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EUROPEAN UNION LEGAL RESPONSE TO THE MIGRATION CRISIS

MASTER THESIS

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ABBREVIATIONS AND MAIN DEFINITIONS

Common European Asylum System – **CEAS**

European Asylum Support Office – **EASO**

1951 Refugee Convention or the Geneva Convention of 28 July 1951 - **Geneva Convention**

The Treaty on the Functioning of the European Union – **TFEU**

The United Nations High Commissioner for Refugees – **UNHCR**

European Court of Human Rights – **ECHR**

Court of Justice of European Union – **CJEU**

The European fingerprint system – **Eurodac**

International Court of Justice – **ICJ**

Treaty on European Union – **TEU**

Non-governmental organizations – **NGO's**

European Union – **EU**

A refugee is someone who has been forced to flee his or her country because of persecution, war or violence. A refugee has a well-founded fear of persecution for reasons of race, religion, nationality, political opinion or membership in a particular social group. Most likely, they cannot return home or are afraid to do so. War and ethnic, tribal and religious violence are leading causes of refugees fleeing their countries[1].

An internally displaced person or IDP, is someone who has been forced to flee their home but never cross an international border. These individuals seek safety anywhere they can find it—in nearby towns, schools, settlements, internal camps, even forests and fields. IDPs, which include people displaced by internal strife and natural disasters, are the largest group that UNHCR assists. Unlike refugees, IDPs are not protected by international law or eligible to receive many types of aid because they are legally under the protection of their own government.[2]

A stateless person is someone who is not a citizen of any country. Citizenship is the legal bond between a government and an individual, and allows for certain political, economic, social and other rights of the individual, as well as the responsibilities of both government and citizen. A

[1] UNHCR. *What is a refugee.* 2020. https://www.unrefugees.org/refugee-facts/what-is-a-refugee/
[2] Račius, E. *Pabėgėlių krizė.* 2020. https://www.vle.lt/Straipsnis/Pabegeliu-krize-124150

person can become stateless due to a variety of reasons, including sovereign, legal, technical or administrative decisions or oversights[3].

Asylum seeker when people flee their own country and seek sanctuary in another country, they apply for asylum – the right to be recognized as a refugee and receive legal protection and material assistance. An asylum seeker must demonstrate that his or her fear of persecution in his or her home country is well-founded.[4]

Migrant is not defined under international law, reflecting the common lay understanding of a person who moves away from his or her place of usual residence, whether within a country or across an international border, temporarily or permanently, and for a variety of reasons. The term includes a number of well-defined legal categories of people, such as migrant workers; persons whose particular types of movements are legally-defined, such as smuggled migrants; as well as those whose status or means of movement are not specifically defined under international law, such as international students[5]. As it was mentioned that there is no exact definition of term migrant. In the global context a person who is outside the territory of the state of which they are nationals or citizens and who has resided in a foreign country for more than one year irrespective of the causes, voluntary or involuntary, and the means, regular or irregular, used to migrate. Under the EU regulations migrant means a person who either: (i) establishes their usual residence in the territory of an EU/EFTA Member State for a period that is, or is expected to be, of at least 12 months, having previously been usually resident in another EU/EFTA Member State or a third country; or (ii) having previously been usually resident in the territory of the EU/EFTA Member State, ceases to have their usual residence in the EU/EFTA Member State for a period that is, or is expected to be, of at least 12 months[6].

Migration means the entry into a foreign country of persons, other than persons enjoying the right of free movement, for various reasons (work, business, family, asylum, etc.) and leading to the residence of persons in the territory of a foreign country.[7]

Migration crisis – its „a period characterised by high numbers of people arriving in the European Union overseas from across the Mediterranean Sea or overland through Southeast Europe“.[8]

Temporary protection a decision of the European Community is granted in case of a mass influx of aliens. The alien himself is not entitled to apply for such protection. Such aliens are

[3] UNHCR. *What is a refugee. 2020.* https://www.unrefugees.org/refugee-facts/what-is-a-refugee/
[4] Kenneth, R. *Migration and sylum. 2019* https://www.hrw.org/world-report/2019/country-chapters/european-union.
[5] IOM un migration. *Who is a Migrant? 2020* https://www.iom.int/who-is-a-migrant.
[6] European Commision. *Migrtion and Home Affairs. 2020.* https://ec.europa.eu/home-affairs/what-we-do/networks/european_migration_network/glossary_search/migrant_en
[7] Naudé, W., Siegel, M., Marchand, K. *Migration, entrepreneurship and development: Critical questions*. US, 2017.
[8] Rankin, J. EU declares migration crisis over as it hits out at fake news. *The Guardian*. Retrieved. 23 November 2019.

admitted to the territory of the EU and accommodated in a place designated by the EC, without restricting their freedom of movement. The concept of Aliens granted Asylum is used to refer to aliens who have been granted one of the valid forms of asylum discussed above: refugee status or subsidiary protection or temporary protection.

INTRODUCTION

The relevance of work. Through the whole history, people have migrated from one country to another for a better life. In the last few years European Union (in the following text - EU) have become a piece of land where migrants, who have been looking for new home by running from the war. The terms such as migrants, refugees, asylum - seekers, migration crisis we hear every day on the media, this makes citizens of the European Union, more involved in the upcoming changes. In last several years the situation in the Middle East has changed drastically. The Arab Spring and Syrian Civil war were the main reasons of increased number of migrants and refugees and as we look further it is not over yet.[9]

In 2015 the EU suffered new wave of refugees and migrants. The whole migration process started to call European Union migration crisis. Millions of migrants per year are coming to EU by running from the war in Syria and other conflict zones. The EU got the burden to relocate and resettle the upcoming migrants through the continent and return the ones who do not qualify under asylum status. Unfortunately, the Mediterranean region and the ways through which European continent is reached, are very unsafe and thousands of people are dying while trying to reach the Europe.[10]

Since 2015, when the migration crisis reached its peak, the EU has implemented measures to improve the control of external borders and migration flows. As a result, the number of people entering the EU illegally has fallen by more than 90 percent. The EU and its Member States are actively working to make European migration policy effective, humane and secure. The European Council has an important role to play in this: it sets strategic priorities. On the basis of these priorities, the EU Council sets the course of action and provides a negotiating mandate with third countries. It also adopts legislation and defines specific programs. The EU has adopted various rules and procedures for managing asylum migrants, highly skilled workers, students and researchers, seasonal workers and family reunification in order to manage legal migration flows. With regard to other migratory flows, the EU has common rules for processing asylum applications. 2015 The Council adopted a decision on the transfer of thousands of asylum seekers to the European Union from Greece and Italy. The EU also establishes readmission agreements for the return of illegal migrants.[11]

In the last five years, Europe has faced the largest influx of refugees since World War II. 2015 - 2016 record migration flows to Europe have declined in recent years. 2018 The

[9] Eurostat Statistics. *Migration and migrant population statistics*. 2017 https://ec.europa.eu/eurostat/statistics%20explained/index.php/Migration_and_migrant_population_statistics
[10] IOM Global migration data analysis centre. *Missing migrants. 2020* https://missingmigrants.iom.int/
[11] Park, J. *Europe's Migration Crisis.* 23 September 2015. https://www.cfr.org/backgrounder/europes-migration-crisis

Mediterranean brought 116,647 people to the EU (more than 1 million in 2015), of whom 2,277 were killed or missing (3,139). Increased migration flows in 2015 revealed that the EU should take appropriate action.[12] So in recent years, people chased by war, terror and persecution in their own country have come to Europe to seek refuge. 2018 year of the nearly 333,400 first-time asylum seekers, more than a quarter came from war-torn Syria, Afghanistan and Iraq. In all these countries, the civilian population is facing the threat posed by terrorists and rebel groups. 2017 year 258 million people all over the world lived in a different country than they were born. There were 57 million such people in the EU or 11 percent of the total EU population, around 20 million they came from another EU country and the rest were born outside the EU.[13]

According to the European Asylum Support Office, in 2016 year, the EU has registered 1.3 million asylum applications. This is 7 percent less than in 2015, and 32 percent applicants are minors. Of the 1.3 million. 26 percent of asylum seekers came from Afghanistan, Iraq, Pakistan and Nigeria. Most of the asylum was granted to Syrian, Eritrean and Iraqi nationals. Of the 1,148,680 applications submitted for the first time, 698,750 were granted. 382 thousand people who crossed the EU border illegally came from Africa, the Middle East and Asia. However, with the entry into force of the agreement between the European Union and Turkey, which stipulates that illegal migrants from Turkey to the Greek islands must be returned to Turkey, the number of illegal migrants from the region has fallen from 885,386,000 up to 182,534 thousand.[14]

The migrant crisis in Europe has exposed the shortcomings of the EU's asylum system. 2017 in November, the European Parliament presented proposals for a reform of the Dublin system determining which country is responsible for examining an asylum application. The European Parliament has also reaffirmed its readiness to enter into negotiations with the EU Council on this issue, but these have not yet begun due to a lack of consensus among EU countries. Parliament has also been involved in the development of new measures to combat immigration and disability border management. It has also contributed to a more efficient system for collecting and storing information on people arriving in the EU.[15]

From 2017 the number of migrants arriving in Europe has fallen sharply. 2017 Over 1 million people arrived the Mediterranean, and in 2018 this number dropped to 117 thousand. The number of asylum applications also decreased: in 2015 year 1.25 million were registered applications, and in 2018 - 581 thousand in turn, the number of illegal EU border crossings fell

[12] European Parliament. 31 July 2019. https://www.europarl.europa.eu/news/lt/headlines/society/20170629STO78631/migrantu-krize-europoje

[13] Van Trigt, E. *The EU Migration Crisis and Moral Obligations.* 4 Sptember 2015. https://www.peacepalacelibrary.nl/2015/09/the-eu-migration-crisis-and-moral-obligations/

[14] *Ibid.*

[15] *Ibid*

from 2.3 million. 2015 and 2016 to the lowest level in 5 years - 150 thousand, 2018 - this is 92 percent, so less than during the height of the migration crisis in 2015.[16]

In 2019 – 2020 years, the flow of migrants to Europe has decreased, the flow of migrants to Europe has decreased, and the migrant crisis has exposed the shortcomings of the current asylum system. Parliament called for it to be reformed by establishing uniform rules on asylum, strengthening the security of external borders and ensuring a fairer distribution of the burden on asylum seekers between EU countries. Nevertheless, in many parts of the world, large numbers of pre-pandemic immigrants and those who did not leave due to pandemic constraints remain a problem in the legal regulation of migration. This problem is related to the legal presence of these persons and the regulation of their rights in the territories of the EU countries, the regulation of the flows of these persons, their social security and the enforcement of their rights.[17] It is planned to deepen cooperation with countries of origin and transit in the fight against illegal migration and to ensure the effective return of illegal migrants in accordance with migration policy and the European Community legal framework.[18]

The problem of work. In order to stabilize the migration flow to Europe, EU adopted legal measures which allows to regulate and check incoming arrivals. First legal response which will be analyzed in master thesis is the EU - Turkey deal. In a landmark deal in March 2016, Turkey promised the EU it would stop the flow of refugees. In return, Turkey would get a 6 billion eur fund for refugees, visa-free travel and a fast-tracked EU membership.[19] Turkey's geographical location is a transit point for asylum seekers and refugees. Nowadays, Turkey is a stopping point for incoming people, a deal with a Turkey gives EU defined time period to adopt legal acts in order to successfully relocate people who would grant a refugee status. However, the problematic aspect arises if EU is not granting a refugee status or subsidiary protection for a person, EU would be forced to send person back to Turkey. The legality and legitimacy of the Agreement, which was based on the premise that Turkey was determined as a ,,safe third country" has been in question since it's declaration. A careful examination of the EU's own laws shows that Turkey does not qualify as a ,,safe third country" making it an unfit destination for the asylum seekers to be returned. Thus, the Agreement between the European Union and Turkey is in violation of both international law and the EU Asylum Procedures Directive.[20] Furthermore, fast track asylum applications which EU tries to apply in order to speed up the process is in violation of EU Asylum

[16] *Ibid*
[17] Stockemer, D., Niemann, A., Unger, D., Speyer, J. The ,,Refugee Crisis", Immigration Attitudes, and Euroscepticism. *International Migration Review*. 2019.
[18] *Ibid.*
[19] Sahin, T. How does the eu Turkey refugee deal work. 24 October 2017. https://www.trtworld.com/turkey/how-does-the-eu-turkey-refugee-deal-work--11588
[20] Aygenc, B., Orpen, C. *The EU-Turkey Refugee Deal*. 13 April 2018. http://www.publicseminar.org/2018/04/the-eu-turkey-refugee-deal/

Procedures Directive. Although Turkey is a signatory to the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol, its instrument of accession stipulates that the Turkish government will maintain a geographic limitation pursuant to the Convention's article 1b, limiting the scope of the Convention's application in Turkey "only to persons who have become refugees as a result of events occurring in Europe".[21] It means that legally Turkey can accept only asylum seekers from Europe however the majority of asylum seekers are flowing from non-European countries.

Sometimes to stabilize relocation process it is not enough to adopt legal acts and hope that process will proceed successfully. The EU adopted Council Decisions in which Member States committed to relocate persons in need of international protection from Italy and Greece. [22] [23] However, not all of the EU member states agreed on such decisions and are not willing to comply with it. To stabilize the situation The European Commission decided to refer the countries, which refuse to implement the obligations, to the Court of Justice of the EU for non-compliance with their legal obligations on relocation. The Commission launched infringement procedures against the Czech Republic, Hungary and Poland. Despite the confirmation by the Court of Justice of the EU of the validity of the relocation scheme in its ruling from the 6 September, the Czech Republic, Hungary and Poland remain in breach of their legal obligations. The replies received were again found not satisfactory and three countries have given no indication that they will contribute to the implementation of the relocation decision. In response to that, the Commission has decided to move to the next stage of the infringement procedure and refer the three Member States to the Court of Justice of the EU[24]. The Council Decisions require Member States to pledge available places for relocation every three months to ensure a swift and orderly relocation procedure. Whereas all other Member States have relocated and pledged in the past months, Hungary has not taken any action at all since the relocation scheme started, Poland has not relocated anyone and not pledged since December 2015. The Czech Republic has not relocated anyone since August 2016 and not made any new pledges for over a year.[25]

While relocating the refugees EU members facing the issues with uncontrolled, self-willed traveling within the EU. As the EU members applied the Council Directive concerning the status

[21]Library of Congress Law. Refugee Law and Policy: Turkey. 31 June 2016. http://www.loc.gov/law/help/refugee-law/turkey.php

[22] 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

[23] 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] European Comission. Relocation: *Commission refers the Czech Republic, Hungary and Poland to the Court of Justice*. 7 December 2017. http://europa.eu/rapid/press-release_IP-17-5002_en.htm

[25] Ibid.

of third-country nationals who are long-term residents[26],[27], the refugees while granted a long term residents permit are allowed to stay in second member state no longer than three months. However, the questions arise, how EU can control such a flow of refugees within the Schengen zone and estimate their duration in different countries?

The last legal response, which will be analyzed in the master thesis, is regarding the reform of the Dublin Regulation. The Dublin Regulation establishes the Member State responsible for the examination of the asylum application. The criteria for establishing responsibility run, in hierarchical order, from family considerations, to recent possession of visa or residence permit in a Member State, to whether the applicant has entered EU irregularly, or regularly[28]. Even so, the Dublin Regulation is not effective in the occurred situation. For that reason, authorities of the EU are seeking to reform the Common European Asylum System. In that scale EU concluded with proposals for Dublin IV Regulation. These proposals are based on solidarity which includes a corrective allocation mechanism and which takes into account resettlement efforts made by a Member State to resettle those in need of international protection direct from a third country. A Member State would also have the option to temporarily not take part in the reallocation. In that case, it would have to make a solidarity contribution.[29]

Until 2007 The legal regulation of migration processes in 2015 was fragmented and did not have a long-term vision. The migration crisis forced the European Commission to review migration policy priorities, identify the needs and integration issues of migrants living in the European Union, and strengthen the legal framework and integration infrastructure, taking into account the successful and unsuccessful experiences of EU Member States in developing and implementing migration management and integration mechanisms. It should be noted that the development of migration policy in the European Union faces political, social and economic challenges posed by the migration process, which are related to the processes of resocialization and adaptation of migrants. At present, although the integration of migrants is quite important in the context of EU migration policy, the right to choose and implement integration policies is a matter for national states. The European Commission pays little attention to integration policy, but the application and targeted implementation of this policy in the Member States of the European

[26] Council Directive 2003/109/EC of 25 November 2003 *concerning the status of third-country nationals who are long-term residents*

[27] European Comission. *Ad-Hoc Query on right of Recognised Refugees to travel in EU Requested by CY EMN NCP* on 02 December 2013 Compilation produced on 16th January 2014. 16 January 2014. https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/networks/european_migration_network/reports/docs/ad-hoc-queries/protection/522_emn_ahq_right_of_recognised_refugees_to_travel_16jan2014_%28wider_dissemination%29.pdf

[28] European Commission. Migration and Home Affairs. Country responsible for asylum applcation (Dublin). 2016. https://ec.europa.eu/home-affairs/what-we-do/policies/asylum/examination-of-applicants_en

[29] Ibid.

Union would help to ensure successful integration processes of migrants, which would later contribute to the rapid development of the national economy.[30]

The research problem. Are the legal responses which can be initiated by the EU to stabilize the migration crisis, effective enough?

Relevance of the final thesis. Problems which are analyzed in the final thesis are relevant due to growing migration crisis and lack of legal remedies which can stabilize and ensure successful migration movement.

The aim of research. Thesis seeks to evaluate three main legal responses which EU can offer in order to stabilize the migration crisis. In the research will be analyzed why legal remedies are not effective enough and what problems arise while trying to apply legal acts.

The tasks of work:

1. To provide migration main definitions and its regulated aspects, types and factors;
2. To provide essential chronological decisions in migrations crisis;
3. To study the relevance of Dublin Regulation in the presence of migration crisis;
4. To examine the EU-Turkey agreement in the context of Greece and Italy relocation issues;
5. To analyze the infringement proceedings in the case law of resettlement and relocation refugees to Poland, Czech Republic and Hungary.

The object of work – is the legal responses of the EU which are applied in order to stabilize and ensure safe and legal migration flow.

Defense of the statements:

1. EU response through EU - Turkey deal, regarding the relocation of refugees, is in violation of both international law and the EU Asylum Procedures Directive. Causing problems for the fast track procedures and the principle of non-refoulement.

2. EU legal framework is not effective and sufficient enough therefore the migration package is being prepared in response.

Methodology of the research: Various research methods are used in this research. The *historical method* is used to review the reasons and consequences of migration flow in order to analyze the legal response. To evaluate legal remedies the *comparative method* is used for a comparison of different legal acts, domestic laws and their connection to EU legislation. *Data collection and data analysis methods* are used to analyze and evaluate the most relevant legal acts which governs migration law.

[30] Tsourdi, E., De Bruycker, P. *EU Asylum Policy: In Search of Solidarity and Access to Protection.* Migration Policy Centre Policy Brief, 2015.

Structure of the research: The structure of the Master Thesis is consisting of an introduction, three main chapters regarding the EU-Turkey deal, infringement procedure against EU member states, who are not in compliance with the agreement and refugee's movement within the EU and the last chapter covers recency of a Dublin regulation. All the chapters contain subchapters where topics are elaborated. Finally, Master Thesis ended with conclusion and recommendations where all the information and discernments are summarized.

Significance of the research: The research could help to understand the problems which occur during the migration crisis. The research could help to direct EU institutions towards stabilization and harmonization of legal remedies in order to stop migration crisis. Problems which are raised in the Master thesis could be the main reasons of the ineffective control of the migration flow and could be useful for the political and law enforcement figures.

1. EUROPEAN UNION LEGAL RESPONSES MAIN DEFINITIONS AND LEGAL FRAMEWORK

1.1 Migration crisis - definition, types and factors

Over the last few decades, the rapid spread of migration in many parts of the world has led to talk about migration and migration crises, processes for managing the flows of migrants from third countries and for regulating their legal status and rights. It should be noted that the terms migration and migration crisis are related, as the migration process is related to the movement of persons between EU countries, and the migration crisis is identified as a consequence of migration processes and shortcomings in their management. Therefore given the links between these two terms, descriptions can be provided.

The purpose of this chapter is to define the main concepts, its meaning, usage also to define the limits of the concepts, which will be analyzed in this thesis. Further, a package of bills, convention, regulations, directives, etc., will be analyzed in the field of a common European asylum system. Their comparison and application is important in order to analyze the accrued issues in migration crisis.

Migration is the long-term transfer of the population from one country to another, crossing territorial boundaries permanently or temporarily.[31] [32]

According to W. Naudé, M. Siegel, K. Marchand (2017), *migration* means the entry into a foreign country of persons, other than persons enjoying the right of free movement, for various reasons (work, business, family, asylum, etc.) and leading to the residence of persons in the territory of a foreign country. W. Naudé, M. Siegel, K. Marchand (2017) provides an overview of the description of migration, it can be stated that migration can be influenced by many factors: work, business, the desire to reunite with family members in foreign countries. Of particular significance in the world over the last five years, however, has been the migration associated with the need for asylum in another part of the world, described as forced migration.[33]

J. P. Cessarino (2019) forced migration is a complex and widespread phenomenon. In order to describe it, three main causes of forced migration are distinguished, which are classified

[31] Lacomba, J., Cloquell, A. *Migration, productive return and human capital: Lessons from the new governmental policy on migration in Ecuador.* International Migration doi., 2017.
[32] Akram, A. A., Chowdhury, S., Mobarak, A. M. *Effects of emigration on Rural Labor Markets.* Bangladesh, 2017.
[33] Naudé, W., Siegel, M., Marchand, K. *Migration, entrepreneurship and development: Critical questions.* US, 2017.

according to the prevailing factors: conflicts, the country's development policies and projects, and disasters:[34]

- *Conflict-induced forced migration.* It is a situation where people are forced to leave their homes due to armed conflicts, including civil war, as well as violence, persecution based on nationality, race, religion, political views or belonging to a particular social group. In this situation, public authorities are unable or unwilling to protect their citizens from violations of these rights. As a result, most of these individuals try to seek refuge outside their home country. Some do so in legal ways, seeking asylum under international law, while others try to cross the state border illegally for fear that asylum will not be granted and they will be returned to their country of origin. The UNHCR annual report, Global Trends, states that at the end of 2015, forced relocation affected 65,3 million people and people, of which almost 21,3 million. – refugees.

- *Forced migration caused by enlargement.* It is the forced relocation of people due to various projects or policies implemented to promote development. Examples of this type of migration are large-scale infrastructure projects such as dams, roads, ports, airports, urban construction, mining, deforestation, park / reservoir conservation and biosphere protection projects. People affected by development-initiated change usually do not go beyond their own borders, but are forced to move from one place to another without adequate compensation. This type of forced migration is much more common than migration due to armed conflict. It should be noted that migration caused by enlargement is less noticeable and analyzed.

- *Forced migration caused by disasters.* This category includes people displaced by natural disasters (floods, volcanic eruptions, landslides, earthquakes), environmental change (deforestation, desertification, land degradation, global warming) and man-made disasters (accidents at work, radioactivity). This type of forced migration is much more problematic than the latter types already discussed. Every year, millions of people around the world leave their homes for these reasons.

- *Involuntary migration* - this type of migration includes forced migration. The prevalence of this migration in most other EU countries has become the most pressing and problematic aspect in the last few years.[35]

[34] Blažytė, G. *Visuomenės nuostatos imigracijos atžvilgiu ir jų atsiradimo prielaidos.* Etniškumo studijos, 2015/1. Vilnius: Lietuvos socialinių tyrimų centras, 2015.
[35] *Ibid*

When assessing migration related to refugees and asylum seekers, it should be noted that the migration of these persons is often associated with illegal migration activities. According to C. Costello (2020), *illegal migration can be divided into two types:*[36]

- *Organized illegal migration* - occurs when there is a network for the transportation of illegal migrants, the members of which organize and carry out the transportation of illegal migrants across borders and territories. This type of transport takes place both across the EU's external border and across the EU's internal border.
- *Unorganized illegal migration* is a case when third-country nationals try to enter Lithuania by crossing the "green" border independently.

When analyzing migration processes and trends, it is necessary to review the description of the migrant as a key player in the migration process. It should be noted that depending on the status of a migrant, the scientific literature distinguishes between two types of migrants who have arrived legally (migrants) and those who have arrived illegally (refugees). In order to distinguish between these two types of migrants, it is necessary to provide descriptions of each of these types.

Migrant is a person who moves from one state to another for a long time or to live permanently.[37]

According to M. Benton, A. Glennie (2016), *migrants* can be classified on the basis of various criteria, but it is important to distinguish between migrants who enter the country, work or earn, and those who seek asylum in the state. The distribution of migrants is presented, according to which its legal status can be determined. Foreign nationals, *divided into legally arrived* and *living and illegal migrants (refugees). Migrants (foreigners) who have arrived legally* are persons who have legally entered the territory of a certain country and obtained a residence permit there, and have undergone the processes of adaptation and integration. According to the authors, often such migrants usually leave the country of origin of their own accord in pursuit of a better economic situation or simply to get rich, in search of change or for other personal reasons. *Refugees* partially leave involuntarily, for a variety of objective reasons, they are forced to do so.[38]

Refugees, otherwise referred to as illegal migrants, are citizens and stateless persons who have entered the territory of the country illegally and are staying illegally in the territory of the Republic of Lithuania and non-Schengen associated countries. Illegal migrants are divided into two groups:[39]

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[36] Costello, C. *Overcoming Refugee Containment and Crisis*. *German Law Journal*. 2020. https://www.cambridge.org/core/journals/german-law-journal/article/overcoming-refugee-containment-and-crisis/9BCD16C5E35F95CD849332F5E896783A

[37] Bauman, Z. *State of crisis.* Cambridge: Polity Press, 2016.

[38] Benton, M., Glennie, A. *Digital Humanitarianism: How Tech Entrepreneurs are Supporting Refugee Integration, and What Policymakers can do to Help.* Washington, D.C.: Migration Policy Institute, 2016.

[39] Bordignon, M., Góis, P., Moriconi, S. *Vision Europe — The EU and the Refugee Crisis.* UK, 2018.

- *Illegal arrivals in the country* - persons who entered the territory of the country illegally by crossing the state border between the BCP or arrived through the BCP using forged or forged documents.
- *Illegally staying in the country* - persons who have entered legally with a valid visa, but have stayed longer than allowed, or engaged in such activities for which the visa does not entitle them; persons who do not have visas or other documents granting the right to stay in the European Union.

Descriptions of the concept of *migration* have identified migration as the long-term movement of people from one state to another in order to find work, get a higher salary, reunite with a family, obtain asylum, etc., in order to improve their living conditions.

W. Naudé, M. Siegel, K. Marchand (2017) states what, the migration process consists of three phases:[40]

- *Premigration*, when individuals decide to migrate and plan their journey.
- *Migration*, which involves the process of migration itself and the physical movement from one place to another. In this phase, physical displacement is directly related to psychological and social factors.
- *Postmigration*, when individuals face socio-cultural challenges in a new society, learn new roles and take an interest in how their ethnic group is changing. In this phase, the migrant faces the phenomena of assimilation, acculturation, and deculturation.

After analyzing the concepts of migration, migration process, migrant and refugee, some fundamental differences can be mentioned. Migrants usually leave the country of origin voluntarily in order to improve their economic situation or simply to get rich, in search of change or for other personal reasons. Refugees leave the country involuntarily, they are forced to do so. In addition, migrants have access to the defense of their own country and refugees have no access, but on the other hand, migrants do not have access to international protection because they do not meet the criteria for refugee status.

Identifying emigration and the causes of immigration is usually one of the most complex problems of all migrations. In addition, the reasons are often confused with the goal pursued in the new country. As the practice of EU countries shows, the society of the host country often refugees and asylum seekers identify with illegal or economic migrants, which leads to a negative attitude of members of society towards them.[41]

[40] Naudé, W., Siegel, M., Marchand, K. *Migration, entrepreneurship and development: Critical questions.* US, 2017.
[41] Blažytė, G. *Visuomenės nuostatos imigracijos atžvilgiu ir jų atsiradimo prielaidos.* Etniškumo studijos, 2015/1. P. 107–134. Vilnius: Lietuvos socialinių tyrimų centras, 2015.

Understandably, this is not unreasonable, especially in recent times, when the flow of refugees to the EU has reached unprecedented proportions, with EU professionals having difficulty in determining who really needs asylum and what is just covering up the situation. It is therefore worth discussing the characteristics of asylum seekers, as defined in the EU legal framework on which asylum is based. Thus, individuals who have left their home country to avoid danger to them are called *refugees* and *asylum seekers*.

According to J. Rankin (2019), *migration crisis* – its *„a period characterised by high numbers of people arriving in the European Union overseas from across the Mediterranean Sea or overland through Southeast Europe"*.[42]

The emergence of migration processes and the migration crisis is determined by the existing economic, social and political conditions in the EU countries, the prevailing legal framework and the applied migration policy. In the analysis of the scale of migration and the emergence of the related crisis, it is necessary to review the factors determining the migration crisis:

- EU countries have significant financial resources and technical assistance to ensure the large number of migrants flowing to Europe. The budget deficits of the EU countries were influenced by the fact that many of these countries were not ready to receive large numbers of migrants and provide them with the necessary asylum and social security.
- A significant number of EU countries have not been able to absorb the expected flows of asylum seekers due to the unstable economic situation and lack of social security.
- In many EU countries, citizens are skeptical about migrants from third countries, as the press increasingly reports negative political and economic decisions in favor of migrants, but forgets about the security of EU citizens and their social and economic well-being.
- The unpredictability of migration flows and the inapplicability of the EU legal framework to mass migration have created difficulties in managing migration processes: providing temporary asylum to migrants from third countries, providing them with accommodation, health care, education, adaptation and integration, protection of rights.[43]

Migration policy is a government action to regulate the causes of migration, migration processes and their consequences (migration crisis). The object of migration policy is the conditions that determine migration processes and the emergence of a migration crisis.[44]

[42] Rankin, J. EU declares migration crisis over as it hits out at fake news. *The Guardian*. Retrieved. 23 November 2019

[43] Rankin, J. EU declares migration crisis over as it hits out at fake news. *The Guardian*. Retrieved. 23 November 2019.

[44] Brekke, Jan-Paul, Staver, Anne. The Renationalisation of Migration Policies in Times of Crisis: The Case of Norway. *Journal of Ethnic and Migration Studies*, 2018.

The aim of EU asylum policy is to grant a fair status to any third-country national in need of international protection in one of the Member States and to ensure that the principle of non-refoulement is respected. The Union therefore seeks to establish a common European asylum system. Immigration policy aims to take a coordinated approach to legal and illegal migration.[45]

Migration policy consists of two components: controlling the migration crisis and ensuring migrant's rights. The process of developing and implementing migration policy consists of two main aspects: legal regulation of migration (rules for admission of re-migrants, control of migration processes, etc.) and policy regulating conditions for migrants (access to employment and housing, access to education, etc.) crisis management and integration policies for migrants.[46]

According to G. Sultankhodjayeva (2015), the process of shaping migration policy consists of two elements: reception policy for migrants (i.e. migration regulation, selection of migrants and rules for their admission) and policy regulating migrants living conditions (i.e. accommodation, employment, education, social services). In other words, migration policy is regulated in the first case and integration policy in the second.[47] L. Chauvet, M. Mercier (2014) highlights the management of migration flows and the control of state borders, the impact of migration on state sovereignty, the institute of citizenship and national security, the social, political and economic integration of migrants as key aspects of migration policy and migration crisis management. It should be noted that integration processes are inseparable from the migration process, therefore, when analyzing integration processes, it is important to take into account the pre-migration situation and the circumstances that affect post-migration processes.[48]

M. Czaika, H. de Haas (2016), defines migration policy as laws, rules, measures, practices implemented by nation states seeking to influence the volume of migration flows. Volume regulation aims to increase, decrease or maintain migration flows at a similar level. The composition of migration flows is related to the frequent tendency of states to increase or decrease the entry of certain categories of migrants. This selective strategy aims to determine in advance what qualifications migrants will enter, what income they will receive on arrival and what class they will represent.[49]

Migration policy is linked to the implementation of the obligations of membership of the European Union. The main document setting out migration policy is the guidelines for migration policy adopted by the European Community. The objectives of the guidelines are to ensure a labor

[45] Ina Sokolska. 2020. https://www.europarl.europa.eu/factsheets/lt/sheet/151/prieglobscio-politika

[46] Moa, Nalepa. *EU migration policy changes in times of crisis.* 2018. https://www.mah.se/upload/FAKULTETER/KS/IMER/Moa_Final.pdf

[47] Sultankhodjayeva, G. *Labor Immigration Policy in the European Union.* UK, 2015.

[48] Chauvet, L., Mercier, M. *Do Return Migrants Transfer Political Norms to their Origin Country?* Journal of Comparative Economics. 2014. 42 (3).

[49] Czaika, M., de Haas, H. *The Effectiveness of Immigration Policies: A Conceptual Review of Empirical Evidence.* IMI Working Papers Series. 2016. No. 33.

market policy that meets the needs of the state, to enable migrants to integrate in order to reap the benefits of migration, to improve the management of processes, control measures to prevent EU Member States international obligations and to manage the migration crisis.[50]

To summarize, migration can be described as the movement of people from one country to another, and the migration crisis is described as a set of factors related to increased migration flows in EU countries, their unwillingness to manage migration and effective political and legal decisions.

1.2 EU migration legal framework

In 2015, the competent authorities of the European Union began to record a sharp increase in the number of illegal entry of foreigners into the EU. According to official figures, in 2015, 1,820,000 cases of illegal entry into the territory of EU Member States were recorded[51]. In 2015, foreigners filed more than 1 million asylum applications, which exceeds the number of applications filed during the conflict in Yugoslavia[52]. This phenomenon, connected with a significant increase in the flow of illegal immigrants to EU countries, as well as the European Union's unpreparedness to contain and effectively distribute this flow, was called the "European Migration Crisis". Initially, European politicians tried to perceive in significant influx of foreigners into the EU, positive aspects, like an opportunity to replenish labor resources. However, as the migration crisis developed, the focus on resolving it more and more began to shift towards preventing illegal immigrants from entering the EU through tightening controls at external borders. The European Migration Crisis has highlighted serious flaws in the overall asylum system, which has been virtually incapacitated. In particular, challenges for the EU have become such problems as: the distribution of asylum seekers among EU member states and the provision of quick and effective identification of persons in need of international protection[53].

The primary legal act which regulates and ensures the rights and obligations of migrants is Geneva Convention – often referred as the 1951 Refugee Convention – is the cornerstone of the

[50] Cardwell, Paul James. *Tackling Europe's Migration „Crisis" through Law and New Governance*. Global Policy, 2018.

[51] European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union. *Risk Analysis for 2016* https://frontex.europa.eu/assets/Publications/Risk_Analysis/Annula_Risk_Analysis_2016.pdf

[52] European Union Agency for Fundamental Rights. *Asylum and migration into the EU in 2015.* https://fra.europa.eu/sites/default/files/fra_uploads/fra-2016-fundamental-rights-report-2016-focus-0_en.pdf

[53] Pascale Joannin. Foundation Robert Shuman. *What type of reform of the common European asylum regime are we heading toward?* 11 July 2016 https://www.robert-schuman.eu/en/european-issues/0400-what-type-of-reform-of-the-common-european-asylum-regime-are-we-heading-toward

international refugee protection regime. Elaborated as a response to the atrocities of World War II, it aimed to address the massive movements of population in Europe in the aftermath of the conflict. The treaty defines the term refugee as a person who "owing to a well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinions, is outside the country of its nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country". Geneva Convention established a solid foundation for substantive policy harmonisation[54]. It also details the rights which are attached to the status of refugee, as well as the obligations of the States parties to the Convention.[55]

The Protocol relating to the Status of Refugees was adopted in 1967 and expanded the geographical scope of the treaty to the protection of all refugees, without territorial limitation. All European member states have ratified the 1951 Refugee Convention and the 1967 Protocol. The principle of non-refoulement, laid out in the article 33, is the core principle of the Refugee Convention. It prohibits the turn of refugees to places where there is a reasonable ground to think that they would face danger or persecution: "where his [or her] life or freedom would be threatened on account of race, religion, nationality, membership of a particular social group or political opinion". This non-refoulement provision conjointly applies to asylum-seekers who have not yet received a final decision regarding their refugee application. Reservations to article 33 are not permitted by the treaty, therefore States parties cannot derogate from this non-refoulement obligation. This obligation of non-refoulement applies not only to countries of origin – direct refoulement – but also to situations of indirect refoulement "countries where individuals would be exposed to a serious risk of onward removal to such a country".

International law provides dual protection to refugees and asylum-seekers, considered to be in a position of vulnerability: if all migrants benefit from the general protection of universal human rights treaties, persons who qualify as refugees are entitled to extra protection measures that are recognised in several international instruments. The right to asylum was first proclaimed in the article 14 of the Universal Declaration of Human Rights: "everyone has the right to seek and to enjoy in other countries asylum from persecution". Entered into force in 1953, the European Convention for the Protection of Human Rights and Fundamental Freedoms is the first regional treaty for the protection of human rights in Europe. Drafted by the Council of Europe, it is not per se an EU document – although negotiations regarding the EU accession to the ECHR are underway. However, since every EU member state is part of the Council of Europe and therefore, contracting party to the ECHR, its provisions are applicable in all EU countries. Furthermore, the 2009 Lisbon treaty established the fundamental rights recognised by the European Convention for

[54] Kay Hailbronner and Daniel Thym, München *Legal Framework for EU Immigration Policy*, January 2016.
[55] Lazaridis, G. *International migration into Europe: From subjects to abjects.* New York: Palgrave Macmillan, 2015.

the Protection of Human Rights and Fundamental Freedoms were "general principles of the Union's law".

The right to asylum is not recognised as such in the ECHR but the Convention ensures the protection of basic human rights such as the right to life (article 2), prohibition of torture (article 3), right to liberty and security (article 5), right to a fair trial (article 6) or right to an effective remedy (article 13), provisions that apply to all individuals under its jurisdiction, including refugees and migrants. Additionally, article 4 of Protocol n°4 to the ECHR provides that "collective expulsion of aliens is prohibited".[56]

To counteract illegal migration, the European Union has developed a legislative framework consisting of four documents:

The so-called Assistants Package, which includes Council Directive 2002/90 / EC, which provides a common definition of the offense of facilitation of unauthorized entry, transit and residence and Framework Decision 2002/946 / JHA, which provides for sanctions for such offenses.

Council Directive 2002/90 / EC and Framework Decision 2002/946 / JHA are interdependent and complementary to each other since they are the basis of legislation under which, by the end of 2004, all EU countries were obliged to amend their criminal codes and other laws governing domestic relations with the help of sanctions for criminal acts and aiding illegal migration. Based on the above mentioned documents, we can say that illegal migration is perceived by the European Union through the prism of measures addressed to employers who provide jobs to undeclared foreigners, as well as through an analysis of possible ways and means of an effective policy for the deportation of migrants.

The Commission also found that the revision of the Assistants 'Package would not bring additional added value compared to its effective and full implementation, but it was generally agreed that non-legislative measures in support of Member States authorities, civil society organizations or other relevant actors, including enhanced cooperation with third countries. In July 2018 the European Parliament called on the Commission to draw up guidelines for Member States on how to prevent the criminalization of humanitarian aid in September 2018, a hearing was held on the subject[57].

The Return Directive (2008/115 / EC) establishes uniform rules and procedures for the return of migrants entering the territory of the EU. Such measures contribute to the solution of certain tasks: the introduction of minimum criteria for the location and terms of detention of illegal

[56] *Ibid*

[57]Marion Schmid-Drüner, Fact Sheets on the European Union, *Immigration policy, December 2019.* *https://www.europarl.europa.eu/factsheets/en/sheet/152/immigration-policy*

immigrants in special institutions, the creation of attractive conditions for stimulating the voluntary departure of migrants from the country, the establishment of bans and criteria for prohibiting re-entry into the country.[58] The first report on its implementation was adopted in March 2014. In September 2015, the Commission published the EU action plan on return, which was followed by the adoption, in October 2015, of the Council conclusions on the future of the return policy. In March 2017, the Commission supplemented the Action Plan with a communication on 'a more effective return policy in the European Union – a renewed action plan' and a recommendation on making returns more effective[59]. The objective of the Return Directive is to ensure that the return of third-country nationals (non-EU nationals) without legal grounds to stay in the EU is carried out effectively through fair and transparent procedures that fully respect the fundamental rights and dignity of the people concerned. The fundamental rights obligations under primary and secondary EU law (including under the EU Charter of Fundamental Rights) and international law include, in particular, the principle of non-refoulement; the right to an effective remedy; the prohibition on collective expulsion; the right to liberty; and the right to the protection of personal data[60]

Directive 2009/52/EC developed unified administrative, criminal law norms for employers from EU countries who employ migrants who entered the country illegally. The main objective of the Directive is to create barriers to the flow of illegal migrants from countries that are not members of the European Union. This document established the principle of the prohibition of all employment for illegal immigrants, which is the basis for controlling illegal migration flows. Also, Directive 2009/52/EC developed an extensive range of sanctions and preventive measures of a rehabilitation and restraining nature.

Those documents presume that criminal measures and administrative sanctions will be imposed on individuals and legal entities for facilitating illegal immigration. It should be noted that the legislation of the European Union does not imply punishment or sanctions for illegal migrants themselves, for the violation of articles of mentioned directives since the EU is based on the principles of humanity and does not represent other options for deportation or voluntary departure. Of course for serious crimes committed by migrant itself in Member State, he/she can be punished under the criminal or/and administrative codes.

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[58]Мохова И.М, Институт Ближнего Востока , *Начало новой политики ЕС по борьбе с нелегальной иммиграцией, 1 July 2008.* http://www.iimes.ru/?p=7291???history=0&sample=12&ref=0

[59] Marion Schmid-Drüner, Fact Sheets on the European Union, Immigration policy, December 2019. https://www.europarl.europa.eu/factsheets/en/sheet/152/immigration-policy

[60] Katharina Eisele, European Implementation Assessment, *European Parliamentary Research Service, Brussels European Union, 2020. https://www.europarl.europa.eu/RegData/etudes/STUD/2020/642840/EPRS_STU(2020)642840_EN.pdf*

Today, the formation of migration policy in the EU member states is based on the identification of the causes of migration, which is usually one of the most complex problems of all migrations. In addition, the reasons are often confused with the goal pursued in the new country. As the practice of EU countries shows, the society of the host country often refugees and asylum seekers identify with illegal or economic migrants, which leads to a negative attitude of members of society towards them. Understandably, this is not unreasonable, especially in recent times, when the flow of refugees to the EU has reached unprecedented proportions, with EU professionals having difficulty in determining who really needs asylum and what is just covering up the situation. Therefore, it is worth discussing the characteristics of asylum seekers, defined in the EU and Lithuanian legal framework, on the basis of which asylum is granted. Thus, individuals who have left their home country to avoid danger to them are called *refugees* and *asylum seekers*.[61] Article 1 point 18 of the Republic of Lithuania Law on the Legal Status of Aliens defines a refugee and article 86 point 1 defines the granting status of refugee "*…a refugee is an alien who, due to persecution in his or her country of origin or for fear of such persecution, is unable to avail himself or herself of the defense of his or her country of origin. Such persecution must be related to race, religion, and nationality, membership of a particular social group or political beliefs. Such an alien is granted the right of permanent residence in Lithuania."*[62]

J. R. Bucheli, M. Fontenla, B. James (2019) notes that the EU has recently paid increasing attention to migration based on study, work or other legal activities and family reunification. This trend is also followed by Lithuania, which has applied the provisions of EU directives to its law - the Law on the Legal Status of Aliens regulates the conditions of entry, residence or work of migrants coming to work or engage in other legal activities, to study or with their family members. However, since the outbreak of the war in Syria in 2015, mass migration flows have also increased from that country, but most EU Member States have not been prepared for this scale of migration and many EU Member States have had to improve their migration policies and legal frameworks.[63]

Speaking about authorities, different governmental institutions are responsible for smooth compliance of legal acts. Few examples of EU member states are taken to compare their national legislation regarding the refugee and migration procedures. The stay and residence of aliens in the Republic of Lithuania is controlled by the police, the Migration Department under the Ministry of the Interior, the State Border Guard Service under the Ministry of the Interior, in association with

[61] Blažytė G. *Visuomenės nuostatos imigracijos atžvilgiu ir jų atsiradimo prielaidos.* Etniškumo studijos, 2015/1. P. 107–134. Vilnius: Lietuvos socialinių tyrimų centras.
[62] Platačiūtė, V. *Migrantų integracija Lietuvoje: individualūs ir struktūriniai veiksniai.* Kaunas: VDU, 2015.
[63] Bucheli, J. R., Fontenla, M., James, B. *Return migration and violence. World Development. Elservier.* US, 2019. Vol. 116 (6).

state and municipal institutions and agencies of the Republic of Lithuania. Those are the main legal acts of the Republic of Lithuania, which regulates the migration and asylum procedures:

- Republic Of Lithuania Law On The Legal Status Of Aliens;
- Government of the Republic of Lithuania, resolution no. 998 "On Approval of the Description of the Procedure for the Provision of State Aid for the Integration of Asylum Seekers";
- Minister of the Interior of the Republic of Lithuania Order on approval of the description of the procedure for granting and withdrawing asylum in the Republic of Lithuania from 26 February 2016.

There are more other orders and articles in Lithuanian legal acts, which ensure refugees and migrants rights, and freedoms in country.

The system of the relationship between international, national and supranational law determines the complexity of legal regulation of the asylum system in the European Union. The main purpose of supranational EU asylum legislation is to, create a regulatory framework for the effective interaction of national legal systems and the distribution of responsibility between member states, and secondly, to ensure that member states comply with certain standards when considering asylum applications and providing international protection.

In view of the identified tasks, EU asylum legislation can be represented in the form of a system consisting of two main parts (elements): institutional (organizational) and material. The organizational (institutional) part regulates the relations associated with the formation of the organizational and institutional structure of a common European asylum policy. Initially, it included unified norms that have direct effect on the territory of the EU. Consequently, the main source of law in this part is the Regulation. Currently organizational (institutional) part represented by the Dublin Regulation[64], Regulation which support the Eurodac[65] fingerprint identification system and Regulation which establishes the European Asylum Support Office[66]. The main objective of the Dublin Regulation is to establish the rules regarding the determination of the state responsibility for examining an asylum application. It is based on the principle that asylum should

[64] 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

[65] Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice.

[66] Regulation (EU) No 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office

be considered within the EU only by one member state. The Regulation obliges the EU member states upon receipt of an asylum application first of all, to determine the state whose competence includes the consideration of this application. To establish the state responsibility for considering the application, the Regulation provides a hierarchical system of criteria's (Dublin Criteria)[67].

The material part of the EU asylum legislation governs relations related to the process of providing international protection in EU member states and determining the status of a person who has received international protection. In the area of the material part, the method of harmonizing legislation has traditionally been used within the EU, and the main sources of law, respectively are directives. At the moment, three key Directives should be included in the material part: standards for the qualification Directive[68], procedural Directive[69] and Directive on the conditions of admission[70]. The main objective of these directives is to establish the minimum guarantees that should be provided to asylum seekers or who have received international protection in Member States. The qualification Directive sets out the criteria for granting asylum seeker a refugee status or subsidiary protection. The main purpose of this directive is to establish harmonized rules in the EU that determine the status of a refugee or a person who has received subsidiary protection. The procedural Directive defines the general framework for the examination of applications for international protection. The main purpose of the Directive is to ensure that national authorities take legitimate and reasonable decisions on asylum applications. The Directive on the conditions of admission contains framework rules establishing minimum standards regarding the conditions of stay of asylum seekers in terms of the right to housing, food, clothing, etc.

By middle of 2016, the Commission had prepared a package of seven legal acts that provide for an almost complete change in existing EU asylum legislation. As noted above, the 2016 reform covers both the organizational (institutional) and material parts of EU asylum legislation. Moreover, the most significant changes are observed in the material part of the indicated legal system, since the legislator fundamentally changes the method of legal regulation, moving from harmonization to unification.

In order to ensure not only the rights and freedoms of the migrants, refugees, asylum seekers, but also duties, they have the right to approach the Courts. To solve the dispute either

[67]European Commission. *The Dublin System*. 2016. 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

[68] Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted

[69] Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection

[70] Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection

member states or migrants, refugees, asylum seekers can apply or appeal to the courts with a lawsuit or claim. There are various courts where the dispute can be solved. First stage of application is the national courts of the member states. Each member state have to ensure the right to apply to their national courts. Each member states have different rules of instances and procedures it means that application procedure is also different. In addition, to solve the dispute there are possibility to apply to ECHR or CJEU.

The 2015 migration crisis was the reason for the next widespread reform of EU asylum legislation. However, at the same time, the aim is not only to overcome the effects of the crisis, but also to solve the "old" problems, which for various reasons could not be solved in previous years. The proposed legal acts allow us to conclude that the European Commission intends to implement a reform of the asylum system in the European Union, covering almost all aspects of this policy. The main objective of the development of the CEAS is to further unify the procedure for providing international protection in the EU and make this system more effective and fair. An analysis of the legal acts and competent authorities also allows us to conclude that the legislator plans to significantly strengthen the supranational component in EU asylum policies. In the short terms plans it is seems that EU is expected to overtake the redistribution process strongly in their hands. In particular, it is planned to transfer responsibility for processing asylum applications from the national level to the EU level for example, by providing the EASO with decision-making functions on international protection. From a legal point of view, the reform of the European asylum system does not raise questions with the possible exception of forced relocation process of asylum seekers. It can be concluded that the EU, while strengthening the supranational component, does not go beyond its powers. At the same time, from a political point of view, the planned reform gives rise to serious rejection by a number of member states, fearing infringement of their interests in such a sensitive sphere as the provision of international protection.

1.3 EU response to the migration

This chapter examines packages of bills introduced by the EU authorities. The main purpose of the chapter consists of analyzing and evaluating the key changes prepared by the European Commission. The changes has started in 2016 when EU migration system were “overheated” and EU authorities took a decision to present new proposals of legal acts to stabilize the migration flow. However new challenges visited legislatures. Long discussions regarding the

proposed legal acts, reluctance of some member states to participate in Common European Asylum System brings us to new proposals from September 2020.

On 13 July 2016 the European Commission presented its second package to reform the Common European Asylum System (CEAS), containing proposals for a new Recast Reception Directive, a new Qualification Regulation and a new Asylum Procedures Regulation. The Commission also tabled a proposal for an EU Resettlement Framework with the aim to "provide a common approach to safe and legal arrival in the Union for third-country nationals in need of international protection."[71] The second package follows 2 months after the first package of reforms, which proposed the Dublin IV Regulation, a Regulation for the European Union Asylum Agency and a new Eurodac Regulation. In the first package according to the European Migration Agenda, one of the key measures in the response to the migration crisis in Europe was improvement of the asylum system in the EU. On April 6, 2016, the European Commission prepared a report for the European Parliament and the Council of the EU on ways to reform the Common European Asylum System and expand legal routes to Europe. This report had to be considered as a plan for the further implementation of measures in the field of asylum and legal immigration provided for by the European Migration Agenda. In terms of structure, the report can be divided into two main blocks: measures concerning the reform of the European asylum system, and measures concerning the reform of the EU immigration policy. In the field of the European asylum system, the Commission has identified five priority areas[72]:

1. Establishing a sustainable and fair system for identifying the Member State responsibility for examining an application for asylum (Dublin criteria).
2. Achieve greater convergence and prevent asylum-seeking practices in several countries (Asylum shopping).
3. Preventing the practice of illegal movement of asylum seekers within the EU.
4. Reforming the Asylum Assistance Service ((European Asylum Support Office (EASO).
5. Expanding the capabilities of the European fingerprint system (Eurodac).

From 2020 September, Commission proposed new migration and asylum package which will change 2016 proposed CEAS package of legislations. As EU Commission stated: "*new Pact on Migration and Asylum, covering all of the different elements needed for a comprehensive European approach to migration. It sets out improved and faster procedures throughout the*

[71] European Council on Refugees and Exiles. *European Commission new package of reforms of the Common European Asylum System*. 15th July 2016. https://www.ecre.org/european-commission-new-package-of-reforms-of-the-common-european-asylum-system/.

[72] Юлия Мальцева. Современная Европа, 2017. No. 4 с. 121-129. *Реформирование общей Европейской системы предоставления убежища*. Ключевые моменты второго пакета законопроектов от 13 июля 2016 г.

asylum and migration system. And it sets in balance the principles of fair sharing of responsibility and solidarity. This is crucial for rebuilding trust between Member States and confidence in the capacity of the European Union to manage migration"[73]. The current system showed it incapacity to cope with migration crisis. Current legal acts outdated due to overflow of incoming asylum seekers. With the new Pact on Migration and Asylum, the Commission proposes common European solutions to a European challenge. The EU must move away from ad-hoc solutions and put in place a predictable and reliable migration management system[74]. Commission did not rejected so far all drafted proposals from 2016, but improved and kept what is relevant for current situation. It included the cooperation between the member states, countries of origin and transit, ensuring effective procedures, successful integration of refugees and return of those with no right to stay. The core elements of this approach are (1) the preliminary examination of asylum applications at the EU's external borders, (2) the introduction of a multilevel solidarity mechanism that takes into account different levels of pressure and (3) the Europeanisation of return, including the development of a complex institutional infrastructure[75]. As we can see, the new proposal package emphasizes the solidarity mechanism which will ensure the fluent operation of the asylum mechanism. After the CJEU decision in Joined Cases C 715/17, C718/17 and C719/17 against Poland, Hungry and Czech Republic refusal to accept the refugees, EU authorities focused on solidarity mechanism to share the burden of member states. However the idea of 'solidarity and responsibility sharing', which the Commission emphasised in the political Communication, aptly captures the tensions inherent in any debate about migration and asylum in Europe. Member States have different views about their 'fair' share, especially when it comes to the reform of the infamous Dublin system[76].The priorities that EU partnerships with third countries should pursue range, according to the New Pact, from addressing the root causes of migration and developing legal pathways both for protection and legal migration purposes to fostering readmission and strengthening migration management capacities in third countries; all these aims to be achieved under comprehensive, balanced and mutually beneficial alliances[77]. The proposed draft laws lead

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[73] European Commission, Press release, *A fresh start on migration: Building confidence and striking a new balance between responsibility and solidarity*, Brussels. 23 September 2020. https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1706

[74] *Ibid.*

[75] Steffen Angenendt, Nadine Biehler, Raphael Bossong, David Kipp, Anne Koch, German Institute of International and Security affairs, *The New EU Migration and Asylum Package: Breakthrough or Admission of Defeat?*, Berlin, October 2020. https://www.swp-berlin.org/10.18449/2020C46/

[76] Daniel Thym, Research Centre Immigration & Asylum Law, University of Konstanz, Immigration and Asylum Law and Policy, *European Realpolitik: Legislative Uncertainties and Operational Pitfalls of the 'New' Pact on Migration and Asylum*, Germany, 28 September 2020. http://eumigrationlawblog.eu/european-realpolitik-legislative-uncertainties-und-operational-pitfalls-of-the-new-pact-on-migration-and-asylum/

[77] Paula García Andrade, Associate Professor, Universidad Pontificia Comillas, Immigration and Asylum Law and Policy, *EU cooperation on migration with partner countries within the New Pact: new instruments for a new paradigm? December 2020, https://eumigrationlawblog.eu/eu-cooperation-on-migration-with-partner-countries-within-the-new-pact-new-instruments-for-a-new-paradigm/*

to the conclusion that the European Commission carrying out a full-scale reform of the EU asylum system, which will cover almost all aspects of this policy. The ongoing reform involves strengthening the supranational component in the asylum policy within the European Union. A characteristic feature is also a change in the form of legal regulation. If regulations in the initial period of development of the asylum policy were adopted in the form of directives, now the main source of law are regulations. This circumstance is due to the fact that the Directives in the field of asylum contained too broad opportunities for their arbitrary implementation, which gave rise to significant discrepancies in the legal regulation of asylum between different EU member states.

Commission in it‘s Communication determined nine main objectives of new pact on migration and asylum[78]:

1. robust and fair management of external borders, including identity, health and security checks;
2. fair and efficient asylum rules, streamlining procedures on asylum and return;
3. a new solidarity mechanism for situations of search and rescue, pressure and crisis;
4. stronger foresight, crisis preparedness and response;
5. an effective return policy and an EU-coordinated approach to returns;
6. comprehensive governance at EU level for better management and implementation of asylum and migration policies;
7. mutually beneficial partnerships with key third countries of origin and transit;
8. developing sustainable legal pathways for those in need of protection and to attract talent to the EU; and
9. supporting effective integration policies.

The Commission to achieve those aims proposed 5 legal acts which should stabilize the migration crisis. Asylum and Migration Management Regulation (AMR): Proposal for a Regulation on asylum and migration management. This Regulation should change the existing Regulation (EU) No 604/2013 or so called Dublin III. This proposal for a new Regulation on Asylum and Migration Management aims at replacing the current Dublin Regulation and relaunches the reform of the Common European Asylum System (CEAS) through the establishment of a common framework that contributes to the comprehensive approach to migration management through integrated policy-making in the field of asylum and migration management, including both its internal and external components. This new approach anchors the existing system in a wider framework that is able to reflect the whole of government approach and ensure coherence and effectiveness of the

[78] European Commision, *Communication on a New Pact on Migration and Asylum,* Brussels, 23 September 2020.

actions and measures taken by the Union and its Member States[79]. The new approach to migration management also includes improving the rules on responsibility for examining an application for international protection, in order to contribute to reducing unauthorised movements in a proportionate and reasonable manner[80]. All the main changes and impacts on migration crisis, Dublin IV is analyzed in chapter 2.1 as the main legislative response to the migration crisis.

Second proposal which ensures the safety of EU borders is Screening Regulation: Proposal for a Regulation introducing a screening of third country nationals at the external borders. The objective of the Proposal for a Screening Regulation is two-fold: a) to identity the persons, establish health and security risks at soonest; and b) to direct the persons to relevant procedures, be it either asylum or return (Art. 1). The proposal envisages that the outcome of the screening will be direction of the persons to appropriate procedures – either asylum procedures or returns and also it will impact on whether to channel asylum seekers to border or regular asylum procedures[81]. This proposal puts in place a pre-entry screening that should be applicable to all third country nationals who are present at the external border without fulfilling the entry conditions or after disembarkation, following a search and rescue operation. The proposal introduces uniform rules concerning the procedures to be followed at the pre-entry stage of assessing the individual needs of third country nationals and uniform rules on the length of the process of collecting relevant information for identification of the procedures to be followed with regard to such persons[82]. For clear and fluent cross border process the main elements of screening procedure are determined. The screening procedure would consist of:

- preliminary health and vulnerability checks;
- identification based on information in European databases;
- registration of biometric data in the appropriate databases (i.e. fingerprint data and facial image data);
- security check through a query of relevant national and Union databases (via the European search portal);
- the filling out of a de-briefing form, and
- referral to the appropriate procedure.

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[79] European Commission. Brussels. *Regulation of the European Parliament and of the Council on asylum and migration management and amending Council Directive (ec) 2003/109 and the proposed Regulation (eu) xxx/xxx [asylum and migration fund]*. 23 September 2020.

[80] *Ibid*

[81] Lyra Jakulevičienė, Lawyer, Professor at Mykolas Romeris University, Immigration and Asylum Law and Policy, *Re-decoration of existing practices? Proposed screening procedures at the EU external borders,* Vilnius, 27 October 2020. https://eumigrationlawblog.eu/re-decoration-of-existing-practices-proposed-screening-procedures-at-the-eu-external-borders/

[82] Proposal for a Regulation of the European Parliament and of the Council introducing a screening of third country nationals at the external borders and amending Regulations (ec) no 767/2008, (eu) 2017/2226, (eu) 2018/1240 and (eu) 2019/817. 23 September 2020

In the new design, the screening procedure becomes the 'standard' for all third country nationals who crossed the border in irregular manner, and also for persons who are disembarked following a search and rescue (SAR) operation, and for those who apply for international protection at the external border crossing points or in transit zones. With the screening Regulation, all these categories of persons shall not be allowed to enter the territory of the State during the screening (articles 3 and 4 of the proposal)[83].

Also the changes were made in inspection field. Second proposal which was presented by Commission as response to the migration crisis were Eurodac system. The Eurodac were established to check the incoming asylum seekers. The European fingerprint system (Eurodac) is the base fingerprint data, with the help of which several tasks are solved. Firstly, the identification of the person who applied for the provision of international home protection, in order to determine the state - the EU member responsible for consideration of his application. Secondly, the identification of a person who entered the EU illegally. Third, the comparison of fingerprints with those available in the database is for security purposes. The draft new regulation expands the scope of Eurodac. The Communication on a New Pact on Migration and Asylum, presented together with a set of legislative proposals, including this proposal amending the 2016 proposal for a recast Eurodac Regulation, represents a fresh start on migration. Based on the overarching principles of solidarity and a fair sharing of responsibility, the new Pact advocates integrated policymaking, bringing together policies in the areas of asylum, migration, returns, external border protection and relations with key third countries[84]. Article 1 of the proposal determines the purpose of the Eurodac system[85]:

1. assist in determining which Member State is to be responsible examining an application for international protection by a third-country national or a stateless person;
2. assist with the control of irregular immigration to the Union and with the detection of secondary movements within the Union and with the identification of illegally staying third-country nationals and stateless persons for determining the appropriate measures to be taken by Member States;

[83] Jean-Pierre Cassarino and Luisa Marin, EU Law Analysis, *The New Pact on Migration and Asylum: Turning European Union Territory into a non-Territory*, 30 November 2020. http://eulawanalysis.blogspot.com/2020/11/the-new-pact-on-migration-and-asylum.html

[84] European Commission, Brussels, Amended proposal for a Regulation of the European Parliament and of the Council on the establishment of 'Eurodac' for the comparison of biometric data for the effective application of Regulation (EU) XXX/XXX [Regulation on Asylum and Migration Management] and of Regulation (EU) XXX/XXX [Resettlement Regulation], for identifying an illegally staying third-country national or stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes and amending Regulations (EU) 2018/1240 and (EU) 2019/818

[85] *Ibid*

3. lay down the conditions under which Member States' designated authorities and the European Police Office (Europol) may request the comparison of biometric or alphanumeric data with those stored in the Central System for law enforcement purposes for the prevention, detection or investigation of terrorist offences or of other serious criminal offences;
4. assist in the correct identification of persons registered in Eurodac; and
5. support the objectives of Visa information and European Travel Information and Authorisation Systems

Second purpose strengthens the identification of illegally staying on EU territory of third-country nationals for the purpose of their subsequent expulsion or readmission. It's talking about those who are not asylum seekers in the EU. It is worth to mention, that the issue of identity checks carried out by law enforcement authorities in the border zone, in trains, at railway stations, ports with the aim of preventing illegal entry or stay on the territory of the member state of the EU, not so long ago was the subject of consideration in the CJEU. Answering to preliminary request from a German court, the CJEU concluded that this kind of checks are permissible provided that they are regulated by establishing clear rules and restrictions in the national legislation of EU member states and do not have an equivalent effect to border control[86].

According to the European Commission, the adoption of the above changes will contribute not only to the implementation of the Dublin reform, but also to combat illegal immigration, as well as readmission of persons who do not have the right to stay in the EU. However, the European Data Protection Officer expressed its concern, which is quite justified, regarding the observance of the principle protection of personal data, enshrined in article 8 of the EU Charter of Fundamental Rights.

The fourth proposal which proposed from Directive form to Regulation is amended proposal for a Regulation establishing a common procedure for international protection in the Union or shortly Asylum Procedures Regulation. The proposal of Asylum Procedures Regulation is about to change the Directive 2013/32/EU. The restructuration were made while considering the problems which arises in refugee granting system. As part of the legislative act, the Commission presented a revised proposal for Asylum Procedure Regulation. While keeping the overall objectives of the 2016 proposal, the Commission made targeted changes to help overcome the impasse on the most contested issues such as the border procedure and returns[87]. The aim of

[86] Request for a preliminary ruling under Article 267 TFEU from the Amtsgericht Kehl (Local Court, Kehl, Germany), made by decision of 21 December 2015, received at the Court on 7 January 2016, in the criminal proceedings against A other party: Staatsanwaltschaft Offenburg**,** CJEU Judgment: Case C-9/16 A., 21 June 2017.
[87] Fabienne KELLER, Legislative train schedule towards a new policy on migration, *Reform of the Asylum Procedure Directive,* 20 November 2020. https://www.europarl.europa.eu/legislative-train/theme-towards-a-new-policy-on-migration/file-jd-reform-of-the-asylum-procedures-directive

Asylum Procedure Regulation proposal is to put in place a broad framework based on a comprehensive approach to migration management, promoting mutual trust among Member States. Based on the overarching principles of solidarity and a fair sharing of responsibility, the new Pact advocates integrated policymaking, bringing together policies in the areas of asylum, migration, return, external border protection and relations with key third countries[88]. In Asylum Procedure Regulation proposal legislator suggest to remain on objectives which were formulated and laid out in 2016 proposal. As it is stated by Commission: „*Against this background, the Commission does not consider necessary to make far-reaching amendments to the 2016 proposal on which the co-legislators have already made significant progress "*[89]. The objectives of the 2016 proposal for an Asylum Procedure Regulation are still relevant and need to be pursued. It is necessary to establish a common asylum procedure, which replaces the various divergent procedures in the Member States and which is applicable to all applications made in the Member States. To ensure an effective and high-quality decision-making process, it is also necessary to put in place simpler, clearer and shorter procedures together with adequate procedural safeguards and tools to respond to abuses of asylum procedures and preventing unauthorized movements. This will lead to a more efficient use of resources improving the rights of applicants, allow those in need of international protection to receive it faster and ensure the swift return of rejected applicants without a right to stay in the Union[90]. The proposal of Asylum Procedure Regulation also determines the right of applicant in case of the need to take advantage of legal remedy. Article 53 of the proposal „The right to an effective remedy „determines the cases when applicant can use them. The applicants who can receive the subsidiary protection are protected by legal remedies against a decision considering their application unfounded in relation to refugee status. It means that in case of unfavorable decision regarding the granting status of refugee, applicant can submit complaint, against the accepted decision. As regards general fast-tracking, in order to speed up the expulsion process for unsuccessful applications, a rejection of an asylum application would have to either incorporate an expulsion decision or entail a simultaneous separate expulsion decision. Appeals against expulsion decisions would then be subject to the same rules as appeals against asylum decisions. If the asylum seeker comes from a country with a refugee recognition rate below 20%, his or her application must be fast-tracked (this would even apply to unaccompanied minors) – unless circumstances in that country have changed, or the asylum seeker comes from a group for

[88] European Commision, Brussels, Amended proposal for a Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU. 23 September 2020.
[89] *Ibid*
[90] *Ibid*

whom the low recognition rate is not representative. [91] Under the proposed Asylum Procedure Regulation article 53, point 9, the applicant has only one level of appeal in relation to a decision taken in the context of the border procedure. It means that many more appeals would be subject to a one-week time limit for the rejected asylum seeker to appeal, and there could be only one level of appeal against decisions taken within a border procedure[92]. The new changes also came in force regarding the time frame of border procedures. The Commission determined that the border procedure which should include court judgments also should be completed within twelve weeks in regular circumstances and 20 weeks in times of crisis. It is provided in article 41 of the amended proposal. Another twelve or twenty weeks are foreseen for authorities to provide return. However the Commission in proposed Regulation do not provide the answer how it can ensure, that court system and domestic authorities will be able to follow the strict time frame. Additionally, the proposal according to article 31 point 3, also obliges the authorities of member states to complete the procedure within six months. What can the EU do about this? Money to support domestic administrations is one option, which the European Council rendered more difficult when it cut the amount earmarked for migration and asylum by 28 % in its compromise on the multiannual financial framework[93].

The last, but not least the Commission proposed a proposal for a Regulation addressing situations of crisis and force majeure in the field of migration and asylum shortly - Crisis instrument.

The EU in the fight against the migration crisis suffered unpredictable situations which is not regulated in legal acts and countries were obliged to act according their own discretion. EU authorities seeing the unpredictable situation decided to adopt regulation for force majeure situations. The EU decided to prepare for force majeure situations with resilience and flexibility by knowing that different situations require different measures. The proposed Regulation is planned to repeal the Temporary Protection Directive 2001/55/EC and instead suggesting to introduce immediate protection.

A new legislative instrument would provide for temporary and extraordinary measures needed in the face of crisis17. The objectives of this instrument will be twofold: firstly to provide flexibility to Member States to react to crisis and force majeure situations and grant immediate protection status in crisis situations, and secondly, to ensure that the system of solidarity

[91] Professor Steve Peers, Law School, University of Essex, EU Law analysis, *First analysis of the EU's new asylum proposals,* 25 SEPTEMBER 2020. http://eulawanalysis.blogspot.com/2020/09/first-analysis-of-eus-new-asylum.html

[92] *Ibid.*

[93] Daniel Thym, Research Centre Immigration & Asylum Law, University of Konstanz, Germany, Immigration and Asylum Law and Policy, *European Realpolitik: Legislative Uncertainties and Operational Pitfalls of the 'New' Pact on Migration and Asylum,* 28 September 2020. https://eumigrationlawblog.eu/european-realpolitik-legislative-uncertainties-und-operational-pitfalls-of-the-new-pact-on-migration-and-asylum/

established in the new Asylum and Migration Management Regulation is well adapted to a crisis characterised by a large number of irregular arrivals. The circumstances of crisis demand urgency and therefore the solidarity mechanism needs to be stronger, and the timeframes governing that mechanism should be reduced18. It would also widen the scope of compulsory relocation, for example to applicants for and beneficiaries of immediate protection, and return sponsorship[94]. A closer look at the new immediate protection status reveals that immediate protection resembles a lot to temporary protection in some respects though there are a number of differences. To increase the protection framework's chances of implementation, the Commission has changed the name of the protection status from temporary to immediate protection, simplified its activation/triggering mechanism, narrowed down its scope and limited its duration[95]. Article 1 point 2 of proposed Regulation defines a situations of crisis[96]:

- an imminent or actual mass influx situation should exist;
- the mass influx should consist of third-country nationals or stateless persons arriving irregularly in a Member State or disembarked on its territory following search and rescue operations;
- the number of persons arriving irregularly to a member state or disembarked after a search and rescue operation should be disproportionate to the population and GDP of the Member State concerned;
- the nature and scale of the arrivals should make the Member State's asylum, reception or return system non-functional.

In article 10 of the proposal he proposal, providing for the suspension of examination of asylum applications for up to one year17 and the granting of "immediate protection" to displaced persons from third countries who face a high degree of risk of being subject to indiscriminate violence in exceptional situations of armed conflict and who cannot return to their country of origin,18 offers Member States the possibility to rapidly grant the rights attached to international protection status when individual refugee status determination becomes particularly difficult in practice[97]. That

[94] European Commision, Brussels, *Proposal for a Regulation of the European Parliament and of the Council addressing situations of crisis and force majeure in the field of migration and asylum*. 23 September 2020.
[95] Dr Meltem Ineli-Ciger, Assistant Professor, Faculty of Law, Suleyman Demirel University, Immigration and Asylum Law and Policy, *What a difference two decades make? The shift from temporary to immediate protection in the new European Pact on Asylum and Migration,* 11 November 2020. http://eumigrationlawblog.eu/what-a-difference-two-decades-make-the-shift-from-temporary-to-immediate-protection-in-the-new-european-pact-on-asylum-and-migration/
[96] European Commission, Brussels, *Proposal for a Regulation of the European Parliament and of the Council addressing situations of crisis and force majeure in the field of migration and asylum*, article 1 point 1. 23 September 2020.
[97] European Commision, Brussels, Proposal for a Regulation of the European Parliament and of the Council addressing situations of crisis and force majeure in the field of migration and asylum, article 10. 23 September 2020

said, the grant of "immediate protection" without changing the applicant's status to an international protection status is liable to create further fragmentation of "asylum seeker" status as an up until now indivisible EU protection status[98]. Such fragmentation will create serious risks of confusion for administrative authorities as regards eligibility for documentation such as residence permits, tax

identification numbers, social security numbers. Full prima facie recognition of international protection status in the cases covered by Article 10 of the proposal promotes both rapid access to rights attached to international protection and administrative efficiency[99]. Article 10 of the proposal promotes both rapid access to rights attached to international protection and administrative efficiency. At the same time, the activation of "immediate protection" status requires Commission initiative. Given this, the regime risks remaining 'dead letter' similar to that of the Temporary Protection Directive under repeal due to the lack of political will for its use[100]. The proposal also fails to expressly connect "immediate protection" to a specific relocation mechanism between EU Member States, which is necessary to ensure timely and efficient responsibility-sharing towards an effective response to the exceptional circumstances covered by Article 10 [101].

To summarize, currently there is an acute issue of reforming the CEAS. There are still numerous and heated discussions. It is rather difficult to predict the outcome of negotiations. On the one hand, it is obvious that the existing asylum system in the EU is outdated and unable to respond to emergency calls related to migration. The voluntary resettlement program for asylum seekers in the EU, which took in place since 2008, does not provide expected results. In addition, massive and uncontrolled flow of migrants pose a threat to the Schengen area. On the other hand, despite the numerous calls for solidarity by the European Commission, many EU member states have repeatedly expressed criticism of the mechanisms for allocating asylum seekers within the EU member states, as well as the payment for refusal to accept them. To sum up the results of the EU summit, which was held in Brussels on June 22-23 of 2017, the heads of state and government came to the conclusion that to reform a common European asylum system there must be the balance between solidarity and responsibility of member states. The Council of Europe also invited the EU Council to continue negotiations and, with the active assistance of the European

[98] CJEU, Case C-179/11 Cimade and Gisti, 27 September 2012, para 40

[99] Refugee Support Aegean (RSA), Greece, *RSA Comments on the Commission proposal for a Regulation addressing situations of crisis and force majeure in the field of migration and asylum, October 2020.*

[100] Hanne Beirens, Sheila Maas, Salvatore Petronella, Maurice van der Velden, ICF, Study on the Temporary Protection Directive, Final Report, January 2016.

[101] Refugee Support Aegean (RSA), Greece, RSA *Comments on the Commission proposal for a Regulation addressing situations of crisis and force majeure in the field of migration and asylum*, October 2020

Commission, introduce the necessary amendments to the draft laws in order to - unblock the reform.

2. EUROPEAN UNION LEGAL RESPONSE TO THE MIGRATION CRISIS PROBLEMATIC ISSUES

2.1 Asylum legislation under Dublin Regulation

In 2016 April, the European Commission proposed changes to the Dublin system to establish a fair mechanism for sharing the burden of refugees between EU countries. In November 2017, the European Parliament presented proposals for a reform of the Dublin system to achieve more equitable distribution of the burden on EU countries in dealing with asylum applications, and reaffirmed its readiness to enter into negotiations with the EU Council on this issue. However, they have not yet been launched because EU countries do not find a consensus. In reforming the Dublin system, Members of the European Parliament proposed automatic arrangements for the distribution of asylum seekers between EU countries. For their part, countries that refuse to process an automatically distributed asylum application would be threatened with a reduction in EU support.

On September 23rd of 2020 The European Commission presented a package of proposals for the reform of the EU migration policy. The goal of the new proposal does not change from the previous one, is to achieve a more equitable allocation of the burden caused by the influx of migrants among all members of the European Union. According to the President of the European Commission, Ursula von der Leyen, the new system will include "a powerful new mechanism of solidarity".[102] The mentioned proposal changes for the past years applicable 2016 package of proposals, however some of the mentioned things will remain unchanged, some of them have been changed due to the moved circumstances. However as it is stated in the Commission proposal „*less progress was achieved on the proposals for the Dublin Regulation and the Asylum Procedure Regulation, mainly due to diverging views in the Council*".

The Dublin Regulation stipulates that the first Member State to which an asylum seeker has arrived is responsible for examining his / her application for international protection. The system set up in 2006 does not take into account the pressure of migratory flows on countries at the EU's external borders, such as Greece and Italy. Against this background, from 2009 The European Parliament calls for it to be reformed to ensure impartiality, responsibility-sharing, solidarity and the speedy processing of asylum applications.

[102] *Galina Dudina*. Newsylist. *EU will accept migrants under new rules* – Mir – Kommersant. September 22, 2020. https://www.newsylist.com/eu-will-accept-migrants-under-new-rules-mir-kommersant/

The main objective of proposal from 23 September of 2020 is to rely on already concluded and discussed proposal from 2016 and form new rules which have changed since 2016 due to inability to reach a consensus between the member states. The EU Commission purpose is to maintain the goals and agreements that have been reached already. To date, the Common European Asylum System (CEAS) consists of seven European legal acts. Its main elements include the Asylum Procedures Directive, which governs minimum standards for the access to asylum procedures and the examination of applications in the member states, and the Reception Conditions Directive, which governs the accommodation and care of asylum seekers. Another element of the CEAS is the Eurodac Regulation: the Eurodac database enables authorities to compare the fingerprints of asylum seekers in order to identify the EU member state where an asylum seeker was registered for the first time. This is relevant for the Dublin Regulation, another important element of the CEAS, which has so far governed which member state is responsible for examining an individual's application for asylum. The CEAS seeks to harmonise the asylum systems of the EU member states to make sure that asylum seekers are treated the same no matter where they apply for asylum[103]. In this chapter attention is directed on the changes and proposals in examining an application (Dublin criteria) systems as the response to migration crisis.

In order to step out from *status quo* and build a broader robust framework for migration and asylum policy, the Commission intends to withdraw the 2016 offer. The 2016 proposal would have created a 'bottleneck' in the Member State of entry, requiring that State to examine first whether many of the grounds for removing an asylum-seeker to a non-EU country apply before considering whether another Member State might be responsible for the application (because the asylum seeker's family live there, for instance)[104]. It would also have imposed obligations directly on asylum-seekers to cooperate with the process, rather than only regulate relations between Member States. These obligations would have been enforced by punishing asylum seekers who disobeyed: removing their reception conditions (apart from emergency health care); fast-tracking their substantive asylum applications; refusing to consider new evidence from them; and continuing the asylum application process in their absence[105]. The aim of the proposal is to repeal and replace existing and functioning Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013, which establishes 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 ("the Dublin III

[103] *From its legal nature to its implementation: FAQ on the new European Migration and Asylum Package*. 8 October 2020. https://www.eu2020.de/eu2020-en/news/article/faq-european-migration-and-asylum-package/2398030
[104] *Professor Steve Peers*, Law School, University of Essex) gives an overview of the proposals published as part of the EU's new Pact on Migration and Asylum, First analysis of the EU's new asylum proposals, 28 September 2020. https://www.statewatch.org/analyses/2020/first-analysis-of-the-eu-s-new-asylum-proposals/
[105] *Ibid*

Regulation")[106]. It important to mention, that existing Dublin mechanism was established in the form of Regulation and in proposal will remain the same only complementing it with a solidarity mechanism. In particular, this proposal aims to[107]:

1. establish a common framework that contributes to the comprehensive approach to asylum and migration management based on the principles of integrated policy-making and of solidarity and fair sharing of responsibility;
2. ensure sharing of responsibility through a new solidarity mechanism by putting in place a system to deliver solidarity on a continued basis in normal times and assist Member States with effective measures (relocation or return sponsorship and other contributions aimed at strengthening the capacity of Member States in the field of asylum, reception and return and in the external dimension) to manage migration in practice where they are faced with migratory pressure. This approach also includes a specific process for solidarity to be applied to arrivals following search and rescue operations;
3. enhance the system's capacity to determine efficiently and effectively a single Member State responsible for examining an application for international protection. In particular, it would limit the cessation of responsibility clauses as well as the possibilities for shift of responsibility between Member States due to the actions of the applicant, and significantly shorten the time limits for sending requests and receiving replies, so as to ensure that applicants will have a quicker determination of the Member State responsible and hence a quicker access to the procedures for granting international protection;
4. discourage abuses and prevent unauthorised movements of the applicants within the EU, in particular by including clear obligations for applicants to apply in the Member State of first entry or legal stay and remain in the Member State determined as responsible. This also requires proportionate material consequences in case of noncompliance with their obligations.

One of the most important shortage which make it difficult to achieve the Dublin III Regulation main objectives is the timeframe. Regulation (EU) No 604/2013 was accepted in 2013, when migration flow was stable and migration system wasn't overloaded. The hierarchy of criteria as set out in the Dublin III Regulation does not take into account the realities faced by the migration

[106] European Parliament. Brussels. *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.*

[107] European Commission. Brussels. *Regulation of the European Parliament and of the Council on asylum and migration management and amending Council Directive (ec) 2003/109 and the proposed Regulation (eu) xxx/xxx [asylum and migration fund]*. 23 September 2020.

systems of the Member States, nor does it aim for a balance of efforts[108]. The method of allocating responsibility delays access to the asylum procedure. Under the current system applicants may wait up to 10 months (in the case of "take back" requests) or 11 months (in the case of "take charge" requests), before the procedure for examining the claim for international protection starts[109]. Long timeframe can be considered as the bottleneck for the implementation of number 3 of mentioned proposal aim „ shorten the time limits for sending requests and receiving replies, so as to ensure that applicants will have a quicker determination of the Member State responsible and hence a quicker access to the procedures for granting international protection". As EU Commissioner for Home Affairs Ylva Johansson explained „*faster procedures are necessary, she noted. When people stay in a country for years it is very hard to organize repatriations, especially voluntary ones. So the objective is for a negative asylum decision "to come together with a return decision. Also, the permanence in hosting centers should be of short duration*."[110] Also as it is stated in proposal a common problem remain regular and repeating multiple applications for international protection as some of them were already been launched in other member states. This can be considered as uneffective Regulation (EU) No 604/2013 application in practice as it did not prevented applicants from pursuing multiple applications, thereby reducing unauthorised movements. The first point of proposal aim stressed out solidarity and fair sharing of responsibility. The Dublin regulation does not provide the answer who should be granted for asylum, however Dublin determines which member state is responsible for considering the application for granting asylum. In Regulation (EU) No 604/2013 which is still applicable, article 13, point 1 states "that an applicant which has irregularly crossed the border into a Member State by land, sea or air having come from a third country, the Member State thus entered shall be responsible for examining the application for international protection"[111]. Among the most critical issues regarding the 30-year-old Dublin system is the attribution of responsibility for asylum seekers and refugees to the country of first arrival in the Union, whenever the person has no valid entry documents[112]. It means that all the burden comes to coastal states of EU like Greece, Italy, and Malta. In the previous chapter the number of arrivals were presented and we can assume what overheating the mentioned countries

[108] European Commission. Brussels. *Regulation of the European Parliament and of the Council on asylum and migration management and amending Council Directive (ec) 2003/109 and the proposed Regulation (eu) xxx/xxx [asylum and migration fund]*. 23 September 2020.
[109] *Ibid*
[110] Ansa, *Relocation, solidarity mandatory for EU migration policy: Johansson, 22 September 2020.* *https://www.infomigrants.net/en/post/27447/relocation-solidarity-mandatory-for-eu-migration-policy-johansson*
[111] European Parliament. Brussels. *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*, article 13, point 1.
[112] Christopher Hein, Brussels, *Dublin Forever - Nothing New for the South,* 26 October 2020. *https://eu.boell.org/en/2020/10/26/dublin-forever-nothing-new-south*

feels while applying Regulation (EU) No 604/2013. The infamous first entry criterion remains intact (Article 21) and is not substantially reversed by extended special rules on previous studies or on family unity for siblings (Articles 16-18, 20)[113]. Article 21 of the proposal determines <...> „*that an applicant has irregularly crossed the border into a Member State by land, sea or air having come from a third country, the first Member State thus entered shall be responsible for examining the application for international protection"*.

Consequently, under the Dublin rules, the overwhelming majority of asylum seekers are supposed to remain in the "frontline" countries, which have to host them, conduct the asylum procedure and take responsibility for their integration process once international protection has been granted, or, alternatively, for their return home. In practice, these rules were never fully observed and people moved without permission to other countries[114]. In cases of secondary movements, asylum seekers can submit a second application in another Member State, which is obliged to officially assume jurisdiction whenever the asylum seeker is not returned to the country responsible within six months after the confirmation of the take back request. Germany and other northern Member States had insisted for a long time that the transfer of jurisdiction should be abolished[115].

While continuing to analyze Regulation (EU) No 604/2013 article 13, point 1, it is stated that responsibility shall cease 12 months after the date on which the irregular border crossing took place[116] and article 13 point 2 states that the applicant — who has entered the territories of the Member States irregularly or whose circumstances of entry cannot be established — has been living for a continuous period of at least five months in a Member State before lodging the application for international protection, that Member State shall be responsible for examining the application for international protection[117]. From the given examples we can see that periods 12 and 5 months are too long for shifting the burden to other member state. That is one of the reason

[113] Daniel Thym, Research Centre Immigration & Asylum Law, University of Konstanz, Immigration and Asylum Law and Policy, *European Realpolitik: Legislative Uncertainties and Operational Pitfalls of the 'New' Pact on Migration and Asylum*, Germany, 28 September 2020. http://eumigrationlawblog.eu/european-realpolitik-legislative-uncertainties-und-operational-pitfalls-of-the-new-pact-on-migration-and-asylum/

[114] Christopher Hein, Brussels, *Dublin Forever - Nothing New for the South,* 26 October 2020. *https://eu.boell.org/en/2020/10/26/dublin-forever-nothing-new-south*

[115] Daniel Thym, Research Centre Immigration & Asylum Law, University of Konstanz, Immigration and Asylum Law and Policy, *European Realpolitik: Legislative Uncertainties and Operational Pitfalls of the 'New' Pact on Migration and Asylum*, Germany, 28 September 2020. http://eumigrationlawblog.eu/european-realpolitik-legislative-uncertainties-und-operational-pitfalls-of-the-new-pact-on-migration-and-asylum/

[116] European Parliament. Brussels. *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*, article 13, point 1

[117] European Parliament. Brussels. *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*, article 13, point 2

why Italy and Greece examined the biggest amount of applications. Responsibility for an asylum seeker based on the first Member State of irregular entry (a commonly applied criterion) would have applied indefinitely, rather than expire one year after entry as it does under the current rules. The 'Sangatte clause' (responsibility after five months of living in a second Member State, if the 'irregular entry' criterion no longer applies) would be dropped[118]. The new proposal as it is stated by the Commision is based on mutual trust and solidarity. The action of application in proposal is different from Regulation (EU) No 604/2013. As an example, a person who will arrive to Italy and Greece coasts would apply for asylum not to the country of arrival, but to the EU itself as entity, in its own right. The geographical location will no longer be the conclusive factor for assign responsibilities. The reasons why country of arrival should be the EU as an entity is that practice has shown the establishment of 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 cannot be achieved by the Member States acting on their own and can only be achieved at Union level[119]. The proposal also been criticed for it's imperfection and again, the interests of coastal states are not fully taken into account. For example under proposal conditions all member states would be obliged to adopt accelerated asylum procedures at the border before accepting the asylum seekers who have arrived from the safe third country or who are originally from a safe country of origin, or who present a manifestly unfounded claim.[120] In the case of Italy, the vast majority of asylum seekers arriving by sea in 2020 are of these "safe" nationalities, such as Tunisians, Bangladeshis, Algerians and Pakistanis. They would not fall under the relocation scheme even if they had been rescued. And Italy would be obliged to re-admit those who had eventually managed to travel irregularly to other European countries.[121]

Currently, the Dublin system causes long and ineffective procedures which often fail in practice. German statistics show that the initial designation of asylum jurisdiction by the authorities takes up to four months, followed by another five months domestic courts currently need to decide on the suspensive effect of appeals. Thus, asylum seekers are legally obliged to return to the state responsible almost one year after having arrived in Germany[122].

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[118] *Professor Steve Peers,* Law School, University of Essex) gives an overview of the proposals published as part of the EU's new Pact on Migration and Asylum, First analysis of the EU's new asylum proposals, 28 September 2020. https://www.statewatch.org/analyses/2020/first-analysis-of-the-eu-s-new-asylum-proposals/

[119] European Commission. Brussels. *Regulation of the European Parliament and of the Council on asylum and migration management and amending Council Directive (ec) 2003/109 and the proposed Regulation (eu) xxx/xxx [asylum and migration fund]*. 23 September 2020.

[120] Christopher Hein, Brussels, *Dublin Forever - Nothing New for the South,* 26 October 2020. *https://eu.boell.org/en/2020/10/26/dublin-forever-nothing-new-south*

[121] *Ibid*

[122] Daniel Thym, Research Centre Immigration & Asylum Law, University of Konstanz, Immigration and Asylum Law and Policy, *Secondary Movements: Overcoming the Lack of Trust among the Member States?* Germany. 29

The changes also affected the process of family reunification while determining the examining member state. For asylum seekers it won't be possible to submit additional information of family links in order to being examined in the same member state as your family member is staying. This proposed decision is controversial considering CJEU Judgment in Case M.A. and others (C-661/17). In this case CJEU stated, *where an unaccompanied minor has already made an application for asylum in one Member State, and then proceeds to make an application in another one, the default rule should be interpreted to mean that the Member State where the most recent application was made is responsible for the application*[123]. In this case the CJEU allowed for unaccompanied minor to provide a second application due to family reunification. However, the definition of family members would have been widened, to include siblings and families formed in a transit country[124]. Also some changes proposed regarding the time limits of providing appeals against transfer. The proposal provides 7 days for appeal and courts have 15 days to provide decisions and the grounds of review would have been reduced.

Finally, the 2016 proposal would have tackled the vexed issue of disproportionate allocation of responsibility for asylum seekers by setting up an automated system determining how many asylum seekers each Member State 'should' have based on their size and GDP. If a Member State were responsible for excessive numbers of applicants, Member States which were receiving fewer numbers would have to take more to help out. If they refused, they would have to pay €250,000 per applicant[125]. Yekaterina Kiseleva, associate professor of the Department of International Law at RUDN University also suggested „*in an ideal situation, countries would have to accept a certain number of forced migrants who entered the EU, in proportion to specific indicators – for example, the size of GDP and GDP per capita*"[126].

There are also many answered questions, like what are the guarantees that the planned preliminary asylum examinations, processing facilities and returns are designed and executed in accordance with human rights laws? Once the legislative amendments have been adopted, what instruments would the Commission have to sanction member states that are not willing to implement them? How can it be ensured that the proposals announced for next year for reforming legal migration – which would be of paramount importance for reducing irregular migration and foster-ing genuine partnerships with countries of origin and transit – are not pushed into the

October 2020 http://eumigrationlawblog.eu/secondary-movements-overcoming-the-lack-of-trust-among-the-member-states/

[123] CJEU - C 648/11 / Judgment MA and Others v Secretary of State for the Home Department. 6 June 2013

[124] *Professor Steve Peers*, Law School, University of Essex) gives an overview of the proposals published as part of the EU's new Pact on Migration and Asylum, First analysis of the EU's new asylum proposals, 28 September 2020. https://www.statewatch.org/analyses/2020/first-analysis-of-the-eu-s-new-asylum-proposals/

[125] *Ibid.*

[126] *Galina Dudina*. Newsylist. *EU will accept migrants under new rules* – Mir – Kommersant. September 22, 2020. https://www.newsylist.com/eu-will-accept-migrants-under-new-rules-mir-kommersant/

background? [127] As an example by following the international and human rights laws, Italy has adopted new legislation in October 2020 abolishing penalties for rescue operations, in contrast to the previous "Salvini-Decree"[128]. In Salvini- Decree NGO's were penalised for performing unauthorized migrant rescue operations.

To sum up from the stated above, in conclusion and recommendations section of asylum and migration management proposed Regulation, the Commission stated, that current (Dublin III) Regulation was not developed as an instrument of solidarity and responsibility-sharing. However as it was analyzed, new proposed Dublin IV regulation and some of it's articles are also lack of solidarity and responsibility-sharing, which in the implementation stage could cause a wave of dissatisfaction between the Member States.

2.2 EU - Turkey Agreement

Since the 2011 when the civil war in Syria has started, millions of Syrians are still standing on the edge by deciding on whether to stay in their home country and face the combats or by any means migrate far from home and look for a better life. Many Syrians arrived to the Turkey with a hope to reach the final destination - EU. However, EU in order to stop the huge migration flow came with an EU-Turkey deal (March 18, 2016 EU-Turkey Agreement[129]), which allows to slow down the attempts to reach the EU borders. It is important to observe the legality of this agreement and compliance to EU directive and Turkish internal legislation regarding the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol.

The Syrian war has brought the massive influx of asylum claimants and refugees across the European Union (EU) into sharp relief. Despite the humanitarian crisis, the international and regional EU responses to the migrant crisis have been inadequate and much too late. First, international organisations such as the UNHCR have proposed an approach which seems to undermine the original object and purpose of the Refugee Convention by recognising refugees in groups instead of allowing for individualised refugee status determination. Second, the EU approach of trading Syrian refugees one for one from those traveling through Greece to Turkey undermines international protection such as CEAS –*refoulement* for asylum claimants. It is argued that in order to properly safeguard the rights of asylum claimants, proper substantive and

[127] Steffen Angenendt, Nadine Biehler, Raphael Bossong, David Kipp, Anne Koch, Berlin, German institute for International and Security affairs, The New EU Migration and Asylum Package: Breakthrough or Admission of Defeat?, October 2020 https://www.swp-berlin.org/10.18449/2020C46/

[128] Ansa, Italy: New decree on migration ready, Salvini regulations out, 28 September 2020. https://www.infomigrants.net/en/post/27597/italy-new-decree-on-migration-ready-salvini-regulations-out

[129] Ministry of Foreign Affairs of Turkey. *Implementation of Turkey-EU Agreement of 18 March 2016.* http://www.mfa.gov.tr/implementation-of-turkey_eu-agreement-of-18-march-2016.en.mfa

procedural safeguards need to be in place, as well as an enlarged role for the regional courts in the EU in adjudicating asylum decisions.[130]

In 2015, the Commission proposed a resettlement system. This system provides the movement of foreign citizens in need of international protection from the territory of a third country to EU countries. On July 20 of 2015, the Council approved the decision to relocate such persons to EU countries. In March 2016, the European Union and Turkey adopted a joint statement regarding the issue of illegal immigration from Turkey to the EU, mainly to Greece. The agreement, which was reached, is called "agreement" or "deal", although from a legal point of view it is neither one nor the other. In accordance with this deal, the EU and Turkey also agreed that for each Syrian citizen returned from the Greek islands to Turkey, another Syrian citizen will be resettled from Turkey to the EU countries. In this chapter it is important to analyze whether we can call EU - Turkey „deal" or „agreement", it's legitimacy and entity. Which legal consequences it can cause. Also to see if Turkey meet the status of a „safe third country".[131]

At the end of the 2015, the European Union entered into an agreement with Turkey that could help limit the influx of refugees into the continent. The agreement dealt with the return of illegal immigrants and the reception of legal ones. By agreement, EU countries received the right to send all illegal immigrants who, after March 20 of 2016, moved to the Greek islands in the Aegean Sea, returned to Turkey (except for those refugees who were able to prove that they were persecuted in Turkey). For every illegal immigrant, the EU was ready to accept one Syrian refugee who was allowed for legal entry from Turkey. Turkey under the agreement received more than three billion euros for the arrangement and improvement of the living conditions of about three million Syrian refugees in its own territory, in the future three billion euros more will be provided.[132]

The EU Turkey „statement", „agreement" or „deal" as it was called, been discussed a lot regarding its nature of international law. The question can be raised whether it can be considered as international agreement? This is contrary to those who consider that the EU-Turkey Statement is not an international agreement, mainly because the procedure established in Art. 218 of TFEU has not been followed.[133] Others construe this statement as international agreement based on it's content, context and decisions which were applied for implementation of the agreement. If we consider EU - Turkey deal as an international agreement it would mean that EU has an

[130] Poon, J. *Legal Responses to the EU Migrant Crisis: Too Little, Too Late? 19 August* 2018 https://www.e-ir.info/2018/08/19/legal-responses-to-the-eu-migrant-crisis-too-little-too-late/

[131] Mayer, M. M., Mehregani, M. *Beyond Crisis Management: The Path Towards an Effective, Pro-active and Fair European Refugee Policy*. EU, 2016.

[132] Cardwell, P. J. Tackling Europe's Migration Crisis through Law and New Governance. *Global Policy*, 2018.

[133] Peers, S. *The draft EU/Turkey deal on migration anf refugees: is it legal. 16 March* 2016 http://eulawanalysis.blogspot.com/2016/03/the-draft-euturkey-deal-on-migration.html

international obligation. It could contradict to other international norms, which are related to refugee rights, human rights and EU law. The recognition of EU Turkey deal as an international agreement would also mean that EU has violated its own stated procedures regarding the negotiation and conclusion of international agreements. It could bring the situation of revocation of the statement by the CJEU. It is important to perceive the legal nature of the EU-Turkey deal in order to conclude upon the difficulties associated with classifying the Statement as an international agreement. To understand the link between the EU – Turkey deal and agreement it is necessary to analyze the laws of international treaties to clarify what can be considered an international agreement. In addition, it is important to review the laws of international organizations to determine the responsibilities.

An objective way to determine the nature of the international agreement is to refer on court cases of the ICJ. After reviewing several ICJ cases, it is clear that court examines the terms of the agreement, under which circumstances it was concluded. Therefore, it is important to review the content and the context in which it was prepared in order to create the existence of the agreement. The ICJ, which give us the overview under which conditions, the treaty is considered valid. In some of the cases ICJ formulated case law regarding the agreement validity. In case *Libya–Chad Territorial Dispute case* the court formulated that the exchange of letters between the governments can be considered as an agreement.[134] In other case *Aegean Sea Continental Shelf (Greece v. Turkey)* the ICJ stated that, Brussels *joint communique* which was concluded by Prime Ministers, can be considered as an international agreement. The court stated that essential part is expression of will, it context and conditions in which the agreement was concluded. It „essentially depends on the nature of the act or transaction to which the Communiqué gives expression".[135] Another court case *Cameroon v. Nigeria: Equatorial Guinea intervening* the ICJ stated that, Maroua Declaration which was verified by the head of Cameroon and Nigeria can be considered as international agreement.[136] Also in case *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* the ICJ stated that even the minutes of consultations concluded by Ministers of Foreign Affairs of the state, can be considered as an international agreement. „*The Court concludes that the Minutes of 25 December 1990, like the exchanges of letters of December 1987, constitute an international agreement creating rights and obligations for the Parties*".[137] From the given examples of the ICJ judgments, we can make a conclusion that to recognize the existence of

[134] Internatonal Court of Justice. *Territorial Dispute (Libyan Arab Jamahiriya/Chad).* 2017. https://www.icj-cij.org/en/case/83
[135] International Court of Justice. *Obligation to Negotiate Acess to the Pacific Ocean.* Bolivia: Chile. 1 October 2018. https://www.icj-cij.org/en/case/62
[136] Ibid.
[137] International Court of Justice. *Obligation to Negotiate Acess to the Pacific Ocean.* Bolivia: Chile. 1 October 2018 https://www.icj-cij.org/files/case-related/153/153-20181001-JUD-01-00-EN.pdf

the treaty we need to look at the terms and conditions of the instrument. However, it is important to take into account when analyzing the cases, the authorities itself that concluded the agreements. In the mentioned cases the governments, Ministers of Foreign Affairs, Prime Ministers and Head of States, concluded the agreements. In the Vienna Convention on the Law of Treaties, article 7 part 2, point a) it is stated that "*in virtue of their functions and without having to produce full powers, the following are considered as representing their State: (a) Heads of State, Heads of Government and Ministers for Foreign Affairs, for the purpose of performing all acts relating to the conclusion of a treaty*. In other case, the ICJ notes, *that with increasing frequency in modern international relations other persons representing a State in specific fields may be authorized by that State to bind it by their statements in respect of matters falling within their purview.*[138] It is important, that ICJ emphasized that persons ,,*may be authorized*", otherwise, these persons, cannot be considered as representatives in order to express the will of the State. Regarding the national courts, in the Affaire Croft case in 1856, the arbitrator found that decisions of national courts could not amount to international legally binding acts. National courts do not engage in international relations, after all, and do not even speak for the government. Consequently, a judicial finding that a foreign plaintiff has a valid claim against a government cannot itself give rise to international reclamations.[139] Similar situation were resolved in Bangladesh v. Myanmar case where the court stated that head of the Burmese delegation did not have full powers to engage his country and did not follow the Vienna Convention article 7, paragraph 1 and 2. ,,*On the question of the authority to conclude a legally binding agreement, the Tribunal observes that, when the 1974 Agreed Minutes were signed, the head of the Burmese delegation was not an official who, in accordance with article 7, paragraph 2, of the Vienna Convention, could engage his country without having to produce full powers. Moreover, no evidence was provided to the Tribunal that the Burmese representatives were considered as having the necessary authority to engage their country pursuant to article 7, paragraph 1, of the Vienna Convention. The fact that the Parties did not submit the 1974 Agreed Minutes to the procedure required by their respective constitutions for binding international agreements is an additional indication that the Agreed Minutes were not intended to be legally binding. For these reasons, the Tribunal concludes that there are no grounds to consider that the Parties entered into a legally binding agreement by signing the 1974 Agreed Minutes".*[140] According to the case law, in order to conclude the binding agreement by the

[138] Ibid.
[139] Kabblers, J. *The Concept of Treaty in International Law*, 1996.
[140] International Tribunal for the Law of the Sea. Dispute Concernint Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the bay of Bengal (Bangladesh/Myanmar). 14 March 2012 https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_16/published/C16-J-14_mar_12.pdf

relevant authorities it is necessary to take into account the Art. 7 of the Vienna Convention of the Law of Treaties.

If we speak regarding the international organizations the questions arises, which organs have authorization to conclude international agreements? The competence of international organizations to conclude agreements through their own organs is widely accepted. There is no generally accepted opinion, however, as to which of the organs is competent. The capacity to conclude agreements in a specific field forms part of the power to regulate that field. The supreme organ in the field concerned will therefore be competent to conclude agreements.[141] However, from the case practice, is clarified that supreme organs can delegate their rights and obligations to another respective organs to conclude the international agreements. In some cases, there are strictly defined rules which organs and what international agreements they can conclude. Another aspect, which can bother, can we consider consequences of the agreement legitimate if the organ who do not have power to conclude it, concludes it? In the analyzed cases, the courts, stated that, if rights and obligations haven't been empowered to the specific organ or person, the concluded international agreements and it's followed consequences can not be considered legitimate. The similar situation should be considered in international organization too. The issue here is not regarding the procedure of conclusion, but the problem is related to international representation of international organizations and States while negotiating and concluding international agreement.

Speaking about EU - Turkey deal, which was concluded by the European Council. Under the TFEU, European Council do not have competence to conclude such an international agreements. The competence of EU authorities while concluding the EU – Turkey deal, breached the TFEU, article 218 and brings this international agreement under invalidity. TFEU, article 218 lay down the rules of conclusion of international agreements. However in case *Parliament and Commission v. Council*, CJEU stated, that breach of procedure, does not affect the existence of the international agreement. In this case CJEU, stated, that Declaration, which was adopted by the Council, was in breach of TFEU article 218. The Council did not follow the rules of application for the issue of fishing authorizations in the exclusive economic zone of Guyana to vessels flying the flag of Venezuela[142]. Mentioned authorization, was adopted by the Council, the EU organ, which has authority to conclude international agreements. CJEU stated that Council had a representative role in that agreement and had power to express the will of EU. In the second, case *France v. Commission in 1994,* the European Commission concluded the international agreement

[141] Schermers, H. G., Blokker, N. M. *International Institutional Law.* Leiden-Boston: Martinus Nijhoff Publishers, 2011, para. 1765.

[142] Curia Europa. CJEU decision. *Joined Cases C‑103/12 and C‑165/12*. 26 November 2014 http://curia.europa.eu/juris/document/document.jsf;jsessionid=42CCE69357CF75414E3401734B431A3D?text=&docid=160110&pageIndex=0&doclang=LT&mode=lst&dir=&occ=first&part=1&cid=1975002

with US Department of Justice. The *ultra vires* principle was applied. In this case, CJEU stated „the fact that the rule laid down by Article 228(1), which confers upon the Council the power to conclude international agreements, is subject to an exception, in that the exercise of that power is subject to powers vested in the Commission, cannot be relied on by the Commission in support of a claim, made with reference to the practices followed or on the basis of reasoning by analogy with the third paragraph of Article 101 of the EAEC Treaty, that it enjoys powers which are not vested in it by the Treaty". „Even though the Commission has the power, pursuant to Article 89 of the Treaty and Regulations Nos 17 and 4064/89, to take individual decisions applying the rules of competition, that does not give it the power to conclude an international agreement with a non-member country in that field. That internal power is not such as to alter the division of powers between the Community institutions with regard to the conclusion of international agreements, which is determined by Article 228 of the Treaty".[143] In this case the European Commission exceed it's competence in negotiating the agreement and concluded it on behalf of EU. European Commission referred to Article 101 of the EAEC Treaty, which stated that it has competence to conclude international agreements.

However, regarding the EU – Turkey deal, situation is slightly different compared to mentioned cases. The issue is that, the Statement was concluded by different EU organ, which is not mentioned in TFEU article 218 and do not have competence to conclude it. In TFEU article, 218 it is stated which EU institutions have competence to conclude such statements. In the process included the European Commission, the Council and the European Parliament. It is useful to analyze whether the power of treaty making process can be extended. The functions of European Council are stated in TEU articles 15 and 26. *The European Council shall provide the Union with the necessary impetus for its development and shall define the general political directions and priorities thereof. It shall not exercise legislative functions*. *The European Council shall identify the Union's strategic interests, determine the objectives of and define general guidelines for the common foreign and security policy, including for matters with defence implications. It shall adopt the necessary decisions.*[144] The competence of European Council is directed to external actions in connection with security policy. EU – Turkey deal is related to the areas of justice, security, freedom and especially the asylum policy, however the European Council do not has competence within these areas. In this situation, as in the given cases, the highest organ could not be competent to conclude an agreement, despite breaching the constitutional rules of the organization. Article 15 of TEU, do not determine the right of legislative function to European Council, so it wrongful

[143] Judgement of the Court of Justice, France v Commision, case C-327/91. 9 August 1994 https://www.cvce.eu/en/obj/judgment_of_the_court_of_justice_france_v_commission_case_c_327_91_9_august_1994-en-69b2166f-abd3-4d96-a4e6-ceb2f5b692fd.html, Summary of the Judgment, para 3 and 4

[144] Consolidated version of the Treaty on European Union, article 15 and 26.

to state that it could have implied treaty-making competences[145]. As it was stated in the court cases, it is obligatory for international organizations to have competence to conclude international treaties in order to make them binding. Moreover, the organ, which concludes the international agreements, must have legislative competence, or at least have been delegated by an organ, which has legislative competence. Again, to rely on Article 15 of TEU, to the European Council such a premise is not applicable. Therefore, the assumption of a conclusion of an international agreement by the European Council based only on the content and context of the instrument, and leaving aside the question regarding the competent organ, would be a contested conclusion since the European Council cannot be considered a representative of the EU in this regard, and therefore is not able to express the consent of the EU to be bound.[146] Thus, neither the European Council, acting on behalf of the EU, nor the Member States, acting on their own behalf, did have the authority, under EU law, to conclude the Statement nor to assume the rights and obligations contained therein.[147] As a consequence, the legality of the Statement can only be based on a superior source of authority. But does this source exist within the European legal order? The only possibility which remains to be explored is that the Statement relies on the unanimous consent of the Member States, which, allegedly, could overcome the legal hurdles imposed by EU law. It would be international law, in this perspective, which provides for the overarching source of authority within the EU legal order.[148]

According to M. Pierini, J. Hackenbroich (2015), the EU – Turkey deal have been widely criticized in regards of refugee and international and European human rights violations. There are possibilities to oppose the deal while disputing the national and European rules of implementation. To dispute might be difficult if we consider the EU-Turkey deal as international agreement because the result might be unpredictable. As it was mentioned in court cases regarding the competence of European Council that it can not conclude the international agreements on behalf of the EU. However to resolve the issue, it is necessary to invoke international law of international organizations, international law of treaties and EU legislation. From that point of view, the position would be favorable for European Council. Finally, if we have to consider the EU-Turkey deal as an international agreement we would grant to European Council a competence to conclude the treaties. This action would mess up the EU system of competences division.[149]

EU Asylum Procedures Directive article 38 (1) determines the boundaries and presents the principles under which, the third country can be evaluated as a "safe third country". Member States

[145] *Ibid.*
[146] Cannizzaro, E. *Disintegration Through Law?* 2018.
[147] Ibid.
[148] Ibid.
[149] Pierini, M., Hackenbroich, J. *A Bolder EU Strategy for Syrian Refugee.* Carnegie Europe. 2015.

may apply the safe third country concept only where the competent authorities are satisfied that a person seeking international protection will be treated in accordance with the following principles in the third country concerned.[150] Mentioned principles are important in order to assess the possibility to asylum seeker to come back to that country. In our case, all relevant measures should be considered, to assess Turkey as „(not) safe third country". Article 38 (1a) of mentioned Directive, presents the conditions, which the asylum seeker who came back to the third country, should not face. Life and liberty are not threatened because of race, religion, nationality, membership of a particular social group or political opinion.[151] The biggest headache for EU competent authorities is to determine whether a Turkey a safe third country or not. The latest research has shown that in Turkey promulgated rights and liberties are not being protected well in compare with EU standards. Those violations appeared on their own citizens who live in Turkey or migrated abroad. Since 2015, Turkey has seen attacks on democratic freedoms, freedom of speech, the press and academia, and civil liberties. The Turkish Government has been accused by the United Nations of 'massive destruction, killings and numerous other serious human rights violations', particularly against the Kurdish minority (11 of the refugees in question are Kurdish)[152]. The impact on human rights violations has a Turkish anti-terrorism law. Anti-terrorism law and its application is one of the prove that Turkey do not follow required human rights protection. Anti-Terrorism Law continue to generate some of the most serious violations of freedom of expression in the country. They had notably observed that in many instances the legitimate exercise of freedom of expression had been criminalised as propaganda for terrorism or as proof of membership of terrorist organizations, notably in cases where no other material evidence exists of any link with a terrorist organization and in the absence of any call or apology for violence.[153] The European Union and the Council of Europe has urged Turkey to make its anti-terrorism legislation compliant with human rights standards, including with the European Convention on Human Rights and the jurisprudence of the European Court of Human Rights.[154] There are many more Human Rights violations, which Turkey's citizens are facing. The problem appears in lack of definitions and clear explanations of different conceptions. In law, it is important

[150] Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection, article 38 (1).
[151] Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection, article 38 (1a).
[152] European Parlament. *Parlamentary questions. 3 May* 2017. http://www.europarl.europa.eu/doceo/document/E-8-2017-003110_EN.html
[153] Human rights comment. *Misure of anti-terror legislation threatens freedom of expression. 4 December* 2018. https://www.coe.int/en/web/commissioner/blog/-/asset_publisher/xZ32OPEoxOkq/content/misuse-of-anti-terror-legislation-threatens-freedom-of-expression/pop_up?_101_INSTANCE_xZ32OPEoxOkq_viewMode=print&_101_INSTANCE_xZ32OPEoxOkq_languageId=en_GB
[154] European interest. *Turkey's Dreconian Anti-Terror Laws.* 23 August 2018. https://www.europeaninterest.eu/article/turkeys-draconian-anti-terror-laws/

to clearly explain and define various concepts, that law could be applicable. Turkish Anti-terrorism law and Turkish Penal code's vague formulation of the criminal provisions on the security of the state and terrorism and their overly broad interpretation by Turkish judges and prosecutors make all critics, particularly lawyers, human rights defenders, journalists, and rival politicians, a potential victim of judicial harassment.[155]

Religion is another important aspect, why asylum seekers, who are coming from different Middle East countries because of the internal conflicts, are facing danger in Turkey. Historically, it appeared that Middle East territories settled with a different cultures and religions. Christians, Jews, Hindus, Buddhists, while running from the war, has reached the territory of Turkey. According the Stockholm center of freedom, the Turkish government led by President Recep Tayyip Erdoğan continued to limit the rights of non-Muslim minorities, especially those it did not recognize as covered under the 1923 Lausanne Treaty.[156] Those actions strengthen the position, that Turkey is not a "safe third country" and do not match the EU Asylum Procedures Directive criteria's: life and liberty are not threatened on account of race, religion, nationality, membership of a particular social group or political opinion[157]. Religious persecutions and later prosecutions are not one-time cases in Turkey. Turkish Christians suffer endless petty and not so petty discrimination at the hands of the state, and Christians in Turkey are also subject to random acts of violence for the simple offence of being Christian.[158] At present, the world's attention is on the case of a Christian pastor who has been held in a Turkish jail for nearly two years, and is now under house arrest, on the charge of espionage.[159]

From a given examples, we can see that Turkey's government moving towards limitation of rights. Under the state-of-emergency issued after the failed coup attempt on July 15, 2016, the government did not revise this law and, in fact, used it to arrest and detain thousands of its citizens, fire public workers from their jobs without trial and close down private media outlets, educational institutions including universities, student dormitories, associations, labor unions, and charitable foundations.[160] It is difficult for different NGO's to work on the territory of Turkey, because a lot of them proclaimed as anti-state. Among undesired NGO's, falls and organizations which have

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[155] *Ibid.*

[156] SCF. Stockholm center for freedom. *US State Department highlights Turkish gov't's violations of religious rights in ints 2017 report*. 30 May 2018. https://stockholmcf.org/us-state-department-highlights-turkish-govts-violations-of-religious-rights-in-its-2017-report/

[157] Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection, article 38 (1a).

[158] SCF. Stockholm center for freedom. *Turkeys Christians are facing increasing persecution we cannot forget them*. 2018. https://catholicherald.co.uk/commentandblogs/2018/08/18/turkeys-christians-are-facing-increasing-persecution-we-cannot-forget-them/

[159] *Ibid.*

[160] Ayyenc, B., Orpen, C. *The EU-Turkey Refugee Deal. Can Turkey be considered as a ,,safe third country?". 13 April 2018*. http://www.publicseminar.org/2018/04/the-eu-turkey-refugee-deal/

been working with refugees. Deputy Prime Minister Numan Kurtulmus defended the ban on the activities of the NGOs operating across the country: "*The organizations are not shut down, they are being suspended. There is strong evidence that they are linked to terrorist organizations*".[161] By applying anti-terrorist law, Turkey's power representatives have benefited from its anti-terrorism law and state-of-emergency by suppressing any political opposition. Speaking about freedoms which are pointed out in EU Asylum Procedures Directive article 38 (1a), Turkey considered as not free. Freedom House, in 2019, estimated Turkey's freedom rating, political rights, civil liberties and evaluated Aggregate Freedom Score with 31 points, which equated it to not free countries.[162] Compared to Lithuania with 91 points[163] and Canada with 99 points[164] Turkey is standing at bottom together with African countries like Angola with 31 points[165] or Somalia with 7 points.[166] Those standings give the clear overview why Turkey do not meet the requirements of concept of the safe third country and it is not safe to send back the asylum seekers.

To move forward, it is important to look to the mentioned directive Article 38 (1b) "there is no risk of serious harm as defined in Directive 2011/95/EU". In this case, in order for EU to send back Asylum seeker, to the country where he came from, there should be no risk of serious harm as defined in Directive 2011/95/EU[167]. It is important to analyze it and make evaluation for Turkey's current situation regarding the risk of serious harm. In the Directive 2011/95/EU Article 15, it is defined what goes under the scope of the risk of serious harm. Serious harm consists of: the death penalty or execution; or torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of inter-national or internal armed conflict.[168] For serious harm we can also assign Asylum Procedure Directive article 38 (1d), which defined that the prohibition of removal, in violation of the right to freedom from torture and cruel, inhuman or degrading treatment as laid down in international law, is respected.[169] To evaluate Turkey's actions under the mentioned definition serious harm, it is important to present the current situation

[161] Reuters. *Turkey halts activities of 370 groups as purge widens. 12 November* 2016. https://www.reuters.com/article/us-turkey-security/turkey-halts-activities-of-370-groups-as-purge-widens-idUSKBN1370DP?il=0
[162] Freedom house. *Turkey.* 2019. https://freedomhouse.org/report/freedom-world/2019/turkey
[163] Freedom house. *Lithuania.* 2019. https://freedomhouse.org/report/freedom-world/2019/lithuania
[164] Freedom house. *Canada.* 2019. https://freedomhouse.org/report/freedom-world/2019/canada
[165] Freedom house. *Angola.* 2019. https://freedomhouse.org/report/freedom-world/2019/angola
[166] Freedom house. *Somalia.* 2019. https://freedomhouse.org/report/freedom-world/2019/somalia
[167] Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted
[168] Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, article 15
[169] Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection, article 38 (1d)

regarding the armed conflict between Turkish security forces and Kurdish guerrillas in the south-eastern region of the country[170]. This conflict between Turkey government and Kurdish minors claimed a lot of victims, destroyed settlements, villages, infrastructure etc. As a consequence of the conflict, Syrian refugees who ran away from civil war in their country and settle them self's in Kurdish territory, appeared in the conflict zone again. Another unsafe aspect, which appear in Turkey's foreign policy, is country's active involvement in Syrian civil war. Turkey — in recent years, President Recep Tayyip Erdogan ordered plans drawn up for a Turkish military incursion into Syria. At every turn, though, military commanders, already fighting a war inside Turkey against Kurdish militants, pushed back.[171] Turkey's intervention into the region raise questions regarding its intention in a conflict. Evaluating EU Asylum Procedure Directive and Directive 2011/95/EU respective articles, Turkey's status as a safe third country do not fit under the scope of definition. Turkey's involvement in the Syrian Civil War and its proximity to the conflict caused concern over the safety of Syrian refugees.[172] Additionally, to that, Turkey's political upheavals and massive intolerant atmosphere regarding the persons who belong to another culture, race, religion, has an impact on refugees and citizens. There are more examples and proven documented cases that refugees as a vulnerable minor, where a target of discrimination and aggression for Turkey's authorities in order to strengthen their positions. Country's propaganda made an effect on local citizens, which started to blame refugees for their general economic difficulties, including lack of jobs (especially unqualified and low-paying ones) and rise of home rental prices as well as their personal safety in areas where refugees congregate.[173] Turkish citizens in order to frighten incoming refugees created the online movement (hashtag # "ÜlkemdeSuriyeliİstemiyorum" („I don't want Syrians in my country"). This is one of the other examples why Turkey do not meet the requirements under Directive as a safe third country. However it is important to analyze case to case as for some of the applicants Turkey can be considered as the "safe third country" In case *„Greece - A 190/2018, 27 March 2018"* ECHR stated, that for applicant Turkey can be considered as a safe third country based on the fact that Turkey is a member of Geneva Convention.

As early as 2015, to respond to the pressure at the EU external borders, especially in the aim of assisting frontline States, Italy and Greece, which were facing increasing numbers of arrivals, the European Commission developed a new 'hotspot approach' in the European Agenda on Migration. Hotspots were defined as followed: "located at key arrival points in frontline

[170] Council on foreign relations. *Global Conflict Tracker*. 10 September 2020. https://www.cfr.org/interactive/global-conflict-tracker/conflict/conflict-between-turkey-and-armed-kurdish-groups
[171] Arango, T. *With Operation in Syria, Erdogan Show His New Power Ovver Turkey's Military*. 25 August 2016. https://www.nytimes.com/2016/08/26/world/europe/turkey-tanks-syria.html
[172] Aygenc, B., Orpen, C. *The EU-Turkey Refugee Deal. Can Turkey be considered as a „save third country*?". 13 April 2018. http://www.publicseminar.org/2018/04/the-eu-turkey-refugee-deal/
[173] Ibid.

Member States, hotspots are designed to inject great order into migration management by ensuring that all those arriving are identified, registered and properly processed". This hotspot approach has been subject to vehement criticisms from NGOs. A research from Amnesty International published in November 2016 concluded that its implementation did not alleviate pressure on frontline States and even led to violations of refugees and migrants' rights, highlighting cases of ill-treatment and arbitrary detention in Italy. In April 2017, the EU Commission also alerted member states to the situation of children in migration, especially unaccompanied minors, who are particularly vulnerable when they arrive in the hotspots.[174]

Nonetheless, member states decided to increase their political and financial engagement with Turkey. Logical follow-up of the hotspot approach, the EU-Turkey statement was signed on 18 March 2016 between the European Heads of States and their Turkish counterpart to put an end to irregular migration flows departing from Turkey to Europe. It was presented by the European Commission as an effective way to prevent migrants from putting their lives at risk and to organise safe and legal pathways to Europe. Presenting externalisation policies as a way of protecting migrants, and not only as border control management tool, is a classic argument in favour of a security imperative. As expressed in the text of the deal, key features of the agreement were that all new irregular migrants crossing from Turkey into Greek islands, as from 20 March 2016, would be returned to Turkey. Migrants arriving would be duly registered and any application for asylum would be processed individually by the Greek authorities, in cooperation with the UNHCR. For every Syrian being returned to Turkey from Greek islands, another Syrian would be resettled from Turkey to the EU (1:1 mechanism), taking into account the UN vulnerability criteria. Finally, Turkey would take any necessary measures to prevent new sea or land routes for illegal migration opening from Turkey to the EU. In exchange its efforts to accept the return of irregular migrants, Turkey would receive 6 billion euros from the European Union, along with promises to facilitate visa liberalisation and reenergise discussions around EU accession. Signing a deal with Turkey was controversial from the get-go. It raises the question of how to conclude partnerships with third countries, a strategy at the heart of the EU's externalisation approach. The Union argues that to build up a comprehensive response all stakeholders in the crisis must be involved, not only the different member states, institutions and agencies but also third countries. If this argument is deemed valid, there are questions which arise from it. How can it be ascertained that states involved will respect human rights? Is the EU not relieving itself of some of its legal and moral obligations by focusing solely on stemming flows of migrants and preventing them from reaching its territory? Numerous issues have arisen in response to these questions, especially regarding the

[174] Petracou, E., Domazakis, G., Papayiannis, G., Yannacopoulos, A. *Towards a Common European Space for Asylum, Sustainability*. 2018.

principle of non-refoulement and the prohibition of collective expulsions. One of the main concerns for NGOs was whether Turkey could be considered as a safe third country for migrants and refugees. Being the largest host country in the world with around 2,9 million refugees, Turkey has to cope with a great number of challenges, especially regarding access to lawful employment and education for refugees. It is important to note that Turkey has not ratified the 1967 Optional Protocol relating to the Status of Refugees, therefore non-Europeans are excluded from qualifying for refugee status in the country. Because of this geographical reservation, refugees from other countries than Syria, for instance those originating from Iraq or Afghanistan, cannot benefit from the same level of protection under the EU-Turkey deal, although their personal situation could make them benefit from such status under international law. Furthermore, Turkish forces were also accused of deporting refugees back to Syria in violation of international law the same month the deal was signed with the EU.

Also the main EU countries which suffered the consequences of the fast track procedures were Greece and Italy. The arrival of more than a million asylum seekers in Europe in 2015 sparked deep divisions between EU Member States, for it revealed both the weakness of the Schengen system, lacking sufficient tools to keep the external borders of the Union under control, and the unsustainability of the Dublin Regulation, which assigns the responsibility for registering and processing asylum applications to the country of first arrival. As numbers became unmanageable, Greece and Italy failed to prevent migrants from continuing their journey to northern Europe. This imposed an equally unsustainable burden on main destination countries such as Germany, Sweden, Finland, Belgium, the Netherlands and Austria, which started to resort to individual actions such as reintroducing border controls and raising barriers at their frontiers.[175]

Unfortunately, Member States are not yet meeting the commitments they made under the Council Decisions on relocation. To date, 24 out of the 31 participating countries have committed to making places available under the relocation scheme, with an overall number of only 8,090 places. The Commission calls on Member States to increase their efforts, in particular with regards to unaccompanied minors, and to fully comply with their commitments and obligations under the Council's Decisions on relocation. It is crucial that all Member States relocate actively and on a regular basis from both Italy and Greece.[176]

According to R. Wodak (2018), despite calls on Member States to commit to their duties and increase their efforts, in particular with regards to unaccompanied minors, only 3,701 people (2,749 from Greece and 952 from Italy) were relocated in 21 countries as of early August 2016,

[175] Kourachanis, N. From camps to social integration? Social housing interventions for asylum seekers in Greece. *International Journal of Sociology and Social Policy*, 2018.
[176] Bordoni, C. *State of crisis.* Cambridge: Polity Press, 2016.

which falls far short of the Commission's proposed target of relocating 6,000 people per month. Moreover, whereas the pace of relocation transfers from Greece increased (most likely due not only to the heightened capacity of the Greek asylum service to process relocation requests, but also to the lowering number of new arrivals), relocation from Italy decreased and remained at a particularly low level compared to the continuously high number of potential applicants for relocation arriving in Italy. Moreover, some of the participating countries have proposed introducing a ceiling on the number of asylum seekers they are willing to take.[177]

On 8 June 2015, the Commission adopted a proposal on a European Resettlement Scheme, which was followed by an agreement among the Member States on 20 July 2015 to resettle 22,504 persons in clear need of international protection, in line with the figures put forward by the UNHCR. In July, EU Member States adopted conclusions on resettling through multilateral and national schemes 22,504 displaced persons from outside the EU who are in clear need of international protection. The Justice and Home Affairs Council also agreed to provide dedicated funding for an extra 50 million euros in 2015/2016 to support this scheme. Following the EU Leaders' Summit with Turkey on 29 November 2015, the EU-Turkey Action Plan was adopted. The plan introduced a voluntary humanitarian admission scheme to create a system of solidarity and responsibility sharing with Ankara for the protection of persons displaced by the conflict in Syria to Turkey. Member States are invited to participate in the scheme on a voluntary basis taking into account their capacities, and the scheme is to be flexible to take into account the sustainable reduction in the number of people irregularly crossing the border from Turkey into the European Union as a result of Turkey's actions – i.e., if the irregular flows into Europe through Turkey are successfully reduced, Member States are invited to accept people from Turkey who are in need of international protection have been displaced by the conflict in Syria. Schengen associated states are also invited to participate. The EU-Turkey Statement of 18 March 2016 provided that, as of April 4, for every Syrian being returned to Turkey from the Greek islands, another Syrian will be resettled from Turkey to the EU.

According to F. Trauner (2016), the sudden change in trend is ascribable to two major attempts to curb migrant flows. On the one hand, with the EU-Turkey deal struck in March, Ankara agreed to prevent people from crossing the border to Europe and to accept irregular migrants caught in Greece in return for billions in financial aid, the promise of visa-free travel to the EU, revived membership talks and a new resettling scheme for Syrian asylum seekers. On the other hand, a group of Balkan states, coordinated by Austria, have built barbed-wire topped fences at their borders to try to keep migrants and refugees out. Ankara has not been 100% effective in

[177] Wodak, R. *Discourse and European Integration*. MIM Working Paper Series. 2018.

containing new arrivals since March, but the EU-Turkey deal has nonetheless had a dramatic effect. Combined with the sealing off of the Greek-Macedonian frontier as well as successive border crossing points along the Balkans route, it proved near-to-completely successful in preventing people from going further north. The closure of European land borders and the Balkans route has not stopped people trying to come. So, the closure of European land borders and the Balkans route has not stopped people trying to come. Although fewer asylum seekers have been risking the journey to Greece across the Eastern Mediterranean, the situation in the Central Mediterranean route is getting worse as the number of refugees shows no sign of slowing. Forced to find another way, migrants and refugees often turn to people-smugglers.[178]

The 2015 migration crisis in Europe and its consequences create a wide field for scientific research in many branches of the social sciences. The crisis entailed consequences in which the European Union was forced to undertake a major reform of all policies in the area of freedom, security and justice in the EU. In addition, it caused an aggravation of the socio-political and legislative situation in many EU member states, as well as outside the Union, which necessitated a review of policies in many areas of public life. Today we can say that this crisis laid the foundation for a change in EU migration and visa legislation, asylum legislation, and also border legislation.[179]

The migration agreement between the European Union and Turkey, which ensured the effective implementation of migration policy and the rights of migrants, as well as the integration processes of migrants, has become particularly important since the start of migration processes in Syria in 2015.

2.3 Analysis of infringement proceedings in the case law of resettlement and relocation refugees to Poland, Czech Republic and Hungary

In 2017, The European Commission initiated an investigation against Poland, Hungary and the Czech Republic as they were suspected of violating obligations within the EU. The reason was that countries did not accept refugees under the 2015 EU determined quotas. In the framework of the agreement on the resettlement of refugees, the states received quotas for the reception of refugees, they were binding. In the fall of 2015, EU countries decided to resettle 160,000 of the African refugees who were in Greece and Italy at that time. Quotas were distributed in proportion to the population of other EU countries and a number of other factors. Poland then pledged to

[178] Trauner, F. Asylum policy: the EU's „crisis" and the looming policy regime failure. *Journal of European Integration.* 2016. 38(3).
[179] Börzel, T. A. *From EU Governance of Crisis to Crisis of EU Governance: Regulatory Failure, Redistributive Conflict, and Euroskeptic Publics*. 2016.

accept 7000 people, the Czech Republic - 1600, Hungary – 1300. Over the last years, the Commission has repeatedly called for refugees to be accepted by Poland, Hungary and the Czech Republic. They did not accepted determined quotas and did not declared their intention to accept the migrants, which is a violation of their obligations as EU members. The infringement procedure is declared in TFEU article 258. That is why The Commission has the right to initiate an investigation when it has a suspicion that a member country of the European Union has violated EU law. The Commission addressed the case to the CJEU. The result of this procedure can be large fines for violating countries. As the most severe punishment, which, however, has never been applied, these states may be deprived of the right to vote in the Council of the EU. In this case, the Commission became plaintiff and Poland, Hungary and the Czech Republic became defendant in separate cases, however the CJEU has joined them for the purposes of the judgment. In 2019 October, general advocate Sharpston issued her opinion in cases against Poland, Hungary and the Czech Republic regarding the failure to comply with the emergency displacement mechanism[180]. Later in 2020 April, the CJEU presented the verdict on this case.

Before Commission submitted lawsuit against Poland, Hungary and the Czech Republic, the notification letter was sent. A letter of formal notice is a first official request for information and the first step in an infringement procedure. Given that the Council Decisions on relocation were adopted in response to an emergency situation and in view of the repeated calls to the three Member States, the authorities of the Czech Republic, Hungary and Poland now have one month to respond to the arguments put forward by the Commission, instead of the customary two-month deadline. If no reply to the letter of formal notice is received, or if the observations presented in reply to that notice cannot be considered satisfactory, the Commission may decide to move to the next stage of the infringement procedure, and send a 'reasoned opinion' to the Member States. If necessary, the Commission may then refer the case to the Court of Justice of the EU[181].

General advocate E. Sharpston on 31 October 2019, issued opinions in three court cases before the CJEU issued their decision on Poland (Case C-715/17), Hungary (Case C-718-17), and the Czech Republic (Case C-719/17). It should be noted that the transfer of third-country nationals under Article 72 TFEU to EU countries in 2015 provided for the organization of resettlement procedures for refugees from third countries, in which EU Member States were required to indicate the number of asylum seekers on a regular basis or at least every three months and to receive them

[180] Opinion of Advocate General E. Sharpston. European Commission v Republic of Poland Case C‑715/17; European Commission v Republic of Hungary Case C‑718/17; European Commission v Czech Republic Case C‑719/17.
http://curia.europa.eu/juris/document/document.jsf?text=&docid=219668&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=2799815

[181] European Commission. Relocation: Commission launches infringement procedures against the Czech Republic, Hungary and Poland. 14 June 2017 https://ec.europa.eu/commission/presscorner/detail/FI/IP_17_1607

within a specified period by granting them asylum and social security. However, in view of the migration crisis in Greece and Italy and in accordance with Article 72 TFEU, Poland, the Czech Republic and Hungary have refused to relocate third-country nationals in order to avoid a migration crisis and ensure internal border security.

E. Sharpston (2019) notes that *„under normal circumstances, Regulation no. Regulation 604/2013 regulates the distribution of applicants for international protection in the European Union between Member States. However, the ongoing conflict in Syria has led to a dramatic increase in the total number of people seeking such protection. Dangerous travel The Mediterranean has been and still is the most important route for such persons to enter the territory of the Union. Such a route puts enormous pressure on two Member States, Italy and Greece, both of which have long shores of the Mediterranean that are virtually impossible to control. Under normal circumstances, these Member States, in accordance with Article 13 of the Dublin III Regulation, be responsible for examining applications for international protection lodged by persons entering the European Union through their territory. Both countries suddenly received a large number of potential applicants for protection"*[182]. According to the lawyer's conclusion, Italy and Greece have become a target for Syrian citizens seeking temporary asylum in EU countries. The closest countries that can be reached faster are Italy and Greece, the target countries for Syrian citizens. However, due to the growing size of Syrian citizens, these countries have faced a migration crisis, which has led German Chancellor Merkel to offer other EU countries to accept migrants from other EU countries in order to reduce the migration crisis in Greece and Italy.

E. Sharpston in her opinion distinguished seven main legal elements and their articles which are cornerstones in cases of Poland, Hungary and the Czech Republic.

- *Legal basis.* Legal decisions on the transfer of asylum seekers in the case of Poland, Hungary and the Czech Republic cannot be considered in isolation, as the basis for these decisions was taken in the light of very complex obligations and established international law and legal instruments in the European Union „Slovak Republic and Hungary Council"[183].
- *Universal Declaration of Human Rights.* Article 14(1) of the Universal Declaration of Human Rights provides in broad terms that 'everyone has the right to seek and to enjoy in other countries asylum from persecution'. However, Article 14(2) thereof provides that 'this right may

[182] Opinion of Advocate General E. Sharpston. European Commission v Republic of Poland Case C‑715/17; European Commission v Republic of Hungary Case C‑718/17; European Commission v Czech Republic Case C‑719/17. 31 October 2019
http://curia.europa.eu/juris/document/document.jsf?text=&docid=219668&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=2799815
[183] *Ibid. Paragraph 8*

not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations'[184].

- *The Geneva Convention.* Article 1(A)(2) of the Convention Relating to the Status of Refugees provides in its first paragraph that the term 'refugee' shall apply to any person who 'owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion is outside the country of his nationality, and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country'[185]. However Article 1(f) provides the exception when Geneva Convention should not be applied. Its related to crimes like war crime, crime to peace and against humanity, non-political crime etc.

- *Treaty on the European Union*. Article 4(2) TEU provides that 'the Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State'[186]. This article is important as Poland, Hungary and the Czech Republic used in their defence a statement that non controllable flow of migrants might effect the national security of Member State.

- *Treaty on the Functioning of the European Union.* Article 72 TFEU provides, succinctly, that 'this Title shall not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security'. Article 78(1) TFEU, part of Chapter 2, ('Policies on border checks, asylum and immigration'), requires the Union to 'develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of *non-refoulement*. This policy must be in accordance with [the Geneva Convention] and other relevant treaties'. Article 78(2) TFEU provides the legislative basis for measures adopted to construct the common European asylum system ('the CEAS')[187].

- *Charter of Fundamental Rights.* Article 18 of the Charter of Fundamental Rights of the European Union states that 'the right to asylum shall be guaranteed with due respect for the rules of [the Geneva Convention] and in accordance with the [TEU] and the [TFEU]'.

The arguments of the parties

[184] *Ibid. Paragraph 9*
[185] *Ibid. Paragraph 10*
[186] *Ibid. Paragraph 12*
[187] *Ibid. Paragraph 13,14*

E. Sharpston evaluated the arguments of the parties which were presented by each Member State and Commission.

Poland argues that complying with the Relocation Decisions would have prevented it from discharging its responsibilities under Article 72 TFEU, read with Article 4(2) TEU, with regard to the maintenance of law and order and the safeguarding of internal security, matters for which it retains exclusive competence. As a provision of primary law, Article 72 TFEU takes precedence over the Relocation Decisions and guarantees Member States total control over their internal security and public order. It is not a mere check on legality during the legislative process but rather a conflict of laws rule, which gives priority to Member State competence. It is for the Member State to assess whether, in any particular set of circumstances, such a conflict exists. A Member State may thus rely on Article 72 TFEU to counter arguments about depriving the Relocation Decisions of 'effet utile' or appeals to solidary — there is no obligation to jeopardise internal security by showing solidarity with other Member States[188].

Hungary likewise relies on Article 72 TFEU as giving it the right to disapply a decision based on Article 78(3) TFEU if it considers that that decision provides inadequate safeguards for its internal security. Hungary argues that the fact that potential transferees under Decision 2015/1601 should be persons possessing nationalities for which 75% or more of applications for international protection are granted (Article 3(1) of Decision 2015/1601) restricts its ability to rely on reasons for exclusion from protected status (as a refugee or a person enjoying subsidiary protection) linked to national security and public order. The fact that the judgment in *Slovak Republic and Hungary* v *Council* upheld the validity of Decision 2015/1601 is irrelevant. The question here is separate and distinct: may a Member State rely on Article 72 TFEU to exclude or limit relocations under Decision 2015/1601 when they have reservations about the impact of such relocations on national security and public order within their territory[189]?

The Czech Republic argues essentially that the relocation mechanism put in place by the Relocation Decisions is dysfunctional and that it has taken other, more effective, measures to help in the fight against the migration crisis. Specifically, it has provided significant assistance to the third countries from which the exodus has been greatest and has seconded significant numbers of police to work on protecting the EU's external frontiers[190].

The Commission relies essentially on the judgment in *Slovak Republic and Hungary* v *Council*, the need to give 'effet utile' to the Relocation Decisions and the principle of solidarity between Member States. It insists that adequate mechanisms existed within the

[188] *Ibid. Paragraph 172*
[189] *Ibid. Paragraph 173*
[190] *Ibid. Paragraph 174*

Relocation Decisions to enable Member States of relocation, in respect of any individual applicant, to take the necessary measures to protect national security and public order within their territory[191]. To summarize the arguments of the respondents:

1. the fact that the judgment in Slovak Republic and Hungary v Council upheld the validity of Decision 2015/1601 is irrelevant (Poland and Hungary);
2. Member States were entitled to disapply the Relocation Decisions (even if valid) on the basis of their retained powers under Article 72 TFEU, read with Article 4(2) TEU (Poland and Hungary);
3. the Relocation Decisions created a dysfunctional system (the Czech Republic)[192].

The Council of the European Communities adopted Decisions (EU) 2015/1523 and (EU) 2015/1601 reviewing temporary measures to reduce the influx of migrants from Greece and Italy in accordance with Article 78 TFEU part 3. According to E. Sharpston (2019), the legality of the adoption of the second decision (EU) 2015/1601 adopted by the Council of the European Community was disputed in Poland, the Czech Republic and Hungary, but without success. The European Commission has brought actions under Article 72 TFEU infringement for all three countries: Poland (Case C 715/17), Hungary (Case C 718/17) and the Czech Republic (Case C 719/17). According to the cases brought, these Member States did not comply with Article 5 of Decision 2015/1523 and Decision 5/1501 of Poland and the Czech Republic. 2, 4 to 11 and the obligations set out therein, without providing assistance to Italy and Greece and without relocating asylum seekers to their territories.[193] According to Mr Sharpston, Poland, Hungary and the Czech Republic challenge the admissibility of the actions, arguing that they can rely on Article 72 TFEU. As a ground for non-application of the Decisions, but these countries recognize that Article 78 TFEU, which is the basis for the decision not to transfer asylum seekers, does not relieve these States of their obligation to maintain their internal public order and ensure internal border security.[194]

E. Sharpston presented the example of court cases related to article 72 of TFEU regarding the safeguarding of internal security as required under Article 72 TFEU. The Court has so far considered Article 72 TFEU on three occasions.

First, in *Adil case*, the Court discussed the proper interpretation of Article 21(a) of the Schengen Borders Code against the background of Article 72 TFEU. The Court concluded that the mobile security monitoring checks at issue in that case were not 'border checks' prohibited by Article 20 of the Schengen Borders Code but checks within the territory of a Member State,

[191] *Ibid. Paragraph 175*
[192] *Ibid. Paragraph 176*
[193] Ibid.
[194] Ibid

covered by Article 21 thereof. Later in the same judgment, the Court reaffirmed that 'the provisions of Article 21(a) to (d) of [the Schengen Border Code] and the wording of Article 72 TFEU confirm that the abolition of internal border controls has not affected the responsibilities of the Member States with regard to the maintenance of law and order and the safeguarding of internal security'[195].

In the judgment in *Slovak Republic and Hungary* v *Council*, the Court examined Poland's argument in that case that 'the contested decision is contrary to the principle of proportionality since it does not allow the Member States to ensure the effective exercise of their responsibilities with regard to the maintenance of law and order and the safeguarding of internal security as required under Article 72 TFEU'. The Court pointed out that recital 32 of Decision 2015/1601 states expressly that 'national security and public order should be taken into consideration throughout the relocation process, until the transfer of the applicant is implemented' and that Article 5(7) expressly preserved Member States' right to refuse to relocate an applicant, albeit only where there were reasonable grounds for regarding him or her as a danger to their national security or public order. If that mechanism 'were ineffective because it requires Member States to check large numbers of persons in a short time, such practical difficulties are not inherent in the mechanism and must, should they arise, be resolved in the spirit of cooperation and mutual trust between the authorities of the Member States that are beneficiaries of relocation and those of the Member States of relocation. That spirit of mutual trust and cooperation must prevail when the relocation procedure provided for in Article 5 of [Decision 2015/1601] is implemented'[196].

An immediate answer to the central argument advanced by Poland and Hungary is to be found in two key provisions of the Relocation Decisions themselves. The final sentence of Article 5(4) thereof provided that 'the Member State of relocation may decide not to approve the relocation of an applicant only if there are reasonable grounds as referred to in paragraph 7 of this Article'. Article 5(7) thereof then stated that 'Member States retain the right to refuse to relocate an applicant only where there are reasonable grounds for regarding him or her as a danger to their national security or public order or where there are serious reasons for applying the exclusion provisions set out in Articles 12 and 17 of [the Qualifications Directive]'. Read together, those two substantive paragraphs of the Relocation Decisions *expressly recognised* that the Member State of relocation retained the right to refuse to relocate *a particular applicant* where (i) reasonable grounds existed for regarding that person as a danger to its national security or public order or (ii) serious reasons existed for thinking that that person could lawfully be excluded from the international protection sought. Article 72 TFEU is therefore not — as Poland and Hungary

[195] *Ibid. Paragraph 191*
[196] *Ibid. Paragraph* 193, 194

contend — a *conflict of laws rule* that gives priority to Member State competence over measures enacted by the EU legislature or decision-maker; rather, it is a *rule of co-existence*. The competence to act in the specified area remains with the Member State (it has not been transferred to the European Union). Nevertheless, the actions taken must respect the overarching principles that the Member State signed up to when it became a Member State and any relevant rules contained in the Treaties or in EU secondary legislation[197].

E. Sharpston concluded her opinion by statement that "*by failing to indicate at regular intervals, and at least every 3 months, the number of applicants who could be relocated swiftly to Polish territory and any other relevant information in accordance with Article 5(2) of 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, and of Article 5(2) of 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, all three Member States have failed to fulfil its obligations under Article 5 of those decisions" [198]*.

„Accordingly, the relocation of applicants as set out in both Article 4 of Decision 2015/1523 and Article 4 of Decision 2015/1601 has not taken place pursuant to the relocation procedure provided in Article 5 of those decisions. The breach of Article 5 has in particular hindered Italy and Greece from identifying the individual applicants who could be relocated to Poland, Hungry and Czech Republic under Article 5(3) and from taking decisions to relocate such applicants pursuant to Article 5(4), thus contravening the principle of sincere cooperation in Article 4(3) TEU. Consequently, Poland, Hungry and Czech Republic are in breach of its obligations under Article 5(5) to (11) of Decision 2015/1523 and Decision 2015/1601, notably to complete the relocation procedure as swiftly as possible as laid down in Article 5(10) thereof"[199].

After general advocate E. Sharpston presented here opinion regarding the Poland, Hungry and Czech Republic refusal to relocate migrants from Greece and Italy, CJEU presented their judgment regarding the failure of Member States to fulfil their obligations in joined cases C‑715/17, C‑718/17 and C‑719/17.

In 2017 June 15 the Commission initiated infringement proceedings under Article 258(1) TFEU against Poland, Hungry and Czech Republic by sending them letters of formal notice. In those notice, the Commission maintained that those Member States had complied with neither their obligations under Article 5(2) of Decision 2015/1523 and/or Article 5(2) of Decision 2015/1601 nor, as a result, their subsequent relocation obligations provided for in Article 5(4) to

[197] *Ibid. Paragraph* 203, 205, 212
[198] *Ibid. Paragraph* 258
[199] *Ibid. Paragraph* 258

(11) of Decision 2015/1523 and/or Article 5(4) to (11) of Decision 2015/1601. Not being persuaded by the replies of the Republic of Poland, Hungary and the Czech Republic to those letters of formal notice, the Commission, on 26 July 2017, sent a reasoned opinion to each of those three Member States maintaining its position that they failed to proceed relocation obligations provided in mentioned Decisions. The Commission was calling upon those three Member States to take the necessary measures to comply with those obligations within four weeks, that is, by 23 August 2017 at the latest. The Commission again noted that the Republic of Poland, Czech Republic and Hungary were the only Member States not to have relocated any applicant for international protection. It requested that those three Member States make relocation commitments and start relocating immediately. Having received no response to those letters, the Commission decided to bring the actions.

The three Member States at issue put forward a series of arguments which they claim vindicates them for having disapplied Decisions 2015/1523 and 2015/1601. The arguments concerned, first, relate to the responsibilities of Member States with regard to the maintenance of law and order and the safeguarding of internal security, arguments derived by the Republic of Poland and Hungary from Article 72 TFEU read in conjunction with Article 4(2) TEU and, secondly, are derived by the Czech Republic from the malfunctioning and alleged ineffectiveness of the relocation mechanism as provided for under those decisions[200]. Their main arguments were that in the present case they were entitled under Article 72 TFEU, read in conjunction with Article 4(2) TEU which brings them exclusive competence to maintain maintenance of law and order and the safeguarding of internal security. To disapply their secondary, and therefore lower-ranking, legal obligations arising from Decision 2015/1523 and/or Decision 2015/1601. Those Member States submit that they decided, under Article 72 TFEU, to disapply Decision 2015/1523 and/or Decision 2015/1601. By applying Decision 2015/1523 and/or Decision 2015/1601 Poland, Hungary and the Czech Republic they see the risk to their national security by letting in "dangerous and extremist persons who might carry out violent acts or acts of a terrorist nature". According to their position relocation mechanism as it was applied by the Greek and Italian authorities did not enable them to fully guarantee the maintenance of law and order and the safeguarding of internal security.

Later CJEU submitted its decision. Since Decisions 2015/1523 and 2015/1601 were, as of their adoption, of a binding nature for the Republic of Poland and the Czech Republic, those Member States were required to comply with those acts of EU law and to implement them

[200] Judgment of the CJEU. European Commission v Republic of Poland Case C‑715/17; European Commission v Republic of Hungary Case C‑718/17; European Commission v Czech Republic Case C‑719/17. 2 April 2020. http://curia.europa.eu/juris/document/document.jsf;jsessionid=DBA84F646D509273C81B26C6B562C1F3?text=&docid=224882&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=2798408 Paragraph 133

throughout their two-year period of application. The same applies in respect of Hungary as regards Decision 2015/1601, an act which was of a binding nature for that Member State as of its adoption and throughout its two-year period of application[201]. CJEU also provided its response to Poland, Hungary and the Czech Republic arguments regarding the TFEU article 72. In this connection, according to settled case-law of the Court of Justice, although it is for the Member States to adopt appropriate measures to ensure law and order on their territory and their internal and external security, it does not follow that such measures fall entirely outside the scope of European Union law. It cannot be inferred that the Treaty contains an inherent general exception excluding all measures taken for reasons of law and order or public security from the scope of European Union law. The recognition of the existence of such an exception, regardless of the specific requirements laid down by the Treaty, might impair the binding nature of European Union law and its uniform application[202]. It follows that, although Article 72 TFEU provides that Title V of the Treaty is not to affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security, it cannot be read in such a way as to confer on Member States the power to depart from the provisions of the Treaty based on no more than reliance on those responsibilities[203]. The scope of the requirements relating to the maintenance of law and order or national security cannot therefore be determined unilaterally by each Member State, without any control by the institutions of the European Union[204]. It is for the Member State which seeks to take advantage of Article 72 TFEU to prove that it is necessary to have recourse to that derogation in order to exercise its responsibilities in terms of the maintenance of law and order and the safeguarding of internal security[205].

The Court in their judgment of 6 September 2017, "Slovakia and Hungary v Council, C‑643/15 and C‑647/15, EU:C:2017:631, paragraph 307", stated that that national security and public order should be taken into consideration throughout the relocation procedure, until the transfer of the applicant is implemented. However Member States retain the right to refuse to relocate an applicant for international protection only where there are reasonable grounds for regarding him or her as a danger to their national security or public order[206]. The Court follow the

[201] *Ibid. Paragraph* 139
[202] *Ibid. Paragraph* 143
[203] Commission v Denmark, C‑461/05, EU:C:2009:783, paragraph 53, and of 4 March 2010, Commission v Portugal, C‑38/06, EU:C:2010:108, paragraph 64.
[204] Judgment of the CJEU. European Commission v Republic of Poland Case C‑715/17; European Commission v Republic of Hungary Case C‑718/17; European Commission v Czech Republic Case C‑719/17. 2 April 2020. http://curia.europa.eu/juris/document/document.jsf;jsessionid=DBA84F646D509273C81B26C6B562C1F3?text=&docid=224882&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=2798408 Paragraph 146
[205] Judgments of 15 December 2009, Commission v Denmark, C‑461/05, EU:C:2009:783, paragraph 55, and of 4 March 2010, Commission v Portugal, C‑38/06, EU:C:2010:108, paragraph 66
[206] Judgment of 6 September 2017, Slovakia and Hungary v Council, C‑643/15 and C‑647/15, EU:C:2017:631, paragraph 308

opinion, that Member State could refuse to accept the applicant only if there are reasonable grounds that applicant may cause danger to their national security or public order. Article 72 of TFEU should be interpreted strictly and narrow accordingly, does not confer on Member States the power to depart from the provisions of European Union law based on no more than reliance on the interests linked to the maintenance of law and order and the safeguarding of internal security, but requires them to prove that it is necessary to have recourse to that derogation in order to exercise their responsibilities on those matters[207]. In regards to mentioned serious reasons of refusing to transpose it follows from the case-law of the Court that the competent authority of the Member State concerned cannot rely on the exclusion clause provided for in Article 12(2)(b) of Directive 2011/95 and Article 17(1)(b) of that directive, which concern the commission by the applicant for international protection of a 'serious crime', until it has undertaken, for each individual case, an assessment of the specific facts within its knowledge. That is done with a view to determining whether there are serious reasons for taking the view that the acts committed by the person in question, who otherwise satisfies the qualifying conditions for the status applied for, come within the scope of that particular ground for exclusion, the assessment of the seriousness of the crime in question requiring a full investigation into all the circumstances of the individual case concerned[208]. The Court also explained that to refuse to relocate an applicant for international protection, those grounds, since they must be 'reasonable' and not 'serious' and do not necessarily relate to a serious crime already committed or a serious non-political crime committed outside the country of refuge before the person concerned was admitted as a refugee but only require evidence of a 'danger to national security or public order', clearly leave a wider margin of discretion to the Member States of relocation[209]. In paragraph 160 the Court made a reference to advocate general E. Sharpston opinion regarding the Member States opportunity to take advantage of peremptorily invoking article 72 of TFEU. It follows that the Republic of Poland, Hungary cannot rely on Article 72 TFEU to justify their refusal to implement all the relocation obligations. In Judgment from 6 September 2017, Slovakia and Hungary v Council, C‑643/15 and C‑647/15, EU:C:2017:631 the Court made clear statement that there should be cooperation between Member States. In this Court case CJEU stated that mechanism provided for in Article 5(4) and (7) of each of Decisions 2015/1523 and 2015/1601 was ineffective, in particular because of a lack of cooperation.

[207] Judgment of the CJEU. European Commission v Republic of Poland Case C‑715/17; European Commission v Republic of Hungary Case C‑718/17; European Commission v Czech Republic Case C‑719/17. 2 April 2020. http://curia.europa.eu/juris/document/document.jsf;jsessionid=DBA84F646D509273C81B26C6B562C1F3?text=&docid=224882&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=2798408 Paragraph 152

[208] Judgment of 13 September 2018, Ahmed, C‑369/17, EU:C:2018:713, points 48, 55 and 58

[209] Judgment of the CJEU. European Commission v Republic of Poland Case C‑715/17; European Commission v Republic of Hungary Case C‑718/17; European Commission v Czech Republic Case C‑719/17. 2 April 2020. http://curia.europa.eu/juris/document/document.jsf;jsessionid=DBA84F646D509273C81B26C6B562C1F3?text=&docid=224882&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=2798408 Paragraph 156

The Court concluded that Republic of Poland, Hungary can not rely on Article 72 TFEU to justify their refusal to implement all the relocation obligations. In it's verdict, CJEU relied on advocate general E. Sharpston findings that "the arguments derived from a reading of Article 72 TFEU in conjunction with Article 4(2) TEU are not such as to call into question that finding. There is nothing to indicate that effectively safeguarding the essential State functions to which the latter provision refers, such as that of protecting national security, could not be carried out other than by disapplying Decisions 2015/1523 and 2015/1601 (paragraphs 226,227). On the contrary, the mechanism provided for in Article 5(4) and (7) of each of those decisions, including in its specific application as it developed in practice during the periods of application of those decisions, left the Member States of relocation genuine opportunities for protecting their interests relating to public order and internal security in the examination of the individual situation of each applicant for international protection whose relocation was proposed, without prejudicing the objective of those decisions to ensure the effective and swift relocation of a significant number of applicants clearly in need of international protection in order to alleviate the considerable pressure on the Greek and Italian asylum systems[210]. Consequently, the pleas in defense was rejected. Also CJEU rejected the defense of Czech Republic which stated that instead of implementing Decisions 2015/1523 and 2015/1601 The Czech Republic therefore preferred to concentrate its efforts on support measures more effective than a relocation measure by providing, both at bilateral level and within the framework of the European Union, financial, technical and staffing assistance to the third countries most affected and to the Member States in the front line of the massive influx of persons clearly in need of international protection[211]. The Court arguments were based on mandatory enforcement. As Czech Republic implemented Decisions 2015/1523 and 2015/1601, they were binding to implement them and was required to comply with the relocation obligations imposed under those decisions. In no circumstances could such aid replace the implementation of the obligations resulting from Decisions 2015/1523 and 2015/1601[212].

Interesting, that Lithuania in the new future may also receive and infringement actions from Commission as Lithuania lags behind the deadlines of resettlement of asylum seekers from Greece and Italy. Lithuania is asking for more time to resettle refugees so far it has accepted only half. And it's important to mention that most of them left to other countries as Germany or Scandinavia region due to family reunification. The fear of infringement actions from Commission may follow the fact that out of 1077 asylum seekers who had to be relocated to Lithuania from the EU and third countries, less than half were relocated within four years. In 2015, Lithuania committed to

[210] *Ibid. Paragraph* 171
[211] *Ibid. Paragraph* 176
[212] *Ibid. Paragraph* 187

accept 1105 refugees. This quota was later reduced to 1077 asylum seekers, so many had to be transferred by the end of October of 2019. However, according to the Ministry of the Interior, 490 people have been relocated so far. If the Government of Migration Commission decides that Lithuania continues to participate in the resettlement programs for foreigners in need of asylum, it is desired to set a new deadline for the fulfillment of the said quota - until 31 December 2022.

It should be noted that all asylum seekers in Lithuania are first accommodated in the Aliens Registration Center (URC) in Pabradė. This institution does not run integration programs for foreigners, but this is where the adaptation period for foreigners begins. The Aliens Registration Center is an institution intended for accommodating detained aliens and asylum seekers, investigating the identity of detained or centered aliens, the circumstances of their entry into the Republic of Lithuania, managing their accounting and carrying out expulsion procedures from the Republic of Lithuania. This institution can accommodate up to 500 foreigners at a time. It should be noted that refugee reception centers and day care centers in Lithuania play a special role in the reception, adaptation and integration processes of foreigners granted asylum.

In Lithuania, the implementation of the social integration of emigrants receives support from the EU structural funds. From these funds, emigrants are provided with social support, maintenance payments, education, employment, health care, housing search, and education of children with young children. The provision of these social services helps emigrants to socialize and integrate in the Lithuanian market, to start a new life in a safe and favorable environment.[213]

By summarizing all of the mentioned above it is important to emphasize the decision of CJEU in cases C‑715/1, C‑718/1, and C‑719/17 against Hungary, Poland and Czech Republic, which formulated the case law where member states are obliged to accept the migrants by adhering the determined quotas. The waiver of accepting the migrants may lead to infringement procedures, where member states will be forced to use their economic, legal and other resources by litigating. Also, the "financial, technical and staffing assistance" or by covering up because of safety, as it was stated as defense statement by Hungary, Poland and Czech Republic, can not be considered as reasonable grounds not to apply Decisions 2015/1523 and 2015/1601.

[213] Damulienė, A. (2013). *Migracijos problema Lietuvoje ir jos įtaka šalies ekonomikai.* Vilnius: MRU. Vol. 3 (1).

CONCLUSIONS

1. As a result of the analysis of the asylum legislation under Dublin Regulation the following conclusion is reached. The coastal states (Greece, Italy, Malta) of the European Union will continue to bear the brunt of the burden of examining applications for international protection. The Dublin Regulation which was proposed by the Commission on 23rd of September 2020 does not remove the responsibility from coastal states and „first arrival „or „first entry „criterion remains intact. Article 21 of the proposal and article 13 of the current Dublin Regulation remain unchanged regarding the examination of the application for international protection.
2. For the last five years Germany received more asylum applications than any other member state due to secondary movement. The further analysis of proposed Dublin Regulation showed that transfer of jurisdiction will remain (articles 27 point 1 and 35 point 1 and 2). This step effectively replicates the legal status quo under the Dublin III Regulation, it allows for double (and three times) asylum applications in cases of secondary movement which will deny the principle of solidarity envisaged.
3. As the family reunification was one of the essential criteria by determining the asylum country, the proposal of Dublin regulation extended the definition of family members by adding siblings into the list.
4. Although the EU and Turkey have reached an agreement on the return of asylum seekers back to Turkey, this agreement cannot have legal consequences. Despite the courts differing interpretative due to EU institutions' expression of will concerning the agreements (CJEU cases; *European Parliament, European Commission v Council of the European Union, France v. Commission in 1994)* the European Council as the highest organ of the international organization (EU) has the representative role and articles 218 of TFEU and 15 of TEU, do not determine the right of legislative function to European Council, so it is wrongful to state that it could have implied treaty-making competences.
5. An agreement which has been reached between the EU and Turkey on returning the asylum seekers, Turkey is not qualifies as a safe third country under article 38 of Directive 2013/32/EU on common procedures for granting and withdrawing international protection. The analysis showed that returned asylum seekers might face threatened on account of race, religion, nationality, membership of a particular social group or political opinion notwithstanding with a fact that Turkey is a member of 1951 Geneva Convention.
6. Initiated infringement procedure against Hungry, Poland and Czech Republic in jointed cases, European Commission v Republic of Poland Case C‑715/17; European Commission

v Republic of Hungary Case C‑718/17; European Commission v Czech Republic Case C ‑719/17 by refusing to uphold their obligations regarding the forced relocation and resettlement process concerning the 160 000 migrants located in Italy and Greece, CJEU opened ways for possible fines. As the court did not issued fines, the European Commission can direct case to the CJEU for financial sanctions. For that reason, to avoid litigation processes and ensure the principal of solidarity the Commission in 2016 proposals suggested to set up fines at the rate of 250 000 € per refused claimant.

7. As a result of the analysis of the joined cases European Commission v Republic of Poland Case C‑715/17; European Commission v Republic of Hungary Case C‑718/17; European Commission v Czech Republic Case C‑719/17 the following conclusions in the court's case-law were identified:
   a) Assistance in various sectors of the economy to the third countries, instead of relocation the migrants can not be considered as reasonable grounds for not applying approved at EU level Decisions. Such a waiver would trigger a chain reaction among other Member States which would also follow the example of refusal
   b) Article 72 of TFEU can not be interpreted as an absolute right for safeguarding of internal security. The measures of relocation mechanism provided for Member States to fulfill their obligations under article 72 of TFEU, while respecting mandatory secondary Union law measures. Member States does not exempt from applying on EU level adopted Decisions under the guise of article 72 of TFEU
   c) Although, Decisions 2015/1523 and 2015/1601 under articles 5 (7) leaves discretion for Member States on right for safeguarding of internal security, however Qualification Directive 2011/95/EU under article 12 (2) (Exclusion) determines the cases under which the refugee could be considered as a threat to national security.

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Bondarenka V. European Union legal response to the migration crisis. Supervisor – Doc. dr. Laurynas Biekša – Vilnius: Institute of International and European Union Law, 2020.
Keywords: Migration, asylum, response, infringement proceedings, agreement, fast track procedure, non refoulement, Court of Justice of the European Union, Dublin regulation.

ABSTRACT

For the past years, since the Syrian civil war started, the increase of asylum seekers raised rapidly. The EU legal system wasn't ready for such flow. To ensure the neat refugee relocation EU authorities started the amendment and supplementation of legal acts. The agreements with the third countries regarding the relocation provoked conflicts in the EU legislative system while ensuring the human rights. The right to appeal became a challenge for the European Court of Human Rights together with the Court of Justice of the European Union to ensure the fundamental rights migrants and asylum seekers. Some of the legal act proposals are still in the phase of active discussion. Ambiguity in certain aspects of relocation causes legal gaps and dissatisfaction of some member states. However, for migrants the courts represents the guarantor of justice and possibility to start the life from the new chapter.

In this Master Thesis the author focused on analyzing main legal acts, which regulates the safe arrival of migrants on the continent, new proposals of EU authorities, EU agreement between the Turkey which notwithstanding the Directive and the case law established by the courts, was signed and infringement procedure against some of the EU member states.

SUMMARY

The EU migration's primary legal act which regulates and ensures the rights and obligations of migrants is Geneva Convention from 1951 and it's Protocol from 1967. To counteract illegal migration, the European Union has developed a legislative framework consisting of four documents: Council Directive 2002/90 / EC, which provides a common definition of the offense of facilitation of unauthorized entry, transit and residence, Framework Decision 2002/946 / JHA, which provides for sanctions for such offenses. The Return Directive (2008/115 / EC) establishes uniform rules and procedures for the return of migrants entering the territory of the EU. Directive 2009/52/EC developed unified administrative, criminal law norms for employers from EU countries who employ migrants who entered the country illegally. In case of legal disputes applicants can use their legal remedies by approaching national or European courts (CJEU, ECHR).

Proposals of new CEAS package which were presented by the Commission in 2016 had no approval between member states. In 2020 September 23rd Commission presented new Pact on Migration and Asylum. The changes have taken place in screening of third country nationals at the external borders, Dublin regulation, Directive on common procedure for international protection in the Union have been changed to Regulation, fingerprint system known as Eurodac strengthen it's verification process for safety and fluent process and crisis and force majeure instrument in the field of migration and asylum.

The Dublin Regulation has undergone the biggest changes due to inability to adapt Dublin III in nowadays situations. The aims of the new Dublin system consist of establishment of a common framework, ensure sharing of responsibility through a new solidarity mechanism, determines the responsibility of Member States for examining an application for international protection, discourage abuses and prevent unauthorised movements of the applicants within the EU.

Concluded EU – Turkey agreement does not meet the requirements of Directive 2013/32/EU on common procedures for granting and withdrawing international protection concerning the concept of 'safe third country'. Under the TFEU, European Council do not have competence to conclude such an international agreements. The competence of EU authorities while concluding the EU – Turkey deal, breached the TFEU, article 218 and brings this international agreement under invalidity. CJEU stated, that breach of procedure, does not affect the existence of the international agreement.

In 2017 June 15 the Commission initiated infringement proceedings under Article 258(1) TFEU against Poland, Hungry and Czech Republic by sending them letters of formal notice. The

CJEU stated that Member States can not take advantage of article 72 of TFEU, by refusing to apply Decisions adopted by the Commission.

PATVIRTINIMAS APIE ATLIKTO DARBO SAVARANKIŠKUMĄ

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