

**MYKOLAS ROMERIS UNIVERSITY**

**FACULTY OF LAW**

**INSTITUTE OF INTERNATIONAL AND EUROPEAN UNION  
LAW**

Tsisia Okropiridze

**INTERNATIONAL LAW PROGRAMME**

**EU Relocation: Legal Aspects**

Master Thesis

Supervisor –

Prof. Dr. Lyra Jakulevičienė

Vilnius, 2018

## Contents

Introduction .....	1
1. The Context of EU Relocation mechanism .....	8
1.1 Background of the Refugee Crisis and its legal aspects .....	8
1.2 The Applicable International Law .....	12
1.3 The Applicable EU Legal Framework.....	17
1.3.1 Does the Common European Asylum System protect asylum seekers and refugees? – The crisis and its impact on the Relocation mechanism.....	23
1.4 The European Agenda on Migration and the Introduction of the Emergency Relocation Mechanism .....	28
1.5 The Dublin Rules Instead of responsibility sharing and the Challenge of Relocation Mechanism.....	31
1.6 The Legal context of the Hotspot Approach in managing the migratory flow.....	35
1.6.1 The Legal framework of Hotspot Approach .....	39
1.7 EU-Turkey deal and its implications for Relocation and Resettlement.....	41
2. The Legal Basis of the Emergency Relocation Mechanism.....	47
2.1. Territorial and personal scope of Council Decisions.....	47
2.2 First Council Decision and the introduction of the first legal framework for Relocation Mechanism .....	49
2.3 The Second Council Decision and introduction of the compulsory Relocation Scheme ....	55
2. 4 The Commission Reports on Relocation and Resettlement – the Case Studies on Italy, Greece and Member states.....	58
2.4.1 The Case Study - Italy.....	60
2.4.2 Case Study - Greece.....	64
2.4.3 Case Study – the EU member states.....	68
3. Analysing the problems related with the Relocation Scheme and its implementation .....	71
3.1 Article 78 (3) TFEU as a correct base for mandatory relocation quota.....	71
3.2 The Response of CJEU on legal basis of Mandatory relocation Mechanism.....	76
3.3 Relocation as solidarity and fair sharing of responsibility – on the basis of the Article 80 TFEU .....	80
Conclusions	
Recommendations	
Abstract	
Summary	

## **The list of abbreviations**

EU	The European Union
CEAS	Common European Asylum System
MS	Member state
EU	Charter of Fundamental Rights of the European Union
NGO	Non-Governmental Organization
UNHCR	United Nations High Commissioner for Refugees
TFEU	Treaty on the functioning of the European Union
TEU	Treaty on European Union
ACVZ	Dutch Advisory Committee on Migration Affairs
IMO	International Migration Organization
ECHR	European Convention on Human Rights
ECtHR	European Court on Human Rights
CJEU	Court of Justice on European Union

## Introduction

*“No one leaves home unless home is the mouth of a shark”<sup>1</sup>*

Warsan Shire

Refugees in Europe are not a concept of the 21st century; Europe has a long history and tradition of providing protection for refugees<sup>2</sup>. There have always been individuals fleeing from their homelands in order to escape persecution, wide-spread violence or their states where the political systems were collapsed. Countries like Somalia where insecurity problems are still unresolved, Afghanistan, where thousands of individuals are still forced to leave their homes due to the violence committed by terrorist groups like Taliban or Islamic State (ISIS). Iraq, where the country is divided between terrorists and Shia militaries, locals are forced to escape from their barbaric treatment.<sup>3</sup>

Another example is Syria, where the world witnessed the biggest humanitarian crisis after the Second World War. <sup>4</sup>Indeed, the Syrian crisis was a wakeup call for the world and especially for the EU. However, these examples are few from many which demonstrate why the Union has become the hope for thousands of persons escaping death by taking trips through the dangerous routes to reach the EU borders. Moreover, these unsafe routes turned to be a new challenge for their lives; it has already been proved by a high number of deaths in the Mediterranean.<sup>5</sup> Many accused this route to be the ‘deadliest route’.

Consequently, those individuals who managed to survive started to seek help from criminal smugglers.<sup>6</sup> This, in fact, makes them irregular migrants in eyes of European policy-makers.<sup>7</sup> According to the International Migration Organization (IMO) regular migrants are

---

<sup>1</sup> Marta Bausells, Maeve Shearlaw, “Poets speak out for refugees: ‘No one leaves home, unless home is the mouth of a shark’”, 16 September 2015, The Guardian <https://www.theguardian.com/books/2015/sep/16/poets-speak-out-for-refugees->

<sup>2</sup> A. Christensen, ‘Comparative Aspects of the Refugee Situation in Europe’, Secretary General, Danish Refugee Council, Copenhagen, International Journal of Refugee Law Special Issue, Oxford University Press 1995, available: <http://heinonline.org/HOL/License>, p.103

<sup>3</sup> Report on “Behind Them, A Homeland in Ruins: The Youth of Europe’s Refugee Crisis”, MERCY CORPS, p.5

<sup>4</sup> “The EU and the crisis in Syria, European Union External Action”, 2018, [https://eeas.europa.eu/headquarters/headquarters-homepage\\_en/22664/The%20EU%20and%20the%20crisis%20in%20Syria](https://eeas.europa.eu/headquarters/headquarters-homepage_en/22664/The%20EU%20and%20the%20crisis%20in%20Syria)

<sup>5</sup> Visit: <http://publications.europa.eu/webpub/com/factsheets/refugee-crisis/en/#what-is-refugee-crisis>

<sup>6</sup> J. Lambert ‘the refugee crisis and the EU: a green response’, Green MEP for London, 2015, pg.2

<sup>7</sup> The EU and the crisis in Syria, European Union External Action”

persons entering in the state legally through the established requirements whilst irregular migrants are those in breach of those requirements or persons whose visas are expired.<sup>8</sup>

Since 2015, the Syrian crisis arose strongly, approximately 1 million asylum seekers reached the Union borders, the greatest part of them (802,000 persons) entered from Greece<sup>9</sup>. In June 2016 around 156,000 individuals reached Union states according to UNHCR.<sup>10</sup> According to Human rights watch in the first part of 2015, approximately 137,000 refugees and migrants came in EU through the sea<sup>11</sup>, around 800,000<sup>12</sup> of asylum seekers intended to reach Italy and Greece while few of them changed their destination to Spain and Malta.<sup>13</sup> The Western Balkan route and the Central Mediterranean routes were the main routes for persons seeking a safe shelter.<sup>14</sup> As a result, Greece and Italy, due to their geographical location, were left alone to handle thousands of individuals applying for the international protection. Obviously, it has become “unprecedented strains” on these member states’ (MS) and in general, on the Union institutions.<sup>15</sup>

The increase in death at sea in addition to the altering numbers of new-comers at EU borders left the Union with two choices: to help or reject. The EU decided to step into the ‘new beginning’ to resolve quite old issue of migration and asylum seekers. The aim of the Union was to create adequate standards of humanitarian imperatives in response to the

---

<sup>8</sup> Study on “Migrants in the Mediterranean: Protecting Human Rights”, Directorate General for External Policies, Policy Department, (DROI) European Parliament, 2015, pg.20, [http://www.europarl.europa.eu/RegData/etudes/STUD/2015/535005/EXPO\\_STU\(2015\)535005\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2015/535005/EXPO_STU(2015)535005_EN.pdf)

<sup>9</sup> Jonathan Clayton, “over one million sea arrivals reach Europe in 2015” UNHCR, see: <http://www.unhcr.org/afr/news/latest/2015/12/5683d0b56/million-sea-arrivals-reach-europe-2015.html>

<sup>10</sup> “Forced displacement: refugees, asylum-seekers and internally displaced people”, European Civil Protection and Humanitarian Aid Operation, European Commission, [http://ec.europa.eu/echo/what-we-do/humanitarian-aid/refugees-and-internally-displaced-persons\\_en](http://ec.europa.eu/echo/what-we-do/humanitarian-aid/refugees-and-internally-displaced-persons_en)

<sup>11</sup> Study on “Migrants in the Mediterranean: Protecting Human Rights”, Directorate General for External Policies, pg.11

<sup>12</sup> Europe’s Refugee Crisis: An Agenda for Action, Human Right Watch, 2015, <https://www.hrw.org/report/2015/11/16/europes-refugee-crisis/agenda-action>

<sup>13</sup> Lizzie. Dearden, “6 charts and a map that show where Europe's refugees are coming from - and the perilous journeys they are taking”, The Independent, 2015, visit: <http://www.independent.co.uk/news/world/europe/refugee-crisis-six-charts-that-show-where-refugees-are-coming-from-where-they-are-going-and-how-they-10482415.html>

<sup>14</sup> Summery on “Desperate Journeys – Refugees and Migrants entering and crossing via the Mediterranean and Balkan routes”, UNHCR Bureau for Europe, 2017 see: <http://www.unhcr.org/58b449f54.pdf>

<sup>15</sup> “2015-116 Symposium Transcript: The Global Refugee Crisis”, working Paper No.1 South European Research Centre, 2016, pg.54 [http://navarinonetwork.org/pdf/SEE\\_View\\_Working%20Paper%201\\_Final\\_Ebook.pdf](http://navarinonetwork.org/pdf/SEE_View_Working%20Paper%201_Final_Ebook.pdf)

‘deadly’ practices at sea.<sup>16</sup> In light of this, European Council on 23<sup>rd</sup> April called the Commission for common union action to prevent further loss of lives at sea by strengthening naval forces in the Mediterranean and to combat human smugglers and traffickers.<sup>17</sup> This is the context in which the European Agenda on Migration has been adopted on 13 May 2015.<sup>18</sup> This Agenda was setting the priority actions that EU needed to undertake in order to address the crisis effectively.<sup>19</sup>

EU Migration Agenda amongst other measures, establish relocation mechanism as an emergency tool to release overburdened Greece and Italy.<sup>20</sup> According to the council decisions 2015/1523<sup>21</sup> and Decision 2015/1601,<sup>22</sup> relocation system was defined and approved. Relocation in itself means a redistribution of individuals in dire need of international protection from one member states to another.<sup>23</sup> This is different from resettlement that is to be defined as transfer of refugees from the state where they sought the protection in state outside of union, which accepts and recognize them as refugees.<sup>24</sup> Hence, the former aims at an intra-Union redistribution whilst second aims at transferring individuals from the third state to the Union territory.

---

<sup>16</sup> Report on “on addressing the refugee and migrant movements: the role of EU External Action”, (2015/2342(INI)), Committee on Foreign Affairs Committee on Development, European Parliament, 2017, <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A8-2017-0045+0+DOC+XML+V0//EN&language=fr>

<sup>17</sup> Nika Bačić Selanec, “A Critique of EU Refugee Crisis Management: On Law, Policy and Decentralisation, Croatian Yearbook of European Law and Policy, 2015, pg.75 <http://www.cyelp.com/index.php/cyelp/article/view/230>

<sup>18</sup> “A European Agenda on Migration, Communication from the European Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee on the Regions, European Commission, Brussels, 13.5.2015 COM(2015) 240 final [https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/communication\\_on\\_the\\_european\\_agenda\\_on\\_migration\\_en.pdf](https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/communication_on_the_european_agenda_on_migration_en.pdf) see also : UNHCR hails today’s EU proposed Agenda on Migration as breakthrough, urges speedy adoption, UNHCR, 2015, <http://www.unhcr.org/news/press/2015/5/55537b166/unhcr-hails-todays-eu-proposed-agenda-migration-breakthrough-urges-speedy.html>

<sup>19</sup> See [http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/background-information/docs/communication\\_on\\_the\\_european\\_agenda\\_on\\_migration\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/background-information/docs/communication_on_the_european_agenda_on_migration_en.pdf)

<sup>20</sup> EU migration Agenda on Migration, European Commission,

<sup>21</sup> Council Decision (EU) 2015/1523 of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece

<sup>22</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>23</sup> Relocation and Resettlement, European Commission, [https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/background-information/docs/relocation\\_and\\_resettlement\\_factsheet\\_en.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/background-information/docs/relocation_and_resettlement_factsheet_en.pdf)

<sup>24</sup> “Safe Passage what is the Difference between Resettlement and Relocation?” Churches’ Commission for Migrants in Europe (CCME) [http://www.ccme.be/fileadmin/filer/ccme/20\\_Areas\\_of\\_Work/Safe\\_Passage/2017-03-03-resettlement\\_vs\\_relocation.pdf](http://www.ccme.be/fileadmin/filer/ccme/20_Areas_of_Work/Safe_Passage/2017-03-03-resettlement_vs_relocation.pdf)

Notably, the member states according to the Council Decisions were obliged to relocate in total 160, 000 asylum seekers from Greece and Italy as the second Council Decision 2015/1601 was imposing the mandatory relocation quota on each union state. Regardless of the mandatory nature of second Decision, both relocation Decisions were based on Article 78 (3)<sup>25</sup> Treaty on the Functioning of the European Union (TFEU). Aforementioned article empowers the union to adopt laws on behalf of the states overwhelmed by a sudden inflow of new-comers, and Article 80 TFEU<sup>26</sup>, ensures that implementation of the relocation mechanism will be governed by solidarity and fair sharing principle, thus, this article aims to ensure that all states fulfill their responsibility in accordance to this principle. To this end, both Council Decisions had a clear intention to reinforce internal solidarity within the EU and demonstrate the commitment of each MS toward Italy and Greece in an effective and timely fashion.

Although the implementation of compulsory relocation quota was expected to be characterized by the principle of solidarity and fair sharing, not all member states were happy with the union's decision to assist Italy, Greece and asylum seekers. Consequently, two years of implementation of relocation mechanism was followed by the resistance of Eastern European states which highly influenced the final outcome of this emergency mechanism. Moreover, two member states – Slovakia and Hungary challenged the legality of the Mandatory relocation quota system in the Court of Justice of European Union (CJEU) <sup>27</sup>under second council decision 2015/1601.<sup>28</sup> The case represented by applicants was dismissed by CJEU.<sup>29</sup> In response, the court stipulated that all member states are obliged without a delay to transfer asylum seekers according to the target numbers they are assigned for.<sup>30</sup>

---

<sup>25</sup> Article 78 (3) European Union, *Consolidated version of the Treaty on the Functioning of the European Union* (TFEU) 26 October 2012, OJ L. 326/47-326/390; 26.10.2012

<sup>26</sup> ARTICLE 80 TFEU

<sup>27</sup> Eszter Zalan, "Hungary to challenge refugee quotas in EU court" EUobserver, 2015 see <https://euobserver.com/migration/131158>

<sup>28</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, 24 September 2015, L 248/80 see: <http://www.refworld.org/docid/587cad524.html>

<sup>29</sup> Judgment in Joined Cases C-643/15 and C-647/15 Slovakia and Hungary v Council, Court of Justice of the European Union, PRESS RELEASE No 91/17, Luxembourg, 6 September 2017 see <https://curia.europa.eu/jcms/upload/docs/application/pdf/2017-09/cp170091en.pdf>

<sup>30</sup> "ECJ ruling on refugees: no more excuses to delay transfers from Italy and Greece", Press Releases, European Parliament, 2017, see <http://www.europarl.europa.eu/news/en/press-room/20170906IPR83203/ecj-ruling-on-refugees-no-more-excuses-to-delay-transfers-from-italy-and-greece>

## **The Problematic aspects raised in the Research**

The goal of the master thesis is concentrated on the EU Relocation Mechanism and demonstrates the problematic aspects of the EU asylum legislation by with examining the relevant provisions of the Union law and applicable information on the research topic. Hence, the current research focuses and analysis the problematic aspects of EU relocation Mechanism from broader perspectives and includes examination of the Council Relocation Decisions 2015/1523 and 2015/1601 in addition to the Dublin III Regulation, EU-Turkey deal and the legal basis of the mandatory relocation mechanism under Second Council Decision 2015/1601.

## **The Aim of Research**

The aim of the Master Thesis is to demonstrate the major legal lacunas related to EU relocation system and its practical implementation by the critical examination of the Council Decisions 2015/1523 and 2015/1601 and EU relevant *acquis* in general.

## **The objectives of the research**

- To determine background information which led the European Union to trigger the emergency relocation mechanism
- To examine all important legislative or policy measures by the European Union which has influenced the Relocation Mechanism
- To research the legality of compulsory relocation system and assess the comments of CJEU on legality of Mandatory quota mechanism
- To identify the reasons of unsuccessful implementation of relocation mechanism and provide suggestions

## **Research Methods**

In order to achieve the aim of the research following methods were used



**Linguistic method.** Linguistic method was used to clarify the meaning of the legal terms and their definitions whilst examining the legal norm of the international documents

**Systematic analysis method.** Systematic analysis method was used to clarify the main features of legal documents and publications of legal scholars. Furthermore, it is also used to assess and systematize various sources of information in order to identify the most important problems.

**Comparative method.** Comparative method was used to analyse the opinions of various authors and persons concerned with regard the same subjects and issues.

### Originality of master thesis

The literature review demonstrated that the legal aspects of relocation mechanism have been largely debatable as migration related matters are still on top of EU policy agenda. Notably, issues concerning compulsory relocation mechanism have been discussed by many academics and persons reflecting ON the EU law. Professor *Marcello Di Pillipo* criticizes the content of the mandatory relocation decision with regard the 'missing' consent of asylum seekers' to choose state of destination and argues that humans are not 'postal packages' to be sent through the lottery in any state. With regard the procedural aspects of the mandatory quota system Professor *Steve Peers* claims that important changes in a measure (exclusion of Hungary from beneficiary list) requires re-consulting the European Parliament, however, he states that the existence of an "emergency situation" can reverse this argument. The examinations of the procedural aspects are further developed by *Zuzana Vikarska*, who considers the Relocation Decision as non-legislative act, which does not require a unanimity voting. Later, such conclusion has been reached by the Court of Justice of the European Union. Professor *George Noll* draws his attention on the principle of solidarity and defines it as "sharing norms", "sharing money", and "sharing people".

The originality of this thesis is that it provides analysis of relocation and resettlement reports, examines the relevant legal aspect of relocation mechanism in a complex manner through representing different opinions and positions of academics and EU representatives.

## **The Structure**

**Chapter 1** will provide the analysis of the ‘EU refugee crises’ in context of adoption of the emergency relocation mechanism. For the better understanding of the relocation mechanism and its problematic legal aspects this chapter aims to provide the relevant legal framework concerning the asylum seekers and refugees on the regional and international level. Chapter 1 will critically examine the legislation or policies related with relocation mechanism including: Dublin III regulation, EU-Turkey statement and the EU hotspot regulation.

**Chapter 2** will critically analyze the scope and content of the relocation Council Decisions, 2015/1523 and 2015/1601. It will further examine the Commission’s reports on relocation and resettlement (focus will be made only on relocation).

**Chapter 3** This chapter then will discuss the legal basis on which the relocation mechanism was triggered. It will also discuss the comments of CJEU with regard the legal challenges of mandatory quota mechanism in addition to the examination of solidarity and fair burden-sharing principle.

## **Defense statement**

The Relocation Mechanism as the tool to cope with increased migratory pressure could no serve its purpose due to the legal difficulties which occurred during its implementation.

# 1. The Context of EU Relocation mechanism

## 1.1 Background of the Refugee Crisis and its legal aspects

*“Mankind Must Put an End to War before War Puts end to Mankind”*<sup>31</sup>

John F. Kennedy

The refugee crisis in Europe is a political and social phenomenon which resulted from the various conflicts in Northern Africa and Middle Eastern states, also exacerbated by the poverty and the regular infringement of human rights within these countries.<sup>32</sup> Until recently, European citizens could not anticipate the magnitude of asylum seekers who would flee from their homelands to reach and settle in Europe. The tragedy in Lampedusa on 3<sup>rd</sup> October 2013, which resulted in 300 deaths, sparked concern for Europe in relation to the humanitarian disaster which had already been occurring for years.<sup>33</sup>

The Arab Spring in Tunisia, Egypt and other Arab countries encouraged protests in Syria in 2011.<sup>34</sup> The protest in the city of Dera was inspired by the idea of releasing 14 school students who were arrested and tortured for writing on the wall famous words: *“The people want the downfall of the regime.”*<sup>35</sup> The movement started to demand more freedom and dignity, however, there was no call for the stepping down of the President Bashar Al-Assad.<sup>36</sup> The security forces opened fire and killed four persons after Friday prayer on 18th March, with another killed the following day, during the victims’ funerals. People were expecting that the President would punish those security forces that killed the innocent humans but the continuous killings, tortures and unlawful arrests of civilians encouraged

---

<sup>31</sup>“ Address Before The United Nations General Assembly” John F. Kennedy Presidential Library and Museum, 25 September 1961, see: <https://www.jfklibrary.org/Asset-Viewer/Archives/JFKWHA-050.aspx>

<sup>32</sup> Carmen Boghean, “The Phenomena of Migration: Opportunities and challenges”, The USV Annals of Economics and Public Administration, Volume 16, Special Issue, 2016, pg.16 see: [https://ideas.repec.org/a/scm/usvaep/v16y2016i1\(23\)p14-20.html](https://ideas.repec.org/a/scm/usvaep/v16y2016i1(23)p14-20.html)

<sup>33</sup> Maxime H. A. Larive, “A Crisis for the Ages The European Union and the Migration Crisis”, Vol. 15 Special , 2300 Campo Sano Building, 220C, 2015, pg.3, see: [http://aei.pitt.edu/74531/1/Larive\\_MigrationCrisis.pdf](http://aei.pitt.edu/74531/1/Larive_MigrationCrisis.pdf)

<sup>34</sup> “The Refugee Crisis in Europe and the Middle East: A Comprehensive Response”, International Rescue Committee (IRC), 2016, pg.15, see: <https://www.rescue.org/sites/default/files/document/911/irccrisisappealcompositerevaugust.pdf>

<sup>35</sup> “Guide: Syria Crisis”, BBC News, 2012 <http://www.bbc.com/news/world-middle-east-13855203>

<sup>36</sup> Lina Sinjab, “Syria conflict: from peaceful protest to civil war”, BBC News, 2013, <http://www.bbc.com/news/world-middle-east-21797661>

the movements to eventually call for ousting of the regime.<sup>37</sup> The Violence soon turned into a civil war.<sup>38</sup> The instability in Syria proved to be an opportunity for terrorist groups to gain control over some territories of Syria. This was evident by the so-called Islamic state, which created its "caliphate" in June 2014 in Iraq and Syria.<sup>39</sup> The Arab League was silent on the matter but later decided to suspend Syrians membership from the League to force President Bashar Al-Assad to relinquish his presidency. The observer mission sent by Arab League was soon suspended due to the increased violence.<sup>40</sup>

Those individuals fleeing from Syria were expecting to return in their homes soon, but the increased violence demonstrated that the conflict in Syria would take years and even longer for life to be as it was prior to the conflict.<sup>41</sup> As a result of the endless conflicts and human right violations encouraged Syrians to flee their homes. According to the International law, individuals are given the right to exist from the state and seek an asylum.<sup>42</sup> These aforementioned rights were considered to be part of modern International customary law.<sup>43</sup> During the crisis of 2015, a great number of Syrians disembarked to the Union's shores with intention to apply for international protection in the EU. Notably, According to the article 18 of the Charter on Fundamental Rights of European Union (EU Charter), these

---

<sup>37</sup> "We've Never Seen Such Horror: Crimes against Humanity by Syrian Security Forces", 2011, Human Right Watch <https://www.hrw.org/report/2011/06/01/weve-never-seen-such-horror/crimes-against-humanity-syrian-security-forces>

<sup>38</sup> Dinoj K Upadhyay, Special Report on "Migrant Crisis in Europe: Causes, Responses and Complexities". Indian Council of World Affairs, 2016, pg.5 <https://icwa.in/pdfs/guestcolumn/2014/MigrantCrisisinEurope26042016.pdf>

<sup>39</sup> Matthew Weaver. "Isis declares caliphate in Iraq and Syria", The Guardian, 2014 <https://www.theguardian.com/world/middle-east-live/2014/jun/30/isis-declares-caliphate-in-iraq-and-syria-live-updates>

<sup>40</sup> Müjge Küçükkeleş "Arab League's Syrian Policy", SETA Policy Brief No: 56, Foundation for Political, Economic and Social Research, 2012, pg.6 <http://file.setav.org/Files/Pdf/arab-league%E2%80%99s-syrian-policy.pdf>

<sup>41</sup> Patrick Cockburn, "Refugee crisis: Where are all these people coming from and why?", The Independent, 2015 <https://www.independent.co.uk/news/world/refugee-crisis-where-are-all-these-people-coming-from-and-why-10490425.html>

<sup>42</sup> The right to seek an asylum or to exist from any state is ensured under international law, for example, Article 13 (2) of the Universal Declaration of Human Rights ensures the right of person to exist from a state including from his/her own country, furthermore, article 14(1) ensures the right of an individual to seek and enjoy asylum. Furthermore, the International Covenant on Civil and Political Rights allows persons to exist from any state including their own. The Protocol No. 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms also ensures individual's right to leave a state, including the country of origin.

<sup>43</sup> Roman Boed, "The State of the Right of Asylum in International Law", Duke Journal of Comparative & International Law, 1994, pg.6 <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?referer=https://www.google.ge/&httpsredir=1&article=1342&context=djcil>

individuals are allowed to seek and enjoy asylum <sup>44</sup> by stating “*The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention.*”<sup>45</sup>

Over the years, the safe and lawful access to the EU borders required an immediate action to prevent those asylum seekers from losing their lives on their way to Europe, whether by sea or by land. EU asylum policy has always been accused of focusing on preventative actions rather than on reactive measures. The EU asylum policy does not contribute toward saving lives; instead it aims to prevent migrants and refugees from reaching Europe. The reason for these dangerous journeys is well demonstrated in EU visa policies and sanctions. The nationals fleeing from their homelands due to war, human rights infringements or persecution require visas to reach the EU. Interestingly, visa issuing criteria include proof of ability and their wish to return to the country of origin. Under international law article 1(A) 2 of Geneva Convention, in addition to European Union law Article 2 of qualification directive<sup>46</sup>, refugees are individuals fleeing from their states of origin and in dire need of protection; hence, return of such individuals will be directly in breach of International and European law. It also worth mentioning that commercial and shipping companies are expecting to give service only to those people holding valid documentation. Consequently, refugees are deprived from all means of legal access to Europe which often motivates them to take dangerous routes to reach the desired destination or to turn to smugglers and traffickers. <sup>47</sup>

The EU was not the destination for Syrians fleeing their home, indeed, states including Jordan, Lebanon and Egypt received a large number of the Syrian refugees from the onset of the civil war. After 2014 their “welcoming policy” was replaced by strict border control policy. The aim was clear to reduce the arrivals of Syrian refugees on their territory, as the number of Syrians was significantly increasing.<sup>48</sup> Another popular state for asylum seekers was Turkey which did not close its borders to new-comers, but the policy of ‘open borders’

---

<sup>44</sup> Handbook on European law relating to asylum, borders and immigration, European Union Agency for Fundamental Rights, Council of Europe, 2014, pg.45

<sup>45</sup> Article 18, European Union, Charter of Fundamental Rights of the European Union, (EU Charter) 26 October 2012, 2012/C 326/02, available at: <http://www.refworld.org/docid/3ae6b3b70.html>

<sup>46</sup> Article 2, Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted, 30 September 2004,

<sup>47</sup> Cathryn Costello, Madeline Garlick, Violeta Moreno-Lax, “The 2015 Refugee Crisis in the European Union Elspeth Guild”, Thinking Ahead for Europe CEPS Policy Brief No. 332, 2015, pg.5 see”  
[https://www.ceps.eu/system/files/CEPS%20PB332%20Refugee%20Crisis%20in%20EU\\_0.pdf](https://www.ceps.eu/system/files/CEPS%20PB332%20Refugee%20Crisis%20in%20EU_0.pdf)

<sup>48</sup> Kemal Kirişçi, Raj Salooja, “Northern Exodus: How Turkey Can Integrate Syrian Refugees”, Council on Foreign Relation, 2014 <https://www.foreignaffairs.com/articles/turkey/2014-04-15/northern-exodus>

could not convince refugees that Turkey was a place where their human rights would be respected. Consequently, refugees were deprived of their right to work due to existing unemployment whilst those few who were able to find the job, were working at lower wages.<sup>49</sup> This led many Syrians from neighboring states to find their way back to the place; they were once forced to leave or to find their way to Europe. As a result of the humanitarian distress and continuous human rights infringements the United Nation (UN) towards the end of 2014, sent a warning message concerning the coming refugee crisis as Syrians who find shelters in the neighborhood were facing hunger and catastrophic living conditions.<sup>50</sup>

According to the UN, approximately 400,000 have died in Syria since 2011, with 5 million seeking refuge outside of their country and almost 6 million displaced internally. Moreover, the UN also revealed that 540,000 people were still living in besieged areas in 2017.<sup>51</sup> In-depth analyses of the conflicts worldwide are not the objective of this work, hence the mentioned short overview of the situation is sufficient enough to demonstrate the ongoing disaster in the world, particularly in Syria. The crisis in Syria has transformed into a humanitarian disaster under international law.

In order to deal with the refugee crisis, the Union and its members decided to implement a number of measures including, the adoption of the European Agenda on Migration, two legally binding Relocation Council Decisions and the EU-Turkey deal. Some member states of Union, led by Germany, have obtained the responsibility of international refugee protection from the EU. In a constitutional context, this might be considered as a subsidiary situation, whereby few member states are inheriting the competence in asylum law and policy from the Union which proved to be insufficient in overcoming the crisis itself. These Member States tried to act in accordance with their legal obligation asserted by the Geneva Convention, in addition to protection the EU's reputation in particular from being accused of various human rights infringement.<sup>52</sup>

As a result of the humanitarian disaster and endless conflicts Syrians started to leave their homes and seek asylum abroad. The right to seek an asylum and to be protected from

---

<sup>49</sup> Dinoj K Upadhyay, Special Report on "Migrant Crisis in Europe: Causes, Responses and Complexities", pg.7

<sup>50</sup> Kemal Kirişci, Raj Salooja, "Northern Exodus: How Turkey Can Integrate Syrian Refugees"

<sup>51</sup> "Syria: Events of 2017", Human Right Watch, <https://www.hrw.org/world-report/2018/country-chapters/syria>

<sup>52</sup> Nika Bačić Selanec, "A Critique of EU Refugee Crisis Management: On Law, Policy and Decentralisation", pg. 93-94

refoulement is driven by the right of people to leave their countries'.<sup>53</sup> Under the International and EU legislation, individuals fleeing from their states are given these rights. Notably, asylum seekers can invoke and rely on the EU law once they reach the Union shores, including territorial water and transit zone.<sup>54</sup> However, the Union acquis does not ensure safe journeys for persons in dire need of international protection. Indeed, these persons seeking the shelter in EU are those nationals requiring the visa for reaching union states safely. Since these people are not able to fulfill the requirements for an ordinary visa; they are often forced to use illegal ways to enter in the Union.<sup>55</sup>

## 1.2 The Applicable International Law

“Convention-based asylum is not a solution in itself; rather it is a protection mechanism which creates space for solutions to be worked out”

Erika Feller<sup>56</sup>

There is no universal definition of asylum.<sup>57</sup> This term is originating from Greek word ‘asylon’ and demonstrates one’s freedom from seizure. Historically, asylum has been considered as a safe place where a refugee was protected from being reached or pursued. The scholars worldwide agree that ‘the practice of asylum is as old as humanity itself’. Despite the fact that there is no agreed definition of asylum, still, consensus on asylum as a right is already reached.

In the debate of an asylum as a right following two factors are essential Firstly, a state does not own its nationals or citizens hence, an individual has the right to move from the state of residence and seek an asylum abroad. Secondly, a state is authorized to exercise *prima facie* an exclusive control over its territories thus, that state has right to determine the entry and stay of all non-citizens, consequently, a right of asylum can be seen as the right of state rather than of an individual. According to *Grotius* and *Suarez* states has an obligation to

---

<sup>53</sup> “The right to leave a country”, Issue Paper by the Council of Europe Commissioner for Human Rights, Council of Europe, 2013, pg. 31

<sup>54</sup> Handbook on European law relating to asylum, borders and immigration, pg. 35

<sup>55</sup> Ibid,

<sup>56</sup> Erika Feller, “The Refugee Convention at 60: Still fit for its Purpose? Protection Tools for Protection Needs”, Workshop on Refugees and the Refugee Convention 60 Years On: Protection and Identity, UNHCR, 2011, pg.6 <http://www.unhcr.org/4ddb679b9.pdf>

<sup>57</sup> Roman Boed, “The State of the Right of Asylum in International Law”, pg.3 note: Professor Atle Grahl-Madsen voiced the common agreed opinion over the absence of clear definition of asylum

grant an asylum to those individuals claiming it, however, this opinion lacks international recognition. Contrary to this opinion, *Felice Morgenstern* has argued that there is “no general right of asylum against the state”.<sup>58</sup>

The protection for refugees on the international was ensured in 1951 Geneva Convention<sup>59</sup> which was mainly corresponding the context of the Second World War which produced a huge number of refugees, who were forced to flee from their home states. As the result, a definition of refugee was clearly related to that era and its difficulties, namely “well-founded fear of being persecuted” became an essential characteristic of the refugee status.<sup>60</sup> Notably, 1967 Protocol<sup>61</sup> has removed the geographic and time limitations.<sup>62</sup> Hence, the Refugee Convention has become a valuable international instrument for the international protection of refugees.<sup>63</sup>

Geneva Convention 1951 is setting out minimum standards for refugees and still is the leading international instrument in this field.<sup>64</sup> Aforementioned Convention was referred as a human right’s treaty which was and still is expecting to meet nowadays needs and challenges hence, to serve as a living instrument for 21 century’s refugees’.<sup>65</sup> Indeed, the Geneva Conventions is not similar to other human right treaties as it is designed in a manner that focuses more on refugee definition rather than on the rights *per se*.

---

<sup>58</sup> Ibid, pg.8

<sup>59</sup> Lebanon, Jordan and Iraq have never ratified the 1951 Refugee convention, and thus all those displaced people have no right to be granted refugee status. Indeed, Turkey has ratified the aforementioned convention but not the 1967 Protocol. This means that as the original Convention only applied in Europe Turkey only accepts refugees from Europe. It means, if Syrians arriving in Turkey they don’t have right to get refugee status. See: <http://www.unhcr.org/4ddb679b9.pdf>

<sup>60</sup> Chris Berg, “Why cling on to an outdated refugee convention?”, 2011 <http://www.abc.net.au/news/2011-10-19/berg-why-are-we-clinging-to-an-outdated-refugee-convention/3577538>

<sup>61</sup> UN General Assembly, Protocol Relating to the Status of Refugees, 31 January 1967, United Nations, Treaty Series, vol. 606 <http://www.refworld.org/docid/3ae6b3ae4.html>

<sup>62</sup> Eugene Quinn, “The Refugee Convention Sixty Years On: Relevant or Redundant?”, Working Notes • Issue 68, December 2011, pg.19-20  
<http://www.workingnotes.ie/images/stories/Issue68/the%20refugee%20convention%20sisty%20years%20on-relevant%20or%20redundant.pdf>

<sup>63</sup> <http://blogs.lse.ac.uk/humanrights/2016/02/08/international-refugee-law-definitions-and-limitations-of-the-1951-refugee-convention/>

<sup>64</sup> Leila Nasr, “International Refugee Law: Definitions and Limitations of the 1951 Refugee Convention”, The London School of Economics and Political Science, <http://blogs.lse.ac.uk/humanrights/2016/02/08/international-refugee-law-definitions-and-limitations-of-the-1951-refugee-convention/>

<sup>65</sup> Guy S. Goodwin-Gill, “The International Law of Refugee Protection”, the Oxford Handbook of Refugee and Forced Migration Studies, Oxford Handbook online Scholarly Research Review, 2014  
<http://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199652433.001.0001/oxfordhb-9780199652433-e-021>



The International Refugee law (IRL) is closely tied with International Human rights law (IHRL) as the latter enhances the legal framework for refugees.<sup>66</sup> IHRL ensures the wider protection than the IRL including the absolute prohibition of *refoulement*.<sup>67</sup> ECHR does not provide the asylum or refugee status per se, but its case law does<sup>68</sup>. The Strasbourg court has already defined the scope of article 3 ECHR in light of prohibition of *refoulement*.<sup>69</sup> The aforementioned is important as there have been numerous case laws with regard the breach of the rights of asylum seekers.<sup>70</sup> The crisis of 2015 and the following events, once again reaffirm the infringements of rights of asylum seekers and refugees.<sup>71</sup>

Significantly, there is no internationally recognized legal principle which would explicitly prohibit states from closing their borders to refugees although the ‘open borders’ has crucial importance for asylum seekers and refugees to exercise their rights under international law.<sup>72</sup> The right of an individual to seek an asylum under international law

---

<sup>66</sup> Mustafa İlhan Öztürk, “The Relationship Between International Human Rights Law and International Refugee Law”, Human Rights Review, Year: 8, Issue:14, December 2017, pg.116 Note: International refugee law seeks to provide safeguards to persons with specific status without hampering the sovereign rights of national states whilst International Human Rights Law “supervises” whether or not states perform their duties in line with the human rights instruments (see page 138)

<sup>67</sup> Ibid, 122 note: It intends, as noted in the preamble to UN Charter, “to reaffirm faith in fundamental human rights, in the dignity and worth of the human person”. Note also that in case of ECtHR, *Bader and Others v.*

*Sweden*, 13284/04, Council of Europe: European Court of Human Rights, 8 November 2005 the court concluding that sending back a person who will face death penalty is forbidden. <http://www.refworld.org/cases,ECHR,437dd21dd.html>

<sup>68</sup> Kelsey L. Binder, Cutting the Wire: A Comprehensive EU-Wide Approach to Refugee Crises, 41 Brook. J. Int'l L. 2016, pg. 1364-65, non-refoulement is an integral part of article 3 ECHR *Soering v. United Kingdom*, judgment of 7 July 1989, Application No. 14038/88, para. 88 see also: <http://www.asylumlawdatabase.eu/en/content/ecthr-soering-v-united-kingdom-application-no-1403888-7-july-1989> However, the ECtHR is not authorized to examine whether the denial of granting refugee status or withdrawal of a status under 1951 Refugee Convention is in breach of ECHR. In addition, the ECtHR cannot address if the failure to recognize the right of asylum seekers under Qualification directive can be controversial to the ECHR. However, if the return of person is in breach of article 3 ECHR or other provisions, ECtHR can examine the claim. See Handbook on European law relating to asylum, borders and immigration pg.45

<sup>69</sup> Ibid, note: accordingly, the application of article 3 might be invoked in cases where an individual is send back in state where he or she might be under serious risk of inhuman treatment or torture

<sup>70</sup> See: “European Court of Human Rights”, Bringing Convention Closer to Home, Human Rights Education for Legal Professionals [https://www.echr.coe.int/Documents/COURTalks\\_AsyL\\_Talk\\_ENG.PDF](https://www.echr.coe.int/Documents/COURTalks_AsyL_Talk_ENG.PDF) See also: Factsheet, “Dublin Cases”, European Court of Human Rights [https://www.echr.coe.int/Documents/FS\\_Dublin\\_ENG.pdf](https://www.echr.coe.int/Documents/FS_Dublin_ENG.pdf)

<sup>71</sup> Catherina Woollard, “The impact of “the refugee crisis”: rights are at risk in Europe”, 2016 <https://www.mo.be/en/opinion/impact-refugee-crisis-rights-are-risk-europe> , see also: “EU Leaders Duck Responsibilities on Refugees: Focus on Outsourcing Asylum, Border Control, Stemming Arrivals”, Human Right Watch, 2015 <https://www.hrw.org/news/2015/09/24/eu-leaders-duck-responsibilities-refugees> and “Refugees endangered and dying due to EU reliance on fences and gatekeepers”, Amnesty International, 2015 <https://www.amnesty.org/en/latest/news/2015/11/refugees-endangered-and-dying-due-to-eu-reliance-on-fences-and-gatekeepers/>

<sup>72</sup> Katy Long, “No entry! A review of UNHCR”s response to border closures in situations of mass refugee influx”, Policy Development and Evaluation Service, United Nations Commissioner for Refugees, 2010, pg.1

does not establish an obligation on the state to allow the access to their territory.<sup>73</sup> Moreover, there is no obligation of the state to grant a person an asylum status.<sup>74</sup> Hence, neither Geneva Convention nor its protocol bounds the states to grant asylum. According to the position of Goodwin-Gill the 1951 Refugee Convention authorizes the signatory states to determine the persons eligible for international protection.<sup>75</sup> Hence, in case if state decides to grant international protection it also defines the scope and timeframe of this protection. However, this power of state is restricted by the internationally agreed definition of refugee, the principle of *non-refoulement*, and the international human right law amongst others.<sup>76</sup> Indeed, states asylum standards vary; this might be explained by single states' national sources, security concerns and the old experiences with forced migration.<sup>77</sup>

Furthermore, *non-refoulement* burdens a state not to harm an individual but it does not impose a positive obligation to assist. The right against non-refoulement is not the right to escape the danger *per se*. Indeed, this principle obliges states to provide a temporary shelter until the day they consider that the country of origin of refuge has become a safe place. Consequently, it gives a positive right to immigrate and start a new life in new country but the opportunity of living a "new life" is limited by the host state's power.<sup>78</sup> Nonetheless, state's obligation to respect the prohibition of *non-refoulement* can be interpreted as the right of an asylum seeker to cross the EU border (even temporarily) and claim an international protection.<sup>79</sup>

The 1951 Convention has been accused to be a 'state-centric' <sup>80</sup>as it represents undertakings and responsibilities, accepted between the parties involved, to demonstrate respect, provide safeguards or grant certain rights and benefits.<sup>81</sup> The Convention does not

---

<sup>73</sup> Alice Edwards, "Human Rights, Refugees, and the Right 'To Enjoy' Asylum", International Journal of Refugee Law, Volume 17, Issue 2, 1 January 2005, <https://academic.oup.com/ijrl/article/17/2/293/1548262>

<sup>74</sup> "Refugee Status Under International Law", European Parliamentary Research Service Blog, <https://epthinktank.eu/2015/10/27/refugee-status-under-international-law/>

<sup>75</sup> Guy S. Goodwin-Gill, "The International Law of Refugee Protection", The Oxford Handbook of Refugee and Forced Migration Studies

<sup>76</sup> Ibid,

<sup>77</sup> "Asylum & The Rights of Refugees", International Justice Resource Center, <https://ijrcenter.org/refugee-law/#gsc.tab=0>

<sup>78</sup> ibid

<sup>79</sup> "Scope of the principle of non-refoulement in contemporary border management: evolving areas of law", European Union Agency for Fundamental Rights, 2016, pg.7-8

<sup>80</sup> Alice Edwards, "Human Rights, Refugees, and the Right 'To Enjoy' Asylum", International Journal of Refugee Law, pg.294

<sup>81</sup> Guy S. Goodwin-Gill, "The International Law of Refugee Protection", The Oxford Handbook of Refugee and Forced Migration Studies

introduce any provision with regard burden sharing to determine which state is responsible for processing the application for the refugee status.<sup>82</sup>

Furthermore, According to the International law state is not legally bound to offer or ensure legal and safe paths to persons seeking international protection abroad. To this end, failure of the state to ensure safe passage is not equivalent to a failure of providing international protection for those in dire need of it. For instance, the EU does not impose the responsibility on member states' to facilitate the arrival and safety of asylum seekers neither it introduces a mechanism which would ease the entrance in Europe. However, EU law provides the right of an individual to claim asylum and have access to it.<sup>83</sup>

1951 Geneva Convention has been regarded as "*the wall behind which refugees can shelter ... the best we have, at the international level, to temper the behavior of states*".<sup>84</sup> However, it has been argued that this convention fails to address needs of refugees for several reasons. Firstly, existing interpretation of the refugee definition is almost of 70 years, thus, excludes the individuals fleeing the violence due to the war or conflicts easily can be differentiated from the conventional refugees.<sup>85</sup> Moreover, persons feeling due to extreme weather conditions, natural disasters or land degradation, are excluded from being even potential candidates for refugee status.<sup>86</sup> According to the Commission, Union member states are frequently granting another type of protection provides that recent conflict and persecutions are not falling under the classical understanding of the convention.<sup>87</sup> Secondly, the convention does not take into account the political, social or financial

---

<sup>82</sup> Ibid,

<sup>83</sup> Note: The Qualification Directive provides that EU members 'shall grant' refugee status to those who meet the appropriate criteria (Article 13; see also Article 8 of the Temporary Protection Directive). The Qualification directive also provides the 'subsidiary protection' which 'protects' persons from being at risk of serious harm in case of return

<sup>84</sup> Eugene Quinn, "The Refugee Convention Sixty Years On: Relevant or Redundant?", Working Notes Issue 68, December 2011, pg.19  
<http://www.workingnotes.ie/images/stories/Issue68/the%20refugee%20convention%20sisty%20years%20on-relevant%20or%20redundant.pdf>

<sup>85</sup> Phil Cole, "What's wrong with the Refugee Convention?", 2015 <https://www.e-ir.info/2015/11/06/whats-wrong-with-the-refugee-convention/>

<sup>86</sup> Eugene Quinn, "The Refugee Convention Sixty Years On: Relevant or Redundant?", Working Notes Issue 68, pg.19  
Note: it is worth mentioning that Convention lacks of reference to economic, social and cultural rights for getting refugee status: for instance, individuals who leave their states of natioanlity or residence due to the lack of education and/or work cannot be recognized as refugees. Additionally, convention foes not take into account gender perspectives, as a ground of persecution or as a limitation to the protect women and homosexuals see: Leila Nasr, "International Refugee Law: Definitions and Limitations of the 1951 Refugee Convention", The London School of Economics and Political Science

<sup>87</sup> Ibid, pg.20

“burden” of the host member states once they tackle the mass influx of asylum seekers.<sup>88</sup> Thirdly, one might claim that the necessary requirement of crossing the national borders and being outside of the state of origin in order to be a potential refugee, demonstrates another restriction of the convention<sup>89</sup> as some individuals in comparison to others might have more “luck” to flee the violence. To this end, it does not mean that those individuals left within the national borders are not in dire need of international protection.

The Convention is silent on the internally displaced individuals. Indeed, they form an invisible majority.<sup>90</sup> The crisis of 2015, revealed the need for sufficient and updated provisions to address existing gaps.<sup>91</sup> Nonetheless, there is no guarantee that the revision of Refugee Convention will not encourage some powerful states to limit the scope of protection even more than it is now. It has been argued, that Geneva Convention 1951 is not a relevant instrument to adequately address the needs of international migration.<sup>92</sup> However, there is no other international legal instrument ensuring better protection than existing 1951 Refugee convention.

According to the international law, there is no explicit right obliging state to grant an asylum. Nonetheless, the right to seek asylum is obtained from the right to exit from the state including your country of origin. Moreover, the well-known principle of non-refoulement is also implying person’s right to seek an asylum.

### 1.3 The Applicable EU Legal Framework

International refugee law through the 1951 Refugee Convention and 1967 Protocol opens the way for regional organizations such as EU to legislate in area of asylum and refugee.

---

<sup>88</sup> Adrienne Millbank, “The Problem with the 1951 Refugee Convention”, Research Paper, Social Policy Group, Parliament of Austria, 2000  
[https://www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/pubs/rp/rp0001/01RP05](https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp0001/01RP05)

<sup>89</sup> Erika Feller, “The Refugee Convention at 60: Still fit for its Purpose? Protection Tools for Protection Needs”, pg.6

<sup>90</sup> “The Invisible Majority: Helping Internally Displaced People”, Unite Nations Office for the Coordination of Humanitarian Affairs, 2016 <https://www.unocha.org/story/invisible-majority-helping-internally-displaced-people>

<sup>91</sup> Phil Cole, “What’s wrong with the Refugee Convention?”, see also: Simon Bradley, “Geneva Convention Need Updating, Says ICRC” <https://www.swissinfo.ch/eng/geneva-conventions-need-updating--says-icrc/225360>

<sup>92</sup> Guy S. Goodwin-Gill, “The International Law of Refugee Protection”, the Oxford Handbook of Refugee and Forced Migration Studies

The legal framework of the EU contains EU asylum law, which integrates the aforementioned international instruments in addition to the European human rights law.<sup>93</sup>

The EU Charter ensures rights for citizens and non-citizens. This Charter is a summation of IHRL, various international and regional legal instruments and the EU case law.<sup>94</sup> The particular article 18 of the EU Charter is the first legal provision explicitly recognizing the right of asylum on the Union level.<sup>95</sup> The aforementioned article refers to 1951 Refugee Convention and the Treaty on the Functioning of the European Union. Furthermore, Article 19 reaffirms the importance of the principle of *non-refoulement*.<sup>96</sup>

The crisis of 2015 produced a huge number of persons seeking asylum undertaking dangerous journeys to reach EU borders;<sup>97</sup> this led the Union to prioritize migration in its political agenda.<sup>98</sup> On 27 May 2015, the Commission submitted the first implementation measures including activating the emergency mechanism under Article 78(3) TFEU.<sup>99</sup> On 27 May 2015, the Commission introduced the first package of proposals under the European Agenda on Migration. The measures envisaged in the Agenda were focusing on the establishment of a relocation scheme as an emergency mechanism under article 78(3) TFEU, relocation of 40,000 individuals amongst others.<sup>100</sup>

On 9<sup>th</sup> September 2015, the Commission introduced a second package covering other measures such as an emergency relocation of 120,000 individuals from Greece, Italy, and Hungary as well as proposing an enhanced solidarity mechanism for member states.<sup>101</sup> As European Agenda in May 2015, proposed triggering the emergency response under the article 78(3) TFEU it also gave promise for mandatory relocation mechanism by end of that

---

<sup>93</sup> Kelsey L. Binder, "Cutting the Wire: A Comprehensive EU-Wide Approach to Refugee Crises", pg. 1342

<sup>94</sup> Ibid, 1360

<sup>95</sup> Article 18, European Union, Charter of Fundamental Rights of the European Union (EU Charter) 26 October 2012, 2012/C 326/02, see: <http://www.refworld.org/docid/3ae6b3b70.html>

<sup>96</sup> Article 19 EU Charter

<sup>97</sup> "EU Policies Put Refugees At Risk: An Agenda to Restore Protection", Human Right Watch, 2016 <https://www.hrw.org/news/2016/11/23/eu-policies-put-refugees-risk>

<sup>98</sup> Sergio Carrera, Steven Blockmans, Daniel Gros, Elspeth Guild, "The EU's Response to the Refugee Crisis Taking Stock and Setting Policy Priorities", Centre for European Policy Studies No. 20, 2015, pg.2 [https://www.ceps.eu/system/files/EU%20Response%20to%20the%202015%20Refugee%20Crisis\\_0.pdf](https://www.ceps.eu/system/files/EU%20Response%20to%20the%202015%20Refugee%20Crisis_0.pdf)

<sup>99</sup> Briefing on "Legislation on emergency relocation of asylum-seekers in the EU", Members' Research Service, European Parliament, 2015, pg.2-3

<sup>100</sup> "European Commission makes progress on Agenda on Migration", Press Release Database, European Commission, 27 May 2015 [http://europa.eu/rapid/press-release\\_IP-15-5039\\_en.htm](http://europa.eu/rapid/press-release_IP-15-5039_en.htm)

<sup>101</sup> "State of the Union 2015: Time for Honesty, Unity and Solidarity", Press Release Database, European Commission, 9 September 2015 [http://europa.eu/rapid/press-release\\_SPEECH-15-5614\\_en.htm](http://europa.eu/rapid/press-release_SPEECH-15-5614_en.htm)

year.<sup>102</sup> In case of mass influx, a relocation system would be automatically triggered distributing people in clear necessity of international protection. As a result, only in September, did the EU actually introduce two relocation decisions<sup>103</sup> in addition to one amending decision in 2016.<sup>104</sup> The aforementioned Decisions before their adoptions were mentioned in EU “soft law”.<sup>105</sup> It worth mentioning that the Council Decisions are not in a hierarchical relationship, the mandatory relocation Decision – 2015/1601 makes reference to the first voluntary Relocation Decision – 2015/1523, however, it should be highlighted that the periods of application marginally differs.<sup>106</sup>

Article 78 (3) TFEU reads:

*“In the event of one or more Member States being confronted by an emergency situation characterised by a sudden inflow of nationals of third countries, the Council, on a proposal from the Commission, may adopt provisional measures for the benefit of the Member State(s) concerned. It shall act after consulting the European Parliament”*<sup>107</sup>

This should be seen in the context of Article 78(1) TFEU, which explicitly makes reference to 1951 Geneva Convention and 1967 Protocol. This was understood as the necessity of EU secondary legislation to comply with these international treaties.<sup>108</sup> According to *Hailbronner* and *Thym* non-compliance with Refugee convention can amount to infringement of article 78(1) TFEU, which can cause the annulment of EU secondary law or at least it can demand its interpretation in accordance to Geneva Convention.<sup>109</sup>

---

<sup>102</sup> Briefing on “Legislation on emergency relocation of asylum-seekers in the EU”, pg.3

<sup>103</sup> European Union: Council of the European Union, Council Decision (EU) 2015/1523 of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece, 14 September 2015, and 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>104</sup> Council Decision (EU) 2016/1754 of 29 September 2016 amending Decision (EU) 2015/1601 establishing provisional measures in the area of international protection for the benefit of Italy and Greece

<sup>105</sup> Lukasz Stepkowski, “National Identity of a Member State in European Union Law in the Context of Relocation of Migrants”, *Review of Comparative Law* Volume XXV2016, pg. 114  
[http://www.kul.pl/files/565/Artykuly\\_naukowe/07\\_stepkowski.pdf](http://www.kul.pl/files/565/Artykuly_naukowe/07_stepkowski.pdf) see footnote 30, namely, 1) the European Agenda on Migration, 2) Towards a Reform on the CEAS and enhancing Legal Avenues to Europe and 3) commission recommendation on a European Resettlement.

<sup>106</sup> Article 13 Council Decisions 2015/1523 and 2015/1601

<sup>107</sup> Article 78 (3) TFEU

<sup>108</sup> Panos Koutrakos, “EU International Relations Law”, Bloomsbury Publishing PLC, United Kingdom, 2015, pg. 568

<sup>109</sup> This view was reaffirmed by the ECJ in several judgments on Asylum Qualification Directive 2011/95/EU for example, joint case CJEU - C-175/08, C-176/08, C-178/08 and C-179/08, Aydin Salahadin Abdulla, Kamil Hasan, Ahmed Adem, Hamrin Mosa Rashi, Dier Jamal v Bundesrepublik Deutschland, see:  
<http://www.asylumlawdatabase.eu/en/content/cjeu-c-17508-c-17608-c-17808-and-c-17908-aydin-salahadin-abdulla-kamil-hasan-ahmed-adem>

Notably, the responsibility driven from Lisbon Treaty<sup>110</sup> to comply with the Refugee Convention is not new<sup>111</sup>, but in comparison with previous provision Article 78(1) demonstrates that the need to respect Geneva Convention and Human right law applies to all EU asylum laws including rules on temporary and subsidiary protection.<sup>112</sup>

*Hailbronner* and *Thym* also argued that as the Union itself is not party of any convention, the constitutive obligation driven from article 78(1) TFEU can be relied on within the union's legal order if each member states has ratified respective multilateral conventions.<sup>113</sup> Notably, in case of 481/13 *Qurbani*<sup>114</sup> the CJEU has declared that it lacks jurisdiction over the provisions of Geneva Convention. In addition, court stated that the article 78 (1) TFEU gains relevance when the dispute is concerning the EU secondary legislation which refers to Geneva Convention. As in this *Qurbani* case no reference was made to secondary legislation, court held it had no jurisdiction to interpret the provision of Geneva Convention.<sup>115</sup>

Furthermore, it was argued that the reference made in Article 78(1) TFEU on “*other relevant treaties*” and on the principle of *non-refoulement* demonstrated that the union's legal order is not just committed to promotion the multiculturalism and public international law but rather EU binds itself by responsibilities driven by international organizations. In doing so *Mendez* argued that Union has accepted maximalist approach. According to article 3 (5) TFEU EU systematize the respect and importance of international obligations and seeks to coordinate with third states and international organizations. Consequently, as article 3(5) TFEU presents the objectives of EU integration process, it can be concluded that they have constitutional importance.<sup>116</sup>

The aim of such distribution mechanism was to establishing the solidarity and responsibility sharing principle aiming at supporting states which for, certain reasons, was

---

<sup>110</sup> Article 63, Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, 13 December 2007, 2007/C 306/01, See: <http://www.refworld.org/docid/476258d32.html>

<sup>111</sup> Kay Hailbronner, Daniel Thym, “A Commentary: EU Immigration and Asylum Law”, Verlag C. H. Beck oHG, Wilhelmstraße 9, 80801 Munchen, Germany, 2016, pg. 1029 <http://odysseus-network.eu/wp-content/uploads/2016/04/HAILBRONNER-THYM-legal-framework-asylum.pdf> note: that article 63(1) EU Treaty as amended by the Treaty of Amsterdam and Article K.2(1) EU Treaty as amended by the Treaty of Maastricht has same instructions

<sup>112</sup> Ibid,

<sup>113</sup> Ibid

<sup>114</sup> Mohammad Ferooz Qurbani, C-481/13, European Union: Court of Justice of the European Union, 17 July 2014, see: <http://www.refworld.org/cases/EJC/53c7a38a4.html>

<sup>115</sup> Panos Koutrakos, “EU International Relations Law”, pg. 568, see the case <http://www.asylumlawdatabase.eu/en/content/cjeu-c%E2%80%919148113-mohammad-ferooz-qurbani>

<sup>116</sup> Ripoll Servent, A. (Ed.), Trauner, F. (Ed.), “The Routledge Handbook of Justice and Home Affairs Research” The Routledge, 2017, pg. 494



experiencing a huge migratory pressure. This aforementioned principle of solidarity and burden-sharing is ensured under article 80 TFEU and served as a support mechanism'.<sup>117</sup> This similar idea is expressed under article 4(3) TEU with regard to “sincere cooperation”.<sup>118</sup> This article was already invoked by the court on the several occasions and has an important influence on the asylum policy as it<sup>119</sup> bounds member states to “*assist each other in carrying out tasks which flow from the Treaties*”.<sup>120</sup> Notably, this article acknowledges de jure equality of member states, h each member states should act not just pursue their national aims but to reach the common objectives by considering the difficulties which is faced by their community members. Another provision establishing the need of solidarity with regard to the third country nationals is set in article 67 (2) TFEU.<sup>121</sup> According to the article 222 TFEU the EU and its member should act together with joint effort and solidarity on behalf of another member states if it is subject of terrorist attack or is “*the victim of a natural man-made disaster*”.<sup>122</sup>

It has been argued that, the various terms including: “fair sharing of responsibility”, “solidarity”, burden sharing”, loyal cooperation amongst others leads to uncertainty. Some of these terms are “accused” to be terminologically confusing or not being legally binding. In addition, it was also question whether these concepts legally bound the union states’ or they refer for fulfillment of certain tasks to assist other member states facing difficulties.<sup>123</sup> However, the article 80 TFEU is legally binding within the union. Its text refers explicitly to the obligation that the implementation of union policies “*shall be governed*” by principle of solidarity and burden sharing. Hence, article 80 TFEU can be considered as the most explicit “solidarity establishing” provision in Union law.<sup>124</sup> To this end, the Solidarity principle<sup>125</sup> in EU Legislation has a core importance as the Union aims to develop the

---

<sup>117</sup> Esin Küçük, “The Principle of Solidarity and Fairness in Sharing Responsibility: More than Window Dressing?”, European Law Journal Volume 22, Oxford, OX4 2DQ, UK and 350 Main Street, Malden, MA 02148, USA, July 2016, pg. 451 <https://onlinelibrary.wiley.com/doi/epdf/10.1111/eulj.12185>

<sup>118</sup> Article 4(3), European Union, Treaty on European Union (Consolidated Version), Treaty of Maastricht , 7 February 1992, Official Journal of the European Communities C 325/5; 24 December 2002 <http://www.refworld.org/docid/3ae6b39218.html>

<sup>119</sup> Iris Goldner Lang, “Is There Solidarity on Asylum and Migration in the EU”, CYELP 9, 2013, pg.7

<sup>120</sup> Article 4 (3) TEU

<sup>121</sup> Article 67 (2) TFEU

<sup>122</sup> Article 222 TFEU

<sup>123</sup> Boldizsar 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”, Working Paper 17, 2017, pg. 3

<sup>124</sup> Iris Goldner Lang, “Is There Solidarity on Asylum and Migration in the EU”, pg.8



economic, social and territorial cohesion within the EU.<sup>126</sup> Consequently, the internal solidarity is *per se* an essence of the EU law.

Both council decisions aimed at establishing provisional measures for international protection on behalf of Italy and Greece.<sup>127</sup> Throughout the council's meeting during June 2015, the discussion in relation to the mandatory and voluntary character of relocation was ongoing, as the views and opinions of MS differed. The president of the European Parliament *Martin Schulz* addressed the failure of voluntary intergovernmental schemes that had occurred in the past, emphasizing the need for each union member to participate in fair burden sharing, arguing that a relocation scheme should be mandatory for MS, otherwise "*real solidarity quickly turns into mere charity*".<sup>128</sup>

After EU commission introduced the need of relocating 160,000 persons in clear need of international protection, the target number was reduced to 98,000 this was rationalized by the fact that the number of eligible candidates had decreased.<sup>129</sup> On the 20<sup>th</sup> of July representatives of governments of member states through the resolution agreed to relocate 32 256 individuals (in the first phase) in clear need of international protection, the decision in regards to the remaining asylum seekers would be decided by December.<sup>130</sup> According to the International Rescue Committee (IRC), the relocation process itself was very slow in addition to the target number of 160,000 places, which constituted 20% of the overall

---

<sup>125</sup> In 19<sup>th</sup> century French philosopher *Charles Fourier* referred to principle of solidarity "*as a concept denoting attitudes and relations characterised by the reciprocal sympathy among persons who were bound together in a community*" see: Steinar Stjerno "The idea of solidarity in Europe", European Journal of Social Law / No 3, September 2011, pg.1 <https://soc.kuleuven.be/ceso/life-sciences-society-lab/files/stjerno-the-idea-of-solidarity-in-ejsl-2011-3-b.pdf>

<sup>126</sup> Executive summary on "Solidarity and strength The Future of the European Union", Green European Foundation, Heinrich-Böll-Stiftung, European Union, Brussels, November 8, 2011, pg.7

<sup>127</sup> Council Decision (EU) 2016/1754 of 29 September 2016 amending Decision (EU) 2015/1601 establishing provisional measures in the area of international protection for the benefit of Italy and Greece

<sup>128</sup> Post-European Council Briefing, "On Outcome of the European Council of 25/26 June 2015", European Parliamentary Research Service, European Council Oversight Unit, European Parliament, 2015, pg.1 [http://www.europarl.europa.eu/EPRS/EPRS\\_BRIF\\_558757\\_outcome\\_june\\_european\\_council.pdf](http://www.europarl.europa.eu/EPRS/EPRS_BRIF_558757_outcome_june_european_council.pdf)

<sup>129</sup> Heaven Crawley, "Named and shamed: EU countries are failing to share responsibility for refugees", The Conversation, Academic rigour, journalistic flair <https://theconversation.com/named-and-shamed-eu-countries-are-failing-to-share-responsibility-for-refugees-80918>

<sup>130</sup> "Resolution of the Representatives of the Governments of the Member States meeting within the Council on relocating from Greece and Italy 40 000 persons in clear need of international protection", Council of the European Union, Brussels, 22 July 2015, pg.3 <http://data.consilium.europa.eu/doc/document/ST-11131-2015-INIT/en/pdf>

arrivals in 2015.<sup>131</sup> It was easily foreseen that relocation numbers would not meet the desired numbers as the relocation proved to be a moving target.

To conclude, the Treaty on Functioning of European Union provides the legal bases in the field of asylum and migration, This is easily seen by the terms it refers to including “common”, “solidarity” and “uniform status”. Moreover, article 78 (3) TFEU provides the possibility to establish an emergency relocation aiming at intra-EU distribution mechanism whilst Article 80 TFEU ensures the solidarity and burden-sharing principle. In light of this, one might argue that theoretically, the renewed asylum legal and policy framework offers more than just minimum standards and<sup>132</sup> therefore, it could serve as “gap filler” of the CEAS

### **1.3.1 Does the Common European Asylum System protect asylum seekers and refugees? – The crisis and its impact on the Relocation mechanism**

The European Common Asylum system was intended to provide protection to asylum seekers and refugees through its legislative framework.<sup>133</sup> The Common European Asylum system is relatively new and most ambitious contribution by Union. The CEAS aims at strengthening the TFEU’s goal of creating common asylum procedures across the EU through various directives and regulations. This goal is to be reached by coordinating the member states’ asylum policies and by the establishment of the uniform standards for evaluating the claims of the international protection through the international refugee law and the EU Charter.<sup>134</sup>

In the logic of legal framework provided by the CEAS, Asylum seekers and refugees who arrived at EU borders are enjoying rights. For instance, the adequate and sufficient reception facilities for asylum seekers are regulated by Reception Directive<sup>135</sup> which also

---

<sup>131</sup> Seventh Report of Session 2016–17, “Migration Crisis”, House of Commons Home Affairs Committee, 2016, pg.31 <https://publications.parliament.uk/pa/cm201617/cmselect/cmhaff/24/24.pdf>

<sup>132</sup> Nika Bacic Selanec, “A Critique of EU Refugee Crisis Management: On Law, Policy and Decentralisation, pg.48

<sup>133</sup> An Introduction to the Common European Asylum System for Courts and Tribunals: A Judicial Analysis, European Asylum Support Office page 13.

<sup>134</sup> Kelsey L. Binder, “Cutting the Wire: A Comprehensive EU-Wide Approach to Refugee Crises”, pg.1357

<sup>135</sup> Article 17, European Union: Council of the European Union, Directive 2013/33/EU of the European Parliament and Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast), 29 June 2013, OJ L. 180/96 -105/32; 29.6.2013, 2013/33/EU,

allows detentions of asylum seekers. The report by Human Right Watch demonstrated that Greek authorities were not able to provide the sufficient reception facilities and instead they were frequently detaining asylum seekers at the Lesbos hotspot. Indeed, according to this report, parts of detained persons were subject of ill-treatment.<sup>136</sup> Furthermore, unsuccessful applicants for international protection were sent back under the Return Directive<sup>137</sup>. However, instead of examining the cases on individual basis and make a relevant decision on returning the new-comers, some states were pushing back them from the borders. The report of Human Right shied the light to the frequent push backs.<sup>138</sup> For instance, the Bulgarian authorities from inland were pushing asylum seekers in Turkish territories.<sup>139</sup>

It worth mentioning that the Union adopted a regulation with on the visa and border control. The persons belonging to certain nationalities are required to have a valid visa to enter the foreigner state's territory. Those nationalities exempted from visa requirement are only able to remain in host state for three months. Hence, if a person cannot prove that his/her stay will last only for limited period of three months, most probably, he/she will not be able to enter at the EU territory at all. However, if the person still tries to enter in the territory of a foreign state he/she is at serious risk to be regarded as an irregular migrant.<sup>140</sup>

Moreover, Under the EU law (namely, Directive 2001/51/EC<sup>141</sup>) persons entering irregularly in the EU will be sanctioned. As a result, a state can issue the entry ban for certain time period, which will be entered in Schengen Information System (SIS), hence, this is a guarantee that the person will not be back to the particular state. If we examine the right of entrance in foreign territory or the visa possibilities or requirements under the

---

<sup>136</sup> European Union: Events of 2017, Human Right Watch, 2017 <https://www.hrw.org/world-report/2018/country-chapters/european-union> note: during November approximately 455 asylum seekers (243 children and 19 unaccompanied minors) were detained in the two transit zones, see also: "Submission by to the United Nations Committee on the Rights of the Child concerning Hungary", Human Right Watch, 2018 <https://www.hrw.org/news/2018/02/28/submission-united-nations-committee-rights-child-concerning-hungary>

<sup>137</sup> Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals

<sup>138</sup> Bulgaria: Pushbacks, Abuse at Borders: Halt Summary Returns, Beatings, Robbery of Asylum Seekers, Human Right Watch, 2016 <https://www.hrw.org/news/2016/01/20/bulgaria-pushbacks-abuse-borders>

<sup>139</sup> Georgi Voynov, "Pushed Back at the Door: Denial of Access to Asylum in Eastern EU Member States", Bulgarian Helsinki Committee - Refugees and Migrants Legal Defence Programme (BHC), 2017, pg.7 [https://www.helsinki.hu/wp-content/uploads/pushed\\_back.pdf](https://www.helsinki.hu/wp-content/uploads/pushed_back.pdf)

<sup>140</sup> Handbook on European law relating to asylum, borders and immigration, European Union Agency for Fundamental Rights, pg.26-30

<sup>141</sup> Council Directive 2001/51/EC of 28 June 2001 Supplementing the Provisions of Article 26 of the Convention Implementing the Schengen Agreement of 14 June 1985, 9 August 2001, Official Journal of the European Union, L 187/45, 10 July 2001

ECHR it's clear that there is no explicit provision stipulating the right of entry in foreigner state nor does it determine persons eligible to receive a visa. However, the Strasbourg court only limits the return of a person if it contradicts the non-refoulement principle.<sup>142</sup> To this end, the complexity of reaching the union legally and safety is restricted by the EU, for this reason persons fleeing violence or persecution choosing the most dangerous ways to reach the Union borders.

Another important issues is whether or not Union can close its border when asylum seekers trying to enter in the EU. Similarly to international law, no provision of EU law expressly forbids border closures with regard to non-EU nationals. However, according to the Schengen Borders Code border checks are properly to be carried out by keeping the full respect of human dignity and prohibition of discrimination on basis of racial or ethnic origin.<sup>143</sup> Notably, in *Hirsi Jamma* case court has recognized the importance of EU asylum law. This law is to be applied prior to a person's arrival at the union borders as denial of entry might amount to the collective expulsions.<sup>144</sup>

Furthermore, the practical implementation of the CEAS also revealed a solidarity deficit within the union.<sup>145</sup> The article 80 TFEU stipulates that legislation "*shall be governed by the principle of solidarity and fair sharing of responsibility*".<sup>146</sup> The article has a clear message that inter-State solidarity is crucial in legislative process however in reality the scope of the solidarity was limited.<sup>147</sup> *Thomas Spijkerboer* has argued that the Commission has failed to call the situation at EU border - a crisis of the CEAS instead of the "migration crisis".<sup>148</sup>

---

<sup>142</sup> Ibid, 30-31

<sup>143</sup> Ibid, note: According to the EU legislation, Article 12 together with Articles 3 and 3a of the Schengen Schengen Borders Code, states that the union should respect the principle of non-refoulement while exercises the border control.

<sup>144</sup> *Hirsi Jamaa and Others v. Italy*, Application no. 27765/09, Council of Europe: European Court of Human Rights, 23 February 2012, see: <http://www.refworld.org/cases/ECHR,4f4507942.html>

<sup>145</sup> Lillian M. Langford, "The Other Euro Crisis: Rights Violations Under the Common European Asylum System and the Unraveling of EU Solidarity", *Harvard Human Rights Journal* / Vol. 26, 2013, pg.219 <http://harvardhrj.com/wp-content/uploads/2013/05/V26-Langford.pdf>

<sup>146</sup> Article 80 TFEU

<sup>147</sup> Daniel Thym, "The 'Refugee Crisis' as a Challenge of legal Design and Institutional Legitimacy", *Common Market Law Review* 53, Kluwer Law International. Printed in the United Kingdom, 2016, pg.1549

<sup>148</sup> Thomas Spijkerboer, "On the Agenda and The Refugee Crisis and European Integration: Minimalist Reflections on Europe, Refugees and Law", *European Papers - A Journal on Law and Integration*, Vol. 1, No 2, 2016, pg.541 [http://thomasspijkerboer.eu/wp-content/uploads/2016/09/EP\\_eJ\\_2016\\_2\\_9\\_Agenda\\_Thomas\\_Spijkerboer.pdf](http://thomasspijkerboer.eu/wp-content/uploads/2016/09/EP_eJ_2016_2_9_Agenda_Thomas_Spijkerboer.pdf)

Furthermore, in examination the CEAS, It is interesting to mention about the Temporary Protection Directive (TPD)<sup>149</sup> which was introduced as the part of the CEAS in 2001 to assist Kosovar refugees displaced by the conflict in former Yugoslavia.<sup>150</sup> The TPD was subject of a serious debate within or outside the EU. It has been repeatedly questioned whether the activation of this directive would be more sufficient than of the emergency relocation mechanism. *Steve peers*, has claimed that the reasons why the TPD was never triggered can be explained by the qualified majority voting (QMV) rule. He further argues that this voting rule would not have resulted in a positive outcome as far as the ‘migratory pressure’ was considered as the concern of the few frontline states. Hence, the implementation of directive could be in interest of the few states interest. This clearly deviates from the founding union principle of solidarity.<sup>151</sup>

Indeed, during the Arab Spring in 2011, this put the reception facilities of the Union under a serious risk, Italy step in assisting Malta by requesting the activation of the Temporary Protection Directive. However, the request was rejected. The council on Justice and Home Affairs stated that the required conditions to activate the directive were not met due to the lack of emergency situation (not enough arrivals) and the status of persons which according the Council was identifying as economic Migrants.<sup>152</sup> Later, in 2014, the activation of the TPD was again asked.<sup>153</sup> In response, in 2015 the Commission stipulated that according to the Eurostat only 100,000 Syrians applied for asylum in the EU. Hence, due to the scale of the inflow of persons and the manner the applications were handled by

---

<sup>149</sup> Council Directive 20 01/55/EC of 20 July 2001 on Minimum Standards for Giving Temporary Protection in the Event of a Mass Influx of Displaced Persons and on Measures Promoting a Balance of Efforts Between Member States in Receiving such Persons and Bearing the Consequences Thereof, 7 August 2001, OJ L.212/12-212/23; 7.8.2001, 2001/55/EC, see <http://www.refworld.org/docid/3ddcee2e4.html>

<sup>150</sup> Hanne Beirens, Sheila Maas, Salvatore Petronella, Maurice van der Velden, “Final Report on Study the Temporary Protection Directive”, Directorate-General for Migration and Home Affairs, European Commission, B-1049 Brussels, 2016, pg.24

<sup>151</sup> Meltem Ineli-Ciger, “The Missing Piece in the European Agenda on Migration: the Temporary Protection Directive: The EU analyses, 2015 <http://eulawanalysis.blogspot.ro/2015/07/the-missing-piece-in-european-agenda-on.html>

<sup>152</sup> Marco Notarbartolo di Sciara, “Temporarily Protection Directive, Dead Letter or Still Option for the Future: An Overview on the Reasons Behind its Lack of Implementation”, 2015, pg.4 <http://rivista.eurojus.it/temporary-protection-directive-dead-letter-or-still-option-for-the-future-an-overview-on-the-reasons-behind-its-lack-of-implementation/?print=pdf>

<sup>153</sup> Clara Burbano-Herrera, “Why has the EU’s Temporary Protection Directive not been applied during the migration crisis in order to receive Syrians and other asylum seekers?”, African Law, 10 June, 2016 <https://africlaw.com/2016/06/10/why-has-the-eus-temporary-protection-directive-not-been-applied-during-the-migration-crisis-in-order-to-receive-syrians-and-other-asylum-seekers/>

the Union, Commission found no justifiable reason to invoke the emergency system under this directive.<sup>154</sup>

The CEAS has in heavily criticized due to its complexity, slow functioning and implementation.<sup>155</sup> The CEAS and its efficiency have been tested after the unprecedented pressure that Union tackled in recent years. This has revealed the incapacity of certain member states as they were lacking the administrative capacity or political will to contribute toward enhanced and well-functioning common asylum system which revealed that the CEAS could not fit the large numbers of arrivals as there was no system in place for legal migration.<sup>156</sup> The tragedy at sea, the inadequate conditions in reception centers as well as some states decision to reintroduce their internal borders amongst other reasons revealed the shortcomings of the CEAS.<sup>157</sup> For this reasons it has been suggested to amend the whole system.<sup>158</sup>

To conclude, the ambitious aim of CEAS to create a “common area of protection and solidarity” could not go far. The legislative contribution at the supranational level did not translate into reality on ground. It still remains just on paper. The high numbers of arrivals in EU was not the only explanation of the failure of the CEAS. Indeed it was largely influenced by improper and insufficient responses to address the migratory challenge effectively. Notably, 2015 and following year has demonstrated that even if the public administrations working sufficiently it might still be devastated by a high number of asylum applicants. The questions whether the TPD would successful address above-mentioned difficulties I would say no. Indeed, one of major reason why it was never triggered is largely influenced by unwillingness of member states. One might argue that, its activation would ease the burden of the Union while dealing the migratory pressure since 2015. However, the fact that the EU could not relocate the relatively small number of 160,

---

<sup>154</sup> Answer given by Mr Avramopoulos on behalf of the Commission see:

[http://www.europarl.europa.eu/meetdocs/2014\\_2019/documents/libe/dv/10\\_e\\_008507\\_2014\\_answer/10\\_e\\_008507\\_2014\\_answer\\_en.pdf](http://www.europarl.europa.eu/meetdocs/2014_2019/documents/libe/dv/10_e_008507_2014_answer/10_e_008507_2014_answer_en.pdf)

<sup>155</sup> Study on “The Implementation of the Common European Asylum System”, Directorate General for Internal Policies, Policy Department C: Citizens’ Rights and Constitutional Affairs Civil Liberties, Justice and Home Affairs, Study for the LIBE Committee, 2016, pg.92 [http://www.europarl.europa.eu/cmsdata/102736/IPOL\\_STU\(2016\)556953\\_EN.pdf](http://www.europarl.europa.eu/cmsdata/102736/IPOL_STU(2016)556953_EN.pdf)

<sup>156</sup> Ibid, 92, 96

<sup>157</sup> Hemme Battjes, Evelien Brouwer, Lieneke Slingenberg and Thomas Spijkerboer, “The Crisis of European Refugee Law: Lessons from Lake Success”, 2016, pg.15-16 <http://christenjuristen.nl/wp-content/uploads/2016/05/H.-Battjes-E.-Brouwer-L.-Slingenberg-T.-Spijkerboer-The-Crisis-of-European-Refugee-Law.pdf>

<sup>158</sup> Note: The Interior ministers of Italy Angelino Alfano and Thomas de Maiziere requested the vice-president Frans Timmermans and Dimitris Avramopoulos the commissioner to amend the Dublin system and the CEAS in general. Joint letter by Ministers Alfano and de Maizière and a German-Italian non-paper on "Save Schengen/Beyond Dublin" accessed at: <http://data.consilium.europa.eu/doc/document/ST-6797-2016-INIT/en/pdf> on 15.03.2016.

000 persons in need of protection, it leaves me with the only conclusion that the TPD will not be triggered in future or at least it will not have the successful outcome.

## 1.4 The European Agenda on Migration and the Introduction of the Emergency Relocation Mechanism

*“It is now time for a fresh approach in the way we work together”*<sup>159</sup>

First Vice President, Franz Timmermans

In the statement of the special council meeting held on 23<sup>rd</sup> of April of 2015, the situation in the Mediterranean was classified as being a ‘tragedy’. The Syrian Conflict strengthens the already existing pressures on the European borders.<sup>160</sup> The statement of the Council reads important promises and solutions on the prevention of further loss of life at sea by mobilizing all efforts of MS and encouraging cooperation with the countries of origin or/and transit.<sup>161</sup>

The deadly practices occurring in the Mediterranean Sea in April 2015, illustrated that the EU had evident shortcomings in the area of migration law, which led to a more effective response to the crisis. The new measures of migration were required to be enforceable, as the preexisting laws were inadequate in addressing the extent of the migration crisis.<sup>162</sup> As a result of new arrivals the concepts of Migration, asylum policy, Border management and even free movement of EU citizens was seriously questioned.<sup>163</sup>

---

<sup>159</sup> “Commission makes progress on a European Agenda on Migration”, The Commission Press Release, 4 March 2015 [http://europa.eu/rapid/press-release\\_IP-15-4545\\_en.htm](http://europa.eu/rapid/press-release_IP-15-4545_en.htm)

<sup>160</sup> See “The EU and the Migration Crisis”, European Commission”, <http://publications.europa.eu/webpub/com/factsheets/migration-crisis/en/#what-is-refugee-crisis>

<sup>161</sup> “Special meeting of the European Council– statement”, European Council, Council of the European Union, 23 April 2015 <http://www.consilium.europa.eu/en/press/press-releases/2015/04/23/special-euco-statement/>

<sup>162</sup> Jelena von Helldorff, “The EU Migration Dilemma”, pg.2

<sup>163</sup> “On the Delivery of the European Agenda on Migration”, Communication from the Commission to the European Parliament, the Council, The European Economic and Social Committee of the Regions, European Commission, Brussels, 27.9.2017 COM(2017) 558 final, pg.1



The Commission stated that: “The migration crisis ... *has also revealed much about the structural limitations of EU migration policy and the tools at its disposal*”<sup>164</sup>. The message of the Commission provided that the EU required common, strong asylum policies to overcome the crisis.<sup>165</sup> Consequently, on 20<sup>th</sup> of April 2015, the Commission introduced its 'Ten point action plan on migration'. In May 2015, the Commission set out an extensive European Agenda on Migration to address the urgent challenges and the structural difficulties of the existing EU acquis and policies.<sup>166</sup> This Agenda was complemented by the EU Action Plan against Migrant Smuggling in May 2015.

The EU's solution to addressing the dangerous voyages across the Mediterranean Sea was found in the following immediate measures including: saving lives at sea; addressing the problem of smuggler networks; cooperation with third states; as well as providing relocation/resettlement and assisting frontline states via the establishment of hotspots amongst others. The Agenda put forward a set of ‘pillars’ of action, which was to guide the common union migration policy in the ‘medium term’<sup>167</sup>, including 1) **Border management** to stop deadly practices and secure external borders 2) the **Union's duty to enhance the common asylum policy** by providing timely processing of application and adequate reception facilities 3) **Hampering the illegal migration** by addressing the root causes of irregular arrivals 4) **A new policy on legal migration** by modernizing the visa policy and providing affective integration.<sup>168</sup> The Commission underlined that these policies would be successful only in the short and medium term. Consequently, other areas were announced to be addressed as achieving long term solutions in tackling migration, including: the finalisation of the Common European Asylum System, A shared management of the European border and a new model for immigration.<sup>169</sup>

The Agenda on Migration on the basis of material and territorial scope can be divided into three main groups.<sup>170</sup> The first group involved measures to be undertaken to resolve the human tragedy in the Mediterranean Sea.<sup>171</sup> The aim of the second group was to unite member states in their efforts to ensure effective fulfillment of international values and responsibilities to secure external borders with a primary objective of assuring

---

<sup>164</sup> “A European Agenda on Migration, pg.6

<sup>165</sup> Ibid,

<sup>166</sup> Commission Communication “On the Delivery of the European Agenda on Migration”, pg.1

<sup>167</sup> Sergio Carrera, Steven Blockmans, Daniel Gros, Elspeth Guild, “The EU's Response to the Refugee Crisis Taking Stock and Setting Policy Priorities”, pg. 18

<sup>168</sup> European Agenda

<sup>169</sup> Ibid, pg.17-18

<sup>170</sup> N. B. Selanec, “A Critique of EU Refugee Crisis Management: On Law, Policy and Decentralisation” Croatian Yearbook of European Law and Policy, 2015, p.76

<sup>171</sup> Agenda on Migration, 2015, p.3



humanitarian aid.<sup>172</sup> The last group aims to strengthen and update existing EU asylum policies.<sup>173</sup> These measures included an EU-wide relocation quota mechanism and resettlement program, amendment of Dublin regulation and effective Common European Asylum System (CEAS) rules as well as disassembling smuggling networks and combating trafficking.<sup>174</sup>

The relocation mechanism has an important role in the Agenda, to release frontline member states from high migratory pressure, it was decided those EU agencies: EASO, Frontex and Europol would jointly contribute towards the identification and registration process of asylum seekers.<sup>175</sup> The Agenda also ensured technical guidelines in the determination of asylum seekers and the number in which host member states would receive. To achieve a balance and equal distribution, a so-called ‘distribution key’ was established and built on the following criteria: GDP, size of population, unemployment rate and past numbers of asylum seekers and of resettled refugees.<sup>176</sup>

An important strand of the agenda is the return policy of rejected asylum applicants and of those individuals termed ‘irregular migrants.’ This term intends to distinguish individuals from those considered outside the scope of international protection established by EU.<sup>177</sup> The agenda clearly prioritizes the need for swift return policy; it highlights important issues related with the security, enhanced role of Frontex and creation of the European Coast Guard. Moreover, it calls for more efforts for successful cooperation with third states with the aim to regain control over its border and migratory flow, by returning new-comers back to their states or to third states.<sup>178</sup> Hence, the need of the list of safe states was required.<sup>179</sup> The proposal of timely processing of unfounded applications was claimed to be a “*more effective approach to abuse*” as the idea strengthened the concept of ‘safe third country’

---

<sup>172</sup> . B. Selanec, “A Critique of EU Refugee Crisis Management: On Law, Policy and Decentralisation”, pg.76

<sup>173</sup> Ibid,

<sup>174</sup> [http://www.europarl.europa.eu/RegData/etudes/PERI/2017/600414/IPOL\\_PERI\(2017\)600414\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/PERI/2017/600414/IPOL_PERI(2017)600414_EN.pdf) 9-10

<sup>175</sup> Maarten D. Heijer, Jorrit Rijpma, Thomas Spikerboer, “Coercion, Prohibition, and the Great Expectations: The Continuing Failure of the Commons European Asylum System”, Common Market Law Review, Kluwer Law International, 2016, pg.628 [http://thomasspijkerboer.eu/wp-content/uploads/2016/03/COLA-53-3\\_Den-Heijer-Rijpma-Spijkerboer\\_Offprint.pdf](http://thomasspijkerboer.eu/wp-content/uploads/2016/03/COLA-53-3_Den-Heijer-Rijpma-Spijkerboer_Offprint.pdf)

<sup>176</sup> “Migration and Asylum: a challenge for Europe”, Factsheet on European Union, European Parliament, 2018, pg.9-10 [http://www.europarl.europa.eu/RegData/etudes/PERI/2017/600414/IPOL\\_PERI\(2017\)600414\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/PERI/2017/600414/IPOL_PERI(2017)600414_EN.pdf)

<sup>177</sup> Study on “Implementation of the 2015 Council Decisions establishing provisional measures in the area of international protection for the benefit of Italy and of Greece, Directorate General for Internal Policies”, pg.45

<sup>178</sup> Report on “Trapped in Greece: One Year after the EU-Turkey agreement”, Spanish Refugee Aid Commission, 2017, pg.9 [https://www.cear.es/wp-content/uploads/2017/06/ATRAPADOS-EN-GRECIA\\_en\\_ok.pdf](https://www.cear.es/wp-content/uploads/2017/06/ATRAPADOS-EN-GRECIA_en_ok.pdf) pg.7

<sup>179</sup> See: <http://www.statewatch.org/news/2015/jun/eu-AVRAMOPOULOS-migration-letter-to-eu-ministers.pdf>

aiding in the returning of individuals originating from ‘safe’ countries.<sup>180</sup> As a result, the cooperation with Turkey was prioritized, providing an example of better and successful cooperation.

Indeed, The European Agenda appears rather vague about the need for structural changes with regard to the distributing the responsibility within the Union. The agenda highlights the failure of Dublin system, but still focuses on greater contribution of more resources to support its successful implementation. For these reasons it can be inferred that The European Agenda has never had a new approach and never sought to fundamental changes<sup>181</sup> rather was seeking for alternative solutions to tackle old problems which grew exponentially in 2015. Therefore, it is a new narrative to an old story, based on the solidarity of member states coming together to share the burden of a common challenge. Moreover, it remained unclear whether the agenda on migration was intending to resolve the issues related to those person not eligible for seeking asylum, but not in the position to be returned in their home states.<sup>182</sup>

## 1.5 The Dublin Rules Instead of responsibility sharing and the Challenge of Relocation Mechanism

*“Dublin did one good thing, in principle, at least: within the EU, it broke the vicious circle of responsibility denial which had been fostered by states on spurious first country of asylum arguments, and in consequence it has helped to strengthen the right to seek asylum, by entrenching the rule that the asylum seeker is entitled to a decision.”<sup>183</sup>*

Guy S. Goodwin-Gill

The rationale of the Dublin system<sup>184</sup> is to determine the first country of entrance, which is bearing the responsibility of processing the asylum claims and providing them an adequate

---

<sup>180</sup> “Common asylum system at a turning point: Refugees caught in Europe’s solidarity crisis”, Asylum Information Database, pg.49

<sup>181</sup> Ibid, 51

<sup>182</sup> Jelena von Helldorff, “The EU Migration Dilemma”, Co-funded by Europe for Citizens Programme of the European Union, pg.8 [http://eu.boell.org/sites/default/files/uploads/2015/09/the\\_eu\\_migration\\_dilemma.pdf](http://eu.boell.org/sites/default/files/uploads/2015/09/the_eu_migration_dilemma.pdf)

<sup>183</sup> Goodwin-Gill's address on 'Regulating “Irregular” Migration: International Obligations and International Responsibilities’, An International Workshop, 2015, pg.7 <http://www.kaldorcentre.unsw.edu.au/sites/default/files/GSGG-IrregularMigration-Athens.pdf>

<sup>184</sup> 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

assistance.<sup>185</sup> The Dublin mechanism is designed in a manner that heavily exerts on the frontline member states.<sup>186</sup> However, in the response to increased arrivals at EU borders in 2015, triggering the emergency relocation mechanism was considered as the temporarily suspension of existing Dublin rules.

This shortcoming of the system was exposed later in 2015, when the EU was challenged by the unprecedented migratory pressure. For maintaining the functioning of national asylum systems during migratory pressure, timely and adequate asylum processing procedures were crucial.<sup>187</sup> For instance, according to the Dublin mechanism, Greece would be responsible for processing the applications and for ensuring the wellbeing of almost one million individuals seeking safe-haven, whilst states like Germany and Sweden due to their location would be responsible for none of those applicants. Moreover, in practice, Greece and Italy were not just responsible to prepare successful applicants for transfer but also to provide necessary assistance to those who unsuccessfully lodged the application. Consequently, Greece and Italy were still responsible to solely handle the coined ‘‘bad cases’’.<sup>188</sup> As a result, the legal challenges faced by Greece and Italy, as gateway states, catalysed pre-existing issues in providing the appropriate accommodation and support to new-comers.<sup>189</sup>

Asylum advocates were continuously claiming that the Dublin mechanism would result in delays in access to protection and might put individuals at risk of being returned to Member states, which lack the capacity to provide adequate assistance to asylum seekers, in addition to the risk of being separated from their families.<sup>190</sup> In 2011 several claims were initiated in the Luxembourg and Strasbourg courts regarding the Dublin transfers, resulting in both courts requesting to suspend the Dublin transfers. The outcome of the decision of grand chamber of ECtHR in *M.S.S vs. Belgium*<sup>191</sup> revealed the human right violations thus, the

---

lodge in one of the Member States by a third-country national or a stateless person (recast), 29 June 2013, OJ L 180/31-180/59; 29.6.2013, (EU)No 604/2013, see: <http://www.refworld.org/docid/51d298f04.html>

<sup>185</sup> Susan Fratzke, ‘‘Not Adding Up: The Fading Promise of Europe’s Dublin System’’, EU:A asylum 2020 Project, Migration Policy Institution Europe, Toward 2015, pg.1

<sup>186</sup> ‘‘The Dublin System’’, Factsheet, European Commission, [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)

<sup>187</sup> Ibid,

<sup>188</sup> Policy Brief on ‘‘EU hotspots, relocation and absconded migrants in Italy. How to save Schengen within a failing Dublin system’’ Institute for European Studies, Issue 2017/03, October 2017, pg.2

<sup>189</sup> Susan Fratzke, ‘‘Not Adding Up: The Fading Promise of Europe’s Dublin System’’, pg.10

<sup>190</sup> Ibid, pg.1

<sup>191</sup> ECtHR - *M.S.S. v Belgium and Greece* [GC], Application No. 30696/09 <http://www.asylumlawdatabase.eu/en/content/ecthr-mss-v-belgium-and-greece-gc-application-no-3069609>

transfers to Greece from most member states were suspended.<sup>192</sup> The court further stated that Belgium was obliged to verify the rights of asylum seeker before returning to Greece. This means that Belgium was expected to be fully informed of the deficiencies in Greek asylum system. Notably, court reached different conclusion in *K.R.S. v the United Kingdom*.<sup>193</sup> The main distinction between these two cases is that in first case person was sent to Greece and he had experienced the deficiencies of the reception conditions, and his sue both – receiving and sending states.<sup>194</sup> The outcome of aforementioned cases give rise to an interesting question, namely, if a sending state can be found responsible for the poor reception facilities of receiving state.<sup>195</sup>

The Dublin system proves to be a difficulty for each country to individually handle the situation of mass migration. In addition to refugees who lodge their asylum claims with them, member states must also bear responsibility for asylum seekers who are physically transferred from other member states, if they originally entered the EU from that member state. It is largely the Border States who bear the brunt of responsibility as they do not possess the necessary financial means to resolve the issue, for example Greece. The international protection model does not take into consideration the circumstances of the receiving country, as the aim is to ensure the protection of human rights is paramount therefore states should be able to finance such measures.<sup>196</sup> The hierarchy of criteria for sharing the responsibility does not focus on the capacity of individual member states, which can result in the confusion and imbalance within the Union.<sup>197</sup> The challenges of the Dublin mechanism was well shown in cases of Italy and Hungary, as both states were lacking sufficient resources and capacity to handle the asylum claims and process the

---

<sup>192</sup> Note: As the ECtHR held that, Belgium's decision to send the person back to Greece amounted to inhuman and degrading treatment due to poor reception conditions and detention.

<sup>193</sup> *R.S. v. United Kingdom*, Application no. 32733/08, Council of Europe: European Court of Human Rights, 2 December 2008, <http://www.asylumlawdatabase.eu/en/content/ecthr-krs-v-united-kingdom-application-no-3273308-decision-admissibility-2-december-2008>

<sup>194</sup> Lehte Roots, "Burden Sharing and Dublin Rules – Challenges of Relocation of Asylum Seekers", Athens Journal of Law, January 2017, pg.11 <http://www.athensjournals.gr/law/2017-3-1-1-Roots.pdf>

<sup>195</sup> *ibid*

<sup>196</sup> *Ibid.* pg.9

<sup>197</sup> Final report on "Evaluation of the Dublin III Regulation DG Migration and Home Affairs", DG Migration and Home Affairs, European Commission, B-1049 Brussels, 2015, pg.11 [https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/asylum/examination-of-applicants/docs/evaluation\\_of\\_the\\_dublin\\_iii\\_regulation\\_en.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/asylum/examination-of-applicants/docs/evaluation_of_the_dublin_iii_regulation_en.pdf)

applications in a timely fashion. In some instances, states simply *de facto* stopped implementation of Dublin, which reduced its legal competence.<sup>198</sup>

Furthermore, the implementation of the Dublin system demonstrated the mistake of the EU policy makers for considering the Dublin as the ‘Cornerstone’ of union’s asylum legislation and depending the CEAS existence on it.<sup>199</sup> However, the practice revealed that shifting the burden on one state and expecting the timely assessment of all applications in addition to providing adequate reception facilities turned to be unrealistic. The solution found by EU was the interdiction of the EU emergency relocation mechanism. The relocation mechanism was considered to be a ‘move away’ from the already criticized Dublin system but<sup>200</sup> in reality, the relocation system could not be easily differentiated from the Dublin rule on the distribution of responsibility. Notably, the relocation mechanism and its implementation were still supposed to function under Dublin premises and major principles. The EU Relocation was expected to be fully implemented in this two year period, but due to flaws in its design, it could not reach its aim to significantly relieve frontline member states.<sup>201</sup> To this end, the idea behind the Relocation mechanism cannot be considered to be the alternative to Dublin III; rather<sup>202</sup> the relocation scheme in addition to the ‘hotspot’ approach complements the Dublin regime but does not replace it.<sup>203</sup>

To summarize, the Dublin III Regulation is founded upon the misconception that Member States are able to provide the same quality of protection.<sup>204</sup> One issue evident in this burden, was that not all member states are experiencing the same economic circumstances and secondly, that not all national asylum systems were adequately functioning. In such circumstances it’s possible that union members can be held responsible for human right violations of one another.

---

<sup>198</sup> “The Dublin System”, Factsheet, European Commission

<sup>199</sup> Final report on “Evaluation of the Dublin III Regulation DG Migration and Home Affairs”, pg.19

<sup>200</sup> Sergio Carrera, Elspeth Guild, “Can the new refugee relocation system work? Perils in the Dublin logic and flawed reception conditions in the EU”, CEPS Policy Brief, 2015, pg.1

[http://aei.pitt.edu/67888/1/SCandEG\\_RefugeeRelocationProgramme\\_0.pdf](http://aei.pitt.edu/67888/1/SCandEG_RefugeeRelocationProgramme_0.pdf)

<sup>201</sup> Policy Brief on “EU hotspots, relocation and absconded migrants in Italy. How to save Schengen within a failing Dublin system”, pg.2

<sup>202</sup> Final report on “Evaluation of the Dublin III Regulation DG Migration and Home Affairs”, pg.15

<sup>203</sup>

[https://www.ies.be/files/JEI\\_Trauner\\_Asylum%20policy%20the%20EU%20s%20crises%20and%20the%20looming%20policy%20regime%20failure.pdf](https://www.ies.be/files/JEI_Trauner_Asylum%20policy%20the%20EU%20s%20crises%20and%20the%20looming%20policy%20regime%20failure.pdf) 322

<sup>204</sup> Florian Trauner, “Asylum policy: the EU’s ‘crises’ and the looming policy regime failure”, Journal of European Integration VOL. 38, NO. 3, Routledge Taylor & Francis Group, 2016, pg.315

[https://www.ies.be/files/JEI\\_Trauner\\_Asylum%20policy%20the%20EU%20s%20crises%20and%20the%20looming%20policy%20regime%20failure.pdf](https://www.ies.be/files/JEI_Trauner_Asylum%20policy%20the%20EU%20s%20crises%20and%20the%20looming%20policy%20regime%20failure.pdf)

The aim of relocation mechanism to assist the beneficiary member states and provide protection to asylum seekers could not have translated in the reality. The reason is behind the logic of the Dublin system which imposes burden on frontline states to examine/assess the applications of asylum seekers, to host and provide them with an adequate protection or to send them back. In addition, Dublin rules imply obligation of the gateway states to control the external and internal borders of the Union. This means that when Italy and Greece are dealing with asylum seekers they have duties on both - national and supranational level. Moreover, the Dublin system is deep rooted in the CEAS and states were frequently relying on it. Furthermore, as relocation was a suspension of Dublin rules for limited time period, it hampered the efficient implementation of the relocation mechanism; indeed, there was need of re-thinking a whole Dublin system in a comprehensive manner.

## 1.6 The Legal context of the Hotspot Approach in managing the migratory flow

One of the major proposals by agenda on migration was to set up a new ‘Hotspot’ approach.<sup>205</sup> It was expected to prevent the illegal migration *inter alia* through regaining authority over the EU external border. Hence, establishment of the hotspots was linked with Europeanization of the EU borders. The Commission has declared some parts of EU external borders as ‘hotspots’. Notably, the Commission was not precise on the criteria’s that would activate the designation; it would obviously trigger a ‘hotspot approach’.<sup>206</sup>

The Agenda Does not define a ‘hotspot’, instead it explains how the ‘hotspot approach is to be applied.’<sup>207</sup> From begging ‘Hotspot’ and later ‘hotspot approach’ make it evident the Commission’s intention was to have a ‘highly flexible approach’.<sup>208</sup> The relocation scheme in addition to the ‘hotspot’ approach complements the Dublin regime but does not replace it. The conceptual framework of the project constitutes a second-order change with implied

---

<sup>205</sup> European agenda on Migration pg.6

<sup>206</sup> Bernd Kasperek, “Routes, Corridors, and Spaces of Exception: Governing Migration and Europe”, Europe at Crossroads Managing Inhospitallity, 2016, pg.10 <http://nearfuturesonline.org/routes-corridors-and-spaces-of-exception-governing-migration-and-europe/>

<sup>207</sup> Explanatory note on the “Hotspot” approach see: <http://www.statewatch.org/news/2015/jul/eu-com-hotspots.pdf>

<sup>208</sup> Bernd Kasperek, “Routes, Corridors, and Spaces of Exception: Governing Migration and Europe”, pg.11

change in instruments however no alteration of the overarching ideals or the order of priorities.<sup>209</sup>

Hotspot' according to Annex II has defined as: *"an area at the external border that is confronted with disproportionate migratory pressure"*.<sup>210</sup> Hotspot approach as an immediate response to migratory crisis<sup>211</sup> was envisaged by the Commission as a coordinated operation with various EU Agencies.<sup>212</sup> Furthermore, it referred to 'crisis' situation and makes reference to permeable borders.<sup>213</sup> The intention was to activate the system in all Member States dealing with mass influxes at the EU's external borders, such as Italy, Greece, also Hungary and Croatia as the first Member States on the Western Balkans route.<sup>214</sup> Due to its political sensitive, both of the latter countries refused to be referred as hotspot areas.<sup>215</sup>

The migration crisis did not just oblige union to sort and examine the asylum applications but it also required new important measures related to reception facilities, identification system, and referral of new-comers in addition to the return of persons not falling under necessity of international protection; Hence, 'provisional people sharing' burdens member states to put one's house in order.<sup>216</sup>

The policy ration of the "Hotspot approach" is explicitly addressed in Articles 7 and 8 of the Council Decisions, ensuring that relocation is to be carried out through "increased operational support," and may be suspended in case of an inability of a beneficiary state to

---

<sup>209</sup> Florian Trauner, "Asylum policy: the EU's 'crises' and the looming policy regime failure", pg. 322

<sup>210</sup> "Managing the refugees crisis: immediate operational, budgetary and legal measures under the European Agenda on Migration", ANNEX to the Communication from the Commission to the European Parliament, the European Council and the Council, Brussels, 23.9.2015, COM 490 final, 2015 [http://eur-lex.europa.eu/resource.html?uri=cellar:305ccf53-61e2-11e5-afb1-01aa75ed71a1.0019.03/DOC\\_5&format=HTML&lang=EN&parentUrn=COM:2015:490:FIN](http://eur-lex.europa.eu/resource.html?uri=cellar:305ccf53-61e2-11e5-afb1-01aa75ed71a1.0019.03/DOC_5&format=HTML&lang=EN&parentUrn=COM:2015:490:FIN)

<sup>211</sup> Special Report, "EU response to the refugee crisis: the 'hotspot' approach", European Court of Auditors, 2017, pg.14 <http://www.refworld.org/docid/5a65bf4a4.html>

<sup>212</sup> "The Hotspot Approach to Managing Exceptional Migratory Flows" [https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/background-information/docs/2\\_hotspots\\_en.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/background-information/docs/2_hotspots_en.pdf)

<sup>213</sup> "Hotspot, Rights Denied: The lack of a legal framework is threatening the rights of migrants reaching the Italian shore", Oxfam Briefing Paper, May, 2016, pg.4 [https://www.oxfam.org/sites/www.oxfam.org/files/file\\_attachments/bp-hotspots-migrants-italy-220616-en.pdf](https://www.oxfam.org/sites/www.oxfam.org/files/file_attachments/bp-hotspots-migrants-italy-220616-en.pdf)

<sup>214</sup> "Migratory Map", European Border and Coast Guard Agency, 2018, see: <https://frontex.europa.eu/along-eu-borders/migratory-map/>

<sup>215</sup> Nika Bačić Selanec, "A Critique of EU Refugee Crisis Management: On Law, Policy and Decentralisation", pg.79

<sup>216</sup> "Fundamental Rights and the EU Hotspot Approach", Danish Refugee COUCNIL, 2017, pg.1 [https://drc.ngo/media/4051855/fundamental-rights\\_web.pdf](https://drc.ngo/media/4051855/fundamental-rights_web.pdf)



comply with its “Hotspot roadmap”.<sup>217</sup> Even though none of the council decisions clearly make reference to Hotspots, the provisions refer to them by providing ‘*operational support to Italy and Greece*.’ The council decisions oblige member states to strengthen the operational support in cooperation with both beneficiary states in area of international protection; these were expected to be achieved by participation in various activities organized by EU agencies, in general by providing national experts. Notably, such inter-agency cooperation lies at the heart of the hotspot notion.<sup>218</sup>

The call for “complementary *measures to be taken by Italy and Greece*” was demonstrating above mention. This consists of Italy and Greece obligation to adopt roadmaps which would cover all those sufficient measures related to reception conditions, the efficiency of the system amongst others.<sup>219</sup> To this end, Hotspot as a mechanism of solidarity<sup>220</sup> and as a model of operational assistance<sup>221</sup> seeks to determine between those individuals falling under eligible international protection and those who are not. This was recognized during the Council Meeting in 2015.<sup>222</sup> Thus, the difference can be seen on one hand as a divide between transit and relocation and refusal and deportation on another hand.<sup>223</sup> According to the research project *Documenting the Humanitarian Migration Crisis in the Mediterranean*, the hotspots instead of being functioning as facilitating transit and protection for new-comers were in fact, mainly characterized as operational mechanism of detention and denial.<sup>224</sup>

The provisional measures were supposed to focus on ‘area of international protection’, but instead, the Council provided migration-management oriented measures. Thus, those activities provided by EU agencies exceed the relocation procedure, as the measures

---

<sup>217</sup> Council Decisions 2015/1523 and 2015/1601

<sup>218</sup> Evangelia Tsourdi, “Bottom-up Salvation? From Practical Cooperation towards Joint Implementation through the European Asylum Support Office”, *European Papers - A Journal on Law and Integration*, Vol. 1, No 3, 2016, pg.1017-18

<sup>219</sup> Article 8 (1) Council Decisions 2015/1523 and 2015/1601

<sup>220</sup> “Improving the Responses to the Migration and Refugee Crisis in Europe”, Vision European Summit, Calouste Gulbenkian Foundation, 2016 pg.21 <http://bruegel.org/wp-content/uploads/2017/02/VisionEurope%E2%80%93PolicyPapersweb.pdf>

<sup>221</sup> A study on “The implementation of the hotspots in Italy and Greece”, the European Council for Refugees and Exiles (ECRE), 2016, pg.1 <https://reliefweb.int/sites/reliefweb.int/files/resources/HOTSPOTS-Report-5.12.2016..pdf>

<sup>222</sup> Conclusions on European Council meeting (25 and 26 June 2015), European Council, Brussels, 26 June 2015 (OR. en) <http://www.consilium.europa.eu/media/21717/euco-conclusions-25-26-june-2015.pdf>

<sup>223</sup> Leonie Ansems de Vries, Sergio Carrera, Elspeth Guild, “Documenting the Migration Crisis in the Mediterranean Spaces of Transit, Migration Management and Migrant Agency”, *The CEPS Paper in Liberty and Security in Europe* No. 94, 2016, pg. 4 <https://www.ceps.eu/system/files/LSE%20No%2094%20DocumentingMigration.pdf>

<sup>224</sup> *ibid*



include the identification stage procedures and continuing with potential relocation, the return or channeling to the national asylum rules.<sup>225</sup> This might be understandable first because there was no other legal instrument extending on collective interagency approach, second, 78(3) TFEU<sup>226</sup> ensures provisional measures, thus, it was not beyond the aim of article 78 TFEU.

The hotspot approach in context of the EU agencies means the intervention in an organized and harmonized manner through the Migration Management Support Teams (MMST). This intervention was largely depended on assistance of union states, as they were responsible for ensuring the supply of personnel and equipment in hotspots. For successful functioning of hotspots the participation of member states' was considered crucial. Each MS was requested and expected to help Greece and Italy by sending experts, officials, relevant materials amongst other.<sup>227</sup> The outcome of expected solidarity has failed. For instance, in 2016, member states only effort to send 70 translators in hotspot areas while the real demand was 400. One another example was requested asylum officials, from expected 475 only 94 were sent.<sup>228</sup>

The 'Achilles heel' of the Hotspot approach is its dependence on reception and Asylum capacities of the member states in question. Commission in its communication on managing the refugee crisis outlined the importance of adequate and sufficient reception conditions are prerequisite for well-functioning of hotspot approach, and they are falling under member states responsibility. Notably, successful functioning of reception conditions is precondition for relocation as well.<sup>229</sup>

Hotspot approach resembles relocation schemes in its operation suffered from lack of efficiency and delays. In January of 2016, three hotspots – *Lampedusa* and *Trapani* in Italy and *Lesvos* in Greece were operational from all eleven.<sup>230</sup> Contrary to relocation mechanism, the hotspot approach was not set up by EU secondary law rather it was created by Union institutions as an approach thus demonstrates a reshaping of existing legal

---

<sup>225</sup> Evangelia Tsourdi, "Bottom-up Salvation? From Practical Cooperation towards Joint Implementation through the European Asylum Support Office" pg.22

<sup>226</sup> Note: provisional measures for the benefit of Member States faced "with an emergency situation characterized by a sudden inflow of nationals of third countries".

<sup>227</sup> "Improving the Responses to the Migration and Refugee Crisis in Europe", pg.21

<sup>228</sup> Ibid, Footnote 8

<sup>229</sup> Sergio Carrera, Leonhard den Hertog, "A European Border and Coast Guard: What's in a name?", The CEPS Paper in Liberty and Security in Europe No. 88, 2016, pg. 11

<https://www.ceps.eu/system/files/LSE%20No%2088%20SC%20and%20LdH%20EBCG.pdf>

<sup>230</sup> "Implementing the European Agenda on Migration: Progress Reports on Greece, Italy and the Western Balkans", Press release, European Commission [http://europa.eu/rapid/press-release\\_IP-15-6324\\_en.htm](http://europa.eu/rapid/press-release_IP-15-6324_en.htm)

instruments.<sup>231</sup> Nevertheless, the absence of concrete legal instruments undermines the effective functioning of the hotspot approach through its ambiguity, as various key players do not undertake measures corresponding with their responsibilities.<sup>232</sup>

The final outcome of hotspots was expected to correspond with the main objectives of this approach, therefore, the identification and registration procedures were supposed to be completely fulfilled. The importance of registration is obvious from EU Commission's perspective, emphasizing the principle of "no registration, no rights".<sup>233</sup> This also follows the logic of the old Dublin rules where asylum seekers were supposed to register or fingerprint in the state in which they first entered otherwise they would not satisfy requirements to be eligible candidates in need of international protection.<sup>234</sup>

Both Hotspots and relocation schemes as tools of EU to address challenges caused by massive influx of new-comers were intended to be preciously pragmatic and customized approach. In fact, the situation developed into dramatic scenario<sup>235</sup> for the reluctance and unwillingness of member states.

### 1.6.1 The Legal framework of Hotspot Approach

The union's initial response to the migration influx was seen in the establishing of hotspots in Italy and Greece, with that relevant policy framework administrating the functioning of these hotspots were provided in an unofficial 'explanatory note.'<sup>236</sup> The principles of which were also ensured in an annex of the 29<sup>th</sup> September 2015.<sup>237</sup> The note aimed at implementing a result-oriented relocation programme under article 78(3) TFEU with a strong and efficient return policy.<sup>238</sup>

---

<sup>231</sup> Federico Casolari, "The EU's Hotspot Approach to Managing the Migration Crisis: A Blind Spot for International Responsibility?", *The Italian Yearbook of International Law*, Vol. 25, 2015, pg.6

<sup>232</sup> Ibid, 7

<sup>233</sup> "European Council Conclusions on migration", European Council, Council of the European Union, 18 February 2016, <http://www.consilium.europa.eu/en/press/press-releases/2016/02/19/euco-conclusions/>

<sup>234</sup> Sergio Carrera, Leonhard den Hertog, "A European Border and Coast Guard: What's in a name?", pg.8

<sup>235</sup> Federico Casolari, "The EU's Hotspot Approach to Managing the Migration Crisis: A Blind Spot for International Responsibility?" pg.2

<sup>236</sup> It was sent by Commissioner on 15<sup>th</sup> of July 2015 to the Justice and Home Affairs Minister see: Explanatory note <http://www.statewatch.org/news/2015/jul/eu-com-hotspots.pdf>

<sup>237</sup> "Managing the refugees crisis: immediate operational, budgetary and legal measures under the European Agenda on Migration" [http://europa.eu/rapid/press-release\\_IP-15-5700\\_en.htm](http://europa.eu/rapid/press-release_IP-15-5700_en.htm)

<sup>238</sup> See <http://www.statewatch.org/news/2015/jul/eu-com-commissioner-letter.pdf>

Beyond quite vague policy framework neither precise and comprehensive legal definition nor a concrete legal framework on EU level was adopted to regulate hotspots or work of MMSTs. Notably, work of EASO and Frontex was arranged through the respective regulations on these two agencies.<sup>239</sup> According to article 8 of Frontex regulation, it was authorized to find support to member states facing a serious pressure by the deployment of its experts in national authorities in question.<sup>240</sup> Likewise, according to EASO regulation, Asylum Support Teams are set up by request of MS when its ‘‘ *subject to particular pressure*’’,<sup>241</sup> Notably, according to relocation decisions article 7 and 8 ‘‘*Member States shall increase their operational support in cooperation with Italy and Greece in the area of international protection through relevant activities coordinated by EASO, Frontex and other relevant Agencies*’’

One of major commitment by union to respond the refugee crisis was the set-up of Hotspots in Italy and Greece. Hotspots in respective states were framed hand in hand with temporarily relocation mechanism with 160 000 asylum seekers.<sup>242</sup> The recent Italian and Greek laws are referring to hotspots but the concrete definition of it is absence. Thus, hotspot approach is regulated by respective state’s national laws and by CEAS. According to the Greek and Italian laws hotspot approach can be understood as consisting of three factors: 1) physical sites 2) working method 3) a filtering mechanism.<sup>243</sup> Hotspots as physical sites imply procedures related with registration and identification, second, hotspots as a working method are allowing EU agencies to assist member state’s competent authorities and third, Hotspot act as filtering mechanism when addressing issues related to identification, registration of new-comers into an asylum or return procedures.<sup>244</sup>

After 20 March, the Hotspot procedure has been “adapted” to the EU-Turkey Deal. Despite its dubious legal nature, the major interest in screening and timely transfers was replaced

---

<sup>239</sup> Study on “On the frontline: the hotspot approach to managing migration”, Directorate General for Internal Policies, Policy Department C: Citizens’ Rights and Constitutional Affairs Civil Liberties, Justice and Home Affairs, Study for the LIBE Committee, 2016, pg.29  
[http://www.europarl.europa.eu/RegData/etudes/STUD/2016/556942/IPOL\\_STU%282016%29556942\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/556942/IPOL_STU%282016%29556942_EN.pdf)

<sup>240</sup> Article 8, Regulation (EU) No 1168/2011 of the European Parliament and of the Council of 25 October 2011 amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, 22 November 2011, OJ L. 304/1-304/7; 22.11.2011, (EU)No 1168/2011

<sup>241</sup> Recital 13, Regulation No 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office, 19 May 2010, OJ L.132/11-132/28; 29.5.2010, (EU)No 439/2010, see:  
<http://www.refworld.org/docid/4c075a202.html>

<sup>242</sup> Sergio Carrera, Leonhard den Hertog, “A European Border and Coast Guard: What’s in a name?”, pg.8

<sup>243</sup> “Fundamental Rights and the EU Hotspot Approach”, pg.9

<sup>244</sup> *ibid*

by the objective of implementing returns in Turkey. This established a clear difference between pre- and post-20 March arrivals. The issue whether the relocation would be accessible for individuals who arrived after 20 March was uncertain. The Commission stated that those migrants arriving after 20 March would not benefit from Relocation scheme. Consequently, the Asylum Service considers the 20 March as the “cut of date for relocation”. This is in line with the EU-Turkey Deal, but not in conformity with the Relocation Decisions which do not confine eligibility to individuals who crossed EU borders before 20 March.<sup>245</sup>

To conclude, there has been strong criticism undermining the effectiveness of the hotspot approach. The design of the approach is often criticized due to the large extent of pressure placed on particular member states and the poor relocation rates which proves to be a disincentive to ‘on-the-ground implementation’. The hotspots approach was a policy measure drawn to target the emergency in which frontline states faced as a result of their geographical location, and to ensure order in the management of migration.<sup>246</sup>

The effectiveness of the hotspots would largely be depended on whether the refugees are provided with adequate assistance to get to safe Europe. Arguably, the efficiency of Hotspots in ending the irregular cross border would be significantly influenced if complementary policies for ‘non eligible’ candidates would be in place. To this end, for successful implementation of EU external borders it would be crucial to revise and reconsider the inconsistent migratory policies of member states with the special focus on establishing different legal routes.<sup>247</sup>

## 1.7 EU-Turkey deal and its implications for Relocation and Resettlement

*“Whether the success or failure of a European Policies depends on one single foreign leader is in itself worrying, it shows there is not embeddedness of a concrete long term policy”*<sup>248</sup>

The Prime Minister of Malta – Joseph Muscat

---

<sup>245</sup>

By Catharina Ziebritzki, Max Planck Institute for Comparative Public Law and International Law

<sup>246</sup> Study on “On the frontline: the hotspot approach to managing migration”, pg.26

<sup>247</sup> Marie Walter-Franke, “External EU Hotspots: The cat keeps coming back”, Jacques Delors Institut <http://www.delorsinstitut.de/en/all-publications/external-eu-hotspots-the-cat-keeps-coming-back/>

<sup>248</sup> Live stream from Palazzo Vecchio, “The State of the Union “- Afternoon session II, European University Institute <https://www.youtube.com/watch?v=pp4AZkZVa1Q>

The crisis of 2015 encouraged the Union to enhance the cooperation with third states, as the intra-distribution mechanism was developing at very slow pace whilst the number of arrivals was increasing due to the endless humanitarian disaster in the Middle East and especially in Syria.<sup>249</sup> Hence, on 15<sup>th</sup> of October 2015, Turkey and the EU reached consensus over the joint EU-Turkey Action Plan. To put it in simple, the aim of the EU was to provide Syrians with temporarily protection and manage the migratory pressure through the tight cooperation with Turkey.<sup>250</sup> On 18<sup>th</sup> of March 2016, the EU-Turkey statement known as EU-Turkey deal was signed.<sup>251</sup> Under the EU-Turkey Statement, the Commission adopted a proposal on 21 March to make 54,000 places not yet allocated, out of the 160,000 places foreseen for relocations, available for the purpose of resettling Syrians from Turkey to the EU.<sup>252</sup>

The Statement starts from ‘*All new irregular migrants*’ which contradicts the following sentence “*excluding any kind of collective expulsion*”.<sup>253</sup> The fact that the statement without any distinction refers to ‘all’ persons who are subject to return while crossing from Turkey to Greece, clearly contradicts International refugee law, international Human rights law and European Union law. Moreover, the ‘deal’ makes the reference to the ban on collective expulsion which is ensured by EU Charter, ECHR and Union’s Asylum Legislation.<sup>254</sup>

The deal was based on the principle ‘one-to-one mechanism’, accordingly all parties of statement were bound with responsibility, the obligation on Turkey was to readmit all

---

<sup>249</sup> İlke Toygür, Bianca Benvenuti “One year on: an assessment of the EU-Turkey statement on refugees” IAI Working Paper, Instituto Affari Internazionali, 2017

[http://www.realinstitutoelcano.org/wps/portal/rielcano\\_en/contenido?WCM\\_GLOBAL\\_CONTEXT=/elcano/elcano\\_es/zonas\\_es/demografia+y+poblacion/ari21-2017-toygur-benvenuti-one-year-on-assessment-eu-turkey-statement-refugees](http://www.realinstitutoelcano.org/wps/portal/rielcano_en/contenido?WCM_GLOBAL_CONTEXT=/elcano/elcano_es/zonas_es/demografia+y+poblacion/ari21-2017-toygur-benvenuti-one-year-on-assessment-eu-turkey-statement-refugees)

<sup>250</sup> Paivi Leino, Daniel Wyatt, “No Public Interest Whether the EU-Turkey Refugee Deal Respects EU Treaties and International Human Rights” European Law Blog, <https://europeanlawblog.eu/2018/02/28/no-public-interest-in-whether-the-eu-turkey-refugee-deal-respects-eu-treaties-and-international-human-rights/>

<sup>251</sup> “EU-Turkey statement”, European Council Council of the European Union, 18 March 2016 <http://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/>

<sup>252</sup> Laura Batalla Adam, “The Refugee Card in EU-Turkey Relations: A Necessary but Uncertain Deal”, Working Paper 14, European Parliament, 2016, pg.4 [https://www.stiftung-mercator.de/media/downloads/3\\_Publikationen/Batalla\\_Adam\\_The\\_Refugee\\_Card\\_September\\_2016.pdf](https://www.stiftung-mercator.de/media/downloads/3_Publikationen/Batalla_Adam_The_Refugee_Card_September_2016.pdf)

<sup>253</sup> See “EU-Turkey statement”

<sup>254</sup> Steve Peers, “The final EU-Turkey refugee deal: a legal assessment”, EU Law Analysis, 18 March 2016 <http://eulawanalysis.blogspot.com.mt/2016/03/the-final-euturkey-refugee-deal-legal.html>

persons illegally crossing Aegean Sea, while in response for each returned person in Turkey from Greece, the EU would bear responsibility to resettle one Syrian within the Union Borders.<sup>255</sup> The ambiguity of the statement is evident in particular in defining the timeframe of the arrangement, as it is temporary in its nature. The statement clarifies the applicability of Asylum procedure directive applicable to persons reaching the Greek islands. The text does not specify Greek waters although the directive applies to these, but not to international or Turkish waters.<sup>256</sup>

The hotspots as the tool to implement the relocation mechanism efficiently has shifted its main focus on return policies in turkey under the Turkey-EU deal.<sup>257</sup> Greece started to impose restrictions on Syrians who were arriving “irregularly”. Furthermore, the ‘punishment’ imposed by Greece was aiming at excluding those individuals to apply for international protection in Europe, even if they were fulfilling all requirements under EU law.<sup>258</sup> This means that individuals who had not tried to reach European shores would be prioritized.<sup>259</sup>

The rationale of asylum system is to provide sufficient protection to those individuals coming from unsafe nations. Whilst Asylum seekers are not allowed to choose the state of destination, there is an obligation on the receiver state not to return them in their country of origin. This definitely, is key factor to understand the Human Rights problems with regard to Turkey.<sup>260</sup> The Geneva Convention did not introduce the concept of “safe country of origin” but nowadays practice is highly recognized on international level. As a part of the European Agenda EU Commission proposed to use the list of the states considered as being safe, for assessing the asylum claims, the list of safe states included Turkey.

According to the EU-Turkey statement, most Syrians should be returned to Turkey: however, the Greek Appeal Committee has overturned the vast majority of the appeals,

---

<sup>255</sup> See “EU-Turkey statement”

<sup>256</sup> Steve Peers, “The final EU-Turkey refugee deal: a legal assessment”

<sup>257</sup> Catherina Ziebritzki, “EU Hotspot Approach and EU-Turkey Statement in Greece: Implementing a return policy? A legal perspective”, 2017 <https://www.juwiss.de/134-2017/>

<sup>258</sup> Gloria Fernández Arribas, “The EU-Turkey Agreement: A Controversial Attempt at Patching up a Major Problem”, European Forum (European Papers, Vol. 1, No 3, 2016, pg.1102  
[http://www.europeanpapers.eu/fr/system/files/pdf\\_version/EP\\_EF\\_2016\\_I\\_040\\_Gloria\\_Fernandez\\_Arribas\\_3.pdf](http://www.europeanpapers.eu/fr/system/files/pdf_version/EP_EF_2016_I_040_Gloria_Fernandez_Arribas_3.pdf)

<sup>259</sup> Gerda Heck, Sabine Hess, “Tracing the Effects of the EU-Turkey Deal The Momentum of the Multi-layered Turkish Border Regime” *Movements Journal for Critical Migration and Border Regime Studies* ,Vol. 3, Issue, 2017, pg.11  
<http://movements-journal.org/issues/05.turkey/04.heck.hess--tracing-the-effects-of-the-eu-turkey-deal.html>

<sup>260</sup> Luisa Chiodi, “The crisis of the EU solidarity: legal issues”, 17 May 2016,  
<https://www.balkanicaucaso.org/eng/Areas/Turkey/The-crisis-of-the-EU-solidarity-legal-issues-170945>

arguing that Turkey does not qualify as a ‘safe third country’, thus blocking a central element of the deal itself.<sup>261</sup> According to reports of Amnesty International thousands of Syrians were returned from Greece are in danger of being sent in Syria.<sup>262</sup>

Turkey has ratified the 1951 Geneva Convention with a limited geographical scope,<sup>263</sup> with Turkey only responsible to grant protection to those refugees that have fled a state part of the European Council. Article 33 (1) of Geneva Convention<sup>264</sup> ensures that individuals without being formally granted refugee status still benefit from *non-refoulement* principle. Furthermore, Turkey has a range of laws at a domestic level dealing with asylum seekers including the principle of *non-refoulment*.<sup>265</sup> However, it’s arguable if the national legislation works properly.<sup>266</sup>

Critics of EU-Turkey statement argue that, statement is not legally binding. The approval on supranational or national level is absent, beside its authorization by the summit meeting. The language of the statement is important, as it refers to ‘will’ instead of ‘shall’. First is typical for non-binding agreements while second is used in international agreements. *Peers* argued that as the agreement is designed as a ‘statement’ it cannot have legal power or consequences whilst it was also argued that the form of the statement itself could not be considered crucial, as the main focus had to be shifted on the ‘actual terms’ of the agreement and the specific conditions in which it was formulated.<sup>267</sup> Furthermore, Turkey was accused for infringement of human rights especially on basis of inhuman treatment of asylum seekers. Notably, before signing the EU-Turkey deal Amnesty International and Human Right Watch revealed the various infringements of human rights including: deportations and physical abuse of asylum seekers.<sup>268</sup> UNHCR and various NGOs have

---

<sup>261</sup> İlke Toygür, Bianca Benvenuti “One year on: an assessment of the EU-Turkey statement on refugees”,

<sup>262</sup> Amnesty International Report 2015/16 “The State of the World’s Human Rights”, 2016, pg.43

<https://www.amnesty.org/download/Documents/POL1025522016ENGLISH.PDF>

<sup>263</sup> “Protecting Refugees”, Human Right Watch, <https://www.hrw.org/reports/2000/turkey2/Turk009-10.htm>

<sup>264</sup> Geneva Convention 1951

<sup>265</sup> “Refugee Law and Policy: Turkey”, Library of Congress, <https://www.loc.gov/law/help/refugee-law/turkey.php>

<sup>266</sup> “Scandalous silence about the violation of human rights in Turkey”, Refugee Support Aegean, 30 August 2017 <http://rsaegean.org/scandalous-silence-about-the-violation-of-human-rights-in-turkey/> see also: “Turkey Events of 2016”, Human Right Watch, 2016

<sup>267</sup> Mauro Gatti, “The EU-Turkey Statement: A Treaty That Violates Democracy”, EJIL: Talk, 18 April 2016 <https://www.ejiltalk.org/the-eu-turkey-statement-a-treaty-that-violates-democracy-part-1-of-2/>

<sup>268</sup> “Europe’s Gatekeeper Unlawful Detention and Deportation on Refugees from Turkey”, Amnesty International, 2015, pg.10 <https://www.amnesty.org/download/Documents/EUR4430222015ENGLISH.pdf> see also Turkey: Syrians Pushed Back at the Border Closures Force Dangerous Crossings with Smugglers, Human Right Watch, 2015 <https://www.hrw.org/news/2015/11/23/turkey-syrians-pushed-back-border>



already stated that ‘returning’ asylum seekers to Turkey amounts to ‘‘mass expulsion’’ in addition to the fact, that Turkey cannot be recognized as ‘‘safe third state’’.<sup>269</sup>

The Turkey-EU deal is called ‘‘statement’’ and not an agreement has a reason. The operational framework between EU and Turkey on common solution over migratory challenges was never approved by the EU Parliament.<sup>270</sup> The legality of the EU-Turkey statement has been under scrutiny within the European Parliament and was concluded that the statement was not a legally enforceable agreement under the scope the international law.<sup>271</sup> According to article 218 TFEU participation of EU parliament in international Agreements is required.<sup>272</sup> Notably, three cases<sup>273</sup> were brought in CJEU for annulment of EU-Turkey Deal. The General Court has declared lack of jurisdiction over asylum cases in context of the EU-Turkey statement.<sup>274</sup> One might argue that the court distinguished the agreements concluded by the Union from those ones which has just been reached by decision of states and of government’s representatives.<sup>275</sup>

The successful implementation of the Relocation Decision was significantly reshaped by the closure of the Greek-Macedonian border on 9 March 2016 and following EU-Turkey statement. As the legality of EU-Turkey deal was invoked on various occasions, it means that non-legal instrument cannot amend legally binding Relocation Decisions because the idea behind this Deal was to limit the numbers of persons benefiting from relocation as

---

<sup>269</sup> Guntramb B. Wolff, “Making the EU-Turkey refugee deal work”, Brugel, <http://bruegel.org/2016/04/making-the-eu-turkey-refugee-deal-work/>

<sup>270</sup> İlke Toygür, Bianca Benvenuti “One year on: an assessment of the EU-Turkey statement on refugees”

<sup>271</sup> “The General Court declares that it lacks jurisdiction to hear and determine the actions brought by three asylum seekers against the EU-Turkey statement which seeks to resolve the migration crisis”, General Court of the European Union, Press Release, No 19/17 Luxembourg, 28 February 2017 <https://curia.europa.eu/jcms/upload/docs/application/pdf/2017-02/cp170019en.pdf>

<sup>272</sup> Mauro Gatti, “The EU-Turkey Statement: A Treaty That Violates Democracy”

<sup>273</sup> T-192/16 NF v. European Council; T-193/16 NG v. European Council; T-257/16 NM v. European Council, see <http://www.asylumlawdatabase.eu/en/content/cjeu-t-19216-nf-v-european-council-t-19316-ng-v-european-council-t-25716-nm-v-european>

<sup>274</sup> “The General Court declares that it lacks jurisdiction to hear and determine the actions brought by three asylum seekers against the EU-Turkey statement which seeks to resolve the migration crisis”, General Court of the European Union, Press Release

<sup>275</sup> Note: These cases are concerning two Pakistani and one Afghan national who arrived in Greece from Turkey. They argued that they would be subject of persecution if they would be sent back to their home states. Furthermore, as the Statement between the EU and Turkey was in force, applicants were fearing that they would be returned in turkey, hence they challenged the legality of the Deal see: <http://www.asylumlawdatabase.eu/en/content/cjeu-t-19216-nf-v-european-council-t-19316-ng-v-european-council-t-25716-nm-v-european>



only those individuals arriving in Greece from 16<sup>th</sup> of September 2015 until 20<sup>th</sup> of March were allowed to benefit under redistribution system of the EU.<sup>276</sup>

The implementation of the EU-Turkey deal is supported by the idea to distinguish between those individuals eligible for international protection and those who are not. This opened the door for crucial questions including who and on which bases would be authorized to distinguish between ‘regular’ and ‘irregular’ migrants and what procedures would be in place to assess cases on individual basis.<sup>277</sup> The statement served as additional encouragement for rapid returns of individuals in Turkey. As the returning of asylum seekers has become a usual practice, it has demonstrated the discrimination on the basis of nationality.<sup>278</sup>

To conclude, the EU-Turkey deal could not work as it was aimed to do. Firstly, its legality was heavily questioned and challenged, secondly, this deal ‘assist’ Greece for mass deportations; thirdly, the hotspots which were created to assist the relocation mechanism shifted its main purpose on detentions, the open reception centers were being turned in closed centers; these places were used for the detention of migrants and refugees. Moreover, similarly as it was under the relocation decisions here as well Greece was still left alone with the responsibility to assess persons coming from Turkey and decide their future.<sup>279</sup>

---

<sup>276</sup> Implementation of the 2015 Council Decisions establishing provisional measures in the area of international protection for the benefit of Italy and of Greece, Directorate General for Internal Policies, Policy Department C: Citizens’ Rights and Constitutional Affairs Civil Liberties, Justice and Home Affairs, Study for the LIBE Committee, 2017 pg.38 [http://www.europarl.europa.eu/RegData/etudes/STUD/2017/583132/IPOL\\_STU\(2017\)583132\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2017/583132/IPOL_STU(2017)583132_EN.pdf)

<sup>277</sup> Mission report in the Greek hotspots in Lesbos and Chios “EU-Turkey statement: the great deception”, Gisti, 2016, pg.5 [https://www.gisti.org/IMG/pdf/rapport\\_gisti\\_mission\\_gre\\_ce\\_2016\\_eng\\_complet\\_light.pdf](https://www.gisti.org/IMG/pdf/rapport_gisti_mission_gre_ce_2016_eng_complet_light.pdf)

<sup>278</sup> Maybritt Jill Alpes, Sevda Tunaboylu, Ilse van Liempt, “Human Rights Violations by Design: EU-Turkey Statement Prioritises Returns from Greece Over Access to Asylum”, Policy Brief, 29 November 2017, pg.2-3

<sup>279</sup> Report on “Trapped in Greece: One Year after the EU-Turkey agreement”, Spanish Refugee Aid Commission, 2017, pg.9 [https://www.cear.es/wp-content/uploads/2017/06/ATRAPADOS-EN-GRECIA\\_en\\_ok.pdf](https://www.cear.es/wp-content/uploads/2017/06/ATRAPADOS-EN-GRECIA_en_ok.pdf)

## 2. The Legal Basis of the Emergency Relocation Mechanism

### 2.1. Territorial and personal scope of Council Decisions

According to the first Council Decision 2015/1523 40,000 asylum seekers were supposed to be transferred from Greece 16.000 and Italy 24.000 to another MS.<sup>280</sup> The first decision was soon followed by second council decision 2015/1601 where the number of expected relocation was increased by 120, 000<sup>281</sup> and the target relocation numbers distributed as following: 50,400 asylum seekers from Greece, another 15,600 from Italy and 54,000 from Hungary during a period of two years.<sup>282</sup> However, Hungary did want to be perceived as a frontline state, therefore, rejected the status of beneficiary state.<sup>283</sup> The Council decided to only follow through with the relocation of the 66,000 applicants.<sup>284</sup> Shortly, after a solution was found for the remaining 54,000 places.

The relocation mechanism aimed to relieve both beneficiary states, therefore it proposed to amend the second relocation decision and enable 54 000 individuals to be resettled under a voluntary arrangement. This figure was to be subtracted from the relocation goal of 160 000, which appeared unrealistic in its achievement, by the completion of the scheme on 17 September 2017.<sup>285</sup>

The exponential increase in the number of new arrivals to the Greek Islands demonstrated that the proposed relocation places for Greece were inappropriate to address the needs of thousands of individuals.<sup>286</sup> The Commission in its proposal drew attention towards the complex migratory landscape of Greece and Italy which proved to be a thoroughfare for

---

<sup>280</sup> First Council Decision 2015/1523

<sup>281</sup> Second Council Decision 2015/2016

<sup>282</sup> “Refugee Crisis – Q&A on Emergency Relocation”, European Commission Press Release, 22 September 2015 [http://europa.eu/rapid/press-release\\_MEMO-15-5698\\_en.htm](http://europa.eu/rapid/press-release_MEMO-15-5698_en.htm)

<sup>283</sup> Raluca Bejan, “A 50/50 Ball: The East versus the EU in the Refugee Relocation Game”, 31 July 2017 <https://verfassungsblog.de/a-5050-ball-the-east-versus-the-eu-in-the-refugee-relocation-game/>

<sup>284</sup> Dominique Bauer , Gerg Hajzer, Dilyara Zeletdinova “Emergency relocation and the future of solidarity in the European Union – a fresh approach?”, Regional Academy on the United Nations, 2015, pg.11 [http://www.ra-un.org/uploads/4/7/5/4/47544571/emergency\\_relocation.pdf](http://www.ra-un.org/uploads/4/7/5/4/47544571/emergency_relocation.pdf)

<sup>285</sup> Ska Keller “Second Emergency Relocation Scheme”, Legislative Train Schedule, European Parliament, 2018 <http://www.europarl.europa.eu/legislative-train/theme-towards-a-new-policy-on-migration/file-2nd-emergency-relocation-scheme>

<sup>286</sup> “Common asylum system at a turning point: Refugees caught in Europe’s solidarity crisis”, Asylum Information Database (aida) pg.41

arriving individuals to enter in Europe.<sup>287</sup> The Commission also highlighted that Italy and Greece were the only member states which experienced the full extent of the emergency situation. Whilst the main emphasis was directed towards the Balkan route as the gateway to Europe, this was encapsulated by the increased numbers of arrivals at the Hungarian-Serbian border. The Commission evidently differentiates both situations on the grounds of the profile of the arriving individuals. It was considered that those persons disembarking in Italian and Greek shores were *prima facie* in need of international protection. Contrary to this, the Commission by indicating a high number of Kosovar asylum applicants considered that they were not *prima facie* in need of international protection regardless of whether they followed the Balkan Route as a major entrance to Europe.<sup>288</sup> This was evident in the case of Hungary. However in 2015 due to enhanced border control, the number of Kosovars notably decreased. Consequently, in 2015, asylum applicants from Syria and Afghanistan were the first and second largest group disembarking in Hungary.<sup>289</sup>

The Commission proposed to that relocation would only apply to individuals *prima facie* in “*clear need of international protection*”.<sup>290</sup> Such approach of Commission can be understood as placing a limitation on relocation, as it has caused confusion over the eligible relocation candidates. The proposal established another limitation by specifying that individuals should belong to those nationalities for which the EU average recognition rate exceeds 75%.<sup>291</sup> This was expected to create difficulties for those applicants originating from Western Balkans as those states cannot be considered as safe heaven.<sup>292</sup> To ease the high migratory pressure which Italy and Greece faces, the EU focused on implementing timely, rational transfers and relocation procedures of individuals which MS would largely agree are in need of international protection. This would have severe ramifications and accordingly would leave Italy and Greece in difficult situation.<sup>293</sup>

The term “applicants” used in both Council Decisions refers to persons who are subject EU relocation mechanism but whose claim has not been determined but however, are identified

---

<sup>287</sup> “Proposal for a Council Decision establishing provisional measures in the area of international protection for the benefit of Italy and Greece”, Brussels, COM(2015) 286 final 2015/125 (NLE), European Commission, 27 May 2015, pg.3

<sup>288</sup> “Common asylum system at a turning point: Refugees caught in Europe’s solidarity crisis”, pg.41

<sup>289</sup> “Bodies found dead in a truck near border, while asylum seekers flow into Hungary”, UNHCR, 28 August 2015, see: <http://bit.ly/1Kxvsya>.

<sup>290</sup> “Proposal for a Council Decision establishing provisional measures in the area of international protection for the benefit of Italy and Greece”, pg.4

<sup>291</sup> Ibid,

<sup>292</sup> Sergio Carrera, Elspeth Guild, “Can the new refugee relocation system work? Perils in the Dublin logic and flawed reception conditions in the EU”, pg.6

<sup>293</sup> “Common asylum system at a turning point: Refugees caught in Europe’s solidarity crisis”, pg.42

as persons in need of international protection.<sup>294</sup> If an applicant who is remaining in Italy and Greece did not lodge her/his application for participating in relocation mechanism, will not be transferred in another MS even if this individual otherwise,<sup>295</sup> should benefit under the Regulation 604/2013.<sup>296</sup> To this end, as both decisions refer to person in dire need of international protection It can be presumed that the whole or majority of asylum seekers will be granted refugee status or some other form of international protection.<sup>297</sup>

One significant issue with regard the quota mechanism was the limited scope of application, the proposal and introduced quotas are focusing to benefit particular union members facing the increased migratory flow and not the Union as such. One might argue, that restricted list of beneficiary state automatically reduced the number of asylum seekers otherwise eligible for relocation. Moreover, the quota system also limits the grounds for stateless persons to benefit from refugee status.<sup>298</sup>

## 2.2 First Council Decision and the introduction of the first legal framework for Relocation Mechanism

The first Council decision on 14<sup>th</sup> September determined that 40,000 asylum seekers from Italy and Greece were to participate in relocation<sup>299</sup> but did not specify the responsibility of Member states in regards to the relocation mechanism.<sup>300</sup> Notably, such distribution would be undertaken on the basis of these states' optional commitments.<sup>301</sup> This system extended to individuals seeking asylum in one of these states, which in accordance with the general procedure, the state would be obliged to process the asylum application abiding by the Dublin rules. The relocation of asylum seekers from these respective countries in such a manner deviated from the Dublin III allocation scheme. In particular circumstances, whereby asylum seekers cross the borders of Italy or Greece without seeking permission,

---

<sup>294</sup> Lukasz Stepkowski, "National Identity of a Member State in European Union Law in the Context of Relocation of Migrants", pg.117

<sup>295</sup> Kelsey L. Binder, "Cutting the Wire: A Comprehensive EU-Wide Approach to Refugee Crises", pg.1382

<sup>296</sup> Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), 29 June 2013, OJ L. 180/31-180/59; 29.6.2013, (EU)No 604/2013, see: <http://www.refworld.org/docid/51d298f04.html>

<sup>297</sup> Steve Peers, "Relocation of Asylum-Seekers in the EU: Law and Policy", EU Law Analysis, 2015  
<http://eulawanalysis.blogspot.com.mt/2015/09/relocation-of-asylum-seekers-in-eu-law.html>

<sup>298</sup> Ibid,

<sup>299</sup> "European Solidarity: A Refugee Relocation System", European Commission, [https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/background-information/docs/2\\_eu\\_solidarity\\_a\\_refugee\\_relocation\\_system\\_en.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/background-information/docs/2_eu_solidarity_a_refugee_relocation_system_en.pdf)

<sup>300</sup> Study on "Implementation of the 2015 Council Decisions establishing provisional measures in the area of international protection for the benefit of Italy and of Greece", pg.17

<sup>301</sup> Steve Peers, "Relocation of Asylum-Seekers in the EU: Law and Policy"

they would fall under the ambit of the Dublin Dn. The Dublin rules would then prioritize another MS, if these asylum seekers for example, have family members within a particular MS, hence the Dublin rules would prevail and the relocation procedures would be inapplicable.<sup>302</sup>

According to the First Council Decision, only those individuals who successfully process their asylum application in Italy or Greece (and for whom those States would generally be responsible under Dublin system) are beneficiaries of the relocation scheme.<sup>303</sup> Hence, relocation as such takes place in second instance.<sup>304</sup> As a result, the asylum seekers who could not successfully go through the identification and registration procedures are deprived of the opportunity to benefit from relocation. Another limitation imposed by both relocation decisions is the arrival date of asylum seekers, hence, according to the first relocation decision those arriving individuals who reached the shores of Italy and Greece after 15<sup>th</sup> August 2015 are potential beneficiaries of the relocation scheme<sup>305</sup>. Furthermore, the second relocation decision covers all asylum seekers arriving from 24<sup>th</sup> March 2015.<sup>306</sup> To this end, an asylum seeker is burdened to prove the date of his/her arrival.

The possibility of asylum seekers to participate in relocation procedures is of a selective nature as it applies only to certain nationalities in clear necessity of international protection, with the average recognition rate of 75%.<sup>307</sup> Notably, the recognition of persons in dire need of protection should be in conformity with the criteria's established by the 1951 Refugee convention. The nationality criterion was reinforced by the notion that it would exclude particular asylum seekers from participating in relocation, who it was believed would fail their application.<sup>308</sup> Moreover, Refugees have been excluded from a 'say' with regard to their recognition as refugees under a recognition rate of 75%.<sup>309</sup> This criterion is overly complex, with asylum seekers often arriving in the EU without documentation, proving difficult in the identification of newcomers. A nationality criterion could only be effective, if the assessment of an individual would be easily and accurately determined.<sup>310</sup> However, taking into account that the relocation decisions were applicable to only 160,000 individuals *prima facie* in need of international protection, the main burden would remain

---

<sup>302</sup> Ibid.

<sup>303</sup> Article 3, First Council Decision 2015/1523

<sup>304</sup> Luisa Chiodi, "The crisis of the EU solidarity: legal issues"

<sup>305</sup> Article 13, First Council decision 2015/1523

<sup>306</sup> Article 13, Second Council Decision 2015/2016

<sup>307</sup> "Refugee Crisis – Q&A on Emergency Relocation", European Commission Press Release

<sup>308</sup> Study on "Implementation of the 2015 Council Decisions establishing provisional measures in the area of international protection for the benefit of Italy and of Greece", pg.20

<sup>309</sup> Kelsey L. Binder, "Cutting the Wire: A Comprehensive EU-Wide Approach to Refugee Crises", pg.1381

<sup>310</sup> Study on "Implementation of the 2015 Council Decisions establishing provisional measures in the area of international protection for the benefit of Italy and of Greece", pg.20

with Italy and Greece. Under the relocation decisions both beneficiary states are responsible for processing the applications of eligible asylum seekers and also to provide adequate support for ineligible candidates while being on their territory.

Furthermore, the nationality criteria in practice while some persons arriving from Syria could be successfully approved as eligible candidates for relocation, others from Iraq or Afghanistan might be rejected from international protection.<sup>311</sup> The major difficulty is related with the general refugee recognition rate in Europe, which is very low and slightly clear among member states even in case of same nationalities coming from same states to EU. As a result, of considerably low and different recognition rates, Bahrain and the Bahamas are listed as relocation beneficiaries as there are very few candidates and the acceptance rate is high, this obviously leads us to conclusion that ‘eligibility criteria’ leaves room for arbitrary decisions and not only.<sup>312</sup>

Moreover, the increased rejections of relocation or the highly low recognition rate might not be considered as *per se* abuse but it is indicator of the deficiencies and gaps in member states’ national asylum systems.<sup>313</sup> However, it can be argued that the “nationality criteria” is in opposition of the universally recognized principle of *non-refoulement* as individuals who would most probably obtain the refugee status due to their ‘unlucky nationalities’ they are not allowed to benefit from the relocation mechanism. Hence, as all those who are not fulfilling eligibility criteria are to be sent back are at high risk that their life will be threatened. In light of this, It is surprising, how the EU when all its members are party of 1951 Geneva convention and 1967 Protocol, agreed upon the “eligibility criteria” which in particular cases will be directly translated as the breach of the principle of *non-refouement*. To this end, the slow implementation of relocations scheme largely occurred due to requirement of the 75% EU recognition rate, as in each quarter the number of ‘wrong nationalities’ was increasing.

The preamble recital 27 of Relocation Decision indicates that the assessment of applications regarding which asylum seekers will be relocated from Greece or Italy, preference should be made in favor of vulnerable applicants in the context of the EU Reception Conditions directive. This directive basically implies that Greece and Italy are empowered to make the selection. Next recital of same council decision states: “*specific account should be given to the specific qualifications and characteristics of the applicants*

---

<sup>311</sup> Heaven Crawley, “Named and shamed: EU countries are failing to share responsibility for refugees”

<sup>312</sup> *ibid*

<sup>313</sup> “Common asylum system at a turning point: Refugees caught in Europe’s solidarity crisis”, pg.49

*concerned*” including language skills, family, social or cultural ties.<sup>314</sup> Authorized officials based on the above mentioned factors are allowed to prioritise some asylum seekers over others.<sup>315</sup> nonetheless, It must be noted that these preferences are not binding, as the main text of the decision clearly emphasize that host member states should receive those eligible candidates who are nominated by Italy and Greece.<sup>316</sup> However, one might argue that preferences are important for better integration of refugees but the questions whether or not the receiving states for better implementation of the relocation mechanism should be allowed to have their own preferences is difficult to answer. Indeed, in my view, not only refugees need to ‘adapt’ with new home state but the host state and its society as well, yet the reality demonstrated that use of preferences by receiving state might be discriminatory, for instance, Poland<sup>317</sup> and Slovakia<sup>318</sup>, Cyprus<sup>319</sup> were often stating that they will accept only Christian refugees. Taking into account the fact that the Union states and their culture, traditions and standards vary, it leads me to the conclusion that allowing host states to make their own preferences while relocating asylum seekers, will impose a great limitation on an relocation mechanism.

According to Article 5 of the Council Decision, for successful implementation of the relocation scheme, mutual cooperation between sending states, receiver states and the EASO is crucial. Greece and Italy are states authorized to register, identify asylum seekers and prepare them for relocation to host states.<sup>320</sup> As a result, receiving member states must accept those asylum applicants who were chosen and approved by Italy and Greece. The receiving state is exempted from this obligation where there are reasonable grounds such as: an evident danger to their national security or public order and in circumstances where there are serious reasons for applying exclusion provisions ensured by the qualification directive.<sup>321</sup>

---

<sup>314</sup> Relocation Decision 2015/1601, Recitals 34-35; and Relocation Decision 2015/1523, Recitals 28 and 30

<sup>315</sup> Ibid

<sup>316</sup> Steve Peers, “Relocation of Asylum-Seekers in the EU: Law and Policy”

<sup>317</sup> Lidia Kelly, Pawel Sobczak, “Polish PM calls for an EU where Christianity is not censored”, The Reuters, November 9, 2017 <https://www.reuters.com/article/us-eu-poland-christianity/polish-pm-calls-for-an-eu-where-christianity-is-not-censored-idUSKBN1D92D3?il=0> see also: “Poland refuses Middle Eastern migrants”, EuroNews, 2018, <http://www.euronews.com/2018/01/02/poland-refuses-mid-east-migrants>

<sup>318</sup> Andrew Rettman, “EU states favour Christian migrants from Middle East”, euobserver, 21 August 2015 <https://euobserver.com/justice/129938>

<sup>319</sup> “Are some EU countries wrong to only want Christian refugees?”, 2015, <http://www.debatingeurope.eu/2015/09/08/are-some-eu-countries-wrong-to-only-want-christian-refugees/#.WwF-6O6FPiV>

<sup>320</sup> “Common asylum system at a turning point: Refugees caught in Europe’s solidarity crisis”, pg.49

<sup>321</sup> Recital 7 and 26 of First Council Decision 2015/1523 and Recital 7 and 32 Second Council decisions 2015/1601

Notably, the responsibility to grant international protection to asylum seekers remains with state of relocation as it's possible that member states, during conducting security checks on its territory, can refuse to grant international protection by relying on the basis national security and exclusion clause.<sup>322</sup> After the Terrorist Attacks in Europe in 2015, the demand by receiving member states to additional security checks increased due incomplete relocation requests they were receiving and inadequate security screenings carried out by Italy and Greece.<sup>323</sup>

This exception needed to be examined very carefully, in depth and on individual basis by sending states to avoid further complications, where hosting member states could use this exception to refuse from performing its obligation under relocation scheme. This evidently occurred where several member states refused to relocate asylum seekers, without any individual assessment or explanation.<sup>324</sup> For example, some Eritreans were excluded from opportunity to participate in relocation due to their military service, even if that obligatory military service was the reason of fleeing from their homelands and coming to Europe to get international protection.<sup>325</sup>

It clear the temporary relocation system relies heavily on the obligation by the two countries concerned, (Greece and Italy) to provide “structural solutions to address exceptional measures in their asylum and migration systems” and a “solid and strategic framework” for responding to the situation. And if that framework does not exist, the Commission has been entrusted to suspend the application of the Decision.<sup>326</sup>

According to the recital 30, and similarly as in Dublin system,<sup>327</sup> there is no opportunity for asylum applicants to consent to their transfer in another MS or to request the desired state of destination.<sup>328</sup> The decision only indicates responsibility of Italy and Greece to inform ‘approved’ asylum seeker about the future host member state, they are supposed to settle. Furthermore, Greece and Italy shall inform each asylum seeker about their relocation

---

<sup>322</sup> Common asylum system at a turning point: Refugees caught in Europe’s solidarity crisis”, pg.43

<sup>323</sup> Study on “Implementation of the 2015 Council Decisions establishing provisional measures in the area of international protection for the benefit of Italy and of Greece “, pg.35

<sup>324</sup> Report from the Commission to the European Parliament, the European Council and the Council, Ninth Report on Relocation and Resettlement, Brussels, COM(2017) 74 final, 8.2.2017, pg.6

<sup>325</sup> Study on “Implementation of the 2015 Council Decisions establishing provisional measures in the area of international protection for the benefit of Italy and of Greece “, pg.34

<sup>326</sup> Recital 18 Council Decision 2015/1601

<sup>327</sup> Francesco Maiani, “Hotspots and Relocation Schemes: the right therapy for the Common European Asylum System?”, EU migration and Asylum Law and Policy, 3 February 2016 <http://eumigrationlawblog.eu/hotspots-and-relocation-schemes-the-right-therapy-for-the-common-european-asylum-system/>

<sup>328</sup> Recital 18 of the First Relocation Decision 2015/1523 and Recital 23 Second Council Decision 2015/1601



decision in an accessible language which they are familiar with. Mass transfers under the relocation scheme were expected to cause serious logistical and legal obstacles, especially when such transfers were taking place against the wish of eligible relocation candidates. This was evident from the slow implementation of Relocation scheme and also from the huge experience of Dublin system.<sup>329</sup>

As asylum seekers had ‘no say’ with regard to their transfer to another state, this resulted in lack of enthusiasm on their behalf when participating in the relocation scheme. *Jacek Rowstoski* claimed that the transfers under mandatory quota are same as “building walls” as individuals are willing to enter in Germany and not Poland or Hungary.<sup>330</sup> It is true that settling in a state where an individual does not want to, might invoke the rights ensured by international human rights treaties and negatively reflect on future integration. However, this must be balanced with the number of individuals seeking the same destination as majority of applicants tries to reach the Western European countries such as Sweden and Germany.

One might argue that the absence of the consent of asylum seekers in their relocation might lead to the secondary movements. However, one should bear in mind that the relocated persons are linked with their host state and they are able to have access to their social benefits only in receiving state. Hence, the residency is linked with social security (much same as for non-EU nationals or even citizens). It would already reduce the number of persons committing secondary movements.<sup>331</sup>

The same recital specifies the applicant’s ground to seek a remedy in circumstances whereby the relocation decision breaches his/her fundamental rights. With this in mind, EU system is empowered to determine the member state in which the asylum seeker will be settled in. Interestingly, those asylum seekers, who are not chosen by Italy and Greece for relocation, have no remedy to challenge these respective countries. Notably, as vulnerable persons are considered to be prioritized in the selection process, vulnerable asylum seekers may be able to challenge sending states on the basis of non-selection, if they can prove that those already identified asylum seekers are not vulnerable.<sup>332</sup>

---

<sup>329</sup> Francesco Maiani, “Hotspots and Relocation Schemes: the right therapy for the Common European Asylum System?”

<sup>330</sup> Sergio Carrera and Daniel Gros, “No need for walls to equitably distribute the refugees”, CEPS Commentary, 25 September 2015, pg.1 <https://www.ceps.eu/system/files/SC%2BDG%20TemporaryRelocationSystem.pdf>

<sup>331</sup> Ibid, 2

<sup>332</sup> Steve Peers, “Relocation of Asylum-Seekers in the EU: Law and Policy”

According to the Preamble of the Council decision it is the responsibility of asylum seekers to remain in the state which they have been assigned. Hence, the EU imposes limitations on asylum seekers after being relocated from moving to other member states. If such movement does occur, then it is the state of relocation that bears the responsibility to take them back, hence, asylum seekers are not legally able to move within the union as provided by the normal Dublin rules. The preamble of decision also explicitly mentions secondary movement, and authorizes states to implement further measures such as national bans on entries, limits on issuing travel documents in addition to other security checks. One might argue that the prevention of secondary movements within the union signals a lack of mutual trust among member states.<sup>333</sup>

Member states are required to assist Italy and Greece, while those member states in return should provide an asylum action plan. In case of failure, the commission is authorized to suspend the decision of payment. Each member state, which transfers asylum seekers are given financial support of 6000 euro per person<sup>334</sup> whilst Greece and Italy will be given 500 euro<sup>335</sup> per person to compensate transfer fees. This support is provided by the Asylum, Migration and Integration Fund (AMIF).

## 2.3 The Second Council Decision and introduction of the compulsory Relocation Scheme

The Adoption of the second council decision is not related to an annulment, amendment or replacement of first decision, rather the Second decision follows the same basic template but consists of some key differences. As the illegal migration has increased not just in central and Eastern Mediterranean but also in Western Balkans route, the Commission proposed to increase the number of participants of the relocation schemes.<sup>336</sup> The number of expected relocation beneficiaries has increased by 120,000 in addition to those 40,000

---

<sup>333</sup> Common asylum system at a turning point: Refugees caught in Europe's solidarity crisis", pg.45

<sup>334</sup> "First measures under the European Agenda on Migration: Questions and Answers", Fact sheet, European Commission, Brussels, 27 May 2015 [http://europa.eu/rapid/press-release\\_MEMO-15-5038\\_en.htm](http://europa.eu/rapid/press-release_MEMO-15-5038_en.htm)

<sup>335</sup> "Managing The Refugee Crisis EU Financial Support to Greece", European Commission, 15 March 2017 [https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/background-information/20170321\\_factsheet\\_managing\\_refugee\\_crisis\\_eu\\_financial\\_support\\_greece\\_-\\_update\\_en.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/background-information/20170321_factsheet_managing_refugee_crisis_eu_financial_support_greece_-_update_en.pdf)

<sup>336</sup> "Refugee Crisis: European Commission takes decisive action", Press Release, European Commission [http://europa.eu/rapid/press-release\\_IP-15-5596\\_en.htm](http://europa.eu/rapid/press-release_IP-15-5596_en.htm)

although the legally valid transfers from first decision were not fully implemented.<sup>337</sup> According to the second decision 50,400 would be transferred from Greece, 15,600 from Italy and remaining 54,000 from Hungary.<sup>338</sup> Hungary refused to be even is classified as a beneficiary state of relocation,<sup>339</sup> with the 54,000 remaining places decided to be used for resettling Syrian asylum seekers under the EU-Turkey statement.<sup>340</sup>

The relocation of asylum seekers according to the second decision <sup>341</sup> binds its members in burden sharing by stipulating the number of asylum seekers to be relocated in each MS.<sup>342</sup> The Decision over obligatory relocation required qualified majority voting (QMV). While some member states voted in favor of obligatory distribution mechanism others states including Slovakia, Hungary, Romania and Czech Republic voted against.<sup>343</sup> Germany has been biggest supporter for the Commission's proposal for obligatory relocation quota. Berlin's decision to temporarily reinstate the control on its border with Austria has been could be interpreted as an 'alert,' that if member states would fail to demonstrate their solidarity, the future of Schengen would be in question.<sup>344</sup>

Member States are not entitled to reject the transferred persons (for whom they receive a lump sum of 6,000 Euro per person), except for reasons of national security or public order, to be ascertained following individual assessment. Furthermore, article 5 (9) allows member states to exclude potential eligible candidates from relocation scheme if they in any manner disobey the relocation rules and procedures.<sup>345</sup> Even if such "prevention" sounds logical for sake of swift and adequate implementation of relocation mechanism,

---

<sup>337</sup> *ibid*

<sup>338</sup> "Refugee Crisis – Q&A on Emergency Relocation", European Commission

<sup>339</sup> Raluca Bejan, "Challenging the East versus the EU in the refugee relocation game", 31 July 2017, <http://rabble.ca/blogs/bloggers/raluca-bejan/2017/07/challenging-east-versus-eu-refugee-relocation-game>

<sup>340</sup> "Commission makes immediate proposal to implement EU-Turkey agreement: 54,000 places allocated for resettlement of Syrians from Turkey", Press Release, European Commission, 21 March 2016 [http://europa.eu/rapid/press-release\\_IP-16-981\\_en.htm](http://europa.eu/rapid/press-release_IP-16-981_en.htm)

<sup>341</sup> Article 4, Second council decision 2015/1601

<sup>342</sup> Annex of the Second council decision 2015/1601

<sup>343</sup> "Court of Justice of the European Union; European Union: Challenges to Mandatory Plan to Relocate Refugees", Global Legal Monitor, 14 December 2015 <http://www.loc.gov/law/foreign-news/article/court-of-justice-of-the-european-union-european-union-challenges-to-mandatory-plan-to-relocate-refugees/>

<sup>344</sup> Nina Schick, "Mandatory redistribution quotas still off the table as EU grapples with refugee crisis", Open Europe, 14 September 2015 <https://openeurope.org.uk/today/blog/mandatory-redistribution-quotas-still-off-the-table-as-eu-grapples-with-refugee-crisis/>

<sup>345</sup> Article 5 (9) Second Council Decision 2015/1601

such provision seems “counter-productive” due to the compulsory nature of the second Council Decision.<sup>346</sup>

However, under the second decision of 22 September it was permitted to notify the Commission and the Council (within three months from the entry into force of the decision) of the temporary incapacity to participate in the relocation process, for up to 30 per cent of the assigned applicants, for duly justified reasons compatible with the fundamental values of the European Union in accordance with Article 2 of the Treaty on European Union (TEU).<sup>347</sup>

The Second council decision provides a distribution key based upon several elements including: firstly the size of the population (40%) which demonstrates the ability to receive a number of refugee; secondly the total GDP (40%) which demonstrates the economic wealth of a country and also indicates the economy’s chance of absorbing and integrating refugees; thirdly, the number of spontaneous asylum applications and the number of resettled refugees per 1 million constituents between 2010- 2014 (10%) which reflects the international protections efforts of Member states in the past; fourthly the unemployment rate (10%) indicating the capacity to integrate refugees. The allocation towards Member States was ideally mandatory, with the exception of Member States being able to refuse applicants on the grounds of national security.<sup>348</sup> Professor *Marcello De Pillipo* argued that the redistribution of asylum seekers according to this so-called distribution key is questionable, as there is no clear guidance as how these individuals will be primarily or normally relocated in any particular state. Furthermore, he claimed that potential candidates of relocation are not “postal packages” to be sent through the lottery in any state, as future integration issues should be taken into account.

According to the second council decision, the distribution key can be disregarded and member states allowed refusing to participate in relocation mechanism on basis of exceptional situation such as natural disaster. The Commission after considering the request of a member state will decide whether request does or does not satisfy the criteria. Moreover, the suspension can be granted only for 12 months. In response member states

---

<sup>346</sup> Lukasz Stepkowski, “National Identity of a Member State in European Union Law in the Context of Relocation of Migrants”, pg.121

<sup>347</sup> Bruno Nascimbene, “Refugees, the European Union and the ‘Dublin System’ The Reasons for a Crisis”, *European Papers - A Journal on Law and Integration*, Vol. 1, No 1, 2016, pg.108 See: also footnote 30

<sup>348</sup> Study on “Implementation of the 2015 Council Decisions establishing provisional measures in the area of international protection for the benefit of Italy and of Greece”, pg.7

are obliged to pay a financial contribution of 0,002% of its GDP to the AMIF.<sup>349</sup> The amount ranges from 525 euros for Bulgaria to 2.247 Euros for Luxembourg for single non-relocated person.<sup>350</sup> Furthermore, if member state experience high migratory pressure they are permitted to inform the Council and the Commission that it is not able to process 30% of the applications it was otherwise supposed to process.<sup>351</sup>

Article 13(3) of the Council Decisions is only applicable to asylum seekers who arrived in Italy and Greece from 25 September 2015 until 26 September 2017, and also applicants who arrived on the territory of those beneficiary States from 24 March 2015 onwards<sup>352</sup> As the result, the relocation scheme is still valid, and member states are bound by it even after 26<sup>th</sup> of September, 2017. The commission has clarified that if member states fail to relocate the target numbers they were assigned in the two years' period, the legal obligation will remain until they will not meet the numbers envisaged by relocation scheme.<sup>353</sup>

## 2. 4 The Commission Reports on Relocation and Resettlement – the Case Studies on Italy, Greece and Member states

*We are not dealing with a failure of the EU, but rather with a glaring failure of some governments, who don't want to take responsibility and thereby impede a joint European solution”.*<sup>354</sup>

Martin Schulz

Evident in 2015, the movement of individuals demonstrated various concerns, with an estimated 880,000 individuals reaching the EU through Italy and Greece. The Council adopted two legally binding Decisions and established a two-year timeframe for implementation of emergency relocation schemes. Hence, Relocation mechanism was a

---

<sup>349</sup> “Refugee Crisis – Q&A on Emergency Relocation”, Press Release

<sup>350</sup> Martin Wagner, Paul Baumgartner, Sonia Nižnik, “Distribution key: when, who and where to?”, International Center for Migration Policy Department, 18 September 2015, <https://www.icmpd.org/news-centre/news-detail/distribution-key-when-who-and-where-to/>

<sup>351</sup> *ibid*

<sup>352</sup> Article 13 Second Council Decision, First Council Decision 2015/1523

<sup>353</sup> “Relocation not Procrastination - ECRE’S Assessment of The Obstacles to Relocating of Asylum Seekers from Greece and Italy and its proposals For A Constitution of Relocation After September 2017”, European Council on Refugee and Exiles, Policy Note N. 07 , 2017, pg.3 <https://www.ecre.org/wp-content/uploads/2017/09/Policy-Note-07.pdf>

<sup>354</sup> “Martin Schulz calls for an EU that can tackle today’s challenges”, The Parliament, 8 September 2015 <https://www.theparliamentmagazine.eu/articles/opinion/martin-schulz-calls-eu-can-tackle-today%E2%80%99s-challenges>

major ‘tool’ to alleviate the burden that was imposed on Italy and Greece, whilst also aiming at providing the access to asylum procedures for relocated individuals.<sup>355</sup> However, the trend of migration continued throughout 2016, with only 937 persons being relocated from both beneficiary states, and only 4,555 been resettled.<sup>356</sup>

The reports on *Relocation and Resettlement* summarize the challenges faced and lessons learnt by EU in the implementation of relocation scheme.<sup>357</sup> The positive development of the relocation scheme was measured by the number of individuals eligible for relocation and whether they are effectively transferred to host states, as provided in the Council Decisions and whether all member states equally participate in the scheme with good spirit and faithful cooperation.<sup>358</sup> Additionally, by emphasizing the difficulties and progress achieved, the Commission was recommending and proposing further actions for all member states.<sup>359</sup>

According to article 8 of the Relocation Decisions, Greece and Italy have submitted to the Commission and the Council roadmaps with measures in the area of asylum.<sup>360</sup> The analysis on Commission reports on *relocation and resettlement* identifies the main priority actions which were necessary to be addressed by both beneficiary and receiving member states: including well-functioning hotspots, implementation of relocation schemes in line with Council Decisions, sufficient reception capacity, adequate return policy and guaranteeing solidarity of member states towards their responsibility of burden sharing.<sup>361</sup> The main objectives of the Commission reports sought to strengthen the EU borders and provide a sense of unity for all member states whilst providing a fair and timely distribution

---

<sup>355</sup> Communication from the Commission to The European Parliament and the Council, The protection of children in migration {SWD (2017) 129 final}, Brussels, 12.4.2017 COM (2017) 211 final, 12.4.2017, pg.11

<sup>356</sup> European Commission, Communication from the Commission to European Parliament, the European Council and the Council, First Report on Relocation and Resettlement, Brussels, COM (2016) 165, 16 March 2016, pg.2

<sup>357</sup> Report from the Commission to the European Parliament, the European Council and the Council, Second Report on Relocation and Resettlement, Brussels, COM (2016) 222, 12 April 2016, pg.2

<sup>358</sup> Report from the Commission to the European Parliament, the European Council and the Council, Tenth Report on Relocation and Resettlement, Brussels, COM(2017) 202 final, 2.3.2017, pg.2

<sup>359</sup> Second Report on Relocation and Resettlement, Brussels, COM (2016) 222, pg.3-4

<sup>360</sup> First Report on Relocation and Resettlement, Brussels, COM (2016) 165, pg.4

Note: During the relocation workshops on 1 October 2015, aforementioned roadmaps were discussed with all Union members and Dublin associated countries

of individuals amongst the union members<sup>362</sup> who would ensure the fundamental human rights of all asylum seekers would be in a line of the European and International law.

Since the first report by Commission, in one years' time some progress was achieved to push forward the implementation of relocation mechanism as the operational infrastructure to enhance the relocation was fully developed. Success was achieved in regards to asylum procedures and facilities; moreover, hotspots were established and the cooperation between member states and EU agencies was reinforced, however it did not result in significant progress on the ground. Whilst there has been some developments achieved in the implementation of relocation schemes, it did not significantly changed the overall situation.<sup>363</sup>

#### 2.4.1 The Case Study - Italy

Due to its position at the heart of the Mediterranean, Italy proves to be a major point of entrance for new-comers from Africa and the Middle East crossing the sea, mainly from Libya. In response of Italy's challenges the EU has established the Hotspot approach and Emergency EU relocation

According to the Commission's reports, during the implementation of relocation Decisions, the relocations schemes demonstrated the major difficulties faced by Italy concerning the huge influx of newcomers. Among various problems identified by the Commission reports the major challenges were 1) partly functioning Hotspots<sup>364</sup>, 2) Challenges related to an unaccompanied minor<sup>365</sup> and 3) 2) Insufficient processing capacity<sup>366</sup>,

**The first major challenge of Italy was concerning partly functioning hotspots.** Italy set up six hotspots one in Apulia and another five in Sicily, only four of these hotspots were operational.<sup>367</sup> In its amended roadmap, Italy has promised to establish an additional hotspot. Furthermore, as the existing hotspots were limited in numbers and weren't

---

<sup>361</sup> Ibid,

<sup>362</sup> Tenth Report on Relocation and Resettlement, Brussels, COM(2017) 202 final, pg.2

<sup>363</sup> Ibid,

<sup>364</sup> First Report on Relocation and Resettlement, Brussels, COM (2016) 165, pg.11

<sup>365</sup> Ibid, pg 4

<sup>366</sup> First Report on Relocation and Resettlement, Brussels, COM (2016) 165, pg.11

<sup>367</sup> Ibid,



adequately functioning, the concept of mobile hotspots was concluded.<sup>368</sup> The unsatisfactory functioning of hotspots was most evident in summer 2016 when Italy witnessed the increased number of new arrivals crossing its border. The already dire situation was exacerbated by a huge number of disembarkation's occurring outside of the existing hotspots.<sup>369</sup> Such speedy increase during summer 2016 threatened the well-functioning of the hotspot approach and revealed an urgent need for the establishment of the new hotspots. However, the Commission attempted to coerce Italy to fulfill its obligation and create new hotspots. Consequently, the issues posed by the hotspots approach have been long-lasting for a period of one year (from 16th of March 2016 until 2nd of March 2017) with no immediate solution available.

**Next Problem Italy has faced during the implementation of Relocation schemes was challenges associated with Unaccompanied Minors.** The European Union has always been identified as a driving force for various powerful policies and programmes that seek to enhance children protection in different domains include Asylum and Migration. In light of the provisions of the Lisbon treaty and EU Charter on Human Rights, the Union developed an agenda on children rights and an action plan on unaccompanied minors which expired in 2014, which is yet to be renewed.<sup>370</sup> Notably, According to the Council Decisions on relocation, each MS should prioritise the relocation of vulnerable persons, including unaccompanied children and other children, in particularly vulnerable situations.<sup>371</sup>

In 2015, 88 300 unaccompanied minors applied for international protection in the EU. Minors accounted for 11 000 and 13 000 in the EU over the period 2008-2013, this statistic almost doubled in 2014 reaching 23 000 persons, in 2015 the number quadrupled.<sup>372</sup> In 2016, over 100, 000 migrant and refugee children reached Europe, of which 33,800 were identified as unaccompanied and separated children.<sup>373</sup> In 2016, approximately 28, 129 minors crossed the Italian borders. The biggest majority 25,772 (91%) were

---

<sup>368</sup> The Commission, Second Report on Relocation and Resettlement, Brussels, COM (2016) 222, pg.5

<sup>369</sup> A study on "The implementation of the hotspots in Italy and Greece", pg.16, see: <https://www.ecre.org/wp-content/uploads/2016/12/HOTSPOTS-Report-5.12.2016..pdf>

<sup>370</sup> Putting the Children at the Forefront, Save the Children's recommendations for a child-centred EU agenda on migration, Save the Children Italia Onlus Via, Volturro 58, 2016, pg.1

<sup>371</sup> Recital 27 of First Council Decision 2015/1523 and Recital 33 of Second Council Decision 2015/1601

<sup>372</sup> Asylum applicants considered to be unaccompanied minors Almost 90 000 unaccompanied minors among asylum seekers registered in the EU in 2015 slightly more than half are Afghans, Eurostat press release, 87/2016 - 2 May 2016, pg.1 <http://ec.europa.eu/eurostat/documents/2995521/7244677/3-02052016-AP-EN.pdf/>

<sup>373</sup> Overview of Trends in 2016 "Refugee and Migrant Children- Including Unaccompanied and Separated Children - in the EU", UNHCR, UNICEF and IOM, April 2017, pg.1 <https://data2.unhcr.org/en/documents/download/55971>

unaccompanied minors.<sup>374</sup> In the first quarter of 2017, 5,700 children reached European shores.<sup>375</sup> In 2017, the number of unaccompanied minors arriving in Italy reached 3,557. Accordingly, the research report by *Mixed Migration Platform* stipulated that since March 2016, the number of refugees and migrants reaching Italy exceeded 260, 000, of these 15% were unaccompanied minors.<sup>376</sup>

Minors who reached Italian borders sought for an improved and secure future but indeed were left with sub-standard conditions of living and overwhelmed reception centers. The unclear and inconsistent situation in Italy left the minors without any opportunity to education and employment. Furthermore, family reunification procedures were lengthy and complicated. As a result, many unaccompanied minors, due to insufficient protection demonstrated a shift in the movement towards other union states, which in turn has increased their susceptibility to being victims of trafficking. According to Europol by 2016 approximately 10, 000 minors have gone missing and at least 5, 000 disappeared in Italy.<sup>377</sup> Additionally, the increased secondary migration which took place in the South to the North parts of Italy demonstrated the inadequate coordination between the regions concerning data sharing. Moreover, this influenced many young people to claim asylum protection in one part of Italy and pursue the claim in another.

Receiving member states' general unwillingness to relocate vulnerable applicant's especially unaccompanied minors due to Italy's failure to adopt relevant measures and address the gaps in rules on UAM. To this end, in October 2016, Commission held a specific session of the 7th Forum on *Resettlement and relocation* addressing challenges faced by unaccompanied children. Furthermore, the Commission continued close cooperation with Italian authorities to enhance specific procedures with regards of guardians and judicial authorities to ensure sufficient and timely relocation procedures for

---

<sup>374</sup> Ibid, Note: According to the Report from the Commission to the European Parliament, the European Council and the Council, Eleventh Report on Relocation and Resettlement, Brussels, COM(2017) 212 final, 12.4.2017, pg.10  
Approximately 4,451 out of 25,772 (3,806 Eritreans, 218 Syrians, 394 Iraqis and 13 Yemenis) and 250 out of 3,557 were eligible nationalities for relocation 11<sup>th</sup> report

<sup>375</sup> Greece and Italy: Refugee and migrant children face challenges in achieving their objectives and lose out on education once in Europe, REACH Forming more effective Humanitarian Action, 2017, <http://www.reach-initiative.org/greece-and-italy-refugee-and-migrant-children-face-challenges-in-achieving-their-objectives-and-lose-out-on-education-once-in-europe>

<sup>376</sup> Research Report on "youth on the Move", REACH within the framework of the Mixed Migration Platform (MMP), and in partnership with the Mixed Migration Hub (MHub), 2017, pg.2  
[http://www.reachresourcecentre.info/system/files/resource-documents/reach\\_ita\\_report\\_mmp\\_mhub\\_youth\\_on\\_the\\_move\\_september\\_2017.pdf](http://www.reachresourcecentre.info/system/files/resource-documents/reach_ita_report_mmp_mhub_youth_on_the_move_september_2017.pdf)

<sup>377</sup> Mark Townsend, "10,000 refugee children are missing, says Europol", The Guardian, 30 January, 2016, <https://www.theguardian.com/world/2016/jan/30/fears-for-missing-child-refugees>

UAM. Consequently, during 2016 the number of unaccompanied minors reached 4, 300, and by end of the year no single UAM was relocated although the majority of them were Eritreans, hence, in list of eligible nationalities for relocation.<sup>378</sup>

By April 2017, only one unaccompanied minor was relocated from Italy<sup>379</sup> and by June the number increased to a mere five individuals<sup>380</sup>. Notably, from the period when the first transfer of UAM took place from Italy, by September 2017, the total number of relocated UAM reached 31.<sup>381</sup>

The challenges Italy faced in relation to UAM highlighted unpreparedness of Italian authorities to deal with unaccompanied minors and to ensure respect to the basic human rights of asylum seekers, to provide them with sufficient assistance in a timely manner. Correspondingly, the tragic and heart-breaking situation experienced by minors in Italy has demonstrated the general problems related with the implementation of relocation schemes on both national and supranational level.

**Another problem Italy come across daring implementation of legally binding relocation decisions was insufficient processing capacity.** With the continuous rise in the migratory flow, it was essential for Italy to address difficulties related to the adequate and timely assessment of asylum applications with an immediate reform of the asylum framework which could have led Italy to develop an effective asylum system able to process asylum applications<sup>382</sup> in a timely fashion.<sup>383</sup> To lower the possibility of absconding, the Commission was often insisting that Italy shorten the application process.<sup>384</sup> This would be enabled by processing the well-founded applications and refusing those which were not. Furthermore, some union members were not willing to relocate asylum seekers from Italy, due to the restriction imposed by Italian authorities who were excluding receiving states the opportunity to process more interviews with

---

<sup>378</sup> Report from the Commission to the European Parliament, the European Council and the Council, Eight Report on Relocation and Resettlement, Brussels, 8.12.2016, pg.5

<sup>379</sup> Study for the LIBE Committee, "Implementation of the 2015 Council Decisions establishing provisional measures in the area of international protection for the benefit of Italy and of Greece", pg.34

<sup>380</sup> Report from the Commission to the European Parliament, the European Council and the Council, Thirteenth Report on Relocation and Resettlement, Strasbourg, COM(2017) 330 final, 13.6.2017, pg.6, Note: According the UNHCR the number of UAM relocated from Greece and Italy was 109, see: <https://data2.unhcr.org/en/documents/download/60348>

<sup>381</sup> Report from the Commission to the European Parliament, the European Council and the Council, Fifteenth Report on Relocation and Resettlement, Brussels, COM(2017) 465 final, 6.9.2017, PG.6

<sup>382</sup> First Report on Relocation and Resettlement, Brussels, COM (2016) 165, pg. 4, 11

<sup>383</sup> Eight Report on Relocation and Resettlement, Brussels, COM (2016) 791 final, pg.12

<sup>384</sup> Report from the Commission to the European Parliament, the European Council and the Council, Sixth Report on Relocation and Resettlement, Brussels, COM(2016) 636 final, 28.9.2016, pg.12

asylum applicants.<sup>385</sup> To this end, the Commission reached a compromise; for host member states it was suggested to find alternatives to security interviews by limiting the requests to the least amount and Italy was proposed to accept the limited number of such requests.<sup>386</sup>

There were no centralised relocation procedures in place in designated centers as well as the transfer of eligible applicants, 10 days before the transfer to reception points in or close to Rome. Those asylum seekers eligible for relocation were expanded all over the Italy, while the designated relocation hubs were usually under-used because they were hosted by migrants who were not qualified as eligible nationalities for relocation. This impeded the relocation process and created logistical problems, especially in the last phases of the relocation procedures, when the necessary health checks were required to take place.<sup>387</sup>

#### 2.4.2 Case Study – Greece

Greece has always been an essential pathway of entry for new-comers with two main entry points: the Greek-Albanian border to the North and the Greek-Turkish border to the East with migrants originating from Asia and Africa.<sup>388</sup>

Greece's asylum system is based on the Geneva Convention of 1951 and its 1967 Protocol, and on EU legal framework on the Common European Asylum System. In 2011, according to ECHR and ECJ decision, the Greece asylum system was defined as insufficient as evident by the limited number of reception facilities, inadequate detention conditions with the absence of an effective remedy. Greece adopted two action plans and implemented legislation to tackle the serious gaps exposed by the brunt of migratory flow due to its geographical location and as the first country of entry pursuant to the Dublin Regulation.<sup>389</sup>

While around 857 000 individuals transited through Greece in 2015, in 2016 approximately 172 000 persons arrived in the country by sea alone. As the result of the closure of the so-

---

<sup>385</sup> Report from the Commission to the European Parliament, the European Council and the Council, Fourth Report on Relocation and Resettlement, Brussels, COM(2016) 416 final, 15.6.2016, pg.9

<sup>386</sup> Report from the Commission to the European Parliament, the European Council and the Council, Fifth Report on Relocation and Resettlement, Brussels, COM(2016) 480 final, 13.7.2016, pg.8

<sup>387</sup> Thirteenth Report on Relocation and Resettlement, Strasbourg, COM(2017) 330 final, pg.5

<sup>388</sup> Report on “Assessing the Cost-effectiveness of Irregular Migration Control Policies in Greece”, Migration& Detention Assessment, MIDAS, 2014, pg.5 <http://www.eliamep.gr/wp-content/uploads/2014/11/MIDAS-REPORT.pdf>

<sup>389</sup> Refugee Law and Policy: Greece, Congress Library , see <https://www.loc.gov/law/help/refugee-law/greece.php>

called "Balkan migration route" in March 2016, thousands of asylum seekers were abandoned in the country<sup>390</sup>. The creation of relocation mechanism on behalf of asylum seekers in Greece was not only aiming to alleviate the burden imposed on these member states but also to provide access to asylum procedures for relocation beneficiaries'. The increase in a number of new-comers to Greek borders partly occurred due to the restrictions enforced at Greece/former Yugoslav Republic of Macedonia Border.<sup>391</sup> As a result, Greece faced a serious humanitarian crisis.

According to the Commission's reports, during the implementation of relocation Decisions, the relocations schemes demonstrated the major difficulties faced by Greece related with the huge number of newcomers. Among various problems identified by the Commission reports the major challenges amongst other were 1) ineffective registration and processing capacity,<sup>392</sup> 2) deficiencies in reception facilities<sup>393</sup> 3) Challenges related to UAM<sup>394</sup>

**Greece was suffering from lack of sufficient registration and processing capacity.**

Greece and other countries upstream on the Western Balkans were in need of significant support to carry out registration process for asylum seekers and provide them sufficient assistance. All eligible candidates for relocation were waiting at least 3 weeks to the registration process.<sup>395</sup> During the implementation of relocation mechanism, the gaps between the requests submitted by Greece and acceptances by receiving member states were remaining high.<sup>396</sup> This gap constantly remained quite large<sup>397</sup> or demonstrated a slight decrease<sup>398</sup> but it was always present.

Throughout the implementation period of Relocation mechanism, **Greece has suffered from deficiencies in its reception capacity.** From the beginning, the reasons behind the failure of reception facilities in Greece was firstly due to **the lack of a precious effective**

---

<sup>390</sup> European Commission Factsheet - "Greece", European Civil Protection and Humanitarian aid Operations, [https://ec.europa.eu/echo/where/europe/greece\\_en](https://ec.europa.eu/echo/where/europe/greece_en)

<sup>391</sup> First Report on Relocation and Resettlement, Brussels, COM (2016) 165, pg.; 6

<sup>392</sup> Ibid, pg.11

<sup>393</sup> Ibid, pg.7, 11

<sup>394</sup> Ibid, pg.8

<sup>395</sup> Ibid, 12

<sup>396</sup> Report from the Commission to the European Parliament, the European Council and the Council, Seventh Report on Relocation and Resettlement, Brussels, COM(2016) 720 final, 9.11.2016, pg. 9 Note: For instance, during period of 28 October to 4 November, Greece submitted approximately 1,570 requests while member states provide 940 available places.

<sup>397</sup> Eight Report on Relocation and Resettlement, pg. 10 For example, for the period of 4 November to 5 December Greece submitted approximately 1,508 requests and only 1,296 places were provided by Hosting member states

<sup>398</sup> Report from the Commission to the European Parliament, the European Council and the Council, Twelfth Report on Relocation and Resettlement, Strasbourg, COM(2017) 260 final, 16.5.2017, pg.3

**legislation and implementation** of legal provisions as well as a monitoring mechanism, with an *ad hoc* management of some camps by the Ministry for Migration and others by the Reception and Identification Service. Secondly, hesitation in decision-making process with regards to the revision of temporary facilities as it was crucial to create permanent facilities for new-comers.<sup>399</sup>

After the European Leaders' Summit of 25 October 2015, Greece assumed responsibility to increase its reception capacity for 50,000 asylum seekers eligible for relocation.<sup>400</sup> UNHCR from its side promised to implement rent subsidies and host family programmes with the aim to provide assistance for 20, 000 more individuals, which was not fulfilled.<sup>401</sup> Regardless of Greece's effort to assist 'irregular' and 'regular' migrants, the substantial support was not provided for two main reasons, firstly, the majority of these facilities were characterized as being 'emergency' and 'temporary', secondly, other reception facilities possessed limited capacity, in addition to only very basic conditions being provided.<sup>402</sup> While one might claim that such conditions and facilities temporarily can be considered adequate until individuals will be transferred in better places, such argument will still be irrelevant as the requirements ensured under the recast Directive on 2013/33/EU<sup>403</sup> will be hampered.

**Greece has faced challenges with regard to the protection of unaccompanied minors.**

As the Council Decisions on relocation, makes special reference to the vulnerable individuals and establish the states obligation to prioritize them over other applicants in practice, the relocation of UAM was challenging due to various factors.<sup>404</sup>

The implementation of the relocation mechanism demonstrated the significant shortcomings of Greek legislation with regard to identification of unaccompanied asylum seekers and unaccompanied minor migrants. Notably, according to the Greek law public prosecutor is authorized to act as "*provisional guardian and shall take necessary steps in*

---

<sup>399</sup> Commission Recommendation "addressed to the Member States on the resumption of transfers to Greece under Regulation (EU) No. 604/2013", Brussels, C (2016) 8525 final, 8.12.2016, pg.13

<sup>400</sup> First Report on Relocation and Resettlement, pg. 12, 14

<sup>401</sup> *ibid*

<sup>402</sup> Para 10 and 11 of Commission Recommendation 2016/1117 on "addressed to the Hellenic Republic on the specific urgent measures to be taken by Greece in view of the resumption of transfers under Regulation (EU) No 604/2013 of the European Parliament and of the Council", 15 June 2016 [http://eur-lex.europa.eu/eli/reco/2016/1117/oj#ntr12-L\\_2016186EN.01002801-E0012](http://eur-lex.europa.eu/eli/reco/2016/1117/oj#ntr12-L_2016186EN.01002801-E0012)

<sup>403</sup> Directive 2013/33/EU of the European Parliament and the Council, laying down the standards for the reception of applicants for international protection, 26 June 2013

<sup>404</sup> Eleventh Report on Relocation and Resettlement, pg.9-10

*view of the appointment of a guardian for the minor”*<sup>405</sup> In reality, the prosecutors do not possess the appropriate capacity to handle all unaccompanied minors regardless of whether they are the only authority directly responsible for assistance.<sup>406</sup>

Despite the fact that the Commission was systematically calling upon member states to provide more places to unaccompanied minors<sup>407</sup> and treat them as a priority group,<sup>408</sup> the pace of relocation of unaccompanied minors was untimely. The obligations imposed on sending and receiving states, to give particular attention to UAM applicants while implementing the hotspot approach and relocation schemes, was not fulfilled by the majority of member states.<sup>409</sup> By 2 April 2017, around 568 unaccompanied minors were registered and whilst only 341 were relocated. Majority of unaccompanied minors were transferred by Finland and very few by Belgium and Spain. Germany imposed the requirements with regard to family relations which automatically deprived separated minors from the right of benefit under Dublin System or relocation schemes.<sup>410</sup>

Despite the fact that there is a clear legal framework in place determining the status of unaccompanied and separated minors, police at the borders often were randomly registering minors which caused obstacles in the identification of these minors. For instance, arbitrarily registering minors as unaccompanied children while they have been traveling with the family could cause forcible separation.

Other challenges that have been occurred in practice are following: the lack of consistent procedures related to the age assessment of UAM, no employees in a field in addition to the absence of the identification documents which could prove or disprove any relations.

---

<sup>405</sup> Article 19, On the transposition into the Greek legislation of Council Directive 2003/9/EC from January 27, 2003 laying down minimum standards for the reception of asylum seekers (Official Journal of the European Communities L 31/6.2.2003 <http://www.refworld.org/docid/49676abb2.html>)

<sup>406</sup> “Legal Representation of Unaccompanied Children: Greece”, Asylum Information Database <http://www.asylumineurope.org/reports/country/greece/asylum-procedure/guarantees-vulnerable-groups/legal-representation>

<sup>407</sup> 1 The Commission, Tenth Report on Relocation and Resettlement, Brussels, pg.4

<sup>408</sup> Report from the Commission to the European Parliament, the European Council and the Council, Third Report on Relocation and Resettlement, Brussels, COM(2016) 360 final, 18.5.2016, pg.4

<sup>409</sup> Communication from the Commission to the European Parliament and the Council, “on the State of Play of Implementation of the Priority Actions under the European Agenda on Migration”, European Commission, Brussels, COM (2016) 85 final, 10.2.2016, pg.16 [http://eur-lex.europa.eu/resource.html?uri=cellar:97f62a52-3255-11e6-b497-01aa75ed71a1.0023.02/DOC\\_1&format=PDF](http://eur-lex.europa.eu/resource.html?uri=cellar:97f62a52-3255-11e6-b497-01aa75ed71a1.0023.02/DOC_1&format=PDF)

<sup>410</sup> Eleventh report on relocation and Resettlement, pg.9



Consequently, this has led local authorities to make unreasonable decisions. In light of this, there was no legal possibility to challenge the unreasonable and wrong assessment.<sup>411</sup>

### 2.4.3 Case Study – the EU member states

The reporting period by commission identified the major objectives of successful implementation of relocation scheme and demonstrated the main concerned areas where member states failed to contribute on the equal basis. Amongst several challenges some were identified as follow: 1) member states inadequate and insufficient contribution in relocation 2) Incorrect use of preferences 3) challenges related to security checks.<sup>412</sup>

**Member states contribution in relocation was inadequate and insufficient.** Analyse of commission reports and the low rate of implementation of relocation scheme demonstrated that most of the member states did not fulfill their legal obligation drawn in Council Decisions whilst non-EU member states including Switzerland, Norway, and Liechtenstein express willingness to transfer asylum seekers.<sup>413</sup> Indeed, few states such as France Finland and the Netherlands were trying to follow the target they were assigned for<sup>414</sup> but the contribution by France remarkably changed in April 2017.<sup>415</sup>

By 26<sup>th</sup> of July, 2017 Hungary and Poland and Austria were three remaining states refusing to relocate a single asylum seeker.<sup>416</sup> Even though Hungary and Slovakia challenged the legality of relocation scheme in ECJ this did not release them from the obligation to transfer asylum seekers pursuant to relocation decisions.<sup>417</sup> For instance, Poland continuously was applying *de facto* suspension of relocation procedure and constantly did not relocated single asylum seeker.<sup>418</sup> Austria<sup>419</sup> relying on the relocation Decision has requested temporarily suspension from relocation mechanism.

---

<sup>411</sup> Andriani Fili, “Unaccompanied Minors in Greece: Who Can ‘Save’ Them?”, University of Oxford <https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2017/02/unaccompanied>

<sup>412</sup> First Relocation and Resettlement report, pg.5-7

<sup>413</sup> Ibid, pg.3

<sup>414</sup> Note: for instance, during period of 29<sup>th</sup> September 2016 (6<sup>th</sup> reporting period) France has relocated 1,952 asylum seekers, Finland – 690 and Netherlands – 726; the number of relocated individuals increased during period of 9<sup>th</sup> November France – 2,155, Netherlands – 915, Finland – 862

<sup>415</sup> Twelvth Relocation and resettlement report, pg.6

<sup>416</sup> Ibid, pg.3

<sup>417</sup> First Report on Relocation and Resettlement, pg.9

<sup>418</sup> Footnote, 14, third Report on relocation and Resettlement

<sup>419</sup> Under the Council Decision 2016/408 of 10 March 2016, Austria benefits from a temporary suspension of the relocation of up to 30% of applicants allocated to Austria under Council Decision (EU) 2015/1601 Note: In summer of

One of the reasons for poor implementation of relocation mechanism was an **incorrect use of preferences by member states**. According to the Article 7 of both relocation decisions host state can refuse from relocating a particular person for a precious reason.<sup>420</sup> The main aim of preference system was to ease integration of relocated individuals. Nonetheless, the list of preference was very restrictive, for instance, some host member states were hesitant to transfer asylum seekers belonging to particular nations, while other member states were unwilling to relocate single asylum seekers or unaccompanied minors.

Theoretically, preference system shifted its main purpose from better integration to a refusal of transferring beneficiaries of the scheme.<sup>421</sup> For instance, a participation of the Czech Republic in the transfer of asylum seekers was based on identification documents; hence, those applicants holding some travel or ID documents were theoretically eligible for relocation<sup>422</sup> while Bulgaria was hesitant to transfer Eritreans and Slovakia was willing to only relocate single mothers with children holding travel documents.<sup>423</sup> It obviously was limiting possible transfers from Italy, as finding eligible applicant matching such restrictive preferences was very difficult. France was willing to only receive families or single women with children of Eritrean origins.<sup>424</sup> Furthermore, relying on preference system Germany was refusing to relocate UAM without first establishing the link between a minor and the state. Moreover, commission reports revealed that member states were highly using the national security and public order exception as an argument against relocation.<sup>425</sup> As a result, it is contrary to the relocation decisions as it led to systematic rejection.

One another reasons why transfers from Italy were significantly lower than once from Greece is partly explained by **challenges over security checks** between Italy and receiving member states. Italy was ‘blocking’ host member states from conducting security checks,

---

2017, Austria made pledges to relocated 50 individuals; however, until the last report of the commission was no progress archived in this respect see fourteen report on relocation and resettlement

<sup>420</sup> Article 7 of both Relocation Decisions stipulates that host member states are allowed to refuse from relocating asylum seeker if they can provide reasonable grounds to demonstrate that the applicant can be considered as a danger on domestic security or public order or if there are serious conditions to apply the exclusion provisions ensured by Directive 2011/95/EU.

<sup>421</sup> First report on relocation and resettlement , pg.9

<sup>422</sup> Sixth Report on Relocation and Resettlement, pg.6

<sup>423</sup> ibid

<sup>424</sup> Fourteen report on relocation and resettlement, pg.7

<sup>425</sup> First Report on relocation and Resettlement, pg. 9-10

hence the pledges made by Estonia and Ireland were unsuccessful.<sup>426</sup> The Italian strict policy also explained the why the transfers by France was so slow.<sup>427</sup>

The limitations on additional security checks imposed by Italy led host member states to slow down the relocation procedures and even the actual number of pledges. Italy was requested by the EU commission to soften its policies with regard to the security checks.<sup>428</sup>

The case study involved both beneficiary states and states who the participant of the relocation mechanism. These case studies revealed much about the poor implementation of relocation mechanism due to the legal, practical or operational measures and commitments. The absence of mutual solution between sending and receiving member states discourage the transfer of asylum seekers and resulted in the poor implementation of relocation mechanism.

---

<sup>426</sup> Footnote 15 of Eight Report on relocation and Resettlement

<sup>427</sup> Eleventh Report on relocation and resettlement, pg.4.5

<sup>428</sup> Ibid,

### 3. Analysing the problems related with the Relocation Scheme and its implementation

#### 3.1 Article 78 (3) TFEU as a correct base for mandatory relocation quota

Triggering article 78 (3) as the legal basis for the compulsory quota mechanism left Eastern European states unsatisfied. If the first voluntary relocation mechanism was supported by aforementioned states the second was not. Hence, Slovakia, Hungary backed with Czech Republic and Romania opposes the mandatory relocation scheme due to its irrelevant legal basis.<sup>429</sup> The legality of both decisions should be examined through the procedural and material aspects.

The procedural side focuses on article 78 (3) TFEU which implies several important points including: the existence of Commission proposal, Council voting by qualified majority (its default rule) and consulting with European Parliament's (EP) which is relevant in joint decision-making power as regards other asylum legislation.<sup>430</sup> The claim that procedures under article 78 (3) TFEU need to be followed by a QMV in the Council whilst the Council imposes a requirement of a unanimous vote, leads us to discuss whether the treaty provides any guidance with regard this issue. Notably, the treaty has no provision suggesting how QMV can be replaced by unanimity but it does have provision with regard the move from unanimity to QMV.<sup>431</sup> The problem related to procedural rule was addressed by *Nika Selane*, who discussed article 78 (3) TFEU and indicated that as this article is given under

---

<sup>429</sup> Bruno Nascimbene, "The strange procedural fate of the actions for annulment of the EU relocation scheme" <http://rivista.eurojus.it/the-strange-procedural-fate-of-the-actions-for-annulment-of-the-eu-relocation-scheme/>

<sup>430</sup> It's obvious that Article 78(3) measures can only cover asylum related issues, due to the placement of this clause in Article 78 TFEU. Moreover, prior to the Treaty of Lisbon, the old version of this clause was free-standing, and hence it was referring to all immigration and asylum issues; its transposition in the asylum Article was clearly no accidental, thus, it should be regarded as legally relevant see: Steve Peers "Relocation of Asylum-Seekers in the EU: Law and Policy"

<sup>431</sup> According to article 48 (7) TEU: "where [TFEU] or Title V of [TEU] provides for the Council to act by unanimity in a given area or case, the European Council may adopt a decision authorising the Council to act by a qualified majority in that area or in that case."

Title V of TFEU the default rule was expected to apply where the Council votes by a qualified majority except if explicitly stated otherwise.<sup>432</sup>

*Pavel Svoboda*<sup>433</sup> during his speech in UN draws his attention on the procedural aspect of second relocation Decisions. He expressed his concerns with regard the principle of subsidiarity as in the context of shared competence the principle of subsidiarity is applicable. Notably, EU can intervene only if it's believed that the matter on the supranational level will be handled more effectively than on national level. This principle is applicable to all legislative acts, which under Article 289 TFEU are identified by some form of involvement of the EP. Furthermore, he stated that member states were deprived of the opportunity to claim a violation of this principle before the adoption of the draft, as Commission proposed both relocation decisions as non-legislative instruments which could be in line with the formalist explanation of article 289 TFEU. Hence, this later was argued to be the reason why member states are not able to challenge the principle of subsidiarity.<sup>434</sup>

The relocation decision was challenged on the basis of its legislative nature. The adoption of the mandatory relocation mechanism under article 78 (3) was considered to be the violation of the “legislative procedures” as it was believed that the content of the decision by its very nature was a legislative act. This gives a rise to an important question, which measure or what is needed it to be considered as ‘legislative act’? The applicants focused on material understanding of legislative act arguing that content of decision contains such important provisions that it cannot be managed by non-legislative act. *Zuzana Vikarska* argued that, the EU law does not define the legislative act according to its material scope. Union law provides an answer in article 289(3) TFEU, as it states: “Legal acts adopted by legislative procedure shall constitute legislative acts.” Hence, it is logical to claim that: “*legal acts not adopted by legislative procedure shall constitute non-legislative act*”.<sup>435</sup> Accordingly, *Zuzana Vikarska* claimed that adopted measures related to asylum under 78 (3) will be of a non-legislative natures whilst measures on diplomatic protection under the article 23(2) TFEU will be legislative even though the procedures in both cases are similar

---

<sup>432</sup> Nika Bačić Selanec, “A Critique of EU Refugee Crisis Management: On Law, Policy and Decentralisation”, pg.88

<sup>433</sup> NOTE: Pavel Svoboda is a Czech politician and Member of the European Parliament

<sup>434</sup> Please see attached speech in UN at “Pavel Svoboda from European Parliament on EU Law Aspects of the solution of Migration Crisis”, Permanent Mission of the Czech Republic to the UN IN New York, 17 November 2015 [https://www.mzv.cz/un.newyork/en/news\\_events/invitation\\_eu\\_law\\_aspects\\_of\\_the.html](https://www.mzv.cz/un.newyork/en/news_events/invitation_eu_law_aspects_of_the.html)

<sup>435</sup> Zuzana Vikarska “The Slovak Challenge to the Asylum-Seekers’ Relocation Decision: A Balancing Act”, 29 December 2015 <http://eulawanalysis.blogspot.it/2015/12/the-slovak-challenge-to-asylum-seekers.html>

– commission has to propose and council will vote by qualified majority rule and after consulting EP. Moreover, *Vikarska* argues that such interpretation is correct as it is supported by the article 289 (2) TFEU which stipulated that only treaty can present, in specific cases, when to invoke the special legislative procedures. For further developing argument in sake of above-mentioned interpretation She also stated that Eur-Lex categorises the contested decision as decision which stands for ‘non legislative procedure’ (NLE). Such textual interpretation sounds logical and well established.<sup>436</sup>

Furthermore, the *advocate general Kokott* reaffirms above-mentioned idea and states that: “Non-legislative acts can also take the form of a regulation, a directive or a decision (Article 297(2) TFEU)”<sup>437</sup>. Notably *Craig & De Burca* share same opinion, as they claim that the answer on nature of the act is to be found in its legal basis, hence, it is important whether the ‘legal base’ makes any explicit reference on the nature of act.<sup>438</sup>

In addition, according to the Article 78 (3) TFEU Council was empowered to adopt emergency measures only if the EP was consulted. However, in the context of second Relocation Decision, after Hungary reject to participate as a beneficiary state, EP was not consulted again, even though after initial changes it is required EP to be consulted. Peers have claimed that, the exclusion of Hungary is to be considered as a change in essential element. Against this approach one might argue that there is no responsibility of council to re-consult the EP or at least it is less stringent in situations where EU facing the emergency situation; Nonetheless, *Peers* also stated that such argument would not be very sufficient, it would require Council to consult the EP again whilst CJEU would keep the Relocation Decision in force. Peers in his discussion indicated that in any case, EP even after consulting would support compulsory relocation mechanism.<sup>439</sup>

The issue of emergency leads us to discuss the second relocation decision in light of its material scope. *Peers* suggested the need for several terms of 78 (3) TFEU to be defined. The main focus was on terms such as: “emergency situation” and a ‘sudden inflow’ as well as a ‘provisional measure’ and the ‘benefit’ of union members. Two of the terms of an aforementioned article attracted most of the attention - an “emergency situation” and a

---

<sup>436</sup> *ibid*

<sup>437</sup> Para 5, Opinion of Advocate General KOKOTT delivered on 17 January 2013 Case C-583/11 P *Inuit Tapiriit Kanatami and Others v European Parliament and Council of the European Union* <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62011CC0583>

<sup>438</sup> Zuzana Vikarska “The Slovak Challenge to the Asylum-Seekers’ Relocation Decision: A Balancing Act”

<sup>439</sup> Steve Peers, “Relocation of Asylum-Seekers in the EU: Law and Policy

‘sudden inflow’. He argued that the mass influx of individuals in 2015 arriving at EU borders qualifies as an emergency situation characterized by the “sudden inflow”. Although Syrian Conflict started in 2011 and EU already was aware of other past conflicts producing refugees, the continuously increased numbers of new-comers according to *Peers* clearly indicates that the criteria of a “sudden inflow” was fulfilled.<sup>440</sup> *Pavel Svoboda* during same speech in UN claimed that the first relocation decision on 40, 000 asylum seekers can be considered as “sudden”. He also argued that in case of second Decision providing relocation of 120, 000 it is very difficult to find the link of “suddenness”.<sup>441</sup>

Furthermore, *Peers* has argued that the beneficiary states of relocation mechanism were allowed to decide if the Commission’s proposal on relocation mechanism would benefit them or not. To support his argument he brings an example of Hungary which was also considered as potential beneficiary state together with Italy and Greece, but the Government of Hungary decided to refuse to benefit from the measures concerned. Consequently, Hungary was removed as a beneficiary state. The definition of “provisional measures” is limited in time. As Lisbon withdraws the time limitation of six months *Peers* argued that this already was intending to consider that the measure can be longer, however, treaty does not explicitly mentions the time limit but the both council decisions do. Two years’ time framework was consider sufficient for implementation of the Council decisions. *Peers* claims that the challenge against the timeframe of implementation of Relocation decisions might be most relevant in addition to this he argued that complete annulment of the relocation mechanism is hard to be achieved.<sup>442</sup>

*Zuzana Vikarska* claimed that the Slovakia’s argument concerning the breach of proportionality principle is a strong argument; however she argued that, Slovakia has failed to provide a more precious examination of aforementioned principle in relation to the adoption of mandatory relocation mechanism. In other words, the applicants should have demonstrated the aforementioned plea in a more precious manner for instance, by providing another less restrictive measure(s) and insists that they could achieve a better result in releasing Greece and Italy from the migratory burden. Furthermore, she suggested that applicant could refer to other alternative measures including activating the Temporarily Protection Directive, providing other alternative form of assistance such as financial, material or personal help or preventing asylum seekers to cross EU borders. In addition, she

---

<sup>440</sup> Ibid,

<sup>441</sup> See the Speech attached [https://www.mzv.cz/un.newyork/en/news\\_events/invitation\\_eu\\_law\\_aspects\\_of\\_the.html](https://www.mzv.cz/un.newyork/en/news_events/invitation_eu_law_aspects_of_the.html)

<sup>442</sup> Steve Peers, “Relocation of Asylum-Seekers in the EU: Law and Policy”



argued that well-grounded claim of proportionality together argument of national identity under article 4 (2) could have been a successful plea against Union.<sup>443</sup> Interestingly, in her discussion she admits the political nature of proportionality principle, yet believes that it could bring a victory to applicants. This argument lacks efficiency on several occasions.

Firstly, Court has wide discretion in considering whether a measure is proportional or not. In my view, suggesting TPD as alternative tool is not efficient. It is true that TPD provides protection irrespective of indiscriminate violence and ensures group-based protection<sup>444</sup> However, its limited timeframe problematic (one-year protection and additional one year). UNHCR has argued that annulment of refugee protection and the untimely returns in a state of origin was a serious deficiency of the system.<sup>445</sup> However, the main reason why TPD cannot serve as an alternative mechanism against relocation mechanism is explained the decision why it was never activated (as it was discussed in first chapter 1.3.1)

Secondly, the alternatives represented by *Zuzana Vikarska* are implying financial or personal help. Such support would be adequate as far as it would be part of relocation mechanism. The crisis of 2015 has demonstrated that the financial contribution would not be enough. Overburdened Italy or Greece needed to release from the increased migratory pressure and one of the most effective tool for this was to transfer asylum seekers in other member states.

Thirdly, the alternative of closing EU external borders for new-comers is the least effective solution. Furthermore, closing border and pushing back person in dire need of protection is a violation of the EU and international law. Moreover, in increased deaths at sea since 2015 was a ‘wake up’ call for member states to take urgent steps and prevent the ‘deadly practices’. To this end, closing borders would seriously question the EU’s role as a promoter of human rights worldwide.

To conclude, above mentioned analysis has demonstrated important legal issues related with relocation scheme. It was argued that the Council Decision was not a legislative act (as the aforementioned article does not explicitly refer to it). Hence, it does not require to be examined as a legislative act. The suggested alternatives to relocation are not sufficient and could not serve as an alternative mechanism to cope with increased migratory pressure

---

<sup>443</sup> Zuzana Vikarska “The Slovak Challenge to the Asylum-Seekers”

<sup>444</sup> Article 2 (c) of Temporarily Protection Directive

<sup>445</sup> Clara Burbano-Herrera, “Why has the EU’s Temporary Protection Directive not been applied during the migration crisis in order to receive Syrians and other asylum seekers?”

in the Union. Below will be presented the response of the CJEU with regard the legal aspects of the relocation mechanism.

### 3.2 The Response of CJEU on legal basis of Mandatory relocation Mechanism

The legal basis of compulsory relocation mechanism was refused by Eastern European States including Hungary, Slovakia, Czech Republic and Romania voting against it. Hungary and Slovakia filed the case against EU mandatory redistribution mechanism and challenged its legality under second Council Decision.<sup>446</sup> It's worth mentioning that the numbers that Hungary and Slovakia were assigned to relocate was 1,294 and 902.<sup>447</sup> Hungary and Poland did not relocate a single person while Slovakia and Czech Republic could accept insignificant number of persons.<sup>448</sup> Indeed, the reason why an aforementioned applicant refused to share the responsibility through the relocation scheme was highly resulted from the fear that it would threaten the sovereignty of state would lead them to cultural and national clash.<sup>449</sup> To calm the fear of being threatened by the asylum seekers applicants sue the Union.

The CJEU dismissed the claim of Hungary and Slovakia. The Court's opinion over the legality of mandatory relocation scheme was expressed in following: whether article 78 (3) is relevant legal base for mandatory relocation mechanism (under which EU can adopt the legally binding relocation decision), the relevance and legality of the procedures related to adoption of decision and the substance of the decision.<sup>450</sup>

One of the pleas against the legality of relocation mechanism was the nature of the Decision establishing compulsory quota system. Applicants tried to prove that the effect of

---

<sup>446</sup> "The Court dismisses the actions brought by Slovakia and Hungary against the provisional mechanism for the mandatory relocation of asylum seekers", Press Release No 91/17, note: In the Court proceeding, Poland has intervened in support of claimants, whilst the Commission and several other member states including Belgium, Germany, France, Luxembourg, and Sweden amongst others have intervened on behalf of the Council.

<sup>447</sup> Annex 1 and annex 2 of Second Council Decision 2015/1601

<sup>448</sup> Gyorgy Folk, "Hungary and Slovakia lose migrant quota case against the EU", Liberties Content, 7 September 2017 <https://www.liberties.eu/en/news/ejc-migrant-quota-ruling-hungary-slovakia-eu/12911>

<sup>449</sup> Melissa Carlson, "Hungary and Slovakia Challenged Europe's Refugee Scheme they Just Lost Badly", The Washington Post, 8 September 2017, [https://www.washingtonpost.com/news/monkey-cage/wp/2017/09/08/hungary-and-slovenia-challenged-europes-refugee-scheme-they-just-lost-badly/?noredirect=on&utm\\_term=.a1d16edd4d1d](https://www.washingtonpost.com/news/monkey-cage/wp/2017/09/08/hungary-and-slovenia-challenged-europes-refugee-scheme-they-just-lost-badly/?noredirect=on&utm_term=.a1d16edd4d1d)

<sup>450</sup> Steve Peers "A Pyrrhic victory? The ECJ upholds the EU law on relocation of asylum-seekers", The EU Analysis <http://eulawanalysis.blogspot.ro/2017/09/a-pyrrhic-victory-ecj-upholds-eu-law-on.html>

the aforementioned Decision was legislative, hence the obligatory relocation system was not adopted through the rules on the legislative procedure. The CJEU responded on this claimed through the reading of article 289 (3) TFEU. This article states that: “*non-legislative acts are those that are adopted by a procedure other than a legislative procedure*”. Applying the *contrario* reasoning the court indicated that a legislative procedure is to be fulfilled only if a provision of the treaty clearly refers to it. Consequently, the court rejected the argument on the need of legislative procedure as the article 78 (3) does not indicate the need of legislative procedure. To this end, the Decision could be adopted in context of non-legislative producers, as the Relocation Decision is non-legislative act.<sup>451</sup>

Furthermore, Slovakia and Hungary claimed that the paragraph 3 should be seen in light of whole article 78 TFEU and especially in the contextual reading of paragraph 2, which introduces different legislative measures for further strengthening of the CEAS. Additionally, claimants were arguing that paragraph 3 should not deviate from the measures ensured by paragraph 2 which do not consider the redistribution of refugees within the union members. However, court stipulated that both paragraphs of article 78 TFEU are “*distinct provisions*” of primary union law. In addition, the court held that the “provisions are complementary” which authorize the union to draft various measures for tackling the migratory challenge sufficiently in short and long term. In addition, court find the “provisional measures” under article 78 (3) TFEU broader enough to empower the union institutions to adopt any provisional measure which would ensure the effective response to the emergency situation followed by mass influx foreign state nationals.<sup>452</sup>

The next issue CJEU was expected to answer was concerning the derogation from Dublin Regulation. The question whether the non-legislative “provisional measures” can derogate from the legislative acts, the court gave a positive answer as the amendment was for limited time and never intended to replace or amend the legislative act permanently. Moreover, the relocation decision was applicable only for two years’ time and only for specified individuals. As the result, court finds such derogation from Dublin as legal.<sup>453</sup> However, it was argue that the effect of transferring Syrians and Eritreans within the union without

---

<sup>451</sup> “The Court dismisses the actions brought by Slovakia and Hungary against the provisional mechanism for the mandatory relocation of asylum seekers”, Press Release No 91/17

<sup>452</sup> “Legal basis and solidarity of provisional measures in Slovakia and Hungary v Council”, European Database of Asylum Law, December 4, 2017 <http://www.asylumlawdatabase.eu/en/journal/legal-basis-and-solidarity-provisional-measures-slovakia-and-hungary-v-council>

<sup>453</sup> Steve Peers “A Pyrrhic victory? The ECJ upholds the EU law on relocation of asylum-seekers”

immediate perspective of return would remain longer.<sup>454</sup> While addressing the issues related to Dublin, CJEU recognized the similarity between Dublin and Relocation.<sup>455</sup> In my view, CJEU decision to highlight the similarity between these two systems was not just an attempt to protect the Union law, because Dublin was already very popular among its critics; indeed, such a comparison primarily was aiming at justifying the derogation of legislative act (Dublin) by non-legislative act (Relocation Decision).

The next plea of applicants was concerning the absence of the consent of asylum seekers in their own transfers which, according to the claimants, was breach of provisions of 1951 Geneva Convention. The court rejected from this argument as redistribution was taking place within the union and not in third unsafe country; hence such mechanism was not in breach of the principle of *non-refoulement*.<sup>456</sup> Such reasoning is justified, as the desirable destination of majority of asylum seekers are Germany, Sweden and Austria. The solution can never be found in shifting the responsibility from particular overburdened states to another few states, rather, it is necessary to create a system which would ensure the fair responsibility sharing among the member states. Notably, neither court nor the claimants put forward any argument with regard human right violations of asylum seekers. The CJEU tried not to get involved in debates neither to be subject of it.

Furthermore, the CJEU did not consider the applicants position with regard the council's power, as applicants argued that the Council exceed its discretion while binding member states to transfer 160,000 asylum seekers.<sup>457</sup> In fact, not just the number of 40,000 was inadequate to tackle the existed migratory pressure, but also its voluntary basis.

Another plea of Applicants was related to breach of proportionality principle. CJEU has clearly indicated that the decision to transfer persons on basis of the mandatory scheme has not been manifestly disproportionate to achieve its objective as it was aiming to release

---

<sup>454</sup> Michal Ovadek, The EU as the Appropriate Locus of Power for Tackling Crises: Interpretation of Article 78(3) TFEU in the case Slovakia and Hungary v Council", 7 September 2017, <https://verfassungsblog.de/the-eu-as-the-appropriate-locus/>

<sup>455</sup> Henri Labayle, "Solidarity is not a value: Provisional relocation of asylum-seekers confirmed by the Court of Justice (6 September 2017, Joined Cases C-643/15 and C-647/15 Slovakia and Hungary v Council", EU Migration and Asylum Law and Policy, 11 September 2017, <http://eumigrationlawblog.eu/solidarity-is-not-a-value-provisional-relocation-of-asylum-seekers-confirmed-by-the-court-of-justice-6-september-2017-joined-cases-c-64315-and-c-64715-slovakia-and-hungary-v-council/>

<sup>456</sup> Steve Peers "A Pyrrhic victory? The ECJ upholds the EU law on relocation of asylum-seekers"

<sup>457</sup> "The Court dismisses the actions brought by Slovakia and Hungary against the provisional mechanism for the mandatory relocation of asylum seekers", Press Release No 91/17

Greece and Italy from the unbearable burden. Furthermore, the court stated that challenge in this respect might be appropriate if it can demonstrate that such measure is manifestly wrong. The CJEU indicated that in 2015, Council took all relevant steps to correctly assess the effectiveness of the measure. Hence, The Court stipulates that: *“it is not opportune to retrospectively assess the efficacy of the contested decision – which may be doubted from an ex post point of view, but could not have been anticipated at the time when the decision was adopted.”*<sup>458</sup>

One of essential challenge was concerning the changes made in the proposal of the Decision. Applicants claimed that as Hungary, by its own request, was excluded from the list of beneficiary states, the EP was not re-consulted. The CJEU stated that before the regulation on 17 September 2015 was adopted, the EP was duly informed on the changes made, thus, the Parliament had opportunity to consider those amendments in that resolution. Furthermore, Court held that other changes which were made after that date did not influence the essence of the Commission proposal.<sup>459</sup> Moreover, it was stated that the Council did not need to act unanimously when it adopted the contested decision, even if adoption of the aforementioned amendments, it required to depart from initial proposal of the Commission.

The Decision of Hungary and Slovakia to challenge the compulsory relocation mechanism demonstrated several important issues. Firstly, the chaos over the mandatory quota revealed the intention of some states to enhance the role of National Parliaments by indicating the power of the Parliament in democratic development.<sup>460</sup> Secondly, resistance of eastern union members expressly refers to a more general problem, namely, the problem of European Integration.<sup>461</sup> Thirdly, while supporting the legality of the relocation mechanism, the political legitimacy of the decision was always forgotten.<sup>462</sup> In addition, the dismissal of aforementioned case influenced the ‘common’ position of applicants. The Hungarian Minister of foreign affairs and Trade, *Peter Szijjarto* stated that the decision of

---

<sup>458</sup> Sarah Progin-Theuerkauf, “Relocation and Solidarity in the Common European Asylum System”, 24 October 2017 <https://blog.nccr-onthemove.ch/relocation-and-solidarity-in-the-common-european-asylum-system/>

<sup>459</sup> “The Court dismisses the actions brought by Slovakia and Hungary against the provisional mechanism for the mandatory relocation of asylum seekers”, Press Release No 91/17

<sup>460</sup> Michal Ovadek, The EU as the Appropriate Locus of Power for Tackling Crises: Interpretation of Article 78(3) TFEU in the case Slovakia and Hungary v Council”

<sup>461</sup> Ibid,

<sup>462</sup> Steve Peers “A Pyrrhic victory? The ECJ upholds the EU law on relocation of asylum-seekers”

CJEU is “unacceptable” and that the “politics has raped the European Law”.<sup>463</sup> Slovakian Minister of Foreign Affairs *Peter Susko* stipulated that, Slovakia “fully respects the verdict.”<sup>464</sup>

To conclude, the dismissal of the aforementioned case was a clear sign that member states should take their legal responsibilities seriously. Being the member of the EU does not mean the well-being of member states, rather it also impose legal restrictions and responsibilities, which has to be shared and tackled with joint efforts. To this end, this case has undoubtedly a vital importance not only in relation to asylum seekers, but generally it should largely benefit the strengthening of the solidarity principle in the Union. The precedent is already into place; however, it’s early to talk on its practical influence on future union policies and laws.

### 3.3 Relocation as solidarity and fair sharing of responsibility – on the basis of the Article 80 TFEU

*“We must have fire protection ready before the fire, not when it is already burning, and we need to organize the solidarity mechanism before solidarity is claimed”*

George Noll

The solidarity principle as the essence of the CEAS was firstly presented during 1999 Tampere Summit. This idea was later ensured in article 80 TFEU which was “encouraging” the Union to step into the asylum related matters in accordance to the article 78 TFEU and its context.<sup>465</sup> The article 80 TFEU refers to notions of “solidarity” and “burden sharing” and has been one of the major legal basis provided for relocation mechanism<sup>466</sup>.

Under the article 80 TFEU the connection between solidarity and fair sharing is obvious, as the treaty introduced them as aspects of a single principle which is applicable in various

---

<sup>463</sup> “Szijjártó: ECJ decision has ‘raped European law’”, Budapest Business Journal, 6 September 2017 [https://bbj.hu/politics/szijjarto-ecj-decision-has-raped-european-law\\_138336](https://bbj.hu/politics/szijjarto-ecj-decision-has-raped-european-law_138336)

<sup>464</sup> Laurel Wamsley, “EU Court Rejects Bid By Hungary And Slovakia To Avoid Taking Migrants”, 6 September 2017 <https://www.npr.org/sections/thetwo-way/2017/09/06/548943527/eu-court-rejects-bid-by-hungary-and-slovakia-to-avoid-taking-migrants>

<sup>465</sup> Harriet Gray, “Surveying the Foundations: Article 80 TFEU and the Common European Asylum System”, Liverpool Law Review 34: 175, 2013, pg.127

<sup>466</sup> Note: the solidarity principle is ensured in several recitals of Second Council Decision 2015/1601 including: Recitals 2,3,4,5,7 and fair burdens haring is given under recital 26 and 29

policies related to asylum and migration.<sup>467</sup> It is arguable whether these notions are to be applied together or rather as separate concepts. However, it was claimed that assisting persons in need should be guided by their international responsibility vis-a-vis refugee rather than leave it upon the individual member states.<sup>468</sup> To this end, it can be concluded that the solidarity and responsibility sharing is to be applied simultaneously otherwise solidarity will be seriously question within the union.

The poor contribution of eastern union states toward the relocation mechanism has been influenced by nationalist, xenophobic forces.<sup>469</sup> The answer to the question whether or not the central European states demolishing the solidarity principle in the EU by resisting the relocation mechanism, largely varies yet they can be summarized into three different position. According to the first position the eastern European states refusing to share burden over the asylum seekers by resisting giving away national sovereignty to the union. Hence, it was argued that this undermines the effectiveness and unity of the EU. Second position argues that refusal of Visegrad states to participate in relocation mechanism is more about the different viewpoints than solidarity itself because when the EU accepted central European states they were aware of the backgrounds and perspectives of those states. Thus, while some considering the EU as “united states of Europe” other recognizes it as “Europe of nation-states”. According to the third position the solidarity cannot be destroyed, as “*there was no such solidarity in the first place*” “in reality the Union has never invoked this principle with regards the Spain when it faced a migratory pressure.”<sup>470</sup>

Indeed, the union law does not provide the definition of the Solidarity. Solidarity is mentioned in various policy areas; thus, it can be referred in various legal contexts. The reference to aforementioned principle in process of drafting and implementing different policies on migration and border related issues, demonstrates the intention of policy makers to give this principle wider scope and not limit it only on emergency situation. In other

---

<sup>467</sup> Boldizsar 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”, pg.3 [http://www.iai.it/sites/default/files/gte\\_wp\\_17.pdf](http://www.iai.it/sites/default/files/gte_wp_17.pdf)

<sup>468</sup> “The Price of Solidarity: Sharing the Responsibility for Persons in Need of International Protection within the EU and between the EU and Third Countries”, Research Findings, pg.3 <http://migrationlawnetwork.org/wp-content/uploads/2015/07/karageorgiou-short-summary.pdf>

<sup>469</sup> The Politics of Solidarity Contentiousness and Rights, Polanyi Centre Publications, Institute of Advanced Studies, 2017, pg.4 [https://iask.hu/wp-content/uploads/2017/09/polanyi\\_i-2017-wp03-migration-2.pdf](https://iask.hu/wp-content/uploads/2017/09/polanyi_i-2017-wp03-migration-2.pdf)

<sup>470</sup> “Judy Asks: Is Central Europe Destroying EU Solidarity?” A selection of experts answers a new question from Judy Dempsey on the foreign and security policy challenges shaping Europe’s role in the world, Carnegie Europe, 5 October 2016, <http://carnegieeurope.eu/strategieurope/64787>



words, the solidarity principle is created to shape the policies from wider perspectives.<sup>471</sup> In light of this, *Marcello Di Filippo* argued that the article 80 TFEU will treat “the final symptoms and not the root causes of a disease”.<sup>472</sup> Hence, it means that since the crisis and its outcomes are long lasting one might argue that, Article 80 TFEU is establishing solidarity for emergency situations as it’s unable to address the causes of the primary problems. However, Noll suggest reading the article 80 TFEU in the context of failed common European Constitution in 2004. He argues that de-constitutionalization by French and Dutch referendum has demonstrated the absence of the “social organism” on the supranational level. Therefore, to compensate this, the Union has introduced several provisions on solidarity in the Lisbon treaty<sup>473</sup> to enhance the unity and solidarity in the EU.

According to the *Dutch Advisory Committee on Migration Affairs (ACVZ)* in debate over the solidarity principle several elements deserve the attention. Firstly, from the international perspectives, the minimum requirement of the solidarity principle is cooperation of the states. Secondly, such cooperation among various ‘players’ should focus on attaining the shared goals, which obviously goes beyond the interest of a sovereign state. Thirdly, the contribution by all parties involved is the crucial element of successful cooperation, this can be seen as the commitment of participants on the basis of shared and mutual decision-making. In addition, the failure to comply with the outcome of the collective decision-making weakens the legal order of the Union.<sup>474</sup>

The article 80 TFEU implies not only a fair allocation of obligations but it also aims to serve as a mechanism to manage the imbalances among union states as some member states such as Greece and Italy, were due to their location, left with the enormous responsibility to handle the migratory flow.<sup>475</sup> According to *Noll*, solidarity is to be seen as following:

---

<sup>471</sup> Iris Goldner Lang, “The EU Financial and Migration Crises: Two Crises - Many Facets of EU Solidarity”, pg.6-7 [https://www.pravo.unizg.hr/images/50016423/Two%20EU%20Crises%20-%20Many%20Facets%20of%20EU%20Solidarity\\_Iris%20Goldner%20Lang.pdf](https://www.pravo.unizg.hr/images/50016423/Two%20EU%20Crises%20-%20Many%20Facets%20of%20EU%20Solidarity_Iris%20Goldner%20Lang.pdf)

<sup>472</sup> Marcello Di Filippo, “The Reform of the Dublin and the First Move on The Commission” , 2016 <http://www.sidiblog.org/2016/05/12/the-reform-of-the-dublin-system-and-the-first-half-move-of-the-commission/>

<sup>473</sup> George Noll, “Failure by Design? On the Constitution of the EU”, Searching for Solidarity in EU Asylum and Border Policy, A Collection of Short Papers following the Odysseus Network’s First Annual Policy Conference, February 2016, pg.3 <http://odysseus-network.eu/wp-content/uploads/2015/09/Searching-for-Solidarity-Short-Papers.pdf>

<sup>474</sup> Evelien Brouwer, “Sharing responsibility: A proposal for a European Asylum System based on solidarity” EU Migration and Asylum law and Policy, 17 February 2016, <http://eumigrationlawblog.eu/sharing-responsibility-a-proposal-for-a-european-asylum-system-based-on-solidarity/>

<sup>475</sup> *ibid*

“sharing norms”, “sharing money”, and “sharing people”.<sup>476</sup> First applies to adoption of harmonized asylum and refugee legislation, second is to be understood as financial assistance whilst third could be associated to the burden sharing with respect to redistributing asylum seekers. The crisis of 2015 and ineffective implementation of relocation mechanism revealed that the EU mainly lacks efficiency with regard the “sharing norms” and “sharing people”. One might argue that, “sharing norms” have become reality on some extend, whilst “sharing people” remained problematic.

Furthermore, “sharing money” is an important contribution toward asylum related matters. It is true that offering money to a person, or member state (include non EU) and its agencies’ is undoubtedly supportive, however it’s not enough. To limit the scope of article 80 TFEU to financial assistance can cause difficulties and might encourage each MS to limit its contribution to some financial means. For instance, Hungary rejects sharing persons and instead agreed to demonstrate its solidarity toward asylum seekers only through the financial assistance.<sup>477</sup> The crisis of 2015 has demonstrated the extent of the problem would not be resolved only by financial contribution; indeed, there was need of a practical, comprehensive and real solidarity which was expected to be translated into reality by relocation of asylum seekers from Greece and Italy.

The Preamble of the 1951 Geneva Convention states:

*“Considering that the grant of asylum may place unduly heavy burdens on certain countries and that a satisfactory solution of a problem of which the United Nations has recognized the international scope and nature cannot therefore be achieved without international cooperation.”*<sup>478</sup>

According to this provision one might question whether it is justifiable to limit the principle of solidarity to the inter-Union solidarity. Noll disagrees that principle of solidarity is limited only to intra-EU solidarity; he argues that this principle indeed follows the opposite

---

<sup>476</sup> G. Noll, “Negotiating Asylum: the EU acquis, Extraterritorial Protection and the Common market of Deflection”, Martinus Nijhoff Publishers, 2000, pg 243-244

<sup>477</sup> Eric Maurice, “Refugee quotas 'unacceptable' for Visegrad states”, Euobserver, 4 September 2015 <https://euobserver.com/migration/130122> see also: Jurek Kuczkiewicz, ““Flexible solidarity” instead of refugee quotas?”, 24 September 2016 <https://www.eurotopics.net/en/166428/flexible-solidarity-instead-of-refugee-quotas>

<sup>478</sup> Preamble to the 1951 Geneva Convention

direction.<sup>479</sup> However, one might try to rebut aforementioned by referring to article 80 TFEU and its textual reading where solidarity is referred as principle “between the member states”. However, in the legal arena where this article is to be applied, it covers issues having an external dimension of the area of freedom, security and justice<sup>480</sup>. Notably, during the conclusions of JHA Council 2012 the solidarity principle was invoked for better cooperation with third states.<sup>481</sup> To this end, solidarity under 80TFEU is linked with the external dimension of the Union asylum policies which undoubtedly leaves a room for external solidarity. As a result solidarity can be divided into two categories, one assisting those in the Union territory (through the relocation mechanism) and second, support for those persons who remains outside the EU and are subject to violence and inhuman treatments amongst other.<sup>482</sup>

To conclude, the attempt of the Union to adopt the relocation system by invoking solidarity and fair burden sharing, could not work properly, due to the different understanding of solidarity within the EU. Despite the fact that the relocation decisions were explicitly referring to the solidarity principle, several states were trying to limit the scope of solidarity only to financial assistance. However, the crisis of 2015 demonstrated that money would not solve the ongoing humanitarian disaster. This sub-chapter has demonstrated that solidarity and responsibility sharing is to be understood as connected concepts. Further, the solidarity was defined as “sharing people”, “sharing money”, and “sharing norms” and due to the nature of the crisis, it was regarded that the Solidarity principle under the article 80TFEU has internal and external dimensions.

---

<sup>479</sup> George Noll, “Why the EU gets in the way of refugee solidarity”, the Open Democracy, 22 September 2015 <https://www.opendemocracy.net/can-europe-make-it/gregor-noll/why-eu-gets-in-way-of-refugee-solidarity>

<sup>480</sup> Chapter II Title V some provisions explicitly refer to matters with external dimension, for instance article 79(3) ensures possibility to conclude agreements with third states, article 78 (2)(g) introduce possibility to manage inflow of asylum seekers by cooperation with third states.,

<sup>481</sup> Council conclusions on a Common Framework for genuine and practical solidarity towards Member States facing particular pressures on their asylum system, including through mixed migration flows. JHA Council, March 2012, pg.7

<sup>482</sup> Working Document on Article 80 TFEU – Solidarity and fair sharing of responsibility, including search and rescue obligations (INI report on the situation in the Mediterranean and the need for a holistic EU approach to migration), Committee on Civil Liberties, Justice and Home Affairs, 15.7.2015, pg.3-4 [http://www.epgencms.europarl.europa.eu/cmsdata/upload/4b9ed7da-274c-4be7-88a6-d86b44035390/Session\\_2\\_-\\_Working\\_Doc\\_on\\_art\\_80\\_TFEU\\_solidarity\\_and\\_fair\\_sharing.pdf](http://www.epgencms.europarl.europa.eu/cmsdata/upload/4b9ed7da-274c-4be7-88a6-d86b44035390/Session_2_-_Working_Doc_on_art_80_TFEU_solidarity_and_fair_sharing.pdf)

## Conclusions

*“Europe cannot go on responding to this crisis with a piecemeal or incremental approach. No country can do it alone, and no country can refuse to do its part”<sup>483</sup>*

1. The European Agenda on Migration introduced various legislative and policy measures. The Agenda on Migration was highly security-centric as it was lacking an efficient legal framework for persons in need of international protection. Indeed, the European Agenda on Migration was prioritizing the security-driven and military concerns including the border control and return policies instead of setting Human well-being, adequate reception facilities and better integration as the primary concerns. Consequently, the EU failed to provide a multi-sector policy approach. The absence of aforementioned priorities in addition to reluctance of member states become Achilles heels of this Agenda, which has undermined the effective implementation of the relocation mechanism. As a result, instead of having an adequate human-focused distribution mechanism, it turned to be a tool concentrating just on mere transfers’ of individuals’ in dire need of protection.
2. The participation in relocation procedures are of a selective nature as it applies only to certain nationalities in clear necessity of international protection, with the average recognition rate of 75%. The eligible “nationalities” according to the EUROSTAT’s quarterly statistics vary hence; the nationality which is today fulfilling the recognition requirement tomorrow might not. Moreover, whilst Syrians can successfully fall under the current recognition rate, Iraqis or Afghans might not. Notably, there are no uniform recognition standards; therefore, recognition rates are very low and vague, even if it is concerning the same nationality within the Union. This criteria has largely influence the poor implementation of the relocation mechanism
3. For the successful implementation of such emergency mechanism the Union has established the hotspots and started cooperation with Turkey Beyond quite vague policy framework neither precise and comprehensive legal definition nor a concrete legal framework on EU level was adopted to regulate hotspots or work. It dependence on national asylum systems turned to be the ‘Achilles heel’ to the Hotspot. EU-Turkey deal could not be effective as instead of releasing Greece from the increased migration difficulties it focused on regular returns from Greece to Turkey. In light of the dubious legal nature of this statement it’s arguable whether this deal was relevant legal tool to amend the legally binding council decisions.

---

<sup>483</sup> “UNHCR chief issues key guidelines for dealing with Europe's refugee crisis”, UNHCR Malta  
<http://www.unhcr.org/mt/component/content/article/35-slideshow-news/804-unhcr-chief-issues-key-guidelines-for-dealing-with-europes-refugee-crisis>

Indeed, EU-Turkey statement decreased the number of relocation beneficiaries as only those individuals arriving in Greece from 16<sup>th</sup> of September 2015 until 20<sup>th</sup> of March were allowed to benefit from relocation mechanism.

4. The Relocation Mechanism does not infringe upon the law but is suffered to serve the purpose it was created for. In accordance with International law, individuals are allowed to seek international protection but the right to determine the specific state of destination is not guaranteed. Consequently, the relocation decisions cannot be considered as breach of international Standards. The EU policies however, have failed to consider the specific personal Dimension of the crisis. The main focus was on the numbers, even if the numbers were relatively low in comparison of the real needs of frontline states it could, on some extend, to release Greece and Italy.
5. Despite the fact that Union has adopted several directives for enhancing the asylum systems across the union, the insufficient responses by individual member states revealed existing gaps and deficiencies in their national asylum systems. Moreover, the poor implementation of the relocation mechanism and the intra-union solidarity was largely influenced by unwillingness and reluctance of member states. Despite the fact that, Finland has abstained the compulsory relocation quota; it was one of few states which relocated almost full number it was assigned for. This demonstrates the importance of Member states willingness to contribute toward the Common and stronger Union.
6. The Decision of Slovakia and Hungary to Challenge the EU relocation Scheme in CJEU, indeed demonstrated serious obstacles that need urgent solution. Despite the fact that CJEU dismissed the case and instead called for immediate implementation of the relocation scheme, it's still very dubious if member states will contribute toward their legal obligation. Moreover resistance by aforementioned states to share burden and assisted other member states in need of support, questions the future fair responsibility sharing in the EU. It is highly expected that in future any asylum related mechanisms with requirement of strong legal commitments might fail again.
7. The Relocation mechanism as the response of the crisis of 2015 could don't achieve its goal, its fall short with regard the implementation number and involvement of member states in general. However, in future, I suppose, the emergency relocation mechanism will work sufficiently under following conditions: 1) if it the solidarity and burden sharing principle will be enhanced within the Union 2) if member states will effectively take into account the preferences before relocating the asylum seekers 3) the recognition rate of 75% will be decreased thus, many asylum seekers will benefit from the relocation 4) the reception facilities will be in compliance of human rights and dignity 5) member states will assess the claims of asylum seekers on individual basis and after in-depth examination of the applications will provide with the relevant protection type and 6) if the Union and its member states in relocations procedures will make the right of appeal and remedies more effective.

8. The analyses of important legal issues related with relocation mechanism has shown that, regardless the poor implementation of the mechanism, it has a legal and relevant intention to help two frontline member states - Greece and Italy, which were bearing the coast of all migration difficulties due to their geographical location and the reluctance of the member states.

## **Recommendations**

1. The EU and its members by taking into account the responsibilities they are assigned for through the international or regional legal instruments should revise the CEAS and make it more human right-focused. Current European Asylum system fails to provide efficient safeguards and respect to human rights namely, adequate reception facility, swift assessment of the asylum applications amongst other. Hence, it is crucial to develop the legal framework on asylum further to ensure the effective international protection.
2. As the world's conflicts and violence seems endless in various regions, it's important to have a new institution on the EU level with strong mechanism responsible to ensure effective implementation of EU asylum and migration

legislation, the new institution will also be responsible to evaluate the commitments of the individual member states on national or supranational level. This will be an EU institution with the power to shape the development of EU asylum and migration laws and assist the union to remain as the role model in respecting the fundamental human rights.

3. The fundamental changes in the EU Dublin system are crucial. The Union needs a system which will not impose burden only on frontline states but rather will require solidarity and burden-sharing responsibility by all members involved. Thus, the “distribution Key” activated under the Second Council Decision should become the general rule of the EU asylum system and respectively amend the Dublin.
4. The relocation mechanism once it will be triggered the EU recognition rate of 75 %, should be decreased significantly, as the EU recognition rate for refugees vary significantly across the union which results in a small number of refugees to benefit from relocation mechanism. Hence, it impedes the efficient implementation of the relocation system.

## **Bibliography**

### **Treaties and Legislation**

#### **International law**

1. Universal Declaration of Human Rights, GA Res 217A (III), UN Doc A/810 (10 December 1948)
2. International Covenant on Civil and Political Rights (Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 23 March 1976, in accordance with Article 49)
3. Convention Relating to the Status of Refugees, 28 July 1951, United Nations
4. Protocol Relating to the Status of Refugees, 31 January 1967, United Nations



5. European Convention on Human Rights (as amended by Protocols Nos. 11 and 14 supplemented by Protocols Nos. 1, 4, 6, 7, 12 and 13)

## **European Union Law**

1. Consolidated version of the Treaty on the Functioning of the European Union, 13 December 2007, 2008/C 115/01
2. Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, 13 December 2007, 2007/C 306/01
3. Treaty on European Union, opened for signature 7 February 1992, (2012) OJ C 326/13 (entered into force 1 November 1993)
4. Charter of Fundamental Rights of the European Union, opened for signature 7 December 2000, (2012) OJ C 326/391 (entered into force 1 December 2009)
5. Council Decision (EU) 2015/1523 of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece
6. 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
7. Directive 2013/33/EU of the European parliament and of the Council of 26 June 2013 on laying down standards for the reception of applicants for international protection (recast)
8. Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals
9. Council Directive 2001/51/EC of 28 June 2001 supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985
10. Council Directive of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted
11. Council Directive 2001/55/EC of 20 July 2001 on Minimum Standards for Giving Temporary Protection in the Event of a Mass Influx of Displaced Persons and on Measures Promoting a Balance of Efforts Between Member States in Receiving such Persons and Bearing the Consequences Thereof, 7 August 2001
12. Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), 29 June 2013
13. Regulation (EU) No 1168/2011 of the European Parliament and of the Council of 25 October 2011 amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational

Cooperation at the External Borders of the Member States of the European Union, 22 November 2011

14. Regulation No 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office, 19 May 2010, OJ L.132/11-132/28; 29.5.2010, (EU)No 439/2010

## **Official Publications**

### **The European Union**

1. European Commission (2015) Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee on the Regions “A European Agenda on Migration”
2. European Commission (2015) Proposal for a Council Decision establishing provisional measures in the area of international protection for the benefit of Italy and Greece
3. European Commission (2016) to the European Parliament and the Council, “on the State of Play of Implementation of the Priority Actions under the European Agenda on Migration”,
4. European Commission (2016) Recommendation “addressed to the Member States on the resumption of transfers to Greece under Regulation (EU) No. 604/2013
5. European Commission (2016) Recommendation 2016/1117 “addressed to the Hellenic Republic on the specific urgent measures to be taken by Greece in view of the resumption of transfers under Regulation (EU) No 604/2013 of the European Parliament and of the Council”
6. European Commission (2017) Communication on The protection of children in migration {SWD (2017) 129 final}, Brussels
7. European Commission(2017) “The EU and the Migration Crisis”

## **Documents and Reports from NGO’s**

### **Amnesty International**

1. Amnesty International (2015) “Refugees endangered and dying due to EU reliance on fences and gatekeepers”  
<https://www.amnesty.org/en/latest/news/2015/11/refugees-endangered-and-dying-due-to-eu-reliance-on-fences-and-gatekeepers/>
2. Amnesty International (2015) “Europe’s Gatekeeper Unlawful Detention and Deportation on Refugees from Turkey”  
<https://www.amnesty.org/download/Documents/EUR4430222015ENGLISH.pdf>
3. Amnesty International (2016) “The State of the World’s Human Rights”  
<https://www.amnesty.org/download/Documents/POL1067002018ENGLISH.PDF>

4. Amnesty International (2016) “Greece: Trapped in Greece: An avoidable refugee crisis”  
<https://www.amnesty.org/download/Documents/EUR2537782016ENGLISH.PDF>

### **Human Right Watch**

1. Human Right Watch(2011) “We’ve Never Seen Such Horror: Crimes against Humanity by Syrian Security Forces”  
<https://www.hrw.org/report/2011/06/01/weve-never-seen-such-horror/crimes-against-humanity-syrian-security-forces>
2. Human Right Watch( 2015) “Turkey: Syrians Pushed Back at the Border Closures Force Dangerous Crossings with Smugglers”  
<https://www.hrw.org/news/2015/11/23/turkey-syrians-pushed-back-border>
3. Human Right Watch (2015) “Europe’s Refugee Crisis: An Agenda for Action”  
<https://www.hrw.org/report/2015/11/16/europes-refugee-crisis/agenda-action>
4. Human Right Watch (2015) “EU Leaders Duck Responsibilities on Refugees: Focus on Outsourcing Asylum, Border Control, Stemming Arrivals”  
<https://www.hrw.org/news/2015/09/24/eu-leaders-duck-responsibilities-refugees>
5. Human Right Watch( 2016) “Bulgaria: Pushbacks, Abuse at Borders: Halt Summary Returns, Beatings, Robbery of Asylum Seekers”  
<https://www.hrw.org/news/2016/01/20/bulgaria-pushbacks-abuse-borders>
6. Human Right Watch(2016) “Turkey Events of 2016” <https://www.hrw.org/world-report/2017/country-chapters/turkey>
7. Human Right Watch (2016) “EU Policies Put Refugees At Risk: An Agenda to Restore Protection” <https://www.hrw.org/news/2016/11/23/eu-policies-put-refugees-risk>
8. Human Right Watch (2017) “Syria: Events of 2017” <https://www.hrw.org/world-report/2018/country-chapters/syria>
9. “Protecting Refugees”, Human Right Watch,  
<https://www.hrw.org/reports/2000/turkey2/Turk009-10.htm>

### **The European Commission Reports on Relocation and Resettlement**

1. European Commission, Communication from the Commission to European Parliament, the European Council and the Council. First Report on Relocation and Resettlement, Brussels, COM (2016) 165, 16 March 2016
2. Report from the Commission to the European Parliament, the European Council and the Council, Second Report on Relocation and Resettlement, Brussels, COM (2016) 222, 12 April 2016;
3. Report from the Commission to the European Parliament, the European Council and the Council, Third Report on Relocation and Resettlement, Brussels, COM(2016) 360 final, 18.5.2016

4. Report from the Commission to the European Parliament, the European Council and the Council, Fourth Report on Relocation and Resettlement, Brussels, COM(2016) 416 final, 15.6.2016
5. Report from the Commission to the European Parliament, the European Council and the Council, Fifth Report on Relocation and Resettlement, Brussels, COM(2016) 480 final, 13.7.2016
6. Report from the Commission to the European Parliament, the European Council and the Council, Sixth Report on Relocation and Resettlement, Brussels, COM(2016) 636 final, 28.9.2016
7. Report from the Commission to the European Parliament, the European Council and the Council, Seventh Report on Relocation and Resettlement, Brussels, COM(2016) 720 final, 9.11.2016
8. Report from the Commission to the European Parliament, the European Council and the Council, Eight Report on Relocation and Resettlement, Brussels, COM(2016) 791 final, 8.12.2016
9. Report from the Commission to the European Parliament, the European Council and the Council, Ninth Report on Relocation and Resettlement, Brussels, COM(2017) 74 final, 8.2.2017
10. Report from the Commission to the European Parliament, the European Council and the Council, Tenth Report on Relocation and Resettlement, Brussels, COM(2017) 202 final, 2.3.2017
11. Report from the Commission to the European Parliament, the European Council and the Council, Eleventh Report on Relocation and Resettlement, Brussels, COM(2017) 212 final, 12.4.2017
12. Report from the Commission to the European Parliament, the European Council and the Council, Twelfth Report on Relocation and Resettlement, Strasbourg, COM(2017) 260 final, 16.5.2017
13. Report from the Commission to the European Parliament, the European Council and the Council, Thirteenth Report on Relocation and Resettlement, Strasbourg, COM(2017) 330 final, 13.6.2017
14. Report from the Commission to the European Parliament, the European Council and the Council, Fourteenth Report on Relocation and Resettlement, Brussels, COM(2017) 405 final, 26.7.2017
15. Report from the Commission to the European Parliament, the European Council and the Council, Fifteenth Report on Relocation and Resettlement, Brussels, COM(2017) 465 final, 6.9.2017

## **CASE LAW**

1. CJEU - C-175/08, C-176/08, C-178/08 and C-179/08, Aydin Salahadin Abdulla, Kamil Hasan, Ahmed Adem, Hamrin Mosa Rashi, Dier Jamal v Bundesrepublik Deutschland
2. Mohammad Ferooz Qurbani, C-481/13, European Union: Court of Justice of the European Union, 17 July 2014
3. Hirsi Jamaa and Others v. Italy, Application no. 27765/09, Council of Europe: European Court of Human Rights, 23 February 2012
4. R.S. v. United Kingdom, Application no. 32733/08, Council of Europe: European Court of Human Rights, 2 December 2008

5. Jointed Cases NF v European Council (Case T-192/16) NG v. European Council (Case T-193/16) NM v. European Council (case T-257/16)
6. Judgment in Joined Cases C-643/15 and C-647/15 Slovakia and Hungary v Council, Court of Justice of the European Union, PRESS RELEASE No 91/17, Luxembourg, 6 September 2017
7. Bader and Others v. Sweden, 13284/04, Council of Europe: European Court of Human Rights, 8 November 2005
8. Soering v. The United Kingdom, 1/1989/161/217, Council of Europe: European Court of Human Rights, 7 July 1989

#### Various Studies and Reports

1. Implementation of the 2015 Council Decisions establishing provisional measures in the area of international protection for the benefit of Italy and of Greece, Directorate General for Internal Policies, Policy Department C: Citizens' Rights and Constitutional Affairs Civil Liberties, Justice and Home Affairs, Study for the LIBE Committee, 2017 [https://www.ceps.eu/system/files/pe%20583%20132%20en\\_All%281%29.pdf](https://www.ceps.eu/system/files/pe%20583%20132%20en_All%281%29.pdf)
2. A study on "The implementation of the hotspots in Italy and Greece" <https://www.ecre.org/wp-content/uploads/2016/12/HOTSPOTS-Report-5.12.2016..pdf>
3. Study on "Migrants in the Mediterranean: Protecting Human Rights", Directorate General for External Policies, Policy Department, European Parliament, 2015
4. Hanne Beirens, Sheila Maas, Salvatore Petronella, Maurice van der Velden, "Final Report on Study the Temporary Protection Directive", Directorate-General for Migration and Home Affairs, European Commission
5. Study on "The Implementation of the Common European Asylum System", Directorate General for Internal Policies, Policy Department C: Citizens' Rights and Constitutional Affairs Civil Liberties, Justice and Home Affairs, Study for the LIBE Committee, 2016
6. A study on "The implementation of the hotspots in Italy and Greece", the European Council for Refugees and Exiles (ECRE), 2016
7. Study on "On the frontline: the hotspot approach to managing migration", Directorate General for Internal Policies, Policy Department C: Citizens' Rights and Constitutional Affairs Civil Liberties, Justice and Home Affairs, Study for the LIBE Committee, 2016
8. Research Report on "youth on the Move", REACH within the framework of the Mixed Migration Platform (MMP), and in partnership with the Mixed Migration Hub (MHub)
9. Report on "Assessing the Cost-effectiveness of Irregular Migration Control Policies in Greece", Migration & Detention Assessment, MIDAS
10. Report on "Behind Them, A Homeland in Ruins: The Youth of Europe's Refugee Crisis", MERCY CORPS
11. Report on "on addressing the refugee and migrant movements: the role of EU External Action", (2015/2342(INI)), Committee on Foreign Affairs Committee on Development, European Parliament, 2017
12. Dinoj K Upadhyay, Special Report on "Migrant Crisis in Europe: Causes, Responses and Complexities". Indian Council of World Affairs, 2016
13. Final report on "Evaluation of the Dublin III Regulation DG Migration and Home Affairs", DG Migration and Home Affairs, European Commission, B-1049 Brussels, 2015
14. Special Report, "EU response to the refugee crisis: the 'hotspot' approach", European Court of Auditors, 2017

15. Mission report in the Greek hotspots in Lesvos and Chios “EU-Turkey statement: the great deception”, Gisti, 2016

## Books

1. Ripoll Servent, A. (Ed.), Trauner, F. (Ed.), “The Routledge Handbook of Justice and Home Affairs Research” The Routledge, 2017
2. Panos Koutrakos, “EU International Relations Law”, Bloomsbury Publishing PLC, United Kingdom, 2015, pg. 568
3. G. Noll, “Negotiating Asylum: the EU acquis, Extraterritorial Protection and the Common market of Deflection”, Martinus Nijhoff Publishers, 2000

## News and Articles

1. “Guide: Syria Crisis”, BBC News, 2012 <http://www.bbc.com/news/world-middle-east-13855203>
2. Lina Sinjab, “Syria conflict: from peaceful protest to civil war”, BBC News, 2013, <http://www.bbc.com/news/world-middle-east-21797661>
3. Matthew Weaver. “Isis declares caliphate in Iraq and Syria”, The Guardian, 2014 <https://www.theguardian.com/world/middle-east-live/2014/jun/30/isis-declares-caliphate-in-iraq-and-syria-live-updates>
4. Marta Bausells, Maeve Shearlaw, “Poets speak out for refugees: 'No one leaves home, unless home is the mouth of a shark'”, 16 September 2015, The Guardian <https://www.theguardian.com/books/2015/sep/16/poets-speak-out-for-refugees->
5. Mark Townsend, “10,000 refugee children are missing, says Europol”, The Guardian, 30 January, 2016, <https://www.theguardian.com/world/2016/jan/30/fears-for-missing-child-refugees>
6. Eric Maurice, “Refugee quotas 'unacceptable' for Visegrad states”, Euobserver, 4 September 2015 <https://euobserver.com/migration/130122>
7. Jurek Kuczkiewicz, ““Flexible solidarity” instead of refugee quotas?”, 24 September 2016 <https://www.eurotopics.net/en/166428/flexible-solidarity-instead-of-refugee-quotas>
8. Evelien Brouwer, “Sharing responsibility: A proposal for a European Asylum System based on solidarity” EU Migration and Asylum law and Policy, 17 February 2016, <http://eumigrationlawblog.eu/sharing-responsibility-a-proposal-for-a-european-asylum-system-based-on-solidarity/>
9. Judy Asks: Is Central Europe Destroying EU Solidarity?” A selection of experts answers a new question from Judy Dempsey on the foreign and security policy challenges shaping Europe’s role in the world, Carnegie Europe, 5 October 2016, <http://carnegieeurope.eu/strategieurope/64787>
10. Harriet Gray, “Surveying the Foundations: Article 80 TFEU and the Common European Asylum System”, Liverpool Law Review 34: 175, 2013, pg.127
11. Evelien Brouwer, “Sharing responsibility: A proposal for a European Asylum System based on solidarity” EU Migration and Asylum law and Policy, 17 February

- 2016, <http://eumigrationlawblog.eu/sharing-responsibility-a-proposal-for-a-european-asylum-system-based-on-solidarity/>
12. Laurel Wamsley, “EU Court Rejects Bid By Hungary And Slovakia To Avoid Taking Migrants”, 6 September 2017 <https://www.npr.org/sections/thetwo-way/2017/09/06/548943527/eu-court-rejects-bid-by-hungary-and-slovakia-to-avoid-taking-migrants>
  13. Steve Peers “A Pyrrhic victory? The ECJ upholds the EU law on relocation of asylum-seekers” <http://eulawanalysis.blogspot.com/2017/09/a-pyrrhic-victory-ecj-upholds-eu-law-on.html>
  14. Szijjártó: ECJ decision has ‘raped European law”, Budapest Business Journal, 6 September 2017 [https://bbj.hu/politics/szijjarto-ecj-decision-has-raped-european-law\\_138336](https://bbj.hu/politics/szijjarto-ecj-decision-has-raped-european-law_138336)
  15. Sarah Progin-Theuerkauf, “Relocation and Solidarity in the Common European Asylum System”, 24 October 2017 <https://blog.nccr-onthemove.ch/relocation-and-solidarity-in-the-common-european-asylum-system/>
  16. Melissa Carlson, “Hungary and Slovakia Challenged Europe’s Refugee Scheme they Just Lost Badly”, The Washington Post, 8 September 2017, [https://www.washingtonpost.com/news/monkey-cage/wp/2017/09/08/hungary-and-slovenia-challenged-europes-refugee-scheme-they-just-lost-badly/?noredirect=on&utm\\_term=.a1d16edd4d1d](https://www.washingtonpost.com/news/monkey-cage/wp/2017/09/08/hungary-and-slovenia-challenged-europes-refugee-scheme-they-just-lost-badly/?noredirect=on&utm_term=.a1d16edd4d1d)
  17. Gyorgy Folk, “Hungary and Slovakia lose migrant quota case against the EU”, Liberties Content, 7 September 2017 <https://www.liberties.eu/en/news/ejc-migrant-quota-ruling-hungary-slovakia-eu/12911>
  18. Zuzana Vikarska “The Slovak Challenge to the Asylum-Seekers’ Relocation Decision: A Balancing Act” <http://eulawanalysis.blogspot.ro/2015/12/the-slovak-challenge-to-asylum-seekers.html>
  19. “Martin Schulz calls for an EU that can tackle today’s challenges”, The Parliament, 8 September 2015 <https://www.theparliamentmagazine.eu/articles/opinion/martin-schulz-calls-eu-can-tackle-today%E2%80%99s-challenges>
  20. Martin Wagner, Paul Baumgartner, Sonia Nižnik, “Distribution key: when, who and where to?”, International Center for Migration Policy Department, 18 September 2015, <https://www.icmpd.org/news-centre/news-detail/distribution-key-when-who-and-where-to/>
  21. Bruno Nascimbene, “Refugees, the European Union and the ‘Dublin System’ The Reasons for a Crisis”, European Papers - A Journal on Law and Integration, Vol. 1, No 1, 2016
  22. “Court of Justice of the European Union; European Union: Challenges to Mandatory Plan to Relocate Refugees”, Global Legal Monitor, 14 December 2015 <http://www.loc.gov/law/foreign-news/article/court-of-justice-of-the-european-union-european-union-challenges-to-mandatory-plan-to-relocate-refugees/>
  23. Nina Schick, “Mandatory redistribution quotas still off the table as EU grapples with refugee crisis”, Open Europe, 14 September 2015 <https://openeurope.org.uk/today/blog/mandatory-redistribution-quotas-still-off-the-table-as-eu-grapples-with-refugee-crisis/>



24. Francesco Maiani, “Hotspots and Relocation Schemes: the right therapy for the Common European Asylum System?”, EU migration and Asylum Law and Policy, 3 February 2016 <http://eumigrationlawblog.eu/hotspots-and-relocation-schemes-the-right-therapy-for-the-common-european-asylum-system/>
25. Lidia Kelly, Pawel Sobczak, “Polish PM calls for an EU where Christianity is not censored”, The Reuters, November 9, 2017 <https://www.reuters.com/article/us-eu-poland-christianity/polish-pm-calls-for-an-eu-where-christianity-is-not-censored-idUSKBN1D92D3?il=0>
26. “Poland refuses Middle Eastern migrants”, EuroNews, 2018, <http://www.euronews.com/2018/01/02/poland-refuses-mid-east-migrants>
27. Steve Peers, “Relocation of Asylum-Seekers in the EU: Law and Policy”, EU Law Analysis, 2015 <http://eulawanalysis.blogspot.com.mt/2015/09/relocation-of-asylum-seekers-in-eu-law.html>
28. “Bodies found dead in a truck near border, while asylum seekers flow into Hungary”, UNHCR, 28 August 2015, see: <http://bit.ly/1Kxvsya>
29. Ska Keller “Second Emergency Relocation Scheme”, Legislative Train Schedule, European Parliament, 2018 <http://www.europarl.europa.eu/legislative-train/theme-towards-a-new-policy-on-migration/file-2nd-emergency-relocation-scheme>
30. Raluca Bejan, “A 50/50 Ball: The East versus the EU in the Refugee Relocation Game”, 31 July 2017 <https://verfassungsblog.de/a-5050-ball-the-east-versus-the-eu-in-the-refugee-relocation-game/>
31. Luisa Chiodi, “The crisis of the EU solidarity: legal issues”, 17 May 2016, <https://www.balkanicaucaso.org/eng/Areas/Turkey/The-crisis-of-the-EU-solidarity-legal-issues-170945>
32. Gerda Heck, Sabine Hess, “Tracing the Effects of the EU-Turkey Deal The Momentum of the Multi-layered Turkish Border Regime” *Movements Journal for Critical Migration and Border Regime Studies*, Vol. 3, Issue, 2017, pg.11 <http://movements-journal.org/issues/05.turkey/04.heck,hess--tracing-the-effects-of-the-eu-turkey-deal.html>
33. İlke Toygür, Bianca Benvenuti “One year on: an assessment of the EU-Turkey statement on refugees” IAI Working Paper, Istituto Affari Internazionali, 2017 [http://www.realinstitutoelcano.org/wps/portal/rielcano\\_en/contenido?WCM\\_GLOBAL\\_CONTEXT=/elcano/elcano\\_es/zonas\\_es/demografia+y+poblacion/ari21-2017-toygur-benvenuti-one-year-on-assessment-eu-turkey-statement-refugees](http://www.realinstitutoelcano.org/wps/portal/rielcano_en/contenido?WCM_GLOBAL_CONTEXT=/elcano/elcano_es/zonas_es/demografia+y+poblacion/ari21-2017-toygur-benvenuti-one-year-on-assessment-eu-turkey-statement-refugees)
34. Paivi Leino, Daniel Wyatt, “No Public Interest Whether the EU-Turkey Refugee Deal Respects EU Treaties and International Human Rights” *European Law Blok*, <https://europeanlawblog.eu/2018/02/28/no-public-interest-in-whether-the-eu-turkey-refugee-deal-respects-eu-treaties-and-international-human-rights/>

## **Abstract**

In response to the Crisis of 2015, The EU triggered emergency relocation mechanism which was based on two Relocation Decisions 2015/1523 and 2015/2016. This Master Thesis aims at analysing the legal aspect of the mechanism and demonstrates the difficulties in this respect. To determine and identify the problems related with poor implementation of relocation mechanism, this research is examining the relevant international and European Union law.

**Keywords:** Relocation mechanism, Burden sharing, solidarity, EU asylum law, Council Decisions

## Summary

### EU RELOCATION: LEGAL ASPECTS

This Master thesis aims at analyzing the legal aspects of the Emergency Relocation Mechanism under relevant EU and international Legal instruments.

First chapter focuses on the general overview of the Crisis of 2015 which led the Union to introduce the emergency relocation mechanism. Hence, this Chapter also concentrates on the relevant EU and International law and the important measures EU has taken to contribute toward successful implementation of relocation mechanism

Second Chapter is focused on the Council Decisions as these legally binding Decisions were defining the scope and context of the emergency asylum redistribution system from Italy and Greece to other member states. Hence, this chapter focuses on the problematic aspects of aforementioned Decisions.

Third chapter addressing the concrete legal base article 78(3) TFEU under which the emergency relocation was triggered. This chapter also assesses Relocation as a mechanism of Solidarity within the Union. In addition this chapter will provide with the short review of the Comments of the CJEU with regard the legal challenges of mandatory relocation scheme brought by Hungary and Slovakia.