unióban*. In: I. Tarrósy & V. Glied & Z. Vörös (eds.): *Migráció a 21. században*, Publikon Kiadó, Pécs 2016, 56. p.

<sup>7</sup> R. Mangabeira Unger, *The Knowledge Economy* <https://www.oecd.org/naec/THE-KNOWLEDGE-ECONOMY.pdf> (20 March 2019).

<sup>8</sup> Council Directive 2009/50/EC on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment. OJ 2009 L 155/17/4.

### 3. The Blue Card Directive

The so-called Blue Card Directive aims at facilitating the admission and movement of third-country nationals for a period of more than three months for high-skilled employment and contributing, for example, to addressing labour shortages<sup>9</sup> in order to make the Union more attractive to such workers from all over the world and to maintain the EU's competitiveness<sup>10</sup> and economic growth.<sup>11</sup> It is also important to mention that there is not one EU Blue Card but rather 25 different ones (the scheme applies to all EU member states except the UK, Ireland and Denmark).<sup>12</sup>

Before we turn to the specific provisions of the directive, we find it important to clarify three concepts. The first – which is the simplest – is to define that who is the third country national. Well, a third-country national is a non-EU citizen.<sup>13</sup>

The second is what is meant by high-qualified employment. The concept consists of three main parts. The first part is that the employee carries out real and actual work under the direction of another person or for someone else and for that purpose, he is protected in the Member State concerned under national labour law and / or national practice irrespective of the legal relationship. The second is to get paid for his work, and then to have adequate and specific competence, as proven by higher professional qualifications.<sup>14</sup>

The third main part is what is the blue card, which is the subject of the Directive. In fact, this is a combination of residence and work permits for people with high qualifications and can be classified as third-country nationals that I explained above.<sup>15</sup>

Of course, the Directive does not apply to all third-country nationals. For example, it doesn't apply to those who hold a temporary protection permit in a Member State or have applied for permission to reside on such grounds and haven't taken a decision from their status yet. It doesn't apply to those who have been admitted to a Member State as seasonal workers.<sup>16</sup>

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<sup>9</sup> S. Bellini, *EU Blue Card: A promising tool among labour migration policies? A comparative analysis of selected countries*, Institute for International Political Economy, Berlin, No. 76, 2016, p. 2. (23 April 2019).

<sup>10</sup> S. Kalantaryan, *Revisions in the Blue Card Directive: Reforms, Constraints and Gaps*, EUI Working Paper RSCAS 2017/59 (23 April 2019).

<sup>11</sup> Directive 2009/50/EC.

<sup>12</sup> C. Sullivan, *The Blue Card for skilled migrants: Why isn't it more popular in the Netherlands?* <https://www.iamexpat.nl/career/employment-news/blue-card-skilled-migrants-why-isnt-it-more-popular-netherlands> (21 March 2019).

<sup>13</sup> [https://ec.europa.eu/home-affairs/content/third-country-national\\_en](https://ec.europa.eu/home-affairs/content/third-country-national_en) (20 March 2019).

<sup>14</sup> Directive 2009/50/EC Art. 2. (b).

<sup>15</sup> Directive 2009/50/EC Art. 2. (c).

<sup>16</sup> Directive 2009/50/EC Art. 3. (2).

### ***3.1 Criteria of the Application***

There are several conditions for a person to apply for a card: he must present a valid employment contract with a duration of at least one year in the concerned Member State or a job offer in accordance with national law on highly qualified jobs; it shall also provide a document certifying that it fulfills the conditions laid down in national law for the exercise by Union citizens of a regulated profession as defined in the aforementioned contract of employment / job offer. In the case of a non-regulated profession, he must provide evidence of higher professional qualifications for the profession or sector specified in the employment contract / job offer. Each Member State determine the professions differently, so there's a unified database according to which one is regulated, and which one is non-regulated. For example, being a real estate agent in the Netherlands is a regulated profession, while in Austria it is not.<sup>17</sup>

There is also a need for a valid travel document under national law, if it is necessary, a visa or a visa application or a valid residence permit or a national long-stay visa certificate. For that purpose, that Member State shall provide all assistance to the applicant.

In addition, he must present a certificate that he has sickness insurance against all the risks which the nationals of the concerned Member State are normally insured or – if the national law prescribe it – he has requested it for each period, when related to the employment contract doesn't provide such insurance coverage or equivalent benefits.

As a last criterion, of course, he can't be a person who threatening public order, public security or public health.<sup>18</sup>

It is important to note that the Directive doesn't affect the right of Member States to allow for the admission of third-country nationals to their territory for this purpose.<sup>19</sup> The vast majority, of course, have serious restrictions on this.<sup>20</sup>

With regard to validity, Member States shall establish a “unified period” of validity for one to four years. If the employment contract is for a shorter period, the EU Blue Card must be issued or renewed for a period exceeding three months.<sup>21</sup> In case of that the person apply for renewal

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<sup>17</sup> [https://europa.eu/youreurope/citizens/work/professional-qualifications/regulated-professions/index\\_hu.htm](https://europa.eu/youreurope/citizens/work/professional-qualifications/regulated-professions/index_hu.htm)  
(20 March 2019)

<sup>18</sup> Directive 2009/50/EC Art. 5. (1).

<sup>19</sup> Directive 2009/50/EC Art. 6.

<sup>20</sup> S. Peers, *The Blue Card Directive on highly-skilled workers: why isn't it working, and how can it be fixed?* EU Law Analysis, 4 June 2014 (<http://eulawanalysis.blogspot.com/2014/06/the-blue-card-directive-on-highly.html>)  
(20 March 2019).

<sup>21</sup> Directive 2009/50/EC Article 7. (2).

of an existing card (which may take up to 90 days to complete), he/she can legally stay and work at the place of their residence, while the application being processed.<sup>22</sup>

In the implementation of the Directive, Member States have provided very high levels of flexibility.

### **3.2. Problems**

Based on the Commission's reports on the directive, it can be said that the Blue Card did not live up to the hopes which it inspired, because unfortunately the Blue Card is underused in almost all EU member states except Germany.<sup>23</sup> If we only examine the number of Blue Cards granted, according to a 2012 data, only 3,664 cards were issued, far below the number of immigrants attracted by similar national systems, which in 2012 was 20,000. Most have been issued by Germany and Luxembourg, and the main countries of origin are India, China, Russia, the USA and Ukraine.<sup>24</sup> It is important to note that – according to the Communication of the Commission on the Implementation of Directive - only 2,1% of the beneficiaries of the EU Blue Card during the first phase of the implementation in 2012 came from Sub-Saharan Africa. This may indicate implicit racial bias applied preventing certain types of workers to access to some more favourable statuses and therefore enjoying equal treatment with other workers or other family members. The lack of diversity among the EU Blue Card holders may reflect national policies and practices which can perpetuate forms of direct, indirect or institutional discrimination towards new candidates.<sup>25</sup>

In the Netherlands – according to Jo Antoons - the Blue Card has had absolutely no success, because the salary threshold is too high, the procedure is lengthy and all diplomas must be recognized.<sup>26</sup> Neither national systems - in spite of the relatively high figures - nor the Blue Card system aren't able to attract enough highly skilled workers to the European Union.<sup>27</sup> This fact definitely indicates the need for revision.<sup>28</sup>

The most important problems are: the poor performance of the number of admissions - this can be seen from numbers previously referred to; extensive discretionary power during the implementation period due to the high level of flexibility that the Member States have in transposing the directive into national law. For example, the Directive makes it possible for the Member States to maintain or to introduce new national residence permits for any purpose of employment and it should not affect the possibility for an EU Blue Card holder to enjoy additional rights and benefits which may be provided by national law, and which are compatible

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<sup>22</sup> <https://www.eu-bluecard.com/validity/0> (20 March 2019).

<sup>23</sup> Sullivan, *ibid.*

<sup>24</sup> Peers, *ibid.*

<sup>25</sup> [http://www.europarl.europa.eu/doceo/document/A-8-2017-0240\\_EN.html](http://www.europarl.europa.eu/doceo/document/A-8-2017-0240_EN.html)

<sup>26</sup> Sullivan, *ibid.*

<sup>27</sup> Kalantaryan, *ibid.*, p. 11.

<sup>28</sup> Peers, *ibid.*

with this Directive.<sup>29</sup> It is also a matter of discretion, but in this case, it showing a relative unity as a result of the Member States intending to set a higher payment threshold than the Directive requires. According to a data from 2014, only two Member States have set a higher payment threshold than required by the Directive, while the rest of the countries have established wages by the Directive as a condition of immigration for blue card holders.<sup>30</sup>

The existence of parallel national systems, thus potentially competing with the blue card, and it's cause greater disruption to stakeholders. For instance, in the Netherlands the national system offers far more favourable conditions for the highly qualified third-country nationals. The minimum payment that an employee must earn is lower, the procedure can be as quick as two weeks for recognized employers, and document requirements are simpler.<sup>31</sup> A long bureaucratic procedure - the discretion of the Member States should also be taken into account here, as the application procedure and the examination of the application may take up to 90 days. Less than half of the Member States have set a shorter deadline for consideration of applications and grant of Blue Cards.<sup>32</sup> The access to the system is limited for small and medium-sized enterprises: the sponsorship system favours large companies not only because the cost of becoming a sponsor is relatively small for them, but also because they have the necessary legal expertise to ensure compliance with all regulations. For smaller firms without this expertise, the costs of acquiring such expertise and the risk of incurring fines is too large, so they do not use the system. To facilitate the use of the system by small and medium-sized companies, public authorities could offer legal assistance in these cases or consider a waiver of the fee for small and medium-sized enterprises with certain characteristics.<sup>33</sup> The lack of opportunities for mobility within the EU is also a huge problem too. The card does not provide authorization to work in all the countries of the EU. Only after an initial eighteen months' freeze, the blue card holder will be able to move to another EU state if they find a job there.<sup>34</sup> A lack of a framework that allows for the recognition of foreign qualifications simply - and because the frame is missing, therefore a large number of beneficiaries decreased significantly: the EU system for the recognition of foreign qualifications is too complex. The problem is specific to all countries and traced back to the same reasons that we mentioned above. There is – currently - no automatic recognition of academic or professional qualifications, even within the EU, and each Member State applies its own rules.<sup>35</sup> As we can read in the summary which wrote by the Migration Policy Institute “In each EU Member State the various rules and procedures applying to the recognition of foreign professional qualifications make up a complex and disparate web of practices rather than a homogeneous corpus. Procedures differ depending on the occupational field, the scope of practice, and the regulated or un-regulated status of the profession for which

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<sup>29</sup> Directive 2009/50/EC (7).

<sup>30</sup> Peers, *ibid.*

<sup>31</sup> Sullivan, *ibid.*

<sup>32</sup> Peers, *ibid.*

<sup>33</sup> OECD, *Recruiting Immigrant Workers: The Netherlands* 2016. p. 24. [https://read.oecd-ilibrary.org/social-issues-migration-health/recruiting-immigrant-workers-the-netherlands-2016\\_9789264259249-en#page1](https://read.oecd-ilibrary.org/social-issues-migration-health/recruiting-immigrant-workers-the-netherlands-2016_9789264259249-en#page1) (21 March 2019).

<sup>34</sup> <http://blogs.worldbank.org/peoplemove/eu-just-approved-the-blue-card> (21 March 2019).

<sup>35</sup> Kalantaryan, *ibid.*, p. 25.

recognition is sought. Moreover, authority over recognition is generally highly fragmented—with numerous public and private stakeholders involved in the process. These are not characteristics singular to EU Member States.”<sup>36</sup>

The aptitude standards are too high, as we already mentioned above. Finally defining moderate rights for the beneficiary and his family. For example, the right to a family reunion is considered to be narrow because the Blue Card holder can only bring his or her family if they have a valid employment contract for a year or longer.<sup>37</sup> Obviously, the restrictions are on rational grounds, but they limit the possibilities to narrow limits. The Blue Card holder is the “sponsor” of the family member’s license, because he or she must provide the appropriate financial support, the right accommodation (to be a suitable place for all family members), health insurance, and he or she has to prove the relationship between him/her and his/her family member. If the family receives the license, then - at least theoretically - they can enjoy the same rights as other citizens of the Member State, whether in education or employment.<sup>38</sup> The Directive does not preclude Member States from maintaining or introducing integration conditions and measures, including language learning, for the members of the family of an EU Blue Card holder.<sup>39</sup>

#### 4. Revision

The Commission's proposal in 2016 (the necessity of which was already referred to in the 2015 Migration Strategy) is to transform the Blue Card into a more inclusive, flexible and transparent system. The aim is to improve the Union's ability to respond effectively and rapidly to the existing and emerging needs of highly qualified third-country nationals, and to offset skill shortages for economic migration, necessary to be able to enhance the economic competitiveness of the Union and deal with the consequences of demographic aging.<sup>40</sup> Demographic aging is a huge problem nowadays: as we can see in the joint EU-OECD Policy Brief, the working-age population in the Union is projected to decline by 7,5 million by 2020.<sup>41</sup>

On 7 December the Commission presented a roadmap to a deal by June 2018 on the comprehensive migration package in which it aims for an agreement on the Blue Card file between the Council and the Parliament by June 2018. In his State of the Union Address 2018, Commission president Juncker called on the Member States to work on the legal migration proposals because the EU needs skilled migrants. In September, the Commission also published

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<sup>36</sup> <http://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupDetailDoc&id=19241&no=3> (21 March 2019).

<sup>37</sup> G. Wisskirchen, *The EU Blue Card*, Defense Counsel Journal, Vol 83, October 2016, pp. 505-506.

<sup>38</sup> <http://eu-bluecard.com/family-reunification/> (20 March 2019).

<sup>39</sup> Directive 2009/50/EC (23).

<sup>40</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: European Agenda on Migration, 2015. COM/2015/0614 final [https://ec.europa.eu/home-affairs/what-we-do/policies/european-agenda-migration\\_en](https://ec.europa.eu/home-affairs/what-we-do/policies/european-agenda-migration_en) (20 March 2019)

<sup>41</sup> OECD, *Matching economic migration with labour market needs in Europe*, September 2014, p. 7.

a Communication on enhancing legal pathways to Europe, where it calls on the Parliament and the Council to adopt the Blue Card Directive before the next European Parliament elections.<sup>42</sup>

The impact assessment showed two basic problems: failure to attract and retain highly qualified third-country nationals and failure to accommodate other highly qualified third-country nationals.<sup>43</sup> The word „other” does not apply to those who do their work as subordinates, but to those who are, for example, some entrepreneurs or other providers.<sup>44</sup>

The following changes have been made in the proposal. Only some of them are listed here by way of example:

The first and most important suggestion is that the Blue Card System becomes a mandatory system for the Member States and replaces the national systems that concern identical or similar groups of third-country nationals. By doing so, they would "force" Member States to start issuing Blue Cards and, at the same time, deprive them of the opportunity to maintain national systems that are more favourable to them. This concept was already part of the original proposal, but it was gradually abandoned during the negotiations, as they wanted to leave the opportunity to develop their competitive national systems based on the express requests of their employers.<sup>45</sup>

Important changes are contained in the proposal as it is for the Commission would like to extend the scope of Blue Card holders. The extension is helped by changing the definition: the concept of “highly qualified employment” is now replaced by “highly skilled employment”.<sup>46</sup> It would be mandatory for Member States on the basis of change that to recognise professional experiences as an alternative to education qualifications.<sup>47</sup>

At least until the establishment of such arrangements for the validation of non-formal and informal learning, every applicant should be required to present evidence of professional experience of at least three years such as recommendations of former employees, former working contracts, job references or certificates of employment.

When transposing this Directive and in order to better respond to the needs of the Union labour market, Members States and the Commission should gather data and list the sectors of

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<sup>42</sup> Legislative Train Schedule: *Revision of the Blue Card Directive* [https://www.europarl.europa.eu/legislative-train/theme-towards-a-new-policy-on-migration/file-jd-revision-of-the-blue-card-directive?fbclid=IwAR1-fpeb\\_W5yccqgPkBsn9I\\_1enWkZ0y1XPLh209u6J69xyWyu\\_13VQaWGw](https://www.europarl.europa.eu/legislative-train/theme-towards-a-new-policy-on-migration/file-jd-revision-of-the-blue-card-directive?fbclid=IwAR1-fpeb_W5yccqgPkBsn9I_1enWkZ0y1XPLh209u6J69xyWyu_13VQaWGw) (23 April 2019).

<sup>43</sup> European Agenda on Migration, *ibid.*

<sup>44</sup> Kalantaryan, *ibid.*, p. 13.

<sup>45</sup> E. Guild, *A New Blue Card Scheme? The Commission's proposal for highly skilled migration into the EU*, EU Immigration and Asylum Law and Policy, 12 July 2016 <http://eumigrationlawblog.eu/a-new-blue-card-scheme-the-commissions-proposal-for-highly-skilled-migration-into-the-eu/> (20 March 2019).

<sup>46</sup> Kalantaryan, *ibid.*, p. 18.

<sup>47</sup> *Ibid.*

employment or geographical areas where there are employment shortages or where vacancies are hard to fill and communicate this information publicly.<sup>48</sup>

According to the proposal, refugees and beneficiaries of subsidiary protection could also receive a Blue Card. This is especially interesting because a person in refugee status could receive the Blue Card with no loss of asylum<sup>49,50</sup>, his/her application will be processed through the relevant regulation with no labour-market test.<sup>51</sup> In respect of the higher education qualifications and higher professional skills of applicants for, or beneficiaries of, international protection residing in the territory of the Union who do not have the necessary documents to prove their qualifications and or professional skills, Member States should be encouraged to establish appropriate skills and knowledge-based assessments that would allow for a determination of their level of qualification and/or professional skills.<sup>52</sup> Long-term residents, seasonal workers and posted workers are still excluded from the beneficiaries.<sup>53</sup>

The new proposal sets the standard validity period of the Blue Card to at least 24 months, or length of the contract plus three months, but a renewal should last at least 24 months. Applicants should be notified of the decision within 60 days, and this period is even shorter for ‘recognised employers’, a new optional system for Member States according to which certain employers recognised by the Member State may obtain access to the fast-track recognition procedure of 30 days maximum. Blue Card holders would also be able to exercise a self-employed activity in parallel to their main work, to which the Blue Card pertains. Access to highly skilled employment in the EU is also simplified, and Member States may only ask the holder to communicate changes of employer or other changes which may affect the holder’s status as Blue Card beneficiary.<sup>54</sup>

It also includes plans to facilitate family reunification - family members could get a residence permit in parallel with the issuing of a Blue Card. In addition, Member States would not be able to restrict labour market access for family members, although they may carry out labour market tests.<sup>55</sup> In accordance with Directive 2003/86/EC, Member States should be encouraged to ensure that family members of the EU Blue Card holders be granted an autonomous residence

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<sup>48</sup> Report on the proposal for a directive of the European Parliament and of the Council on the conditions of entry and residence of third-country nationals for the purposes of highly skilled employment (PE 595.499v05-00), amend. 12-13. [http://www.europarl.europa.eu/doceo/document/A-8-2017-0240\\_EN.html](http://www.europarl.europa.eu/doceo/document/A-8-2017-0240_EN.html) (20 March 2019)

<sup>49</sup> Asylum, in international law, the protection granted by a state to a foreign citizen against his own state. See more: <https://www.britannica.com/topic/asylum>

<sup>50</sup> Guild, *ibid.*

<sup>51</sup> Kalantaryan, *ibid.*, p. 19.

<sup>52</sup> Report on the proposal for a directive, *ibid.*, amend. 14.

<sup>53</sup> European Parliament, *Briefing, EU Legislation in progress: Revision of the Blue Card Directive* p. 6. [https://www.europarl.europa.eu/RegData/etudes/BRIE/2017/603942/EPRS\\_BRI%282017%29603942\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2017/603942/EPRS_BRI%282017%29603942_EN.pdf) (20 March 2019).

<sup>54</sup> *Ibid.*

<sup>55</sup> *Ibid.*

permit, independent of that of the EU Blue Card holder, in the event of widowhood, divorce, separation or death of first-degree relatives in the direct ascending or descending line.<sup>56</sup>

They would also extend the rights of blue card holders, ensure the right to self-employment in parallel with blue card work and at the same time access to highly qualified workers would be simplified.<sup>57</sup> Therefore they ease the conditions for obtaining long-term residence rights - instead of five years, it would be enough to stay for three years in the same country.<sup>58</sup> This part of the proposal is somewhat twofold, as in this case - until the remaining two years for the five years are over - all the requirements for blue card holders must also be fit, and it is not enough to maintain a permanent residence.<sup>59</sup>

Blue Card holders would also be able to enter and stay in other Member States for the purpose of carrying out a business activity without having to procure a work permit from the other Member State<sup>60</sup> – short-term business trips will be less complicated too.

## 5. Conclusion

Overall, the Commission proposal is undeniably timely. As can be seen in relation to the current asylum crisis, there is a growing political resistance to the development of common European rules on migration, especially where such rules mean a large reduction of sovereignty and control of entry rules. Consequently, the legislative process can be long and difficult, even though it is increasingly acknowledged that skilled labour migration is beneficial to economic competitiveness.

Several features of the 2009 directive, which are still relevant for its revision, have been discussed and criticised. Steve Peers<sup>4</sup> warned that the features of the 2009 Blue Card which would have been attractive to third-country nationals, such as short decision-making deadlines, job mobility, lower thresholds for younger applicants, and validity of permits, were either dropped or watered down in the legislative procedure. He also identified the exclusion of certain categories of people, such as beneficiaries of international protection, as a problem. The new proposal has also already drawn some criticism. The abolition of parallel national schemes is expected to be a source of reluctance from the Member States, and as such would not make the EU more attractive according to Jean-Baptiste Farcy. He also predicts a long and difficult legislative process for the directive under the current political climate. Maria Vincenza Desiderio agrees with this prediction, and discusses the abolition of national schemes and facilitated intra-EU mobility as some of the main points of contention. Sona Kalantaryan and Ivan Martin also question the necessity of abolishing national schemes, which may be more

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<sup>56</sup> Report on the proposal for a directive, *ibid*, amend. 38.

<sup>57</sup> European Parliament, *Briefing*, *ibid*.

<sup>58</sup> *Ibid*.

<sup>59</sup> Guild, *ibid*.

<sup>60</sup> European Parliament, *Briefing*, *ibid*.

flexible and dynamic in meeting the needs of national labour markets. They express concern over the adequacy of taking the national average salary as a threshold instead of a threshold related to sector/ region/occupation-specific salary or one agreed through collective bargaining. In addition, the current proposal may not offer a mechanism enabling a pool of eligible potential candidates, but is merely a way for candidates who already have a job offer to get a permit.<sup>61</sup> In addition to these criticisms, there are still many shortcomings in the current blue card system, such as family reunification, which is a very important part of the system.

Overall, we believe that the Commission should find a "golden middle" between national systems and the European Union Blue Card system. This is expected to take many years to come, and there is also a need for closer cooperation between the Member States and the Union, which will allow the single system to operate. However, unification should not jeopardize the attractiveness of the Union, as the objective is still to attract as many highly qualified third-country nationals to the European Union.

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<sup>61</sup> Ibid.

# Some Effects of the Migration and Asylum Crisis on Hungarian and EU Legislation

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*The goal of this study is to evaluate the Dublin Regulation's effectiveness in terms of the management of the migration crisis, to crawl up the most important changes in legislation which were introduced in Hungary as a reaction to mass migration, and also to reflect the effect of the migration crisis on Hungary in numbers. This study emphasizes Hungary's role in the management of the migration crisis started in 2015 and aims to give a more nuanced picture of Hungary's role in it.*

*Keywords: migration and asylum crisis, Dublin Regulation, European Union, Hungary*

## **1. Introduction**

Inbound illegal migration is not considered to be a new phenomenon when it comes to Europe. Even before 2015, when the volume of illegal migration increased to a level which have caused difficulties for the European Union member states to handle, the number of illegal migrants showed a continuously increasing tendency. The different historical circumstances were reflected in different standing points migration-wise, and consequent to the different historical developments, there are unequivocal differences between the countries of Western Europe and the countries of Eastern Europe when it comes to the general point of view on the management of mass migration.

Such different approaches served and serve continuously as the ground of unavoidable and interesting debates among member states in the European Union, and show more and more that it is a pure illusion that this platform of twenty-eight states integrating even more nations and several different cultural circles, will be able to show a unified attitude towards the subject issue.

Uncontrolled migration, and therefore co-existing of significantly different cultures consequently leads not only to economic challenges, but also to cultural tensions and, as we experience it more and more, from the day-to-day news of countries following open border policies, parallel societies and the increasing level of exposure to security threat as well. The management of the issue one way or the other will be determinative regarding the whole future of Europe in historical perspective. The migration crisis, which the societies of Europe had to face in the recent past and the consequences of which they have to face nowadays has a

significant impact on the general interpretation of the issue and without a doubt are reflected on the highest level of domestic and EU level decision making procedures as well.

The main goal of this study is to crawl up the general framework regulating migration policies in the European Union, and to reflect a better understanding on the domestic legislative regulation of the most migration-exposed member states. The emphasis of this study is to specify those legislative changes which were introduced explicitly in order to manage the increased volume of migration or offer preventive measures against the process. The new legislative materials on domestic level are appearing in the form of new legislative acts, government decrees and lower level materials, and in the form of amendments of the foregoing materials as well.

After providing a general overview on the Dublin regulations and the presently relevant EU regulation, this study focuses primarily on Hungary in the foregoing respect, which, due to its geographical situation and due to fact that it is a Schengen border country, was highly exposed to mass migration in 2015 and needed to introduce radical and fast measures in order to cope with this never-before-experienced new phenomenon, which also emerged as a key issue in other countries, such as, including but not limited to, Germany, France, the United Kingdom, and Sweden. It is essential to give a true picture highlighting that Hungary is an EU member state that in fact performs its obligations in terms of border protection, unlike several EU member states that does not do the same way, or not to the fullest extent.

## **2. The Dublin Regulation**

The Dublin Regulation (currently *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* or also known as the Dublin III regulation) is a collection of rules which lay down the applicable mechanism to determine which member state is responsible for the examination of a request for international protection lodged in one of the member states by a citizen of a third country or by a stateless person. The currently valid and applicable Dublin III regulation is applicable to the twenty-eight member states of the European Union, moreover to Iceland, Norway, Lichtenstein and Switzerland.<sup>1</sup>

If an asylum seeker submits its application for international protection in one of the Dublin-member countries, the application is also examined on the basis of the Dublin regulation, in order to determine whether the target country is indeed the one that is entitled to and obliged to record the application and decide it.<sup>2</sup> Under the Dublin III Regulation it may be appointed that

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<sup>1</sup> <https://eur-lex.europa.eu/legal-content/en/ALL/?uri=celex%3A32013R0604> (27 March 2019)

<sup>2</sup> [http://www.citizensinformation.ie/en/moving\\_country/asylum\\_seekers\\_and\\_refugees/the\\_asylum\\_process\\_in\\_ireland/dublin\\_convention.html](http://www.citizensinformation.ie/en/moving_country/asylum_seekers_and_refugees/the_asylum_process_in_ireland/dublin_convention.html) (27 March 2019)

the application shall be decided in another country and therefore, to this end the applicant may be transported to this country in order to the evaluation of its application. The Dublin Regulation had been adjusted several times in the past decades and the most recent version, the Dublin III Agreement has been effective as of 2013. The corner stone of Dublin III is that an asylum applicant can only be considered in one member state, in order to the most expedient allocation and distribution of economic resources and in order to the avoidance of unnecessary administrative burden. The basic principle of Dublin III is that an asylum applicant shall make its asylum claim in the first member state where it arrives at and enters the European Union. The application of same standards is problematic with view to the different geographic locations and therefore the significantly unequal exposure of member states to migration. Naturally, Greece, Italy or Spain are the target entries to the European Union via sea-route migration, and in the mass migration crisis of 2015, Hungary as a land border of the Schengen Area had to face many more times bigger migration pressure than other European countries. As a direct result of the aforementioned differences, member countries have different approaches on the management of migration and domestic legislative measures vary from country to country. In this very distinct environment, the uniform application of Dublin rules seems to be problematic in several cases, not to mention that the enforcement mechanisms in central EU-level are proven to be ineffective. The applicants' chance on receiving refugee status is much higher in certain countries compared to several others. Welfare policies, labour market opportunities and pure political approaches are different. Another problematic issue with Dublin III is burden sharing. The whole set of regulations were developed in order to create the fair sharing of burden between member states, and in this respect, Dublin III proven to be ineffective.<sup>3</sup>

The question comes, whether it can be a goal to distribute migrants between member states? Can the foregoing be interpreted as a measure taken in the spirit of fairness and in the spirit of respecting European values, or to the contrary, it is rather a premeditated attempt to change Europe's ethnic and cultural features irreversibly?

The first public criticism of the Dublin Regulation came from no one other than the Chancellor of Germany, Angela Merkel in August 2015, at the peak of the migration crisis. On 27 August 2015, after her participation at the Western Balkans Summit, organized in order to the development of a common management mechanism with view to the handling of mass migration at that time, Merkel directly stated at a press conference that the Dublin Regulation does not work and 'Europe as a whole' shall give a unified response to the new phenomenon. Chancellor Merkel indicated that the Constitutional Court of Germany and the European Court of Justice (ECJ) are both contributing to migrants not being returned to Greece, where most of migrants who arrived via sea routes entered the European Union. She expressed her doubts by pointing out that "Where are we going to return them to? To Hungary, Austria, Serbia, who all have as many or more refugees than we do?"<sup>4</sup> The German foreign minister, Frank-

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<sup>3</sup> G. E. Tryggvadóttir, *The Dublin III Regulation, A System Under Strain*, Reykjavik University, School of Law, 2017

<sup>4</sup>[https://www.cidob.org/en/publications/publication\\_series/notes\\_internacionals/n1\\_135\\_por\\_que\\_dublin\\_no\\_funciona/why\\_dublin\\_doesn\\_t\\_work](https://www.cidob.org/en/publications/publication_series/notes_internacionals/n1_135_por_que_dublin_no_funciona/why_dublin_doesn_t_work) (27 March 2019)

Walter Steinmeier, expressed the need to reform the Dublin Regulation for ‘fair distribution’ of refugees in Europe.<sup>5</sup>

It could be experienced in the recent couple of years that in member states with higher exposure to migration, election campaigns and the whole policy agenda was strongly dominated by the issue of migration and state security. This consequently led to the passing of state-level legislations which reflected such different approaches. Without the need for full completeness, the following chapter will try to give a general overview on the Hungarian legislation pertaining to illegal migration.

### **3. Legislative Effect of Migration in Hungary**

Due to its geographic and economic situation, Hungary serves as a destination country for regular migration from the neighbouring countries. The relative economic prosperity, the geographic location and the European Union membership are all together the key elements which play a significant role when Hungary is approached by regular migration, mostly by ethnic Hungarians. When it comes to the examination of migration policies and legislation in Hungary pertaining to migration, it has to be strongly emphasized that the Hungarian legislation relevant to regular migration is not different in merits at all from other European Union member states’ legislation which are considered to be liberal. To the contrary, the approach of Hungary towards legal migration can be considered as welcoming. The different approach is reflected in the laws applicable to situations when people are crossing the Hungarian borders and therefore entering the European Union illegally.

At the appearance of mass migration at Hungary’s Eastern borders with Serbia in 2015, the Hungarian government made radical measures which proved to be highly effective. A border fence was constructed as a physical obstacle to hold up illegal migrants approaching the European Union on both the Eastern and the South-Eastern migration routes, among which the Western Balkan route (via Turkey, Greece, Macedonia, Serbia or Croatia to Hungary, then other EU Member States) was the most active at the peak of the crisis. In addition to the border fence, several legislative changes had been enacted in Hungary as of 2015.

### **4. Changes in Legislation<sup>6</sup>**

Fundamental legislative developments have commenced in 2015, when major modifications and several minor changes were adopted to Hungarian asylum law, including amendments to *Act LXXX of 2007* on Asylum and other laws as well.<sup>7</sup>

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<sup>5</sup><https://www.dw.com/en/german-fm-steinmeier-demands-fair-distribution-of-refugees/a-18677140> (27 March 2019)

<sup>6</sup> B. Nagy, *Hungarian Asylum Law and Policy in 2015–2016: Securitization Instead of Loyal Cooperation*, German Law Journal, Vol. 17, No. 06., 2016, pp. 1034-1082.

<sup>7</sup> Nagy, *ibid*, p. 1045.

The most important measure was the declaration of the list of safe third countries. *Government Decree 191/2015 (VII. 21)* on the designation of countries declared to be safe on a national level and on the designation safe third countries, declared the following two lists:

One list designated third countries qualified as safe ones and another list designated safe countries of origin. According to the lists, safe countries of origin and safe third countries are “Member States and candidate states of the European Union - except for Turkey, Member States of the European Economic Area, and those States of the United States of America that do not apply the death penalty, furthermore: 1. Switzerland 2. Bosnia and Herzegovina 3. Kosovo 4. Canada 5. Australia 6. New-Zealand.” After the EU-Turkey agreement on asylum, Turkey was added to both lists.<sup>8</sup>

At the same time, the first review of the refugee status determination procedure had been carried out, in order to facilitating and the asylum proceedings with view to the establishment of the border fence at the Serbian-Hungarian border.<sup>9</sup>

The focal point of the adopted changes had been the following:

- Shortening deadlines for the authorities to decide on asylum requests and shortening the deadline given for the applicant to legally challenge a negative decision. Accelerated procedures are to be finished within fifteen calendar days and an appeal must be submitted within three days<sup>10</sup>. Courts have an eight-day decision deadline and courts become entitled to refrain from personal hearings. The separation of preliminary procedure on admissibility and procedure on the merits have ceased to exist and has been transformed into a unified procedure.
- Termination of suspensive effect of appeals in the majority of asylum procedures, which means that in several cases applicants can be removed from the territory of Hungary before the judicial review of their request has commenced.
- Supplementing the list of premises suitable to serve for the purpose of detention.<sup>11</sup>

The scope of the next round of modifications was to lay down a special set of rules pertinent to migrants trying to come across the border fence. The new regulation is pertaining to and applicable in the event of exceptional situations, and grants powers to the Hungarian government, within the possession of which it becomes entitled to declare a crisis situation of mass migration. Moreover, legislation have been modified in several other points as well: the

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<sup>8</sup> Nagy, *ibid* p. 1045.

<sup>9</sup> Nagy, *ibid* p 1046.

<sup>10</sup> Act CXXVII of 2015 on the establishment of a temporary security border-closure and on the amendment of laws relating to migration. Published in the Official Journal (*Magyar Közlöny*) on 13 July 2015, in force since 1 August 2015.

<sup>11</sup> The whole listing was prepared on the basis of Nagy, *ibid*, p. 1046.

border fence and the adjacent transit zone became exempt from environmental impact assessment and other administrative procedures.<sup>12</sup>

In 2016, several important amendments have been introduced, among others, assistance provided to recognized refugees have been terminated and a new rule has been established, according to which the status of a person who was granted refugee status have to be reviewed in every three years automatically, with the proviso that the foregoing rule shall also be applicable to holders of subsidiary protection. In addition, new rules have also been introduced in terms of designating a zone adjacent to the border, in which law-enforcement rights are allowed to be applied. The foregoing results that migrants held back in the subject zone are being inspected and if police forces determine that they are not entitled to stay in Hungary, they are prevented from going further and escorted back to the other side of the border.<sup>13</sup>

## **5. Volume of Migration in Numbers** <sup>14</sup>

These measures together contributed to the fact that number of illegal border crossings have decreased in a volume never seen before. In 2015, there were days when thousands of illegal migrants crossed the Serbia-Hungary border. With the building of the fence, this number have dramatically reduced, with nowadays this number is being close to zero. This naturally does not mean that by building the fence migration towards the European Union had been reduced or had been partly prevented. This only means that the land migration routes started to avoid Hungary and enter the European Union in other border countries<sup>15</sup>.

It is important to note that from the early days of migration crisis, as of 2014 until nowadays the demographic background of asylum seekers have changed in a significant manner. In 2014, the vast majority of asylum applicants in Hungary was of Kosovo, Syrian and Afghan origin. In 2015, at the peak of the migration crisis, recently before the building of the border fence, the number of Syrian and Afghan migrants increased dramatically to approximately 65,000 and 46,000 from circa 21,000 and 9,000, the number of applicants from Kosovo remained on the constant level of circa 25,000. In addition, the number of Pakistani asylum applications increased in a volume never seen before, from the circa 400 in 2014 to almost 15,000 in 2015, and as well, Iraqi applications increased from circa 500 in 2014 to circa 9,000 in 2015. All in all, after the building of the Hungarian border fence, the aforementioned numbers started to drastically decrease. The drastic decrease, besides the border fence, was thankful to the EU-Turkey statement as well. The EU-Turkey statement was issued in early 2016 and serves as a sort of an action plan and workload sharing mechanism between the European Union and Turkey. The most essential part of the statement was that with the conditions mutually agreed by the parties, Turkey undertook to take back irregular migrants who entered the EU throughout crossing Turkey. The number of total applications fell dramatically, from circa 177,000 in 2015

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<sup>12</sup> Nagy, *ibid*, p. 1047.

<sup>13</sup> Nagy, *ibid*, 1050-1051. o.

<sup>14</sup> <http://www.iom.hu/migration-issues-hungary> (27 March 2019)

<sup>15</sup> *Ibid*.

to circa 29,000 in 2016, and further decreased in 2017: the aggregate number of asylum applications were approximately between 3,000 and 4,000. Moreover, the number of applications were even lower in the first quarter of 2018, closing at 280.<sup>16</sup>

It is of high importance that as of 2015, Hungary was the second European Union member state to intercept illegal migrants at its borders, while Hungary had more than 411,000 recorded border crossings at the respective year. However, with the construction of the border fences with Hungary's southern borders with Serbia and partly Croatia, Hungary was put outside the Western Balkan migratory route.<sup>17</sup>

## 6. Findings

Doubts may be expressed concerning the *fair nature* of the 'fair distribution' of migrants, which has been already referred to above. The European Union is a significant, beneficial and effective organization which first and foremost contributed to the avoidance of wars between European countries after the Second World War, however, it also has to be taken into consideration that the European Union is a collection of sovereign states with individual historical backgrounds. This consequently leads to different cultural values and different interpretations when it comes to the issue of migration. Some societies are more *closed* in this sense and some are more *open*. The foregoing is subject to in-depth sociological analysis and should not be judged by outside of the respective state, and it shall be within a sovereign state's and its people's discretion whether or not they are open to welcoming economic migrants. Each state is unique not only in its culture, but as well in its socio-economic conditions, and there are states which are able to carry the economic burden which comes with migration, and there are states which cannot. But even the aforesaid neither means that a richer country *shall* be open to migration. A state, or a government of a state shall bring its decision for the satisfaction and for the welfare of its citizens first and foremost. Therefore, the respective approaches and policy-making shall be established in accordance with the people's will, because this reflects the true nature of democracy. It means that it shall not be judged from outside if a state is open to migration, and it shall neither be judged if another state, like Hungary, finds that it is in the best interest of its citizens that it does not keep its borders wide open to economic migration. With a view to the foregoing, it may be grounded that contrary to Mrs. Merkel's statement, 'Europe as a whole' proved to be insufficient to give proper answers to the migration crisis, and national solutions may become necessary.

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<sup>16</sup> <http://www.iom.hu/migration-issues-hungary> (27 March 2019)

<sup>17</sup> Ibid.

# Treatment of Refugees at the Borders

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*During the 'modern day migration crisis' that caught the European Union obviously unprepared, Hungary and Croatia experienced almost identical problems. However, the response of the countries in question was somewhat different which the authors believe is best demonstrated through comparison of real situations witnessed as citizens of those two countries. Thus, we will attempt to provide an overview of the relevant legal documents, both on international, European and national level and analyze how that legal framework is (or is not) being applied in real life situations.*

*Keywords: refugees, migration, Croatia, Hungary, borders, asylum, crisis*

## **1. International and European legal framework**

International law provides a legal framework for the treatment and concretization of national legal rules in many areas, including refugee law. This topic, by itself, is something that concerns the wider society and not just the national interests of a particular country, so harmonization at the international level is necessary and inevitable at least as far as the basic concepts are concerned, although it would be very useful if international community defined it more specifically and strictly and if necessary, sanctioned some other areas of contemporary refugee law. International law should be able to respond to the demands of migration in the modern world, referring to issues of protection of security and national interests on one hand, and humanitarian issues on the other, all to avoid inequality and illegality in the treatment of all involved, and to fill in all the more obvious and increasingly detrimental legal gaps.

Nevertheless, international law elaborated refugee protection mechanisms only in the 20th century. Thus, the Agreement on the Legal Position of Russian and Armenian Refugees, which guarantees some of the rights that refugees still enjoy today - such as protection from expulsion and return to the country they have fled, rights to work, access to justice, etc - was passed in 1928. Under the influence of this Agreement and under the auspices of the League of Nations the Convention on the International Status of Refugees was adopted in 1933, which further expanded the already established rights and thus added the right to health care and the right to access to education. Under the auspices of the same organization, in 1936 the Interim Agreement on the Status of German Refugees was created, followed by the adoption of the

Convention on the Position of German Refugees in 1938.<sup>18</sup> However, the "cornerstone" of the international protection of refugees as we know today is the Universal Declaration of Human Rights.

It was adopted by the United Nations in 1948 and it was the first comprehensive instrument of human rights protection, including refugees. Among other things, the Declaration recognizes the right of persons to seek asylum (refuge) from persecution in other states.<sup>19</sup> 1951 Convention on the Legal Status of Refugees is based on this document.

It was adopted under the auspices of the United Nations on July 28<sup>th</sup>, 1951, and came into force on April 22<sup>nd</sup>, 1954 and according to its preamble, its purpose is to revise and consolidate (codify) previous international agreements on legal status of refugees.<sup>20</sup> It is a document that came into existence after the Second World War, and was limited to people escaping the events that took place in Europe before January 1<sup>st</sup>, 1951. Namely, the Convention allowed the States Parties to limit the application of its provisions not only temporarily but geographically. Thus, apart from referring only to refugees who have become victims of events occurring before January 1<sup>st</sup>, 1951, the Convention also offered the States the option of restricting the application of its provisions solely to refugees from Europe by giving a statement upon signing, ratifying or acceding to the Convention. States, naturally still have the possibility of subsequently removing such restrictions and accepting the application of the Convention for all refugees by means of a notification sent to the Secretary-General of the United Nations. For example, Turkey, while party to the 1951 Refugee Convention, maintains the geographical limitation only to people originating from Europe which has been one of the big talking points in regards to their accession to the EU. Nevertheless, despite this limitation, Turkey provides non-European refugees with protection and temporary asylum, pending UNHCR's search for durable solutions elsewhere.<sup>21</sup>

The Convention has experienced an amendment in the form of the 1967 Protocol, which abolished the above mentioned limitations in the application. However, for countries that have already decided on a geographic limitation, it continues to apply even after the Protocol enters into force, while for other states, as well as for new parties of the Protocol, such a limitation is no longer allowed.<sup>22</sup> The former SFRY was a party to both documents, therefore the Republic of Croatia, as state succession also became a party of said documents.

The Convention and the Protocol remain the core international documents in the field of migration and as such they define the main concepts and provide answers to the main issues

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<sup>18</sup> D. Lapaš, , *The Protection of Refugees in International Law*, Croatian Legal Center, Zagreb 2008, p.1.

<sup>19</sup> The Universal Declaration of Human Rights (adopted and proclaimed at the General Assembly of the United Nations, Resolution 217 A (III) on 10 December 1948), Art. 14.

<sup>20</sup> J. Andrassy & B. Bakotić & M. Seršić & B. Vukas, *Međunarodno pravo*, Part 1, 2nd edn, Školska Knjiga, Zagreb 2010, p. 367

<sup>21</sup> <https://www.unhcr.org/474ac8e60.pdf> (8 May 2019)

<sup>22</sup> Lapaš, *ibid*, p.4.

that the international community still faces today. Thus, according to the Convention, a refugee is a person who is outside the country of his or hers nationality because of well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion and cannot, or because of said fear does not want to accept the protection of the country concerned. Also, a refugee is considered to be a stateless person who, because of the above circumstances, is outside the country of his former habitual residence, who cannot or, out of fear, will not return to said country. In the case of a person who has more than one nationality, the term “country of nationality” shall apply to any country whose nationality the person has and if such person, without justified grounds based on established fear, sought protection from one of the countries whose nationality said person has, it will be considered that the protection of one of the countries of nationalities is not denied. That is, if such a person loses the protection of one of the countries whose nationality he or she has, he or she shall not be considered a refugee as long as there is a possibility of protection from another state whose nationality that person has.<sup>23</sup> It is important here to emphasize the difference between refugees and the so-called "economic migrants." The difference is visible from the refugee definition itself, because the reasons why refugees leave the country of their origin are not the same as those of economic migrants. Although the definition of refugees mentioned above is the one that is most often used, it does not mean that it cannot be supplemented or changed as it was in some other international documents (e.i. the 1969 Convention on the Specific Aspects of the Refugee Problem in Africa, Cartagena Declaration of 1984), but the changes cannot provide more restrictive parameters for defining the concept of a refugee, because this term is the minimum refugee protection standard. In the light of contemporary so-called "refugee crisis", the generalization, trivialization and promotion of refugees as the main cause of the rise of crime in some host countries, it is important to point out that the Convention itself excludes its application to persons who are seriously suspected of committing a crime against peace, war crime or crime against humanity, those suspected to have committed another serious crime under international law outside the state of acceptance before they have received them as refugees or to have committed other offenses contrary to the purposes and principles of the United Nations.<sup>24</sup>

The status of a refugee is a complicated one in every scenario, but the one that causes the biggest problems and the one that is here the most relevant is when refugees are stopped at the border of the country since the space between two countries, before crossing the border is not really territory of that country, but it is also not terra nullius. Refugees in such relation of the mere jurisdiction to the state of acceptance, i.e. ones without the physical presence in its territory will enjoy fundamental human rights and freedoms such as the right to life, legal personality, freedom from racial discrimination, genocide, slavery, arbitrary punishment and seizure of liberty, etc. They also have the right to non-refoulement which for refugees is probably the most significant of their very limited rights. It is the Convention's obligation of the State to accept that refugees are not returned to their country of origin, or at all, to the frontiers of areas where their life or freedom would be endangered by their race, religion, nationality, belonging to a

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<sup>23</sup> 1951 Convention relating to the Status of Refugees, Art.1.

<sup>24</sup> Ibid.

particular social group or their political beliefs.<sup>25</sup> The biggest role in such cases is played by the two instruments of the EU: Directive 2013/32/EU<sup>26</sup> which establishes common procedures for granting and withdrawing international protection and Directive 2013/33/EU<sup>27</sup> which lays down the standards for the reception of applicants for international protection in Member States. Furthermore, there is a special procedure foreseen in cases of arrival of larger number of refugees, as such situations demand faster and more effective procedures and treatment. In such cases, the above mentioned Directive on the conditions of receiving international protection is derogated by the Council Directive 2001/55/EC which regulates the conditions under which international protection will be granted and the allocation of duties between countries in situations of mass influx.<sup>28</sup>

## 2. Croatian national legislation

The Law on International and Temporary Protection and the Aliens Act regulates the issue of refugees, asylum seekers and aliens, conditions, rights and obligations when entering and staying in the Republic of Croatia. Also, both law acts regulate the principle of forbiddance of forcible, known as *non – refoulement*. Croatian legislation provides that it is forbidden to return a third – country national or a stateless person to the country in which their life or freedom would be endangered because of their race, religion or national affiliation, affiliation to certain social group or because of their political opinion, in which it may be subjected to torture, inhuman or degrading treatment and which could extradite her to other country.<sup>29</sup> Among them are the principle of family integrity and the principle of the best interests of the child, but also cooperation with the United Nations High Commissioner for Refugees (UNHCR).<sup>30</sup>

The rights that international protection seekers enjoy in the territory of the Republic of Croatia are also highlighted; right to stay, freedom of movement in the Republic of Croatia, health care, primary and secondary education, legal counselling and free legal aid, freedom of religion, work, etc., are provided by the Law on International and Temporary Protection. However, it also emphasizes obligations to respect the Constitution of the Republic of Croatia, laws and other regulations, cooperation with state bodies and acting in accordance with their instructions

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<sup>25</sup> Lapaš, *ibid*, pp. 9-18.

<sup>26</sup> Directive 2013/32/EU of the European Parliament and of the Council of June 26, 2013 on common procedures for granting and withdrawing international protection.

<sup>27</sup> Directive 2013/33/EU of the European Parliament and of the Council of June 26, 2013 laying down standards for the reception of applicants for international protection.

<sup>28</sup> Council Directive 2001/55/EC of July 20, 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.

<sup>29</sup> Immigration Law, Official Gazette 130/11, 74/13, 69/17, 46/18, Art. 126.

Law on International and Temporary Protection, Official Gazette 70/15, 127/17, Art. 6.

<sup>30</sup> *Ibid*, Art. 11.

and measures, undergoing verification and identification of their identity, cooperating during the procedure of international protection etc.<sup>31</sup>

International protection seekers are located in the Reception Office, which is the organizational unit of the Ministry of the Interior, where UNHCR, the Croatian Red Cross, as well as other organizations dealing with the protection of refugee rights or humanitarian work, can implement educational and similar programs while also providing other forms of assistance, with the consent of the Ministry.<sup>32</sup>

It is important to point out temporary protection in cases of massive inflows or massive inflows of third-country individuals who cannot return to their own country because of armed conflict, local violence or serious dangers such as human rights violations in duration from one to maximum of three years which is provided by the Law on International and Temporary Protection.

Same as international protection seekers, they enjoy certain rights, which binds themselves with the obligations of temporary protection seekers. Thus the Act emphasizes the right to stay, identity card, basic living and accommodation, health care, elementary and secondary education, work, family reunion and freedom of religion.<sup>33</sup> The difference that can immediately be noticed between international and temporary protection is accommodation at the Reception Center, because the Law on International and Temporary Protection in article 90 provides that accommodation only if they do not own personal financials to insure their own.

The Aliens Act regulates the issue of entry of third-country nationals into the territory of the Republic of Croatia and states that if it does not meet the entry requirements of the Schengen Borders Code, said person may be granted entry into the Republic of Croatia at a certain border crossing if that is required due to serious humanitarian reasons.<sup>34</sup>

European Union and Croatian law which regulate status, rights and obligation of refugees and migrants, are harmonized. However, even though European Union directives have been implemented in Croatian legislation, real situation and law are in contradiction.

### **3. Croatia in contemporary refugee crisis**

The term "Arab Spring" is considered the most famous political spring in the last few years<sup>35</sup> and marks the first chain of social movements for the political and economic reforms in the

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<sup>31</sup> Ibid, Art. 52.

<sup>32</sup> Ibid, Art. 56.

<sup>33</sup> Ibid, Art. 78.

<sup>34</sup> Immigration Law, Official Gazette 130/11, 74/13, 69/17, 46/18, Art. 36.

<sup>35</sup> B. Zgurić, *Political Concept: Political Spring, Phenomenology of Protests*, Political Analysis, Vol. 5, No. 17, 2014, pp. 73-76.

Arab world that began in Tunisia and Egypt and then spread to a third of Arab countries.<sup>36</sup> A series of political protests and demonstrations against the authorities that later turned into civil wars led to the emergence of a refugee crisis that was intensified during the conflict in Syria.<sup>37</sup> In search of asylum and a better life, thousands of migrants and refugees flee from war, hunger, poverty and mass destruction and move from Iraq and Syria and other Arab countries to Germany, Austria and Great Britain, or towards the European Union as the ultimate destination.<sup>38</sup> To get to the European Union, they have to go through Turkey to get to Greece and cross over Macedonia and Serbia to Hungary and Croatia.<sup>39</sup> By the summer of 2015, the refugee route went through Hungary, but faced with a large number of refugees and migrants without sufficient shelter options, Hungarian authorities made the decision and closed the state borders and border crossings and lifted the wire fence.<sup>40</sup> At that point, Croatia becomes the main gateway to the so-called "*Balkan route*" to Austria and Germany.

Over the period from September to December 2015 more than 550,000 refugees went through Croatia.<sup>41</sup> In the Opatovac area near Ilok, a temporary refugee camp was established where migrants were registered. Food and water, warm clothing and other hygienic items were distributed.<sup>42</sup> Several hundred volunteers helped border and refugee camps. The migrants came from Tovarnik or Bapska border crossing where a bus service with a police escort was organized for them. Every day, a large number of migrants entered the Republic of Croatia and it became common to see migrants all over nearby Croatian cities such as Osijek and Beli Manastir. It is understandable that smaller towns could not receive several thousand refugees especially those such as Beli Manastir, where about 11,000 refugees arrived in September 2015 and Beli Manastir itself counts *less* than 11,000 residents.<sup>43</sup> It soon became clear that the number of migrants arriving far exceeds Croatia's accommodation potential, and the Croatian authorities encountered a new problem.<sup>44</sup> As the Article 10 of Directive 2013/32/EU says, detention of applicants shall take place, as a rule, in specialized detention facilities. However, if a Member State cannot provide accommodation in a specialized detention facility and is therefore obliged to resort to prison accommodation, the detained applicant shall be kept separately from ordinary prisoners and the detention conditions provided for in this Directive shall apply.

This led to an increasing number of illegal crossings across the Croatian border and entry into the country. The number of people that have entered Croatia and the way they have done it, is

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<sup>36</sup> A. Osrečki, *New Media and "Arab Spring"*, Political Thought, Vol. 51, No. 3, 2014, pp. 101-122.

<sup>37</sup> J. Simić, *Rights of migrants - respect for universal human rights or the right to development*, The Security Studies Forum, Vol. 1, No. 1, 2016, pp. 75-96.

<sup>38</sup> Ibid, 75.

<sup>39</sup> J. Čapo, *The Security-scape and the (In)Visibility of Refugees: Managing Refugee Flow through Croatia*, Migration and ethnic issues, Vol. 31, No. 3, 2015., pp. 308-406.

<sup>40</sup> Ibid, p. 392-

<sup>41</sup> M. Grba-Bujević and associates: *Response of the Croatian Health System to the Migrant Crisis*, Medical Journal, Vol. 138, No. 3-4, 2016, pp. 99-103.

<sup>42</sup> Ibid, p. 101.

<sup>43</sup> <https://www.vecernji.hr/vijesti/vise-od-10000-izbjeglica-preplavilo-grad-spavaju-uz-cestu-ili-lutaju-trazeci-prijevoz-1025476> (8 May 2019)

<sup>44</sup> Čapo, *ibid*, pp. 308-406.

completely in accordance with the definition of mass influx as given in the Directive 2001/55/EC. Thus, the said directive should have been activated and because that was not the case, neither the Croatian authorities nor the Croatian police were prepared to deal with the new problems nor they knew how to behave in a given situation. Consequence of that was a major violation of human rights of migrants and refugees.

Croatian border police as a body responsible for dealing with incoming refugees should have provided them with information about the possibility of applying for international protection which was not done at all or it was not done in an adequate manner and such actions are a direct violation of article 8, section 1 of Directive 2013/32/EU. Several civil society organizations have decided to help migrants, and several initiatives have been established that regularly monitor the situation at the Croatian borders and provide assistance to migrants. The Center for Peace Studies founded the initiative "*Welcome*"<sup>45</sup>, while the Volunteer Center of Zagreb founded the initiative "*Are you Serious*".<sup>46</sup> A "*Border Violence Monitoring*" platform has also been established, which deals with research and data gathering and documenting the experiences of violence occurring at the state borders of countries affected by the refugee crisis, primarily at the Croatian borders.<sup>47</sup> The activists of these associations have repeatedly reported reports of violence and unlawful conduct at borders, which violates fundamental human rights and dignity, which is in full contradiction with all national and international obligations of Croatia.

According to the report "*Welcome*" and "*Are you Serious*" in 2017, we learned about the brutality that was happening along the Croatian border, that is, the illegal, clandestine expulsions from Croatia to Serbia committed by the Croatian police, which in most cases is accompanied by various types of violence and humiliation.<sup>48</sup> In the interview with asylum seekers in Croatia, initiatives suggest that there have been long lasting detentions in police stations without a translator, forcible signings of documents in Croatian or any other language that asylum seekers do not understand and excesses of powers leading to violent expulsion despite explicit asylum claims in Croatia which is in direct confrontation with the article 9, section 4 of European Parliament and of the Council Directive 2013/32, OJ L 180/96. Such events were accompanied by severe physical and verbal violence, *i.e.* various impulses, blows, insults, threats, mismanagement etc.<sup>49</sup> The mentioned initiatives filed two criminal reports, which resulted in the conduct of a criminal investigation, but the response from the Ministry of the Interior was always the same, *i.e.* that the allegations of the complaint were not

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<sup>45</sup> The initiative brings together more than 60 civil society organizations, one football club and over 400 volunteers who provide day-to-day support to refugees - from humanitarian aid, coordination with local organizations, as well as information to refugees about current entry and exit procedures from Croatia. He also works in the field in coordination with the Croatian Red Cross, the Asylum Coordination and the institutions.

<sup>46</sup> In addition to providing direct assistance - food, clothing, hygiene supplies, information and friendly support, we are continuously working on improving the living conditions of refugees, advocating their rights and informing the public about the state of the refugee route.

<sup>47</sup> <https://www.borderviolence.eu/about/> (8 May 2019)

<sup>48</sup> Report on Illegal and Violent Displacement of Refugees from the Republic of Croatia, *Welcome* and *Are you Serious* initiatives, 24 January 2017

<sup>49</sup> *Ibid*, p. 4.

established and that no unprofessional or illegal behavior of Croatian police officers took place against migrants.<sup>50</sup> In the meantime complaints from asylum and international protection seekers in the Republic of Croatia continue to arrive and the requests for initiatives seeking urgent cessation of illegal conduct, detailed investigations and the return of displaced migrants who continue to seek asylum in Croatia remain unfulfilled. There was a slight, but nevertheless deficient shift after the death of an Afghan girl, Madine Hosseini - the Ombudsman sent a letter to the State Attorney's Office of the Republic of Croatia, listing many irregularities and illegalities in the work of the Ministry of the Interior<sup>51</sup>.

#### 4. Hungary in crisis

The history of the refugee crisis in the European Union (later referred as „EU”) in 2015 goes back to the Arab Spring in 2011. As mentioned above, it started from Tunisia and Libya, and later refugees came from other African countries too to the EU. In 2015 refugees came in the highest number from Syria because of the spread of the Islamic State and the civil war in Syria.

The problem is a particular concern for Hungary because it is one of the countries that lies on the external border of the Schengen area. According to Eurostat data, the number of asylum applications started to increase exponentially in the European Union during the asylum crisis starting in 2011. In 2011, the number of applications was 309.000 for 4 years, and this number rose to 1.322.800, including data from the member states of the European Union. However, in 2017, 704.600 applications were registered by Eurostat, a slight decrease compared to previous years.<sup>52</sup> Such a high number of refugees has physically overwhelmed the host countries and it showed that the EU’s asylum system is wrong. The reason for the increase in the number of asylum seekers is not that the applicants wanted to stay in Hungary, as shown by the Immigration and Citizenship Office, as 97% of the incoming applications were rejected and the applicants left the country after the registration. However, the number of people who have not been registered in the country is unknown, despite the fact that the main goal of the Hungarian authorities was to register citizens whom requesting it.<sup>53</sup>

Another problem is that some countries do not apply the requirement of solidarity in connection with asylum policy (TFEU article 80.). The member states’ asylum systems have been overwhelmed and this led to some asylum seekers have been forced to wait for a long period of

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<sup>50</sup> Second Report on Illegal and Violent Displacement of Refugees from the Republic of Croatia, Welcome and Are you Serious initiatives, 7 March 2017

<sup>51</sup> <http://ombudsman.hr/hr/npm-novosti/cln/1263-pravobraniteljica-dostavila-dorh-u-sve-informacije-o-okolnostima-pogibije-madine-husseini-modulnpm> (8 May 2019)

<sup>52</sup> Asylum applications (non-EU) in the EU-28 Member States, 2008–2018. [https://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum\\_statistics0](https://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum_statistics0) (8 May 2019)

<sup>53</sup> A. Juhász & Cs. Molnár: *Magyarország sajátos helyzete az európai menekültválságban* <http://old.tarki.hu/hu/publications/SR/2016/13juhasz.pdf> (8 May 2019)

time for the decision in connection with their asylum applications. In conclusion we can say that the reform of the asylum system is necessary and inevitable.

Thanks to the Schengen Convention border control between states, which allowed member states not to proceed with the asylum procedure. It was complicated that in general the betting conditions only served to meet basic needs. It is important that applicants are accommodated in a place where they can easily access public needs. Long-term issues may also include providing food and healthcare. Another main goal of the EU's asylum policy is that the asylum applications must be judged effectively and faster because it is important that the refugees can get protection as soon as possible if it is necessary.

In 2015 Hungary had to face with a mass influx of migrants entering to the country. In 2014 July there were 1258 applications for refugee status, in 2015 July this number was 72.200.<sup>54</sup> At the same time, the Hungarian government started a politically motivated campaign against migration (it was the „national consultation”). Due to this anti-migration campaign, hungarian people started to fear from the migrants, and become hostile about the migration crisis.<sup>55</sup> It is important to emphasize that Hungary is not the final destination, migrants just simply have to go across the country to reach Austria or Germany. They do not stay in Hungary after they have been registered. The fear was not fully unfounded: because of this fact (that they do not want to stay here for a long time) these refugees left behind convulsion and atrocities.

The hungarian reaction to the refugee crisis was to close the borders. In 2015 a fence was built at the southern borders (hungarian-serbian and hungarian-croatian borders) which closes the so-called „green-border“ (the territories between the official border crossing points) and it supposed to stop the illegal migration. Moreover the Criminal Code was amended, introducing three new crimes related to crossing the border with Serbia, including: unauthorized entry into the territory “protected by the border closure,” punishable by up to 3 years imprisonment); damaging of the border closure, punishable up to 5 years imprisonment; and obstructing the construction or maintenance of the border fence, punishable by up to 3 years imprisonment.<sup>56</sup> In 2016 eight long-term immigration-related detention facilities were created: Budapest International Airport, Győr, Kiskunhalas (2), Nyírbátor (2), Békéscsaba and Debrecen.

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<sup>54</sup> Hungary Immigration Detention [https://www.globaldetentionproject.org/countries/europe/hungary?fbclid=IwAR1qMNkZeveMLSkr8iyQBd\\_mW8ZyXAvpp22jr1jg6JAus5N13CrsYyzvjik](https://www.globaldetentionproject.org/countries/europe/hungary?fbclid=IwAR1qMNkZeveMLSkr8iyQBd_mW8ZyXAvpp22jr1jg6JAus5N13CrsYyzvjik) (8 May 2019)

<sup>55</sup> T. Drinóczi – Á. Mohay: *Has the migration crisis challenged the concept of the protection of the human rights of migrants? The case of Ilias and Ahmed v. Hungary*, in: E. Kuzelewska & A. Weatherburn & D. Kloza, *Irregular Migration as a Challenge for Democracy*, Intersentia, Cambridge 2018. p. 101.

<sup>56</sup> The Hungarian Helsinki Committee's opinion on the Governments amendments to criminal law related to the sealed border [https://www.helsinki.hu/wp-content/uploads/modification-of-criminal-laws-16092015.pdf?fbclid=IwAR1pGAQBI8HslGoruC6dBKtVP6KivIH6\\_OE\\_IxSLyrsE0OMjZVi5oKGrqcw](https://www.helsinki.hu/wp-content/uploads/modification-of-criminal-laws-16092015.pdf?fbclid=IwAR1pGAQBI8HslGoruC6dBKtVP6KivIH6_OE_IxSLyrsE0OMjZVi5oKGrqcw) (May 15<sup>th</sup> 2019)

Nowadays there are only two administrative detention centres, at Tompa and Rösztke (transit zones).<sup>57</sup>

In 2015 the EU created a new asylum policy, and owing to that a decision was made to help Italy and Greece cope with the huge refugee wave (Council Decision 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece). It was about the balanced relocation of the migrants between the member states so the external countries won't be too overwhelmed.<sup>58</sup> The decree was accepted by qualified majority (however Hungary, the Czech Republic, Slovakia and Romania voted against it). The Hungarian parliament legislated the Act CLXXV of 2015 in which they rejected the quota system. In 2016 there was a referendum which asked the people of Hungary whether they want the European Union to resettle refugees in the country without the permission of the parliament. In 2017 the European Court dismissed the lawsuits of Hungary and Slovak Republic and imposed a fine.<sup>59</sup>

## 5. Conclusion

Refugee crisis is still an urgent problem and finding a solution to it is necessary and inevitable. As we can see from the statistics, there are more and more people are coming to Europe asking for asylum, and their situation will not be solved as long as they have to flee from war and as mentioned before, countries in which they came and are still coming are not fully prepared for max influx of refugees. We can see how two countries on same territory but with different leadership reacted to situation they had to face with. Both, Croatia and Hungary can't boast about the way they handled the given situation. As said before, Croatia violated several Directives while dealing with refugees and Hungary basically hid behind the wall. There are opinions that say that Hungary violate the Article 3 and 5 of the European Convention on Human Rights with its actions but from our point of view the situation is not this simple. The migration crisis equally affects refugees and the citizens of the countries they come to. While refugees are faced with inhumane conditions, maltreatment and physical, psychological abuse, citizens of EU member states are afraid because they do not know what to expect from refugees. As a result, there is an increased violation of human rights on both sides. In our opinion, long term solution for stopping those violations to happen in the future is education, providing information and sharing experiences.

The problem is very complex but we think that the EU need to cooperate with its member states and create a solution which is acceptable for the countries and protection of their culture but

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<sup>57</sup> Hungary Immigration Detention Profile,

<https://www.globaldetentionproject.org/countries/europe/hungary?fbclid=IwAR2SiEPubeGzUA5aqnS01J3 - JYBgLiXkhSpO MBV1LHG6xh-199SoNa3jM> (May 15<sup>th</sup> 2019)

<sup>58</sup> Council decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece

<sup>59</sup> Joined Cases C-643/15 and C-647/15 [EU:C:2017:631]

also the refugees' rights have to be protected and respected as they are granted both in EU and national legislation of each country.

# Analysis of the Intra-Corporate Transfer Directive

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*The present article aims to highlight the novelties and the most significant provisions of the Intra-Corporate Transfer (ICT) Directive, applicable to highly skilled Third Country Nationals (TCN) who are assigned to a Member State within the structure of a company. The Directive brought remarkable changes in respect of the rights of the intra-corporate transferees regarding their working conditions, their mobility within the EU and their family reunification, in order to compensate the lack of a qualified labour force in the European Union. The article outlines some potential issues emerging from the transposition of the Directive that may affect the achievement of the purposes of the ICT Directive.*

*Keywords: intra-corporate transfer, intra-EU mobility, labour migration, facilitated procedure, right to equal treatment, family reunification*

## **1. Introduction**

### ***1.1. Why is the issue relevant?***

As a result of demographic changes in the EU a decline in employment can be perceived since 2010. This decline was foreseeable, since the European Commission indicated it in its Green Paper, issued in 2004 on an EU approach to managing economic migration. In the Green Paper, the Commission expressed the need to review the immigration policy of the EU in the longer term.<sup>1</sup> It outlines, that between 2010 and 2030 at the immigration flow of that time, the number of employed people will fall because of the decline in the EU's working age population. The long-term demographic projections that Eurostat issued in 2005 revealed that migration will be able to counterbalance the decline of the population until 2025, but after that it will not be able to outweigh the decrease.<sup>2</sup>

Considering these facts, it is essential to admit third country nationals in order to ensure the prosperity of the EU by means of compensating the decreasing level of employment. As the Hague Programme, adopted by the European Council, stated „Legal migration will play an important role in enhancing the knowledge-based economy in Europe, in advancing economic

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<sup>1</sup> European Commission, Green paper on an EU approach to managing migration, COM/2004/0811, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52004DC0811> (5 February 2019)

<sup>2</sup> Policy Plan on Legal Migration MEMO/05/494.

development, and thus contributing to the implementation of the Lisbon strategy.”<sup>3</sup> It is quite important to establish a migration policy that secures a legal status and guarantees a set of rights for the labour migrants. Additionally, in case of a lack of a common criteria for the admission of economic migrants, third country citizens are likely to enter the EU illegally.<sup>4</sup>

## ***1.2. The background of the directive***

In order to fulfil its mandate given by the Hague Programme, in 2005 the European Commission published the Policy Plan on Legal Migration which intended to establish a common policy on economic migration.<sup>5</sup> It sketched out that the Commission plans to propose a series of legislative and operational initiatives on legal migration, however they do not contain any factual proposal concerning them.<sup>6</sup> It sought to function as a general document that sets out the instruments of the development of a consistent migration policy. The Plan consists of four sections, namely: the legislative proposals regarding the conditions of the entry and residence of TCNs, non-legislative instruments that improve access to information, facilitating integration, lastly, enhancing cooperation between the country of origin and the EU.

Regarding the legislative instruments, the Plan aimed to introduce four complementary directives regulating four different areas of labour migration. The four directives intended to regulate the entry and residence conditions of third country nationals dividing them into four categories: seasonal workers, highly qualified workers, intra-corporate transferees and remunerated trainees.

These directives are in accordance with the purposes of Article 79 TFEU which states that the EU aims to develop an immigration policy that ensures the proper management of migration flows and the fair treatment of third-country nationals residing legally in Member States.<sup>7</sup>

## **2. The aims of the directive**

### ***2.1. The importance of the directive***

In order to perceive the significance of the directive, first of all we have to define who intra-corporate transferees are. Intra-Corporate Transferees are those highly skilled third-country nationals who are employed by a multinational corporation and are temporarily sent to another country – within the company structure – to perform their jobs there. The sending

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<sup>3</sup> European Council, The Hague Programme: Strengthening Freedom, Security, and Justice in the European Union (2005/C 53/01) <https://www.easo.europa.eu/sites/default/files/public/The-Hague-Programme.pdf> (5 February 2019)

<sup>4</sup> COM/2004/0811.

<sup>5</sup> Policy Plan on Legal Migration MEMO/05/494.

<sup>6</sup> European Commission: Policy Plan on Legal Migration, (COM/2005/0669) <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3A114507> (5 February 2019)

<sup>7</sup> Treaty on the Functioning of the European Union (consolidated version), *OJ 2012 C 326/47*.

company is usually the mother company that is located in a third country and the employees are transferred to a subsidiary which can be found in the EU.<sup>8</sup> This organisation-dominated feature of ICTs is particularly important as it distinguishes ICTs from other highly skilled migrants seeking for jobs individually in the EU. The temporary relocation of managers, specialists, trainee employees has become more and more recent before the introduction of the directive due to the globalisation of business and increasing trade. It is an outstanding opportunity of gaining knowledge and new skills both for the host entities and the transferred person. The companies choosing the transfer of their employees can tap their human resources best.<sup>9</sup>

Over the past few years, intra-corporate transfer has become more frequent and the sending companies bumped into many administrative obstacles. The complexity of work permit requirements, the lack of clear schemes but also the flow of intra EU workforce made for companies difficult to transfer third-country workforce into the EU. Further difficulties were occurring in securing family reunification as well.<sup>10</sup> The directive set up many provisions in order to eliminate these drawbacks of intra-corporate transfer. These will be explained in detail in the next section.

To sum up, the main novelty of ICTD is that it covers a group of economic migrants whose rights were not protected previously by any economic migration directive. It also reduces the administrative burden on ICTs while ensuring them and their families a set of significant rights.

## **2.2. Comprehensive aims**

This section aims to summarize the aims of the directive according to its preamble although the aims are going to be explained in detail in chapter IV, V, VI. In pursuance of the preamble of the ICTD its aims are complex. It includes the reduction of administrative burden on companies and taking measures to facilitate the managers', specialists' and trainee employees' entry into the area of the EU through a framework of an intra-corporate transfer. In order to achieve an easy access to the territory of the EU the directive aims to construe a transparent and simplified procedure for admission that is based on common definitions and harmonised criteria.<sup>11</sup>

Moreover, the directive wishes to facilitate the intra-EU movement of ICTs during their transfer. They are exempt from Schengen visa obligations during their stay and they are entitled

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<sup>8</sup> P. Minderhoud & T. de Lange, *The Intra Corporate Transfer Directive: Central themes, problem issues and implementation in selected Member States*, 1st edn, Wolf Legal Publishing, Oisterwijk 2018, p. 1. [https://www.researchgate.net/profile/Tesseltje\\_De\\_Lange/publication/327542574\\_The\\_Intra\\_Corporate\\_Transferee\\_Directive\\_Central\\_Themes\\_Problem\\_Issues\\_and\\_Implementation\\_in\\_Selected\\_Member\\_States/links/5b950522299bf147392fe925/The-Intra-Corporate-Transferee-Directive-Central-Themes-Problem-Issues-and-Implementation-in-Selected-Member-States.pdf](https://www.researchgate.net/profile/Tesseltje_De_Lange/publication/327542574_The_Intra_Corporate_Transferee_Directive_Central_Themes_Problem_Issues_and_Implementation_in_Selected_Member_States/links/5b950522299bf147392fe925/The-Intra-Corporate-Transferee-Directive-Central-Themes-Problem-Issues-and-Implementation-in-Selected-Member-States.pdf) (5 February 2019)

<sup>9</sup> Directive 2014/66/EU of the European Parliament and of the Council of 15 May 2014 on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer, *OJ L 157*, 27.5.2014

<sup>10</sup> Minderhoud & de Lange, *ibid*, p. 1.

<sup>11</sup> ITCD 2014/66/EU.

to to enter stay and work in a Member State that differs from the one that issued the ICT permit without having to apply for another work permit.<sup>12</sup>

The most significant aim of the directive from the transferees' point of view is ensuring them and their family a wide set of rights. For instance, Member States have to secure that ICTs enjoy equal treatment with the nationals occupying comparable positions regarding their remuneration in order to exclude the exploitation of ICTs and also to guarantee fair competition between undertakings established in a Member State and established in a third country. Family reunification is also a priority of the directive and generally the legal migration policy of the EU in order to make the Directive more attractive. In accordance with this purpose, favourable rights are set forth regarding family members. They are entitled to join the ICTs in the area of the EU during their intra-EU movement and their access to the labour market is facilitated as well.<sup>13</sup>

These supplemental goals of the directive are part of the main aim which is expressed in the impact assessment accompanying the proposal of the Directive. The main purpose is to boost the economic competitiveness of the EU and to achieve the Goals of EU 2020 strategy. Associated with this aim there is a great need for qualified workers such as senior executives who are able to provide resources concerning skill shortages.<sup>14</sup>

### **3. The directive's scope and conditions**

#### ***3.1. To whom can it be applied?***

The directive filled a gap in the legislative instruments of the EU since ICTs were excluded from all the other EU directives on third-country migrant workers.

Article 2 (1) defines its scope as following: “it shall apply to third-country nationals who reside outside the territory of the Member States at the time of application and apply to be admitted or who have been admitted to the territory of a Member State under the terms of this Directive, in the framework of an intra-corporate transfer as managers, specialists or trainee employees.”

The directive has a specific scope since it is applicable solely to highly skilled third-country nationals who are temporarily assigned by a company to subsidiaries located in the EU. The definition of “intra-corporate transfer” outlines that the employee has to be bound by a work contract with the sending company located outside the EU prior to and during the transfer. The scope of the directive is restricted to managers, specialists and trainee employees. These

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<sup>12</sup> M. Lommers & S. Oehlers, *ICT Permit Study, Facilitating EU mobility for third-country nationals*, [https://www2.deloitte.com/content/dam/Deloitte/global/Documents/Tax/dttl-tax-ict-permit-study.pdf?fbclid=IwAR1aEaR4ePQn6F3RABHCwCVSA-mIrW9IHc\\_qQQv0MPcuZREOO8n9173Xdxw](https://www2.deloitte.com/content/dam/Deloitte/global/Documents/Tax/dttl-tax-ict-permit-study.pdf?fbclid=IwAR1aEaR4ePQn6F3RABHCwCVSA-mIrW9IHc_qQQv0MPcuZREOO8n9173Xdxw) (5 February 2019).

<sup>13</sup> Directive 2014/66/EU.

<sup>14</sup> B. Friðriksdóttir, *What happened to equality? The Construction of the Right to Equal Treatment of Third-Country Nationals in European Union Law on Labour Migration*, Brill-Nijhoff, Leiden 2017, pp. 264–307.

definitions are given in Article 3 but also Recital 13 sets out that they should be built on the specific commitments of the EU under the GATS<sup>15</sup> and bilateral trade agreements.

The directive lists six type of third-country nationals that are excluded from the scope of the directive: researchers<sup>16</sup>, TCNs who enjoy the right of free movement under an agreement<sup>17</sup>, posted workers<sup>18</sup>, self-employed workers<sup>19</sup>, TCNs who are assigned by agencies<sup>20</sup> and students<sup>21</sup>. In contrary to the Posted Workers Directive the meaning of “worker” is not defined thus the definition of the ECJ shall be applied. The ECJ defines a worker as a person who pursues economic activities which are real and genuine.<sup>22</sup> Considering the main features of an employment relationship which are the following: a person performs services for and under the direction of another person, in return for which the direction of another person, in return for which the employee receives remuneration it can be set apart from self-employment.

### ***3.2. Under which conditions can it be applied?***

Article 5 of ICTD governs the conditions of the admission of intra-corporate transferees. The requirements – aside from those explained in the frames of the scope of the Directive – are hereunder briefly set out: proof of an immediate preceding employment with the undertaking outside the EU<sup>23</sup>, proof of the sending entity and the host entity belonging to the same undertaking/group of undertakings<sup>24</sup>, proof of professional qualifications and experience<sup>25</sup>, proof of the details of the assignment in particular some conditions<sup>26</sup>, proof of valid travel document and if required a visa and a sickness insurance if required.<sup>27</sup>

However, the duration of the preceding employment depends on the decision in each Member State, it is limited. The limit is from three up to twelve uninterrupted months in case of managers and specialist while a three to six months uninterrupted period is required regarding trainee

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<sup>15</sup> 1995 General Agreement on Trade in Services.

<sup>16</sup> Directive 2014/66/EU, Art. 2 (2) (a).

<sup>17</sup> Directive 2014/66/EU, Art. 2 (2) (b).

<sup>18</sup> Directive 2014/66/EU, Art. 2 (2) (c).

<sup>19</sup> Directive 2014/66/EU, Art. 2 (2) (d).

<sup>20</sup> Directive 2014/66/EU, Art. 2 (2) (e).

<sup>21</sup> Directive 2014/66/EU, Art. 2 (2) (f).

<sup>22</sup> See recently e.g. Case C-22/08 Vatsouras and Koupatantze [EU:C:2009:344], para 26., or Case C-46/12 L. N. v. Styrelsen for Videregående Uddannelser og Uddannelsesstøtte [EU:C:2013:97], para. 39.

<sup>23</sup> Directive 2014/66/EU, Art. 5 (1) (a).

<sup>24</sup> Directive 2014/66/EU, Art. 5 (1) (b).

<sup>25</sup> Directive 2014/66/EU, Art. 5 (1) (d).

<sup>26</sup> Directive 2014/66/EU, Art. 5 (1) (c).

<sup>27</sup> Lommers & Oehlers, *ibid.*

employees.<sup>28</sup>The purpose of this criteria is to ensure that the skills of the intra-corporate transferee are specific to the host entity.<sup>29</sup>

Belonging to the same undertaking follows from the nature of intra-corporate transfer.

Regarding the fact that the conditions of the employment have a great importance in the implementation of the Directive, information such as the duration of the transfer, the remuneration, the location of the host entity and the return to the third country of the transferee has to be ensured in written form in the work contract.<sup>30</sup>

Additionally, proof that the transferee has a health insurance in the concerned Member State, but if not so the application has already been serviced, is required. The insurance must cover all the arising risks which are covered for nationals in the normal case. The same applies for the periods in which the employees are not entitled to such insurance or other benefits regarding their work carried out in the Member State in question.<sup>31</sup>

Article 5 4(a) stipulates that the conditions, laid down in the legislative instruments of the host State, which are applicable to posted workers such as instruments concerning maximum work periods and minimum rest periods, minimum number of paid annual holidays, minimum rates of pay should be met during the transfer.<sup>32</sup> Recital 15 confirms that the Directive aims to provide the same employment conditions to ICTs that are provided to posted workers except for remuneration

As mentioned above, remuneration is exempt from the provisions applicable to posted workers, since ICTs shall be granted a remuneration that is not less favourable than the one granted to nationals occupying comparable position in the Member State where the work is carried out.<sup>33</sup>

The provisions of Article 5(4)(a) and (b) are just obligation towards Member States to examine these conditions while considering a request for admission. However, these rights are not guaranteed as individual rights. On the other hand rights laid down in Article 18 are considered as individual rights.<sup>34</sup>

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<sup>28</sup> Directive 2014/66/EU, Art. 5 (1) (b).

<sup>29</sup> Directive 2014/66/EU, Recital (16).

<sup>30</sup> E. Guild, *Intra-corporate Transferees: Between the Directive and the EU's international obligations*, in Minderhoud & de Lange, *ibid*, p. 38.

<sup>31</sup> Directive 2014/66/EU, Art. 5 (1) (g).

<sup>32</sup> Directive 96/71/EC of the European Parliament and of the Council concerning the posting of workers in the framework of the provision of services *OJ 1996 L 18/1*, Article 3 (1)

<sup>33</sup> Directive 2014/66/EU, Art. 5 (4) (b).

<sup>34</sup> H. Verschueren, *The Role of Employment and Social Security Rights in the Intra-Corporate Transfer Directive*, in Minderhoud & de Lange, *ibid*, p. 40.

## 4. Transparent and simplified procedure for admission

The following section intends to outline the main features of the application procedure, the permit and the procedural safeguards of the Directive while highlighting the potential issues regarding a few provisions.

### 4.1. Questions connected to the application procedure

One of the aims of the Directive is to establish a simplified and transparent admission procedure for ICTs. In the frame of the procedure, Member States can decide whether they require the host entity or the transferee to submit the application for the permit. The Directive prescribes that the application has to be submitted when the applicant resides outside of the territory of the Member State to which the admission is sought. In case of an ICT permit the application has to be submitted at a stage when the transferee is still residing outside the territory of the EU. In case of a long-term mobility the application can be submitted from the territory of the EU but from outside the territory of the Member State to which the long-term admission is sought<sup>35</sup> and it can also be submitted from the territory of the second Member State if the applicant is already staying there.<sup>36</sup> Furthermore, the ICT permit has to be submitted to the authority of the Member State in which the transferee stays in the first place, unless it is not the one where the longest overall stay should occur.<sup>37</sup> The aim of this provision is to eliminate that the applicants choose the Member State on the basis of easier admission conditions instead of the actual needs circumventing the rules of admission of a Second Member State through intra-EU mobility rights.<sup>38</sup>

Regarding the purpose of the directive, the Member State issuing the ICT permit qualifies as the first Member State even in the case where the transferee commences its work in another Member State (the second Member State for the purpose of the Directive) to which the transferees entitled to due to their intra-EU mobility rights.<sup>39</sup>

It is also a significant provision of the Directive that the applicant is entitled to lodge an application in a single application procedure.<sup>40</sup>

There is an option for Member States while transposing the Directive to introduce simplified procedures to entities or (group of) undertakings that have been recognized for that purpose by the Member States according to their regulations. The simplification can manifest in an ease of

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<sup>35</sup> Directive 2014/66/EU, Art. 22 (2) (c).

<sup>36</sup> Directive 2014/66/EU, Art. 22 (2) (e).

<sup>37</sup> Directive 2014/66/EU, Art. 11 (3).

<sup>38</sup> F. Lutz, *Transposition of the ICT Directive 2014/66/EU: Perspective of the Commission*, in Minderhoud & de Lange, *ibid*, p. 24.

<sup>39</sup> *Ibid*.

<sup>40</sup> Directive 2014/66/EU, Art. 11 (5).

the presentation of some evidence required<sup>41</sup>, or in a faster admission procedure and issue of ICT permits or long-term mobility permits as well as in a facilitated visa require procedure.

#### ***4.2. Duration and the renewability of the permit***

The upper limit of the duration of the transfer is three years for managers and specialists and one year for trainee employees.<sup>42</sup> Once the duration expired, the transferee is obliged to leave the territory of the EU except for the case if they obtain a residence permit on an other basis under EU or national law. A lower limit has not been set up for the duration of the permit, however it should not be forgotten that the Directive is applicable for stays of more than 90 days.<sup>43</sup> While Member States are empowered to establish a more favourable framework than laid down in the Directive, the minimum length is binding.<sup>44</sup> Member States can decide if they require a maximum of 6 months period to elapse between the end of the maximum duration of a transfer and another application submitted by the same third-country national to the same Member State.<sup>45</sup> These provisions intend to ensure the temporary nature of such assignments of ICTs. The transposition of this provision varies. Some countries decided for the longest period applicable (for example Germany, the Netherlands) while others chose a shorter period of time to be elapsed (Austria, Italy).

Another key feature of ICT Directive is that Member States are precluded from introducing other permits, particularly work permit. Indeed, except for the case of the Blue Card Directive, this scheme replaces any existing national schemes, which is essential for the harmonization of the intra-corporate transfers.<sup>46</sup>

#### ***4.3. Procedural safeguards***

Article 15(1) stipulates that the competent authorities of the concerned Member State shall decide on the application for an ICT permit or its renewal and notify the applicant in writing as soon as possible. The notifying period cannot exceed 90 days from the date the application was submitted.

The restricted length of the decision on the ICT permit application is a crucial factor regarding the efficiency of the Directive. Multinational companies operate in a highly dynamic environment therefore it is inevitable to react to their needs fast. Most of the national regulations are compliant with this requirement, for instance according to the transposition it takes a

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<sup>41</sup> In Art. 5, or in point (a) of Art. (22).

<sup>42</sup> Directive 2014/66/EU, Art. 12 (1).

<sup>43</sup> Directive 2014/66/EU, Art. 1 (a).

<sup>44</sup> F. C. Roda, *Light and Dark Aspects of the Legal Framework of Intra-Corporate Transfers in Spain*, in Minderhoud & de Lange, *ibid*, p. 130.

<sup>45</sup> Directive 2014/66/EU, Art. 12 (2).

<sup>46</sup> L. Brieskova, *Rights, Mobility and Integration of Intra-corporate Transferees in Europe: The Case of Slovakia and England*, Oxford Brookes University, Oxford, 2017, p. 105.

maximum of 8 weeks in Austria, 13 weeks in Bulgaria and 30 days in Croatia for the authorities to decide on the ICT permit application. Usually the decision is made in 90 days but obtaining the actual work and residence permit often exceeds this period. Moreover, exceeding the 90 days issuing period can be problematic since ICTs are not entitled to enjoy their intra-EU mobility rights without their permit, they can only rely on their passport or visa which means that they can not travel a longer period than 90 days within the Schengen area.<sup>47</sup> The so-called "accredited sponsorship" scheme can be beneficial to companies since they are eligible to a fast-track admission procedure, the applicant can be exempted from presenting some evidence required and a facilitated visa require procedure.<sup>48</sup> The application of this scheme is not obligatory, it is only optional therefore only few countries are applying it additionally.

## 5. Intra-EU mobility

### 5.1. A unique regime

One of the essential features of the ICT Directive is the possibility it offers to the ICT and in terms of mobility within the EU. As stated by recital 25 this directive aims at facilitating the mobility of ICTs within the Union and at reducing the administrative burden connected to work assignments in several Member States. For this purpose, this directive sets up a specific intra-EU mobility scheme.<sup>49</sup>

Under Article 20 third-country nationals who are in possession of a valid intra-corporate transfer permit, issued by the First Member State and a valid travel document, are allowed to enter, stay and work in one or more Member States under the conditions of short-term<sup>50</sup> or long-term<sup>51</sup> mobility.

The intra-EU mobility provisions of the Directive will lead to a significant and unique development in comparison with national systems which do not enable for transferees to work in subsidiaries established in other Member State. By introducing the ICTD this became possible on the basis of the first residence permit and of an additional document listing the entities of the group undertakings in which the transferee is entitled to work.<sup>52</sup> Since free mobility within the EU is a privilege of EU nationals and third-country nationals are required a five year long permanent residence – nevertheless obtaining permanent residence status is subject to many conditions – in order to enjoy such rights, this scheme qualifies as a remarkable development.<sup>53</sup> As it can be seen this scheme qualifies as a remarkable development correlate to the existing rules. Following from the abovementioned restricted opportunities for intra-EU

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<sup>47</sup> J. Antoons & A. Ghimis & C. Sullivan, *ibid*, p. 78.

<sup>48</sup> Directive 2014/66/EU, Art. 11 (7).

<sup>49</sup> H. Verschueren, *ibid*, p. 42.

<sup>50</sup> Directive 2014/66/EU, Art. 21.

<sup>51</sup> Directive 2014/66/EU, Art. 22.

<sup>52</sup> Á. Tóttós, *Negotiations in the Council*, in Minderhoud & de Lange, *ibid*, p. 13.

<sup>53</sup> Brieskova 2017, *ibid*, p. 105.

mobility, it became obvious during negotiations within the Council that a new autonomous regulation has to be adopted in order to fit the needs of ICTs.<sup>54</sup>

### ***5.2. Short-term mobility***

Under the rules of short-term mobility, ICTs, holding a valid ICT permit, issued by the first Member State, are entitled to stay in any second Member State and work for their company's subsidiary for a period not succeeding 90 days in any 180-day period per Member State, if the transferee meets the conditions laid down.<sup>55</sup> Under Article 21 of the Directive there are two possibilities for implementing mobility provisions: the mobility can happen under a "no procedure" requirement or under a 'notification procedure'. The second Member State can require the host entity of the first MS to notify the authorities of the first and second MS of the mobility. The second may require the notification to include the transmission of certain, which were transmitted to the first MS in accordance with Article 5(1)(c). The second Member State may object to the move of the ICT to its territory within 20 days from the date it received the notification, when the conditions set out in Article 5(4)(b) are not complied with. If the second Member State objects and the mobility has not started yet, the ICT can be prohibited to work in the second Member State. However, if the mobility has started, in certain circumstances the ICT can be requested to cease work and leave the territory. Article 5(4)(b) obliges the Member States to require that the remuneration granted to the third-country nationals during the entire transfer is not less favourable than the remuneration granted to nationals of the Member State where the work is carried out occupying comparable positions.

### ***5.3. Long-term mobility***

Member States have two options to choose from while implementing the procedure for long-term mobility: they can apply the same procedures as for the short-term mobility, or a specific procedure for long-term mobility – application for long-term mobility permit submitted to the second Member State.<sup>56</sup> If the second Member State opts for an application procedure of long-term mobility, Article 22(2) allows that second Member State to require the applicant to submit a work contract and, if necessary, an assignment letter, as provided for by Article 5(1)(c) as well as evidence of having, or having applied for, sickness insurance, as provided for in Article 5(1)(g). The second Member State may reject an application for long-term mobility when the criteria of the employment conditions, the remuneration as well as the sufficient income requirements of the ICTs are not met (Article 22(3)(a)). Decision on the application will be made within 90 days and the ICT can stay and work there, under certain conditions, until the

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<sup>54</sup> Töttös, *ibid*, p. 14.

<sup>55</sup> Directive 2014/66/EU, Art. 21 (1).

<sup>56</sup> Directive 2014/66/EU, Art. 22 (1).

decision is made, without being subject to visa.<sup>57</sup> If the Member State takes a positive decision on the application, it issues a permit for long-term mobility.

Application for long-term mobility and for short term mobility can not be lodged in line.<sup>58</sup> The aim of this provision of ICTD is to prevent the circumvention of the distinction between short and long-term mobility. In case of a positive decision, a permit for long-term mobility is issued that allows transferees to stay and work in the second Member State.

## **6. Set of rights provided by ICTD**

### ***6.1. Right to equal treatment***

Under Recital 15 of ICTD ICTs should benefit from at least the same terms and conditions of employment as posted workers –unless the remuneration- such as maximum work periods or safety at work. It means that these conditions will be determined by the laws of the country of origin.<sup>59</sup> Member States should require that ICTs enjoy equal treatment with nationals occupying comparable positions as regards the remuneration which will be granted during the entire transfer. Each Member State should be responsible for checking the remuneration granted to the ICTs during their stay on its territory. The aim of these provisions is to protect workers and guarantee fair competition between undertakings established in a Member State and those established in a third country. It ensures that companies established in a third-country will not be able to benefit from lower labour standards. Remuneration, employment conditions and sickness coverage play a significant role in the implementation of the criteria for admission, since once these conditions are not met, it can be ground for refusal, withdrawal or non-renewal of an ICT permit. However, these provisions do not qualify as individual rights, they only oblige the Member States.

Article 18 grants individual rights to ICTs, moreover, under Article 4 of the ICT Directive Member States are not prohibited to introduce in their national legislation more rights than the rights the transferee can draw directly from the equal treatment provisions in Article 18.

It has to be mentioned that the remuneration appears in Article 5 (Criteria for Admission), instead of Article 18 (Right to Equal Treatment). That means that ICTs are given equal treatment with EU nationals regarding salary by putting this as an admission criterion but not an individual right as the other working conditions.<sup>60</sup>

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<sup>57</sup> Brieskova, *ibid*, p. 107.

<sup>58</sup> Directive 2014/66/EU, Art. 22 2 (e).

<sup>59</sup> L. Brieskova: *The new Directive on intra-corporate transferees: Will it enhance protection of third-country nationals and ensure EU competitiveness?*

<http://eulawanalysis.blogspot.com/2014/11/the-new-directive-on-intra-corporate.html> (17 February 2019).

<sup>60</sup> Brieskova 2014, *ibid*, p. 111.

Besides remuneration, another important segment of equal treatment between ICTs and nationals concerns the branches of social security in particular benefits related to sickness, invalidity and old age.<sup>61</sup> According to Recital (38), adequate social security coverage for ICTs and benefits for family members is important for ensuring proper working and living conditions therefore equal treatment should be granted under national law. Also, Member States can also decide not to grant family benefits to ICTs who stay less than 9 months in the EU.

Article 18 (2)(a) and (b) of the ICTD also establish a list of rights for ICTs regarding freedom of affiliation to a trade union, recognition of diplomas, and access to public goods and services, except housing.

## ***6.2. Provisions concerning family reunification***

Significant provisions are introduced in the ICTD regarding the rights of family members of ICTs. The purpose of it was to remove an important obstacle to accept an assignment in the EU, meaning that the family members of ICTs will be able to accompany the ICTs at the start of their assignment, if they apply at the same time. Moreover, the labour market is accessible also for the family members of ICTs. ICTs' family members unlike EU nationals' family members, need a permit in order to accompany the ICTs. ICTs, similarly to Blue Card holders, enjoy some favourable conditions for family reunification. Its aim is to facilitate intra-corporate transfers to the EU, and thus contribute to the EU's economic competitiveness. Family reunification is an outstanding area of the Directive. ICTs' and their families' right to family reunification is covered by the Family Reunification Directive<sup>62</sup>, subject to the derogations from it governed by the ICTD.<sup>63</sup>

There are several favourable conditions regarding family reunification. Firstly, ICTs do not need to have a reasonable prospect of obtaining the right to permanent residence and have a minimum period of residence to be able to bring family with them. Secondly, the integration measures referred to in the Family Reunification Directive, for example the language and civic tests (or courses) can be applied by the first Member State only after the family reunification was granted.

Thirdly, the first Member State must grant residence permits to family members within three months, however under the Family Reunification Directive it takes nine months and six months under the Blue Card Directive, from the date of the application.

Lastly, spouses enjoy immediate access to labour market in the host Member State.

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<sup>62</sup> Council Directive 2003/86/EC of 22 September 2003 on the Rights to Family Reunification, *OJ 2003 L 251/12*.

<sup>63</sup> Brieskova 2014, *ibid*, p. 113.

As it can be seen numerous favourable provisions are set up regarding the rights of family members in order to make the ICT more attractive to the potential transferees.<sup>64</sup>

## **7. Assessment and potential issues of the Directive**

### ***7.1. General assessment of the Directive***

By creating this new EU immigration scheme, the ICT Directive brings more certainty, in certain aspects, for economic actors. A quite positive development is that now all EU countries will have an ICT permit, whereas before the Directive only 14 Member States had such a permit. This makes the EU more transparent and predictable for companies regarding immigration. Moreover, the ICT permit increases efficiency, as it creates a combined work and residence permit which was not necessarily the case before its introduction. The duration of the application procedure has also been significantly reduced in several countries.

However, the harmonizing effect of the EU ICT Directive is still quite limited. Although most EU countries eliminated their parallel national schemes – which was supposed to result in more harmonization between the Member States – our practical experience shows that companies are still dealing with many variables because national administrations have adapted their schemes to the specificities of their job markets.<sup>65</sup> While challenging, these variables can nevertheless create opportunities for strategic immigration planning. What remains to be seen is whether these opportunities will become more apparent to companies, or if business operators will continue to focus on limitations in the individual Member States.

According to some opinion, the Intra-Corporate Transfer Directive is beyond any doubt a unique and valuable piece of legislation in the European migration landscape that contributes to a major change in the EU's and Member States' economic migration policies. This Directive can prove how important is to establish EU-wide schemes and their added value compared to purely national ones. As a consequence, the ICT Directive could a huge shift to the entire European labour migration policy. According to others, who present a more negative appoint of view for example Löriges in his comment<sup>66</sup> on the Directive: “Due to its restricted scope, the overall impact of this Directive will be rather limited. In addition, its effects might be further diminished by its considerable complexity which reduces the attractiveness of the rules and raises doubts whether the Directive will indeed be able to enhance the number of intra-corporate transfers significantly. However, the Directive might play an important role in the further development of intra-EU mobility for third country nationals due to its flexible mobility scheme which is independent from the Schengen regime.” It is not possible yet to verify or falsify these statements.

The fact that nine Member states opted for the non-bureaucratic ‘no procedure’ requirement for

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<sup>64</sup> Ibid, p. 114.

<sup>65</sup> Antoons & Ghimis & Sullivan, *ibid*, p. 83.

<sup>66</sup> Cf. H. Löriges: *Intra-Corporate Transfer Directive 2014/66/EU ICT Directive*, in K. Hail- Bronner, D. Thym, *EU Immigration and Asylum Law – A Commentary*, 2nd edition, C.H. Beck, München 2016.

short term mobility even though they could have chosen the heavier notification procedure, may be taken as a positive signal. A significant number of Member States also provided for deadlines for taking a decision which are shorter than the maximum of 90 days prescribed by Article 15(1). It also appears that in many cases Member States did not opt for the less burdensome options available in the Directive:

Only a limited number of Member States seem to have used the option to set up simplified procedures for entities or groups of undertakings which have been recognized for that purpose.

Most Member States seem to have opted for requiring a cooling off period. Sometimes this choice appears to be in contradiction with the wish, expressed by the same Member States, to allow for periods of stay of ICTs exceeding the maximum periods of three years (for managers and specialists) or one years (for trainee employees).

Maybe the positive reception of the directive by economic operators and the fact that – so far – no complaints were received by the Commission may be taken as a signal for justifying a positive assessment. But it cannot be excluded either that a number of problems have not surfaced yet. The first application report, due in November 2019, will tell more.<sup>67</sup>

## **8. Summary**

As the present study highlighted it, the Intra-Corporate Transfer Directive introduced several outstanding developments in the area of legal migration in the EU, such as the unique scheme of intra-EU mobility, the facilitated procedure of entering the Union, or the significant rights concerning transferees and their family. In the view of the above, it is not certain yet, to what extent the implementation of the Directive is going to realize the aim of a facilitated and a less burdensome procedure. It is also questionable if the equal treatment and the integration of ICTs is going to be achieved easily.

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<sup>67</sup> Lutz, *ibid*, p. 33.

# Measures Towards a Common Asylum Framework within the European Union with the Aim to Tackle the Asylum Crisis of 2015

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*This paper will present the Decision of the Council of EU 2015/1601 of 22 September 2015 on the introduction of provisional measures in the field of international protection in favor of Italy and Greece and the main provisions which it prescribes. The emphasis will certainly be on the lawsuit against the Decision brought by the Slovak Republic and Hungary before the Court of Justice of the European Union, their lawsuits and ultimately the opinion of the Court and its judgment on the case. In his opinion, independent lawyer Yves Bot raises the question of whether behind what is called the 'migration crisis 2015' is the crisis of the whole European integration project based on the solidarity and mutual assistance of the Member States?*

*Keywords: asylum crisis, European Union, Slovak Republic, Hungary, Dublin Regulation, Common European Asylum System*

## 1. Introductory remarks

By the end of 2014 and early 2015, we have witnessed the mass influx of third-country nationals who need international assistance and protection in the area of Europe and the European Union<sup>1</sup>. This was caused by frequent disasters and numerous conflicts in the Middle East and in the African countries that have a Mediterranean coast, as well as poor living and economic conditions.<sup>2</sup>

From the unification of European integrations, a common economic and political union, a supranational character and as a unique international organization with the powers delegated exclusively by the Member States to treaties to Union institutions, was attempted. The Treaty of Amsterdam, which entered into force in 1999, jurisdiction in the field of freedom, security and justice is divided between the institutions of the European Union and the Member States. This area was created to ensure the free movement of persons and provide a high level of security for the citizens of the Union. It also includes asylum and immigration policies and the fight against crime. These two policies played a key role in the times of migration crisis and brought the Union's institutions as well as the member states to completely new situation. Given the border openness, the Schengen Agreement and the ease of movement of people within the

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<sup>1</sup> [https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Asylum\\_statistics](https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Asylum_statistics) (20 March 2019).

<sup>2</sup> J. Park: *Europe's Migration Crisis*, Council on Foreign Relations, New York 2015.

Union, the goal of most asylum seekers was to reach the nearest EU member state and to continue to other countries, predominantly in Germany and Scandinavia. Because of the border in the Mediterranean and the already established immigration routes, Italy and Greece have become the first countries on the route of third-country nationals. In response to the crisis situation and the assistance of these two countries, EU institutions have adopted a Decision on the introduction of temporary measures in the field of international protection in favor of Italy and Greece.

## **2. Decision of the EU Council 2015/1601 of 22 September 2015.**

The EU Council Decision 2015/1601 of 22 September 2015 on the introduction of provisional measures in the field of international protection in favor of Italy and Greece was issued in response of the European Union institutions to the migration crisis which, at the end of 2014 and early 2015, affected Europe, countries whose borders are in the Mediterranean. Due to current instability and conflict in the immediate neighborhood of Italy and Greece, the two states have been particularly exposed to the unaddressed inflow of migrants, including the applicants for international protection whom it is indisputably necessary. All of these points to the need for solidarity with Italy and Greece and to supplement the previous measures with temporary measures in the area of asylum and migration.<sup>3</sup>

The adoption of the Decision itself preceded the adoption of various concrete measures of solidarity in favor of the most advanced Member States. At a joint meeting of Ministers of Foreign Affairs and Home Affairs, on 20 April 2015, the Commission presented a ten-point plan on direct action to be taken in response to this crisis, including an obligation to consider the possibility of urgent relocation.<sup>4</sup> Since then, the European Council has decided to strengthen internal solidarity and accountability, and in particular has called for increased urgent assistance and help to the most deprived Member States - Italy and Greece and to consider the possibility of voluntary relocation among member states on a voluntary basis and to deploy teams of the European Asylum Support Office (EASO) in the most complex states.<sup>5</sup>

The European Parliament, in its resolution, also stressed the need for the Union to respond to Mediterranean tragedy based on solidarity and fair division of responsibility and to step up efforts in this area vis-à-vis those Member States that accept the largest number of refugees.<sup>6</sup> Especially emphasized needs are addressed to the most advanced Member States to step up their efforts to establish measures to deal with the flows of mixed migration at the external

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<sup>3</sup> [https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/20171114\\_relocation\\_eu\\_solidarity\\_between\\_member\\_states\\_en.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/20171114_relocation_eu_solidarity_between_member_states_en.pdf) (21 March 2019).

<sup>4</sup>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, 13 May 2015, COM (2015) 240.

<sup>5</sup> EU Council Decision 2015/1601 of 22 September 2015, OJ L 248/80

<sup>6</sup> Joined Cases C-643/15 and C-647/15, Slovakia and Hungary v. Council, [2017] ECR 631

borders of the European Union. These measures should protect the rights of those who need international protection while at the same time preventing illegal migration.

On 9 September 2015, the Commission filed, pursuant to Article 78 III of the Treaty on the Functioning of the European Union, the proposal of the Council on the introduction of provisional measures in the field of international protection in favor of Italy, Greece and Hungary. In addition, pursuant to Article 78 II e) of the Treaty on the Functioning of the European Union, and the Proposal for a Regulation of the European Parliament and of the Council on the establishment of a crisis-management mechanism and a proposal to amend Regulation 604/2013 of the European Parliament and of the Council of 26 June 2013.<sup>7</sup>

The Commission's initial proposal foresees the transfer of 120 000 applicants for international protection from Italy (15 600 persons), Greece (50 400 persons) and Hungary (54 000 persons) to other Member States. The annex to that proposal contained three tables, each of these three Member States being distributed among the other Member States in the form of shares established for each of these host Member States. The proposal was passed to national parliaments on 13 September 2015

### **3. Judgment of 6 September 2017 - Joined Cases C-643/15 and C-647/15 Slovakia and Hungary against the Council of the European Union**

In response to the migration crisis that affected Europe in the summer of 2015, the Council of the European Union adopted a decision in order to help Italy and Greece deal with the massive inflow of migrants.

The decision provides for the relocation from those two Member States to other EU Member States, over a period of two years, of 120 000 persons in clear need of international protection. The contested decision was adopted on the basis of Article 78 III TFEU, which provides that “in the event of one or more Member States being confronted by an emergency situation characterized by a sudden inflow of nationals of third countries, the Council, on a proposal from the Commission, may adopt provisional measures for the benefit of the Member States concerned. It shall act after consulting the European Parliament”. Slovakia and Hungary which, like the Czech Republic and Romania, voted against the adoption of the contested decision in the Council, have asked the Court of Justice to annul the decision. The Court dismisses in their entirety the actions brought by Slovakia and Hungary.

First, the Court rejects the argument that a legislative procedure 3 should have been followed because Article 78 III TFEU provides that the European Parliament is to be consulted when a

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<sup>7</sup> Ibid.

measure based on that provision is adopted. The Court notes in this regard that a legislative procedure can be followed only where a provision of the Treaties expressly refers to it.

As Article 78 III TFEU does not contain any express reference to a legislative procedure, the contested decision could be adopted in a non-legislative procedure and is consequently a non-legislative act. The Court holds in that connection that Article 78 III TFEU enables the EU institutions to adopt all the provisional measures necessary to respond effectively and swiftly to an emergency situation characterized by a sudden inflow of displaced persons.<sup>8</sup>

The Court considers that the relocation mechanism provided for by the contested decision is not a measure that is manifestly inappropriate for contributing to achieving its objective, namely helping Greece and Italy to cope with the impact of the 2015 migration crisis.<sup>9</sup>

The Court considers that the relocation mechanism provided for by the contested decision is not a measure that is manifestly inappropriate for contributing to achieving its objective, namely helping Greece and Italy to cope with the impact of the 2015 migration crisis. In that regard, the legality of the decision cannot be called into question on the basis of retrospective assessments of its efficacy.<sup>10</sup> Where the EU legislature must assess the future effects of a new set of rules, its assessment can be challenged only where it appears manifestly incorrect in the light of the information available to the legislature at the time of the adoption of the rules in question.<sup>11</sup> That is not the case here, given that the Council carried out, on the basis of a detailed examination of the statistical data available to it at the time, an objective analysis of the effects of the measure on the emergency situation in question.<sup>12</sup>

#### **4. The reform of the Dublin Regulation as a measure to tackle the asylum crisis**

The European Commission created a proposal for tackling the current asylum crisis. This proposal has four priorities which must be acquired in order to effectively deal with the massive influx of third country nationals into EU member states. These four points are the following: improving the Common Asylum System including reforming the Dublin Regulation<sup>13</sup>, creating joint border management, combating crime related to migration<sup>14</sup> and cooperation with third countries that also have interest in tackling the asylum crisis. This paper concentrates on the

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<sup>8</sup> Joined Cases C-643/15 and C-647/15, *Slovakia and Hungary v. Council*, [2017] ECR 631

<sup>9</sup> *Ibid.*

<sup>10</sup> *Ibid.*

<sup>11</sup> *Ibid.*

<sup>12</sup> *Ibid.*

<sup>13</sup> The CEAS consists of a number of directives and the Dublin Regulation. This framework directs the reception, qualification and the status of asylum-seekers in member states of the European Union.

<sup>14</sup> Namely smuggling of persons within and outside of the European Union.

first point, improving and achieving a truly centralised Common European Asylum System (CEAS) by reforming the Dublin Regulation.

#### ***4.1. Reasons of the reform***

The Dublin System was created in 1990 with the Dublin Convention signed and created by member states of the European Communities.<sup>15</sup> The importance of drafting this agreement lies in the Schengen Agreement thanks to which internal border management in the Communities was formulated. According to the Schengen Agreement passengers don't need to check their identification crossing the inner borders. As it was already mentioned above this makes it possible for asylum seekers to apply for international protection in member states they desire. The Dublin Regulation operates with a system to appoint the member state which is responsible for processing the claim of an asylum seeker in order to disable forum-shopping or asylum-lottery.

It is of great importance in connection with improving CEAS to come up with new regulation for the previous Dublin Regulation. There are some big omissions in the current regulation. First and foremost the Dublin System is not able to even out the weight of processing asylum claims between member states since the regulation is formulated in a way which puts the most pressure on member states bordering the European Union.<sup>16</sup>

The system in almost all cases puts this responsibility on the state in which the asylum seeker first entered the territory of the EU. There is only one exception to this rule which has priority above all other criteria: the unification of families.<sup>17</sup> In practice this means that in the first place the member state responsible for processing the asylum claim is the one in which the asylum seeker's family members reside however if there is no family member in any member state then the responsibility shifts to the member states in which the asylum seeker first entered the EU.<sup>18</sup>

It is worth mentioning that the Dublin System does have a solidarity clause which makes it possible for member states to voluntarily take the responsibility for processing the asylum claims that must be processed by another member state in the situation when the asylum systems of the other member states are overwhelmed.<sup>19</sup> However the asylum crisis showed that this solidarity clause cannot provide a solution for mass influx of refugees since member states who are not primarily responsible for the processing of asylum claims were not eager to accept

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<sup>15</sup> J. Mitchell: *The Dublin Regulation and Systemic Flaws*, San Diego International Law Journal, Vol. 18, No. 2, 2017, p. 300.

<sup>16</sup> Ibid., p. 318.

<sup>17</sup> Zs. Horváth & Á. Mohay & A. Pánovics Attila & E. Szalayné Sándor, *Európai Közjog 2.*, PTE ÁJK, Pécs 2016, p. 193.

<sup>18</sup> [https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/background-information/docs/20160406/factsheet\\_-\\_the\\_dublin\\_system\\_en.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/background-information/docs/20160406/factsheet_-_the_dublin_system_en.pdf) 21 (21 March 2019).

<sup>19</sup> The current regulation has a mechanism built in to foresee crises. The article drawn up for this mechanism contains the requirement for solidarity which can be realized with voluntary transfers of asylum claims from one Member State to another. See: OJ L 180/31

transfers of asylum seekers based on the Dublin Regulation. This was the reason for introducing the temporary measures of resettlement and relocation of refugees in other member states.<sup>20</sup>

#### ***4.2. The proposed reform of the system***

The reform of the Dublin System revolves around these problems while the aim of the system remains the same: appointing the member state which is responsible for processing the asylum claim of the refugee. However it is clear that the regulation in its current form can not equalize the pressure on member states.<sup>21</sup> The proposed short-term solution for this is the creation of a correctional mechanism which was created by the European Commission.<sup>22</sup> The proposal operates with a correctional key that is determined for every member states with regard to their GDP and demography. This key must be applied to all asylum claims a member state is processing at the moment. Then the correctional mechanism itself would trigger if the member state had to process 50% more claims than it was designated with the correctional key.<sup>23</sup> Instead other member states would have to take responsibility for asylum seekers in this situation. This means that the mechanism of the relocation scheme would be introduced in a directive. On the other hand the proposal provides the possibility for member states to deny the transfer of asylum claims in return for financial support for member states taking responsibility.<sup>24</sup>

This measure could very well have the potential to solve one of the core problems of the asylum crisis which is the lack of solidarity between member states. In the current situation there are many member states that do not want to deal with refugees. Their intention is realized by the Dublin Regulation. This is reason for introducing the possibility to deny transfers in turn of financial support. This measure may be able to increase solidarity between member states.

The European Commission also drafted a long-term proposal for the Dublin System. According to this proposal the system would become completely centralized on the long run which would replace the asylum systems of member states for one common system of all the EU which would contribute to establishing a centralized Common European Asylum System.<sup>25</sup> In this system the European Asylum Support Office would become a first-instance decision-making agency with headquarters in every member state. The EASO would take over processing asylum claims from authorities of member states. It is easy to see that sufficient harmonization of the asylum

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<sup>20</sup> 2012 Treaty on the Functioning of the European Union, Art. 78 III

<sup>21</sup> A. T. Rubin: *Shifting Standards: The Dublin Regulation and Italy*, Creighton International and Comparative Law Journal, Vol. 7, No. 1, 2016, p. 139.

<sup>22</sup> This correctional mechanism is based on the same calculations as the relocation scheme. See: COM(2016) 197 final 4.

<sup>23</sup> This means that member states would not have to process asylum claims that fall above 150% of all claims according to the correctional key.

<sup>24</sup> According to the recent proposal the amount of money to be paid would be 250.000 euro per person. See: [http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/586639/EPRS\\_BRI\(2016\)586639\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/586639/EPRS_BRI(2016)586639_EN.pdf) pp. 4-5.

<sup>25</sup> Commission to the European Parliament and the Council towards a reform of the common European asylum system and enhancing legal avenues to Europe, 6 April 2016, COM (2016) 197 final, p. 8.

systems of member states could only be achieved by this measure since this way every member states would have identical asylum procedures with only one authority to adjudicate appeals on second instance.<sup>26</sup>

## **5. Social integration as a factor of deciding the host country for an asylum seeker**

The current regulation does not provide for a criteria which would incorporate the success rate of social integration of refugees granted asylum. This factor could monitor the integration process of refugees in every member state. This success rate could play an important role in the new framework of the Dublin System. It could be incorporated in the system which appoints the member state responsible for processing the asylum claims. As a result a system would be created which would evaluate not only the economical strength of a member state but also the social aspect of accepting refugees.

It is important to take into consideration the social aspect as well since those persons are not grantees international protection right now have the possibility to abuse rights gained in the EU, in the Schengen Area. This means that there tends to be a great tendency of secondary movement of refugees in the European Union regardless of the member state they are granted protection. That's why the reform of the CEAS incorporates the idea that these secondary movements must be stopped somehow – probably with some sanctions regarding the status of refugees.<sup>27</sup>

## **6. Suggestions for the future**

Faced with the sudden mass influx of third-country nationals who need international assistance and protection, the European Union has been trying to reach the best possible solution to respond to the current crisis situation in the shortest possible time. It was necessary to help member states who found themselves in the crisis as the most prominent, namely Italy and Greece. In a very short time since the outbreak of the crisis, Union institutions have found a possible temporary solution to help the most affected member states face and solve the problem. EU Council Decision 2015/1601 of 22 September 2015 on the introduction of interim measures in the field of international protection in favor of Italy and Greece, based on Article 78 III of the Treaty on the Functioning of the European Union, has proved to be the most appropriate solution. The Decision introduced a transfer mechanism based on the mandatory shares allocated to the Member States in accordance with the proportionality principle.

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<sup>26</sup> Ibid, p. 9.

<sup>27</sup> Commission staff working document, Impact Assessment, Accompanying the document Proposal for a Regulation of the European Parliament and of the Council, 19 December 2017, part ¾, COM (2016) 466 final, pp. 4-5.

The Slovak Republic and Hungary, failing to accept the obligation of the Decision, filed a lawsuit against the European Court of Justice against the Council, citing the reasons why the Decision was not a favorable resolution of the crisis situation. In its lawsuits, the State Prosecutors point out that the Decision was adopted in breach of the procedure for passing legal acts, that the principle of proportionality was not respected, that the adoption of the Decision was not necessary and that the crisis situation as such did not exist. In the defendant's case, the non-compliance of Article 78 III of the UFEU as the legal basis for the adoption of the Decision and the legality of the Decision is being challenged. In its judgment, the Court dismissed all the defendant's grounds as unfounded by explaining each of them in detail individually.

The attitude of Slovakia and Hungary, the lawsuit the filed showed that member states lack the solidarity towards each other which is the main reason the asylum crisis could not be tackled in the early years. However it can also be states that the temporary measures the Council introduced are not sufficient to handle the reception of refugees on the long run. In order to bypass this problem the European Commission called for the reform of the CEAS including the Dublin Regulation which is proposed to have a likewise mechanism for allocation as the temporary measures introduced.

Independent lawyer Yves Bot pointed out that the claims of the Slovak Republic and Hungary reminded us that solidarity was one of the basic values of the Union and even made its foundation. There is a question of whether it is possible to increase solidarity among the peoples of Europe and to imagine all the well-connected Union among the peoples, as suggested in the preamble of the Treaty on European Union, if there is no solidarity between Member States when one of them faces crisis situations?

This is the essence of what at the same time represents the purpose and goal of the European project. Therefore, it should first be emphasized the importance of solidarity as the fundamental and existential value of the Union. Already confirmed by the Treaty of Rome, solidarity is still at the heart of the integration process that is being sought in the Treaty of Lisbon.

The particularity of the contested decision is the introduction of a transfer mechanism based on the mandatory shares allocated to the Member States. By this decision, solidarity among member states is given concrete content and binding nature. This crucial and innovative feature of the aforementioned decision explains the political sensitivities of these cases, as it reveals the opposition of some Member States of proponents of solidarity who have taken over by free will and based solely on voluntary obligations.<sup>28</sup>

In conclusion the reform of the Dublin Regulation intends to achieve more solidarity between member states by making a compromise – the new regulation would allow member states to deny accepting transfers of refugees in turn of financial support. This solution would be beneficiary for both rejecting and accepting member states. However – in the end – the faith of

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<sup>28</sup> Opinion of the Advocate General Y. Bot of 26 July 2017, EU: C: 2017: 618.

the proposed reform is decided in the co-decision-making procedure of the European Parliament and the Council which will be a political decision.

# The Marrakesh Agreement and its influence on the protection of migrants from detention

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*Migration is undoubtedly one of the most topical and much discussed topics not only in Europe but on a global scale as well. This paper focuses on the Marrakesh Agreement and analysis it mainly from the point of view of the detention of migrants.*

*Keywords: migrants, Marrakesh Agreement, detention*

## 1. Introduction

Throughout history, people were on a constant move, trying to reach the shores of Europe for various reasons and through different channels. Migrants were trying to find legal channels, but they were also risking their lives in order to avoid political oppression, war and poverty, as well as to connect with the family, for entrepreneurship and to acquire knowledge and education. Behind every migration there is a special life story hidden. Wrong and stereotyped argumentation often seeks to focus only on certain types of flows, overcoming the inherent complexity of this phenomenon that affects society in various ways and seeks a variety of responses. Freedom of movement of people, issuance of residence permits, work permits, brain drain, asylum policy, smuggling of migrants and migrants' integration are some of the aspects of migration that has become more and more present in the global scene over the last twenty years.<sup>1</sup> Reasons why people are migrating are many, though in their essence, they are always down to the pursuit of a better quality of life and greater earnings. They are classified as motivation to depart from country of origin (so-called push factors) and factors of attraction to return to the country of origin (so called pull-factors).<sup>2</sup> These factors are diverse and can be grouped (*inter alia*) in the following way:<sup>3</sup>

1) Economic reasons such as poverty, unemployment or unfavourable entrepreneurial and investing climate, which act as incentives to move away, and in contrast to the possibility of

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<sup>1</sup> R. Mikac & F. Dragovic, *Massive Migration: Challenges, Consequences and Way Forward*, Security Studies Forum, Vol. 1, No. 1, 2017, pp. 134-136.

<sup>2</sup> I. Vukorepa, *Migrations and right to work in European Union*, Digest FLZ, Vol. 68, No. 1, 2018, pp. 85-120.

<sup>3</sup> Ibid.

achieving greater earnings, better living and working conditions in other states that act as attracting factors,

2) Political reasons such as wars, civil conflicts, insecurity due to political and religious affiliation, and violations of human rights versus countries where personal and legal security and political freedom are guaranteed,

3) Natural (climatic) reasons such as rainy, flood and damp areas in favour of climate-friendly areas,

4) Social and cultural reasons such as violations of civil rights and the disintegration of society based on ethnic, racial, sexual or religious affiliation, and lack of educational services in the face of attracting factors such as family reunion, friendly relationships, migrant social networks and favourable immigration policies and historical connections.<sup>4</sup>

Migration is one of the priority topics on the United Nations' agenda, which is confirmed by a number of discussions in different segments of the UN system. Special attention to migration issues is devoted by the UN Economic and Social Council (ECOSOC) through its Functional Commission - The Population and Development Commission whose theme of the 2012 annual session was devoted to migration as well as the Global Migration and Development Forum (GFMD) which deals with the world migration trends and brings conclusions and recommendations. The International Organization for Migration (IOM) is a major international organization that deals with the understanding of migration and monitoring of migration management, from social and economic to the criminal law aspect of migrations. The problem facing Europe over recent years is the migration / refugee crisis. IOM defines a migrant as any person who is moving or has moved across an international border or within a State away from his/her habitual place of residence, regardless of (1) the person's legal status; (2) whether the movement is voluntary or involuntary; (3) what the causes for the movement are; or (4) what the length of the stay is.<sup>5</sup> A distinction is made between short-term or temporary migration covering movements with a duration between three and 12 months, and long-term or permanent migration, referring to a change of country of residence for a duration of one year or more.<sup>6</sup> While according to the Convention, a refugee is someone who is unable or unwilling to return to their country of origin owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion.<sup>7</sup>

The issue, which has become the major issue of international and national policies of the world, especially the EU, since it has been initiated by the adoption of the New York Declaration on Refugees and Migrants in 2016 which says that the main aim is to protect human

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<sup>4</sup> Ibid., p. 113.

<sup>5</sup> <https://www.iom.int/who-is-a-migrant> (5 May 2019).

<sup>6</sup> <https://refugeesmigrants.un.org/definitions> (5 May 2019).

<sup>7</sup> 1951 Convention and Protocol relating to the status of refugees (UNHCR), p. 3. (introductory note)

rights of all refugees and migrants, regardless of status.<sup>8</sup> The Declaration sought to improve the cooperation between the states on the migration crisis. It was the predecessor of deciding on the conclusion of the Global Migration Agreement.

## **2. The context of the Marrakesh agreement**

The Global Migration Agreement was adopted on 10 December 2018 in Marrakesh and is therefore colloquially called the Marrakesh Agreement.

The agreement rests on the principles of the Charter of the United Nations, the Universal Declaration of Human Rights and Freedoms, the principles of the International Labour Organization.<sup>9</sup> The Marrakesh Agreement was adopted to better control and manage migration at the global, regional, national and local level, given that the number of migrations reached its highest level, where over 250 million migrants, including the Middle East refugees, are currently on the move. The aim of the agreement is joint cooperation to address migration problems. The nature of this phenomenon is such that no country can solve it alone, and this way it calls for joint state co-operation. The Marrakesh Agreement is not a legally binding agreement and states do not have to incorporate it into their legal systems.<sup>10</sup>

It guarantees state sovereignty, which would mean that each country has the right to define its own national migration policy and manage the migration within their jurisdiction. Also, states can, in accordance with their political and social order, set a border between legitimate and illegal migrations and, accordingly, implement policies and measures related to entry, stay, departure, migrant work. In addition, responsibility for violation of human rights, respect for human rights and freedoms and the prohibition of discrimination and the ban on calling on xenophobia and racism are guaranteed.<sup>11</sup>

In order to facilitate the migration process, the Agreement calls for understanding, unification and assistance to migrants, and therefore the need to strengthen international cooperation is great because the migration process is happening globally. The rule of law is considered to be based on migration management. One of the primary goals of the Agreement is to reduce as far as possible the problems in migrants' countries of origin as far as possible, i.e. to secure decent living conditions and to reduce the reasons why people would emigrate from them.<sup>12</sup> The agreement calls for regulation, information, assistance and securing the options to migrants, as well as the strengthening of awareness of illegal migration, and thus the reduction of illegal migrations.

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<sup>8</sup> 2016 71/1. New York Declaration for Refugees and Migrants, 1.5 (introduction)

<sup>9</sup> 1949 Convention concerning Migration for Employment (No.97); 1975 Convention concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers (No.143)

<sup>10</sup> Global Compact for Safe, Orderly and Regular Migration; final draft, 11 July 2018

<sup>11</sup> Ibid.

<sup>12</sup> Ibid.

In order to make the implementation of the Agreement effective, international cooperation between the states and the UN is of crucial importance. This should be achieved through the voluntary contributions, namely the financial, technical and other help of the state, engaging with external partners, including migrants, civil society, migrant and diaspora organizations, faith-based organizations, local authorities and communities, the private sector, employers' and workers' organizations, trade unions, parliamentarians, National Human Rights Institutions, the International Red Cross and Red Crescent Movement, academia, the media and other relevant stakeholders at global, regional and national levels, as it is stated in the Objectives of UN Network on Migration, which was established to support the implementation, follow-up and review of the GCM<sup>13</sup>. These capacities are increased, and co-operation promoted through consultation, request processing, identification of partners to provide assistance, linking requests to similar initiatives, identifying funding opportunities, that is, through the establishment of project funds, the receipt of state contributions, and so on.<sup>14</sup>

In addition to this, the agreement is foreseen to establish the Global Online Migration Forum as a source of all data. The agreement will be implemented in cooperation with migrants, organizations, local authorities, cooperation between states which is of crucial importance, in cooperation with National human rights institutions<sup>15</sup>, and by identifying funding opportunities, including by initiating the start-up fund, for whom the solutions and proposals are incorporated in the Global Compact itself.<sup>16</sup>

The Agreement has 23 goals for successful implementation of migration policy which are; 1. collect and utilize accurate and disaggregated data as a basis for evidence-based policies, 2. minimize the adverse drivers and structural factors that compel people to leave their country of origin, 3. provide accurate and timely information at all stages of migration, 4. ensure that all migrants have proof of legal 5. identity and adequate documentation, enhance availability and flexibility of pathways for regular migration, 6. facilitate fair and ethical recruitment and safeguard conditions that ensure decent work, 7. address and reduce vulnerabilities in migration, 8. save lives and establish coordinated international efforts on missing migrants, 9. strengthen the transnational response to smuggling of migrants, 10. prevent combat and eradicate trafficking in persons in the context of international migration, 11. manage borders in an integrated, secure and coordinated manner, 12. strengthen certainty and predictability in migration procedures for appropriate screening, assessment and referral, 13. use migration detention only as a measure of last resort and work towards alternatives, 14. enhance consular protection, assistance and cooperation throughout the migration cycle, 15. provide access to basic services for migrants, 16. empower migrants and societies to realize full inclusion and social cohesion, 17. eliminate all forms of discrimination and promote evidence-based public discourse to shape perceptions of migration, 18. invest in skills development and facilitate mutual recognition of skills, qualifications and competences, 19. create conditions for migrants

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<sup>13</sup> [https://www.un.org/en/conf/migration/assets/pdf/UN-Network-on-Migration\\_TOR.pdf](https://www.un.org/en/conf/migration/assets/pdf/UN-Network-on-Migration_TOR.pdf) (5 May 2019).

<sup>14</sup> Global Compact for Safe, Orderly and Regular Migration; final draft, 11 July 2018

<sup>15</sup> [https://www.ohchr.org/Documents/Publications/PTS-4Rev1-NHRI\\_en.pdf](https://www.ohchr.org/Documents/Publications/PTS-4Rev1-NHRI_en.pdf) (21 March 2019).

<sup>16</sup> Global Compact for Safe, Orderly and Regular Migration; final draft, 11 July 2018

and diasporas to fully contribute to sustainable development in all countries, 20. promote faster, safer and cheaper transfer of remittances and foster financial inclusion of migrants, 21. cooperate in facilitating safe and dignified return and readmission, as well as sustainable reintegration, 22. establish mechanisms for the portability of social security entitlements and earned benefits, 23. strengthen international cooperation and global partnerships for safe, orderly and regular migration.<sup>17</sup>

### 3. Objective 13 of the GCM

In this section of the essay, we will take a closer look at the detention of migrants. The reason why this topic has been highlighted is because it is an area of debate amongst states across the globe. Not all countries detain migrants in the same condition i.e. the treatment of migrants, who are detained, differ from country to country. The key question to bear in mind is, should there be a set minimum standard across the globe, which would ensure the safety of those individuals who are detained. As stated earlier, each person, who decides to migrate from their homeland, has a special story; thus, some may have a genuine reason for their action. That said, a person who is in fact innocent, should not have undergo further hardship from being detained.

Immigration detention is the deprivation of liberty for migration-related reasons. In most countries, immigration authorities have the power to hold non-citizens on grounds relating to a person's migration situation. This is an administrative or civil power that operates separately to the powers given to the police and criminal courts. In contrast, criminal incarceration is the deprivation of liberty of a citizen or non-citizen due to criminal charges or convictions.

Objective 13 of the Global Compact for Migration (GCM) ensures the commitment to "Use immigration detention only as a measure of last resort and work towards alternatives". This in detail sets out several actions for the effective commitment to this objective, these actions include using human rights mechanisms for the monitoring of migrant detention, consolidating a collection of alternatives to migrant detention, providing justice to migrants facing detention, and aims to reduce the negative and lasting effects of detention.

The key aspect of this objective is the protection of human rights for migrants. However, as migrant detention is often characterised by little or no independent oversight, and in many countries, migrant detention is among the opaqueness of public administration, the effective protection of human rights becomes increasingly challenging. Article 5 of the European Convention on Human Rights (ECHR) enshrines the right to liberty and security, ensuring that the arrest or detainment of person effecting an unauthorised entry into the country remains lawful. At first instance, upon entry of a migrant, the discretion of the individual's liberty is up to state in question as established in the European Court of Human Rights (ECtHR) case of *Khlaifia and others v Italy*. The discretion however must be in line with the general purpose of

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<sup>17</sup> Ibid.

Article 5, which is to preserve the right to liberty and guarantee that no individual is deprived of their liberty through arbitrary means as shown in the case, *Saadi v United Kingdom*.

The ECtHR case of *SK v Russia*<sup>18</sup> involved a decision by the Russian authorities to detain the applicant, a Syrian national, and remove him to his home country. The applicant complained in particular that his continuing detention was arbitrary, given that he could not be removed to Syria, and that there had been no domestic procedure which he could have used to have had his detention reviewed. The Court held that there was a violation of the applicants Article 5 rights as no applicable procedure was available for the applicant to obtain a review of his detainment nor to obtain release.

As detention must only be used as a last resort, alternatives to detention are any policies or practices that States must first implement. However, as human migration is reaching unprecedented levels, many States are struggling to respond to new migrant arrivals. Additionally, the balance between state sovereignty and the protection of human rights is heavily affected by the increasing use of human trafficking and smuggling, but it can be argued that States that work together to address the humanitarian and protection dimensions of irregular movements by addressing the root causes and drivers of displacement, improving protection conditions where people are, and creating safer and more orderly ways of securing long-term solutions will present States with opportunities. Alternatives to detention is preferred as there is no empirical evidence to suggest that the threat of being detained deters irregular migration<sup>19</sup>, alternatives have been shown to be up to 80% cheaper than detention<sup>20</sup> and detention has been shown to harm health and mental wellbeing in detainees<sup>21</sup>. One example of an alternative being used in an EU Member State is in Sweden, where individuals subject to a supervision order (a combination of reporting and a surrender of documents) are obliged to report to the nearest police station or the Swedish Migration Board on a regular basis.

As the GCM is merely an intergovernmental agreement and not legally binding on the signatories, the absence of enforcement mechanisms for the agreements objectives is apparent. Objective 13 can be further reinforced by legislation similar to the EU Reception Conditions Directive<sup>22</sup> which provides that an asylum seeker can only be detained if no other coercive measure can be applied and obliges Member States to incorporate alternatives to detention in national law. However, on the assumption that an asylum seeker is a type of migrant based on the UN definition of a migrant being “any person who is moving or has moved across an international border or within a State away from his/her habitual place of residence”<sup>23</sup>, the

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<sup>18</sup> European Court of Human Rights: *SK v Russia* (App. no. 52722/15) ECtHR (2017).

<sup>19</sup> H. Crawley: *Chance or Choice? Understanding Why Asylum Seekers Come to the UK*, UK Refugee Council, London 2010.

<sup>20</sup> R. Sampson, *There Are Alternatives*, International Detention Coalition, Melbourne 2015.

<sup>21</sup> Soorej Jose Puthooppambal, Magdalena Bjerneld, Carina Källestål: *Quality of Life Among Immigrants in Swedish Immigration Detention Centres: A Cross-Sectional Questionnaire Study*, Global Health Action Vol. 8, No. 1, December 2015.

<sup>22</sup> Directive 2013/33/ EU, OJ 2013 L 180/96.

<sup>23</sup> <http://www.un.org/en/sections/issues-depth/migration/index.html> (5 May 2019).

directive might be applicable. This paragraph makes the point that the GCM can be reinforced and gives the example of Directive which would apply to member states if we assume an asylum seeker is a migrant.

Although Objective 13 of the GCM provides an important safeguard for the detention of migrants, it fails to include an action for effective remedies against unlawful detention. This include certain legal measures, such as providing detainees with the right to legal advice or representation while in detention, detainees being periodically informed of their right to legal advice and requiring the state to provide detainees with written reasons for their detention in a language they can understand. These rights are protected under Article 9 of the International Covenant on Civil and Political Rights (ICCPR), and more specifically for migrant workers under Article 16 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

#### **4. Conclusion**

In order to maintain safe, orderly and regular migration, in particular to those countries affected by the on-going migrant/refugee wave in the past few years, this agreement is considered to be a significant direction to solving the global crisis. However, countries which have adopted the Marrakesh agreement should firstly start by respecting fundamental human rights by incorporating it within their own national legislation. Countries which migrants have emigrated from should work on strengthening inter-national relationships between the countries of origin from which migrants have fled. In regard to the countries of origin, through cooperation between other states, certain aspects should be developed on. For example, in the field of public safety, public health and public security. By helping the countries of origin to improve in these three categories, the overall living conditions of the citizens should improve, which in effect should decrease citizens from leaving their countries. As there is no clear framework at a European level for alternatives to migrant detention, the GCM provides the first steps for a common approach to the treatment of migrants that could be followed by the signatories through 23 objectives. As one of the alternatives of non-custodial measures, states may consider establishing a voluntary return programme which would provide several benefits to both the migrant in question as well as the State administering the migrant. These include reducing the incidence of detention, reducing the period of detention and providing a dignified and sustainable alternative with an effective focus on human rights.

# **The Creation and the Development of the European Border and Coast Guard Agency with a Fundamental Rights Perspective**

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*FRONTEX, the European Border and Coast Guard Agency, promotes, coordinates and develops European border management in line with the EU Fundamental Rights Charter and the concept of Integrated Border Management. To answer the main questions around FRONTEX, the first step that we had to do is to have an overview of the development of the FRONTEX agency from the beginnings to the recent status of the Agency. Just like European integration, FRONTEX has also been through many changes during the last 15 years. This change resulted in positive and negative aspects as well. In our research we were focusing on the presentation of the problems in connection with the work of the Agency and actual tendencies about how it should continue its practice, especially as regards the possible ways of reforms. Besides the abovementioned questions, our research also aimed to highlight some related issues regarding fundamental rights.*

*Keywords: FRONTEX, border control, border management, fundamental rights*

## **1. Introduction**

With the process of European integration gaining stronger traction even nowadays, it has a notable impact on the European Union's security and foreign politics, its border control and border protection practice. If the border controls stay firmly within the Member States' powers, it is hard to imagine a unified approach in regards to border management. As each Member State has a different practice and policies in place, the idea of a unified approach has emerged lately in order to forego the infringements of rights, divergent practices and other problems. This "solution" is called FRONTEX (or, since recently, the European Border and Coast Guard) which it aims to coordinate border control at the EU level.

The 2015 migration crisis had put tremendous pressure on the countries at the external borders of the EU, and the number of infringements and problematic solutions had also soared.

The crisis had shed a light on the fact that the FRONTEX solution needs another reform. The 2016/1624/EU directive has undertaken changes in the Agency that far exceeds its original mission. In this study, we aim to answer the following questions: How did border management change during the last two decades? How did FRONTEX change since its inception? What opportunities still lay within FRONTEX? What does the future hold for FRONTEX and what suggestions are there to reform it yet again?

In order to answer these questions we have to examine the Agency and its activity from the beginning throughout its different reforms to its current state.

## 2. Historical overview

### 2.1 Background

With the fall of the communist regimes during the early '90s, Eastern European countries produced an unforeseen westward migration wave. This wave of immigration alone has already raised concerns regarding the management of external borders.<sup>1</sup> The worries have increased among the Western countries with the attacks on the United States on 9/11 in 2001. In pursuance of avoiding terror attacks and upholding peace, the agenda of adopting tighter border control measures have gained a highlighted importance.<sup>2</sup>

The first document to emphasize is the 1985 Schengen Agreement and the 1990 Convention Implementing the Schengen Agreement, which had entered into force on in 1995. These included both internal and external border crossing regulations. The regulations regarding the crossing of external borders were included in Article 3-8. As a matter of principle, it spelled out that border crossing of people could only be take place at declared border crossing points, only during their opening hours. These measures were implemented to serve the unification of control measures, but the border control itself has remained in the hands of the Member States. The treaty did not have a supranational edge.<sup>3</sup>

The Treaty of Amsterdam that entered into force on 1 May 1999, has transferred parts of the justice and home affairs cooperation to the Community institutions, thus incorporating it into the first pillar of the Union. Among these affairs, the questions of immigration and refugee policies were included along with the management of external and internal borders. The Treaty has established a five-year transitional period in order to adopt the unified Community legislation. According to that, uniform border control measures and a uniform visa issuing procedure should be instituted until 1 May 2004. Furthermore, a Community *acquis* had to be created for immigration and refugee policies, as well as regarding the conditions of entry and stay for citizens of third countries.

Ever since the Treaty of Amsterdam, the declared aim of the domains in the first and third pillar was to create and reinforce this territory of countries, where liberty, safety, and the rule of law provide the base for governing.

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<sup>1</sup> By external border we mean external land and sea borders, along with airports with an incoming or outgoing traffic into or out of the European Union coming from or leaving third countries.

<sup>2</sup> I. Rossi: *The establishment of FRONTEX and the humanitarian emergency in the Mediterranean: the failure of an intergovernmental solution*. In: Leonard S., *The Creation of FRONTEX and the Politics of Institutionalisation in the EU External Borders Policy*, Volume 5, Journal of Contemporary European Research, 2009, pp. 375–376.

<sup>3</sup> G. Virányi: *Az Európai Unió, a Schengeni Egyezmények és a Magyar határrendészet* In: *Határellenőrzés az Európai Unióban*, Hanns Seidel Foundation, 2000, pp. 34-36.

The provisions of the third pillar provided the governing principles for the cooperation on police, judicial, and criminal matters, including the cooperation of police services, customs authorities, and other law enforcement agencies through Europol, in addition to the Eurojust, where the judicial authorities cooperate; as well as providing a legal basis for the approximation of the criminal laws of the Member States.<sup>4</sup>

In terms of further inspiration for FRONTEX, regional conventions also played a role, like the Baltic Sea Region Border Control Cooperation (BSRBCC) with Estonia, Denmark, Finland, Germany, Latvia, Lithuania, Norway, Poland, Russia, and Sweden as members, while Iceland maintained an observer status.<sup>7</sup>

The regional, as well as the bilateral and multilateral agreements, and the projects financed by the EU had played a vital role in building the Agency.<sup>8</sup>

## ***2.2 The beginnings***

FRONTEX<sup>5</sup> was established in 2004<sup>6</sup>, in order to reinforce the external borders of the European Union by its own means. The most important argument for instituting FRONTEX was that the free movement of people of the Union was highly dependent on the sustained internal security of the area, thus the security of external borders.

Besides those listed above, the Agency's mission is to train and educate the workforce of border management organizations<sup>7</sup> of Member States. By combining the know-how of various Member States, its aim is to create a new and improved theory and practice to implement those into national systems.

The operations of the Agency started on 3 October 2005 in Warsaw, where the headquarters were also established.

It seems clear that FRONTEX had grown itself to significant presence under a short time and the ideas and projects that constitute the plans in the past, has been realized and properly implemented by now. Among these plans were the formation of Rapid Border Intervention Teams (RABIT) units or the formation of border control units in the Mediterranean Sea.

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<sup>4</sup> Z. Horváth & B. Ódor: *Az Európai Unió szerződéses reformja – Az Unió Lisszabon után*, HVG-ORAC, Budapest 2010, pp. 264-267.; <http://www.bsrbcc.org/about/history/>. (20 March 2019.)

<sup>5</sup> Original name: European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union

<sup>6</sup> Council Regulation (EC) No 2007/2004 of 26 October 2004.

<sup>7</sup> Including police, border police, customs duty and other workforce with necessary legal authorisations, specialist agreements and financial agreements

In the original concept of FRONTEX, the Agency had not had any compulsory decisions towards the Member States, they had a more optional approach towards problem-solving.

### ***2.3 Changes in border management in light of the Treaty of Lisbon***

On 13 December 2007, the Treaty of Lisbon<sup>16</sup> was signed, which modified the Treaty on the European Union and the Treaty establishing the European Community. Not only FRONTEX received a new legal basis, but the legislature has also envisaged a coming European integrated border surveillance system on external borders, similar to what FRONTEX represents nowadays.

The Treaty read as follows:

*“The Union shall develop a policy with a view to:*

*a) ensuring the absence of any controls on persons, whatever their nationality, when crossing internal borders;*

*b) carrying out checks on persons and efficient monitoring of the crossing of external borders;*

*c) the gradual introduction of an integrated management system for external borders.<sup>17</sup>”*

Previously, the border surveillance measures, policies concerning immigration were regulated by the Treaty establishing the European Community, in Article 62-64, later replaced by Article 77-80 of The Treaty on the Functioning of the European Union.

The Commission has an exclusive role of making proposals regarding the aforementioned issues, thus barring the way for the Member States to submit initiatives to the Commission so as to make proposals to the Council. In principle, the decisions are made by an ordinary legislative procedure (there are two exceptions to this rule that are regulated by Article 78 (3) and Article 20 (2) in the Treaty on the Functioning of the European Union.<sup>8</sup>

The gradual implementation of the integrated external border surveillance system after the Treaty of Lisbon has also become a part of the Stockholm Program, adopted by the European Council. The Council has been clear on the matter that FRONTEX plays a key role in this field, and strengthening the role of the Agency has become a necessary condition for furthering European integration.<sup>9</sup>

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<sup>8</sup> Horváth & Ódor, *ibid*, pp. 273– 274.

<sup>9</sup> Stockholm Programme – An open and secure Europe serving and protecting citizens (2010/C 115/01)

### **3. The 2015-16 migration crisis and the 2016 reforms of FRONTEX**

#### ***3.1 The effects of the migration crisis on the European Union***

In the year 2015, the external borders have registered more than 1.82 million of illegal crossings. This is six times the numbers registered during the previous year, so the magnitude of the problem has become clear.

One of the turning points in the migration crisis were the events in Former Yugoslav Republic of Macedonia<sup>10</sup>, where a legislative change has opened the door to lawful passing of migrants, but it gave a 72 hour period to every man, to either apply for asylum or leave the country. More than 100 000 border crossings have been registered. This legislation has directly led to the strengthening of the migration wave until the things have fallen out of control.<sup>11</sup>

The fundamental trouble lays in the fact that after an illegal crossing of an external border, it is nearly impossible to track down movement of the people within the Union.

Most prominently, registered cases were reported in the routes crossing the Eastern Mediterranean, mainly between Greece and Turkey, while only a small minority of people applied for refugee status in Greece and left instead for Macedonia, and continued their way through the Balkans up to the Serbian-Hungarian border, where they have decided to apply for refugee status.

On the western side of the continent, due to the strict Spanish legislation and due to the strong collaboration between Spain and Morocco, there was an increased chance for migrants to be sent back to their home countries, so they choose to go approach through Italy instead, from the routes coming from Libya.<sup>12</sup>

Another notable problem with illegal border crossing is the fact that most of the migrants arrive without any documentation, so in order to verify their citizenship, they have to go through a screening process. This is due to the fact that many try to take advantage of the system and declare fake citizenships so they may hasten their way. Also, there are people that may possibly not receive a refugee status due to their original citizenship or could be forcibly returned to their countries.

An increased volume of violent incidents is another complication surfacing on the external borders. Illegal human trafficking can be accounted for most of the violent outbreaks. This is due to the fact that the traffickers' approach directly threatens the lives of the migrants in hopes

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<sup>10</sup> Since then called Republic of North Macedonia

<sup>11</sup> Frontex General Report 2015

<sup>12</sup> Frontex General Report 2015

of realizing a profit. This is also endangering the border guards' security and lives, because they are not properly trained nor equipped to secure violent incidents, especially en masse.<sup>13</sup>

### ***3.2 The 2016 reforms***

Due to the events of December 2015, the European Commission has voted for a package of measures guaranteeing the free movement of the people, while securing the borders of the EU and its internal security, and more effectively manage the migration. This package of measures consisted of five main elements that are the following:

- a) Establishment of the European Border and Coast Guard Agency<sup>14</sup> that significantly expanded the mandate of FRONTEX
- b) The re-evaluation of the border surveillance code of the Schengen Area
- c) A European travel document for returning of the third country illegals
- d) A proposal by the Commission regarding executing and controlling of a handbook for European border surveillance system, and the eighth half-yearly report about Schengen Area.<sup>15</sup>

With the 2016/1624 regulation of the European Parliament and the Council, the European Border and Coast Guard Agency was established in a form resembling its current state. With that, the domains of the FRONTEX were also expanded.<sup>16</sup> This expansion included:

- Rapid Border Intervention Teams,
- the specialist repatriation teams,
- vulnerability assessment,
- coast guard duties.

One indicator showing serious changes in comparison to the previous period is that the number of permanent personnel has doubled and its financial resources have also grown. The total

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<sup>13</sup> Frontex General Report 2015, pp. 3–10.

<sup>14</sup> Along with deleted provisions: 2007/2004/EC Regulation, 863/2007/EC Regulation, and 2005/267/EC council regulation

<sup>15</sup> Frontex General Report 2015, pp. 10-11.

<sup>16</sup> The new of the agency have replaced the name a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, the shortened name "Frontex" and the personnel have remained the same. See the Frontex General Report 2016.

financial support has increased to 161 562 000 Euros, which makes it 175% of the amount distributed in 2015, which was 92 009 000 Euros (this is the 70% of the total budget of the Agency - 232 757 000 euros).

The new regulation introduced new elements to the activities regarding shared resources.

A revision on the profile of experts was an important step inside FRONTEX. During the revision, which was facilitated with the European Commission and the Member States, they created two new profiles: a European Coast Guard functional officer and the dog trainer. Along with these two new profiles, they have worked out three new profiles for repatriation activities:

- an expulsion observer
- an expulsion accompanying staff
- a returns specialist

The aim of the regulations was to widen the scope of the Agency by collecting and analyzing personal data. Currently, the Agency conducts a wide variety of data management:

- analysis of the personal data of terrorists during the risk assessment process,
- ensuring the collection of personal data for the staff of the Agency,
- forwarding the analyzed data for the recipient countries, and
- forwarding the data to Europol.<sup>17</sup>

## **4. The European Border and Coast Guard Agency**

### ***4.1 About the Agency in general***

The European Border and Coast Guard Agency<sup>18</sup> is an agency providing help to Member States of the EU and the Schengen associated countries regarding the border surveillance of its external borders, its coordination and improvement of border management, and in its Unionwide harmonization<sup>19</sup> of border control measures with respect to the Charter of Fundamental

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<sup>17</sup> Frontex General Report 2016, pp. 1-12.

<sup>18</sup> Important notice: despite name change, the Agency retained the shortened version of its name, the “Frontex”

<sup>19</sup> [https://europa.eu/european-union/about-eu/agencies/frontex\\_hu](https://europa.eu/european-union/about-eu/agencies/frontex_hu) (20 March 2019.)

Rights of the European Union and the Integrated European Border Management concepts.<sup>20</sup>

#### **4.2 The Mission of FRONTEX**

The Agency is responsible for a variety of fields, provided for in the legal acts establishing the Agency.<sup>21</sup> These fields include:

- Risk assessment: every activity of the Agency is based on assessing risks. After the Agency has analyzed the risks and dangers, it creates reports on the tendencies, and the shares its findings with the Member States and the Commission. Lastly, it uses the assessments in planning its own activities.
- Shared operations: in case of a dangerous situation on its external borders, the Agency can answer the call with units with trained border management specialists, along with engineering tools.
- Quick deployments: in shared operations, quick deployment units can help solve problems during the above-mentioned situations
- Research<sup>22</sup>: FRONTEX seeks to apply new and useful technologies, both in risk assessment and operations. This is done by including industry specialists and researchers.
- Training: one of the most important goals of the Agency is to harmonize the education of border policing specialists in Schengen and partnered states. In order to fulfil this goal, FRONTEX is working out common training norms for the competent authorities to ensure that the same standards are applied across each external border crossings and border crossing procedures.
- Common return operations: each Member State has the right to decide the subject of expulsions within their territories. FRONTEX is working out measures and methods regarding transporting the repatriated persons to third countries. It also harmonizes repatriating operations.
- Sharing of information: the importance of fast exchange of information between border management authorities are unquestionable: for this reason, FRONTEX is developing

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<sup>20</sup> <https://frontex.europa.eu/about-frontex/origin-tasks/> (20 March 2019.)

<sup>21</sup> <https://frontex.europa.eu/about-frontex/legal-basis/> (20 March 2019.)

<sup>22</sup> Important to notice: in the beginnings, Frontex did not work on research and development, it only followed certain developments in particular fields that connected to border management, 2007, [https://europa.eu/european-union/about-eu/agencies/frontex\\_hu](https://europa.eu/european-union/about-eu/agencies/frontex_hu) (20 March 2019.)

and operating certain information systems to ensure the smooth exchange of information.<sup>32</sup>

Tasks listed above are only part of the FRONTEX's activities. Others include:

- Situation monitoring: The Agency provides a fast way to exchange data between Member State authorities and the European Commission. It also grants crisis monitoring, early crisis alerts and news about the ongoing events at the external borders.
- Coast Guard duties,
- Cooperation with international organizations and third countries,
- Combating international crime,
- adhering to fundamental rights<sup>23</sup>

It is important to note that FRONTEX itself does not own any tools of engineering or border guard staff. In order to fulfil its duties, the Agency has to rely on the Member States to ensure the proper personnel and its equipment. FRONTEX, however, provides financial resources for the operations (e.g. by reimbursing for the transport of border guards). Most of the work done by the Agency is an organization and harmonization work.<sup>24</sup>

#### ***4.3 Annual report of FRONTEX***

The new FRONTEX regulation has taken effect on 6 October 2016, which obliges the executive director to create an annual report and submit it to the board of director. If the report about the Agency's previous year gets accepted by the board, it has to be forwarded to European Parliament, to the Council and the Commission, and the European Court of Auditors by 1 July.

The annual report on activities consists of two parts. The first part includes detailed information about the work done by FRONTEX.

The second part (chapter 4-6) presents a tool that helps audit the board, additionally it includes the executive director's responsibilities about accomplishing specific goals, for the bookkeeping and the budgetary and financial management, etc.<sup>25</sup>

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<sup>23</sup> Frontex General Report 2016, 18. pp.

<sup>24</sup> [https://europa.eu/european-union/about-eu/agencies/frontex\\_hu](https://europa.eu/european-union/about-eu/agencies/frontex_hu) (20 March 2019.)

<sup>25</sup> K. Zámbo: *A FRONTEX szervezete és működése* <http://www.pecshor.hu/periodika/XI/zambok.pdf> (20 March 2019.), 221–231 pp.

Besides measuring the success rate of the finished projects and operations, the aim of the annual report is to provide feedback, help avoid past mistakes in the future and in the planning of the operations.<sup>37</sup>

## 5. The future of FRONTEX

Based on the experiences of the past years and on the problems, many ideas have surfaced that aimed to reform both border management and FRONTEX. In this chapter, we will take a look at a few of these recommendations.

The problem itself was defined by György Bakondi, on 6-9 June 2016 during the conference “Solutions and possibilities on managing the migration crisis” in his lecture entitled “Does the common European refugee system work?”, where he framed the problems the following way: according to him, Europe is missing Union-wide external border protections, the screening of the economic migrants and the execution of repatriation. He gave a few recommendations to handle the immigrant crisis, one of them was the plan to separate the economic migrants from the actual refugees at the Schengen borders. He also introduced the idea of decreasing the expenses by 1% and increasing the rate of contributions by 1%. The extra financial resources could have helped to manage the migrant crisis. He also proposed an advanced partnership status for countries stricken by the crisis, like Turkey.<sup>26</sup>

Jean-Claude Juncker, the President of the European Commission in his annual State of the Union speech in 2018, has advocated for a solution that would expand both the personnel and the assets of the Agency in order to handle the unlawful immigration that would also reinforce the Union’s external borders.<sup>27</sup> He put forward a plan to increase the size of the staff financed by the EU budget to 10.000 men that shall be accomplished by 2020. The plan would also allow the EU to expand its operations to partnering countries and it would strengthen the repatriation process.<sup>28</sup> After their bilateral meeting on 16 September 2018, German Chancellor Angela Merkel and Austrian Chancellor Sebastian Kurz has announced that they support this notion.<sup>41</sup>

Not everybody agrees on the future propositions for FRONTEX. Andrej Babis, the Prime Minister of Czech Republic and Peter Pellegrini, the Prime Minister of Slovakia has criticized the plans of the Commission regarding the development of FRONTEX until the year 2020.

According to their statements, it is only a “useless parallel structure” to the Member States’ already existing border protection forces. In their opinion, it would make more impact to

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<sup>26</sup> A. Teke, *Megoldási lehetőségek a migrációs válságkezelésben. Működik-e a közös európai menekültügyi rendszer?* Hanns Seidel Alapítvány, 2016, pp. 27-32.

<sup>27</sup> <https://emerging-europe.com/news/hungary-czech-republic-and-slovakia-reject-juncker-frontex-plan/> (20 March 2019).

<sup>28</sup> State of The Union 2018 – Letter of Intent to President Antonio Tajani and to Chancellor Sebastian Kurz <https://emerging-europe.com/news/hungary-czech-republic-and-slovakia-reject-juncker-frontex-plan/> (20 March 2019).

support and strengthen the national agendas. Pellegrini has also added that he would rather see FRONTEX as a coordinating institution.<sup>29</sup>

Some opponents had a sharp criticism of this proposition: Hungarian Prime Minister Viktor Orbán had a highly critical reaction to the plan. According to him, the European Union is trying to take away the rights of Hungary to defend its own borders and the next “battle” will be about who decides whom to let inside the country.

A statement of the European Commission has repeatedly argued that FRONTEX does not intend to hinder the national commitments to the defence of national borders.<sup>30</sup>

## **6. The operations of FRONTEX – from a fundamental rights perspective**

The migration wave of 2015 has brought with it a number of human rights issues that impacted the activities and actions of FRONTEX. A question has come to surface: who is responsible for FRONTEX actions and for the human rights damage they cause?

The FRONTEX Regulation clearly proclaims that: “[T]he extended tasks and competence of the Agency should be balanced with strengthened fundamental rights safeguards and increased accountability.”<sup>31</sup>

That means that the European Border and Coast Guard Agency must respect fundamental right, while protecting the citizens of the Schengen area. In 2014-15 border guards have displaced people and committed other cruel human rights violations. The problem lay within the joint operations, because they were developed on „annual risk analysis reports”.<sup>32</sup> All guards are bound by the FRONTEX Code of Conduct, which includes specific provisions on the respect of fundamental rights and the right to international protection. It sets an amount of behavioural standards that all staff members should follow within joint operations.<sup>33</sup> The eventual human rights violations came from the FRONTEX border control activities: these fundamental rights violations that are included in the EU Charter of Fundamental Rights are the right to asylum, right to social security and social assistance, right to health care.

The second big problem came from the fact that FRONTEX is an inter-governmental agency created by the EU and some third country measures, questioning the autonomy of the countries

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<sup>29</sup> <http://www.visegradgroup.eu/news/babis-pellegrini-are> (20 March 2019).

<sup>30</sup> <https://emerging-europe.com/news/hungary-czech-republic-and-slovakia-reject-juncker-frontex-plan/> (20 March 2019).

<sup>31</sup> Regulation 2016/1624, preamble, para. 14.

<sup>32</sup> Annual Risk Analysis Reports analyses the likely future risk of irregular migration and cross-border crime along the EU external border

<sup>33</sup> <https://frontex.europa.eu/operations/roles-responsibilities/> (20 March 2019).

and the competences of the EU. The problems that came from the human rights issues of FRONTEX must be solved in the near future.<sup>34</sup>

Although the reforms of FRONTEX have explicitly included an obligation to respect international human rights, some serious criticisms have emerged about the Agency's work. A study conducted by Migreurop, a French human rights organization focused on preventing and helping human rights abuses on Europe's external borders claimed that FRONTEX's maritime interception operations do not offer sufficient guarantees about respect for human rights.

A prime example of a significant violation has occurred in June 2009, where a FRONTEX naval operation, with a German helicopter and an Italian coast guard, intercepted a boat of 75 migrants off the coast of Lampedusa, a small island of Italy. The Italians have handed the migrants over to a Libyan patrol boat, after which they were reportedly handed over to the Libyan military. The incident violated the Article 33 of the Geneva Convention on Refugees:

“No Contracting State shall expel or return a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened...”

Another example of human rights violations ignored and neglected by FRONTEX is connected to the Nouadhibou detention facility in Mauritania, where repeated inhuman and degrading treatments were well documented by various NGO investigations. Despite violating the Charter of Fundamental Rights of the European Union and the European Convention for the

Protection of Human Rights and Fundamental Freedoms, FRONTEX has reported that Operation HERA was a success in aiming to stop the migration from the unauthorized maritime routes, thanks to the close cooperation of Mauritania and other West African countries. After these violations have come to a spotlight, FRONTEX said that they do not consider themselves responsible for assessing whether or not human rights are respected in countries to which migrants are returned.

Questions were also raised about racial discrimination of the Agency in connection to targeted interventions. Operation HYDRA was highly criticized in 2007, where 22 European airports have been swept by FRONTEX in 16 Members States and resulted in an arrest of 291 Chinese nationals. According to the FRONTEX, the operation was aimed specifically to tackle illegal Chinese immigration. A similar case happened during Operation SILENCE, with Somali immigrants. Targeted interventions might be conflicting with Article 21 of the Charter of Fundamental Rights.<sup>35</sup>

At the end of November 2018, FRA published its opinion on the revised European Border and

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<sup>34</sup> <https://www.eustudies.org/conference/papers/download/427> (20 March 2019).

<sup>35</sup> S. Keller & U. Lunacek & B. Lochbihler & H. Flautre, *Frontex Agency: Which Guarantees for Human Rights?* <https://www.migreurop.org/IMG/pdf/Frontex-PE-Mig-ENG.pdf> (20 March 2019).

Coast Guard Regulation and its fundamental rights implications. Before discussing the opinion, it is worth briefly summarizing what the FRA is. The European Union Agency for Fundamental Rights (FRA) provides independent, factual advice to EU and Member State decision-makers. It aims to make the fundamental rights debate, policies and legislation more targeted and based on as much credible information as possible. The Agency advises EU institutions and Member State governments on fundamental rights.<sup>36</sup> In the Opinion, FRA focuses on four issues: adjusting the framework to protect fundamental rights; operationalising fundamental rights protection in the Agency's activities; reducing fundamental rights risks when supporting returns; reducing risks when cooperating with third countries.<sup>37</sup> In the following, we would like to briefly summarize the contents of the FRA opinion. In the first chapter, the opinion proposes to support existing horizontal fundamental rights safeguards in order to strengthen them in the light of the Agency's mandate and activities.<sup>38</sup> The second chapter covers specific issues related to the Agency's activities, including specific comments on integrated border management, risk analysis, operations and training.<sup>39</sup> In the third chapter, the FRA provides an opinion on reducing the risks of fundamental rights when supporting returns. The aim of the proposal is to extend the Agency's mandate and capacity in the field of return, and to strengthen and support cooperation with third countries by developing technical equipment and technical and operational assistance to Member States in return procedures. The opinion shows that the Agency is increasingly relying on its own technical equipment to carry out return operations, which, in turn, will make it impossible for external contractors operating under the contractual obligations of Member States to effectively exercise their supervisory role.<sup>40</sup> The fourth chapter covers six different issues, the first section is about the cooperation between Member States and third countries and the other five sections cover fundamental rights issues which emerge from the cooperation between the Agency and third countries.<sup>41</sup>

## 7. Summary

Guaranteeing external border protection in the European Union is a huge challenge from a legal and a political point of view as well. Thus it is not surprising that very recently the Commission president proposed yet another reform of the Agency. The problem – at least politically – seems clear: Juncker's plan is more than controversial with the representatives of Member States. The root of the problems is not anything we have not seen before: this is a community of countries with different cultures, traditions, and mentality. Whatever desirability it might have, the European way of integration is much harder to execute than an American model. As opposed to the United States, the Member States of the European Union are trying hard to guard their national sovereignty. If European countries want to work towards a higher level of integration,

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<sup>36</sup> [https://europa.eu/european-union/about-eu/agencies/fra\\_en](https://europa.eu/european-union/about-eu/agencies/fra_en) (20 March 2019).

<sup>37</sup> The revised European Border and Coast Guard Regulation and its fundamental rights implications - Opinion of the European Union Agency for Fundamental Rights

<sup>38</sup> Opinion of the European Union Agency for Fundamental Rights, p. 20.

<sup>39</sup> Opinion of the European Union Agency for Fundamental Rights, p. 27.

<sup>40</sup> Opinion of the European Union Agency for Fundamental Rights, p. 36-37.

<sup>41</sup> Opinion of the European Union Agency for Fundamental Rights, p. 45

it is necessary to limit national sovereignty in some cases or confer certain powers and authorizations to the Union. But this never comes easily – one needs to just think about the time it took to develop a supranational justice- and home affairs policy at the EU level in the first place.

There are opposing viewpoints that they to maintain their countries sovereignty in border control matters by a way of negotiations. Janek Magi, the director of the Border Guards of Home Affairs Ministry of Estonia wanted to make a modification to Juncker’s plan: the expansion of 10.000 recruits should not be recruited from the Member States’ border guard personnel, but it should rather serve as an addition to the national border guard forces.<sup>42</sup>

Whether we look at the problem from a supporters’ or from a critics’ point of view, we should not get bogged down in details. The questions that we ask shall not be about specific workings of FRONTEX or certain border management issues, but we should go back to the fundamental form of the problems. The proper question should be: do the Member States wants to take European integration to the next level or not?

Summarizing the abovementioned, we can conclude that FRONTEX has been a subject of tremendous changes during the 14 years since its inception, those including changes in its staff, in its structure and organization, in its mandate and budget. In my opinion, the Agency could be a symbol of the European Union. A union that could project inner stability and trust among its members to third countries. But a way to reinforce this trust is for the Member States to put away their fear of losing sovereignty and acknowledge that the Agency plays a crucial role in the future of the Union - especially in border management issues and that they should support the strengthening of FRONTEX.

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<sup>42</sup> <https://news.err.ee/863310/estonia-does-not-support-strengthening-frontex-at-expense-of-border-guards> (20 March 2019).

# Principle of non-refoulement in the context of Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms

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*Non-refoulement is an essential element of asylum law – without it, international protection to asylum seekers can hardly be guaranteed. This paper looks at this fundamental principle from the point of view of the European Convention for the Protection of Human Rights and Fundamental Freedoms, by analysing some relevant cases as well.*

*Keywords: refugee status; principle of non-refoulement; principle of non-refoulement on the high seas; fundamental human rights.*

## 1. Introduction

One of the fundamental elements of the right of access to asylum is access to the territory of a particular country, including the reception of refugees and the provision of assistance to meet basic living needs. In addition, one of the fundamental refugee rights is the principle of non-refoulement. Due to the importance of such issues, this principle is considered to be an international custom.<sup>1</sup> Legal literature does not agree to the recognition of the non-refoulement principle as a part of customary international law, pointing out that it must apply exclusively to subjects of international law and that principle applies to the individual and the state. In the legal literature there is no consensus as to whether an individual is a subject of international law, therefore, certain authors do not recognize the legal nature of international custom by this principle. The ban on returning in legal literature is defined as a principle prohibiting states to return foreigners, refugees or asylum seekers to their country of origin or some other state where such persons may be subjected to torture, inhuman or degrading treatment or punishment or have such a return/expulsion that was endangered by life or freedom.<sup>2</sup> As already mentioned, this principle is a part of customary international law and is binding for all states whether they are signatory states of the European Convention for the Protection of Human Rights and Fundamental Freedoms. (hereinafter referred to ECHR).<sup>3</sup> It is necessary to distinguish the

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<sup>1</sup> G. Lalić Novak, *Principle of Prohibition of Return and Access to Asylum System: Two Faces of the same Coin*, Migration and Ethnic Issues, vol. 31, no. 3, 2015, p. 367.

<sup>2</sup> G. Lalić Novak, *Asylum, Europeanization, Institution, Institutionalization, Institutionalism, Refugees, Neo-institutionalism, Impact Assessment, SIGMA, Prohibition of Returns*, Croatia and Comparative Public Administration, Vol. 4, 2012, p. 1300.

<sup>3</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, 1950

prohibition of direct return (in a state where there is a danger of persecution) and indirect return (in countries where there is a danger of further departure).<sup>4</sup>

## 2. Legal circumstances and legal elements of prohibited return

The principle of non-refoulement extends through primary and secondary EU legislation as part of the legal regime of fundamental human rights. It thus appears in Article 78 (1) of the Treaty on the Functioning of the EU<sup>5</sup> and Articles 18 and 19 of the Charter of Fundamental Rights of the European Union.<sup>6</sup> This principle, as interpreted by the European Court of Human Rights (ECtHR), is a fundamental component of the ban on torture, cruel, inhuman or degrading treatment or punishment, which does not allow deviations, exceptions or limitations. It is an absolute ban in this sense, and the categories of persons who are protected by such provisions are: refugees in danger of persecution and asylum seekers until a final decision on their request to obtain asylum.<sup>7</sup> Provisions on the prohibition of torture, cruel, inhuman or degrading treatment or punishment are contained in various legal acts such as: the 1966 International Covenant on Civil and Political Rights,<sup>8</sup> United Nations Convention against Torture of 1984<sup>9</sup> and the ECHR already mentioned,<sup>10</sup> but also all secondary legislation of such connotation. The main source of refugee law in this context is the 1951 Convention on the Legal Status of Refugees, which states in Article 33.1: "No Contracting State shall in any way expel or refouler refugees to the frontiers of the territory where their life or freedom would be jeopardized by their race, religion, nationality, belonging to a social group or their political opinions."<sup>11</sup> As already mentioned, the provisions on the prohibition of torture represent an absolute ban which does not allow any restrictions or exceptions, but according to legal literature,, this cannot be

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<sup>4</sup> Guidelines for Reducing Return Risk in Foreign State Border Management while Working in or with Third Countries, European Union for Fundamental Rights, 2016, p.1

<https://fra.europa.eu/en/publication/2016/guidance-how-reduce-risk-refoulement-external-border-management-when-working-or> (28 February 2019).

<sup>5</sup> Which states: "The Union is developing a common policy on asylum, subsidiary protection and temporary protection aimed at providing each third country national with international protection needs an appropriate status and ensuring respect for the principle of non-refoulement or non-refoulement. This policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 on the Status of Refugees and other relevant treaties. "

<sup>6</sup> As follows: "The right to asylum is guaranteed, in compliance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January. 1967 on the Status of Refugees and in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union. "Collective expulsion is prohibited. No one shall be expelled, returned or extradited to a state where there is a serious danger of being subjected to death penalty, torture or other inhuman or degrading treatment or punishment. "

<sup>7</sup> Op. cit. (footnote 5.) p. 1.

<sup>8</sup> Article 7 regulates: "No one shall be subjected to torture or cruel, inhuman or degrading treatment or punishment. It is especially forbidden to subject a person to a medical or scientific trial without his or her free consent. "

<sup>9</sup> Article 3, paragraphs 1 and 2 regulates: "No Member state shall expel, return or extradite a person to another state if there are serious grounds for suspecting that he may be subjected to torture. In order to determine the existence of such reasons, the competent authorities will take into account all relevant circumstances, including possibly the existence of a series of systemic, serious, obvious or gross human rights violations in that country. "

<sup>10</sup> Article 3 of the ECHR reads: "No one shall be subjected to torture or inhuman or degrading treatment or punishment."

<sup>11</sup> Convention on the Legal Status of Refugees, SFRY Official Gazette - International Agreements (hereinafter SL - MU), No. 7/60

applied to the principle of a ban on return. Point 2 of the same article states that such a right cannot be used by a refugee who, for justified reasons, is considered to be dangerous to the security of the state, nor a person who has been convicted of a particularly serious criminal offense by virtue of a final judgment, thereby posing a danger to the society of that state.<sup>12</sup> The Qualification Directive contains a similar provision in Articles 17 and 21<sup>13</sup>. If a Member State assesses a threat to national security or community security, it has the power to revoke, cancel or refuse to renew or issue a refugee residence permit.<sup>14</sup> Although the above-mentioned international treaties prohibit torture, inhumane behaviour and treatment, and in connection with their return, there is a lack of determination of the fundamental elements of the principle of the ban on return. Thus legal literature determines constituent elements and binding standards. The principle of non-refoulement includes refugees, but also asylum seekers irrespective of the level of connection with the host state and whether or not they are legally or not in the state. The principle will apply from the point of expression of willingness to seek asylum or from the moment of entry into the territory of the respective state (non-refoulement includes a ban on refusing entry). The scope of application of the principle lies both outside the borders of the state and its jurisdiction and extends to those areas where the state has control. If the extradition or resettlement is requested by another state, the authorities of the state in whose territory the person is located shall determine whether there is any breach of the rights guaranteed in the receiving state and to provide protection mechanisms for the requested person.<sup>15</sup> Domestic legal legislation in Croatia has recognized the principle of the ban on returning to the Law on International and Temporary Protection<sup>16</sup> (hereinafter referred to as ZMPZ). The provisions of Article 6 of the law include statelessness persons and third-country nationals, and regulates situations where return is prohibited. Thus a statelessness person or a third-country national cannot return nor be forced to leave the country where there is a risk of endangering life and security for race, religion, national affiliation, belonging to a particular group or political conviction. He/she cannot return to the country where there is a possibility of torture, inhuman or degrading treatment. The new solution provided by the law is an indirect obligation of the state to determine with certainty whether there is a possibility of safe deportation and, if so, the state must not return or forcibly refoul the individual in any way.<sup>17</sup> Furthermore, the Act emphasizes the exceptions to the above provisions in the case where an statelessness person or a third-country national who fulfils or has been granted international protection may be refouled or returned to the country if he/she presents a danger to national

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<sup>12</sup> Ibid, p. 2.

<sup>13</sup> Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of protection granted (recast), OJ 2011 L 337/9

<sup>14</sup>Novak, op. cit. (footnote 1.), p. 372.

<sup>15</sup> Ibid.

<sup>16</sup>Law on International and Temporary Protection Official Gazette 70/15, 127/17

<sup>17</sup>Art. 6. point 1 ZMPZ

security or if he/she is sentenced to a final judgment for offence that poses a threat to public order.<sup>18</sup>

### 3. Responsibility of the state

In the context of the principle of non-refoulement, the question of the area of application is raised, so legal literature points out that it also applies to cases in which a person is outside the frontier (refusal of entry into a state) at the border or within the jurisdiction of a particular state if it is subjected to the opposite mentioned legal acts.<sup>19</sup> It is clear from the practice of the ECtHR that the responsibility of Member states extends beyond the scope of their jurisdiction and it is solely for the State which carries out and not the recipient. This responsibility (in respect of the prohibition of torture) will be prolonged even if there is no risk of violation of Article 3 of the ECHR in the recipient country but, in the case of a person's return, there is a risk of being deported to a third country where the risk of torture, inhuman or degrading treatment exists.<sup>20</sup> It is clear from the ECtHR's practice that states are required to assess the possibility of violating Article 3 of the ECHR by the receiving state in respect of the rule of international refugee law.

Thus, in the case of *Hirsi Jama and others against Italy*, a group of two hundred migrants who were intercepted in the open sea by the Italian authorities returned to Libya without the possibility of filing an asylum application. The Court concluded that the Italian authorities were bound to assess the risk of returning migrants to Libya with certainty, which may have resulted in a violation of Article 3 of the ECHR. It is important to point out that a state cannot deny its own responsibilities towards migrants which found themselves in an area which is not under the jurisdiction of that state. If a state can take supervisory measures in the area, therefore can be responsible for the ensuring that the rights of migrants are respected.<sup>21</sup>

Concerning the risk assessment or the threat of violations of the guaranteed refugee rights in the sense of the ban on torture, ECtHR, through its interpretations, highlights certain criteria. In each individual case, there must be a high degree of likelihood that the person or persons will be hurt or threatened with guaranteed rights, and that there is inability of the State concerned to provide adequate protection. The possibility (probability) of a violation of the law is not sufficient, given the specific case, the authorities must evaluate with certainty that the person will indeed be subjected to torture, inhuman and degrading treatment.<sup>22</sup>

The factual situation of the case indicated that J.K. had been subjected to violence before his asylum application and residence permit. Such circumstances took on the characteristics of

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<sup>18</sup> Ibid. point. 2

<sup>19</sup> Novak 2015, ibd, p. 374.

<sup>20</sup> Ibid. p. 375.

<sup>21</sup> European Court of Human Rights: *Hirsi Jamaa and others v Italy* (App. no. 27765/09) ECtHR (2012)

<sup>22</sup> Novak 2015, ibd, p. 378.

inhumane treatment.<sup>23</sup> Although the applicant's concern as well as the competent authorities was focused on the general situation in Iraq, the Court found it necessary to examine whether the applicant's personal circumstances indicate that he and his family would be exposed to real danger from the treatment of the contrary Article 3 of the ECHR. The Court's role in correcting previous decisions by lower instances on the same matter highlights the importance of considering personal circumstances in each particular case to reach the most favourable decision for the vulnerable.<sup>24</sup> The obligations of the individual and the state which are provided by the aforementioned Directive are very clear.<sup>25</sup> Thus the Court correctly concludes and activates the institute of shared burden of proof. The state collects evidence based on cooperation with migration institutions as well as human legal sources at the international level although the situation in Iraq is satisfactory for most of the population, but there still are individual cases that may be subject to treatment contrary to Art. 3 ECHR. In addition, the Court comes to the crucial findings that the Iraqi authorities as well as the system are insufficient to protect the fundamental human rights of this case.

On the other hand, in case *S.H.H against UK*, the applicant argued that the circumstances that he will face in Afghanistan will amount to a breach of Article 3. ECHR as a result of ill-treatment of his disability.<sup>26</sup> Although it was acknowledged that the medical facilities in Afghanistan were limited and underdeveloped The Court held by four to three votes that there would be no violation of Article 3 of ECHR in the event of the applicant's removal to Afghanistan.<sup>27</sup> Unlike the Courts decision in the case *J.K. and others vs. Sweden*, the Court didn't look into the character of the disability within the context of the specific facts of a given case, as the 3 opposing judges pointed out in their Joint Dissenting Opinion.

As noted, in each case, it is necessary to examine the degree of probability of a violation of the rights of refugees, and this will be done regularly after an individual proves an individual threat. It should be emphasized that ECtHR has also considered issues in which an individual does not have to prove an individual threat, but it can exist in view of the state of the country from which it comes. In cases where states are in a state of emergency, war or conflict, the intensity and level of such status is assessed and whether such circumstances pose a threat to refugees if they are returned to the country concerned.<sup>28</sup>

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<sup>23</sup> In October 2004, al Qaeda tried to kill J.K. and in 2005 his brother was kidnapped and threatened to be killed because of J.K.'s affiliation with Americans. In 2006 Al Qaeda ordered his murder, and during October 2008, the applicant's daughter was killed when shooting at their car. J.K filed a request on 14 December for asylum and residence permit in Sweden.

<sup>24</sup> European Court of Human Rights: *J.K. and others v Sweden* (App. no. 59166/12) ECtHR (2016)

<sup>25</sup> 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 provides that Member States must ensure that they are informed in a language which they understand, they shall receive the services of an interpreter, they shall not be denied the opportunity to communicate with UNHCR etc.

<sup>26</sup> The applicant is an Afghan national who relied on the fact that his lower right leg had been amputated, among other physical illnesses.

<sup>27</sup> European Court of Human Rights: *S.H.H. v UK*, (App. no. 60367/10) ECtHR (2013)

<sup>28</sup> Novak 2015, *ibid*, p. 378.

#### 4. The principle of non-refoulement and threat to state security

Legal literature considers that even the most serious offenders are entitled to protection guaranteed by Article 3 of the ECHR, which guarantees a wider restriction on the restitution of the guaranteed Article 33 of the 1951 Refugee Status Convention. Such an exemption clause in the case of a person posing a threat to national security or the society as a whole does not limit the application of Article 3 of the ECHR.<sup>29</sup> Persons who have committed serious crimes are also protected from expulsion and extradition, unless such protection is inconsistent and does not lead to the avoidance of punishment or trials.<sup>30</sup> With regard to expulsion, the UNHCR Executive Committee in 1977 emphasized that refugees could only be expelled in exceptional cases and that the receiving state can deal with them in the same way as dealing with their own nationals posing a threat to national security and society, but also it points out that a refugee can only be detained if the interests of public security so require.<sup>31</sup>

It needs to be taken into account the hypothetical situation in which, according to the Article 12 of the Directive 2011/95/ a third-country national or a statelessness person is excluded and has no right to obtain refugee status if he or she has committed a non-political offense of a heavier nature outside the receiving state prior to their acceptance or issuance of a residence permit. Also here are the perpetrators of particularly cruel acts even if committed with the alleged political goal.<sup>32</sup> The same persons in accordance with Art. 17 of the same Directive does not have the right to subsidiary protection if it falls under the reasons set out in the Directive. Accordingly, statelessness persons and third country nationals could find themselves in a situation where they were deprived of any status. With regard to the absolute legal nature of the non-refoulement principle, the question of further action by the state, but also of the individual, is being challenged. Even though the state is, according to the Article 6.1. Directive 2013/32/EU as competent authority obliged to register the application for international protection, it is also obligatory to consider the same and decide on it<sup>33</sup>, and there is no possibility of returning the person to the country of origin. Irregularity with legal sources or court practice leads to uncertainty as to the legal fate and also the life circumstances of migrants.

The ECtHR through its case-law points out that the exceptions should be interpreted restrictively and that certain circumstances that would activate the institute of exception from the Convention on the Status of Refugees do not limit Article 3 of the ECHR, even in the most serious circumstances such as terrorism. Such a question appears for the first time before the ECtHR in *Chahal v. The United Kingdom (2001)*.<sup>34</sup> The circumstances of the case were as follows: Chahal is a declared Sikh separatist who has been granted unlimited residence permits in the United Kingdom on the basis of amnesty. It is included in the passive resistor for the Sikh

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<sup>29</sup> Ibid. p. 379.

<sup>30</sup> I. Damjanović & L. Tomicevic, *Legal Status of Refugees*, Pravnik, Vol. 38, No. 79, 2004, p. 80.

<sup>31</sup> Ibid. p. 81.

<sup>32</sup> Directive 2011/95/EU.

<sup>33</sup> Directive 2013/32/EU.

<sup>34</sup> European Court of Human Rights: *Chahal v Great Britain* (App. no. 22414/93) ECtHR (1996)

"Khalistan" independent country. In 1990, the United Kingdom authorities made a decision demanding the deportation of Mr Chahal for the protection of national security and the fight against terrorism, stating that Mr Chahal was involved in the management of terrorist attacks. Mr Chahal denied such allegations and demanded political asylum, stating that he would be a victim of persecution and torture if he was expelled in India or that Article 3 of the ECHR would be violated. In the proceedings before the ECtHR, the Court emphasizes that it is within the competence of the state to control the entry, stay and expulsion of aliens, but the prohibition of abuse under Article 3 of the ECHR is absolute in cases of expulsion. If it is clear there are certain reasons why an individual with a high degree of probability will be exposed to the risk of breaches of the aforementioned guaranteed rights if he is expelled from another state, there is a duty of the state to protect such a person by adequate mechanisms to avoid suspected violation of the rights guaranteed by Article 3 ECHR.<sup>35</sup> Therefore, the behaviour of an individual, no matter how dangerous, cannot be considered, and the return of Mr Chahal to India where he seriously threatens the risk of torture, inhumane treatment and punishment would constitute a violation of Article 3 of the ECHR.<sup>36</sup>

## 5. Conclusion

Although domestic and foreign legal literature is inconsistent with the question of the legal nature of the principle of the non-refoulement, the ECtHR case-law points out the need to recognize it as a part of international customary law. Most states value the principle as *ius cogens* while retaining the right to certain exceptions prescribed by relevant international legal sources. Therefore, we have a relative right which is often connected to absolute right, the right to ban torture, inhuman or degrading treatment, which does not allow exceptions and limitations. In light of recent events of massive migratory movements caused by conflicts in third countries, as well as increasing number of terrorist attacks, it is reasonable to expect that all life threatening situations will not be covered by legal norms and that in numerous cases the situation will arise without a clearly visible solution. When a person is deprived of refugee status as well as subsidiary protection, the principle of non-refoulement, in that case, forbids the return legal sources do not regulate or leave empty spaces for acting of the authorities on the one hand, and a migrant on the other. It is necessary to point out the need for a clear regulation of further action by the legislative bodies, but it is quite certain that a challenge to the Court in the forthcoming legal practice will arise in resolving such situations. The Court's decision on this issue as a precedent will produce legal effects to the addresses and provoke the introduction of the provision into the third generation of the Directive 2011/95/EU. International entities are trying to remedy this situation by concluding bilateral and multilateral agreements, but also by codifying the provisions of international legal sources. This principle

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<sup>35</sup> In the case *Saadi v Italy*, (App. no. 37201/06) ECtHR 2008 in which the Court concludes that acting on the basis of the judgment or deportation of terrorists to Tunisia (which was tried in absence of the applicant) has led to violations of Art. 3 because Italian authorities have not provided sufficient guarantees that the applicant will not be subjected to torture or inhuman treatment. This leads to another indicator of the state's unwillingness to achieve full international co-operation.

<sup>36</sup> European Court of Human Rights: *Chahal v Great Britain* (App. no. 22414/93) ECtHR (1996)

should also be understood as a preventative mechanism of violation of fundamental human rights, and supervision over the implementation of such provisions must be upon state bodies, states themselves and international organizations.

# Is the EU Principle of Solidarity Just a Political Statement or is it a Legal Principle with Real Substance in the EU?

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*The paper reviews “solidarity” as a legal institution. It had been a fundamental principle since the establishment of the European Union, and it seems to have become significantly important as our continent grows stronger and becomes more united. The text focuses on key elements such as the current existence of Solidarity in EU Law and whether the Courts are implementing those. The authors attempt to explore the concept of “solidarity” in EU law by reviewing books, legal cases, journals, and legal reports in order to understand its importance. It is hoped that this study will inform practitioners and those who are interested in EU law to understand the fundamental ground on which Europe was formed.*

*Keywords: solidarity, European Union, asylum, migration, human rights*

*‘Europe will not be made all as once, or according to a single plan. It will be built through concrete achievements which first create a de facto Solidarity’ (Robert Schuman, 9<sup>th</sup> May 1950)*

## 1. Introduction

Solidarity has been part of society as early as the nineteenth century, where philosophers and sociologists observed that in the process that gave rise to modern society, togetherness and social bonds were torn apart. The only way to social integration and social cohesion was through Solidarity<sup>1</sup>. Max Weber and Emily Durkheim, the founder of the academic discipline of Sociology, considered Solidarity a fundamental principle of social integration. Émile Durkheim, was one of the first to distinguish that Solidarity implies the fundamental ties between members of a small or large community<sup>2</sup>. As a fundamental principle of European integration and unity, Solidarity was first mentioned in the 1950 Schuman Declaration<sup>3</sup> and soon incorporated into the preamble of the 1951 treaty of the European Coal and Steel Community. In 1987, solidarity was also added into the preamble of the European Single Act and gradually attained a legal framework within the Treaty on the European Union (TEU).<sup>4</sup> Once it became a part of the legal framework of European Unity and Integration and after the

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<sup>1</sup> S. Stjernø, *Solidarity In Europe*, Cambridge University Press, Cambridge 2005, p. 1.

<sup>2</sup> E. Durkheim, *De la division du travail social*, Puf, Paris 1930; M. Weber, *Wirtschaft und Gesellschaft: Grundriss der Verstehenden Soziologie*, Erster Halbband, Mohr, Tübingen 1956)

<sup>3</sup> R. Schuman, 'Declaration of 9 May - Robert Schuman Foundation' (Robert-schuman.eu, 1991) <https://www.robert-schuman.eu/en/declaration-of-9-may-1950> (11 May 2018.)

<sup>4</sup> A. Giannakopoulos, *Solidarity in the European Union: Challenged and Perspectives*, The S Daniel Abraham Centre 2017, pp. 13-14.

agreement of the Lisbon treaty in 2009, solidarity became a legal principle of primary European law. In the TEU it states that Solidarity is a mission of the European Union with regards to mutual relations of member states, their citizens and third country nationals<sup>5</sup>. Even now there is still no precise agreement on what solidarity means in the EU and what it should consist of. In the search for a legal definition of solidarity within the EU primary and secondary law, it has many definitions. In the amending treaty of Lisbon, the principle of solidarity is defined by giving importance to the relation between a Member state and its citizen<sup>6</sup>. Solidarity is a key principle mentioned in the ‘EU Charter of Fundamental Rights’, in which it states that the Union consists of four main values namely Human Dignity, freedom, equality and Solidarity<sup>7</sup>. Solidarity duties require Member States to apply Community rules unselectively, even if it was against their national interest: ‘failure in duty of solidarity accepted by Member States by the fact of their adherence of the Community strikes at the fundamental basis of the Community legal order’<sup>8</sup>. This makes it clear that the Court regarded solidarity as a cooperative action that was essential for the functioning of the Community system which means that in result EU law will prevail national law. The Principle of Solidarity has been distinguished as a fundamental principle in the European Union. It is based on sharing advantages and disadvantages equally between Member states i.e. burden sharing. Chapter IV of the Charter of Fundamental Rights of the European Union is titled ‘Solidarity’ (Articles 27-38). The first eight articles link directly to employment and industrial affairs: (art 27) Workers’ right to information and consultation, (art 28) Right of collective bargaining and action, (art 29) Right of access to placement services, (art 30) Protection in the event of unjustified dismissal, (art 31) Fair and just working conditions, (art 32) Prohibition of child labour, (art 33) Family and professional life and (art 34) Social security and social assistance. In the joined case of *Poucet v Assurances Générales de France and Pistre v Cancava*<sup>9</sup>, the European Court of Justice applied the principle of solidarity in relations to social protection. The case concerned self-employed workers complaining about that compulsory contributions towards the mutual funds established to provide social protection was in violation of the principle of free competition in the common market as stated in the articles 101-102 of the Treaty on the Functioning of the European Union (TFEU; then known as articles 81-82 EC). In its defence, the French government used article L 111-1 of the Social Security Code. The code outlines the principle of social protection in France – Solidarity and Compulsory affiliation<sup>10</sup>. In their judgement, the court rejected the workers complaints, as the French Social Security Code adhered to the solidarity principle. The remaining articles of Chapter IV, detail Health Care (art 35), Access to services of general

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<sup>5</sup> Treaty on European Union [1992] OJ C 191

<sup>6</sup> Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union [2010] OJ C 83.

<sup>7</sup> Chapter IV on Fundamental Rights [2000] OJ C 364/1

<sup>8</sup> Case 39-72 Commission v Italian Republic [1973] ECR 00101.

<sup>9</sup> Cases C-159/91 and C-160/91 Christian Poucet v Assurances Générales de France and Caisse Mutuelle Régionale du Languedoc-Roussillon [1993] ECR I-00637.

<sup>10</sup> European Foundation for the Improvement of Living and Working Conditions, *Solidarity Principle*, Eurofound, 2018 <https://www.eurofound.europa.eu/observatories/eurwork/industrial-relations-dictionary/solidarity-principle> (13 April 2018).

economic interest (art 36), Environmental protection (art 37) and Consumer Protection (art 38)<sup>11</sup>.

Furthermore, art 2 TEU also refers to the solidarity principle where it states ‘The Union is founded on the values of respect... These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail’<sup>12</sup>. This strongly hints that the concept of Solidarity is an important principle under EU law.

## 2. Solidarity in the area of Asylum and Migration

Article 80 TFEU states that EU policies should be ‘governed by the principle of solidarity and fair sharing of responsibility, including its financial implications between the Member States.’<sup>13</sup> The increased number of asylum seekers and refugees in some Member States, creates the need for solidarity in the area of asylum and migration. The most important international refugee law is the 1951 Convention, Convention Relating to the Status of refugees, adopted 28 July 1951 and came into force on 22 April 1954<sup>14</sup>. Under article 1a (2) of the Convention, the term “Refugee” is described as a person who is under ‘*fear of being prosecuted 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*’<sup>15</sup>. At this point it would be appropriate to also mention article 33(1), which states that no signee Member States ‘*shall expel or return (refouler) a refugee... 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*’<sup>16</sup>. The convention also prohibits the torturing and degrading of refugees. In the convention against torture, article 3(1) states that Member States must not ‘*expel, return (refouler) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture*’<sup>17</sup>.

The European Convention of Human Rights also prohibits the torturing and degrading of refugees by stating that ‘*no one shall be subjected to torture or to inhuman or degrading*

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<sup>11</sup> Chapter IV Charter of Fundamental Rights of the European Union [2000] OJ C 364/01.

<sup>12</sup> Consolidated version of the treaty on European Union [2016] OJ C 202/17.

<sup>13</sup> Article 80 TFEU.

<sup>14</sup> I. Goldner Lang, *Is there solidarity on asylum and migration in the EU?* Croatian Yearbook of European Law and Policy, University of Zagreb, Zagreb 2013) <http://www.cyelp.com/index.php/cyelp/article/view/172> (13 April 2018).

<sup>15</sup> Article 1(a) Convention Relating to the Status of Refugees, 1951 <http://www.ohchr.org/EN/ProfessionalInterest/Pages/StatusOfRefugees.aspx> (13 April 2018)

<sup>16</sup> Ibid.

<sup>17</sup> Article 3(1) Convention against Torture (1987) <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx> (13 April 2018).

*treatment or punishment*<sup>18</sup>. In the landmark ruling of *Soering v UK [1989]*<sup>19</sup>, the ECtHR ruled that the deportation of a German national to the USA for his capital punishment is in fact in violation of article 3 ECHR as the deporting State has ‘*substantial grounds... for believing that the person concerned, if deported, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country*’. Followed by the *Soering* case, a similar case came forth to the ECtHR where a deportation order of Ms Jabari to Iran which created a real risk of subjecting her to death by stoning<sup>20</sup>, *Jabari v Turkey [2000]*<sup>21</sup>.

Under EU law, all Member States must adhere to EU primary and secondary law and appropriately implement Union policies. One of the policies involving solidarity is Member states helping each other, i.e. Member States who have lesser amount of migration flow, asylum seekers and refugees are encouraged to assist Member States with higher amounts. Member states with higher amount of migration flow, asylum seekers and refugees are usually the ones forming the external Union border. The principle of Solidarity has its strongest manifestation in the Solidarity clause. It was introduced by Article 222 TFEU providing the Member States with three options:

1. To act jointly;
2. To prevent the terrorist threat in the territory of an EU country;
3. To provide assistance to another EU country which is the victim of a natural or man-made disaster.

To a certain extent, Member State adhere to this act, in terms of terrorist threats and providing assistance to one another. For example after the Paris attacks of 2016, all Member States become more cautious of standing unitedly against terrorism, i.e. to act in solidarity.

### **3. Responsibility-sharing and the Law**

Within the area of asylum, migration and border controls, treaty articles strongly depend on the principle of solidarity and responsibility-sharing. As established before, article 80 TFEU is the most important construction of the principle of solidarity. Adding to this point, article 4(3) TEU which mentions the ‘*principle of sincere cooperation*’, is applied by the Court of Justice in a number of cases such as the case of *PPU Hassen El Dridi*<sup>22</sup> where a third-country national refused to obey an order to leave the territory of a Member State. Article 4(3) obliges the EU

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<sup>18</sup> Article 3 European Convention of Human Rights (1950)

[https://www.echr.coe.int/Documents/Convention\\_ENG.pdf](https://www.echr.coe.int/Documents/Convention_ENG.pdf) (13 April 2018).

<sup>19</sup> *Soering v United Kingdom* App no 14038/88 (ECtHR, 7 July 1989) para. 91.

<sup>20</sup> Goldner Lang, *ibid*.

<sup>21</sup> *Jabari v Turkey*, App no 40035/98 (ECtHR, 11 July 2000).

<sup>22</sup> Case C-61/11 *PPU Hassen El Dridi*, alias Karim Soufi [2011] ECR I-03015.

Member States to ‘assist each other in carrying out tasks which flow from the treaties’, which means to support each other in matters of asylum, migration and border controls.

Article 67(2) in title V on the Area of Freedom, Security and Justice states solidarity which must exist ‘between Member States, which is fair towards third-country nationals’, this ‘shall frame a common policy on asylum, immigration and external border control’<sup>23</sup>. Yet, the most important and specific law linked with solidarity under title V is article 80, which states that ‘this Chapter and their implementation shall be governed by the principle of solidarity and fair sharing of responsibility’<sup>24</sup>.

The urge of Solidarity in the area of asylum and migration is due to primarily financial, social and political reasons. This is because some geographically exposed Member states incur a higher number of migration and refugees which calls for the help of less pressured Member States, this can encourage Member States to realise the advantages of burden-sharing and in result agreeing to Solidarity measures. In result, if one Member State can successfully handle immigrants, refugees and asylum seekers, keeping human rights standards ranked high, this could have a positive effect for all other Member States as irregular migration will reduce and could lead to increased internal security<sup>25</sup>.

Some Member States have reintroduced their borders<sup>26</sup> due to the recent refugee flow. Within the Schengen Acquis, the Schengen border code allows temporary reintroduction of border controls at internal borders<sup>27</sup>. The conditions of granting the temporary border control are serious or immediate threats, at times these conditions aren’t apparent in some Member State’s applications yet they are granted border control. In the ‘Back to Schengen Communication’ paper, the European Commission set out a roadmap for internal borders to be lifted<sup>28</sup>. The Member States which were granted temporary border control have reasons such as a visit of a prime Minister or the Pope. This shows the lack of an efficient and fair solidarity mechanism<sup>29</sup> as clearly not all Member States are acting jointly in the no internal border agreement.

Art. 78 TFEU guides the Union to ‘develop a common policy on asylum... with a view to offering appropriate status to any third-country national requiring international protection’. Special attention should be given to the words of this article, which are ‘ensuring compliance

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<sup>23</sup> Article 67(2) Treaty on the Functioning of the European Union 2007.

<sup>24</sup> Article 80 Treaty on the Functioning of the European Union 2007

<sup>25</sup> Goldner Lang, *ibid*.

<sup>26</sup> Temporary Reintroduction Of Border Control - Migration And Home Affairs - European Commission (Migration and Home Affairs - European Commission, 2018) [https://ec.europa.eu/home-affairs/what-we-do/policies/borders-and-visas/schengen/reintroduction-border-control\\_en](https://ec.europa.eu/home-affairs/what-we-do/policies/borders-and-visas/schengen/reintroduction-border-control_en) (13 April 2018).

<sup>27</sup> G. Malmersjö, *Schengen And The Management Of The EU’S External Borders*, European Parliament, 2016 [http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/581392/EPRS\\_BRI%282016%29581392\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/581392/EPRS_BRI%282016%29581392_EN.pdf) (13 April 2018).

<sup>28</sup> European Commission, Communication from the Commission to the European Parliament, the European Council and the Council, COM(2016) 120 final.

<sup>29</sup> E. Küçük, *Solidarity in EU Law*, Maastricht Journal of European and Comparative Law, Vol 23, 2016 <http://journals.sagepub.com/doi/abs/10.1177/1023263X1602300604?journalCode=maaa> (13 April 2018).

*with the principle of non-refoulement*'. The term refoulement has a direct link with solidarity which links back to as early as the 1980's where in the Note by the UN Refugee Agency it was highlighted out that '*solidarity is a concept which plays an extremely important role in the protection of refugees... as it assists States to meet their non-refoulement and asylum obligations*'<sup>30</sup>.

Furthermore, in art 78 subsection 2 are detailed factors that should be adopted for a common European asylum system such as:

- (a) A uniform status of asylum for nationals of third countries, valid throughout the union;
- (b) A uniform status of subsidiary protection for nationals of third countries who, without obtaining European asylum, are in need of international protection;
- (c) A common system of temporary protection for displaced persons in the event of a massive inflow;
- (d) Common procedures for the granting and withdrawing of uniform asylum or subsidiary protection status;
- (e) Criteria and mechanisms for determining which Member State is responsible for considering an application for asylum or subsidiary protection;
- (f) Standards concerning the conditions for the reception of applicants for asylum or subsidiary protection;
- (g) Partnership and cooperation with third countries for the purpose of managing inflows of people applying for asylum or subsidiary or temporary protection<sup>31</sup>.

#### **4. The Common European Asylum System (CEAS)**

The CEAS aims to protect human rights standards and restraining national measures and policies that would refuse refugees and asylum-seekers from third-countries. It aims to create burden-sharing systems that '*should go hand in hand*'<sup>32</sup> with national policies and measures, as suggested by Iris Goldner Lang in her paper. Such a system can only run successfully if there

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<sup>30</sup> United Nations High Commissioner for Refugees, *Note on International Solidarity and Refugee Protection* (1988) EC/SCP/50 <http://www.unhcr.org/afr/excom/scip/3ae68cd4c/note-international-solidarity-refugee-protection.html> (13 April 2018).

<sup>31</sup> Consolidated version of the Treaty on the Functioning of the European Union [2008] OJ C 115 0076-0077.

<sup>32</sup> Goldner Lang, *ibid*.

is Solidarity between all Member States. The CEAS allows to rectify the differences in Member State's asylum systems and practices to form a common minimum standard for asylum<sup>33</sup>.

Three most important legislative acts and one regulation was adopted by CEAS by 2005: the Reception Conditions Directive, the Qualification Directive, the Asylum Procedures Directive and the Dublin Regulation. The 2004/83 Qualification Directive which was repealed by Directive 2011/95, sets the conditions for the qualification and status of third-country nationals and stateless persons as refugees<sup>34</sup>. Minimum standards on procedures for granting and withdrawing refugee status in EU Member States is laid down in the 2005/85/EC Asylum Procedures Directive.

Lastly, The Dublin II Regulation which was later repealed by the Dublin III Regulation after the judgements of the cases *MSS*<sup>35</sup> and *NS*<sup>36</sup>, is based on the principle that the first Member State where finger prints are stored or an asylum claim is lodged is responsible for investigating an asylum application. Dublin III Regulation came into force on 19 July 2013, it applies to all MS except Denmark. The Regulation has received heavy criticism by the European Council and the Refugee and Exiles (ECRE) on their maintained Dublin II regulation principle to have 'extensive detrimental effects to Member States and asylum seekers'<sup>37</sup>.

## 5. European Solidarity Corps: from pilot project to reality

Solidarity is a shared value within the whole European Union. It prevails between its citizens, Member States, and in some external and internal actions of the Union. To prove that "solidarity in EU" is not just a "fiction" there is an example, such as an initiative created in 2016, which gave opportunities for young people to volunteer or work in projects in their own country or abroad that benefit communities and people around Europe. At the creation of this institution President Juncker said the following in his "State of the Union address": "We often show solidarity most readily when faced with emergencies. When the Portuguese hills were burning, Italian planes doused the flames. When floods cut off the power in Romania, Swedish generators turned the lights back on. When thousands of refugees arrived on Greek shores, Slovak tents provided shelter. In the same spirit, the Commission is proposing today to set up a European Solidarity Corps."<sup>38</sup> The aim of the Corps would be to create opportunities for young people across the EU to make a meaningful contribution to society, show solidarity and develop their skills. The Bratislava Summit of 16 September 2016 called for greater political

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<sup>33</sup> Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers [2003] OJ L31/18.

<sup>34</sup> Goldner Lang. *ibid.*

<sup>35</sup> *M.S.S. v Belgium and Greece*, Application No. 30696/09 [2011].

<sup>36</sup> *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 and Minister for Justice, Equality and Law Reform* [2011].

<sup>37</sup> A. Biondi, E. Dagilytė and E. Küçük, *Solidarity in EU law*, Edward Elgar Publishing 2018, p. 148.

<sup>38</sup> [http://europa.eu/rapid/press-release\\_MEMO-18-4840\\_en.htm](http://europa.eu/rapid/press-release_MEMO-18-4840_en.htm) (13 April 2018).

momentum to support young Europeans and establish new EU programmes to improve their opportunities. As a result of this initiative, eight different EU programmes were mobilised to offer volunteering, traineeship or job opportunities to young people across the EU. The solidarity project should address a specific challenge within the participants' community and show a clear European added value. In June 2018 the European Parliament and the Council reached a political agreement on the Commission's proposal to provide the European Solidarity Corps with its own budget and legal framework until 2020. By June 2018 European Solidarity Corps had almost 65.000 applicants from more than 30 European countries. The legal basis of the institution is based on Articles of the Treaty on the Functioning of the European Union.<sup>39</sup> Article 165(4) allows EU action aimed at "encouraging the development of youth exchanges (...) and encouraging participation of young people in democratic life in Europe. The European Solidarity Corps aims to strengthen the engagement of young people and organisations in accessible and high-quality solidarity activities. The Corps is a means to help strengthen cohesion, solidarity and democracy in Europe and abroad and to address societal and humanitarian challenges on the ground, with a particular focus on promoting social inclusion."<sup>40</sup>

## **6. Measures for promoting Solidarity in the area of asylum and migration**

In order to create and maintain solidarity a range of measures can be applied. The Greatest achievement of the European Union has been the abolition of internal borders between Member States to keep them closer, this is to enable free movement of goods, persons, services and capital<sup>41</sup>. This was done so in the hope to harmonise Member States' rules on asylum, immigration and external border controls<sup>42</sup>, this also includes the obvious economic factors.

Many measures have been adopted in order to develop and promote solidarity in the area of asylum and migration. Most of the measures encourage financial assistance such as the European Refugee Fund, other being the relocation and resettlements of asylum-seekers and migrants. Financial support is not the only solidarity measure applied by the EU but it is certainly the most effective one for the assistance of Member States which are in need of help. The European Refugee Fund measure is the oldest standing measure for financial support. It covers asylum procedures, integration of refugees, reception infrastructure, resettlement and emergency measures<sup>43</sup>.

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<sup>39</sup> [https://ec.europa.eu/commission/sites/beta-political/files/budget-may2018-solidarity-corps-in-action\\_en.pdf](https://ec.europa.eu/commission/sites/beta-political/files/budget-may2018-solidarity-corps-in-action_en.pdf) (13 April 2018).

<sup>40</sup> <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=COM:2018:440:REV1> (13 April 2018).

<sup>41</sup> 'Article 26' (Lisbon-treaty.org, 2018) <http://www.lisbon-treaty.org/wcm/the-lisbon-treaty/treaty-on-the-functioning-of-the-european-union-and-comments/part-3-union-policies-and-internal-actions/title-i-the-internal-market/168-article-26.html> (13 April 2018).

<sup>42</sup> Goldner Lang, *ibid.*

<sup>43</sup> European Commission 'Refugee Fund' [2000] [https://ec.europa.eu/home-affairs/financing/fundings/migration-asylum-borders/refugee-fund\\_en](https://ec.europa.eu/home-affairs/financing/fundings/migration-asylum-borders/refugee-fund_en) (13 April 2018).

From the period of 2007-2013, there were four funds allocating almost EUR 4 billion under the ‘Solidarity and the Management of Migration Flows’ namely: the European Refugee Fund of EUR 700 million, the European Borders Fund of EUR 1820 million, the European Return Fund of EUR 630 million and the European Fund for the Integration of Third-Country Nationals, EUR 825 million<sup>44</sup>. By the time period of 2014-2020, the total home affairs budget should have exceeded the 2007-2013 period by 40% with a budget of EUR 10.9 billion.

To try manage migration, EU Member States need to manage their external borders. Frontex is an agency of the EU and was established in 2005 as the European Agency for the Management of Operational Cooperation at the External Borders. This agency was created to ensure EU Member States’ cooperation in the management of the EU’s external borders<sup>45</sup>. On the 15<sup>th</sup> December 2015, the European Commission decided to transform the Frontex to the European Border and Coast Guard<sup>46</sup>, this was done due to the European Migration crisis of 2015-16. It officially became operational on 6<sup>th</sup> October 2016. Data published by the Frontex on migration showed that between 2011 and 2015, there were 2,426,152 illegal border crossings<sup>47</sup>. In 2016, the Frontex detected more than 7000 people with fraudulent documents at the EU’s external borders, compared to the previous year this number was a decrease by 15%<sup>48</sup>. This suggest that the Frontex has been running successfully with their missions.

## 7. Conclusion

The Principle of Solidarity has been a questionable principle since its creation and still has no precise definition. It has been mentioned throughout the years in many different treaties, academic and legal papers and in various EU law agencies. One certain fact is that the Principle of Solidarity has been distinguished as a fundamental Right in the European Union. It is present in Chapter IV of the Charter of Fundamental Rights of the European Union. Over the Years, we can see how the Courts are becoming more and more cautious in their use of the Solidarity Principle i.e. in the case of social protection as in the case of Grzelczyk.

Solidarity has been a recognised principle in the Treaties as well, for example in article 2 TEU and very importantly article 80 TFEU in terms of Asylum-seekers ‘*this Chapter and their implementation shall be governed by the principle of solidarity and fair sharing of responsibility*’. The ‘Solidarity Clause’ in art 222 TFEU had been distinguished as the strongest manifestation of the Principle of Solidarity and Member State have become more open to the

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<sup>44</sup> Goldner Lang, *ibid*.

<sup>45</sup> [https://ec.europa.eu/home-affairs/content/european-agency-management-operational-cooperation-external-borders-member-states-european\\_en](https://ec.europa.eu/home-affairs/content/european-agency-management-operational-cooperation-external-borders-member-states-european_en) (13 April 2018).

<sup>46</sup> European Agenda On Migration: Securing Europe's External Borders (2015) [http://europa.eu/rapid/press-release-MEMO-15-6332\\_en.htm](http://europa.eu/rapid/press-release-MEMO-15-6332_en.htm) (13 April 2018).

<sup>47</sup> E. Küçük, *The Principle Of Solidarity and Fairness in Sharing Responsibility: More than Window Dressing?* European Law Journal, Vol. 22, July 2016, pp. 448-69.

<sup>48</sup> Annual Activity 2016 (Frontex General Report Reg No 14665 2017) [https://frontex.europa.eu/assets/Key\\_Documents/Annual\\_report/2016/Annual\\_Activity\\_Report\\_2016.pdf](https://frontex.europa.eu/assets/Key_Documents/Annual_report/2016/Annual_Activity_Report_2016.pdf) (13 April 2018).

use it. In terms Asylum-seekers, art 78 TFEU direct the Union to '*develop a common policy on asylum*'. The Common European Asylum System aims to create a system together with the Member States for burden-sharing. The most criticised regulation under the CEAS has been the Dublin III Regulation as it is based on the principle that the first Member State where an asylum seeker enters is responsible for the asylum application. This creates certain pressures on Member States along the external Borders.

The Inability and reluctance to perform at the external borders by Member States is resulting the mutual trust between Member States and faith in the EU institutions to collapse. Member States that have been seeking an intra-EU solution based on co-operation and Solidarity are being undermined by countries that are objection to a fair sharing of responsibility<sup>49</sup>.

Virginie Guiraudon, director of research of the CNRS at the Sciences Po European Studies in France, questioned in her paper 'The European Union and Asylum: A Problem of Solidarity' that "instead of a European asylum Policy a policy of non-access to asylum"<sup>50</sup> has been created. She criticised that provisions like the Dublin Agreement and the EURODAC database allow countries which have created an informal system to stop asylum seekers, to toss them from country to country, rather than creating a common policy. One can argue that what we see as a Common European Asylum Policy, in reality shows actual little Solidarity and is only a façade created by Countries who instead of welcoming asylum seekers, want to discourage them to come to Europe

Some opposing views are also present, where certain Member State made an application to the European Council arguing the fact that to act in solidarity is based on the willingness of the Member State. This was rejected by the CJEU as it has been made clear from treaty law and previous rulings, that the principle of solidarity a legally enforceable obligation. If the Solidarity mechanisms of the non-active directive, Temporary Protection Directive, had been enforced, they all would have been at risk of breaching art 80 TFEU. A range of measures have been adopted to develop, maintain and promote solidarity such as the abolition of internal borders, bringing Member States closer. Free movement has been put in place for all EU citizen and their Third-Country family members. Some measures have been adopted in order to encourage financial assistance to Member states in need such as the longest and strongest standing measure, the European Refugee Fund. It has been making regular funds into various Framework Programmes and aims to enhance its objectives in the future by raising their budget. Frontex is another measure applied by the EU which focuses on the External Border and Coast Guard. It has been annually publishing reports detailing the migration flows of illegal border crossings or people with fraudulent documents arriving at the border.

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<sup>49</sup> B. Nagy, *Sharing the Responsibility or Shifting the Focus? The Responses Of The EU And The Visegrad Countries To The Post-2015 Arrival Of Migrants And Refugees* Global Turkey in Europe, 2017 [http://www.iai.it/sites/default/files/gte\\_wp\\_17.pdf](http://www.iai.it/sites/default/files/gte_wp_17.pdf) (13 April 2018).

<sup>50</sup> V. Guiraudon, *Les Réfugiés*, Seuil 2013, pp. 79-89.

We can definitely see a stronger approach of Solidarity in the EU, for example by the Council in March 2012 where they concluded on the possible idea of a common Framework for genuine and practical solidarity towards Member States facing particular pressures on their asylum systems<sup>51</sup>.

In September 2015, Jean-Claude Juncker, the president of the European Commission, stated in his address to the European Parliament '*If I could describe Europe with just one word, it would be perseverance*'. However, he also criticised the lack so solidarity in the EU during the refugee and migrations crisis but expressed his confidence that Europe will finally '*show their resilience*.'<sup>52</sup>

The exact effect of the solidarity principle depends on the circumstances existing in the sector in which the principle will apply.

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<sup>51</sup> Communication from the Commission to the European Parliament, the Council, The European Economic and Social Committee and the Committee of the Regions on enhanced intra-EU solidarity in the field of asylum – An EU Agenda for better responsibility-sharing and more mutual trust [COM (2011) 835].

<sup>52</sup> J.-C. Juncker, *European Solidarity in a World of Crises*, Project Syndicate, 2015 <https://www.project-syndicate.org/onpoint/european-solidarity-greek-crisis-refugees-by-jean-claude-juncker-2016-01?barrier=accesspaylog> (13 April 2018).

# Statelessness – Insights from International, European and National Perspectives

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*This article aims to highlight some crucial issues around and about statelessness. Humbly, it stands for the awareness of the reader, alerting on the problematics involved in this regretful phenomenon. It is neither new nor recent. It has existed for decades, not only abroad. Indeed, statelessness does not only concern other continents, but also happens in Europe and in the European Union. Despite the existence of international instruments specifically dedicated, a regional approach is required, as an impulse for a change in domestic laws.*

*Keywords: statelessness, migration, asylum, European law, international law*

## 1. Introduction

While statelessness has existed for several centuries, the international community has only been concerned with its eradication since the middle of the 20th century. Indeed, according to some authors such as French professor Jules Lepoutre « *Since the end of the Second World War, nationality has become a human right<sup>1</sup>* ». From its inception, the United Nations had to deal with the mass atrocities of wars, including tremendous refugee populations across Europe following the Second World War. It led Hannah Arendt to affirm that nationality is the very first right, as it allows someone's right to have rights<sup>2</sup>.

Nationality is a contentious issue because it is a manifestation of the sovereignty and the identity of a country. It is no wonder that the quarrels around citizenship often lead to tension and conflict, both within states and between them. During the 20th century, cases of statelessness in the world have increased even as the commitment to human rights grew stronger. International law rules on nationality has thus evolved in two directions: the need to protect and assist stateless persons and to eliminate or, at least, to reduce statelessness.

Statelessness is the lack of nationality, or the absence of a recognized link between an individual and any State.<sup>3</sup> A stateless person is not considered as a national by any state under the operation of its law, he or she has no citizenship nor nationality. *Some stateless persons are also refugees* but not all and many persons who are stateless never have crossed an international

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<sup>1</sup> [https://www.liberation.fr/france/2016/01/04/au-ps-allons-ensemble-vers-l-apatride\\_1424318](https://www.liberation.fr/france/2016/01/04/au-ps-allons-ensemble-vers-l-apatride_1424318) (20 May 2019).

<sup>2</sup> <https://www.newyorker.com/news/our-columnists/the-right-to-have-rights-and-the-plight-of-the-stateless> (20 May 2019).

<sup>3</sup> 1954 Convention on Statelessness, article 1.

border. Therefore, the stateless persons do not benefit of the State protection. It has practical consequences. In some countries, they cannot obtain an accommodation or a bank account, they cannot have healthcare or send their children at school, as they have no official document provided for by a public authority. The access of civil status is sometimes impossible; therefore, they cannot get married for example.

According to the UNHCR, it is hard to precisely know the number of stateless people in the world, as, by definition, they are not in any public record<sup>4</sup>. However, the UNHCR estimates that number around 10 million in the world, and has the ambitious, not to say idealistic, goal to eradicate statelessness for 2024. Roughly, it is possible to say that there are 370,000 registered in the Middle East and North Africa; 715,000 in Africa; 2,500 in Americas, 1.500 million in Asia and the Pacific.<sup>5</sup> It is not a phenomenon only happening outside Europe. Indeed, there are 570,000 registered, mainly due to the collapse of old States.

Causes of Statelessness varies. It can occur because of wars, when countries collapsed (such as the Soviet Union or Yugoslavia), and new were created. It can also be the consequence of some conflicting nationality laws. Indeed, some countries nowadays do not allow female citizens to confer nationality of their children.<sup>6</sup> In most large-scale statelessness situations, statelessness is a result of discrimination.

Many states define their body of citizens based on ethnicity, leading to the exclusion of large groups<sup>7</sup>. Another reason comes from the administration of a country. Indeed, individuals might be entitled to citizenship but may be unable to undertake the necessary procedural steps<sup>8</sup>.

In rare cases, individuals may become stateless upon renouncing their citizenship because of philosophical, political, or religious beliefs may desire or seek statelessness. There were also some famous stateless persons , such as Albert Einstein when he renounced his German nationality in 1896. A final cause of statelessness is non-state territories, the Palestinian territories being perhaps the most prominent example.

The practice of creating statelessness is forbidden by the international community. Prior to the existing tools to fight against this phenomenon, some initiatives were taken. For instance, the Nansen-Passport can be seen as the very first protection for refugees and Stateless. It was a certificate of identity and travel created at the initiative of Fridtjof Nansen, a Norwegian diplomat, at the intergovernmental conference of July 1922 in Geneva. It was initially intended

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<sup>4</sup> <https://www.unhcr.org/stateless-people.html> (20 May 2019).

<sup>5</sup> <https://www.unhcr.org/ibelong/wp-content/uploads/UNHCR-Statelessness-2pager-ENG.pdf> (20 May 2019).

<sup>6</sup> <https://www.statelessness.eu/issues/ending-childhood-statelessness>. (20 May 2019).

<sup>7</sup> For example, over a million of people living Rakhine State in Myanmar (Burma) are stateless because of the laws currently into force, stating that only members of specific ethnic groups are eligible to the Burman nationality (The International Observatory on Statelessness: <http://www.nationalityforall.org/burma-myanmar>) (20 May 2019).

<sup>8</sup> For example, the country of origin of the individual might have collapsed, such as it was the case for Yugoslavia, and a former citizen may not meet the requirements for the gratification of the successor State's citizenship (CMS – *Center for Migration Studies*, <https://cmsny.org/the-stateless-in-the-united-states/>) (20 May 2019).

for refugees and stateless Russian after the collapse of the Russian Empire<sup>9</sup>, it was extended in 1924 to the Armenians and in 1928 to the Assyro-Chaldeans. In 1924, thirty-eight states, including France, adopted this document. The passport was written in French and in the language of the refugee's country of origin; the same solution was adopted in the other host countries. Its definitive status was laid down by the Geneva Convention of October 28, 1933. Its name was officially abolished after the Second World War, while remaining present in the current administrative language. Nowadays, the Travel Document replaces the Nansen Passport.<sup>10</sup> In total, between the two world wars nearly 450,000 Nansen passports were granted,<sup>11</sup> leading some authors to strive for a new kind of Nansen-Passport because of the Refugee crisis occurring in Europe<sup>12</sup>.

With the collapse of the League of Nations, the United Nations had to come up with stronger and more stable guarantees. Those are to be found in several instruments, such as the Universal Declaration on Human Rights (UDHR) which provided both a right to asylum (Article 14) and a right to nationality (Article 15). The declaration also expressly prohibited arbitrary deprivation of nationality, which had affected many of the wartime refugees – although it needs to be said that the UDHR is not a binding instrument.

In 1954, the Convention relating to the Status of Stateless Persons was adopted, which provides a framework for the protection of the stateless. In 1961, the UN adopted the Convention on the Reduction of Statelessness. This convention provided a definition of a stateless person (which has since become part of customary international law, according to the International Law Commission) and sets out several rights that stateless persons should enjoy. The convention thus became the basis for an international protection regime for stateless persons.

However, in order to ensure that the rights enumerated in the convention are protected, States need to be able to identify stateless individuals. On the 14<sup>th</sup> of April 2018, 91 states are parties to the 1954 convention. There are also regional instruments of great importance which protect the stateless persons such as the European Convention on Nationality signed in 1997 under the auspices of the Council of Europe which tends to reduce statelessness in the European region, as it is still occurring.

Statelessness often is the result of policies aiming to exclude people considered as outlanders, foreigners, notwithstanding their profound ties with a given country. For example, over a million people living Rakhine State in Myanmar (Burma) are stateless because of the laws currently into force, stating that only members of specific ethnic groups are eligible to the

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<sup>9</sup> It concerned refugees from the former Russian Empire fleeing the October Revolution, because a Soviet decree of 15 December 1922 revoked the nationality of all emigrants who became stateless.

<sup>10</sup> Definition of the Nansen-Passport : <https://ofpra.gouv.fr/fr/passeport-nansen>

<sup>11</sup> J-P Dubois, “Nansen-Passeport, first protection for refugees in international law history”, CAIRN <https://www.cairn.info/revue-apres-demain-2016-3-page-48.htm> (13 April 2018).

<sup>12</sup> D. Ducret, *Recréons le “passeport Nansen”, pour répondre à la crise des réfugiés* [https://www.lemonde.fr/idees/article/2019/01/22/diane-ducret-recreons-le-passeport-nansen-pour-repondre-a-la-crise-des-refugies\\_5412512\\_3232.html](https://www.lemonde.fr/idees/article/2019/01/22/diane-ducret-recreons-le-passeport-nansen-pour-repondre-a-la-crise-des-refugies_5412512_3232.html) (13 April 2018).

Burman nationality. On the other hand, policies can help to solve statelessness situations. Indeed, the Baltic Countries, Lithuania, Estonia and Latvia recently adopted measures to facilitate the acquisition of nationality for people born in those two countries from two non-nationals parents from the ex-USSR<sup>13</sup>.

Despite an international protection regime against statelessness, this phenomenon still exists in many countries of the world. The consequences of statelessness depends on the country. Indeed, the status of a person who might be stateless ultimately depends on the viewpoint of the state with respect to the individual or a group of people. Today, some of the largest populations of stateless persons are found in Burkina Faso, Thailand, Lithuania and the Dominican Republic. The country most concerned by the statelessness is Burma where more than 1 million Muslims have had their nationality refused by a law from 1982<sup>14</sup>.

The UNHCR, the UN's refugee agency declared that every 10 minutes, a stateless child is born in the world. Antonio Guterres described this situation as unacceptable in the 21st century. The UNICEF also estimated in 2013 that 230 million of children under the age of 5 have not been registered<sup>15</sup>.

The struggle to identify and to eradicate the statelessness phenomenon relates to the fact that statelessness is only the surface of a bigger and almost endless vicious circle. Indeed, statelessness can be a consequence of but also a cause of migration. During the collapse of Yugoslavia or the USSR, many nationals became temporarily, or still are, stateless as they could not enjoy any effective protection from their State of origin as it had disappeared. On the other hand, it can also be a cause of migration, as it can be regretfully illustrated by the Rohingyas crisis in Burma. Accordingly, Rohingyas are deprived of their possessions and from their nationality because of racial laws, leaving them in the impossibility to cross lawfully any border.

There is a strong connexion between the statelessness phenomenon and migration issue. They are migrants, as they hope to find a better treatment and greater opportunities elsewhere. It implies the right to emigrate, protected by the International Covenant on Civil and Political Rights of 1966<sup>16</sup>.

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<sup>13</sup> R. Vejonis, Latvian president, speech at the Latvian Senate <https://bnn-news.com/latvian-president-proposes-giving-citizenship-to-all-children-born-in-latvia-198581> (13 April 2018).

<sup>14</sup> European Parliament resolution on the situation of the Rohingya minority in Myanmar, 2017 [http://www.europarl.europa.eu/doceo/document/B-8-2017-0529\\_EN.html?redirect](http://www.europarl.europa.eu/doceo/document/B-8-2017-0529_EN.html?redirect) (13 April 2018).

<sup>15</sup> UNICEF, Press release, “*one in three children under-five does not officially exist*” [https://www.unicef.org/media/media\\_71508.html](https://www.unicef.org/media/media_71508.html) (13 April 2018).

<sup>16</sup> Article 12 of the *ICCPR*: “Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.” If we focus on the second paragraph, it shall allow persons to leave freely his/her own country also.

However, the conditions of admission and entry are left to the discretion of the hosts States<sup>17</sup>. The only limitation of the host state's immigration policy is the need to give "due consideration to the situation of vulnerable persons, including those who might be stateless."<sup>18</sup> Those elements mentioned above combined, allow to define the international freedom of movement, which shall include three rights: the right to enter, re-enter and return to a country; the right to remain in a country; and the right to leave a country.<sup>19</sup> The broadness left to the use of "a" country instead of using the qualification of "country of origin" can be seen as a more adequate way to protect stateless persons. However, there is still an issue as the absence of a country of nationality obliged to readmit them remains.<sup>20</sup>

This article intends to contribute to provide a humble insight into the rights and protection of stateless persons. The aim of this article is, firstly to focus on the different factors involved in the avoidance and eventually eradication of the statelessness phenomenon. Regardless whether it occurs by birth, or by the arbitrary deprivation of nationality by a state, this paper aims to stress that the creation of stateless people is something that can easily happen, and is inextricably linked to political willingness, and that no right is indefinitely acquired. Indeed, it was an issue in France when the French government wanted to amend the Constitution to set out the possibility of deprivation of nationality regarding terrorist persons. To do so, this paper aims to explain and define what is statelessness; provide a brief insight of the legal tools used both internationally and at the European scale, and how France deals in practice with statelessness.

## **2. Statelessness and international law**

The very core definition of a stateless person is established by the 1954 Convention on the status of stateless persons (2.1.). Considered as amending this convention, the 1961 Convention on the reduction of statelessness is the other instrument provided for fighting against this phenomenon internationally (2.2.).

### ***2.1. The cornerstone convention of 1954 on the Status of Stateless Persons***

The 1954 Convention aims to ensure that stateless persons can exercise a minimum of fundamental rights. It sets out the legal definition of a stateless person as "a person who is not recognized by any State as its national under its law"<sup>21</sup>. In simpler terms, this means that a stateless person is a person who does not possess the nationality of any country. The 1954 Convention also sets minimum standards for the treatment of stateless persons with respect to

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<sup>17</sup> Human Rights Committee, General Comment n°15 on the position of aliens under the Covenant, 1986

<sup>18</sup> Human Rights Committee, General Comment n°15 on the position of aliens under the Covenant, 1986

<sup>19</sup> L.E. Van Waas, *Nationality Matters, Statelessness under International Law*, School of Human Rights Research Series, Volume 29, 2008.

<sup>20</sup> N. Coleman, *European Readmission Policy: Third Country Interests and Refugee Rights*, Martinus Nijhoff, Leiden 2008.

<sup>21</sup> UNHCR, UN Conventions on Statelessness: the 1954 Convention on the Status of Stateless Persons

a number of rights. These include the right to education, employment and housing. It is important to note that the 1954 Convention also guarantees stateless persons the right to identity and travel documents, and administrative assistance.

Persons covered by Article 1 (1) of the 1954 Convention are sometimes qualified of "de jure" stateless persons, although this term is not used in the Convention itself. On the other hand, the Final Act of the 1961 Convention refers to stateless persons per se, or "de facto". Unlike stateless persons falling under Article 1 (1), the term "de facto" statelessness is not defined in any international instrument and there is no regime Convention specific to this category of persons. Indeed, the reference in the Final Act of the 1961 Convention is not being developed and not binding<sup>22</sup>.

Focusing on the specific issue of statelessness, it should be read in accordance and as a *lex specialis* to the 1951 Convention on the Status of Refugees (hereinafter: the 1951 Convention), as stateless persons are often migrants and may seek asylum.<sup>23</sup> It seems to provide a solution, even a flawed one. Indeed, article 33 of the 1951 Convention codifies the principle of non-refoulement, prohibiting the return of a refugee to a State or territory where their life or liberty would be at risk due to persecution because of their race, religion, political opinion, nationality or membership in a particular social group.<sup>24</sup> It represents a distorted layer of protection as it will depend on the conditions and procedures implementing the obligation of non-refoulement. The minimum protection is to be found in the 1954 Convention on statelessness, as it aims to establish a minimal requirement for States Parties to issue travel documents to stateless persons, when lawfully staying in their territory.

By its very wording, it excludes stateless people that crossed borders without any legal document, or with the aid of smugglers that provided them false or fraudulent documents. It creates a vicious circle as "*fraus omnia corrumpit*" in international private law<sup>25</sup>.

In 2014, when the UNHCR launched the campaign to end statelessness in 10 years, there were 83 States Parties to the 1954 Convention.

## ***2.2. The 1961 Convention on the Reduction of Statelessness***

The objective of this Convention is to prevent statelessness and to reduce it over time. It creates an international framework to guarantee the right of every person to a nationality. It requires states to provide safeguards in their nationality laws to prevent statelessness at birth and later in life. Perhaps the most important provision of the Convention is that children must acquire

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<sup>22</sup> UNHCR, Expert Meeting - The Concept of Stateless Persons under International Law ("Prato Conclusions"), May 2010, <http://www.refworld.org/docid/4ca1ae002.html> (13 April 2018).

<sup>23</sup> H. Massey, "*UNHCR and de facto Statelessness*", UNHCR Legal and Protection Policy Series, 2010

<sup>24</sup> Article 1 of the 1951 Convention on the Status of Refugees.

<sup>25</sup> B. Ancel and Y. Lequette, *Grands arrêts de la jurisprudence de droit international privé*, Sirey, Paris 1992: accordingly, this theory tends to explain that in international private law, fraud corrupts the whole claim.

the nationality of the country in which they were born if they acquire no other nationality. It also establishes important safeguards to prevent statelessness related to the loss or renunciation of nationality and state succession.<sup>26</sup> The Convention also provides for the very limited situations in which States may deprive a person of his nationality, even if that would render him stateless.

In 2014, when UNHCR teams launched the campaign to end statelessness in 10 years, there were 61 States Parties to the 1961 Convention.

As it was said previously, currently in the world, there are about 10 million of stateless people. This issue touches the children in the first place: at least third of statelessness are children born stateless. First to understand the issue regarding the statelessness as it concerns the lack of nationality, it is crucial to understand how to obtain a nationality, and what the international law provides about the nationality. There are various international legal documents focus on the stateless status. However, any treaty or legal text provides the fundamentals criteria to determine the acquisition of nationality. Thus, every States are legally autonomous to determine its own rules about the citizenship (nationality).

Two main legal models can be identified. The *jus soli principle* stands in Latin for the law of the territory. Under this concept, citizenship of a person is determined by the place where a person was born. The other one is the *jus sanguinis* principle, standing in Latin for the right of blood. Under this concept, the citizenship is not determined by place of birth but by having one or both parents who are citizens of the state. Some other countries as in France accept the acquisition of citizenship by both ways.

Consequently, the issue of statelessness can happen in countries which only recognize *jus sanguinis*. On the American continent (except Haiti) the right of territory is use as a citizenship model, therefore the statelessness issue does not exist there. Despite the international treaties, despite the rules provided by the UDHR and both UN conventions, 1 child is born each 10 minutes without any nationality<sup>27</sup>.

Some causes are possible to identify. The first one would be the failure of the administration. For instance, if children are not registered in official document about where and when they were born. Thus, they will not be able to prove their citizenship. It is usually the case in the country in war, or where the power has overturned by insurrection (in that case, usually former documents are destroyed by the new government). Some people decided to be stateless because of their ideology or for their way of life. Also, countries that recognizes just the right of blood, implying that the children born from stateless parents will also be stateless. It happened usually is case of refugees. Moreover, a lot of Arabic countries refuse to recognize

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<sup>26</sup> The 1961 UN Convention on the Reduction of Statelessness

<sup>27</sup> UNHRC, *The urgent need to end childhood statelessness*, UNHCR Division of International Protection, 2015 <https://www.unhcr.org/ibelong/the-urgent-need-to-end-childhood-statelessness/> (13 April 2018).

the parentage by the mother. For instance, in Syria, children can only obtain the Syrian nationality by descentance from the father.

Currently it is a crucial issue as 25% of the children born during the Syrian conflict, have lost their fathers. Furthermore, they were usually born in refugee camps, and do not have any administrative document asserting their father's citizenship.

Statelessness could also be caused by a non-state territory, as is the case in Palestine. Finally, the main cause of creation of statelessness in the world is the discrimination (ethnic, race, religion, gender) and the non-recognition of a minority. This situation causes the highest number of statelessness in the world.

The 1954 Convention on Statelessness could be effective under several conditions: the threshold of ratification must be attained; that the State has effectively signed and ratified the Convention, and that the States has acknowledged the ICJ's jurisdiction as it has competence to settle the disputes arising on any point of international law. If one of those countries were a State Party to the European Convention of Human Rights, which would prevail for 47 States, this regional institution is binding on its Member States. The issue is that the jurisdiction of other international jurisdictions is to be accepted. It is not automatically compulsory (besides for 72 States that decided otherwise, for the International Court of Justice).

Within the European Union, not all Member States are party to the 1954 Convention relating to the Status of Stateless Persons.<sup>28</sup>

### **3. Statelessness: tools available at the European level**

Statelessness is a phenomenon to be found in the European Union. In 2015, UNHCR estimated the total number of stateless persons at in Europe 592,151<sup>29</sup>, despite the provisions aiming to eradicate, or at least reduce, statelessness. In Europe, mainly two organisations are trying to solve this issue. The first one is the Council of Europe, using the European Convention of Human Rights and several other instruments (3.1.). Then, on the EU level, the Charter of Fundamental Rights aims to contribute to tackling this phenomenon (3.2.).

#### ***3.1. The protection of stateless persons under the auspices of the Council of Europe***

Perhaps surprisingly, only one convention specifically addresses the issue of statelessness. In 1997, under the auspices of the Council of Europe, the European Convention on nationality was

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<sup>28</sup> The 1954 Convention relating to the Status of Stateless Persons. EU Member States which are party to the 1954 Convention include France, Ireland, Lithuania, Germany, the United Kingdom, Spain, Belgium, the Netherlands, Luxembourg, Italy, Greece, Sweden, Finland, and Denmark. Czech Republic, Estonia, Poland, Romania, Austria and Portugal are not States Parties to the 1954 Convention.

<sup>29</sup> <https://www.unhcr.org/statistics/unhcrstats/576408cd7/unhcr-global-trends-2015.html> (13 April 2018).

born. Unsurprisingly, and even predictably, not all Member States ratified this Convention, notably France, Italy, Latvia and Poland. France even decided not to transpose it in its domestic legal order. Therefore, it is crucial to look at the practice of the European Court of Human Rights (ECtHR) and how it deals with statelessness.

In 2010, in the “*Kuric v. Slovenia*” case<sup>30</sup>, it held the impossibility for a State to “eradicate” the nationality of its nationals without breaching their right to privacy. Moreover, although it does not guarantee “any right to acquire or retain a particular nationality”, the Convention prohibits “in certain circumstances ... the arbitrary denial or withdrawal of citizenship” (para. 353). Indeed, the applicants lived in the territory of the Republic of Slovenia for several years; most of them for decades [and / or] were even born there (para. 356).

As a result, in “*passing [a] substantial part of their lives in Slovenia [...], they have developed a network of personal, social, cultural, linguistic and economic relations that make up the private life of every human being*” (para. 359).

Once the interference with the right to private and family life was established (para. 361), the finding of lack of justification for the interference appeared not surprising. Indeed, the ECHR merely repeated (para. 373) all the criticisms of the contested legislation as formulated by the Slovenian Constitutional Court (para. 367-372: “*vagueness of the textual conditions, discrimination against “erased”, inadequate legal regime*”). As a result, it also emphasized that “*the legislative and administrative authorities did not act in accordance with the judicial decisions*” (para. 373). While acknowledging the difficulty of the situation and the Slovenian efforts (§ 374), the European Court of Human Rights also considers “*in the light of the relevant standards of international law relating to the difficulties of stateless persons, especially in situations of succession of States*”(para. 260 and followings), that the situation of the “erased” constitute a violation of Article 8 (para. 376).

### **3.2. The EU’s fight against the proliferation of statelessness**

Only 24 EU Member States are States Parties to the 1954 Convention relating to the 1954 Convention and 19 Member States are States Parties to the 1961 Convention.<sup>31</sup>

Among the Member States, there is *no homogeneity in the procedures used to determine statelessness*. Current practices may include special procedures for administrative determination; a general administrative procedure or other administrative procedure; ad hoc administrative procedures; and legal proceedings<sup>32</sup>. Sporadic rules but still the Charter represents a protection. Several rights apply to everyone, regardless of a condition of nationality or migration status. Some are meant to be and remain universal, such as human dignity, right

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<sup>30</sup> Application no. 26828/06

<sup>31</sup> EMN Inform synthesis report, « Statelessness in the EU”

<sup>32</sup> EMN Inform synthesis report, “Statelessness in the EU”

to life, right to physical integrity, the prohibition of torture and inhumane or degrading treatment, non-discrimination, effective remedy, etc.

In December 2015, the EU Council adopted conclusions on statelessness. The EU and its Member States expressed their willingness to put an end to this phenomenon, inscribing/fitting the plan taken by the UNHCR to end it by 2024. They acknowledged the importance of strengthening the existing systems of protection and put in relief the vulnerability of stateless people. Indeed, Statelessness should be allowed to “enjoy core fundamental rights and reducing the risk of discrimination or unequal treatment”<sup>33</sup>. Despite this layer of willingness from the Member States and the EU, conclusions do not hold any legal binding effect, it is just the expression of a political commitment.<sup>34</sup>

Notwithstanding, this willingness is carved in stone elsewhere. Indeed, it is to be found and binding Member States and the EU through the Charter of Fundamental Rights (hereinafter the Charter), having the same legal status as the other treaties of the European Union. For instance, an effective protection to Stateless people can be provided for in the letter of Article 21, establishing the right to non-discrimination. The second paragraph of the Article 21 invokes “*any discrimination on grounds of nationality shall be prohibited*”.

However, what happens when there is no nationality at all? The first paragraph of the same article stands for an absolute non-discrimination right, regardless of the origin, genetic features, property or birth. By the combination of those paragraphs, stateless people can benefit from this protection.

This other protection Stateless people can benefit from, is settled in Article 6 of the Charter, ensuring the right to liberty and security, but also including the prohibition of arbitrary detention. In the *Al Chodor* case (C-528/15, para. 37-39), the European Court of Justice (ECJ) held that “given the importance of the right to liberty and security of the EU Charter, and the severity of the interference that detention presents, limitations on this right shall only be allowed when strictly necessary.”<sup>35</sup> Further on, the Court added that the detention process must be “subject to compliance with strict safeguards, namely the presence of a legal basis, clarity, predictability, accessibility and protection against arbitrariness.”<sup>36</sup>

The interpretations of the ECJ help to create a more effective protection, on the judicial perspective as, compared to other jurisdiction, especially international ones, the *ratione personae* criterion might not be satisfied. Indeed, for instance, before the International Court of

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<sup>33</sup> EU Council conclusions on Statelessness, 2015 (<https://www.consilium.europa.eu/en/press/press-releases/2015/12/04/council-adopts-conclusions-on-statelessness/pdf>) (13 April 2018).

<sup>34</sup> As they are not foreseen in the article 288 of the Treaty on the Functioning of the EU, they cannot be adopted, and therefore have no legal binding effect.

<sup>35</sup> Case C-528/15 *Al Chodor* [EU:C:2017:213], para. 37-39

<sup>36</sup> *Ibid.*, para. 40.

Justice, the litigation is only for States and between them, whereas the ECJ or the ECtHR have jurisdiction for legal persons. It helps to provide an effective remedy for Stateless people.

On the other hand, the ECJ can also hold different positions. In the C-135/08 *Rottman case*, it stated that a Member State of the EU may withdraw its nationality, though granted through naturalization, from a citizen of the EU, even if it implies that the person loses both his or her nationality and the EU citizenship – of course it must be noted that the case revolved around fraudulent acquisition of citizenship. This demonstrates that the creation of Stateless persons also happens in the European Union and is ultimately left at the discretion of the Member States by one of the EU institutions, in that case, the ECJ, even if in the case in question the ECJ held that the national court deciding on the case must have due regard to EU law and in particular the principle of proportionality.

The usual threshold used by the Court was the proportionality test. As it was a preliminary ruling on interpretation of EU law, the ECJ cannot rule instead of the national jurisdiction. It gives a binding judgement but does not amend the national law or decide the basic case. It even decided not to address the question whether Austria is obliged to restore Rottman's original citizenship, as it would have ruled *ultra vires*. Indeed, according to international law, the acquisition or loss of nationality and the conditions towards it, remain in the sole competence of the Member States<sup>37</sup>. Consequently, the applicant was left stateless. Appropriately, as due to the proportionality test and the facts of the case, as the applicant obtained the naturalization by fraud<sup>38</sup>. It is possible to presume that, only when fraudulent behavior is occurring, *fraus omnia corrumpit*<sup>39</sup>, meaning that fraud corrupts everything. It also implies that the withdrawal of a nationality, leaving the applicant stateless, is a proportionate sanction to criminal behaviors. It outstandingly shows the fact that, as it remains in the sole competence of the Member States, granting and withdrawal of citizenship is not harmonized in the EU and is not likely to be anytime soon. Indeed, nationality is inherent to the idea of sovereignty.

#### **4. Statelessness: protection provided at the domestic level - an overview of the French System**

About 50 years ago, a number of laws regarding the deprivation of nationality were enacted under the Vichy Regime. The laws of 23 of July and 10 of September 1940 allowed the withdrawal of nationality from individuals who left French territory without mission order. Under the Act of July 23, 446 people, including Charles de Gaulle and Pierre Mendes France

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<sup>37</sup> Case C-149/79 *Commission v. Belgium* [EU:C:1982:195]: the ECJ held that it is within the exclusive competence of Member States to determine the conditions of acquisition and loss of nationality, referring to the solidarity and reciprocity between rights and duties between Member States.

<sup>38</sup> Case C-135/08 *Rottmann* [EU:C:2010:104], para. 52 : “a person may be deprived of the nationality of a Contracting State if he has acquired that nationality by means of misrepresentation or by any other act of fraud [...] even if he thus becomes stateless, when that nationality was acquired by means of fraudulent conduct, false information or concealment of any relevant fact attributable to that person”

<sup>39</sup> Cass. Requête, 3 juillet 1817, *Princesse de Bauffremont*: this case establishes the theory of fraud to the law, providing for the “*fraus omnia corrumpit*” principle.

were deprived of their nationality by the Vichy Regime. It is still a recurrent debate. The following part of this paper aims to focus on the protection of stateless people in France (4.1.) and the practical effect of this protection (4.2.).

#### ***4.1. Historical background: the elaboration of the protection for Stateless persons***

The deprivation of nationality for binational individuals is already in the French Civil Code - for foreigners who have acquired French nationality and only for them. The government intended to expand in 2016 with the French born binational. The measure was very hard to reconcile with French republican values that it would have required amending the Constitution, which failed in the end.

It was a very crucial moment. As Montesquieu said, "*it is sometimes necessary to change certain laws. But the case is rare, and when it happens, it must be done with a trembling hand.*" The hands of parliamentarians have all reasons to tremble as the only time France has denaturalized French people, it was by law of 22 July 1940, under the Vichy Regime during the Occupation - just before voting legislation regarding the status of Jews. Finally, the repeal of Decree *Cremieux*, on the 7th of October 1940, deprived 100,000 Jews of Algeria of French citizenship.

The parallel is not absurd, "*foreigners should not forget that the quality of French must be earned,*"<sup>40</sup> said Raphaël Alibert, the Ministry of Justice of Maréchal Pétain, according to the *Journal des débats* of 24 July 1940. "*Being French is earned*"<sup>41</sup> writes Robert Ménard (Front National – now Rassemblement National), mayor of Béziers on Boulevard Voltaire site. "*Being french, it must be earned. French citizenship must be earned. All rights and duties that go with it must be respected*"<sup>42</sup> asserted Xavier Bertrand, secretary general of the UMP (so called Republicans) on the 31st of July 2010. It is a recurrent debate. This part of this paper aims to focus on the protection of stateless people in France (A) and the practical effect of this protection (B).

#### ***4.2. Practical views on the functioning of the French system***

The 1998 *Guigou Act* forbids the creation of stateless people. On an initiative of the former minister of justice this prohibitions was added to Article 25 of the French Civil Code. The French statelessness-specific protection mechanism (the oldest in the world) was created in 1953, thus it pre-dates the 1954 Statelessness Convention.

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<sup>40</sup> B. Laguerre, les dénaturalisés de Vichy », 1940-1944, Vingtième Siècle, Revue d'histoire, Vol. 20, 1988, pp. 3-15.

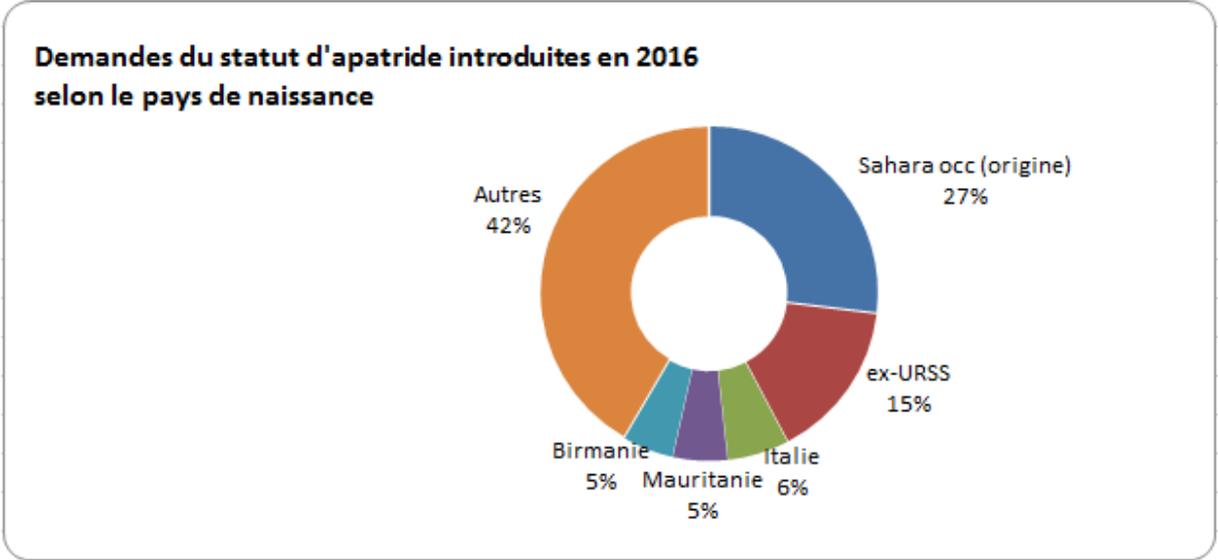
<sup>41</sup> R. Ménard, French politician, Nouvelles de France 2012 <https://www.ndf.fr/identite/21-10-2012/etre-francais-ca-se-merite/> (13 April 2018).

<sup>42</sup> X. Bertrand, French politician, interview [https://www.lepoint.fr/politique/bertrand-lr-favorable-a-la-decheance-de-nationalite-pour-tous-les-individus-04-01-2016-2006846\\_20.php](https://www.lepoint.fr/politique/bertrand-lr-favorable-a-la-decheance-de-nationalite-pour-tous-les-individus-04-01-2016-2006846_20.php) (13 April 2018).

Since then, a centralised administrative authority, namely the French Office for the Protection of Refugees and Stateless Persons (*Office Français de Protection des Réfugiés et Apatrides, OFPRA*) has overseen assessing claims for stateless status. French law does not stipulate detailed and specific rules on how such claims should be dealt with (e.g. regarding evidentiary matters), however, the procedural framework can still be considered settled, partly based on the OFPRA’s brief guidance published on its website. Applicants are commonly (yet not obligatorily) invited to an oral hearing by the determining authority. The OFPRA’s negative decision can be appealed in the regular framework of judicial review of administrative decisions, before a local administrative court (*tribunal administratif*), and at second instance, before a regional administrative court of appeal (*cour administrative d’appel*).

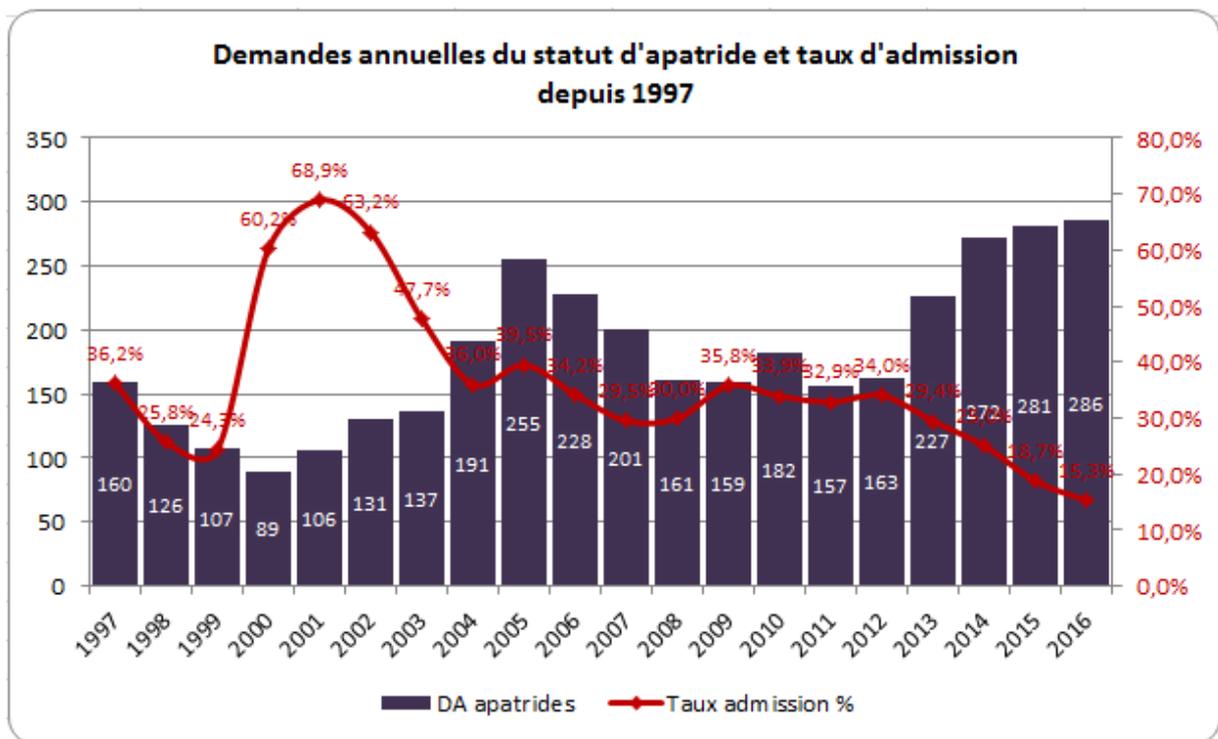
These courts can only quash decisions made in breach of law and refer the case back to the OFPRA for a new procedure, they are not entitled to rectify an erroneous legal conclusion and grant stateless status themselves. In cases of an error of law, further review can be sought with the Conseil d’État.

Statelessness determination represents a minuscule proportion of the OFPRA’s caseload. Between 2006 and 2010, for example, 931 persons claimed stateless status in France, while the country registered hundreds of thousands of asylum seekers in this five-year period. Applicants come from various parts of the world; yet Europe (in particular Southeast Europe) regularly constitutes a significant region of origin. The ‘recognition rate’ in the administrative phase usually verges around 30 percent (a higher proportion than in asylum cases). Between 2006 and 2010, the OFPRA recognised 311 persons as stateless.



*Applications for stateless status in 2016, according to the country of birth*

*Source: OFPRA website – latest data available.*



*Yearly applications for stateless status and admission rate*

*Source: OFPRA website – latest data available.*

In France, the French Office for the Protection of Refugees and Stateless Persons (OFPRA) oversees the statelessness determination procedure since its creation in 1952. It is the first country in the world to have established such a procedure, even before the 1954 Convention. In 2017, 341 applications for statelessness were newly filed with OFPRA, representing an increase of 19.2% over 2016. 52% of requests come from persons originating from Europe, 32% are from Africa and 16% from Asia. In 2017, OFPRA took 298 decisions, 65 of which were positive. The admission rate is 22%, up from 2016 (15.3%). It should also be noted that 114 adults who have already filed an application for international protection were ultimately granted a dual status of refugee-stateless.

The result is that in theory a person’s nationality may be withdrawn and so France could make a person stateless. This is underlined by the fact the country did not ratify to the 1961 United Nations Convention on the Reduction of Statelessness. The convention has been ratified by only 40 countries worldwide and says that contracting states shall not deprive someone of their nationality if it would render that person stateless.

France signed this convention on 31 May 1962 but has not ratified it. In addition, France made a reservation based on art. 8.3 of the Convention, allowing it "to deprive an individual of his

*nationality, [... if he] has behaved in such a way as to cause serious prejudice to the essential interests of the State [...]*».

Similarly, the European Convention on Nationality of 1997, which provides that "every individual has the right to a nationality", has been signed but not ratified by France, and Article 15 of the Universal Declaration of Human Rights. states that "every individual has the right to a nationality"; but this text has a weak legal effect, for the Conseil d'Etat it has no normative value.

Consequently, for the constitutional expert Didier Maus, "*legally there is no international text that commits France to prohibit statelessness*"<sup>43</sup>. But for another constitutionalist, Dominique Rousseau, "*its simple signature [of the 1961 convention] commits [France] to respect the spirit and purpose of the text*"<sup>44</sup>.

Nevertheless, a contracting state may strip a private individual of his nationality under certain conditions like showing a lack of loyalty to that state or displaying the kind of behaviour to be seriously prejudicial to the vital interests of the state.

In other words, even if France did ratify the convention it could still make a person stateless. Legally yes, but would it dare to act at a time when the UN has heightened its campaign against statelessness? Such a move would create the wrong sort of headlines for the French government.

Neither the Constitution nor the implementing bill will no longer reference to the binational persons, therefore making theoretically possible the deprivation of nationality for a French having no other nationality. The government has just promised to ratify the UN Convention of 1961 on the "Reduction of Statelessness."<sup>45</sup>

The treaty, however, allows states to practice statelessness in limited circumstances, including "*an individual who has had a course of action to be seriously prejudicial to the vital interests of the State*". Understand here terrorism and preparation, as the plotting phase before taking actions. Consequently, there is only French law to prevent the withdrawal of a person's nationality whom only nationality is French. This prohibition, inscribed in Article 25 of the Civil Code, is provided for by the Act of 16 March 1998 on the nationality brought by the government of Lionel Jospin, in this case by the Minister for Justice of that time, Elizabeth Guigou, stating that it "*would allow, while respecting our international commitments, to no*

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<sup>43</sup> D. Maus, legal expert in French Constitutional law, interview <https://www.rtl.fr/actu/debats-societe/l-interdiction-de-l-apatridie-n-est-pas-actuellement-dans-les-obligations-de-la-france-dit-un-juriste-7781170563> (13 April 2018).

<sup>44</sup> D. Rousseau legal expert in French Constitutional law, interview [https://www.lemonde.fr/politique/article/2016/01/05/la-decheance-pour-tous-juridiquement-difficile-a-imposer\\_4842065\\_823448.html?xtmc=decheance\\_pour\\_tous&xtcr=4](https://www.lemonde.fr/politique/article/2016/01/05/la-decheance-pour-tous-juridiquement-difficile-a-imposer_4842065_823448.html?xtmc=decheance_pour_tous&xtcr=4) (13 April 2018).

<sup>45</sup> M. Valls, former French Prime Minister speech [https://www.lemonde.fr/les-decodeurs/article/2016/01/27/apatrides-valls-s-emmele-dans-les-ratifications-de-textes-internationaux\\_4854861\\_4355770.html](https://www.lemonde.fr/les-decodeurs/article/2016/01/27/apatrides-valls-s-emmele-dans-les-ratifications-de-textes-internationaux_4854861_4355770.html) (13 April 2018).

*longer distinguish between French with regard to the crimes of terrorism". "Certainly, we might create stateless people", notes the former minister. Constitutional reform would, in any event, that a mouthful of this provision now judged expired, including by its initiator*<sup>46</sup>.

Only the European Court of Human Rights<sup>47</sup> could prevent France from taking that action. However, in order to fight the action through these courts could take years.

At the same time, going opposite to France, the Canadian government opened the way for the repeal of the deprivation of nationality that applies to binational individuals guilty of terrorism or espionage, explaining that "there is only one class Canadians."<sup>48</sup>

There will be no revision of the French Constitution to include the principle of deprivation of nationality against perpetrators of terrorist acts, such as those of the attacks in Paris in January 2015 and November last. After four months of controversy in the state of emergency, the head of state François Hollande finally gave up on March 30 to convene a Congress at Versailles to achieve this political response. Senate President Gérard Larcher highlighted the "divisions" aroused by the project, rewritten after each vote. But a single text should have been adopted by a majority of 3/5<sup>49</sup>.

## 5. Conclusion

Statelessness is not a new phenomenon. Both the 1954 and 1961 Conventions are specifically dedicated to this issue. Those were merely the first steps to stem the proliferation of stateless persons. However, the collapse of old states, and the arising of new ones, implied also a change of nationality status for the inhabitants with very practical consequences, even in Europe. Those old instruments also appear to be not sufficient enough to fight against statelessness, as it is a recurrent and topical issue. Indeed, this is what explains the commitment of the UNHCR, illustrated by its very ambitious - though probably too ambitious - action plan to eradicate Statelessness by 2024. On the other hand, the European Convention on Nationality of 1997 was not ratified by all the EU Member States, including France and the United Kingdom. It highlights a visceral condition, but also a critical dilemma here: the will of states is the cornerstone of the well-functioning and effective protection for stateless people, created by States

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<sup>46</sup> E. Guigou, newspress, "*reflexions autour de la déchéance de nationalité* » : [http://www.newspress.fr/Communique\\_FR\\_293467\\_2970.aspx](http://www.newspress.fr/Communique_FR_293467_2970.aspx) (13 April 2018).

<sup>47</sup> Nottebohm Case (Liechtenstein v. Guatemala) ICJ. Reports 1955: "Nationality serves above all to determine that the person upon whom it is conferred enjoys the rights and is bound by the obligations which the law of the State in question grants to or imposes on its nationals. This is implied in the wider concept that nationality is within the domestic jurisdiction of the State." Furthermore, the litigation conditions before the ICJ are very strict. It consists on three elements: to settle a dispute, between States, according to international law. The main issue concerns the State to act on the basis of the protection on diplomatic action for the stateless person, a protection nowadays obsolete. Only the ECtHR would be a viable option for an effective protection.

<sup>48</sup> J. Trudeau, Canadian Prime Minister, interview <https://globalnews.ca/news/2245012/watch-trudeau-would-let-convicted-terrorists-keep-canadian-citizenship/> (13 April 2018).

<sup>49</sup> G. Larcher, speech at the French Senate <https://www.senat.fr/presse/cp20160330.html> (13 April 2018).

themselves, sometimes even allowed by the European Court of Justice. The questionable proportionality test to allow the deprivation of citizenship to a human being because of a fraudulent behaviour brings up a lot of criticism. As Simone Veil said, “*no right is to be taken for granted*”, and French debate towards the unilateral withdrawal of a sole nationality, shows that it can occur, and it had occurred in the UK, as a woman got her citizenship revoked by the Home Office, leaving her stateless after leaving for Syria.<sup>50</sup> Therefore, migration, asylum and statelessness are inextricably connected, either being the cause or the consequence of one another. It seems that creating a stateless person is a punishment, unilaterally with no chance for a fair hearing or an effective remedy. If the States do not have enough will and commitments put in practice to solve the statelessness issue, it will remain a challenge.

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<sup>50</sup> N. Wayne, I. Forbes, C. Tomalin, S. Eccleston and W. Schabas, *Shamima Begum citizenship decision sets a dangerous precedent*, The Guardian, 21 February 2019 <https://www.theguardian.com/uk-news/2019/feb/21/shamima-begum-citizenship-decision-sets-a-dangerous-precedent> (13 April 2018).

# **Free Movement of Workers in EU: Current Status, Outcomes of Implemented Legislation and Challenges to Deal with**

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*In this paper, we will consider the legal status of workers in accordance with the principle of "free movement of workers" in the European Union, and the legal status of workers originating from non-EU countries. Attention will be paid to such problems of free movement of workers as: discrimination, recognition of workers' qualifications, etc. Also, an analysis of legal instruments aimed at ensuring and encouraging the free movement of workers in the EU was conducted. The final part will be the study of the positive and negative effects of free movement of workers in the host country and home country.*

*Keywords: free movement of worker, workers from non-EU countries, protection of employees*

## **1. Introduction**

Labor is the main source of the existence, prosperity and progress of any human being. Since the existence of homo sapiens and to date, and since the creation of the first wheel and to the serial launch of high-tech machines, the main and constant life-companion of a man was his work. With the development of information and technologies and the process of globalization, the work became publicly available and gave rise to such processes as "labor migration", including illegal border crossing.

In the European Union this is a subject that has been faced with labor migration and the consequences of the movement of workers. Being one of the most economically powerful associations in the world, the EU is an attractive place for possible employment for citizens from less developed countries of the EU and third-country nationals.

From a legal point of view, freedom of movement for workers includes the rights of movement and residence for workers, the rights of entry and residence for family members, and the right to work in another Member State and be treated on an equal footing with nationals of that Member State. Movement of workers means their physical movement from the territory of one state to another, for the purpose of performing work, providing services or staying at a permanent place of work.

The movement of workers in the territory of the European Union can take place in two ways:

a) movement of workers within the European Union, from the economically weaker developed countries to countries with a stronger economy, directly depends on the level of wages of the host country;

b) movement of workers from the third countries to the territory of the European Union for the purpose of employment and further migration.

Every year, the level of labor migration to more developed countries is increasing, and the EU focuses on the legal instruments for this issue. The question arises as to what legal instruments regulate the movement of workers between EU countries and third countries? And what socio-economic impact is the labor migration for the donor country and the host country?

So, let's start with what legal instruments regulate issues related to the movement of workers.

## **2. Free movement of workers within the European Union**

The free movement of workers in the EU is regulated by the provisions of the Treaty on European Union (TEU) (Article 3(2)) and of the Treaty on the Functioning of the European Union (TFEU) (Articles 4(2)(a), 20, 26 and 45-48). Furthermore, the free movement of workers is regulated by secondary legislation, including several directives and regulations. Some of them are: Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States; Regulation (EU) No 492/2011 on freedom of movement for workers within the Union; Regulation (EC) No 883/2004 on the coordination of social security systems and its implementing Regulation (EC) No 987/2009.

And, of course, the case law of the Court of Justice of the European Union (ECJ) is another important source of rules on the free movement of workers in the European Union. By virtue of its judgements and broad interpretations of the provisions regulating the freedom of movement of workers, ECJ has contributed substantially to the development of this part of the EU law. The ECJ firstly provided a definition of the concept of a worker, which was not previously provided in the treaties. For example, in the judgment of the Court of Justice in lawsuit 66/85 Lawrie-Blum [1986], it was stated that "it is a person who, during a certain period of time, carries out economic activities under the direction of another person and receives a reward for it". Persons who work part-time also referred to this concept.<sup>1</sup>

Currently, the movement of EU citizens throughout the European Union is one of the four 'fundamental freedoms'<sup>2</sup> of the EU enshrined in Article 45 of the Treaty on the Functioning of the EU. This article consolidates the principles of fighting against any form of employees'

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<sup>1</sup> Case 53/81 Levin v Staatssecretaris van Justitie [EU:C:1982:105] and Case 139/85 Kempf v Staatssecretaris van Justitie [EU:C:1986:223].

<sup>2</sup> Case 7/75 Mr. and Mrs. F. v. Belgian State [1975]

discrimination due to their state affiliation in the field of employment, wages and other conditions of work. EU citizens are entitled to: look for a job in another EU country, work there without needing a work permit and reside there for that purpose, stay there even after employment has finished, enjoy equal treatment with nationals in access to employment, working conditions and all other social and tax advantages. Also, Article 18 of the TFEU generally prohibits any form of discrimination based on nationality, and this extends to the field of labor law of the participating countries. The legal framework governing the issue of discrimination rests with the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt rules designed to prohibit such discrimination.

The EU's policy on combating discrimination is that, on the one hand, workers have the right to use every new job offer in the EU, and on the other hand, employers and Member States can not discriminate workers based on their origin from other member states. This has led to the first precedents for recognizing the laws of some Member States that are not in line with EU law.

For instance, the decision in case 167/73 Commission v. France [1974] of the ECJ. There was a provision in the French Code du Travail Maritime, which determined the percentage of the national composition of the merchant ship's crew. Namely, it allowed the imposition of restrictions on persons who are not French nationals for inclusion in the ship's command (not more than 25%). The EU Commission argued that France violated Art. 39 Treaty on the Establishment of the European Community (now Article 45 TFEU), since as this restriction may be applied to citizens of the EU Member States. The French government used the arguments that the restrictions practically did not apply to citizens of other EU countries and stated that provisions of free movement of workers of the Treaty establishing the European Community did not apply to maritime transport, as the Council of the EU did not take decisions on this in accordance with Art. 80.2 (now - Article 100.2 of the TFEU). The EU Court, rejecting France's arguments, ruled that mentioned Article from the French Code du Travail Maritime violates Art. 39 of the Treaty establishing the European Community (now article 45 TFEU), and also noted that the prohibitions contained therein are of an absolute nature and provide citizens of any State of the European Community with free access to employment in other Member States, as well as in accordance with Art. 234 (now - Article 267 of the TFEU) grant them a guarantee against unfair terms of employment and pay.

### **3. Legal regulation of the movement of workers from third countries to the EU.**

Legal status of workers from third countries on the territory of the EU is not defined, much attention is paid to workers from other EU member states. From the analysis of EU legislation, the division of employees into:

A) seasonal workers from third countries;

## B) Workers on an ongoing basis.

In the area of work safety of seasonal workers, the European Parliament and the Council adopted an instrument of harmonization which defines the conditions of entry and residence of third-country nationals for the purpose of employment of seasonal workers and defines the rights of seasonal workers<sup>3</sup>. In particular, the European Parliament has established unified conditions for the process of establishing a permit for seasonal work (by issuing a short-term visa or a work permit). Also, a great deal is given to the terms of seasonal work, in particular the minimum period must be at least 5 months and not more than 9 months for every 12 months. This provides more opportunities for earning a worker from a third country. Also, the host countries are required to protect the rights of seasonal workers and give them the legal status of the national workers of the host state (the principle of equal treatment).

The procedure for registration of time-wage workers is carried out in accordance with the national legislation of the host state (exclusive competence of the EU member states).

Regarding workers who work on an ongoing basis, the procedure for access of workers to the labor market of a Member State of the EU is determined by the national legislation of the host country and bilateral agreements on the regulation of relations in the labor markets.

The national law of the participating countries establishes appropriate conditions for admission to its market, in particular, the mandatory issuance of work visas and work permits (according to the EU visa code). Access to the labor market is usually limited, due to the host country's need to protect its domestic labor market, and access to a worker from a third country is usually provided when there is an urgent need for workers of the profession in the national market. Responsible for the implementation of such a system of permits are various agencies. For example, the National Employment Agency (France), the Ministry of Labor and Social Insurance (Cyprus). In addition, responsibility lies with local authorities (Belgium).

Frequently the requirements for the level of qualification of employees are set, this issue is rather sharp and raises the issue of discrimination (the problem of discrimination is discussed below), so the EU has issued a legal instrument to Council Directive 2009/50/EC on the conditions of entry and residence of representatives third countries to ensure high-quality employment. According to the latter, the procedure for legalization and conditions of stay in the territory of the receiving state is established.

Analyzing the foregoing, one can say that the European Union legal system contains a well-established and sufficient legal regulation mechanism, but the modern legal system has in practice revealed a significant number of conflicts, and problems that are not sufficiently regulated by EU legislation and national law of the participating countries. Typically, these

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<sup>3</sup> Directive 2014/36/EU on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers.

problems are related to wage discrimination, problems of recognition of qualifications and illegal employment in general. This is a serious debate, and so far there is a problem in their legal settlement. In particular, we will consider some of them:

### ***3.1. Wage discrimination***

Wage discrimination occurs when the employer provides unequal treatment to foreign workers in comparison to local ones. Thus, the employer hires workers from less developed countries offering them lower wages for the same quality and amount of done work than is usually offered to the residents of the host country.

Reverse discrimination also takes place. In this case, employer artificially creates more favorable conditions for foreign employers in comparison to local ones.

Some of the solutions on how to deal with this issue is provided with adoption of Posting of Workers and Enforcement Directive . Though posted workers differ from EU mobile workers, as they come to the host country for specific period and do not integrate into internal market, they still reflect EU's approach on protection of all workers who come to any Member State on work purposes. This directive provides standards on conditions of posted workers employments and protects them from wage discrimination through equal pay principle.

Moreover, this is clearly stated in the articles of TFEU that employers have right for free movement and shall not be subject to any discrimination.<sup>4</sup>

### ***3.2. Recognition of worker's qualification in the host country.***

Recognition of worker's qualification in another country is one of the key factors which may influence his/her ability to be hired in another country. Subsequently, it is especially important to provide European countries with some legal basis for this procedure.

The recognition system for vocational qualifications has been reformed to help make labor markets more flexible and encourage more automatic recognition of qualifications. Directive 2005/36 / EC<sup>5</sup> on the recognition of professional qualifications integrates and updates 15 existing directives covering almost all recognition rules, and provides for innovative features such as the European professional card and mutual assessment of regulated professions.

It is also important to note that Member States also implement national laws which facilitate freedom of movement for workers within EU. An explicit example of the positive effect of labor migration is the adoption by Germany of a new law that simplifies the mechanism of

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<sup>4</sup> Article 45 of TFEU

<sup>5</sup> Directive 2005/36/EC on the recognition of professional qualifications, modified by Directive 2013/55/EU amending Directive 2005/36/EC on the recognition of professional qualifications.

access by foreign workers to the German labor market. The new law was adopted in 2018, and this year should come into force. The main task of the law is to facilitate the conditions of labor migration from non-EU countries. Thus, those law is targeted to facilitate the process of employment for job seekers from third countries. According to this law, non-EU workers now will be able to go for a job in Europe if the have a minimum degree or vocational training certificate, and contract with an employer.<sup>6</sup>

#### **4. Legal Measures to encourage freedom of movement**

Due to the mentioned above issues with freedom of workers' movement, European Union took decisive measures to solve them.

Generally, it is recognized and legally implemented within EU that EU citizen is eligible to work in any member state. In practice though there are many court cases claiming that national requirements for certain positions in host countries do not comply with mentioned above principle of equal access to the vacancy by any EU citizen. EU reacted with legal rules and directives called to overcome this issue.

A direct link to the freedom of movement of workers was firstly made by the ECJ in the Heylens case [1987] regarding a Belgian football trainer who carried out his profession in France even though his Belgian football trainer's diploma had not been recognized, and therefore was summoned before a criminal court in France. In this judgment the ECJ declared that – in the absence of harmonization of conditions of access to a particular occupation – the Member States are entitled to lay down according conditions, but need to ‘reconcile the requirement as to the qualifications necessary in order to pursue a particular occupation with the requirements of the free movement of workers’, and that the procedures for the recognition of foreign diplomas therefore need to meet certain standards. Referring to the Heylens case, the ECJ in later decisions consequently declared that ‘national requirements concerning qualifications, even if applied without any discrimination on the basis of nationality, may have the effect of hindering nationals of the other Member States in the exercise of their right of establishment or right to freedom of movement of workers’,<sup>11</sup> and that ‘the analysis does not differ according to whether it is freedom of movement for workers or the freedom of establishment which is relied upon’ if the national rules at issue fail to take account of the qualifications already acquired by the person concerned in another Member State.<sup>7</sup>

The recognition system for vocational qualifications has been reformed to help make labor markets more flexible and encourage more automatic recognition of qualifications. Directive 2005/36/EC on the recognition of professional qualifications integrates and updates 15 existing

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<sup>6</sup> <https://www.germany-visa.org/germanys-new-immigration-laws-open-door-for-skilled-labor/>

<sup>7</sup> Online Journal on free movement of workers within the European Union, European Union, 2010, p.7

directives covering almost all recognition rules, and provides for innovative features such as the European professional card and mutual assessment of regulated professions.

There are certain measures taken on the EU level to ensure workers' mobility. These measures include but are not exhausted to:

- Coordination of social security schemes through Regulation (EC) No. 883/2004 and implementation of Regulation (EC) No. 987/2009, which is currently under revision (2.3.4);
- The adoption in April 2014 of the Directive 2014/50 / EU on minimum requirements for increasing the mobility of workers between member states by improving the acquisition and retaining additional rights to retirement;

The importance of this directive is in its support of values proclaimed in article 46 of TFEU which says that free movement is a fundamental principle of EU functioning. And provisions of this directive are focusing on reducing barriers to free movement of workers caused by difficulties with supplementary pension schemes. Thus, this act is aimed to improve preservation and acquisition of pension by the worker who has pension scheme which is connected to work place within the EU but in the country other than country of worker's citizenship.<sup>8</sup>

So, we have determined that the EU legal system for regulating relations with workers' "movement" is imperfect due to the constant development of labor relations, and in member countries there are a number of problems with the unification of legal norms and compliance with the standards related to the fight against discrimination and compliance working conditions. However, in spite of the large number of problems, host countries and donor countries are positively tuned to this process, and there is a tendency in the world to simplify the legal requirements for access to national markets for foreign workers.<sup>9</sup> And there are such questions : Why is the positive attitude of countries to the process of movement of workers? What are the positive and negative aspects of the impact of the "movement" of workers on host countries and donor countries?

As it follows from the said above, legal framework of free movement of workers in the EU has some issues to work on. In order to improve the European laws on labor migration, it is necessary to analyze what are the outcomes of current legislation.

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<sup>8</sup> <https://publications.europa.eu/en/publication-detail/-/publication/112466fb-d031-11e3-8cd4-01aa75ed71a1>

<sup>9</sup> Poland : Compared to 2016, the number of such work permits increased by more than one third. If compared with 2014, according to experts, this number has increased by 350%.), Germany, Czech Republic.

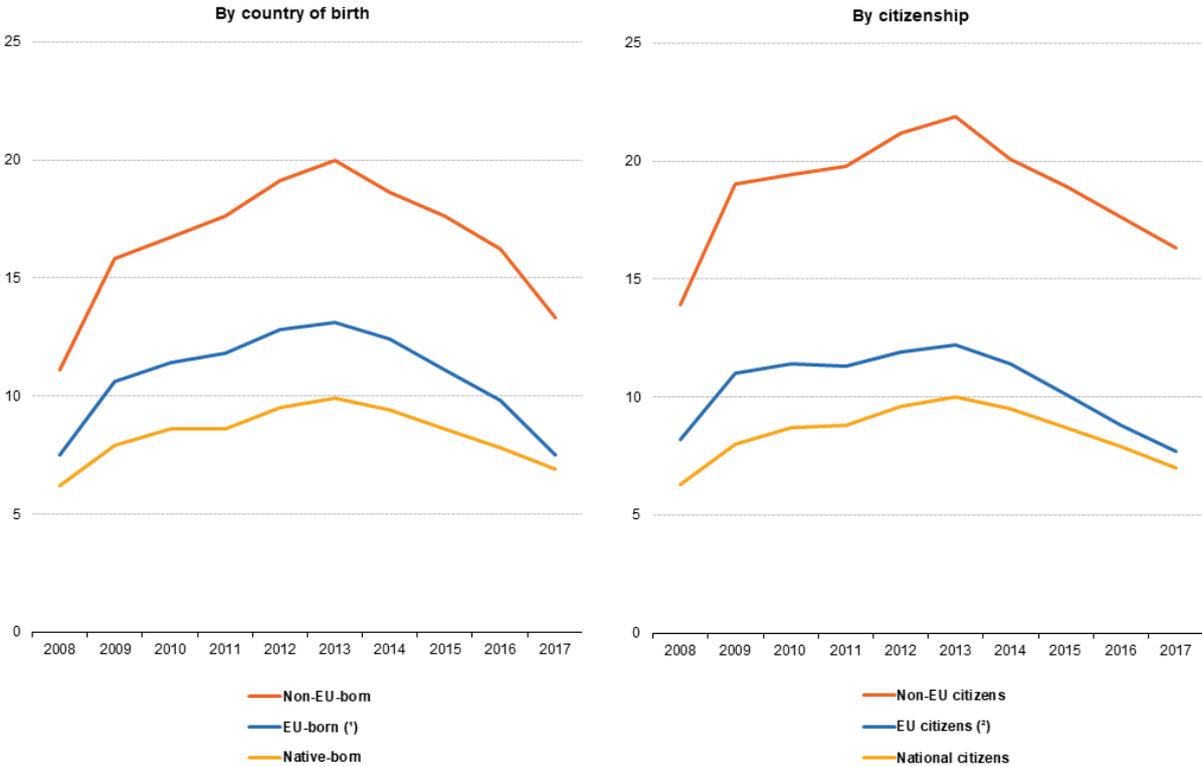
We think, that more appropriately is to distinguish advantages and disadvantages separately for donor and host countries, as each of them has its own interest and outcomes from migration.

Among significant advantages of labor migration legislation for donor countries it is necessary to outline the following:

*Reduction of unemployment rate in the donor country*

As we see from the statistical data of Eurostat below, the rate of unemployment EU citizens even decreased.

Development of unemployment rates for the population aged 20-64, EU-28, 2008-2017 (%)



(\*) Other than in the reporting Member State.  
 (\*) Other than national citizens.  
 Source: Eurostat (online data code: ifsa\_urgacob and ifsa\_urgan)



*Constant inflows of foreign currency into the donor country, causing economic growth and GDP growth.*

An example is the situation in Ukraine. With the strengthening of the process of European integration of Ukraine, EU countries are loyal to the movement of workers from Ukraine and promote their employment. The National Bank of Ukraine has published statistical data that from 2017, money transfers to Ukraine from abroad amounted to approximately \$ 9.3 billion.

This amount is more than five times the foreign direct investments of the same year that the National Bank estimated at \$ 1.8 billion.<sup>10</sup>

And the national bank is trying to simplify the procedure for the transfer of cash boats abroad, for this were provided relevant proposals to the government.

- Deepening of labor relations between the country as an exporter and importer of labor resources.

Usually, the deepening of labor relations between states is realized through a system of mutual employment contracts between them. Typically, these treaties regulate relations regarding the legal registration of employees and working conditions. For example, an agreement between the Republic of Poland and the Federal Republic of Germany (in the middle of the EU) or an agreement between Ukraine and the Czech Republic on cooperation in the field of labor and employment.

Negative consequences for donor countries are:

*The loss of working resources and the loss of highly skilled workers will lead to worsening production, lack of staff in servicing various spheres of the country's economy.*

*The deterioration of the demographic situation.*

Due to the outflow of young people, and their further residence in other countries. For example, we will take statistical information from the Republic of Lithuania.

Professor Stankuniene from the Department of Sociology at the University of Vytautas the Great, March 9, made a presentation at a conference in the Parliament: "Every year we are reduced by 1%, this is largely due to emigration - more than 650,000 people left Lithuania in 25 years"... "Again and again, it is necessary to recognize that the cause of emigration is primarily economic: they leave where their level of well-being is lower, where their incomes and wages are lower, they go to where they are better in terms of welfare and income This is a rule, not an exception. " - said the professor.<sup>11</sup>

*Inflation growth due to excessive inflow of foreign currency;*

*Elimination of workforce shortage by filling vacancies by labor migrants;*

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<sup>10</sup> <https://112.international/opinion/labor-migrants-transfer-almost--10-billion-a-year-to-ukraine-30781.html>

<sup>11</sup> See further: <https://ru.file.lt/news/live/proгноз-na-nedalekoe-buduschee-situaciya-v-litve-serezno-uhudshaetsya.d?id=706448>

According to the State Labor Service of Germany, last year difficulties with filling vacancies were reported by 47% of enterprises. The construction industry has especially big problems in finding workers. On December 19, 2018, the German government approved a bill that should simplify immigration to Germany of qualified specialists from third countries.

*Involving highly qualified specialists from a foreign country can lead to increasing of profits and to exchange of information between employees, that is, to improve their qualification.*

*Growth of production at enterprises.*

The presence of a sufficient amount of labor at the enterprise leads to the expansion of the latter's capabilities. That increases the quantity of produced products and the profit received as a whole. The shortage of labor in Germany leads to the impossibility of functioning of enterprises in full force and led to losses to the economy of 33 billion euros.<sup>12</sup>

*Growth of the economy and budget revenues through the taxation of income of migrants and through receipt of tax revenues from products sold by enterprises;*

Due to the constant labor migration from Ukraine, GDP growth in the Republic of Poland, according to analysts, reached 4.5%.<sup>13</sup>

*Solving demographic problems, reducing the problems of aging of the nation.*

Negative consequences for host countries on the other hand include:

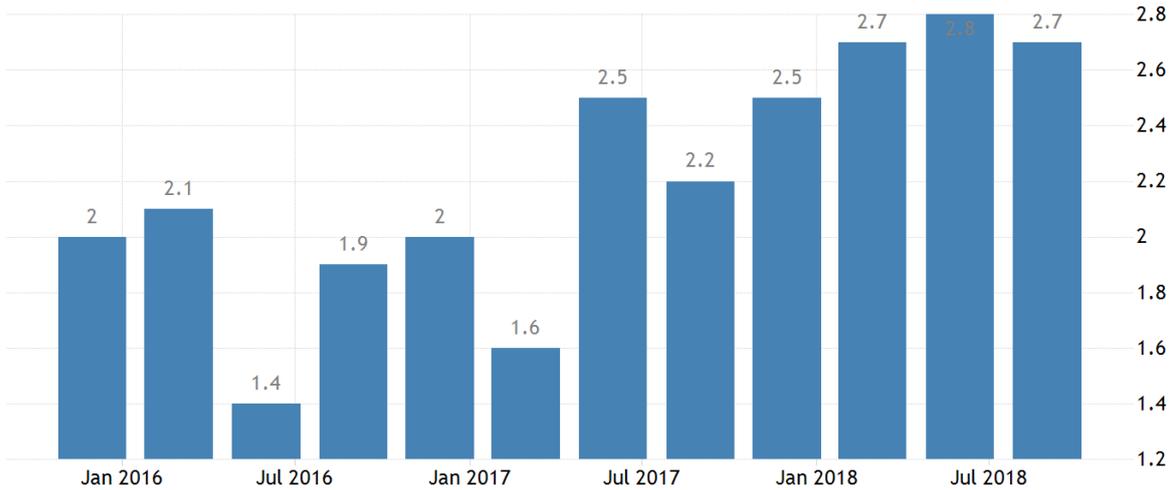
*Reduction of wages and conditions of work due to the availability of cheap labor.*

Wages in the European Union increased 2.7 percent year-on-year in the third quarter of 2018, following a 2.8 percent growth in the previous period. Wage Growth in European Union averaged 1.94 percent from 2009 until 2018, reaching an all-time high of 3.60 percent in the second quarter of 2009 and a record low of 0.90 percent in the third quarter of 2010.

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<sup>12</sup> See further: <https://www.dw.com/uk/%D0%B4....-17008044>

<sup>13</sup> See further: <https://www.epravda.com.ua/rus/news/2018/01/30/633547/>

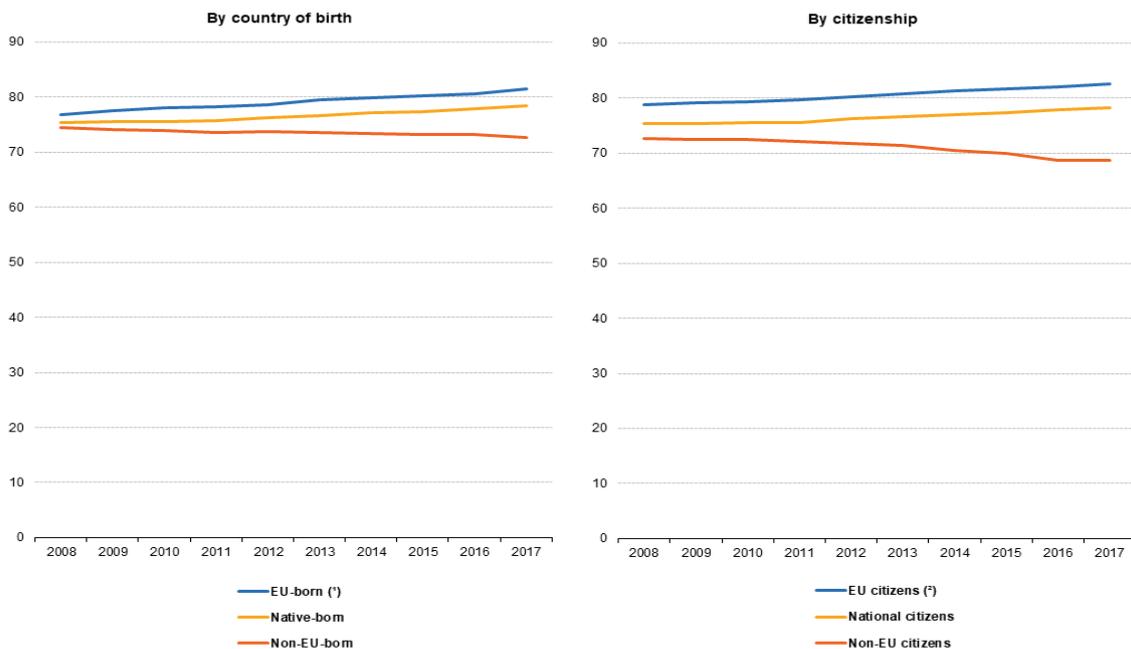


SOURCE: TRADINGECONOMICS.COM | EUROSTAT

*Increased competition for the workplace due to the presence of a large number of manpower.*

But, actually the activity rate of the EU-28 working-age population varies somewhat according to country of birth or citizenship (as illustrated in Figure 1). During the period 2008-2017, non-EU-born migrants (hereafter referred to as migrants born outside the EU) systematically recorded lower activity rates than EU-born migrants (those born in a different EU Member State to the one in which they were living) or the native-born population, with these differences increasing over time.

Development of activity rates for the population aged 20-64, EU-28, 2008-2017 (%)



(\*) Other than in the reporting Member State.

(\*\*) Other than national citizens.

Source: Eurostat (online data codes: ifsa\_argan and ifsa\_argacob)

*Problems with housing and placement of migrant workers, great influence on housing infrastructure;*

*A leakage of the national currency in connection with the transfer of funds to the territory of another country;*

*In the case of a large number of migrants without proper employment, they will be concentrated in one place and further problems with the law (smuggling, drug trafficking, other criminal offenses).*

*Negative relations of the local population, refusal to accept the culture of local residents.*

## **5. Conclusion**

After analyzing the causes of the movement and migration of workers, its impact and economic consequences for the states, it can be concluded that the movement of workers has positive consequences for the host country and helps to reduce the unemployment rate in the donor country, on the one hand.

On the other hand, there's another side to this issue. With an annual increase in the flow of labor migrants to the more economically developed countries of the European Union, an increase in the flow of migrant workers from third countries and their illegal employment, some gap in the legislation of the European Union became obvious. Hence, the effectiveness of the mechanism of protecting workers' rights and protection against discrimination have not been fully realized. More attention must be paid to combating illegal employment, discrimination in the field of pay and conditions of access to the labor market of the host country. It is also important to note, that national legislation of Member States should comply with European standards provided by the bodies and agencies of European Union. Therefore, only common efforts of Member States and European Union will lead to maximum effect in the sphere of guaranteeing free movement of workers to EU citizens.

# Do Tax Havens Serve as a Safe Harbor of the Internal Market?

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*The last decades are characterised by significant changes in international financial relations. Growing financial flows and increasingly sophisticated financial instruments bear witness to the phenomenon. The mobility of capital on an international and unprecedented degree inspired the phrase - 'financial globalisation'. Today, the financial sector is becoming increasingly detached from the productive sectors, which is also one of the main reasons for the financial crises that have repeatedly shaken the societies. In the process of financial globalisation, tax havens play a central role. Tax evasion has become a complex problem which extends beyond borders. This academic paper investigates the resultant effects of tax havens on the Internal Market and provides the possible EU Member States' determined policy responses which are needed to be implemented at all levels in order to reduce the effects of tax avoidance phenomenon and crack down on the tax havens per se.*

*Keywords: tax havens, financial globalisation, Internal Market, free movement of goods, tax evasion, international tax law, tax fraud.*

## **1. The phenomenon of financial globalisation**

***1.1. "Without understanding tax havens, we will never properly understand the economic history of the modern world."*<sup>1</sup>**

For a quarter of a century, active measures were repeatedly taken to create the European single market, allowing people and businesses to move freely and trade in different EU countries, as well as to modernize and deepen this market through a series of targeted legislative actions and non-legislative actions. Macroeconomic data indicates the progress achieved in 26 years, as well as the economic importance and power of today's Single Market and its attractiveness.

Tax policy in the European Union (the EU) has two components: direct taxation, which remains the sole responsibility of Member States, and indirect taxation, which affects free movement of goods and the freedom to provide services in the single market.

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<sup>1</sup> Nicholas Shaxson, author of "Treasure Islands: Tax Havens and the Men Who Stole the World". <https://www.bloomberg.com/news/articles/2013-05-03/offshore-tax-havens-in-spotlight-after-200-year-history>

The European internal market, also referred to as a single market, allows people and businesses to move and trade freely across the 28-nation group. The free movement of goods has been one of the most significant advantages of the EU membership. However, there are clearly occasions when national industry and specific sectors have been disadvantaged for the greater good. Moreover, the co-existence of different tax systems still makes life difficult for companies and individuals operating across borders.

The last decades of the 20th century and the first few years of the 21st century were characterized by significant changes in international financial relations. Growing financial flows, the opening up of markets, and new and increasingly sophisticated financial instruments bear witness to the phenomenon. The mobility of capital on an international and unprecedented degree inspired the phrase ‘financial globalisation’ which enshrines the idea of a globalized financial market on an international scale.

The current financial globalisation is not only characterised by the use of sophisticated financial instruments and their circulation worldwide, but also by the gradual decoupling between financial flows and production. We live in an age when the financial sector is becoming increasingly detached from the productive sectors, allowing for speculation. This phenomenon is at the root of the financial crises that have repeatedly shaken our societies.

### ***1.2. The problem of ‘aggressive tax planning’ de facto***

In the process of financial globalisation, tax havens play a central role considering their growing importance in recent decades, one could argue that they represent a fundamental pillar in economic and financial globalisation. According to the United Nations Conference on Trade and Development (UNCTAD), about half of all the investments made by multinational companies originate in tax havens.<sup>2</sup> To quote an example that merely hints at the true scale of the phenomenon, the Channel Islands (Jersey and Guernsey) have invested more in China than have Japan and the USA whilst Mauritius was India’s largest foreign investor.<sup>3</sup> As reported by ATTAC Switzerland, there are currently more than 700 tax havens around the world concentrated in three geographical areas: the Caribbean, Western Europe and South Asia.<sup>4</sup> All of them are linked to and are highly dependent on the major industrial and banking powers that dominate the world’s economy: the USA, Western Europe and Japan. Tax havens have grown exponentially over the last three decades and have become the core of the world’s financial system.

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<sup>2</sup> See UN World Investment Report [2014]: Chapter 3. Recent policy developments and key issues

<sup>3</sup> See Telegraph Weekly World Edition, “*Jersey and Guernsey: Channel Islands look East for new opportunities*” <https://www.telegraph.co.uk/finance/personalfinance/expat-money/8043135/Jersey-and-Guernsey-Channel-Islands-look-East-for-new-opportunities.html> (07 October 2010).

<sup>4</sup> See Financial Secrecy Index [2018], e.g. *Narrative Report on Switzerland*, <http://www.financialsecrecyindex.com/PDF/Switzerland.pdf> (25 March 2019).

Unrevealed examples of aggressive tax planning by some multinationals - e.g. Starbucks, Apple, Google, Amazon, Fiat, etc., and the leaked “Panama Papers” have caused huge anger and despair of many developed nations and international community.

By way of illustration, according to the BBC News dated on 06 November 2017, *the Paradise Papers* revealed how Apple sidestepped a 2013 crackdown on its controversial Irish tax practices by actively shopping around for a tax haven. It then moved the firm holding most of its untaxed offshore cash, now \$252 billion, to the Channel Island of Jersey.<sup>5</sup> Apple said the new structure had not lowered its taxes. It said it remained the world's largest taxpayer, paying about \$35 billion in corporation tax over the past three years, that it had followed the law and its changes “did not reduce our tax payments in any country.” In a further statement the company stressed that no operations or investments had been moved from Ireland. *The Paradise Papers* served as a huge leak of financial documents that is throwing light on the world of offshore finance.

The pervasiveness of this economic misconception is testified by the reaction to the Paradise Papers scandal – and more generally by how the debate about tax havens is framed, especially on the left. Progressives tend to couch the argument about the offshoring of wealth first and foremost in terms of its impact on the domestic tax base (the tax or revenue loss) – and therefore on the budget balance – of ‘source’ countries. A few years back, for example, Richard Murphy, director of Tax Research UK, estimated that tax evasion and tax avoidance together ‘cost’ EU Member States around 1 trillion euros a year in lost revenues, equal to around 105 per cent of total healthcare spending.

The implication of such analyses is obvious: if only governments could find a way of tackling tax evasion/avoidance and could get their hands on some of that offshore cash, they could afford to spend more – on nurses, for example – and bring their fiscal deficits and public debt under control. In his report, Murphy even went as far as writing that ‘tax evasion and tax avoidance undermine the viability of the economies of Europe and have without doubt helped create the debt crisis that threatens the well-being of hundreds of millions of people across Europe for years to come’ – thus establishing a causal link between offshoring, the European debt crisis, and the related economic and social crisis.

## **2. Tax havens: need for the EU’s response to the global problem.**

### ***2.1. What such tax planning practices do actually entail? Whether they are legal under currently existing international tax law rule?***

Today, many nations are scrutinizing their national tax legislation with a view to fill the remaining loopholes.

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<sup>5</sup> <https://www.bbc.com/news/world-us-canada-41889787> (25 March 2019).

According to the OECD Model Tax Convention, Chapter 2 “Fundamental principles of taxation”, the right to levy taxes is a necessary attribute of each sovereign state.<sup>6</sup> Hence, collecting taxes is the competence of each individual EU country. And it is also for national authorities to deal with those who do not pay the taxes they owe. However, tax avoidance and evasion are complex problems which extend beyond borders. EU countries need to work closely together to tackle these problems at home and abroad.

European legislation and bilateral tax treaties e.g. the Mutual Assistance Directive for the Exchange Information on reportable Cross-Border Arrangements<sup>7</sup> and Mutual Assistance Directive for the Recovery of Taxes,<sup>8</sup> provide for cooperation and information exchange between EU countries. To further strengthen the fight against tax fraud and tax evasion, the European Commission presented an action plan in 2012, with over 30 planned actions in this area. There are now several EU initiatives in place or under development, such as:

- a platform for tax good governance to monitor EU countries’ progress in tackling aggressive tax planning and in clamping down on tax havens;
- EU rules whereby each EU country automatically passes to other EU countries information it has on the income or financial accounts of individuals resident in those other EU countries;
- a quick reaction mechanism to combat VAT fraud;
- rules for assistance between EU countries in recovering claims for taxes, customs duties and certain fees as well as taxes on income, capital and insurance premiums;
- cooperation to combat VAT fraud through the use of information exchange systems to alert other EU countries of fraudulent activities.<sup>9</sup>

## ***2.2. Tax Havens – ‘sunny places for shady people’?***

Money laundering is a specifically targeted area of the EU Criminal Law because of its obvious links with cross-border crime. While the legal regimes that tax havens set up to enable this secrecy are complex, their basic outline is simple – banks, companies, trusts, or other financial

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<sup>6</sup> See, generally OECD/G20 Base Erosion and Profit Shifting Project: *Addressing the Tax Challenges of the Digital Economy, Action 1: 2014 Deliverable, Chapter 2 “Fundamental principles of taxation”*, OECD, 2014, pp. 29-49

<sup>7</sup> Council Directive (EU) 2018/822 of 25 May 2018 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements.

<sup>8</sup> Council Directive 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures.

<sup>9</sup> See, generally Communication from the Commission to the European Parliament and the Council, *An Action Plan to strengthen the fight against tax fraud and tax evasion*, COM (2012) 722 final.

actors in the country are allowed to accept money from basically anywhere without reporting it to the authorities in the country where it originates or from which it is controlled.

In some cases, it is actually illegal to disclose that information, but in many places, it is simply because the banks or other entities aren't required to disclose it and there is no mechanism to force them to do so. For the less criminally inclined, tax havens often also offer a great legal ways to avoid paying taxes, simply by characterizing income as passing through that country and using loose tax treaties or loopholes in one's home country tax law to claim that the income is untaxable there.

The Organization for Economic Cooperation and Development (OECD) has adopted so-called 15 Actions Points to tackle base erosion and profit shifting (BEPS) practices (2013).<sup>10</sup>

EU has followed the OECD recommendations by adopting the Anti Tax Avoidance Directive (ATAD)<sup>11</sup> in relation to corporate tax (2016) and the DAC6 Directive in the area of administrative cooperation (2018).<sup>12</sup>

On 16 May 2013, Google executives were called to the UK Parliament for questioning by the public accounts committee about their tax practices. Apparently, Google paid £10 million in UK corporate taxes on revenues of £11.9 billion - less than 0.1% - between 2006 and 2011. Apple CEO was called in front of the US Senate on 21 May 2013 to face similar questions. Amazon and Starbucks were also questioned in the UK Parliament in November 2012. According to various estimates from \$8 trillion to even \$123 trillion could be held offshore by various taxpayers worldwide.

President of the European Commission, called for EU countries to exchange income tax data automatically, saying tax evasion and illegal fraud in the EU cost \$1.2 trillion a year, "nearly double the 2012 combined annual budget deficit of all member states".<sup>13</sup>

Tax should not drive business strategy and should only be considered once a location is determined as being suitable.

The EU Member States do not wish to give up any tax sovereignty, but they do not wish to lose any policy race to the bottom from their fellow Member States either, so they sat together to agree on a non-binding code of conduct to curb what they see as harmful tax competition by their fellow Members. That Code of Conduct for Business Taxation, a political rather than a

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<sup>10</sup> See, generally 2013 OECD *Action Plan on Base Erosion and Profit Shifting*.

<sup>11</sup> Council Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market.

<sup>12</sup> Council Directive (EU) 2018/822 of 25 May 2018 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements.

<sup>13</sup> See Independent Business News: *Google paid £36 million in tax on UK revenues of £1 billion, reports show*, <https://www.independent.co.uk/news/business/news/google-tax-36-million-annual-report-corporation-tax-george-osborne-johnmcdonnell-susan-kramer-a7661221.html> (31 March 2017).

legal instrument, was agreed on in December 1997. It distinguishes ‘good’ (fair) and ‘bad’ (unfair) fiscal policy competition and is aimed at preventing a policy race to the bottom, the ‘bottom’ being a situation in which too little tax revenue is raised to keep up decent public service, infrastructure and social security, to the unjustified benefit of internationally mobile capital. The Commission (Commissioner Monti) called this effect of excessive harmful tax competition ‘fiscal degradation’. The Code in principle targets non-selective incentives for especially mobile foreign investors not reflecting the true balance of taxes and public service.

National governments are broadly free to design their tax laws according to their national priorities. However, in doing so, they must respect certain fundamental principles, such as non-discrimination and respect for free movement in the internal market.

The EU supplements this with cooperation procedures and a legal framework to ensure the fair and efficient taxation of cross-border activities in the EU.

### ***3. Should tax havens be closed down?***

To this respect, I would like to provide some reasons for tackling tax evasion/avoidance and closing down tax havens, and for collecting more taxes in general. However, these have little to do with the financing of public expenditure (with the possible exception of the Eurozone).<sup>14</sup> They largely have to do with social justice, inequality and the distribution of political power. It is a well-established fact that today’s soaring levels of inequality – which have returned to levels of over a century ago – represent a grave economic and social problem.

As acknowledged even by the International Monetary Fund (IMF), inequality hampers growth (“when the rich get richer, benefits do not trickle down”, one IMF study notes, consigning decades of trickle-down propaganda to the dustbin of history), exacerbates financial instability, erodes social cohesion, and leads to political polarization. Even more importantly, various studies show that extreme inequality represents a threat to democracy itself. Allowing a small minority to amass obscene amounts of wealth leads them to wield disproportionate influence and power, and allows them to capture the legislative process and push through laws that further cement their power and influence. As Branko Milanovic writes, the “higher the inequality, the more likely we are to move away from democracy toward plutocracy.” It is important to admit the importance and often the effectiveness of huge expenditure in many political campaigns today, despite national legislation which attempts to prevent it. The current scenario of outright impunity in tax matters requires a thorough response from political actors. However, merely scratching the surface will not do. It cannot focus only on one or a few cases involving well-known multinational companies that received significant media coverage. Such cases are

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<sup>14</sup> M. Jarociński & B. Maćkowiak: *Monetary-fiscal interactions and the euro area’s malaise*, European Central Bank Working Paper Series No. 2072, June 2017, pp. 1-46.

important because they attract public attention and force governments to act. Nevertheless, they are not isolated cases.

Tax fraud and tax evasion are widespread, benefiting from a legal and political ecosystem that has been set up laboriously over decades by key governments in the western world, along with the backdrop of the liberalisation and financialisation of economies.

Hence, fighting tax fraud and tax evasion means fighting such a system and proposing alternative measures based on greater public control over the financial system and capital flows. Tax havens and offshoring, by facilitating the concentration of wealth, exacerbate the problem of inequality. For this reason, they should be shut down.

# **Judicial Cooperation between the Member States of the European Union and the European Arrest Warrant**

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*The paper focuses on*

*Keywords: European Arrest Warrant, Judicial Cooperation, European Union*

## **1. Introduction**

The European Arrest Warrant is one of the most important instruments of judicial co-operation in criminal matters among the member states of the European Union. Since I did not know much about the European Arrest War, except what I heard from the media, I decided to write and research about it. The more I read about the European Arrest Warrant, I realized how much the problems of the European arrest warrant itself were complicated, and how far a complicated path to the adoption of the Framework Decision on a European Arrest Warrant, and how much and what problems the implementation of the Framework Decision had to implement. Through this seminar I went into the issue of the adoption of an instrument to facilitate the extradition of the perpetrators or suspects to serious criminal offenses to EU member states. In addition, I have explored a historical review of the progress made by the judicial cooperation between the member states of the European Coal and Steel Community, as it is today, by which the Member States have been instrumental in judicial co-operation in criminal matters. I also presented the difference between the traditional extradition and the European arrest warrant, and the paper also outlines the principles underlying the Framework Decision on a European Arrest Warrant and some of the Member States' concerns about the implementation of the European Arrest Warrant mostly because of the constitutional constraints around extradition of their own nationals. I have also studied the positive and negative side of the European Arrest Warrant and whether it actually fulfilled the purpose for which it was made. At the end of the work I have analyzed the statistical data related to the issuance and issuance of the European Arrest Warrant and analyzed two known cases related to the European Arrest Warrant.

## **2. Extradition and the historical development of European countries' cooperation**

Extradition means the surrender of someone from the government of one state to the government of another state for the purpose of prosecuting or punishing the sentence. Given the complicated nature of the extradition, especially because one country leaves part of its sovereignty over the criminal proceedings of another state, the extradition is subject to

numerous restrictions. Some restrictions have already been set in the constitution itself, such as the Croatian Constitution, which until 2010 revoked the extradition or expulsion of its own nationals. Extradition represents the oldest co-operation between states in criminal matters, and the concept of extradition has emerged in ancient societies. In the antiquity and medieval times, extradition was primarily for the surrender of persons for religious and political delictions, whereas in today's society extradition for political delinquency is explicitly prohibited by constitutions and international conventions. The purpose of extradition is to combat criminal offenses that violate the peace and security of the society as a whole.<sup>1</sup> One of the main sources of extradition rights is the European Convention on Extradition of 1957, together with its additional Protocols, and among other important sources of the right of co-operation between European States in criminal matters are the Schengen Agreement of 1985, the Schengen Convention of 1990 and the Final Framework Council Decision 2002 on European Arrest Warrants and Surrender Procedures Between Member States. The idea of a united Europe was first proclaimed on May 9, 1950. through a proposal on combined coal and steel production of Germany and France into one organization that could be accessed by other European countries as well. The Treaty signed in Paris in 1951 created the European Coal and Steel Community. With the emergence of the European Coal and Steel Community, all the way to the European Union as it is today, there is an awareness of the need for mutual cooperation in criminal matters between the countries of Europe. The next step towards the unification of European states is the 1957 Treaty signed in Rome, Community, and came into force in 1958. Further, the 1990 Treaty of Europe signed in 1992 in Maastricht entered into force. The Treaty establishing the European Community and the Treaty on European Union are the founding treaties of the European Union and constitute its legal basis. Beginning of co-operation between Western European countries in criminal matters dates back to 1975 when a European Council meeting was held on which a forum for the fight against crime was established by the ministers of justice and home affairs of member states. The next step was the 1985 Schengen Agreement and the 1990 Schengen Convention, which "represent state efforts to deepen operational cooperation in the field of combating crime".<sup>2</sup> The first document that systematically edited this matter was the Maastricht Treaty of 1993, which established the structure of three pillars, the second and third ones being added to the already existing first pillar of the European Community, and for this work is the third pillar in which the police and Member States' judicial co-operation with the remark that the third pillar was not over-national because of the opposition of the member states to the idea of transferring part of their sovereignty over justice and home affairs, meaning that the right does not apply by the EU itself but that the member states have themselves in their legal system implement the decisions made. The Maastricht Treaty envisaged three possible instruments of legal influence on member states: common positions, joint actions and conventions.<sup>3</sup> The adopted legal acts did not have binding force and therefore were not efficient

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<sup>1</sup> I. Turudić & B. Pavelin & T. Borzić & I. Bujas, European arrest warrant with examples from case law, Novi Informator, Zagreb, 2014, p.15

<sup>2</sup> I. Vuletić, Pravo EU u kaznenom i kaznenom procesnom pravu, in: B. Ljubanović & T. Petrašević & P. Poretti & I. Vuletić – M. Župan, *Procesnopravni aspekti prava EU*, Sveučilište Josipa Jurja Strossmayera Osijek, 2016, p. 68

<sup>3</sup> Vuletić, *ibid.*

enough. The Treaty of Amsterdam, which entered into force in 1999, the third pillar becomes exclusively criminal and has been fully transferred to police and judicial cooperation. The European Union is defined as a space of freedom, security and justice.<sup>4</sup> In addition, the Amsterdam Treaty introduces a Framework Decision that has had similar effect as a directive because the state could impose an obligation to harmonize certain provisions of national legislation, with the significant difference that the framework decision could not produce direct effect on national legislation. Furthermore, following a recent attempt to introduce the 2004 Constitution of the European Union, the Treaty of Lisbon, which abolished the structure of Stage 3, was signed in 2007, introducing a single legal system and transferring the provisions on police and judicial cooperation to the Treaty on the Functioning of the European Union. The Treaty of Lisbon established a supranational jurisdiction of the European Union law in criminal matters and the obligation to interpret domestic law in accordance with the law of the European Union was the responsibility of national or national courts.

### ***2.1. Extradition in Europe before the introduction of the European Arrest Warrant***

The extradition procedure before the adoption of the Framework Decision on a European Arrest Warrant was governed by the European Convention on Extradition of 1957 issued by the Council of Europe. The extradition was a sovereign act, the proceeding was of an administrative nature and was conducted through the competent ministries, most often the foreign ministry.<sup>5</sup> Thus, the final decision on extradition was made by an executive and not by the judiciary, even in the state in which the judicial authority had decided to extradite a final decision, the competent minister would have made on the basis of a discretionary assessment, and extradition was more political than legal. With numerous barriers to extradition, such as prohibition of extradition for political offenses, prohibition of extradition of their own nationals and the principle of double punishment, the procedure was complicated and lengthy. As the European Community, and later the European Union, changed with the gradual abolition of the border between Member States by introducing the Schengen Zone, member states began to realize the need for more effective co-operation in extradition. Since a common space with the free movement of persons was created, border controls were abolished, which hampered the cross-border escape of perpetrators, and there was no supranational body for criminal prosecution, thereby facilitating and facilitating the perpetration of perpetrators while not permitting the border crossing to the police, judicial and judicial bodies. In order to prevent a certain weakening of the efficiency of criminal prosecution, it is necessary to strengthen the police and judicial cooperation of the Member States and find new ways to overcome the difficulties that existed in the traditional extradition procedure. After the abolition of the border, the Second Schengen Agreement gave two new extradition conventions between member states, which sought to address the shortcomings of the traditional extradition procedure but unsuccessfully because the conventions showed "a contentious and formally inappropriate legal instrument for

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<sup>4</sup> Turudić & Pavelin & Borzić & Bujas, *ibid*, p. 18.

<sup>5</sup> Z. Đurđević, *Europski sud pravde i legitimitet Europskog Uhidbenog Naloga. Hrvatski ljetopis za kazneno pravo i praksu*, vol. 14, No. 2, 2007, pp. 1021-1028.

achieving their goal".<sup>6</sup> The two main problems of these conventions are that they did not have binding force until all the member states ratified it, and because of the delayed ratification, none of the conventions has survived to this day, the second problem was that conventions contained reserves for political offenses and for extradition own nationals and what the Member States used. It has become clear that a new way of overcoming the difficulties of cooperation between Member States needs to be found.

### **3. Council Framework Decision on European Arrest Warrant**

As stated earlier, the Amsterdam Treaty introduced a framework decision as a new legal instrument of the European Union, the implementation of which did not require ratification but implementation in national legislation. At a meeting of the European Council in Tampere in 1999 the solution to the extradition problem was found in the principle of mutual recognition of court decisions and also in the framework decision as an implementing instrument. The Framework Decision on the European Arrest Warrant, replacing existing international treaties on extradition, greatly facilitated the extradition procedure, which was adopted in 2002, and has begun to apply in 2004. Extradition entities are no longer a member state, but their courts based on mutual trust the legal systems acknowledge the decisions on the arrest warrants of the courts of other Member States, the Framework Decision repeals the principle of double criminality for the more serious criminal offenses listed in the Framework Decision. The ban on the extradition of its own nationals and the ban on extradition for fiscal and political offenses was also lifted. Such a new teaching process became depoliticized, and with the exclusion of many reservations and foundations, it became more efficient and faster.<sup>7</sup>

#### ***3.1. Validity of the Framework Decision on a European Arrest Warrant before the European Court of Justice***

The Member States implemented the Framework Decision by April 2005 and due to the complications of the extradition issue and the large newspaper that came with the European arrest warrant, the courts of the Member States made various decisions. Some of the Constitutional Courts of the Member States have declared implementation laws unconstitutional and abolished them.<sup>8</sup> First of all, because of the constitutional ban on the extradition of their own nationals, ie the constitutional right of non-extradition of a member state, they have changed their own constitutions. Given that the national constitutional courts are not competent to evaluate the validity of the legal acts of the European Union, only the European Court of Justice has jurisdiction to assess validity and to give an interpretation of the framework decisions. The Belgian Constitutional Court sought assessment of the validity of the European Court of Justice in its review of the constitutionality of Belgian implementing

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<sup>6</sup> Đurđević, *ibid*, p. 1023.

<sup>7</sup> Đurđević, *ibid*, p. 1024.

<sup>8</sup> The German Federal Constitutional Court declared it unconstitutional and abolished because of the provision for the extradition of its own nationals. The Polish Constitutional Court also proclaimed a national implementing law to be contrary to Poland's constitution.

legislation. The European Court made its decision legitimized by a framework decision and confirmed that the use of the European Arrest Warrant as an instrument of criminal co-operation between the Member States is consistent with the fundamental principles of the European Union legal order.<sup>9</sup>

#### **4. Schengen Information System (SIS)**

The Schengen information system is an information system that greatly facilitates and facilitates the co-ordination of co-operation between the competent authorities of the Member States of the European Union. The system provides information on the requested persons for which European arrest warrants, missing persons and those who need to be found for judicial purposes, such as witnesses, convicts, and the like. In addition, the Schengen Information System also includes information on the things that are alienated and the data for checking suspected persons involved in criminal activities. The Schengen Information System allows access to alerts and information to the bodies responsible for border control, the bodies responsible for police and customs control, national judicial bodies, bodies responsible for issuing visas and residence permits, vehicle registration authorities.

##### ***4.1. European Arrest Warrant***

The European Arrest Warrant was adopted to replace the traditional extradition system between the European Union countries, mainly for the purpose of accelerating and simplifying the commission of perpetrators, facilitating the prosecution, and executing prison sentences or other security measures. The term extradition was replaced by an expression of surrender. The European Arrest Warrant is a warrant issued by a judicial body of a member state of the European Union for the purpose of arresting and surrenders of persons arrested in other Member States, and the purpose of the warrant is the prosecution or execution of a prison sentence or other measure involving the confiscation of liberty. The European Arrest Warrant is considered to be fundamental in establishing judicial cooperation in criminal matters between the Member States of the European Union. The same judicial cooperation is based on the principle of mutual recognition as the European Court has stated in its decision C-388/08 PPU, where in point 51 clarifies the principle of mutual recognition, based on the Framework Decision, also means, in accordance with Article 1, paragraph 2 of the Framework Decision that Member States are, as a rule, required to act on a European Arrest Warrant, that State must or may refuse the warrant only in the cases referred to in Articles 3 and 4<sup>10</sup>. Obligatory reasons for non-execution of the European Arrest Warrant are: „1. if the criminal offense for which the arrest warrant has been issued is subject to amnesty in a Member State of execution, and that State is responsible for prosecuting a criminal offense in accordance with its criminal law; 2. if the judicial authority of execution is informed that the requested person is legally convicted in one of the Member States for the same offenses, provided that in the case of pronouncing the sentence, that sentence

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<sup>9</sup> Đurđević, *ibid*, p. 1026.

<sup>10</sup> Turudić & Pavelin & Borzić & Bujas, *ibid*, p. 18.

has been or is currently being served or the judgment can no longer be enforced the law of the Member State in which the judgment was pronounced; 3. if a person against whom a European arrest warrant has been issued can no longer be punished for the criminal offenses underlying the arrest warrant for his age, in accordance with the law of the Member State of execution."<sup>11</sup> Apart from three cases of compulsory non-execution of the European Arrest Warrant, Article 4 of the Framework Decision also lists cases of optional failure to execute a European Arrest Warrant, which are: 1. already existing criminal prosecution in the Member States and the warrant was issued for the same criminal offense for which prosecute a Member State; 2. The judicial authorities of the Member State in which the citizen of the European Arrest Warrant is detained have suspended the persecution or there is already a final court judgment on the same criminal offenses as stated in the warrant; 3. the statute of limitation of the criminal prosecution or the execution of the punishment has occurred; 4. the requested person has already been legally convicted of the same criminal offenses in the third country; 5. if the European Arrest Warrant is issued for execution of a prison sentence or forfeiture of liberty, and the requested person is in the executing State or is a national of that Member State, and that Member State is obliged to execute the sentence in accordance with its legal order; 6. if the European Arrest Warrant relates to criminal offenses which are: in accordance with the law of the Member State of execution, in whole or in part committed in the territory of a Member State of enforcement or at a place deemed to be such; or committed outside the state territory of a Member State of the issuing officer of the arrest warrant, and the law of the executing Member State does not allow prosecution for the same offenses if committed outside its State territory; 7. if, in one of the cases referred to in Article 2, paragraph 4,<sup>12</sup> the offense for which a European Arrest Warrant has been issued does not constitute a criminal offense in accordance with the law of the Member State of execution; however, the execution of a European Arrest Warrant can not be refused on the basis of the fact that the law of the Member State of enforcement does not prescribe the same type of tax or duty or does not contain the same kind of rules as regards the grant, taxes and duties and currency exchange regulations as the law of the Member State in which the arrest warrant has been issued.<sup>13</sup>

#### ***4.2. Characteristics of the European Arrest Warrant***

As has been said in this paper, the extradition was in the sphere of politics or state executive power, while the European Arrest Warrant, a court order and is attempted to "eliminate the possible political influence of the surrender in such a way that the warrant can be issued only by the court."<sup>14</sup> Judicial decisions are enforced on the basis of mutual recognition while the

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<sup>11</sup> Council Framework Decision 2002/584/JHA on the European arrest warrant and the surrender procedures between Member States. OJ 2002 L 190/1.

<sup>12</sup> For criminal offenses not covered by paragraph 2, the requested person may be committed provided that the offenses for which a European arrest warrant has been issued constitute a criminal offense in accordance with the law of the Member State of execution, regardless of the elements or description of the criminal offense. Paragraph 2 lists criminal offenses covered by the European Arrest Warrant.

<sup>13</sup> Council Framework Decision 2002/584/JHA, Art. 4.

<sup>14</sup> A. Blagojević & Cs. Herke & Á. Mohay, *Pravne karakteristike Europskog uhiđenog naloga, njegova*

role of the state authorities is reduced to practical and administrative assistance in the execution of the European Arrest Warrant. Further, the European Arrest Warrant and the Framework Decision partially eliminated the duplicate (double) punishability requirement by listing 32 serious offenses that are sufficient to be punishable in the country issuing the European Arrest Warrant and do not require duplicate punishment. Apart from the partial abolition of the double punishability, the ban on the surrender of its own nationals was also illegally abolished. According to the traditional extradition, the states are generally defending the extradition of their own nationals, whereas according to the European Arrest Warrant their own nationals of the EU Member States may be surrendered to the other Member State in the same way as those who do not have the nationality of the State in which they are detained. And finally the difference is also in the speed of the procedure "unlike the traditional system, where the average extradition period was nine months, the European Arrest Warrant has an average of 43 days ... and if the attendant person agreed to surrender, the process is even faster, and the average time is 13 days."<sup>15</sup> It is evident that with such changes, the European Arrest Warrant, or the Framework Decision, significantly increased the efficiency and speed of the surrender of persons found in other countries, and greatly reduced the complexity of traditional extradition.

#### ***4.2.1. Negative side of the European Arrest Warrant***

Despite the fact that the European Arrest Warrant greatly simplified and expedited the process of handing over persons suspected or convicted of a criminal offense between the EU Member States, the European Arrest Warrant fails. Given that the European Arrest Warrant has been accepted primarily for the purpose of combating serious and organized criminal offenses, the problem is an insignificant ie easy criminal offense for which a European Arrest Warrant has been issued. For this reason, the European Commission has stressed the need to carry out a proportionality test before issuing a warrant, in its European arrest warrant. The Framework Decision on the European Arrest Warrant does not include a proportionality test, and the European Commission has issued a recommendation to avoid issuing a warrant "where a person is expected to be released after a first trial or for a serious criminal offense ... or if the requested person remains to endure less than 4 months in prison."<sup>16</sup> It is recommended to assess whether the costs of the proceedings, arrests and resignation of the requested person are proportionate to the offense, the amount of the expected punishment and whether it is possible to achieve a mild measure such as a fine. There are different forms in which irreverence may occur. Like the disproportion between the severity of the offense and the punishment imposed in the various Member States, a deed in one Member State in another can be characterized as a criminal offense again depending on the legal systems. The professional literature cites an example of a violation of the principle of proportionality, the issuance of orders for the theft of a mobile device, stating that the criminal offense of theft in all Member States corresponds to the

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implementacija u Mañarskoj i njegova buduća implementacija u Hrvatskoj, in: Pravni aspekti prekogranične suradnje i EU integracija : Mañarska – Hrvatska, Pravni fakultet Sveučilišta Josipa Jurja Strossmayera u Osijeku, Pečuh – Osijek 2011, p. 58.

<sup>15</sup> Blagojević & Herke & Mohay, ibid, p. 59.

<sup>16</sup> Turudić & Pavelin & Borzić & Bujas, ibid, p. 37.

conditions set out in the Framework Decision. An example shows that proportionality can only be assessed with regard to the specific case. Furthermore, it is possible that the issuance of a warrant is justified but the measure shows a precaution in relation to the individual and the life circumstances of the person who violated the European Convention on Protection of Human Rights and Freedoms.<sup>17</sup> In addition to the lack of rationality, there is also a problem that there are no other ways of conducting criminal proceedings without the presence of the requested person, which poses a risk of non-punishment of perpetrators, as well as the lack of grounds for refusing to execute the issued orders because the Framework Decision does not prescribe proportionality as a reason for rejecting a lecture.

## **5. Statistics on issuing and executing a European Arrest Warrant**

According to the data collected from 2005 to 2015, 133977 European Arrest Warrants were issued in total during that period, with 34193.<sup>18</sup> Observed by the years 2005 to 2009, the number of European arrest warrants issued has exponentially increased, which may indicate that the state has increasingly begun to apply and accept the European arrest warrant, but also to increase mutual trust and cooperation in criminal things. From 2010 to 2011, the number of orders issued was down but it should be noted that in these two years the statistical data on the number of issued arrest warrants have not been issued by eight member states and the data are therefore incomplete, since 2012 the number has again started to grow. According to the reasons for the issuance as set out in the European Union questionnaire addressed to Member States regarding the issuance and execution of the European Arrest Warrant for 2015. The total number of orders issued in 2015 was 16144, of which the majority of the issued warrants were issued for the criminal prosecution of the perpetrator while the issuance of the punishment was already reduced to a lesser extent with the exception of Romania, France and Poland.<sup>19</sup> According to the category of criminal offense for which a European arrest warrant was issued, 18 Member States responded to this question in the questionnaire, and according to these data it is apparent that the European Arrest Warrant was most often published for the criminal offense of theft and damage (2983 European Arrest Warrants) , due to fraud and corruption (1875 EUN), and the third most common reason for issuance was due to drug offenses (1137 EUN). According to the number of arrests and surrenders of suspects according to which the European Arrest Warrant was issued, in total 10388 persons were arrested in 2015 and 6518 were handed over to the state issuing the European Arrest Warrant. Out of the total number of submissions, 49% agreed to surrender.<sup>20</sup> Looking at the length of the procedure, 25 Member States responded to the question in the questionnaire, and the average time of the procedure for the persons who agreed to submit was 14 days, which exceeded the deadline of 10 days, while for persons who objected to the referral procedure on average it lasted for 56 days<sup>21</sup> , which is

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<sup>17</sup> Ibid, p. 38.

<sup>18</sup> [https://e-justice.europa.eu/content\\_european\\_arrest\\_warrant-90-hr.do](https://e-justice.europa.eu/content_european_arrest_warrant-90-hr.do) (18 February 2019)

<sup>19</sup> Comission Staff Working Document : *Replies to questionnaire on quantitative information on the practical operation of the European arrest warrant* – Year 2015, SWD(2017) 320 final, page 4.

<sup>20</sup> Ibid, p. 5.

<sup>21</sup> Ibid.

within the deadline for enforcement of 60 days under the Framework Decision. Observed according to the number of rejected European arrest warrants for the surrender of persons to statistics, the execution was rejected in 712 cases (a response to this question was given by the 26 Member States), which is roughly 8% of the issued warrants issued in 2015.<sup>22</sup>

## **6. Issuance and application in practice**

In order to facilitate issuance and related to this, and to reduce translation costs, the Framework Decision also provided a unique form of the European Arrest Warrant which needs to be carefully filled out prior to issuance. In addition, one of the conditions for issuance is that „judicial authorities issuing a custody warrant must always ensure that there is a national executing court order“ before the issuing of a European arrest warrant<sup>23</sup>, scope of application: criminal prosecution or execution of a prison sentence, that there is proportionality, that the offense for which it falls falls under one of the 32 listed in the Framework Decision and that the work is described in detail so that the judicial body of the issuing Member State has sufficient information. One example of where the court, the state where the suspect was found to have been ordered, rejected the European Arrest Warrant because of insufficient information in the case is Frederick Toben's case, which will be analyzed in the next section.

### **6.1. Case of Gerald Fredrick Against SR Germany**

Gerald Frederick Töben was arrested on October 1, 2008. in London on the basis of the European Arrest Warrant issued by the Federal Republic of Germany. The European Arrest Warrant was issued for suspicion of committing a criminal offense of anti-Semitism, which was promoted by Töben on its web site.<sup>24</sup> According to the order, it was alleged that during the period from 2000 to 2004 Toben denied the Holocaust on its own website and reduced the number of Jewish victims who had been killed during World War II and doubted him for the reign of Nazi crimes. In the order form, the court of the Federal Republic of Germany stated: racism, xenophobia and cybercrime. The problem with the warrant was that it was not stated where a criminal offense was correctly committed and it should be noted that anti-Semitism was not a criminal offense against commonlaw but could be judged for racism, the court assessed whether the offense was committed in Great Britain, whether it was committed in the Federal Republic of Germany and whether it could, for that reason, extradite Töben SR to Germany as required for the European Arrest Warrant. Given that the court found that there was insufficient information in the EUN, he did not agree to extradite Töben because the perpetration of the offense was "the worldwide internet", which the court considered to be insufficiently precise with the objection that the exact name of the page on which the disputed material and also extradited by Töben to the fact that it would be a direct violation of freedom

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<sup>22</sup> Ibid.

<sup>23</sup> European Commission, *Handbook on how to issue and execute a European Arrest Warrant*, OJ 2017 C 335/1, p. 16.

<sup>24</sup> <https://www.telegraph.co.uk/news/newstoppers/lawreports/joshuarozenberg/3132331/Man-accused-of-denying-the-Holocaust-may-escape-extradition-from-Britain.html> (18 February 2019)

of speech and thought since anti-Semitism is not a criminal offense in the UK and is in the Federal Republic of Germany.<sup>25</sup> At the end of all, SR Germany withdrew the European Arrest Warrant following advice from the English side.

## ***6.2. The case of Julian Assange against Sweden***

Julian Assange is an Australian citizen who currently resides in the London Embassy in London, which has given him political asylum. His case started in 2010 when a criminal report was issued against him for rape and sexual abuse. In November 2010, Sweden issued a European arrest warrant for the capture and surrender of Julian Assange in order to prosecute him. At that time Assange resided in the UK, London. Assange has lodged an appeal against the issued European Arrest Warrant which was dismissed by the High Court of England and Wales.<sup>26</sup> According to the order Assange is suspected of: 1. Illegal coercion; 2. Sexual assault from 13 to 14 August 2010; 3. Sexual assault on August 18, 2010; 4. Loss on 17 August 2010 Assange lodged an appeal for all four reasons, stating that the European Arrest Warrant was not issued by the Swedish court, that the said criminal offenses are not subject to the double punishment of the State in which the crime was committed and the state in which he was detained; he complained that the principle of proportionality was violated and that he was not "accused" under Swedish law. The High Court dismissed all of the appellative grounds given by Assange.<sup>27</sup> Since Assange was unavailable to British authorities since 2012 as a political asylum in London's Ecuadorian Embassy, Sweden decided in 2017 to withdraw the European Arrest Warrant and does not demand extradition from the UK. But Assange is still in the Embassy of the United States because the United Kingdom authorities are suspected of violating the suspicion.<sup>28</sup>

## **7. Conclusion**

By analyzing the effects of the European Arrest Warrant, I consider that the European arrest warrant fulfilled its purpose, extradition or surrender is significantly more efficient, less complicated and much faster than the traditional extradition procedure. I also believe that the European Arrest Warrant is indeed one of the most important instruments of judicial and criminal co-operation between the Member States and that the principles on which the European Union is based are not a dead letter on paper but that the Member States really adhere to them, such as the principle of mutual recognition judicial decisions. From the positive side of the European arrest warrant, I would like to state the partial abolition of the ban on the extradition

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<sup>25</sup> [https://www.parliament.uk/documents/joint-committees/human-rights/JCHR\\_EXT\\_Written\\_Evidence\\_11.pdf](https://www.parliament.uk/documents/joint-committees/human-rights/JCHR_EXT_Written_Evidence_11.pdf) (18 February 2019)

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<https://web.archive.org/web/20130310021505/http://www.judiciary.gov.uk/Resources/JCO/Documents/Judgments/assange-summary.pdf> (18 February 2019)

<sup>27</sup> Ibid.

<sup>28</sup> <https://abcnews.go.com/International/wikileaks-julian-assange-evicted-ecuador-embassy-providing-asylum/story?id=56808551> (18 February 2019)

of own nationals, because I believe that this was one of the main obstacles to international criminal co-operation, with the drastic increase in the procedure, saying that the European arrest warrant really serves its purpose . I would add that moving the extradition from the executive branch, from the sphere of politics to the hands of the judiciary, is the main reason why the process is significantly accelerated. From the negative characteristics of my opinion, I should introduce a proportionality test not listed in the Framework Decision on the European Arrest Warrant. This is also a problem when the warrant is issued for the offense and what is actually contrary to the very purpose for which the Framework Decision was made, namely to punish and find offenders of more serious offenses, which, of course, are not covered by the offense. The statistical data analyzed can see the usefulness of the European Arrest Warrant as it would take so many years of action for years that the EUN Framework Decision had not been reached and that it was achieved to execute the warrant within a short period of two months. Although there is still negation of the state, especially in terms of double punishment, I believe that the European Arrest Warrant is one of the most useful decisions of the European Union and that it is of utmost importance for judicial cooperation between the EU Member States.

# **The Interrelationship between Terrorism and Organised Crime: Towards a Uniform Approach?**

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*The paper aims to look at the difficult definitions of both terrorism and organised crime. It enumerates the main legal measures enacted to combat these phenomena, and aims to highlight the relationship between these types of serious criminal activities.*

*Keywords: terrorism, counter-terrorism, organised crime, European Union*

## **1. Introduction**

In our paper we are covering the topics of terrorism and organized crime. On the topic of terrorism there are many questions, first of all the definition of the term. Because it cannot be clear and obvious what terrorism means in general, especially what kind of offences can be evaluated as terrorist attacks. Terrorism is not a new phenomenon (it dates back to the first century), but it is not a constant thing. It is changing, evolving so we must be prepared to counter it and its effects. On the topic of organised crime there are similar problems with the definition. The definition of organised crime is a widely debated term however the theme of organized crime is not new as it appeared a long time ago in the USA. There is still no generic definition because many countries worldwide have refused to agree on it. This is mainly because organized crime differs state to state based on the geographic, social and economic factors of the countries however there are specific characteristics of organized activities. Numerous organised crime groups are active in the EU and worldwide, often with cross - border reach and multi - ethnic composition. However, in order to prevent and combat these crimes efficiently it is necessary to understand their model, structure, ideology and activities. If we look at the two phenomena at the same time we need to examine a few features: the goal, structure, income, and the victims of crimes. We also need to talk about terrorism in the EU, and in the Middle East, as they show significant differences. The main question that arises is whether we should come up with a common legal framework to combat these phenomena. The growing threat of these two phenomena and their obvious relation requires a common framework for fighting them. It would give us a better chance at monitoring the network and identifies the members and groups.

## 2. Defining terrorism

There are many concepts, what we understand under terrorism, and what kind of offences we call terrorist attacks. In Bruce Hoffmann's phrasing: „[...] the word terrorism is politically and emotionally charged, and this greatly compounds the difficulty of arriving at an exact meaning.”<sup>1</sup> It has more than a hundred academic definitions, and these typically concentrate the criminological side of the concept. Nicholas Perry described it as „*the search for the Holy Grail*”.<sup>2</sup> The definitions have different aspects and representations, but it's an unquestioned fact, that terrorism is a crime. That's why the nations and the international factors – such as the European Union – individually or collectively have to fight against this type of crime. It follows, that we must have a standard term for this offence, what is causing a big threat against the nations and the organisations.

The Resolution of the Security Council of the United Nations reaffirmed that terrorism is a criminal act, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act, which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature.”<sup>3</sup> This very circumstantial wording gave a good base for the further declaration of terrorism. Although the Resolutions of Security Council are binding for the member states of United Nations, this definition was non-binding for them.

As the time flew it was necessary to make general definition for terrorism in an EU level, because of a couple of reasons. One of these was to differentiate the terrorism from other political violence, because it is not really obvious to separate offences from each other. Another one was the harmonisation, because of the same understanding between the nations. The member states had already had their own definitions for the term, but those were not similar enough, moreover the general definition make it easier to interpret the criminal offences as a terrorist crime. In 2002 the Council released a frame resolution, which included a description of the terrorist offences. It banded the states to criminalise the offences, which attacks upon a persons' life or attacks upon the physical integrity of a person, etc.<sup>4</sup> At that time it was a suitable definition for the states to criminalise these offences and understand the character of this crime. The Council of the European Union developed a strategy, named the EU Counter-terrorism Strategy. It is based on four pillars: prevent, protect, pursue, respond. The first one had more

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<sup>1</sup> B. Hoffmann: *Inside Terrorism*. Columbia University Press, 2006. 34. p.

<sup>2</sup> N. J. Perry, *The Numerous Federal Legal Definitions of Terrorism: The Problem of Too Many Grails*. *Journal of Legislation* Vol. 30:2. 2004. p. 249 quoted by A. Greene: *Defining terrorism: one size fits all?* *International and Comparative Law Quarterly* Vol. 66, No. 2, 2017, p. 411.

<sup>3</sup> United Nations Security Council Resolution 1566 (2004)

<sup>4</sup> Council Framework 2002/475 on combating terrorism (2002) OJ L 164

key priorities, one of them was to develop a common approach. Besides this the strategy did not declare a general definition for terrorist offences.<sup>5</sup>

In 2017 the European Parliament and the Council modified the definition of terrorism and incorporated it in a directive, because of the raising chance for violence and the terrorist attacks against European cities (for example: London, Madrid, Manchester). The Art. 3 describes the offences, which must be criminalised as a terrorist crime:

“[...] offences under national law, which, given their nature or context, may seriously damage a country or an international organisation, are defined as terrorist offences where committed with one of the aims listed in paragraph 2: (a) attacks upon a person’s life which may cause death; (b) attacks upon the physical integrity of a person; (c) kidnapping or hostage-taking; (d) causing extensive destruction to a government or public facility, a transport system, an infrastructure facility, including an information system, a fixed platform located on the continental shelf, a public place or private property likely to endanger human life or result in major economic loss; (e) seizure of aircraft, ships or other means of public or goods transport; (f) manufacture, possession, acquisition, transport, supply or use of explosives or weapons, including chemical, biological, radiological or nuclear weapons, as well as research into, and development of, chemical, biological, radiological or nuclear weapons; (g) release of dangerous substances, or causing fires, floods or explosions, the effect of which is to endanger human life; (h) interfering with or disrupting the supply of water, power or any other fundamental natural resource, the effect of which is to endanger human life; (i) illegal system interference, as referred to in Article 4 of Directive 2013/40/EU of the European Parliament and of the Council (1) in cases where Article 9(3) or point (b) or (c) of Article 9(4) of that Directive applies, and illegal data interference, as referred to in Article 5 of that Directive in cases where point (c) of Article 9(4) of that Directive applies; (j) threatening to commit any of the acts listed in points (a) to (i). 2. The aims referred to in paragraph 1 are: (a) seriously intimidating a population; (b) unduly compelling a government or an international organisation to perform or abstain from performing any act; (c) seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation.”<sup>6</sup>

### **3. A brief history of terrorism, and the most intense elements**

The brief history of terrorism demonstrates some of the distinctive features of terrorism as it appeared in various chronological times. Such reference is relevant as it demonstrates that terrorism is a unique criminal activity that should be differentiated from any other form of crime. The first appearance of terrorism can be traced back to the political movements the Sicarii and the Zealots.<sup>7</sup> The two groups were fighting against the occupying Roman forces. Their

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<sup>5</sup>The EU Counter-terrorism Strategy. Council of the EU, 2005

<sup>6</sup> Directive 2017/541 of the European Parliament and of the Council on combating terrorism (2017) OJ L 88/6

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<https://web.archive.org/web/20120511140810/http://www.cdi.org/friendlyversion/printversion.cfm?documentID=1502> (20 March 2019)

instruments of causing terror were the assassinations against the romans and the peoples that were collaborating with them. An another appearance of terrorism in this era was the order of Hashshasins (or Assassins) in the eleventh century. The Hashshasins were an offshoot of the Isma'ili sect of Shia Muslims, a group that opposed the Fatimid rule. The members of the order carried out assassinations against political and military leaders (it is important to note that in certain definitions of terrorism the act of political assassination is not considered as a terrorist activity).

The second era in the history of terrorism starts in the eighteenth century. The term „regime de la terreur” (which later became the English word “terrorism”) appears at the time of the French revolution (1793 – 1794). The goal of the “regime de la terreur” was the consolidation of the newly - installed revolutionary government. Although initially it was a positive term (the French revolutionary leader Maximilien Robespierre proclaimed that: “Terror is nothing other than justice, prompt, severe, inflexible; it is therefore an emanation of virtue; it is not so much a special principle as it is a consequence of the general principle of democracy applied to our country's most urgent needs.”), in the next years terrorism became a negative word because of the public executions and the continuous imprisonments.

David Rapoport divides the history of terrorism to four „waves” which are the following:<sup>8</sup>

- The „Anarchist Wave”, which started in the 1880s and continued nearly 40 years (the Russian populist group „Narodnaya Volya” came to life in this wave.<sup>9</sup>
- The „Anti – Colonial Wave” started in the 1920s and ended in 1960.
- The „New Left Wave” started in 1960 and lasted nearly the 1990s (certain terrorist group in this wave is still active nowadays for example in Sri Lanka).
- The last wave is the „Religious Wave” which started in 1979 and it is still active.

Religion is the most determinative aspect of the Religious Wave. In this wave terrorism became a global phenomenon (opposed to the preceding waves), its core elements changed, and the numbers of terrorist attacks increased.

With the new wave of terrorism, the elements of the phenomenon are changed. One group of the changes is the methods of committing the act of terrorism, the targets, and the weapons used in the act. Causing the most damage became an important aspect, for which the use of weapons

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<sup>8</sup> D. C. Rapoport, „*The Four Waves of Rebel Terror and September 11*”, *Anthropoetics* no. 1 (Spring / Summer 2002), <https://wrlldrels.org/wp-content/uploads/2016/02/Rapoport-Four-Waves-of-Terror.pdf> (20 March 2019)

<sup>9</sup> D. Rapoport, *The Fourth Wave: September 11 in the History of Terrorism. Current history* (New York, 2001). pp. 419-424.  
[https://www.researchgate.net/publication/287623980\\_The\\_Fourth\\_Wave\\_September\\_11\\_in\\_the\\_History\\_of\\_Terrorism](https://www.researchgate.net/publication/287623980_The_Fourth_Wave_September_11_in_the_History_of_Terrorism) (20 March 2019)

of mass destructions became the primary method. In the choosing of targets instead of political targets, indiscriminate attacks became the trend. There is no distinction between the military and civilian targets.

Another important change in the topic is the using of new technologies and the globalisation of terrorism. In the field of the new technologies the use of devices and applications to send anonymous text is one of the important aspects.<sup>10</sup> New technologies are emerging, and the globalisation of terrorism also means an important change. Among the new technologies the most problematic ones are the mobile applications that provide anonymous ways of communication. This proves to be troublesome when identifying potential terrorists. Unlike until recent time nowadays we can see terrorism gain international characteristics. Both terrorist attack and the organisations can be found in more and more countries around the world. Even the aims of terrorist organisations reach through the borders of states.

#### **4. Definition of organised crime**

The theme of organised crime is not new as it appeared a long time ago in the US during the prohibition period in relation to corruption of local police/mayors by groups of people producing alcohol illegally. Later on, the Italian mafia got involved and the organised crime groups began to distinguish by the name of the diaspora they belonged to. Talking about international organised crime, it appeared as soon as trans-border activities were involved in either the traffic of products like drugs or arms or in the recycling of money. By the late seventies, drug trafficking including mostly cocaine trafficking become more common, especially in the Latin America, and the terminology has moved from international to transnational organised crime or trans-border crime.<sup>11</sup>

During the eighties the EU MSs have considered using the common term of Transnational Organised Crime (TOC) instead of drug trafficking, arms trafficking, financial crime/corruption under the influence of the US.<sup>12</sup>

However, there is still no generic definition as many countries worldwide have refused to agree on it. Analysis shows that there are quite a lot of definitions of organised crime and that there are several common features in those definitions (by scholars such as Albanese, 2016; Finckenauer, 2005; Hagan, 1983; Maltz, 1985). They include the purpose of organised crime which is to financially profit through the crime and the corruption is the most common protection of the organised crime operations as well as fear, threats and force needed.<sup>13</sup> All

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<sup>10</sup> <https://www.wired.com/story/terrorist-groups-prey-on-unsuspecting-chat-apps> (20 March 2019)

<sup>11</sup> J. Sheptycki, H. B. Jaffe, D. Bigo, *International Organised Crime In The European Union*, European Parliament, 2011.

<sup>12</sup> Ibid.

<sup>13</sup> M. Riccardi & G. Berlusconi, *Measuring organised crime infiltration in legal businesses*, in E.U. Savona & M. Riccardi & G. Berlusconi (Eds.), *Organised Crime in European Businesses*, Routledge, London 2016, pp. 16-17.

these explains why it also referred to as a “serious crime” but also importantly it must be “organised”, so it includes planned, rational acts of the groups with specific objective.<sup>14</sup>

As said above, there were several attempts to define phenomenon of organised crime and in 1998 Sam Porteous, in a report to the Solicitor General of Canada offered the following definition:

*“economically motivated illicit activity undertaken by any group, association or other body consisting of two or more individuals, whether formally or informally organized, where the negative impact of said activity could be considered significant from an economic, social, violence generation, health and safety and/or environmental perspective.”<sup>15</sup>*

However, it was not successful as there was no notion of duration of criminal activity, no requirement for the “organised” activity and no mention of the capacity to enforce violence and corruption used by the group. Thus, the organised crime in this context implies all criminal activities that involved two or more people with some kind of economic motivation and therefore most corporate crime and financial frauds by this definition can be referred to organised crime activities.<sup>16</sup>

Academic criminologists have been researching another approach to define organised crime and came to an idea that there is a unique process that makes organised crime activities different from other form of criminal conduct and even more of a threat to society and therefore needed a special legislative procedure. Characteristics involved within this approach are exactly the characteristics that are missing from the definition of the Porteous – continuing criminal enterprise, potential to use corruption/violence/threat and on-going conspiracy between the members of the group.<sup>17</sup>

However, now there are a lot of examples that suggest that this insistence on a specific “process” by which serious crimes are committed ineffectively resolves the issue of what is seen to be organized crime.

Thus, one of the potential bases for the unified definition of organised crime is through identifying and comparing the organised crime features mentioned above in different countries. Unfortunately, numerous trials of European countries in the field of the international co-

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<sup>14</sup> Organized Crime - Module 1 - Key Issues: Defining Organized Crime, UNODC, 2018 <https://www.unodc.org/e4j/en/organized-crime/module-1/key-issues/defining-organized-crime.html> (20 March 2019)

<sup>15</sup> S. Porteous, Organized Crime Impact Study: Highlights, Solicitor General Canada, 1998, p. 2.

<sup>16</sup> M. Beare and R. T. Naylor, *Major Issues Relating To Organized Crime: Within The Context Of Economic Relationships*, Nathanson Centre for the Study of Organized Crime and Corruption, 1999 (<https://dalspace.library.dal.ca/bitstream/handle/10222/10284/Nathanson%20Centre%20Research%20Economic%20and%20Organized%20Crime%20EN.pdf?sequence=1>) (20 March 2019)

<sup>17</sup> Ibid,

operation, focused on the search of strategies and tactics of suppression of organised crime, have given only limited results.<sup>18</sup>

The first international effort to provide a clear and precise definition of organised crime at international level through the adoption of the UN Convention against Transnational Organised Crime in 2003. For the purpose of this Convention the term “serious” crime, the offence must be punishable for at least four years. However, countries are not obliged to follow the definition of Convention but at the same time the Convention is applicable in case of transnational level of organised crime – usually when offence is committed in more than one country.

Talking about the EU, now there are three types of method to criminalising organised crime:

- *Civil law approach consists of criminalising participation in a criminal association*
- *Common law approach based on conspiracy - an agreement to commit a crime*
- *Scandinavian approach, rejecting "criminal organisation" offences and relying instead on the general provisions of criminal law (collaboration, aiding and abetting)<sup>19</sup>*

However, even within the same approach, Member States in the EU have adopted completely diverse definitions of organised crime. For example, Article 416-bis of the Italian Criminal Code dealing with mafia-type associations is of a nature unknown to many other civil law countries.<sup>20</sup>

After the Treaty of Lisbon came into force in 2009, it has opened new paths for the approximation of national criminal laws in the EU including legislation on the organised crime. For example, Article 83(1) of the TFEU establishes minimum rules for the definition of serious crime with a cross border dimension and organised crime is also involved there. Also, Article 83(2) TFEU gives a possibility for approximation of criminal laws when considered necessary for the effective implementation of EU policy in the field that has been subject to harmonisation measures.<sup>21</sup>

#### ***4.1. Structure and activities of organized crime***

Numerous organised crimes are active in the EU and worldwide, often with cross-border reach and multi-ethnic composition. In the EU a few of the leader groups are Italian, Russian and

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<sup>18</sup> B. Dobovšek, *Organised crime – can we unify the definition?* In: Policing in Central and Eastern Europe: Comparing Firsthand Knowledge with Experience from the West, 1996 <https://www.ncjrs.gov/policing/org323.htm> (20 March 2019)

<sup>19</sup> P. Bąkowski, *The EU Response To Organised Crime*, Library of the European Parliament, 2013, p. 1

<sup>20</sup> F. Calderoni *A definition that does not work: The impact of the EU Framework Decision on the fight against organized crime- Common Market Law Review* No.4, 2012, pp. 1378-1379. Quoted by Bąkowski 2013, p. 2

<sup>21</sup> Bąkowski 2013, pp. 3-6.

Albanian. EU Member States are not equally exposed to those activities; however, the development of the internal market, unfortunately gave new possibilities to criminals to extend their sphere of action<sup>22</sup>. The EU takes actions and adapts its response with the growing complexity of the situations. Special agencies, such as Europol, Eurojust and CEPOL were developed to combat these crimes<sup>23</sup>, but further action is needed to prevent them. Examining the different academic's opinions, we can see why it is so hard to find one standard definition and why is so difficult to completely define it<sup>24</sup>. One of the first difficulties comes from the fact that the term organised is ambiguous. Most academics agreed that there must be two or more persons conspiring together on continues basis to commit serious crimes to maintain a financial or other benefit<sup>25</sup>. Also, they agreed that typically they will have a hierarchical organisation with a set of rules and regulations. Therefore, a gang which temporarily groups or a couple of youth involved in small illegal activities, most likely will not be considered organised crime. Also, the primary goal of organised crimes is economic profit; therefore, terrorist organisations, even if they are well organised and meet some of the characteristics typical for Organised crime groups, are not usually considered organised crimes-groups, because the goal is different<sup>26</sup>. Furthermore, depending on their target, objectives and mechanisms they can be larger or smaller, local or global, domestic or transnational, centrally directed or highly decentralized.

Commonly, these organisations engaged in enterprises and these includes various criminal acts. Albanese J. pointed that it emerges three main categories of criminal activities. These include provision of illicit services, provision of illicit goods and infiltration of legitimate business or government<sup>27</sup>. The provision of illicit services involves for example prostitution, loan-sharking and illegal gambling and human trafficking. Provision of illicit goods includes drug trafficking, distribution and sale of stolen property and counterfeiting (goods, arms, documents). The last category involves extortion of business owners, money laundering and fraud (smuggling, investment broad).

Over the time there was a shift of organised crime activities; however, it can be seen that modern forms are a newer version of older kinds of criminal conduct that changed due to new technology and opportunities. Many attacks are happening online. We have various forms of cybercrime such as online identity theft and various attacks against information systems – this are due to rapidly technological developments.

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<sup>22</sup> P. Bakowski, *Briefing on organised crime in the European Union*, European Parliamentary Research Service 2015 (PE 569.039).

<sup>23</sup> Ibid.

<sup>24</sup> Ibid.

<sup>25</sup> F. Varese "What is Organised Crime? Organised Crime (Critical Concepts in Criminology)", Routledge, London 2010, Vol. I, pp. 11-33.

<sup>26</sup> E4J University Module Series: *Organised Crime* (2018) <https://www.unodc.org/e4j/en/organized-crime/module-1/key-issues/activities-organization-composition.html> (20 March 2019)

<sup>27</sup> J. Albanese, *Risk Assessment in organized crime, Developing a Market and product-Based Model to determine threat levels*, Journal of Contemporary Criminal Justice Vol. 24, No. 3, 2008, pp. 263-273.

After a significant number of cases and studies and research papers on criminal organisations there were identified three types of organised crime groups: hierarchical model, local, cultural model and enterprise or business model. The first type identifies it as a group of criminals in which the leader is distinguished and in a superior position respect of other members. The illegal activities are organised by the leader and carried out by other members in a lower rank<sup>28</sup>. An example is the Italian mafia who consists of bosses, lieutenants and soldiers.

The second type of criminal groups are connected by ethnic and cultural ties. This type usually is local in nature<sup>29</sup>. The third one it is based on economic consideration and they tend to form their illegal activities with regard to customers need. They tend to traffic drugs, arms or stolen property and other products with the objective to make a profit. According to Smith<sup>30</sup> these type act as legitimate business do. They take into consideration the need and demand of suppliers, customers, regulators and competitors. The difference is that one deals with legal activities, other with illegal. The emphasis is on economic relationship rather than personal relationship. Today, we have a fourth new type of organised crime which occurs in the virtual world. The Web is the new place where illicit goods and services are sold. Hackers for example may extort victims. The cyber dimension permit criminals to be more disconnected from customers and victims. Potentially, it can be argued that members of organised crime may be starting to move away from the past type of relationship to a less formal one and disconnected. Europol reported in 2017 that 20% of criminal network known in Europe exists only for a short period of time<sup>31</sup>.

## **5. The comparison of terrorism and organized crime**

When we compare terrorism and organized crime, we have to examine a few features: the goal, structure, income, and the victims of crimes. We also have to talk about terrorism in the EU, and in the Middle East, as they show significant differences.

Terrorism can be used as a tactic to scare a social group, ethnicity, or an entire country. It is often backed by an ideology or a religion. While the background of terrorist groups can be very different, almost all of them uses more or less the same tactics of intimidation. The goal and motivation of a criminal group are vastly different than terrorist groups, it is the main difference between these organizations. Its main motivation is to generate huge amounts of income, and to gain as much influence as possible.

When we talk about the structure of a terrorist group, it is important to differentiate between its appearance in the EU and outside. Organizations in the middle east commit mostly the same crimes as criminal groups anywhere else in the world, and have almost the same structure. In the EU, terrorist groups form cells, which are loosely connected to the main organization. They

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<sup>28</sup> Cf. J. Albanese, *Organized Crime: From the Mob to Transnational organized crime*” Routledge, London 2015

<sup>29</sup> H. Abadinsky, *The Mafia in America: An oral history*” Praeger, New York 1981

<sup>30</sup> Cf. D. C. Smith, *The Mafia Mystique*, University Press of America, New York 1990

<sup>31</sup> European Union Serious and Organised Crime Threat Assessment 2017, European Police Office, 2017

remain dormant, until the call comes from their group. Then they activate from their “sleep” and commit the terrorist acts. Criminal organizations very rarely use this tactics, as the group is more tight, and it is based on the trust of the members.

The income of criminal groups is very colourful, ranging from drug trafficking, arms dealing, to money laundering or even legal businesses. Terrorist groups inside the EU are mainly involved in drug trafficking and money laundering, meanwhile in other parts of the world, they commit more or less the same crimes as criminal groups to generate profit. The goal of Criminal groups is to generate income, so these two features are almost the same. The main difference between organized crime and terrorism is, that terrorist groups use their income as a tool, so they have the manpower, weapons, vehicles etc. to commit their goal, which is to articulate their discontent via bloody and cruel acts.

The motives and mechanisms of organized crime are vastly different. It is a parasite, a tumour, on the body of the economy and society, they use forms of violence and corruption to achieve their goals.

The victims of violent crimes committed by these groups are different too. The victims of organized criminal groups are often part of another similar society. These groups mainly fight for power, influence, and income. It is rare that an outsider becomes a victim of these crimes, although it is possible

To achieve their goals, terrorist groups mainly use brutal, violent crimes as they are the most effective to plant fear in a society. They choose their victims randomly, or based on the victims ethnicity, religion, or other features.

We also have to state that not all terrorist acts are committed by a terrorist organization. Some terrorist groups like the Islamic State like to take responsibility for actions, which cannot be clearly linked to them. The most recent terrorist crime was committed in Christchurch, New Zealand. In this case it is clear that the perpetrator was not a member of a terrorist group. The same goes to the attack committed in 2011 in Norway, where 77 children were massacred.

So in conclusion, we can see that the main difference between terrorism and organized crime, is the motivation behind their acts. While terrorist groups use their income as a tool, organized criminal groups generate income to gather more and more profit, which they can use to gain even more influence and power. Some of their methods are the same, but their goals are vastly different.

## 6. Common Legal Framework for Fighting Terrorism and Organized Crime

Structuring a common legal framework for terrorism and organized crime could be of outmost importance and significance because of the recent researches and analyses on the linkages between the two phenomena. More and more similarities can be found, these organisations and networks are co-existing, cooperating and converging, they are increasingly working together which gives law enforcement the opportunity to better observation, monitoring and the chance to expose these circles and because of their connections it is also easier to identify further members and groups in their network.

On the other hand, their interaction can be quite limited and not possible to trace due to the use of advanced communication and information technologies so it is really a big challenge to the authorities to keep up with this kind of technical development and find new possibilities to pursue their targets and gather information.

We are clearly of the opinion to have this common framework because it could even provide unpredictable benefits. There are several similarities which can be used as the basis of the framework e.g., structural and organizational similarities, their operational tactics, financial resources – normally illegitimate drug trades – and technologies. Linkages are surely established in firearms trafficking, drug trafficking, smuggling of migrants.<sup>32</sup>

Terrorism and transnational organized crime have a nexus formed between them, they are benefitting from the other, there is mutual operational, financial and logistical support which strengthens their infrastructure and widens their capabilities. It also creates more vulnerabilities that gives the possibility of better detection of both types of groups. Their cooperation can cause distrust as criminals do not have the same loyalty to the cause as terrorists have. This includes the possibility of the increased attention by law enforcement agencies and the chances of infiltration. Also, the involvement of criminals can undermine the credibility and support of the terrorist groups and it can also cause distraction from political goals and put an emphasis on the profit-making aspect. This can be used against the terrorist networks to discredit their ideological goals and purposes openly so that they are associated with common criminals.<sup>33</sup>

The newest and most dangerous forms of their collaboration are the hybrid organizations. These are sharing the characteristics and attributes of both terrorist organizations and organized crime groups. They have a complex structure, there is a clear political orientation and also a profit-making agenda. This new phenomenon requires the increased attention of the authorities and new perspectives, analysis and monitoring.

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<sup>32</sup> <https://www.unodc.org/dohadecaration/en/news/2018/05/unodc-invites-new-academic-thinking-on-linkages-between-organized-crime-and-terrorism.html> (20 March 2019)

<sup>33</sup> <https://www.vocaleurope.eu/organized-crime-vs-terrorism-are-they-converging> (20 March 2019)

This agenda desperately needs the common international attention, serious cooperation, the coordination and support of the member states' initiations. After gathering enough data, it would also be useful to train competent experts, maybe create an agency devoted to these serious issues, and put the emphasis on the collection of information.

The chief global legal tool in this area is the United Nations Convention against Transnational Organized Crime and its three protocols (the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children; the Protocol against the Smuggling of Migrants by Land, Sea and Air; and the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition).<sup>34</sup>

Based on the previously mentioned facts I am on the opinion that besides the differences of these two organizations it is really needed to create this common framework because of the hidden possibilities of their similar aspects. Until now there are no successful initiations but with some time and enough resources it has a high chance to succeed.

In conclusion we can say that although on the EU level the behaviours that are related to terrorism are regulated, it would be much better, if the states have a general definition for terrorism in the criminological aspect. The phenomena of terrorism changed since the 9/11 attacks. There are changes in its tools, its methods (for example the using of weapons of mass destruction), the working mechanics of the terrorist cells, the use of new technologies, and the international aspects of the attacks. Talking about the organised crime phenomenon, the persistent attempts to harmonise the criminal law in different countries in order to come up with one common definition of organised crime have not been successful yet as there is still tension between the search for meaningful harmonisation and the respect for state sovereignty and national diversity as all States have their own view on how to deal with "serious" types of crime and therefore their own legislation. However, the EU's position in this field have been substantially strengthened after the Treaty of Lisbon came into force. The issues, however, still persist and we have seen how there are different types of organised criminal groups which differ in structure and are involved in different activities. Whether it is necessary to focus on their structure or activities is still subject to academic debate. It appears that both have to be analysed deeply to understand how to prevent them. About the differences of the two phenomena we can see that the main difference between terrorism and organized crime, is the motivation behind their acts. While terrorist groups use their income as a tool, organized criminal groups generate income to gather more and more profit, which they can use to gain even more influence and power. Some of their methods are the same, but their goals are vastly different. Although the differences and difficult questions of the two phenomena it is important to have a common legal framework both for terrorism and organized crime.

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<sup>34</sup> [https://www.unodc.org/documents/terrorism/Publications/Training\\_Curriculum\\_Module2/17-04123\\_eBook\\_FINAL.pdf](https://www.unodc.org/documents/terrorism/Publications/Training_Curriculum_Module2/17-04123_eBook_FINAL.pdf) (20 March 2019)

# Substantive Criminal Law Harmonisation regarding serious crimes listed in Article 83 TFEU

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*The article revolves around the cooperation between Member States regarding criminal justice. The basis of the article is the Stockholm Programme which was adopted in 2014 and it formulated the whole cooperation in justice and home affairs in the European Union. The article shows how important harmonisation of criminal laws of Member States and shows how it affects cooperation in criminal justice.*

*Keywords: Stockholm Programme; harmonisation; guidelines; trafficking in human beings; computer crimes; justice and home affairs*

## 1. Introduction

We have chosen this topic since the harmonisation of substantive criminal law of Member States is not researched much. When it comes to cooperation in criminal matters between Member States, it is often referred to that the approximation of criminal procedures and cooperation in criminal matters are of huge importance. However, the harmonisation of substantive criminal law is often overlooked as if it was of no importance. On the contrary, in our opinion it constitutes the core of the judicial cooperation in criminal matters. It is based on the fact that criminal procedure is based on substantive criminal law.<sup>1</sup> Thus it goes without question that the approximation of substantive criminal law must keep pace with the approximation of criminal procedures. Needless to say harmonisation also provides means to avoid forum-shopping regarding serious and organised crimes.

Our article revolves around the Stockholm Programme. It's relevant guidelines will be introduced in the second part of our study. The reason for this is that the Stockholm Programme is a strategic document for cooperation in justice and home affairs.<sup>2</sup> It was introduced after the adoption of the Treaty of Lisbon so it reflects the situation as it is now in the European Union. Another reason for choosing the Stockholm Programme was that it had ample time to make a positive change in relation to the harmonisation of substantive criminal law of Member States. Last but not least this was the first programme that supported this issue in a substantial manner.

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<sup>1</sup> It is also worth mentioning that one of the main purpose of procedural law is to realise regulations of substantive law.

<sup>2</sup> Zs. Horváth & Á. Mohay & A. Pánovics & E. Szalayné Sándor, *Európai Közjog 2.*, PTE ÁJK, Pécs 2016, p. 184.

First, we introduce the evolution of cooperation in justice and home affairs between Member States and the important guidelines incorporated in it regarding our topic. After this we examine the importance of approximation of substantive criminal law in the context of the Lisbon Treaty. In the end we draw conclusion regarding the role of the Stockholm Programme and make recommendations for future development in this topic.

## **2. Area of Freedom, Security and Justice**

The second item of the third article of the Treaty on the European Union aims to establish an area without internal borders based on freedom, security and justice.<sup>3</sup> In this area the free movement of persons, the supervision of outside borders, common policies on asylum and migration shall be framed, not to mention furthering the judicial cooperation in civil and criminal matters.<sup>4</sup> Currently the regulations regarding justice and home affairs of the EU can be found in Title V of the TFEU that is called the Area of Freedom, Security and Justice.

It has taken a long time for the cooperation between member states in justice and home affairs to come to life. Before the ratification of the Treaty of Maastricht it was formulated outside the framework of the EU. When the Treaty of Rome was ratified the idea had not even been an aim to achieve later. Instead the first instance of this cooperation was the TREVI-group which consisted of the ministers of justice and home affairs of the member states, thus this group was organised on an intergovernmental level. It involved cooperation in matters regarding migration, asylum, police and judicial cooperation.<sup>5</sup>

The Schengen cooperation was the forerunner of the cooperation in justice and home affairs. Later the Schengen cooperation was integrated into primary EU law by the Treaty of Amsterdam.<sup>6</sup> It was the Treaty of Maastricht that incorporated justice and home affairs into primary EU law. The three pillars of the EU – which then went on to stay in force until the ratification of the Treaty of Lisbon – was created by the Treaty of Maastricht. In this system justice and home affairs was the third pillar which meant intergovernmental level. The Treaty of Amsterdam changed this system by incorporating most element of justice and home affairs into the first pillar which only left the judicial cooperation in criminal matters in the third pillar. In 2009 the three pillars of the EU were revoked by the Treaty of Lisbon which reshaped the institutions of the EU in a radical way.<sup>7</sup>

Along with repealing the three pillars of the EU the Treaty of Lisbon also introduced the ordinary legislative procedure in justice and home affairs. This procedure is based on the co-decision of the Council of the EU and the European Parliament. This means that those legal

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<sup>3</sup> 2012 Consolidated version of the Treaty on the European Union Art. 3 It. (2).

<sup>4</sup> 2012 Consolidated version of the Treaty on the Functioning of the European Union Art. 67.

<sup>5</sup> A. Osztovits András (ed.): *Az Európai Unió szerződéseinek magyarázata 1-2.*, Complex, Budapest 2008, p. 365.

<sup>6</sup> Osztovits, *ibid.*, p. 366.

<sup>7</sup> Horváth & Mohay & Pánovics & Szalayné, *ibid.*, p. 182.

norms specifically used for the third pillar were exchanged by the secondary legal sources of the EU such as directives, decisions and regulations. However, this does not mean that those special legal norms which were used to regulate justice and home affairs are automatically repealed.<sup>8</sup> In addition a break clause has been introduced in the legislation regarding justice and home affairs.<sup>9</sup> Another important novelty is the Committee on Internal Security introduced by Art. 71. of the Treaty on the Functioning of the EU. It is a standing committee of the Council of the EU aiming to improve the cooperation regarding the internal security within the EU.<sup>10</sup>

There were other programs like the Stockholm Programme as well in justice and home affairs. Before the Stockholm Programme there was the Tampere Programme and the Hague Programme. The current programme following the Stockholm Programme is called the Post-Stockholm Strategy.<sup>11</sup>

### **3. Guidelines of the Stockholm Programme regarding the approximation of the substantive criminal law**

The role of minimum rules is to strengthen mutual recognition and cooperation in judicial matters. The basis of mutual recognition and minimum rules is set in Art. 82-83. of TFEU. According to these articles the Council and the EP may introduce minimum rules regarding substantive criminal law in five cases:

1. mutual admissibility of evidence between Member States
2. the rights of individuals in criminal procedure;
3. the rights of victims of crime;
4. any other specific aspects of criminal procedure which the Council has identified in advance by a decision; for the adoption of such a decision, the Council shall act unanimously after obtaining the consent of the European Parliament.
5. The European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis.<sup>12</sup>

We are going to examine the fifth point of the list. The Stockholm Programme has a chapter called a Europe that Protects. In this chapter the European Council instructs the European

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<sup>8</sup> Horváth & Mohay & Pánovics & Szalayné, *ibid*, p. 183.

<sup>9</sup> J. Fazekas, *Bel- és igazságügyi együttműködés az Európai Unióban - a hágai programtól a stockholmi programig*. OKRI Szemle, vol 2, 2009, p. 4.

[http://www.okri.hu/images/stories/OKRISzemle2009/OKRISzemle\\_2011/006\\_fazekas.pdf](http://www.okri.hu/images/stories/OKRISzemle2009/OKRISzemle_2011/006_fazekas.pdf) (1 February 2018).

<sup>10</sup> 2012 Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union Art. 71.

<sup>11</sup> These programmes are introduced by the European Council according to Art. 68. of the TFEU.

See: Horváth & Mohay & Pánovics & Szalayné, *ibid*, p. 184

<sup>12</sup> Treaty on the Functioning of the European Union, Arts. 82-83.

Commission to review the directives setting out the minimum rules for those serious crimes mentioned in TFEU and if the need arises commence new legislation.<sup>13</sup> This next chapter, a Europe that Protects lists those serious crimes with a cross-border dimension that need to be reviewed.<sup>14</sup>

#### **4. Approximation of substantive criminal law in relation to serious and organised crimes**

In criminal law organised crime can be categorised as part of those formations (organised crime, criminal association and gang<sup>15</sup>) when there are two or more persons jointly concerned in the commission of an offence. In this case there is said to be participation.<sup>16</sup> By formulating the definition of a criminal organisation criminal codes approve the existence of organised crime, not to mention that regarding sentencing committing crimes in criminal organisation is deemed more serious.<sup>17</sup>

Members of a criminal organisation intend to generate profit from committing crimes.<sup>18</sup> A criminal organisation poses greater threat to the society since these groups have many members, they are specially organised for committing crimes and their ties to the economy are plenty as opposed to principal participation.<sup>19</sup> A group of perpetrators is deemed a criminal organisation if it consists of three or more persons, is organised for a longer period of time, achieves cooperation and aims to commit crimes deliberately that are punishable by five or more years of prison sentences.<sup>20</sup>

We also need to examine organised crime from a practical viewpoint. As the internal borders of the Member States of the EU were opened upon the Schengen Cooperation organised crime stated to become cross-boarder. Europol's Serious and Organised Crime Threat Assessment directs our attention to this fact. Organised crime is much more of a complex nature than we can demonstrate it with the definition of criminal organisation. It is a formation which is deeply connected to the legal economy, it operates according to the rules of supply and demand of the market not to mention that there is a fair deal of tolerance towards criminal organisations coming from the population for some reason. This makes them extraordinarily flexible for

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<sup>13</sup> The Stockholm Programme - An open and secure Europe serving and protecting the citizen, p. 44.

<sup>14</sup> These areas of crime are the following: terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime. See: Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union Art. 83. It. 1.

This item also empowers the Council and the European Parliament to adopt a decision identifying other areas of crime that meet the criteria of having cross-border dimensions.

<sup>15</sup> Á. Balogh Ágnes & M. Tóth (eds.): *Magyar Büntetőjog Általános rész*, Osiris Kiadó, Budapest 2015, p. 219.

<sup>16</sup> Criminal Law, University of Minnesota Libraries Publishing Edition, 2015, 227. p.

<sup>17</sup> 2012. évi C. törvény a Büntető Törvénykönyvről 91. §.

<sup>18</sup> Balogh & Tóth, *ibid*, p. 222.

<sup>19</sup> Balogh & Tóth, *ibid*, p. 221.

<sup>20</sup> 2012. évi C. törvény a Büntető Törvénykönyvről 459. § (1) bekezdés 1. pont.

changes which makes them even more dangerous for the whole population of Europe disregard of any European state.<sup>21</sup> This is the basis for the cooperation between Member States against organised crime. In the Stockholm Programme this cooperation is strongly advocated by the European Council. It contains suggestions for unified border control, harmonization of jurisdictions, approximation in the field of substantive criminal law and last but not least the mutual recognition of judicial decisions. According to our point of view the approximation of substantive criminal law and the mutual recognition can be the basis of the cooperation between Member States against organised crime.

In part 2. you could already see that the policy of justice and home affairs of the EU was created by the Treaty of Maastricht. However at this point mutual recognition was not incorporated in the third pillar.<sup>22</sup> For this to happen it had to wait until the Treaty of Lisbon which incorporated justice and home affairs into primary EU law. As a consequence it was ridden of its intergovernmental traits. With the Treaty of Lisbon mutual recognition was introduced at a primary level in EU law. Before this Treaty it was possible only at a smaller level by secondary legal sources of the EC (for example the European Arrest Warrant is regulated in a framework decision). Thus the legal institution of mutual recognition on a primary level has been created by Item (3)-(4) of Art. 67. of TFEU. The legal institution of mutual recognition introduced a novelty in justice and home affairs. According to the regulations Member States mutually have to recognise the judicial and extrajudicial decisions of other Member States as binding.<sup>23</sup> However this means that these decisions are binding disregard of any differences between laws of Member States. This evolution of cooperation in the Area of Freedom, Security and Justice makes the approximation of laws indispensable. It is needed because mutual recognition of decisions require strengthening mutual trust between Member States regarding their legal systems. It is achievable by the approximation of laws since it makes it possible to create minimum standards that provide a common approach towards certain regulations in question. As an example, we may examine human trafficking. If Hungary punishes human trafficking with a minimum of one-year sentence and a maximum of five-year sentence it is clearly against its criminal policy to recognise a judgement based on a criminal code which punishes human trafficking with a maximum of two or three years of prison sentence. It is also necessary regarding the formulation of criminal policies of Member States to create minimum standards of acts and punishments of serious and organised crimes that are cross-border in the EU with very similar traits.

Due to its nature the main tool of the approximation of laws is the directive which doesn't have direct effect. Instead of this it contains results to achieve without dictating the means for achieving them thus Member States have discretionary power to decide on the means to achieve

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<sup>21</sup> Serious and Organised Crime Assessment: Crime in the age of technology, Europol, Hague 2017. p. 13.

<sup>22</sup> V. Mitsilegas: *EU Criminal Law*, Hart Publishing, Oxford 2009, p. 115.

<sup>23</sup> 2012 Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union Art. 67. paras. 3-4.

the results.<sup>24</sup> This discretionary power is needed since the legal systems of Member States may vary in numerous aspects.<sup>25</sup> As a consequence there are cases in which a decision or a regulation would not be able to fulfil its purpose since they may contain such legal institutions that some legal systems are not familiar with. This could very well lead to such results when – without the proper time to prepare for their entry into force – certain legal institutions could be practically useless.

The basis of the approximation of the substantive criminal law is provided in Art. 83. of TFEU. We know of three kind of approximation of laws categorised by the extent of the approximation of regulations: full, optional and minimum approximation.<sup>26</sup> Regarding the substantive criminal law of Member States approximation is done at a minimum extent. According to Art. 83. of TFEU approximation of substantive criminal law shall be done in case of the listed serious crimes that affect every European Citizen. The extent of minimum approximation in this case means that there are certain acts that may be deemed punishable in every Member State and directives may introduce sanctions for punishing these acts.<sup>27</sup> Member States may provide more stringent regulation however they may not introduce sanctions that are less serious.<sup>28</sup>

The approximation of substantive criminal law in justice and home affairs was first regulated in the Treaty of Amsterdam (1997). After the ratification of this Treaty the evolution it started. This can be viewed as the predecessor of today's approximation of substantive criminal law since it affected the same crimes such as terrorism, sexual harassment of children, human trafficking, drug trafficking, crimes against information technology and corruption. However this approximation was achieved by framework decisions which reflects the fact that at that time the pillar-system was still intact.<sup>29</sup> Today's approximation is based on the Treaty of Lisbon which means that the approximation of substantive criminal law is done in the framework of ordinary legislative procedure which is an important change in the topic since in ordinary legislative procedure the EP and the Council only need a popular vote to pass a directive.<sup>30</sup>

## 5. Approximation of substantive criminal law in practice

In order to understand the process and the positive effects of the harmonisation of criminal law we need to examine working examples. For this we examine three areas of crime that are designated in the Stockholm Programme, namely trafficking in human beings, sexual exploitation of women and children and computer crimes. The main interest of this article is to show how the guidelines regarding these crimes achieves the harmonisation of substantive

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<sup>24</sup> A. Osztovits András (ed.): *EU-jog* (Második, aktualizált és bővített kiadás). HVG-ORAC, Budapest 2015. p. 179.

<sup>25</sup> Á. Mohay, *Jogharmonizáció az Európai Unióban*, Dialóg-Campus, Budapest 2018, p. 7.

<sup>26</sup> Mohay, *ibid*, pp. 10-11.

<sup>27</sup> Treaty on the Functioning of the European Union, Art. 83.

<sup>28</sup> Mohay, *ibid*, pp. 19-20.

<sup>29</sup> Mitsilegas, *ibid*, p. 33.

<sup>30</sup> E. Várnay & M. Papp, *Az Európai Unió joga*. KJK-KERSZÖV, Budapest 2003, p. 192.

criminal laws. We also examine how these guidelines has been implemented into Hungarian criminal law.

### ***5.1. Trafficking in human beings***

Criminal cooperation regarding trafficking in human beings is important for many reasons. It is needless to say that it is one of the most widespread cross-border crime in the EU along with trafficking in drugs.<sup>31</sup> It is also deemed to be greatly harmful to society for it has serious causes.<sup>32</sup>

The relevant directive 2011/36/EU determines the acts that are to be punished in every Member State. In other words, the guideline introduced minimum rules regarding trafficking in human beings. These acts include the recruitment, transportation, transfer, harbouring or reception of persons and the exchange or transfer of these persons by means of threat or use of force or other forms, or by means of abduction, fraud, deception, abuse of power or of position of vulnerability.<sup>33</sup> In addition the guideline defines what exploitation means. If the act is committed with the aim of exploitation it brings more serious punishment. According to this definition exploitation shall include, as a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, including begging, slavery or practices similar to slavery, servitude, or the exploitation of criminal activities, or the removal of organs.<sup>34</sup> Last but not least those acts are also punished that nevertheless are not committed in this manner but the victim is under the age of 18.<sup>35</sup>

The guideline determines the minimum standard of punishment for the defined acts. This fits the form of minimum harmonisation, so the smallest possible sanction is determined for them.<sup>36</sup>

As a consequence the harmonisation of substantive criminal law of the Member States results in a consolidated regulation regarding trafficking in human beings by determining the acts by which human trafficking can be committed and the minimum standard of punishment for these acts. Another important novelty of the guideline is that it introduces the aim of exploitation. If human trafficking is committed with this aim it is deemed more serious resulting in harsher sanctions.

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<sup>31</sup> EU Organised Crime Threat Assessment, Europol, Hague 2009, p. 23.

<sup>32</sup> Such as harming human dignity and freedom of movement of persons. See: M. Tóth & Z. Nagy (eds.), *Magyar Büntetőjog Különös rész*, Osiris, Budapest 2014, p. 116.

<sup>33</sup> Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA. OJ 2011 L 101/1, Art. 2. para. 1.

<sup>34</sup> Ibid, Art. 2. para. 2.

<sup>35</sup> Ibid, Art. 2. para 5.

<sup>36</sup> It is also worth mentioning that Member States usually do not apply more stringent punishments than these minimum sanctions.

The Hungarian example shows the effect of approximation of criminal law. The new criminal code incorporated the aim of exploitation into the crime. So according to this exploitation shall mean the abuse of power or of a position of vulnerability for the purpose of taking advantage of the victim forced into or kept in such situation.<sup>37</sup> It can be stated that – though the first impression is that it does not fully comply with the definition of exploitation given in the guideline – it clearly accomplishes the implementation of the aim into our criminal code. The difference is due to the fact that it is a highly abstract form of definition aiming to fit for every possible way of committing smuggling of persons with the aim of exploitation.

The effect of the guideline can be observed in case of the German criminal code as well however in a totally different manner since the German code does not restrict trafficking in human beings with only one crime but with many (for example with human trafficking for the purpose of sexual exploitation, human trafficking for the purpose of work exploitation, assisting in human trafficking, child trafficking and abduction of minors from the care of their parents etc).<sup>38</sup> This shows that though in different form the German code also incorporates the aim of exploitation and the minimum standard of punishment for this crime.

## ***5.2. Sexual exploitation of women and children***

The sexual exploitation of women and children is not directly linked to organised crime. Instead it is connected to it by human trafficking since it is often its aim to use victims of trafficking for prostitution or other forms of sexual exploitation.<sup>39</sup>

For this reason the directive<sup>40</sup> on combating the sexual abuse and sexual exploitation of children and child pornography introduces stringent rules regarding the sexual abuse of children and child pornography.<sup>41</sup> According to the guideline the Hungarian criminal code incorporated a form of child abuse as crime. Before the 2012. criminal code Hungarian criminal law did not punish acts of sexual abuse that is made of a recognized position of trust, authority or influence over such person.<sup>42</sup> More protection for children can also be found regarding the crime of indecent exposure. According to the guideline Hungarian criminal code incorporated a case where the victim of this exposure is specifically a person under the age of fourteen. This case is punished with harsher sanction.<sup>43</sup>

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<sup>37</sup> 2012. C. törvény a büntetőjogról 192. § (8).

<sup>38</sup> German Penal Code 2013 232-236. §.

<sup>39</sup> EU Organised Crime Threat Assessment, Europol, Hague 2009, p. 23.

<sup>40</sup> Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA. OJ 2011 L 135/1.

<sup>41</sup> Much like in case of human trafficking the guideline determines the acts and the minimum standard of punishment for them. See Articles 3-5 of the directive.

<sup>42</sup> 2012. évi C. törvény a Büntető Törvénykönyvről 198. §.

<sup>43</sup> 2012. évi C. törvény a Büntető Törvénykönyvről 205. §.

The German code has the same type of regulation which was introduced by the Hungarian criminal code due to the guideline in question.<sup>44</sup>

### 5.3. *Computer crimes*

Without any doubt harmonisation regarding computer crimes is needed since these crimes are not stopped by borders.<sup>45</sup> Thus computer crimes slowly but steadily became one of the main tools of organised crime. The guideline on attacks against information systems justifies the harmonisation on the basis that society is extremely dependant on information systems. Computer crimes can also be connected to organised crime since information systems may be attacked by terrorist or these attacks may serve political purposes. It is needless to say that these attacks may also result in great economic harm. On the other hand, stealing and marketing of personal data is also a widespread aim of cyber-attacks.<sup>46</sup>

These crimes are exceptions in the harmonisation of substantive criminal laws as for Hungary since the implementation of this guideline is not complete. This fact alone shows that computer crime is a novelty which cannot yet be effectively combated and the legislations cannot really keep the pace with it yet. Thus further efforts are needed to effectively combat attacks against information systems.

## 6. Conclusion

In summary one of the aims of the harmonisation of substantive criminal laws is to effectively combat organised crime across the EU. Thus, the guidelines introduced above are the realisation of the Stockholm Programme's purposes.

It is worth examining the results of the harmonisation. In general it can be said that unfortunately the numbers does not show that the harmonisation of criminal laws of the Member States proved effective. This is based on the fact the since the introduction of the Stockholm Programme the number of victims of human trafficking increased. However it must not be overlooked that this is the first attempt for a consolidated regulation aiming to achieve stronger cooperation regarding organised crime. Taking into consideration every aspects of cooperation against organised crime between Member States it can be stated that the Stockholm Programme provides a mature structure for this aim.<sup>47</sup> As a result in the future it is worth researching the

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<sup>44</sup> German Penal Code 2013. 182. § (2) item.

<sup>45</sup> K. Mezei, *Az információs rendszerek elleni bűncselekmények uniós szintű szabályozása különös tekintettel az Európai Unió 2013/40/EU sz. irányelvre*, Jogi Fórum, 2015. pp. 3-5 [http://www.jogiforum.hu/files/publikaciok/mezei\\_kitti\\_informacios\\_rendszerek\\_elleni\\_buncselekmények\\_eu\\_s\\_zabalyozasa\[jogi\\_forum\].pdf](http://www.jogiforum.hu/files/publikaciok/mezei_kitti_informacios_rendszerek_elleni_buncselekmények_eu_s_zabalyozasa[jogi_forum].pdf) (18 Februray 2018).

<sup>46</sup> Cf. for example the preamble of Directive 2013/40/EU on attacks against information systems and replacing Council Framework Decision 2005/222/JHA. OJ 2013 L 218/4.

<sup>47</sup> It is the Stockholm Programme which introduced the Internal Security Strategy and the office of the EU Anti-Trafficking Coordinator was created due to this framework as well.

results of this framework for cooperation established upon the strategic guidelines of the Stockholm Programme.

As a final point it is worth mentioning that the reception of the Stockholm Programme was not as well as it was meant since the Programme introduced many novelties along with the Lisbon Treaty. As a result it upset the framework of cooperation in criminal matters which was formulated after the Treaty of Amsterdam. This being said its effects showed since the European Committee did not realise many of its objectives since they would not fit in the previous framework.<sup>48</sup> However, in conclusion the Stockholm Programme had enormous effect on combatting organised crime in the EU. Taking into consideration this fact, the Post-Stockholm Programme should continue this work, however with introducing more moderate changes in the system of cooperation in criminal justice between the Member States.

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<sup>48</sup> S. Carrera & E. Guild, *Does the Stockholm Programme matter? The Struggles over Ownership of AFSJ Multiannual Programming*, Liberty and Security in Europe Papers, CEPS, December 2012, p. 15.

# The November 2015 terror attack in Paris: case summary and legal aspects

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*“Jihadists travelling from Europe to Syria and other hotspots in great numbers are a serious problem for European internal security. Urgent action needs to be taken.”<sup>1</sup> These sentences have been written by the EU Counter-Terrorism Coordinator in a report to the Council two years before the 2015 Paris attacks. This clearly highlights the importance and seriousness of the question of having effective legal instruments which are able to prevent radicalization (and consequently terrorist attacks) and to tackle the issue of foreign fighters returning from Syria (or elsewhere) to the European Union. The purpose of this article is primarily to introduce the November 2015 Paris Attacks with special focus on the details of the case in relation to the relevant French and EU regulations. We firmly believe that a complex approach is necessary and indeed useful, therefore the facts of the case will be discussed in detail, including methodological aspects for criminal tactics usage. It will be shown that there is a strong relationship between the attacks and the foreign fighters issue, as at least some of the perpetrators of the November 2015 Paris attacks were EU citizens returned from Syria.<sup>2</sup>*

*Keywords: terrorism, counter-terrorism, Paris attack, border control, foreign fighters*

## 1. Introduction

Terrorism, as an international phenomenon, is not one of today's novelties. An ancient Chinese definition has already reflected the foundations of today's terrorism: “Kill one to intimidate ten thousand!”<sup>3</sup>

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<sup>1</sup> Foreign fighters and returnees from a counter-terrorism perspective, in particular with regard to Syria. Report from the EU Counter-Terrorism Coordinator. 9946/13. May 2013. <http://www.statewatch.org/news/2013/jul/eu-council-terr-coordinator-syria-9946-13.pdf> (5 January 2019).

<sup>2</sup> P. Bąkowski & L. Puccio: *Foreign fighters – Member State responses and EU action*, Briefing, European Parliamentary Research Service, March 2016 p. 3. <http://www.europarl.europa.eu/EPRS/EPRS-Briefing-579080-Foreign-fighters-rev-FINAL.pdf> (22 December 2018).

<sup>3</sup> J. Béres: *Napjaink muszlim terrorizmusának gyökerei és visszaszorítási lehetőségei*, PhD Értekezés, ZMNE Hadtudományi Doktori Iskola, Budapest 2008, p. 10. [http://uni-nke.hu/downloads/konyvtar/digitgy/phd/2008/beres\\_janos.pdf](http://uni-nke.hu/downloads/konyvtar/digitgy/phd/2008/beres_janos.pdf) (31 June 2018).

We can find terrorism in antique Greek and Roman civilizations as well. However, it can be stated regardless that terrorism is typically a 20th century phenomenon, which became a major problem only after the Second World War.<sup>4</sup> The renaissance of terrorism was clearly in 2001, when it underwent some major changes and started to emerge as a global risk factor.<sup>5</sup> Without a proper definition effective cooperative work is unimaginable on the international level.

Of course, many attempts had been made to define terrorism or terrorist acts, but these attempts for the common definitions were total resultless until nowadays.

At the European regional level, the 2017/541/EU Directive has adopted a definition binding on the EU Member States, which has to be also quoted here. An offence<sup>6</sup> should be qualified as a terrorist offence “*when and insofar as committed with a specific terrorist aim, namely to seriously intimidate a population, to unduly compel a government or an international organisation to perform or abstain from performing any act, or to seriously destabilise or destroy the fundamental political, constitutional, economic or social structures of a country or an international organisation. The threat to commit such intentional acts should also be considered to be a terrorist offence when it is established, on the basis of objective circumstances, that such threat was made with any such terrorist aim.*”<sup>7</sup>

In the light of the definitions, one can easily conclude that the November 2015 Paris attacks – the deadliest terrorist attack in Europe since the Madrid bombings in 2004 – were likely terrorist offences. It is also meaningful, that the Directive gives a clear definition, for it is binding on the EU Member States – and thus also France.

## 2. The 13th November 2015 Paris attacks<sup>8</sup>

The attacks did not come as a surprise. In the past 30 years, French jihadists were involved in conflicts in Afghanistan, Somalia, Iraq, which affected the French national security in terms of recruitment, support, propaganda, or terrorist acts. A research conducted in 2013 found that 11 percent (one in nine) foreign fighters returned to Western Europe to perpetrate attacks.<sup>9</sup> According to Marc Trevidic, who was the leading French counterterrorism judge, 50 percent of the jihadis who fought abroad rejoined in terror networks after their return to France. Every

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<sup>4</sup> I. L. Gál: *A terrorizmus finanszírozása*, PTE Állam- és Jogtudományi Kar Gazdasági Büntetőjogi Kutatóintézet, Pécs 2010, p. 6.

<sup>5</sup> F. Dávid: *A terrorizmus és nemzetbiztonság az ezredforduló jogalkotásában*, Szakmai Szemle, 2013/1, p. 44.

<sup>6</sup> The offences (serious crimes) which may be considered as terrorist acts are exhaustively listed in the Directive.

<sup>7</sup> Directive (EU) 2017/541 of the European Parliament and of the Council on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA.

<sup>8</sup> The Attacks on Paris: Lessons learned. A Presentation of Findings. White paper. Courtesy of HSAC and the Paris Public Safety Delegation, June 2016.

<https://static1.squarespace.com/static/5782ad8f9de4bb114784a8fe/t/5783fec9d482e95d4e0b79bf> (28 September 2018)

<sup>9</sup> T. Hegghammer, “*Should I Stay or Should I Go? Explaining Variation in Western Jihadists’ Choice between Domestic and Foreign Fighting*,” *American Political Science Review*, Vol. 107, No. 1, February 2013, pp. 1-15.

major terror plot prevented in France since 2000 involved returnees (e.g. the Strasbourg Cathedral Plot in 2000, the U.S. embassy bombing plot in 2001, a chemical attack plot in 2002, and plans to bomb the Eiffel Tower and the Notre-Dame Cathedral in 2010.)

The highest number of foreign fighters from Europe in Syria and Iraq came from France. More than 2,000 French citizens and residents are taking part in Syrian and Iraqi jihadi networks, 600 of them are believed to be fighting alongside terrorist organizations abroad and 250 are believed to have returned.<sup>10</sup>

The shooting at Brussels's Jewish Museum was the first successful attack committed by a returnee in European soil in 2014. It has been followed by other attacks, "*culminating with the coordinated attacks in Paris in November 2015 and Brussels in March 2016.*"<sup>11</sup>

### **3. The details – facts of the case**

In this chapter we are going to discuss the events as has been described in the White Paper.

On the evening of November 13, the nine attackers divided into three groups. One group went to the Bataclan, Salah Abdeslam drove three suicide bombers to the Stade de France, and another toward the bars and restaurants of the 10th and 11th arrondissements.

The first of three explosions took place at 21.20 outside the Stade de France stadium where thousands of fans watched France versus Germany in a soccer match. A terrorist with a suicide belt was prevented from entering the stadium near Gate D. The man backed away from security guards and therefore he detonated the explosives, causing the death of the bomber and a bystander. At 21:30, a second man detonated his suicide vest outside Gate H. President Hollande, who was inside the stadium watching the game during these events, was rushed to safety. The crowd was not notified of the events and the match continued. At 21:53, a third terrorist wearing a suicide vest self-imploded at a fast-food store near the stadium.<sup>12</sup>

At 21:25 in the 10th arrondissement, a district known for its plethora of bars, restaurants and cafés, gunmen in a black vehicle opened fire on Le Carillon and Le Petit Cambodge. Fifteen people died in the shooting, with fifteen severely injured. The terrorists continued on to Rue de

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<sup>10</sup> J.-C.s Brisard: *The Paris Attacks and the Evolving Islamic State Threat to France*, CTC Sentinel, Vol. 8 , No. 11, p. 5. <https://ctc.usma.edu/the-paris-attacks-and-the-evolving-islamic-state-threat-to-france/> (20 September 2018)

<sup>11</sup> T. Renard & R. Coolsaet (eds.): *Returnees: Who are they, why are they (not) coming back and show should we deal with them?* Assessing Policies on Returning Foreign Terrorist Fighters in Belgium, Germany and the Netherlands, Egmont Papers, February 2018, p. 4. [http://www.egmontinstitute.be/content/uploads/2018/02/egmont.papers.101\\_online\\_v1-3.pdf?type=pdf](http://www.egmontinstitute.be/content/uploads/2018/02/egmont.papers.101_online_v1-3.pdf?type=pdf) (15 January 2019)

<sup>12</sup> J.-C. Brisard & K. Jackson: *The Islamic State's External Operations and the French-Belgian Nexus*, CTC Sentinel, Vol. 9, No. 11, November/December 2016, pp. 11-13. [https://ctc.usma.edu/app/uploads/2016/11/CTC-Sentinel\\_Vol9Iss1118.pdf](https://ctc.usma.edu/app/uploads/2016/11/CTC-Sentinel_Vol9Iss1118.pdf) (20 January 2019)

la Fontaine au Roi in the 11th arrondissement and opened fire on two more restaurants, Café Bonne Biere and La Casa Nostra. Eight people were severely injured, while five were killed. Witnesses reported that the gunmen were travelling in a black car. At 21:36, gunmen opened fire on another bar in the 11th arrondissement, La Belle Equipe. Witnesses again said that the attackers were in a black vehicle. Nineteen civilian people died during the attacks, with nine severely injured. At 21:40, a terrorist – later revealed to be Brahim Abdeslam – entered the restaurant Le Comptoir Voltaire. The attacker detonated his suicide vest, killing himself and injuring fifteen others.

The deadliest attack of the day happened at the Bataclan, a 1,500 seat concert hall, where the American rock group Eagles of Death Metal was playing to a crowd. At 21:40, three attackers with assault rifles emerged from a black vehicle, entered the Bataclan, killed the security guard and began firing on the crowd. Ninety people were killed and the rest of the audience was taken hostage, the siege lasted over two hours. Police forces rushed the Bataclan at approximately 00:20. A police officer shot one of the terrorists and his suicide belt detonated. The other attackers self-detonated also. Ninety-nine injured were taken to the hospital.

Intelligence authorities think that one of the intents of the Stade de France attack was meant to draw security forces out of the city. Frequently after an emergency, law enforcement's reaction is to flood an area with resources, depleting the ability to react to another event.<sup>13</sup>

#### **4. The perpetrators<sup>14</sup>**

According to a document of findings, the below mentioned persons took part in the attacks.<sup>15</sup>

Abdelhamid Abaaoud. He is believed to be the mastermind of the November Paris attacks. Abaaoud died in a police raid five days after the attacks, after a throughout search and investigation nationwide.<sup>16</sup>

Salah Abdeslam, who was the only survivor of the Paris attackers. After four months he appeared in Brussels. His capture and interrogation was one of the reasons behind the Brussels attacks of March 2016. Abdeslam is in French custody today.

Mohamed Abrini: a friend of Abdeslam. He was instrumental in the attack on the Brussels airport. According to the photos about the attackers, he was known as “the man in white”. Weeks after the attacks, he was captured and detained in Brussels.

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<sup>13</sup> The Attacks on Paris: Lessons learned, *ibid*.

<sup>14</sup> See also: Daniel Milton: *The French Foreign Fighter Threat in Context*, CTC Sentinel, 14 November 2015. <https://ctc.usma.edu/ctc-perspectives-the-french-foreign-fighter-threat-in-context/> (2 January 2019)

<sup>15</sup> The Attacks on Paris: Lessons learned, *ibid*, p. 11.

<sup>16</sup> G. van Vlieden: Profile: *Paris Attack Ringleader Abdelhamid Abaaoud*, CTC Sentinel, Vol. 8, No. 12, p. 30.

Cherif and Said Kouachi: French brothers who attacked the Charlie Hebdo offices. They were killed three days later in a shoot-out with police.

Armedy Coulibaly. He met Cherif Kouachi in prison. Coulibaly killed a policewoman in Montrouge and afterwards entered a Kosher market taking patrons hostage while killing four people. Finally he died in a police raid.

After Abaaoud's death, Salah Abdeslam was the only suspected Paris attacker still alive. On November 15, the authorities released his name and photo to the public. In 15h December, police raided an apartment in Brussels. They found explosives and Abdeslam's fingerprint. After a four month-long manhunt, Abdeslam was captured in Molenbeek on March 18. He was shot in the leg but he survived it. The family suspected of hiding him was also arrested. In the wake of Abdeslam's arrest, Belgian authorities worried about the prospect of another terrorist attack. Belgian Interior and Foreign Ministers warned the public on March 20, and again on March 21, that authorities suspected Abdeslam and his accomplices were planning an imminent attack.

## **5. Modus operandi<sup>17</sup>**

The attacks in Paris in 2015 caught authorities off guard for a number of reasons. Previous attacks by terrorists trained in Syria had relied on a single mode of operation: a shooting, an explosion or an attempted hostage-taking. In Paris, the attackers did all of the abovementioned, with the aim to overwhelm the country's emergency response capabilities. The attackers employed new tactics, exploited the weaknesses of Europe's border controls and showed a desire for maximum carnage, as opposed to directing attacks at symbolic targets. In many ways, the Paris attacks were similar to the Mumbai attacks in 2008. In India, ten attackers mounted a complex operation that lasted over sixty hours. The terrorists were each carrying heavy assault rifles and multiple rounds of ammunition, as well as improvised explosions. They split into four teams. One group targeted Mumbai's main train station, and then a hospital. A second targeted a Jewish residential complex, the third team stormed the Trident-Oberoi Hotel, while the fourth group attacked the Taj Mahal Palace Hotel. All terrorists killed indiscriminately. Indian commandos ultimately brought down all of them, although they had killed 164 victims. The Mumbai attacks required, "precise planning, detailed reconnaissance and thorough preparation, both physical and mental. It relied on surprise, creating confusion and overwhelming the ability of the authorities to respond." As in Mumbai, the attackers in Paris had carefully planned, carried heavy firepower along with explosives, and split into three groups, simultaneously attacking different locations to prevent the authorities from developing an accurate action of the situation. The terrorists were better planned than in the Charlie Hebdo attacks and their aim was mass murder rather than targeted killings. At the Bataclan, they killed the security guard first and then took large numbers of hostages, creating a siege. It seems, that the terrorists studied Mumbai and replicated what worked. While the attackers in Paris were organized into

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<sup>17</sup> The Attacks on Paris: Lessons learned, *ibid*, p. 18.

blind cells, they had extensive logistical support. They spoke the language and had knowledge about the geographical layout of the area. The group that attacked the restaurants in the 10th and 11th arrondissements targeting crowded places, provided a high number of potential victims, but also multiple options for ingress and egress. However, at least two of the attackers had trained in Syria.<sup>18</sup>

Main purposes of the religious terrorist is the religious cleansing, so to create religiously pure state. The basic device of this aim is a suicide bombing. The definition of the suicide attack from the International Policy Institute for Counter-Terrorism: “*as a politically motivated violent attack perpetrated by a self-aware individual (or individuals) who actively and purposely causes his own death through blowing himself up along with his chosen target. The perpetrator’s ensured death is a precondition for the success of his mission*”.<sup>19</sup> This method has some advantages for the perpetrators, mostly that it is cheap, easy and – unfortunately – very effective. These three elements can enable to the lone wolfs to kill millions of people all over the world.

## **6. Foreign fighters in French and EU law**

The French Code pénal (Criminal Code) defines terrorism as a number of listed acts – including intentional homicide, assault, kidnapping, hijacking, theft, extortion, property destruction, membership in an illegal armed group, digital crimes, forgery, and more – carried out with the goal of “seriously disturbing public order through intimidation or terror.” Preparing to commit an act of terrorism, and seeking, obtaining, and keeping material to be used for an act of terrorism, is also considered an act of terrorism in and of itself. Intelligence gathering and training for the purpose of carrying out an act of terrorism also falls under that definition, as does the habitual access to websites that encourage or justify terrorism.<sup>20</sup>

Codified in Article 421 - 2 - 1 of the French Criminal Code, the AMT offence today penalises as a terrorist offence “the fact of participating in a group formed or in an agreement struck for the purposes of the preparation – characterised by one or several material facts – of one of the acts of terrorism mentioned”. These acts of terrorism include attacks on life and physical integrity; the hijacking of planes and other modes of transport; theft, extortions, destructions, degradations; membership in or support of dissolved armed groups and movements; offences in relation to armaments, explosives, and nuclear materials; dealing in stolen goods related to these offences; as well as some aspects of money laundering and financing. These acts become ‘terrorist’ provided that they occur with the additional qualification of “aiming to seriously trouble public order [ordre public] by intimidation or terror. The 1986 law created a specially composed Assize Court (La Cour d'Assises spécialement composée), entitled to adjudicate on terrorist-related offences. This specially composed court, contrary to the composition of the

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<sup>18</sup> The Attacks on Paris: Lessons learned, *ibid*, pp. 18-19.

<sup>19</sup> J. Béres: *A nők és az öngyilkos-terrorizmus*. Felderítő Szemle, Vol 6, No. 3, 2007, p. 16.

<sup>20</sup> K. Buchanan: *FALQs: Terrorism in France*, In Custodia Legis, Library of Congress, 2015. <https://blogs.loc.gov/law/2015/01/falqs-terrorism-in-france/> (28 August 2018).

regular Cours d' Assises with respect to non-terrorist-related criminal matters, is without a jury. Instead, it is composed of the Court's President as well as professional judges, of which there are four at first instance and six on appeal. The speciality of this regime is derogatory but its application by ordinary magistrates ensures it derives its origin from within French Law itself. The prosecution of terror-related crimes, which incur a penalty up to 10 years of imprisonment, takes place before the 16th Chamber of the Court of first instance in Paris, which is composed of a bench of three judges. The prosecution of terror-related crimes, which incur a penalty above 10 years, are judged by the Paris Cour d' Assises specially composed of professional judges only. A terrorism investigation takes an average of two to three years.<sup>21</sup>

The attacks in Paris have brought a significant amount of attention to the issue of border controls, in particular since it has been confirmed that at least one of the terrorists, holding a Syrian passport, entered the EU through Greece via a route used by refugees. It is also suggested that the Paris attackers, themselves EU citizens, had left the EU to fight in Syria and returned to carry out the attacks in Paris, and that one of them, Salah Abdeslam, could even have managed to flee to Syria after the attacks. This is the phenomenon of so-called "Foreign Fighters": EU citizens who become radicalised and leave their home in the EU to join the war in Syria before returning to Europe.

As Salah Abdeslam is French and not a third-country national, he could not, by definition, be the object of an alert related to the immigration policy. When he was checked by the French police during the night of 13 to 14 November, he was not known to the French authorities apparently because, despite being French, he was living in Belgium. He was also not the object of an alert for the purpose of arrest as the EAW was only issued by Belgium after the attacks, on Sunday. He had however been signalled in the SIS by the Belgian authorities as a person to be the object of a "discreet or specific check". Following Article 36 of Council Decision 2007/533, such an alert may be issued for the purposes of prosecuting criminal offences and for the prevention of threats to public security, "*in particular where an overall assessment of a person, in particular on the basis of past criminal offences, gives reason to suppose that that person will also commit serious criminal offences in the future.*"<sup>22</sup>

In the past few years since the attacks in Paris occurred, the European Union took many steps in order to ensure that such an attack will not take place again. However, it has been since 2013 that issues like foreign fighters and radicalization were on the agenda of the Council of the EU and the European Council.

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<sup>21</sup> S. Weil: *Terror in Courts, French counter-terrorism: Administrative and Penal Avenues*, Report for the official visit of the UN Special Rapporteur on Counter-Terrorism and Human Rights, PSIA, Sciences-Po, Paris, May 2018, p. 8. <https://www.sciencespo.fr/psia/sites/sciencespo.fr/psia/files/Terror%20in%20Courts.pdf> (22 June 2018).

<sup>22</sup> P. de Bruycker et D. Watt & H. Labayle & A. Weyembergh et C. Brière: *The Paris Terrorist Attacks : Failure of the EU's Area of Freedom, Security and Justice?* January 2016 <http://www.gdr-elsj.eu/2016/01/08/cooperation-judiciaire-penale/the-paris-terrorist-attacks-failure-of-the-eus-area-of-freedom-security-and-justice/> (25 June 2018).

Even before the January 2015 Paris attacks, the members of the European Council announced a statement, in which they expressed their strong belief on the importance of safeguarding common values against terrorist attacks. The three main element of the announcement was the protection of the security of citizens, the prevention of radicalization, and the enhanced cooperation with international partners.<sup>23</sup>

In March, 2017, the Council adopted a new directive on combating terrorism, which has been already mentioned and cited above. The directive aims to strengthen the EU's legal framework in order to be more able to prevent further attacks. It also includes the phenomenon of foreign terrorist fighters, however, it gives a definition on terrorism acts for common use.<sup>24</sup>

At the same time the Council also adopted a regulation, which amends the Schengen borders code. It reinforces checks at external borders, while it makes a systematic check against relevant databases on all persons crossing external borders obligatory for member states to carry out.<sup>25</sup>

Protecting citizens and reducing vulnerability to attacks is one of the most important priority of the EU counter-terrorism strategy. This mostly focus on securing external borders, improving transport security, protecting strategic targets and reducing the vulnerability of critical infrastructure.

In this area, the EU adopted a directive regulating the use of passenger name record (PNR) data in April 2016.<sup>26</sup>

*“Passenger name record (PNR) data is personal information provided by passengers and collected and held by air carriers. It includes information such as the name of the passenger, travel dates, itineraries, seats, baggage, contact details and means of payment. The proposal for a directive presented by the Commission aims to regulate the transfer of such PNR data to member states' law enforcement authorities and their processing for the prevention, detection, investigation and prosecution of terrorist offences and serious crime.”<sup>27</sup>*

The main aims of the PNR system is to complement the already existing tools to cope with cross-border crime and harmonise member states' legal provisions.<sup>28</sup>

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<sup>23</sup> <https://www.consilium.europa.eu/en/press/press-releases/2015/02/12/european-council-statement-fight-against-terrorism/> (20 January 2019).

<sup>24</sup> <https://www.consilium.europa.eu/en/press/press-releases/2017/03/07/rules-to-prevent-new-forms-of-terrorism/> (15 January 2019).

<sup>25</sup> <https://www.consilium.europa.eu/en/press/press-releases/2017/03/07/regulation-reinforce-checks-external-borders/> (18 January 2019).

<sup>26</sup> <https://www.consilium.europa.eu/en/policies/fight-against-terrorism/eu-strategy/> (25 January 2019)

<sup>27</sup> <https://www.consilium.europa.eu/en/policies/fight-against-terrorism/passenger-name-record/> (25 January 2019).

<sup>28</sup> <https://www.consilium.europa.eu/en/policies/fight-against-terrorism/passenger-name-record/> (25 January 2019).

In April 2017, the Council adopted a directive on control of the acquisition and possession of weapons, which includes more strict rules for the acquisition and possession of the most dangerous weapons. The directive also incorporates measures that aims to improve the traceability of firearms and to prevent the reactivation or conversion of them.<sup>29</sup>

The EU also worked on to reach an improved information exchange, while also launched the European Counter-Terrorism Centre in January 2016, and also created a dedicated unit to tackle online terrorist propaganda.<sup>30</sup>

## 7. Conclusion

The Parisian terrorist acts were very well organized, albeit not unpredictable actions. Since 2011 when the Syrian conflict began, thousands of EU nationals travelled to Iraq and Syria in order to join terrorist groups.<sup>31</sup> According to a study, 30 percent of them had already returned to their home country.<sup>32</sup> In the past few years, the European countries faced many terrorist attacks, which caused a threat to our common values and security. Each of them is somehow related to the above mentioned returnees.<sup>33</sup>

The threat caused by Europeans being radicalised, travelling abroad, gaining combat experience and returning, thus becoming a ‘foreign fighter’ by definition, has been high on the political agenda for the last couple of years. This phenomenon affects a wide range of policies including e.g. the importance of a high volume information exchange, the criminal justice response system, and policies concerning the prevention of radicalization.

It seems that the threat is likely to exist in the coming years, although no new attack by returnees has occurred since. Having the ability to perform an effective response requires a well-prepared approach both legally and politically. The primary responsibility in dealing with this issue lies with the member states, nonetheless the EU made very important steps and play a supportive role in order to help member states.<sup>34</sup>

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<sup>29</sup> <https://www.consilium.europa.eu/en/press/press-releases/2017/04/25/control-acquisition-possession-weapons/> (21 January 2019).

<sup>30</sup> <https://www.consilium.europa.eu/en/policies/fight-against-terrorism/foreign-fighters/#> (20 January 2019)

<sup>31</sup> Amandine Scherrer: The issue of foreign fighters: the EU framework, Part I., The return of foreign fighters to EU soil, Ex post valuation, European Parliamentary Research Service, May 2018, 5. [http://www.europarl.europa.eu/RegData/etudes/STUD/2018/621811/EPRS\\_STU\(2018\)621811\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2018/621811/EPRS_STU(2018)621811_EN.pdf) (10 November 2018).

<sup>32</sup> B. van Ginkel & E. Enternmann (eds.): *The Foreign Fighters Phenomenon in the European Union, Profiles, Threats & Policies*, ICCT Research Paper, April 2016. p. 3. <https://icct.nl/wp-content/uploads/2016/03/ICCT-Report-Foreign-Fighters-Phenomenon-in-the-EU-1-April-2016-including-AnnexesLinks.pdf> (11 November 2018).

<sup>33</sup> Renard & Coolaset, *ibid*, p. 3.

<sup>34</sup> Scherrer, *ibid*, p. 5.

While focusing on the future, it should be borne in mind that a more integrated and coordinated area of freedom and security is the only possible solution.<sup>35</sup>

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<sup>35</sup> <http://www.gdr-elsj.eu/2016/01/08/cooperation-judiciaire-penale/the-paris-terrorist-attacks-failure-of-the-eus-area-of-freedom-security-and-justice/> (25 June 2018).

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