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FACULTY OF LAW

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# BIAŁOSTOCKIE STUDIA PRAWNICZE

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# The New Pact on Migration and Asylum as a Response to Current Migration Challenges– Selected Issues

**Abstract:** The Covid-19 pandemic has significantly affected the movement of people within the European Union, both in terms of nationals of the Member States and others. On many occasions, as an instrument to combat or contain the spread of the virus, EU Member States have made use of the possibility of temporarily reintroducing border controls in the Schengen area, or even temporarily closing their national borders. Despite the Covid-19 pandemic, the migratory pressure on the countries of the European Union has not ceased, although the scale of this phenomenon has decreased in many areas. A separate problem is also the influx of illegal migrants to the territory of European Union Member States and the effective implementation of instruments to combat this practice. The regulations in force in the European Union in the area of migration and asylum were developed under different conditions, i.e. standard migration flows, and despite many modifications (e.g. in the context of the competences and tasks of Frontex) they have not proved effective in emergency situations. Consequently, many attempts have been made to amend these regulations. In 2020, they were replaced by a new comprehensive Pact on Migration and Asylum. The aim of this paper is to present and analyze selected legal problems related to the influx of irregular migrants to the European Union in the light of current migration trends and to show, against this background, the main demands for changes contained in the submitted legislative proposals.
**Keywords:** irregular migrants, migration routes, migration management, migration control, migratory movement, EU migration policy

## Introduction

The inflow of irregular migrants into the European Union increased uncontrollably in 2015, particularly as a long-term consequence of the Arab Spring

and the war in Syria. European Union Member States have taken a variety of multifaceted measures to mitigate the phenomenon, but it has not been completely eliminated. Until now, some EU countries, especially Greece and Italy, have been struggling with the problem of being the country "on the front line" of crossings of the external EU border.

As we know, the problem of migration is complex. On the one hand, we have the problem of the security of people looking for a new, better place to live. On the other hand, there are the justified concerns of the states at the external borders in the context of the particular pressure to which they are exposed. The main burden rests with them, often exceeding the internal capabilities of the country concerned, and as past practice has shown, the solidarity of other EU countries (e.g. in the area of relocation) looks different in practice.

It should be remembered that procedures and their observance at external borders are crucial. They also have an impact on the situation in other EU Member States in terms of asylum, integration or return operations in cases of large influxes of people. The existing EU regulations in this area, designed for "normal" migration flows, have not worked well in an emergency situation. The challenge of the scale of migration after 2015 exposed the weaknesses of the current European asylum system. These have conditioned the need for a new approach to addressing the problem.

The Commission has already put forward several proposals to amend the existing regulations. Based on a comprehensive assessment of the situation, a new pact on migration and asylum was proposed on September 23, 2020. It proposes a proper new migration policy, more efficient procedures and a new balance between Member States' responsibilities and solidarity. The rationale for this new approach has been the existing practice of implementing migration and asylum policy and the specific problems associated with it.

## 1. The Current Migration Situation in the European Union

Looking at the statistical data in the area of migratory movements in the EU countries, it is clear that we still have an increased influx of migrants in this direction, although far fewer than in the peak year of 2015. Undoubtedly, this was influenced by the Covid-19 pandemic in 2020. However, the trend of the increase, which is still high, calls for a revision of the current approach to shaping a common policy on migration and asylum. At the level of the European Union, several attempts have been made to modify the current system in this area, with mixed results. Hence another attempt to systematically redefine the common approach to the procedures applied, the scope of responsibility of individual states and their solidarity in the form of a New Pact on Migration and Asylum submitted in September 2020.

Referring to the data in terms of non-EU28 countries' population in 2020[1], the impact of the Covid-19 pandemic on migration movements is clearly visible. The largest indicator in terms of non-EU28 countries' population in 2020 in absolute numbers is recorded in Germany: 8,604,207, which means an increment of 162,888, compared to 2019. However, the dynamics of this increment have decreased in 2020, as the increment in 2019 compared to 2018 was at a higher level, at 646,699. In second place is France: 6,384,234, which means an increment of 133,713, compared to 2019. Here also the dynamics of the increment have decreased compared to the previous year. The increment in 2019 compared to 2018 was higher, at 193,856. In third place is Spain: 5,029,446, an increment of 429,134, compared to 2019. Here, however, the dynamics increased in 2020, as the increment in 2019 compared to 2018 was lower, at 326,898.

The countries most affected by the influx of migrants, i.e. Italy and Greece, were ranked fourth and eighth respectively. Italy recorded 4,430,954 non-EU foreigners in 2020, a decrease of 15,403 compared to 2019. The previous year saw an increase compared to 2018, at 103,485. In Greece, the non-EU population was at 998,150 in 2020, an increase of 39,343 compared to 2019. In 2019, the increase in this indicator compared to 2018 was at a lower level, at 25,046. Detailed conclusions can of course be drawn after a more in-depth analysis, but it is impossible not to point out that the situation in terms of the number of non-EU populations was influenced by the Covid-19 pandemic. This is particularly evident in Italy, where the epidemic situation in 2020 was probably the most dramatic in Europe.

The postulates of revising the current approach to the shape of migration and asylum policy are confirmed by subsequent data on the number of submitted asylum applications. At the time of this article's submission, the latest available full-year data is for 2019.There were 2,712,477 refugees (defined as people who are outside their country of origin due to a well-founded fear of persecution) across the EU in 2019. In contrast, there were 721,075 asylum seekers (who, because their lives are in danger in their country of origin, have made a formal application to the host country and are awaiting a decision) compared to 1,321,600 applications in the peak year of 2015[2]. During this period, Germany had the highest number of asylum applications, with 169,615 (of which first-time applications were 142,450), followed by France with 128,940 (of which first-time applications were 119,915) and Spain with 117,795 (of which first-time applications were 115,175)[3].

1 Non-EU28 countries (2013–2020) nor reporting country, https://ec.europa.eu/eurostat/databrowser/view/migr_pop3ctb/default/table?lang=en (accessed 15.01.2021).

2 Evolution of asylum applications and refugee numbers in the EU, https://www.europarl.europa.eu/infographic/ welcoming-europe/index_pl.html#filter=2019 (accessed 15.01.2021).

3 *Ibidem*; First-time asylum applications by third-country nationals, https://ec.europa.eu/eurostat/web/asylum-and-managed-migration/visualisations (accessed 15.01.2021).

In 2019, there were 714,200 applications for international protection in the EU (plus Norway and Switzerland), 13% more than the 634,700 applications in 2018. This compares to 728,470 applications in 2017 and nearly 1.3 million in 2016[4]. In 2019 EU countries granted protection to nearly 295,800 asylum seekers, down from 333,400 in 2018 and 533,000 in 2017. Almost a third of these (27%) were from Syria, with Afghanistan (14%) and Venezuela (13%) also in the top three. The number of people from Venezuela increased by nearly 40% in 2019 compared to 2018. Of the 78,600 Syrians granted international protection in the EU, almost 71% received it in Germany[5].

There was a decrease in asylum applications in 2020, undoubtedly related to the restrictions following the Covid-19 pandemic. In the first ten months of 2020, 390,000 asylum applications were made in the EU (including 349,000 first-time applications), 33% fewer than in the same period of 2019. This allowed for some reduction in the backlog of applications, with 786,000 pending cases at the end of October 2020, 15% fewer than at the end of 2019. In the same period (January–October 2020), the number of decisions issued at first instance was 386,000, 2% less than in the same period in the previous year. 43% of these decisions were positive (81,000 decisions granting refugee status, 34,000 granting subsidiary protection status and 50,000 granting humanitarian status)[6].

Illegal crossings of the EU's external borders are also a persistent problem, albeit with much lower dynamics compared to the situation at the peak of the migration crisis. In 2015 and 2016, more than 2.3 million illegal border crossings were detected. In 2019, the total number of illegal EU border crossings fell to around 141,800, the lowest level since 2013 and 5% lower than in 2018[7]. Of the number of illegal border crossings in 2019, 106,200 cases relate to the maritime border (down 7% compared to 2018) and 35,500 cases to the land border (here a level similar to 2018). According to the data for 11 months of 2020, in this period we had 114,300 cases of illegal border crossings (a decrease of 10% compared to the same period in 2019)[8].

4 Asylum trends in the EU in 2019, https://www.easo.europa.eu/sites/default/files/easo-eu-2019-asylum-trends.pdf (accessed 15.01.2021).

5 Asylum decisions in the EU, https://ec.europa.eu/eurostat/documents/2995521/9747530/3–25042019-BP-EN.pdf/22635b8a-4b9c-4ba9-a5c8–934ca02de496 (accessed 15.01.2021).

6 European Commission, Statistics on migration to Europe, https://ec.europa.eu/info/strategy/priorities-2019–2024/promoting-our-european-way-life/statistics-migration-europe_en (accessed 15.01.2021).

7 Asylum and migration in the EU: facts and figures, https://www.europarl.europa.eu/news/en/headlines/society/20170629STO78630/asylum-and-migration-in-the-eu-facts-and-figures (accessed 15.01.2021).

8 European Commission, Statistics on migration, *op. cit.*

Analyzing in more detail the situation of individual migratory routes[9] in 2019, there was a clear decrease (-57%, 26,700) in the number of people crossing the border into the Western Mediterranean (including the Atlantic route from Western Africa to the Canary Islands). An equally pronounced, but slightly smaller, decrease (-40%, 14,000) was recorded on the Central Mediterranean route. At the same time, a robust increase was recorded on the Eastern Mediterranean route (+47%, 83,300). On the Eastern borders route (via borders with Belarus, Moldova, Russia and Ukraine) illegal crossings also decreased (-38%, 640), but this is still not the main route. According to the data for January–November 2020 compared to the same period in 2019, there was an increase (year-on-year) in crossings on the Central Mediterranean route (+154%, 34,100) and the Western Mediterranean route (+46%, 35,800) and a decrease in crossings on the Eastern Mediterranean route (-74%, 19,300). This simultaneously resulted in a significant deterioration of the situation in the transit camps[10]. One person can cross the border several times, so the number of people actually arriving in Europe is lower, but some Member States are undoubtedly still under considerable pressure, where solutions developed in other circumstances do not fully work.

The justification for the calls for reform of the existing system in the implementation of migration and asylum policy was also based, among other things, on the significant differences in recognition rates across EU countries. For example, in 2019 the recognition rate of Afghan citizens at first instance ranged from 2% in Hungary to 93% in Italy. This range has increased compared to 2018. In practice, the application of the existing provisions of the Dublin Regulation is also sometimes problematic. In 2019 Member States reported 142,900 outgoing requests under the Dublin rules. These requests were sent to other Member States to take responsibility for examining an application for international protection. 131,300 decisions were issued in these cases. 85,700 (i.e. 65%) of the requests were accepted and 24,100 outgoing transfers were executed (which is 28% of the accepted requests)[11].

9 See also Sara Casella Colombeau, Crisis of Schengen? The Effect of Two 'Migrant Crises' (2011 and 2015) on the Free Movement of People at an Internal Schengen Border, "Journal of Ethnic and Migration Studies" 2020, vol. 46, no. 11, pp. 2258–2274.

10 See E. Kondilis, K. Puchner, A. Veizis, C. Papatheodorou and A. Benos, Covid-19 and Refugees, Asylum Seekers, and Migrants in Greece, "British Medical Journal" 2020, no. 369, doi.org/10.1136/bmj.m2168 (accessed 20.12.2020); K. Mitchell and M. Sparke, Hotspot Geopolitics versus Geosocial Solidarity: Contending Constructions of Safe Space for Migrants in Europe, "Environment and Planning D: Society and Space" 2020, vol. 38, no. 6, pp. 1046–1066, doi:10.1177/0263775818793647 (accessed 20.12.2020); A. DoliwaKlepacka and M. Zdanowicz, The European Union Current Asylum Policy: Selected Problems in the Shadow of COVID19,"International Journal for the Semiotics of Law – Revue internationale de Sémiotique juridique" 2020, doi.org/10.1007/s11196–020-09744–3 (accessed 15.01.2021).

11 European Commission: Statistics on migration, *op. cit*.

Resettlement is another important point in the organization of the Common Migration and Asylum Policy system so far. In 2019, around 21,200 people in need of international protection were resettled from non-EU countries to EU Member States (12% more than in 2018). Most of them were resettled from Turkey and the main nationality was Syrian (around 60% of resettled persons). Since 2015 more than 75 000 people have been resettled into the EU under joint EU resettlement schemes[12].

## 2. Assumptions of the New EU Pact on Migration and Asylum

Previous experience, starting from 2015 when there was an unprecedented influx of migrants to the EU, has shown the inefficiency and ineffectiveness of the introduced mechanisms, including especially in the area of relocation of migrants who found their way to the territory of the European Union[13]. In this context, a New Pact on Migration and Asylum was developed at the EU level. On September 23, 2020, the European Commission presented a new concept of migration policy, revising the procedures used and finding the optimal balance between responsibility and solidarity.

The new pact was based on the 2016 reform concept. Of the proposals made at that time, the Commission withdrew one, the Dublin Regulation (Dublin IV). Instead, additional elements were included to ensure a balanced, common framework linking all aspects of asylum and migration policy. The New Pact on Migration and Asylum is de facto a combination of legislative and non-legislative instruments. They are intended to complement each other and create a comprehensive system –on the one hand, effective management of external borders, and on the other, coherent cooperation in the internal and external aspect of migration policy. In this way, a balance is to be achieved between the demand for responsibility and solidarity in the implementation of a comprehensive policy towards migrants.

The Pact on Asylum and Migration[14] presents a comprehensive approach to the issue of external borders, the asylum and return system and the functioning of the Schengen area. In this set of proposals, both legislative and non-legislative, the Commission has proposed the adoption of a broader, more solidarity-based framework for migration and asylum policy, while at the same time modifying existing concepts from the Dublin IV Regulation.

12 *Ibidem.*

13 A. Doliwa-Klepacka, Joined Cases C-643/15 and C-647/15 Slovak Republic and Hungary v Council of the European Union, "Polish Review of International and European Law" 2019, vol. 8, no. 2, pp. 141–154, doi.org/10.21697/priel.2019.8.2.07 (accessed 15.01.2021).

14 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the New Pact on Migration and Asylum, COM/2020/609 final, https://eur-lex.europa.eu/legal-content/PL/TXT/?uri=CELEX%3A52020DC0609&qid=1607428374739 (accessed 20.12.2020).

The Pact on Migration and Asylum comprises a package of nine instruments, both binding (legislative) and non-binding. The Commission's legislative proposals within the common package include:

- a legislative proposal for a Regulation of the European Parliament and of the Council introducing 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 (COM/2020/612 final)[15];
- an amended legislative proposal for a Regulation of the European Parliament and of the Council establishing a common procedure for applications for international protection in the Union and repealing Directive 2013/32/EU (COM/2020/611 final)[16];
- an amended legislative 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 Regulation (EU) XXX/XXX (Regulation on Resettlement) for the purpose of identifying illegally staying third-country nationals or stateless persons and on requesting comparisons 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 (COM/2020/614 final)[17];
- a legislative proposal for a Regulation of the European Parliament and of the Council on asylum and migration management and amending Council Directive 2003/109/EC and the proposed Regulation (EU) XXX/XXX (Asylum and Migration Fund) (COM/2020/610 final)[18];
- a legislative proposal for a Regulation of the European Parliament and of the Council on responding to emergencies and force majeure in the area of migration and asylum (COM/2020/613 final)[19].

In addition to those mentioned above, the pact also includes instruments without a formally binding character:

15 https://eur-lex.europa.eu/legal-content/PL/TXT/?qid=1601291190831&uri=COM%3A2020%3A612%3AFIN (accessed 15.01.2021).

16 https://eur-lex.europa.eu/legal-content/PL/TXT/?qid=1601291268538&uri=COM%3A2020%3A611%3AFIN (accessed 15.01.2021).

17 https://eur-lex.europa.eu/legal-content/PL/TXT/?qid=1601295417610&uri=COM%3A2020%3A614%3AFIN (accessed 15.01.2021).

18 https://eur-lex.europa.eu/legal-content/PL/TXT/?qid=1601291110635&uri=COM%3A2020%3A610%3AFIN (accessed 15.01.2021).

19 https://eur-lex.europa.eu/legal-content/PL/TXT/?qid=1601295614020&uri=COM%3A2020%3A613%3AFIN (accessed 15.01.2021).

- a Commission recommendation (C(2020) 6469 final) on an EU mechanism for Preparedness and Management of Crises related to Migration (Migration Preparedness and Crisis Blueprint)[20];
- a Commission recommendation (C(2020) 6467 final) on legal pathways to protection in the EU: promoting resettlement, humanitarian admission and other complementary pathways[21];
- a Commission recommendation (C(2020) 6468 final) on cooperation among Member States concerning operations carried out by vessels owned or operated by private entities for the purpose of search and rescue activities[22];
- Commission Guidance on the implementation of EU rules on definition and prevention of the facilitation of unauthorized entry, transit and residence (C(2020) 6470 final)[23].

It is important to note that the comprehensive view of the New Pact incorporates some of the Commission's earlier legislative proposals from 2016 and 2018, on which some political agreement had already taken place in the Council and the European Parliament, but without completing the legislative process (drafts: EU Asylum Agency Regulation, Reception Conditions Directive, Qualification Directive, EU Resettlement Framework and Return Directive).

The submitted draft of the new Asylum and Migration Management Regulation is intended to replace one of the key elements of the 2016 reform, the Dublin Regulation. The new 2020 proposal proposes a more effective and comprehensive management system with greater practical guarantees of solidarity between Member States.

## 3. New Regulations on Asylum and Migration Management as a Key Element of the Pact

The adoption of the Asylum and Migration Management Regulation and the creation of the Asylum and Migration Fund will mean that the Dublin III Regulation will be replaced by new arrangements. The Commission has justified its legislative

20 https://ec.europa.eu/info/sites/info/files/commission_recommendation_on_an_eu_mechanism_for_preparedness_and_management_of_crises_related_to_migration_migration_preparedness_and_crisis_blueprint_0.pdf (accessed 15.01.2021).

21 https://ec.europa.eu/info/sites/info/files/commission_recommendation_on_legal_pathways_to_protection_in_the_eu_promoting_resettlement_humanitarian_admission_and_other_complementary_pathways.pdf (accessed 15.01.2021).

22 https://ec.europa.eu/info/sites/info/files/commission-recommendation-_cooperation-operations-vessels-private-entities_en_0.pdf (accessed 15.01.2021).

23 https://ec.europa.eu/info/sites/info/files/commission-guidance-implementation-facilitation-unauthorised-entry_en.pdf (accessed 15.01.2021).

proposal at length. It stresses in particular the need for a common framework to facilitate a comprehensive approach to the management of asylum and migration, based on the principles of integrated policy making as well as solidarity and fair sharing of responsibility. It also stresses the need to ensure the sharing of national responsibilities by means of a new solidarity mechanism, as well as to enhance the system's capacity to identify a single Member State responsible for the examination of an application for international protection. This is to be achieved, inter alia, by removing the cessation of responsibility clauses, by eliminating the possibility of shifting responsibility between Member States as a result of the applicant's actions (e.g. preventing unauthorized movement of applicants for international protection between EU countries) and by significantly reducing the time limits for sending applications and receiving replies[24].

Justifying its proposal, the Commission noted that Member States' existing asylum and return systems remain largely incompatible. This leads to divergent standards of protection, inefficient procedures and encourages the unauthorized movement of migrants across Europe in search of better reception conditions and residence prospects, thus having undesirable effects on the Schengen area. It is precisely the lack of harmonized and correct implementation in the Member States that has been the biggest weakness in the application of the Dublin procedure so far[25]. The Commission stressed that a common problem in the European Union is the submission of multiple applications for international protection by the same person. According to the Commission's research, in 2019 (preceding the submission of the legislative proposal), as many as 32% of applicants had already filed applications in other Member States. This demonstrates that the procedures set out in the previous Dublin III Regulation[26] did not effectively limit the possibility of multiple applications or the unauthorized movement of persons in the procedure[27].However, it must be remembered that the Dublin III Regulation, which has been in force since July 19, 2013, was adopted in different external circumstances. Therefore, it is difficult to maintain that the mechanisms set out in it did not work in the extraordinary situation of migratory pressure or the need to make a fair division of responsibility between Member States.

The draft regulation on asylum and migration management adopts a new working model based on the solidarity mechanism. It aims at addressing the

24 COM (2020) 610 final, p. 5 of the explanatory memorandum of the proposal.

25 The evaluation report and the implementation report are available athttps://ec.europa.eu/home-affairs/what-wedo/policies/asylum/examination-of-applicants_en (accessed 15.01.2021).

26 Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing criteria and mechanisms for determining the Member State responsible for examining an application for international protection, https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex:32013R0604 (accessed 15.01.2021).

27 COM (2020) 610 final, p. 16 of the explanatory memorandum of the proposal.

challenges posed by migratory pressures. The mechanism is to be applied flexibly in situations with different migration flows and under different conditions. It involves individual Member States making solidarity contributions to finance relocation or return. This contribution will be compulsory for individual EU Member States on the basis of a scale of 50% of GDP and 50% of population. Such a system will, in the Commission's view, guarantee the principle of fair sharing of responsibility[28]. The new system also assumes that each EU country will have the right to choose whether to participate in the refugee relocation procedure or to make a solidarity contribution by sponsoring the return of persons identified as illegally staying in Member States affected by excessive migratory pressures.

States are left to take the initiative to inform the Commission that they are under migratory pressure. If the Commission's assessment in this respect is in line, the Commission will determine the overall needs of the Member State and the appropriate measures necessary to address the situation. All other Member States will be required to make an appropriate solidarity contribution (sponsoring relocation or return). The beneficiary Member State is not obliged to make a solidarity contribution. Member States indicate the type of contributions they will make in solidarity response plans, which are sent to the Commission[29].

It is also possible that the Commission will accept the need for solidarity measures other than sponsoring relocation or return. These could be, for example, measures to enhance the State's asylum, reception or return capacity or external measures to reduce migration flows. In this case, the contributing Member State may identify such measures in its solidarity response plans instead of sponsoring relocation or return. These assistance measures may take various forms: providing assistance for the introduction of increased reception capacity, including infrastructure or other systems, improving reception conditions for asylum seekers, financial or other assistance targeted at infrastructure and equipment that may be necessary to improve the implementation of return decisions, providing materials or means of transport for carrying out operations, etc. In addition to detailed guidance on the relocation procedure and return sponsorship, the Commission's legislative proposal envisages providing additional financial support for relocation to encourage Member States to choose the option of relocating refugees.

The new draft regulation on asylum and migration management also introduces significant changes to the procedure for applying for international protection, in an attempt to address the fundamental issue of the disproportionate allocation of asylum seekers. The proposal requires an application to be made either in the Member State of first illegal entry or in the Member State of legal residence. The applicant will not be allowed to choose either the Member State of application or

28 *Ibidem*, p. 20.
29 *Ibidem*, pp. 22–23.

the Member State responsible for examining the application. It will also introduce the obligation for the applicant to reside, during the determination procedure, in the Member State of application and, after such a determination, in the Member State considered responsible. Undoubtedly, this modification will tidy up the management of migration flows, facilitate the determination of the responsible Member State, and consequently enable faster access to the procedure for granting international protection, preventing unauthorized movement.

## Conclusions

The Pact on Migration and Asylum submitted in September 2020 is an expression of a new, comprehensive approach to the problems of managing the EU's external borders, a common migration and asylum policy. For the time being we have a rather early stage of legislative procedures, so it is difficult to prophesy about the real effectiveness of the new set of instruments. Nevertheless, the new approach, at least in its assumptions, seems to respond to the most important challenges of the current solutions in this area. Continuous migratory pressure on the borders of Member States (irrespective of temporary fluctuations in the context of the Covid-19 pandemic) fully justifies the urgent need to revise the current system.

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# The EU Member States' Diverging Experiences and Policies on Refugees and the New Pact on Migration and Asylum

**Abstract:** The refugee crisis in 2015 revealed the lack of solidarity and the divergent migration policies of the EU Member States. It showed clearly that when faced with the problem of migration, the EU countries fail to cooperate and support one another. The EU Member States with more experience with migration coped better and were more open to migrants. The South European countries took in a huge inflow of migrants and expected (in vain) support from other EU members. The countries of Central and Eastern Europe were unwilling to receive refugees. These diverging approaches to refugees presented by particular Member States resulted in the New Pact on Migration and Asylum, which was adopted by the European Commission in September 2020.The purpose of the pact was to provide humanitarian aid to migrants, since one of the human rights is the right to migrate, but it was not its only objective. The New Pact on Migration and Asylum was supposed to be a guarantee of solidarity and efficient management of the migration process.
**Keywords:** migration, refugee crisis, New Pact on Migration and Asylum

## Introduction

Migration is a complex issue with many aspects that must be considered together: the safety of people who seek international protection or a better life and the concerns

of the countries at the EU's external borders, which may face migratory pressures exceeding their internal capacities and expect solidarity from other countries. As there has been no uniform asylum procedure on the EU level, in September 2020 the Commission proposed the New Pact on Migration and Asylum.

This is supposed to change and improve the current procedures by means of sharing responsibility and solidarity. The EU Member States' sense of co-responsibility has often been put to the test, especially at the time of the refugee crisis[1]. Therefore, there is an actual and urgent need for starting a discussion and undertaking actions aimed at building solidarity on the transnational level. However, just a day after the new plan was presented by the EC, some doubts appeared about whether it will bring about a real change[2]. The basic question that arises in this context concerns the possibilities and barriers that may appear during the implementation of the new pact. Will the divergent experiences and policies on refugees hinder the implementation of the New Pact on Migration and Asylum, in particular, with regard to the EU members' solidarity? The objective of this article is to ponder this issue and attempt to answer the question asked above.

The paper is composed of four sections. Section one starts with diverging migration experiences in the EU Member States. Section two analyses the dynamics and refugee crisis in the EU Member States. Section three is devoted to the New Pact on Migration and Asylum and its potential impact on EU migration policy. Section four will draw some conclusions.

## 1. Diverging Migration Experiences in the EU Countries

With their permanent differences with regard to economic conditions, political situation, the advancement of civil society, the efficiency of human rights protection or, finally, experience with migration and tolerance towards others, the EU Member States have very divergent approaches to migratory phenomena, which became all too evident during the refugee crisis. The purpose of this section is to discuss the major differences in migration experiences, including refugeeism, between the three main geographic regions of Europe, i.e. the East, the West and the South.

1 L. Lonardo, The 'Migrant Crisis': Member States' or EU's Responsibility, (in:) E. Kużelewska, A. Weatherburn and D. Kloza (eds.), Irregular Migration as a Challenge for Democracy, Cambridge/Antwerp/Portland 2018, p. 15ff; A. Miglio, Solidarity in EU Asylum and Migration Law: A Crisis Management Tool or a Structural Principle?, (in:) E. Kużelewska, A. Weatherburn and D. Kloza (eds.), Irregular Migration as a Challenge for Democracy, Cambridge/Antwerp/Portland 2018, pp. 36–47.

2 The concerns were voiced, among others, by deputies from the LIBE committee, https://www.europarl.europa. eu/news/pl/press-room/20200918IPR87422/meps-question-whether-the-new-migration-pact-will-bring-about-real-change (accessed 22.12.2020).

Western Europe has been experiencing a major wave of immigrants for many years, which has resulted in the need for the development of migration policies. A period of an intensive inflow of immigrants to Western European countries started after 1945, when mainly Germany, France, the United Kingdom and – to a slightly lesser extent – the Netherlands pursued active immigration policies by importing a foreign workforce[3].

Germany, France and the UK are examples of countries with a long tradition of being the final destination for immigrants (despite some major differences between the migration policies that these countries have)[4]. Migrants included not only those moving in search of work, education or to be reunited with their family but also those who were running away from persecution in their own country. Western European countries (especially Germany) had strong economies, well-developed and friendly systems of social benefits for refugees and a high level of tolerance and acceptance for religious and cultural otherness – the main pull factors for refugees. In the UK, a major part of the newcomers arrived from former British colonies (India and Pakistan), in France from North Africa, while in Germany they were *Gastarbeiter* from Turkey[5].

It is worth emphasising that after 1945, the Federal Republic of Germany (FRG) experienced a wave of return migrants of German origin. The economic development of Germany in the 1950s led to a workforce shortage, which was soon mitigated by contract workers from Southern Europe,in particular Italy. Migrant workers also came from Turkey, Yugoslavia, Morocco or Tunisia. In the 1950s and 1960s, West Germany signed numerous agreements[6] with Italy, Spain, Greece, Turkey, Morocco, Tunisia, Portugal and Yugoslavia, which allowed the recruitment of workers (*Gastarbeiter*) from those countries[7]. Temporary labour migrants started to settle down in West Germany[8], although the original idea was that they were supposed to work in Germany only for a limited period of time and then be replaced by others[9]. It should be underlined, however, that Germany did not have one common (holistic and coherent) immigration policy and it was officially declared that the FRG was not

3 J. Brzozowski, Polityka migracyjna w Unii Europejskiej: stan obecny i perspektywy, "Studia Europejskie" 2011, no. 3, p. 53.

4 B. Vollmer, Policy Discourses on Irregular Migration in Germany and the United Kingdom, Basingstoke 2014.

5 M. Pacek and M. Bonikowska, Unijna droga do wspólnej polityki migracyjnej w kontekście debaty o przyszłości Wspólnot, "Studia Europejskie" 2007, no. 1, p. 56.

6 C.V. Marie, Immigration and the French Experience, "Contemporary European Affairs" 1990, vol. 3, no. 3, p. 59.

7 A. Stempin, Niemiecki model polityki imigracyjnej, "Kultura i polityka" 2013, no. 13, p. 56.

8 M. Kwiecień, Polityka imigracyjna Niemiec, "Studia Ekonomiczne. Zeszyty Naukowe" 2015, no. 211, pp. 81–82.

9 B. Gibki, Zmiany w polityce imigracyjnej Niemiec na przełomie XX i XXI wieku i ich znaczenie dla sytuacji imigrantów, " Prace geograficzne" 2008, no. 120, p. 129.

and would never be an immigration country[10]. There were different policies in place for the expelled and refugees, ethnic Germans, migrant workers and asylum seekers[11]. Indeed, the FRG was never counted among the "classic" immigration countries such as the USA, Canada or Australia[12].

France, on the other hand, became a final destination country as early as the end of the 19th century, which was connected with its vast overseas territories and the pull force of the French economy and culture[13]. In France, just like in Germany, the post--war reconstruction, the development of industry and negative demographic trends were the factors that led in the 1960s to undertaking some large-scale actions aimed at attracting additional workforce.In France, the solution was relatively simple. It was enough to open the borders for the residents of former colonies and the francophone community and maximally reduce the formalities related to granting them a legal status[14]. This period, known as laissez-faire immigration[15], lasted from 1945 to 1974 and ended with the global oil crisis. Unlike in Germany, where *Gastarbeiter* prevailed, France received mainly immigrants coming from the former French colonies or those who came to be reunited with their families. Because of the economic challenges, the inflow of immigrants was tolerated by the authorities practically until 2005 (when there were riots in Paris and other major cities)[16].

In the case of the United Kingdom, migration policy was mainly shaped by the country's colonial experience and relations with other members of the Commonwealth[17]. For many years, the British authorities encouraged a free movement of people within the British Empire in order to maintain ties with the "British Crown"[18]. The British Nationality Act of 1948 had a great impact on the immigration issue. Firstly, it made it possible for Irish labourers to work without

10 B. John, German Immigration Policy – Past, Present, and Future, (in:) T. Herzog and S.L. Gilman (eds.), A New Germany in a New Europe, New York and London 2001, p. 43.

11 See M. Mazur-Rafał, Zmiana paradygmatu w niemieckiej polityce imigracyjnej w latach 1998–2004? Wnioski dla Polski, "Środkowoeuropejskie Centrum Badań Migracyjnych" 2006, no. 2, p. 5.

12 C.M. Schmidt, Immigration Countries and Migration Research: The Case of Germany, (in:) G. Steinmann and R.E. Ulrich (eds.), The Economic Consequences of Immigration to Germany, Heidelberg 1994, p. 1.

13 H. Wyligała, Problem imigracji w relacjach francusko-niemieckich, (in:) P. Mickiewicz and H. Wyligała (eds.), Dokąd zmierza Europa. Nacjonalizm, separatyzm, migracje – nowe wyzwania Unii Europejskiej, Wrocław 2009, p. 207.

14 E. Mazur-Cieślik, Polityka migracyjna państw europejskich a wyzwania dla Polski, "Bezpieczeństwo narodowe" 2011, no. 20 IV, p. 128.

15 J.R. Watts, Immigration Policy and the Challenge of Globalization. Unions and Employers in Unlikely Alliance, New York 2002, p. 44.

16 H. Wyligała, *op. cit*., p. 211.

17 K. Fiałkowska and J. Wiśniewski, Polityka integracyjna Wielkiej Brytanii wobec uchodźców, Warsaw 2009, p. 1.

18 B. Jaczewska, Zarządzanie migracją w Niemczech i Wielkiej Brytanii. Polityka integracyjna na poziomie ponadnarodowym narodowym i lokalnym, Warsaw 2015, p. 63.

any restrictions. Secondly, it offered British citizenship to all members of the British Commonwealth, which meant that 800 million residents of Commonwealth territories were granted the right to come, settle down and work in the United Kingdom without any limitations[19].

Northern European countries have a lot of experience with refugees. Sweden, Denmark and Finland have perfectly developed civil society systems and high standards of living. Welfare state policies that contribute to, among others, preventing poverty and building an egalitarian, open society are attractive for refugees. Not too long ago, Scandinavian countries had an open immigration policy. However, Denmark and Finland have recently taken a number of steps aimed at discouraging potential refugees from coming to their countries. The governments of Denmark and Finland put paid advertisements in the most popular Turkish and Iraqi newspapers discouraging people from coming[20]. Sweden had an immigration-friendly policy due to their low birth rate[21] and, according to the Migrant Integration Policy Index (MIPEX), it ranked first as the most migrant integration-friendly country[22]. The Swedish government pursued a policy of a multi-cultural society[23]. Even though Stockholm closed the borders for migrant workers from non-Nordic countries, at the same time they were open to receiving refugees[24]. For many years, the Swedish model was considered as standard-setting. The main idea was to guarantee that immigrants had the same standard of living as the native inhabitants of Sweden[25]. However, in the early 1990s, the migrant integration policy was met with more and more criticism from Swedish society and an open anti-immigration debate, which ultimately led to the creation of anti-immigrant and xenophobic political parties[26].

Eastern Europe has much less experience with receiving migrants, including refugees. Eastern European societies are practically hermetic and unfriendly towards strangers, which explains the reluctance to receive refugees shown by these countries.

19 R. Stevens, Immigration Policy from 1970 to the Present, New York and London 2016.

20 https://www.washingtonpost.com/news/worldviews/wp/2015/09/07/denmark-places-an-advertisement-in-lebanese-newspapers-dear-refugees-dont-come-here/ (accessed 12.02.2021).

21 A. Chodubski, Możliwości i bariery imigracyjne w Europie, (in:) J. Balicki and M. Chamarczuk (eds.), Wokół problematyki migracyjnej. Kultura przyjęcia, Warsaw 2013, p. 31.

22 P. Pogodzińska, Integracja i przeciwdziałanie dyskryminacji imigrantów na szwedzkim rynku pracy, Warsaw 2011, p. 1, http://www.mipex.eu/sweden-s-migration-policy (accessed 23.12.2020).

23 A. Wiesbrock, The Integration of Immigrants in Sweden: A Model for the European Union?, "International Migration" 2011, vol. 49 no. 4, pp. 50–51.

24 T. Hammar, 'Cradle of Freedom on Earth': Refugee Immigration and Ethnic Pluralism, (in:) J.E. Lane (ed.), Understanding the Swedish Model, New York and London 1991, p. 196.

25 P. Odmalm, Migration Policies and Political Participation. Inclusion or Intrusion in Western Europe?, Basingstoke 2005, p. 52.

26 M. Kamali, Integration beyond Multiculturalism: Social Cohesion and Structural Discrimination in Sweden, (in:) P. van Aerschot and P. Daenzer (eds.), The Integration and Protection of Immigrants. Canadian and Scandinavian Critiques, New York and London 2016, p. 79.

So far, the immigrants that have come to this region were mainly from the former Soviet Union and Yugoslavia[27]. Eastern Europe is not attractive for refugees as it does not have (on purpose) much to offer to them. Rather than being a final destination, Eastern Europe is treated by refugees as a place for a temporary stay, which they are happy to change for a more open and attractive Western country if an opportunity presents itself. Since most refugees in the years 2015–2016 were Muslims, who are considered by the inhabitants of this region as strangers in terms of culture and civilisation, in these countries we observe less and less support and acceptance for those refugees.

The situation in Southern Europe is quite peculiar. For many years, Southern European countries have been – quite in vain – demanding help and solidarity from other European countries. To make matters worse, they have also been struggling with an economic crisis. It should be mentioned that until recently Southern European countries were seen as a positive example of experience connected with receiving immigrants. In Spain and Portugal, the economy absorbed the foreign workforce in a conflict-free way (referring, in particular, to foreigners from Maghreb). Italy and Greece had a significant number of migrant workers in the tourist industry[28]. Spanish migration policy is a response to workforce shortages in the local labour markets. Nevertheless, Spain, similarly to Portugal, Greece and Italy, is a country with large-scale illegal immigration[29]. From a historical perspective, Greece was seen as a country of emigrants. It was only after the country's accession to the EU and its economic development in the early 1990s that Greece started to be the final destination for a growing number of immigrants and a transit country for illegal migrants from outside Europe[30].

## 2. The Refugee Crisis – Differences in the Scale and Dynamics of This Phenomenon in the EU Member States

As a result of the geopolitical situation in neighbouring countries, from 2008 to 2015, the number of people seeking international protection in the EU grew constantly. The year 2015 was a record year in terms of the number of applications

27 A. Hárs, Immigration Countries in Central and Eastern Europe. The Case of Hungary, IDEA Working Papers 2009, p. 12, http://www.idea6fp.uw.edu.pl/pliki/WP12_Hungary.pdf (accessed 20.01.2021).

28 E. Mazur-Cieślak, *op. cit.*, p. 129.

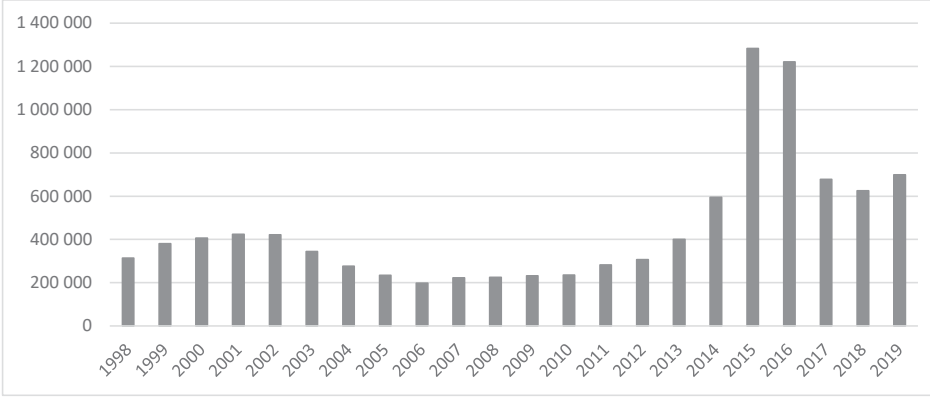
29 E. Kużelewska, A. Weatherburn and D. Kloza (eds.), Irregular Migration as a Challenge for Democracy, Cambridge/Antwerp/Portland 2018; M. Villa (ed.), The Future of Migration to Europe, Milan 2020.

30 I. Jakimowicz-Ostrowska, Imigracje do Europy wyzwaniem XXI wieku – przypadek Grecji, "Rocznik Bezpieczeństwa Międzynarodowego" 2010/2011, p. 362.

filed, and although the figure dropped in the following years, it is still very high – over 600,000 applications per year (Fig.1).

In 2013, for the first time in 11 years, the number of applications for international protection exceeded 400,000 and in 2014, that figure increased to nearly 600,000, 89% of which were filed by first-time asylum seekers. In 2015, the number of applications reached the unprecedented level of 1,282,900. At the turn of those two years (2014/2015), the number of applications lodged rose by 116%, with diverse dynamics of this phenomenon observed in particular Member States, i.e. the biggest increase in the inflow of asylum seekers was seen in Finland and Hungary (793.5% and 314% respectively). At the same time, in Croatia, the number of asylum applicants dropped by nearly half (-53.3%) while in Slovenia there was a decrease of 28.6%[31].

Figure 1. The number of applications for international protection in the EU in the years 1998–2019*

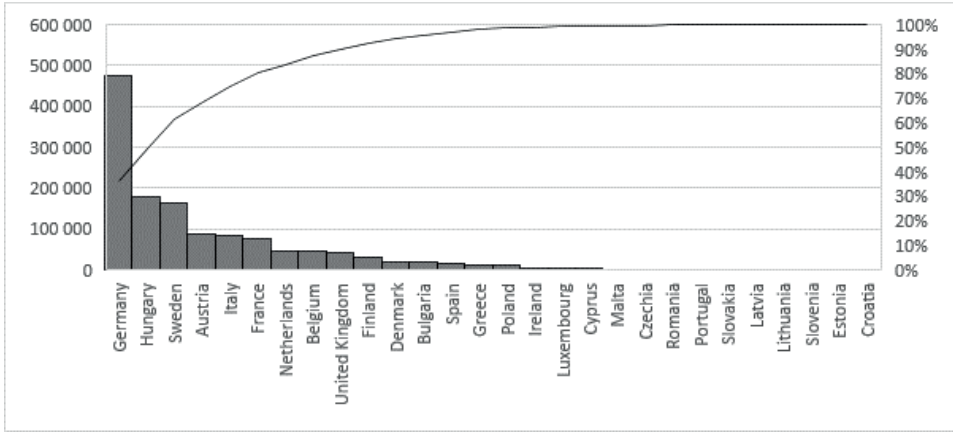



** Due to changes in definitions and methodology, it is not possible to compare statistical data from the years1998–2007, 2008–2013 and 2014–2019.*
*Source: http://ec.europa.eu/eurostat/data/database [migr_asyctz] and[migr_asyappctza] (accessed 22.12.2020).*

Particular EU countries were affected by the refugee crisis to different degrees. The influx of refugees was clearly concentrated on chosen countries: in 2015, 92.7% of those seeking international protection filed their applications in ten Member States (Fig. 2). In 2015, the highest number of applicants was recorded in Germany – over 476,000, i.e. 36% of the total number.

31 Own calculations based on http://ec.europa.eu/eurostat/data/database [migr_asyappctza] (accessed 23.02.2021).

Figure 2. The main EU Member States in terms of the number of applications for international protection received in 2015 and the share in the EU total (%)




*Source: http://ec.europa.eu/eurostat/data/database [migr_asyappctza] (accessed 23.12.2020).*

At the same time, we should also consider the scale of migration from a relative perspective, i.e. in proportion to the population of the receiving country. From this perspective, the greatest impact from asylum seekers was felt in Hungary, Sweden and Austria, where the number of applications per 1 million inhabitants was, respectively, 17,973, 16,666 and 10,280. The policies those countries had towards refugees were completely different: while in Austria and Germany refugees were welcomed with flowers, in Hungary they were refused access to a fair procedure[32]. From a relative perspective, Germany took fifth place, while the EU average was 2,599 applicants per 1 million inhabitants[33]. In Central and Eastern Europe, Hungary, due to its location on one of the main migration routes to Austria and Germany, was the only country affected by the migrant crisis[34]. However, refugees show little interest in staying in this region since these countries are less attractive for them in terms of economic prospects in comparison to Western European countries which, what is more, have more experience with migrants from Muslim countries. Central and Eastern Europe have received Christian immigrants, mainly from Ukraine[35].

32 N. Zaun, EU Asylum Policies. The Power of Strong Regulating States, Basingstoke 2017, p. 1.

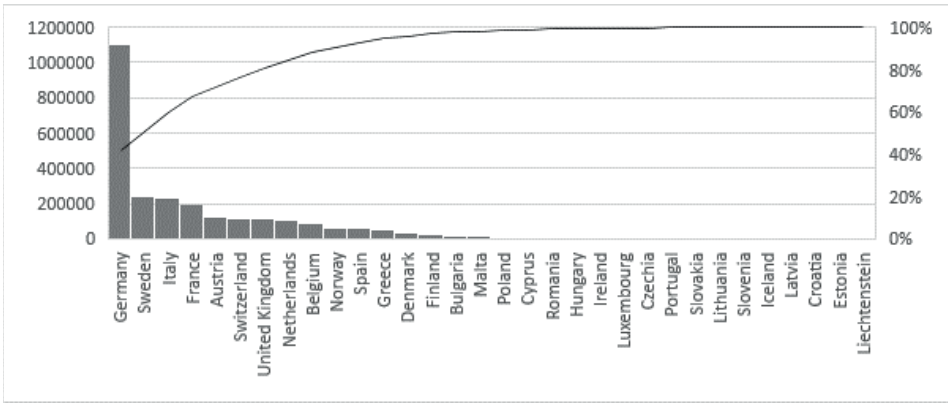
33 Self-made on the basis of data, http://ec.europa.eu/eurostat/data/database [migr_asyappctza] and [demo_pjangroup] (accessed 23.02.2021).

34 A. Juhász, B. Hunyadi and E. Zgut, Focus on Hungary. Refugees, Asylum and Migration, Prague 2015, p. 10.

35 M. Jaroszewicz and M. Lesińska, Introductory Remarks, (in:) M. Jaroszewicz and M. Lesińska (eds.), Forecasting Migration between the EU, V4 and Eastern Europe. Impact of Visa Abolition, Warsaw 2014, p. 14.

The differences within the EU refer not only to the scale and dynamics of asylum application filing but also the results of procedures for granting international protection. In the years 2008–2019 – in absolute terms – the most positive first-instance decisions granting asylum were given in Germany (nearly 1.1 million), followed by Sweden (almost 240,000) and Italy (almost 230,000). As few as five Member States account for the total of 77% of positive asylum decisions issued in the EU[36].

Figure 3. EU Member States in terms of the number of positive decisions granting international protection and the share in the EU total (%) in the years 2008–2019.




*Source: http://ec.europa.eu/eurostat/data/database [migr_asydcfsta] (accessed 23.12.2020).*

The main reason why the application processing procedure is fast in those countries and the authorities are more immigrant-friendly is that they have comprehensive asylum and refugee integration policies and relevant legislation. In the years 2008–2019, the highest percentage of positive first-instance decisions was recorded in Malta (67.1%), in Bulgaria (66.3%) and in Denmark (56.5%). At the same time, in several EU countries, i.e. Ireland, France and Hungary, the positive decision ratio was significantly lower: 24.1%, 23.4% and 16.6%, respectively. The EU average in the years 2008–2019 is that 43% of applicants for international protection were granted positive decisions[37].

These divergent migration experiences of the EU Member States and, most of all, their different and sometimes even mutually contradictory migration policies have motivated the European Commission to look for more efficient and satisfying solutions. The New Pact on Migration and Asylum is supposed to be such a solution.

36 Own calculations based on http://ec.europa.eu/eurostat/data/database [migr_asydcfsta] (accessed 23.12.2020).

37 Own calculations based on http://ec.europa.eu/eurostat/data/database [migr_asydcfsta] (accessed 23.12.2020).

### 3. The New Pact on Migration and Asylum

The New Pact on Migration and Asylum[38] is a document prepared in September 2020 by the European Commission whose main purpose is to introduce a more efficient migration procedure with a clear division of responsibilities between the countries and to guarantee solidarity mechanisms. The New Pact rightly assumes that migration should be managed in an efficient and humanitarian way. It also recognises that no EU Member State should shoulder a disproportionate responsibility (as has been the case so far[39]) and that all states should contribute on a constant basis and show solidarity, which, so far, has simply been lacking[40]. The pact provides for faster and seamless migration processes and stronger governance in the area of migration and border policies, which will be supported by modern IT systems and more effective agencies.

The main objectives of the pact are listed as follows:

– "robust and fair management of external borders, including identity, health and security checks,
– fair and efficient asylum rules, streamlining procedures on asylum and return,
– a new solidarity mechanism for situations of search and rescue, pressure and crisis,
– stronger foresight, crisis preparedness and response,
– an effective return policy and an EU-coordinated approach to returns,
– comprehensive governance at EU level for better management and implementation of asylum and migration policies,
– mutually beneficial partnership with key third countries of origin and transit,
– developing sustainable legal pathways for those in need of protection and to attract talent to the EU,
– supporting effective integration policies"[41].

The Pact on Migration and Asylum proposed by the European Commission is based on four main pillars: (1) a mandatory solidarity mechanism, (2) more comprehensive security procedures, (3) new criteria for the distribution of migrants and (4) increased cooperation with third countries.

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38 https://eur-lex.europa.eu/legal-content/PL/TXT/?qid=1601287338054&uri=COM%3A2020%3A609%3AFIN (accessed 23.12.2020).

39 C. Wihtol de Wenden, Actual Patterns of Migration Flows: The Challenge of Migration and Asylum in Contemporary Europe, (in:) A. Grimmel and S. My Giang (eds.), Solidarity in the European Union. A Fundamental Value in Crisis, Cham 2017, p. 67ff; J. Seges Frelak, Solidarity in European Migration Policy: The Perspective of the Visegrad States, (in:) Grimmeland My Giang (eds.), *ibidem*, p. 81ff.

40 A. Miglio, *op. cit.*, p. 38ff.

41 https://eur-lex.europa.eu/resource.html?uri=cellar:85ff8b4f-ff13–11ea-b44f-01aa75ed71a1.0002.02/DOC_3& format=PDF (accessed 23.12.2020).

The pact, which is much needed and based on the right principles, was met with mixed reactions from the EU Member States. It is true that Member States, *in gremio*, do see a need for better governance of migration and refugee crises but, nevertheless, their positions are different. Most EU Member States have accepted the proposal of the European Commission but "the devil is in the details." Spain, Italy, Greece and Malta claimed that the project does not guarantee solidarity and called for an equitable distribution of the migratory burden[42].

The opposite block, composed of Visegrad countries, is, in general, satisfied with the pact. However, in the joint position announced by Poland, Hungary, the Czech Republic, Slovakia, Estonia and Slovenia, there is a warning that "(...) the Pact lacks a proper balance between principles of responsibility and solidarity"[43]. For them, the proposed distribution key taking into account solely the simple algorithm based on population and GDP is not acceptable. In their opinion, "the relocation or other forms of admission of migrants have to be of voluntary nature. Member States must not be forced to implement any particular instruments that could be considered as violation of their sovereignty. In this context, we feel obliged to voice our concerns also on the concept of return sponsorship as the only equivalent to relocation"[44]. As a result, with regard to the European solidarity mechanism, Visegrad Group countries are against any relocation. These countries are in favour of strengthening the external borders, and in their opinion, the mechanism of European solidarity should support the countries of origin or transit of persons coming to Europe.

The recommendations proposed by the European Commission prove that the EU has to a small extent drawn conclusion from the failure of the current model of joint and several liability of Member States. The new solidarity mechanism is to be based on a voluntary basis. Member States have the option of choosing one of three forms of involvement: (1) by participating in the relocation of persons to their national territory; (2) by contributing financially to the return of "ineligible" persons for the asylum procedure; or (3) by proposing operational support to host countries. In general, the pact focuses on identifying access routes to the EU territory under various forms of possible migration and trying to manage the so-called illegal crossing of EU borders. The pact applies in a very limited scope to migrants already residing in the EU countries. There is no reference to the reception policy at all. The document does not guarantee the improvement of conditions and standards in places of reception for asylum seekers.

42 F. Manchón, The Pact on Migration and Asylum: A New Opportunity for Europe?, "Opinion Paper" 2020, no. 152, p. 13, http://www.ieee.es/Galerias/fichero/docs_opinion/2020/DIEEEO152_2020FELMAN_migraciones-ENG.pdf (accessed 27.12.2020).

43 https://www.visegradgroup.eu/download.php?docID=457 (accessed 27.12.2020).

44 *Ibidem*.

## Conclusions

Western European countries have extensive experience with receiving refugees, which means that they also have extensive legislation ensuring a more efficient protection for those who need it. They are also undoubtedly an attractive destination for asylum seekers. The situation is quite different in Eastern European countries, which are opposed to receiving newcomers from Muslim countries and are often unfriendly to migrants from other cultures. Eastern European countries are not attractive for asylum seekers, in terms of both economic and social prospects. In between those two extremes, there are Northern European countries, which are seen as a model of refugee integration (although during the refugee crisis their policies underwent some important changes). The countries of Southern Europe, on the other hand, due to their geographic location, were exposed to significant migratory pressures during the refugee crisis and, since they did not have sufficient experience in that respect, they appealed to other EU Member States for solidarity. It is hard to agree with the statement that all EU Member States passed a test of solidarity during the refugee crisis. The divergent experiences with refugees in particular European countries are still reflected in the number of asylum applications filed and positive decisions granted.

The solidarity is the main issue of the New Pact on Migration and Asylum. It results from the 2015 refugee crisis when the EU Members States' solidarity failed as the relocation deeply divided the EU members. Yet, the solidarity is not systematised in the pact as a core of the agreement. It is foreseen as a choice open to Member States between two opposite options – relocation and return sponsorship. Thus, it calls into question the possibility of an effective implementation of the New Pact on Migration and Asylum, which – also in the context of the Member States' strongly diverging experiences and attitudes to refugees – should be seen as a very ambitious plan which implementation in the near future is unrealistic.

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# The 25th Anniversary of the Schengen Area and the Impact of COVID-19

**Abstract:** The analysis is concerned with the current state of the Schengen Area, its legal and institutional framework, as well as the impact of COVID-19 on its functioning. The paper demonstrates that COVID-19 has forced EU Member States to adopt unprecedented measures on mobility restriction. The author distinguishes three groups of measures in response to the COVID-19 pandemic: the temporary reintroduction of border controls at internal borders; a ban on crossing internal borders; a ban on entering into the EU for third-country nationals. All measures were taken on a national level; EU institutions do not have enough competence in this sphere, which is why they have mostly played a coordinating role. Moreover, the pandemic increases the deficit of solidarity between EU Member States. The author concludes that the COVID-19 pandemic demonstrates that the EU needs more powers to react in such a situation. Thus, the EU has to create additional legal instruments for the realization of a common policy on crises affecting the Schengen Area.
**Keywords**: Schengen Area, area of freedom, security and justice, border control, mobility restrictions, COVID-19

## Introduction

On the 26th March 2020, in the midst of the COVID-19 pandemic in Europe, the Schengen Area celebrated its 25th anniversary. 25 years before, the Schengen agreements came into force and seven EU Member States (Belgium, Germany, France, Luxemburg, the Netherlands, Spain and Portugal) officially lifted border controls at internal borders. During the last 25 years, the Schengen area has undergone

significant changes, including the extension of geographical boundaries and competence. Moreover, it has created abroad legal basis and institutional framework.

Initially, the EU was established as an organization of economic integration; for a long time the EU was associated mainly with the internal market. EU Member States did not confer competence in internal matters to the Union; even if this did happen, then it was only on intergovernmental level. That is why the first Schengen agreements were concluded outside of the EU legal framework. The Schengen Acquis became part of EU law only in 1999, according to the Amsterdam Treaty.

The creation of the Schengen Area and its subsequent integration into the EU legal framework as a part of the area of freedom, security and justice (AFSJ) significantly changed the situation. The EU has rapidly begun to build up the institutional and legal basis of the AFSJ. From the field of cooperation between the Member States, the AFSJ has become a fully-fledged integration mechanism.

During the last five years, the Schengen Area has been faced with a number of challenges, caused by the migration crisis, the lack of solidarity between Member States, and the pandemic of COVID-19. The latter creates unprecedented pressure on the Schengen Area, which undermines the main achievements of European integration. In this situation, the question arises: does theCOVID-19 pandemic mean the collapse of the Schengen Area, and how it will function after the pandemic?

The main purpose of this article is to study the readiness and possibility of the Schengen Acquis to resist the current challenges. As a part of this purpose, a number of measures will be studied, realized on national and supranational levels in response to the COVID-19 pandemic, and their impact on the further development of the Schengen Acquis.

## 1. The Schengen Area: The Current State

The Schengen Area is not a legal definition, but despite this it is widely used by scholars and practitioners. The Schengen Area should be understood as the territory of those states that fully apply the Schengen Acquis. In other words, the Schengen Area includes the territory of states within which there is no regular border control at internal borders, and those who implement a single visa policy. At the same time, non-EU states are also included in the Schengen Area. From a legal point of view, these countries fully apply the Schengen Acquis. As of June 2020, the Schengen area includes 26 countries with a total population of over 400 million people and a surface area of 4,312,259 square km.

The Schengen Area is not equivalent to the European area of freedom, security and justice from the legal and geographical point of view. The latter includes all 27 EU Member States and four associate Schengen countries. The Schengen Area has its own legal basis, which is historically defined as the Schengen Acquis.

Some authors use the definition "Schengen Law"[1]. According to Daniel Thym[2], the term "Schengen Law" shall cover both the Acquis as it was integrated by the Treaty of Amsterdam and new measures building on the Acquis under EU primary law. Professor S.Y. Kashkin defines Schengen Law as a system which regulates relations in two areas: conditions of entry and movement in the Schengen Area as a whole and fighting against crime[3]. According to the position of Professor M.M. Biryukov, Schengen Law is a set of legal norms that are a component of European law and regulate relations related to ensuring freedom of movement of both EU citizens and third-country nationals within the Schengen Area[4].

At the moment, more than 20 years after the integration of the Schengen Acquis into the legal framework of the EU, both definitions (Schengen Acquis and Schengen Law) could be used. The Schengen Acquis is a system of EU legal norms, which regulates the free movement of persons across internal and external borders. In this connection we can distinguish abroad and narrow sense of this definition.

According to the narrow sense, the Schengen Acquis includes the rules on border crossing and visas. According to the broad sense, the Schengen Acquis consists of four parts: legislation on border control; visa legislation; immigration legislation; EU asylum law. This system of legal norms is sometimes qualified as the EU Immigration and Asylum Law[5], which is a part of AFSJ law. In this sense, the definitions "Schengen Acquis" or "Schengen Law" and EU Immigration and Asylum Law shall be considered as synonyms.

It must be recognized that in contemporary legal literature the term "Schengen Law" is practically not used. This is due to the fact that after the integration of the Schengen Acquis into the EU legal system, it became an integral part of the AFSJ. As

1 См. Право Европейского Союза: учебник / под ред. С.Ю. Кашкина, 2002; Потемкина О.Ю., Войников В.В., Понятие и содержание шенгенского права // Актуальные проблемы совершенствования законодательства и правоприменительной практики на современном этапе: материалы межвузовской конференции / под общ. ред. О.А. Заячковского. Калининград, Изд-воКГУ, 2004. с. 60–70. (see.: Pravo Evropieiskogo Soiuza: utchebnik/ ed. by prof. S.I. Kashkin, M., 2020; Potiomkina O.I., Voicov V.V., Poniatie i sodierzanie Tchengienskogo prava// Aktualnyie problemy soviertchenstvovania zakonodatielstva i pravoprimienitielnoi praktyki na sovriemiennom etapie: matierialy miezvuzovskoi konfierencii/ ed. by O.A.Zaiatchkovski, Kaliningrad: Izd-vo KGU, 2004. S. 60–70).

2 D. Thym, The Schengen Law: A Challenge for Legal Accountability in the European Union, "European Law Journal" 2008, vol. 8, p. 218, 10.1111/1468–0386.00151.

3 Право Европейского Союза: учебник / под ред. проф. С.Ю. Кашкина. М., 2002. С. 782.

4 Бирюков М.М., Европейское право до и после Лиссабонского договора. М.: Научная книга, 2010, с. 118. (Birukov M.M., Evropieiskoie pravo do i posle Lissabonkogo dogovora. M.: Naucznaia kniga, 2010. o. 118).

5 K. Hailbronner and D. Thym, EU Immigration and Asylum Law: A Commentary, 2nd edition, Munich and Oxford 2016; S. Peers and N. Rogers (eds.), EU Immigration and Asylum Law: Text and Commentary, Leiden 2006, p.1025.

a result, the term "Schengen Acquis" (Schengen Law) began to lose its independence; in fact, it was dissolved in the framework of a larger and more ambitious AFSJ project.

## 2. The COVID-19 Pandemic and its Impact on the Schengen Area

The Schengen Area is currently seriously affected by the new coronavirus infection COVID-19. The announcement of the pandemic by the WHO forced the EU Member States to almost completely close the external and internal borders. Such a measure has an unprecedented character for Europe not only over the period of the Schengen Area, but also over the entire post-war period.

During the last five years, the COVID-19 pandemic became a second serious challenge for the Schengen Area after the migration crisis in 2015. Similarly to the migration crisis of 2015, the rapid spread of COVID-19 was followed by a late political reaction at the EU level. In this situation, the EU Member States adopted unilateral relevant measures on closure of the external and internal borders, and such measures were not always consistent[6].

Carrera and Luk distinguish three groups of national measures on mobility restriction in response to theCOVID-19 pandemic: the temporary reintroduction of border controls at internal borders; bans on entry to the country; restrictions on entry and exit for modes of passenger transportation[7].From the Schengen Law perspective, the measures of EU Member States on mobility restriction can be divided into three groups: the temporary reintroduction of border controls at internal borders; a ban on crossing the internal borders; a ban on entering into the EU for third-country nationals[8].

Among these measures, only *temporary reintroduction* of border controls at internal borders is provided by the Schengen Law. According to Art. 25 of the Regulation (EU) 2016/399[9] (Schengen Borders Code) where, in the area without

6 Бабынина Л.О., Коронавирус: что может сделать и делает Европейский союз// Аналитическая записка (Babynina L.O., Koronavirus: czto mozet sdielat i dielaiet Evropieiskii soiuz// Analititcheskaia zapiska) no. 12, 2020 (no. 195), http://www.instituteofeurope.ru/images/uploads/analitika/2020/an195.pdf (accessed 30.06.2020).

7 S. Carrera and N.C. Luk, Love thy neighbour? Coronavirus politics and their impact on EU freedoms and rule of law in the Schengen Area, "CEPS" April 2020, no. 2020–04, https://www.ceps.eu/cepspublications/love-thy-neighbour/ (accessed 30.06.2020).

8 Потемкина О.Ю., Европейский союз: ограничение передвижения граждан как средство борьбы с COVID-19. Аналитическая записка (Potiomkina O.J., Evropieiskii Cojuz: ograniczenie pieredvizenia grazdan kak sredstvo borby c COVID-19. Analititcheskaia zapiska) no. 14, 2020 (no. 197), http://instituteofeurope.ru/images/uploads/analitika/2020/an197.pdf (accessed 25.06.2020).

9 Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code), O.J. L 77, 23.3.2016, pp. 1–52.

internal border controls, there is a serious threat to public policy or internal security in a Member State, that Member State may exceptionally reintroduce border controls at all or specific parts of its internal borders for a limited period.

Formally, the Schengen Borders Code does not foresee a threat to public health as grounds for reintroduction of internal border controls. EU law and particularly the Schengen Borders Code distinguish between public policy and public health, but in terms of the COVID-19 pandemic the latter was considered by Member States as a serious threat to public policy.

The temporary reintroduction of border controls at internal borders was the first reaction in response to the migration crisis in 2015. During the COVID-19 crisis, the reintroduction of border controls was less chaotic and did not cause a tangible impact on the Schengen Area[10]. Temporary reintroduction of border controls at internal borders does not mean a ban on entry to the territory of certain Member States. That is why the majority of EU Member States introduced different types of entry ban. For the purpose of this study, we can distinguish the travel bans in accordance with two criteria: a ban on crossing internal and external borders; a ban for EU citizens and their family members, and a ban for third-country nationals.

Union law guarantees the free movement of EU citizens and their family members across the border. However, according to the Art. 27 Directive 2004/38/EC[11], Member States may restrict the freedom of movement and residence of Union citizens and their family members on grounds of public health. Thus, Union law does not preclude national measures on restrictions to the right of free movement of persons.

According to Art. 6(1)(e) of Regulation (EU) 2016/399, an EU Member State may deny the entry of a third-country national on the basis of the fact that that national is considered to be a threat to public health. Art. 8 (2) of Regulation (EU) 2016/399 provides competent authorities on a non-systematic basis to carry out minimum checks on persons enjoying the right of free movement under Union law in order to ensure that such persons do not represent a threat to public health. At the same time, all decisions under the Schengen Borders Code shall be taken on an individual basis (Art. 4). It means that the collective refusal of entry is not expressly foreseen

10 Потемкина О.Ю., Влияние COVID -19 на свободу передвижения и миграцию в Евросоюзе // Научно-аналитический вестник ИЕ РАН РАН (Potiomkina O.J., Vliianie COVID-19 na svobodu pieredvizenia i migraciu v Evrosojuzie// Nauczno-analititcheskii vectnik RAN), 2020, no. 3, http://vestnikieran.instituteofeurope.ru/images/Potemkina32020.pdf (accessed 06.07.2020).

11 Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (Text with EEA relevance) (O.J. L 158, 30.4.2004, pp. 77–123).

by Union law, albeit that the European Court of Justice notes that "any reference by the EU legislature to the concept of 'threat to public policy' does not necessarily have to be understood as referring exclusively to individual conduct"[12]. In other words, the European Court of Justice distinguishes the application of the public policy exception in terms of EU citizens and third-country nationals. This interpretation could also apply to the concept of threat to public health.

As far as the ban on crossing internal borders goes, the Schengen Borders Code does not contain any provisions. Strictly speaking, Union law prohibits regular border controls at the internal border, but not closure of the border (ban on entry). Thus, the substantive and procedural conditions related to the collective ban on crossing the internal and external borders are not expressly foreseen by the Schengen Law. That is why all measures were imposed in accordance with national legislation.

Most of the EU Member States introduced restrictions on modes of international passenger transportation in March 2020. Such restrictions applied to air, rail, road, sea, and inland waterway transport. According to the Treaty on the Functioning of the EU (TFEU), the Union develops a common transport policy. Within this policy, Union law provides the common rules applicable to international transport, transport safety, and any other appropriate provisions. Moreover, the TFEU prohibits any national measures on discrimination towards the carriers of other Member States as compared with carriers who are nationals of that state. Measures on the restriction or cancellation of international transportation are not foreseen in EU law.

As was mentioned above, national measures in response toCOVID-19 were not consistent and homogeneous. In this situation, on 16th March 2020 the European Commission prepared two documents, the first one concerned with the Guidelines for border management measures[13], the second one with the Temporary Restriction on Non-Essential Travel (EU travel ban)[14].

In the Guidelines for border management measures, the European Commission emphasizes the importance of protecting health while preserving the integrity of the Single Market. The Commission found the temporary reintroduction of border controls at internal borders by certain EU Member States to be justified. It was

12 C380/18, Judgment of the Court of 12 December 2019 (Reference for a preliminary ruling – Border controls, asylum and immigration – Regulation (EU) 2016/399,https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=ecli:ECLI:EU:C:2019:1071 (accessed 06.07.2020).

13 European Commission, COVID-19. Guidelines for border management measures to protect health and ensure the availability of goods and essential services. Brussels, 16.3.2020, C (2020) 1753 final,https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/20200316_covid-19-guidelines-for-border-management.pdf (accessed 06.07.2020).

14 European Commission, Communication from the Commission. COVID-19: Temporary Restriction on Non-Essential Travel to the EU. Brussels, 16.3.2020, COM (2020) 115 final, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2020:115:FIN (accessed 16.06.2020).

noted that "in an extremely critical situation, a Member State can identify a need to reintroduce border controls as a reaction to the risk posed by a contagious disease." But the European Commission did not support measures on the entry ban of EU nationals; the Commission put special emphasis on non-discrimination between Member States' own nationals and EU citizens from other countries. According to the Commission, a Member State must not deny entry to EU citizens or third--country nationals residing on its territory.

With regard to external borders, the European Commission clarified that border checks may include health checks. During this check, the competent authority may refuse entry to non-resident third-country nationals where they present relevant symptoms, or impose obligatory isolation or quarantine. The Guidelines underline that any decision on refusal of entry needs to be proportionate and non-discriminatory.

At the same time, in a Communication on the EU travel ban, the Commission recommends the European Council to adopt a decision to apply a temporary restriction on non-essential travel from third countries into the EU and Schengen associated countries. The temporary restriction applies only to third-country nationals, but not to EU nationals and citizens of Schengen associated countries. The next day, 17th March 2020, the European Council adopted the political decision on the reinforcement of EU external borders by applying a coordinated temporary restriction on non-essential travel to the EU for a period of 30 days[15]. In fact, some EU Member States adopted wider restrictions, which apply also to certain categories of EU citizens.

Thus, EU institutions did not adopt the formal rules; there is no legally binding legislative act or executive regulation underlying the travel ban[16]. Instead of legal acts, only Commission Communication, Guidelines and Presidency Conclusions were adopted, which are "soft law" acts. In other words, the EU institutions played a coordinating role.

Such a role of the European Union was criticized by some experts[17]. But in fact, acting within the principle of conferral, EU institutions could not do more. The Schengen Acquis as a part of the AFSJ falls into the shared competence of the EU. The competence on border control is realized both at national and supranational level.

15 Conclusions by the President of the European Council following the video conference with members of the European Council on COVID-19, https://www.consilium.europa.eu/en/press/press-releases/2020/03/17/conclusions-by-the-president-of-the-european-council-following-the-video-conference-with-members-of-the-european-council-on-covid-19/ (accessed 06.07.2020).

16 D.Thym, Travel Bans in Europe: A Legal Appraisal (Part II), http://eumigrationlawblog.eu/travel-bans-in-europe-a-legal-appraisal-part-ii/ (accessed 06.07.2020).

17 C. Hruschka, The pandemic kills also the European solidarity, http://eumigrationlawblog.eu/the-pandemic-kills-also-the-european-solidarity/ (accessed 03.07.2020).

Current legislation does not authorize the EU institutions to adopt the legislative acts on travel restrictions. In any case, the COVID-19 pandemic requires a swift reaction, which was difficult to achieve at the EU level in the absence of a necessary legal base. That is why a political decision and the Commission's Guidelines could be considered as appropriate EU measures in response to theCOVID-19 crisis.

To be sure, some national measures were not well enough justified and demonstrate the lack of compliance with certain requirements under EU law[18], principles of proportionality and policy coherence[19] between EU Member States. Apparently, some of these measures will be reviewed by the European Court of Justice on compliance with EU law. But in such an exceptional and unexpected situation, public health should have priority over the free movement of persons.

The most serious problem is a deficit of solidarity between EU Member States. The principle of solidarity is a fundamental principle of European unity[20] and the basic value of European integration[21]. This principle was at risk during the migration crisis of 2015. The COVID-19 pandemic demonstrates that this risk is still in force and has become more serious. The fact that most of the actions in response to COVID-19 were carried out at the national level does not preclude compliance with the principle of solidarity. But most of the EU Member States failed to act in the spirit of solidarity. This situation posed a risk for the future of the Union. During a video conference of the European Council, on 26th March 2020, the French president Emmanuel Macron warned that the EU's key projects, including the Schengen Area, could be at danger if the nations failed to show solidarity. "The risk we are facing is the death of Schengen," Macron added[22].The end of Europe's borderless area has been declared by many[23]. The deficit of solidarity does not mean the collapse of the Schengen system, but it creates additional obstacles for effective implementation of EU policy.

In June 2020, the Commission prepared a Communication[24] containing recommendations on the abolition of border controls and other restrictions on

18 Carrera and Luk, Love thy neighbour? *op. cit*.

19 Thym, Travel Bans in Europe, *op. cit*.

20 A. Pimor, Solidarity was a founding principle of European unity – it must remain so, http://theconversation.com/solidarity-was-a-founding-principle-of-european-unity-it-must-remain-so-74580 (accessed 06.07.2020).

21 A. Sangiovanni, Solidarity in the European Union, "Oxford Journal of Legal Studies" 2013, vol. 33, p. 1.

22 Macron to EU Leaders: We Are Facing the Death of Schengen, March 27, 2020, https://www.schengenvisainfo.com/news/macron-to-eu-leaders-we-are-facing-the-death-of-schengen/ (accessed 30.06.2020).

23 M. De Somer, Schengen isn't dead – yet. The real test will be dismantling border controls again, https://www.euronews.com/2020/04/03/schengen-isn-t-dead-yet-the-real-test-is-still-to-come--view (accessed 01.07.2020).

24 Communication from the Commission to the European Parliament, the European Council and the Council on the third assessment of the application of the temporary restriction on non-

movement within the Schengen Area from 15th June 2020. With regard to external borders, the Commission invited Member States to maintain restrictions on non--essential travel to EU countries until 30th June 2020. After 30th June 2020, the restriction should be lifted for specific countries, by common agreement of the Member States, based on a set of principles and objective criteria, including the epidemiological situation, considerations of reciprocity, etc.

On 30th June 2020, the Council adopted a Recommendation[25] on the gradual lifting of the temporary restrictions on non-essential travel into the EU. The Recommendation set out the criteria and conditions for restrictions on travel into the EU, as well as the list of countries whose citizens should not be affected by temporary external border restrictions from 1stJuly 2020. This Recommendation is not a legally binding instrument, albeit it was based on 77 (2)(b) TFEU, which applies to legislative procedure. According to the Recommendation, this list of countries should be updated every two weeks based on the epidemiological situation in the third countries concerned.

## 3. Lessons Learned from the COVID-19 Pandemic

At the moment (July 2020), the epidemiological situation in EU countries is significantly improved, but the pandemic globally continues and intensifies. Moving forward, there will be questions of how to deal with such diseases in the future from the perspective of the free movement of persons in Europe.

The COVID-19 pandemic demonstrates the need for further development of the Schengen Acquis. As an area without internal border controls, the EU was not ready for a swift response to the pandemic. In fact, the EU did not have legal power to adopt a binding decision in response to the pandemic. The EU institutions mostly played a coordinating role. In this situation, during the first phase of the pandemic, all decisions were taken by national authorities without a clear position of the EU.

The previous crises demonstrate that the EU's response was to strengthen the supranational component of certain policies. This approach could be considered as relevant for the current situation. To be sure, in such situations, EU institutions should have more power to adopt common legally binding rules on mobility restrictions. Such an approach would provide uniform application of EU rules and

-essential travel to the EU. Brussels, 11.6.2020, COM (2020) 399 final, https://ec.europa.eu/info/sites/info/files/communication-assessment-temporary-restriction-non-essential-travel_en.pdf (accessed 20.06.2020).

25 Council Recommendation on the temporary restriction on non-essential travel into the EU and the possible lifting of such restriction. Brussels, 30 June 2020,9208/20. https://data.consilium.europa.eu/doc/document/ST-9208–2020-INIT/en/pdf (accessed 06.07.2020).

enhance legal certainty for EU citizens and foreigners[26]. One of the possible solutions is the introduction by means of regulation of a special mechanism specifying detailed provisions on mobility restrictions within the Schengen Area, including procedural and substantive standards. It could be a separate regulation or part of the Schengen Borders Code. In doing so, the EU will prove their respect for the rule of law and other fundamental principles in adoption of measures on mobility restriction in Europe.

Another issue is solidarity between EU Member States that is difficult to enforce by means of legal instruments. The European Union will have to look for a political solution to implement this principle within the Schengen Acquis, because not only the Schengen Area but the whole project of European integration largely depends on this decision.

## Conclusions

The Schengen border-free area is one of the most important and perceptible achievements of European integration. This project has created huge benefits for EU citizens and third-country nationals. At the same time, during the last 25 years it has demonstrated steadiness and resilience to crises. The COVID-19 pandemic constitutes an unprecedented challenge for the functioning of the Schengen Area. At the moment, the border controls at internal borders are lifted, but restrictions for entering into the EU are still in force. The Schengen legislation did not contain an exhaustive list of Union measures towards the situation related to the spread of COVID-19. In this regard, Member States have chosen national measures, with the supporting and coordinating role of the EU. This approach was the only one possible but was not efficient enough. Taking into account the current level of integration, the EU needs a Union-based approach to resolve such crises. In these circumstances, the EU has to create additional legal instruments for the realization of a common policy on crises affecting the Schengen Area. The COVID-19 crisis may serve as a chance to make the Schengen Area more flexible and resilient in the face of new challenges, thus, the Schengen system will get a "vaccine" against different crises.

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# The Global Compact for Safe, Orderly and Regular Migration and Regional Implementation Practices

**Abstract**: The article analyzes the essence and perception of the global community of the Global Compact for Safe, Orderly and Regular Migration, which was developed under the auspices of the UN and adopted by the member countries of this organization on December 10, 2018 in Marrakesh (Morocco). This was the first international compromise agreement between the donor and recipient countries. More than 160 states have signed the Compact, believing that it is long overdue for the international community to come to a more realistic understanding of global migration. Some countries refused to sign the Compact, including seven EU states and Ukraine. The content of the Compact is aimed at liberalizing the migration regime, which explains why it was rejected by many governments and political forces. Non-acceptance of the Compact by a number of countries that have accepted migrants reduces the potential effect of its application. However, it can be useful for improving the efficiency of legal migration, regulating the employment of skilled labor, which is of interest to the recipient countries. The crisis in the migration policy of some countries has shown that the low level of harmonization of national legislation on refugee shelter has significantly contributed to the spread of the disaster and the increase in the number of asylum seekers that the countries had to accept on their territory.
**Keywords:** Global compact on migration, UN, nation states, migrants

## Introduction

Human migration has become a common phenomenon in the modern world. People have been moving from place to place since time immemorial. While some move in search of a better job, education, economic benefits, or family reunification, others are forced to flee conflict, terrorism, or violation of human rights. A growing number of people are being removed from their homes due to the effects of climate

change, natural disasters, or other environmental factors. European countries have always attracted migrants from all over the world, and at the beginning of the 21st century, these trends have remained unchanged. However, the migration crisis caused by growing political instability in the Arab countries of Asia, mass protests and military actions in Libya, Iraq, Morocco, Egypt, and, finally, the civil war in Syria forced millions of people to leave their homes and seek protection in Europe again in 2015–2017.

More people than ever now live in countries that they were not born in. If in 2000 the number of migrants in the world was about 173 million, in 2019 their number has already reached an estimated 272 million. However, the fraction of international migrants in the total world population has barely changed over the past decades: 3.4% of the world's population in 2017, 2.8% in 2000, and 2.3% in 1980[1]. According to the official Eurostat statistics, more than 1.2 million people who sought asylum in EU countries for the first time were registered in 2015, mainly from Syria, Afghanistan, and Iraq[2].

For some, migration is a matter of choice; for others, it is a matter of life and death. There are 70 million forcibly displaced persons worldwide, including 26 million refugees, 3.5 million asylum seekers, and over 41 million internally displaced persons. Due to the scale of global migration, this phenomenon should not be left without appropriate attention of scientists and modern political process. It is hardly possible to name a country that has been bypassed by the global migration processes. Donor and recipient countries are involved in the vortex of modern migration flows. All this testifies to the extreme urgency of the problem and the need for detailed research.

The unprecedented scale of migration flows does not cease to come to the EU countries in waves, leaders of which, in turn, are constantly generating new, extremely contradictory ideas. Some talk about a multicultural society, tolerance, and the possibility of assimilation of migrants, while others react quite negatively and strongly criticize policies that are loyal to incoming migrants. These polar opinions do not help find solutions, but only expose the problems and difficulties associated with refugees in society, focusing public attention on the disputes that inevitably arise in connection with the difficulties of assimilation of foreigners in the new society.

1 Миграция (Migracia), https://www.un.org/ru/sections/issues-depth/migration/index.html (accessed 12.05.2020).

2 Евростат (Evrostat), https//ec.europa.eu/eurostat/statistics-exsplained/indeks.php/Main_Page (accessed 12.05.2020).

## 1. Current European Migration Processes

In 2015, more than a million migrants, mostly from Asian countries, seeking haven, rushed to the shores of southern Europe across the Mediterranean in boats that were not always suitable for such a dangerous journey[3]. When they reached Europe, they sought to move further north, to Germany or Sweden. The influx of migrants in 2018 can be compared to the situation in 2013. Migrant transport routes across the Mediterranean have been eventually blocked. The number of illegal EU border crossings has fallen by 30% over the past year. "We should no longer talk about the migration crisis," said Fabrice Leggeri, head of Frontex (European Border and Coast Guard Agency)[4].

However, the uncontrolled influx of asylum seekers, which was called the "migration crisis" or, more correctly, the "refugee crisis," had serious consequences for the European Union and manifested itself primarily in the media, public opinion, and the political agenda at the supranational level and in the member states.

The crisis sparked fierce discussions among politicians and citizens about the number of refugees that EU countries could accept, as well as about the conditions of granting them asylum. Many citizens, journalists, and politicians, regardless of their political beliefs, accused the EU of failing to cope with the crisis. Some were dissatisfied with the fact that the EU did not do enough to provide the necessary assistance to refugees, redistribute those who migrated between countries, and speed up the process of processing their applications[5]. Others believed that the EU did not protect the external border well, and demanded that the Schengen Borders code be immediately revised[6].

Many blamed their national governments for the crisis, like in Germany, where the outrage was caused by Chancellor Angela Merkel's stance that allowed too many asylum-seeking migrants to come to the country. For example, the ratings of the far--right party Alternative for Germany, in the wake of criticism of the government, rapidly increased from the beginning of the summer of 2015. Radicals have criticized governments in both the Netherlands and France, countries that have taken in significantly fewer refugees. Under threat of a crisis, EU leaders were forced to start

3 Суворова В.А., Миграционный кризис в Европе: проблемы вынужденной миграции // Власть, 2018, no. 1, С. 176–179 (Suvorova W.A., Migracionnyi krizis w Evropie: problemy vynuzdiennoi migracji/ Vlast, 2018, № 1, p. 176–179).

4 Frontex news release, Migratory flows in October 2018, https://frontex.europa.eu/media-centre/news-release/migratoryflows-in-october-down-by-a-third-spain-accounts-for-60-ofdetections--ppaQPH (accessed 13.05.2020).

5 R. Bauböck, Refugee Protection and Burden-Sharing in the European Union, "Journal of Common Market Studies" 2018, vol. 56, no. 1, p. 141.

6 A. Niemann and N. Zaun, EU Refugee Policies and Politics in Times of Crisis: Theoretical and Empirical Perspectives, "Journal of Common Market Studies" 2018, vol. 56, no. 1, p. 18.

reforms in important areas and refugee policy[7], focusing on the foreign policy aspects of migration policy. In connection with the migration situation and the reaction to it in a number of states, international organizations – the UN General Assembly, the United Nations Department of Economic and Social Affairs (UNDESA), the European Union, the International Organization for Migration (IOM), etc. – were looking for ways to normalize this process. In the end, the UN decided to create a framework document that would normalize this crisis situation on a legal basis.

## 2. Adoption of the Global Compact for Migration and Reaction of World Leaders

On December 10, 2018, at a conference in the Moroccan city of Marrakech, 164 countries of the world adopted the Global Compact for Safe, Orderly and Regular Migration[8]. This was the first international compromise agreement between migrants' donor and recipient countries. German chancellor Angela Merkel welcomed this event, saying that it was high time the international community reached a more realistic understanding of global migration. But the joy over this important event was overshadowed by the refusal of a number of countries to join the Compact, including seven EU states.

Six months before the conference in Marrakesh, in July 2018, the countries of the world under the auspices of the UN reached a consensus in intergovernmental agreements on the text of the Compact. Negotiations began in 2016 after the UN General Assembly adopted the Declaration for Refugees and Migrants, in which the heads of states and governments of 193 UN member states pledged to join forces and coordinate their actions in the face of the global phenomenon of large-scale movements of refugees and migrants, in full compliance with international law and human rights. The Compact was supposed to be based on a clear understanding that the problems of cross-border movements are more effectively solved by the entire world community, through strengthening global governance and international coordination of actions.

Negotiations over the text development took six months. Two aspects were being discussed: "The Global Compact for Safe, Orderly and Regular Migration," supported by Switzerland and Mexico; and the "Global Compact on Refugees" under the auspices

7 Войников В.В., Европейское пространство свободы, безопасности и правосудия и миграционный кризис, „Современная Европа", 2017, no. 2, С. 49–54 (Voinicov V.V, Evropieiskoie prostranstvo svobody I pravosudia I migrationnyi krizis, „Sovremiennaia Evropa", 2017, № 2, p. 49–54).

8 UN General Assembly, Global Compact on Safe, Orderly and Regular Migration: Final Draft, 11 July 2018, https://refugeesmigrants.un.org/sites/default/files/180711_final_draft_0.pdf (accessed 10.05.2020).

of the United Nations High Commissioner for Refugees. However, in December 2017 the Administration of the President of the United States, Donald Trump, announced the state's withdrawal from the Compact negotiations, arguing that it could "undermine the sovereign right of the United States to enforce immigration laws and secure state borders"[9] and that the Compact "contains approaches that are simply not compatible with the US policy on migrants and refugees and the Trump Administration's principles on migration." At the same time, US Ambassador to the UN Nikki Haley noted that "America is proud of its immigrant heritage and long--standing moral leadership in providing support to migrant and refugee populations across the globe"[10].

Representatives of 192 states were expected to sign the Compact. Therefore, the US was the only UN member country that refused to do so. "We still have 192 countries that agreed on the text, and we keep the door open for the United States to come back," said the UN General Assembly President, Miroslav Lajčák (who was the head of the 72nd session of the UN General Assembly from September 2017 to September 2018), speaking at the organization's headquarters in New York[11].

But soon a similar statement was made by the Australian Home Affairs Minister Peter Dutton, who also referred to the threat to the national interests and sovereignty of his country. Subsequently, EU member states began to express doubts about joining the UN initiative.

The Hungarian government, led by Prime Minister Viktor Orban, was the first to express dissatisfaction with the terms of the document. He refused to participate in the conference, asserting that the document contradicts the interests of the country and European security, as well as common sense[12]. It should be emphasized that in October 2016, Hungary held a referendum, for the first time since 2003 when citizens had voted for joining the European Union. In 2016, Hungarians were asked to answer just one question: "Do you want the European Union to be entitled to prescribe the mandatory settlement of non-Hungarian citizens in Hungary without the consent of Parliament?" At that time, Hungary was the leader in the number of applicants in relation to the population of the country (17,699 asylum seekers per 1 million

9 U.S. Ends Participation in the Global Compact on Migration, Press Statement. Rex W. Tillerson, Secretary of State, Washington, DC, December 3, 2017.

10 "Ми самі вирішимо, як контролювати наші кордони". Що відомо про Всесвітній пакт ООН про міграцію („My sami viriszimo, jak kontrolovati naszi kordoni". Szczo vidimo pro Vsiesvitnyi pakt OON pro migraciu), https://tyzhden.ua/News/223713 (accessed 10.05.2020).

11 Країни ООН погодили перший в історії глобальний договір про міграцію (Kraini OON pogodili pierszii v istorii globalnyi dogovor pro migraciu), https://www.dw.com/uk/%a-44671486 (accessed 02.05.2020).

12 Угорщина виступила проти глобального договору ООН що до міграції (Ugorsztsina vystupila proti globalnogo dogovoru OON szo do migracji), https://www.dw.com/uk/%D1% 83%/ a-44734380 (accessed 02.05.2020).

inhabitants). Back in 2015 almost all of the citizens of Hungary were acting against the settlement on migrants on the country's territory. This was reflected in the negative answer to the question of the referendum[13].

According to the results of the referendum, 90% of Hungarians considered migrants a burden on the entire social security system of the country; 86% were dissatisfied with the influence of migrants on Hungarian culture and traditions; 83% of citizens believed that the presence of migrants is harmful to the Hungarian economy; 76% saw the refugees as a source of terrorist threat; 70 to 80% denied the EU's right to prescribe the mandatory settlement of foreigners in Hungary, without the consent of the Parliament[14].

The second half of 2018 was the time of the Austrian Presidency of the Council of the EU. Following the example of Orban, the Austrian government also stated that "migration is not and cannot become a human right, and we want to be the ones deciding who to let into the country"[15]. At the same time, the Hungarian Prime Minister's partners in the Visegrad group – Poland and the Czech Republic – made the same announcement. These states reasoned their decisions by referring to "national interests," "principles of sovereignty," and the need to differentiate between legal and illegal migration[16]. Slovakia also refused to sign the Global Compact, and this almost led to the resignation of the Minister of Foreign and European Affairs, Lajčák, who personally participated in the preparation of the document.

Due to the fact that the Prime Minister of Belgium, Charles Michel, was going to sign the Compact in Marrakesh, despite the resistance of the coalition partner, Flemish far-right party N-VA, the coalition government of the state nearly collapsed. However, the N-VA party still left the government, in protest against the Prime Minister's decision.

Thus, the Global Compact for Migration caused another split in the EU and a fierce debate in a number of member states – Germany, Estonia, Croatia, the Netherlands, Slovenia, and Belgium. The last country to refuse to sign the document was Italy. Minister of the Interior Matteo Salvini announced a change in the position of Italy, which initially supported the Compact, but then refused to participate in the conference in Marrakesh.

13 Евростат (Evrostat), https//ec.europa.eu/eurostat/statistics-exsplained/indeks.php/Main_Page (accessed 02.05.2020).

14 Migration in Europe – Statistics and Facts, https://www. Statista.com.topics/4046/migration-in-europe/ (accessed 02.05.2020).

15 Австрія відмовилася підписати міграційний пакт ООН (Avstria vidmovilasia pidpisati migraciinyi pakt OON), https://www.dw.com/uk/%D1%97a-44734380 (accessed 14.05.2020).

16 S. Carrera, K. Lannoo, M. Stefan, and L. Vosyliūtė, Some EU governments leaving the UN Global Compact on Migration: A contradiction in terms? "CEPS Policy Insights" November 2018, no. 15, p. 11–12.

The European Commission was outraged by the position of the states that rejected signing the Compact and said that the countries that did not join it obviously did not read it. As reported by the UN News Center, the same opinion was held by the United Nations Special Representative of the Secretary General for International Migration and the head of the conference, Louise Arbour. She was disappointed by the refusal of a number of countries to join the Compact after lengthy negotiations had already resulted in agreement on the text. At the same time, commenting on the results of the conference, Arbour said that the Global Compact, which was supported by more than 160 states, is a clear example of successful international cooperation[17].

The deep split over the issue of migration between deputies from the right- and left-wing parties was confirmed by the debate that took place in the European Parliament on November 29, 2018. Back in April, European deputies had supported the UN initiative by a majority vote, but six months later, on the eve of signing the Compact, many of them expressed fears of the consequences of its implementation, in particular, "the disappearance of the Western world." A number of deputies from the social democratic faction supported signing of the document, hoping that it would serve as a tool to counter the exploitation of migrants in the labor markets. Representatives of the Green Party noted the ambivalence and inconsistency ("schizophrenia") of the position of the EU institutions: on the one hand, member states had not come to a consensus in the EU Council, and on the other hand, the High Representative for Foreign Affairs and Security Policy, Federica Mogherini, welcomed the signing of the Compact in the European Parliament, which had a goal to make migration "orderly, humane and stable," and suggested the EU demonstrate its willingness to ensure decent living conditions for the children of migrants.

Therefore, Mogherini fully supported the Compact, recalling that the initiative to develop it came from the Europeans, who in 2015 addressed the world community with a proposal to establish a partnership to regulate migration flows. She disagreed with the definition of migration as a clash between the North and the South, since many African countries both supply and receive migrants, as well as serving as a transit point for their movement; she said that the Ministers of Foreign Affairs discussed the possibility of intensifying and speeding up the process of resettlement of persons in need of international protection, "whether in Libya, Nigeria, or any other country"[18]. Mogherini also drew the attention of the deputies to the non-

17 Україна не приєдналася до Глобального Договору про міграцію – спочатку треба вирішити проблеми власних ВПО (Ukrayina nie pryyednalasya do Globalnogo Dogovoru pro migraciyu – s pochatku triebo virisziti problem vlasnych WPO), https://islam.in.ua/ua/novyny-u-sviti/ukrayina-ne-pryyednalasya-do-globalnogo-dogovoru-pro-migraciyu-spochatku-treba (accessed 14.05.2020).

18 Могеріні попереджає ЄС, що гроші на регулювання міграції закінчуються (Mogerini poperedzae EC so grosi na reguluvannia migracii zakincuutsa), https://www.ukrinform.uarubric-

-binding legal nature of the Compact, which really only includes "a list of useful experiences that member states can learn from each other"[19].

Despite this, the High Representative's assurances did not impress right-wing MEPs, who accused the left of trying to stage a "crazy race" in support of migrants by opening borders and even expressed doubt that the UN has the authority to solve migration problems.

Opponents of the Compact for Migration manipulated its content before the European Parliament elections. The UN initiative was strongly opposed by far-right populist parties. So, at the meeting on December 8, 2018, the Flemish party Vlaams Belang opposed it. This meeting was attended by the head of the political organization "Movement" and one of the leading ideologists of conservative populism in the world, Steve Bannon.

Two days before the conference in Marrakech, Marine Le Pen, the leader of France's political party the National Front, made an angry protest[20]. She called the Compact a "global flood," against the background of the "yellow vests" protests in France, and said that "the President of the French Republic has not found anything better than to say that the decisions spelled out in the Compact correspond to European values and interests of Europe. The National Front asks the President of France to renounce this act of high treason. If this agreement is signed, the National Front will fight to the death all the provision it contains"[21].

Preparing the election program for the 2017 presidential elections, Marine Le Pen devoted the second section – "Confident France" – to the traditional issues of immigration and security for the National Front. She shocked the supporters of multiculturalism with her position, emphasizing meetings with the voters: "I am a woman, and as a woman I feel extreme violence and restriction of freedoms spreading throughout our state through the development of Islamic fundamentalism. I am a mother, and like millions of parents, I feel every moment of concern for the state of my country and the world that we will leave as a legacy to our children. I am a lawyer, and I have learned a deep commitment and respect for public freedoms

world/2740863-mogerini-poperedzae-es-so-grosi-na-reguluvanna-migracii-zakincuutsa.html (accessed 11.04.2020).

19 Франція та Італія закликають створити нову систему автоматичного перерозподілу мігрантів у країнах ЄС (Francia ta Italia zaklikajut stvoriti novu sistiemu avtomaticznogo pererozpodilu migrantov u krainach EC), https://www.ukrinform.ua/rubric- 35 world/2783918-italia-i-francia-zaavili-pro-neobhidnist-novoi-sistemi-rozpodilumigrantiv.html (accessed 11.04.2020).

20 Марин Ле Пен: «Франция должна отказаться от Договора ООН о миграции» (Marin Le Pen: „Francia dolzna otkazatsia ot Dogovora OON o migracji"), https://regnum.ru/news/2530135.html (accessed 11.04.2020).

21 Макрон и Меркель наводнят Европу миллионами мигрантов (Macron i Merkel navodniat Evropu milionami migrantov), https://tsargrad.tv/articles/makron-i-merkel-navodnjat-evropu-millionami-migrantov_172310 (accessed 14.04.2020).

from my practice of law, as well as empathy for victims who suffer from the impunity of criminals"[22]. Marine Le Pen has been repeatedly criticized for her lack of tolerance and extremely negative attitude to migration, but this did not prevent her from taking second place in the first round of the French presidential election in April 2017 (21.43% of the vote), which gives a reason to conclude that many French people share her point of view.

## 3. Content Analysis of the Global Compact: Myths and Realities

To understand why the Compact is so strongly opposed by some countries and various political forces, we should first note that two different documents were combined under a common name: one dedicated to legal and illegal migration, the second characterizing refugees and those who sought asylum. Opponents of the Compact, in particular Austrian chancellor Sebastian Kurz, were dissatisfied with the fact that the text mixed provisions on those who seek asylum and labor migrants. He believed that Austria itself has the right to decide "who will be allowed to immigrate and who will not"[23].

The same concerns were expressed by members of the German Bundestag during a debate on the Compact in early November 2018[24]. In fact, the preamble of the Compact clearly states that "migrants and refugees are two different groups of people, whose situation is regulated by separate legal acts. Only refugees can be provided with special international protection in accordance with international law" (art. 2)[25].

Furthermore, the Compact convincingly explains that it is a framework document on cooperation mechanisms and is therefore not legally binding; it also identifies "the sovereign right of states to determine their migration policies," including in relation to legal and illegal migration within its legal jurisdiction, with regards to their international law obligations (art. 4)[26]. However, another popular

22 Марин Ле Пен: Во имя Французов! Против мигрантов 12 февраля 2017 г. / Русское Агенство Новостей (Marin Lepen: Vo imia Francuzov! Protiv migrantov 12 fievrala 2017 g. / Russkoie Agenstvo Novostiei), http://новости-мира.ru-an.info/марин-ле-пен-во-имя-французов-против-мигрантов (accessed 14.04.2020).

23 "Ми самі вирішимо, як контролювати наші кордони". Що відомо про Всесвітній пакт ООН про міграцію („My sami viriszimo, jak kontroluvati naszi kordony". Sztso vidomo pro Vsesvitnyi pakt OON pro migraciu), https://tyzhden.ua/News/223713 (accessed 14.04.2020).

24 Пакт ООН о миграции: дебаты в бундестаге. Информационный портал Germania онлайн (Pakt OON o migracji: debaty v Bundiestagie. Informacionnyi portal Germania onlain), https://germania-online.diplo.de/rudz-ru/politik/-/2161318 (accessed 16.04.2020).

25 UN General Assembly. Global Compact on Safe, Orderly and Regular Migration: Final Draft, 11 July 2018, https:// refugeesmigrants.un.org/sites/default/files/180711_final_draft_0.pdf (accessed 16.04.2020).

26 *Ibidem*.

argument against the Compact was given by the government of Poland – that it is an attack on the state and the "end of the Westphalian system of national sovereignty"[27].

The UN Secretary General Antonio Guterres has refuted some popular myths regarding the document's contents, including the one that would allow the UN to impose migration policies on member states. He stressed that he sees the Compact as a "road map to prevent suffering and chaos."

The Global Compact for Migration is based on ten basic principles, including the sovereignty of nation states and the recognition of universal human rights, and includes 23 goals to minimize the negative factors of migration processes, protect and integrate migrants, increase access to regular migration routes, strengthen borders and fight illegal migration, and facilitate family reunification and repatriation. In addition, the document focuses on supporting legal migration, countering human trafficking, strengthening border cooperation, protecting children and women, and improving migrants' access to basic services.

The Compact contains balanced recommendations on harmonization of travel documents in line with the specifications of the International Civil Aviation Organization and the labor mobility simplification through visa liberalization. The UN has also proposed measures to protect migrant workers from exploitation, and called for countering smuggling and human trafficking. The UN International Children's Emergency Fund (UNICEF) also supported the agreement, seeing it as a way for migrant children to have access to education, health care, and protection from exploitation and violence.

During the intergovernmental coordination of the Global Compact, Ukraine also expressed some concerns about its adoption, referring to the non-binding legal nature of the document, and refrained from signing it[28]. In a joint comment by the Ministry of Foreign Affairs and the State Customs Service of Ukraine, it was emphasized that the Global Compact was meant to be an important addition to international instruments and mechanisms for the protection and enforcement of fundamental human rights and freedoms. However, in its recent history the Ukrainian state was faced with an unprecedented challenge – the armed aggression of the Russian Federation led to the illegal occupation of the Autonomous Republic of Crimea, the city of Sevastopol, their annexation and the Russian expansion of international armed conflict to the Donetsk and Luhansk regions. These criminal actions have turned almost 1.5 million

27 Польша отказалась подписывать пакт ООН о миграции. (Polsza otkazalas podpisat pakt OON o migracji), https://iz.ru/814506/2018–11-20/polsha-otkazalas-podpisyvat-pakt-oon-o-migratcii (accessed 16.04.2020).

28 Україна не приєдналася до Глобального Договору про міграцію – спочатку треба вирішити проблеми власних ВПО (Ukraina nie priednalasia do Globalnogo Dogovoru pro migraciu – spochatku trieba wirisziti problemy vlasnych BPO), https://islam.in.ua/ua/novyny-u-sviti/ukrayina-ne-pryyednalasya-do-globalnogo-dogovoru-pro-migraciyu-spochatku-treba (accessed 16.04.2020).

Ukrainian citizens into displaced persons. Ukraine is making every effort to ensure the rights and needs of internally displaced persons, but there is still a lot of work ahead, as the war in the East of the state continues. Confrontation with the enemy requires significant material and financial resources. With this in mind, Ukraine will consider joining the Global Compact for Safe, Orderly and Regular Migration at another stage under favorable conditions[29].

It should be emphasized that Ukraine has always consistently fulfilled its obligations under international conventions and treaties on human rights, readmission and the like. Despite the serious challenges and problems associated with the forced relocation of a significant number of our citizens within the country, the state continues to accept immigrants and create appropriate conditions for their stay on our territory. According to the State Migration Service of Ukraine, as of October 1, 2018, 275,030 immigrants were registered in the SMS. In just nine months of the same year, the SMS authorities issued 10,410 immigration permits and issued 33,567 temporary residence permits[30].

Ukraine welcomed the development of international cooperation in the field of migration and noted the important role of the International Organization for Migration in this process; it stated that it was ready to continue constructive cooperation with IOM on a wide range of issues related to migration. Ukraine called on all countries that had not joined the Compact to reconsider their position and reminded them that the document does not impose new obligations on member states and does not violate their sovereignty.

According to the director of the Brookings Institution Doha Center, Tarek Youssef, it is necessary to look for innovative approaches to solve problems related to migration. Effective solutions using new technologies will help implement the provisions of the Compact, he believes, for example educational programs in the field of migrant rights. If migrants are aware of their rights, it will be easier for them to resist discrimination and fight exploitation.

Commenting on the conference in Marrakesh, the representative of Morocco's King Mohammed IV, who was not able to participate in the events, said that the Compact offers navigation between two extremes, the closure of borders and uncontrolled migration, and saw this as a compromise.

29 *Ibidem*.

30 Спільний коментар МЗС України і ДМС України у зв'язку із проведенням Конференції ООН для прийняття Глобальної угоди про безпечну, впорядковану та законну міграцію (10–11 грудня 2018 р., м. Марракеш, Марокко) (Spicialnyi komentar MZS Ukrainy i DMS Ukrainy u zwiazku iz proviedeniem Konfierencii OON dla priniatia Globalnoi ugody pro bezpiecznu, vporiadkovanu ta zakonnu migraciu (10–11 grudnia 2018 r., m. Marrakesz, Marokko), https://dmsu.gov.ua/news/dms/spilnij-komentar-mzs-a-dms.html (accessed 16.04.2020).

However, it seems that the balance of interests in the Global Compact for Migration is still shifted towards the states that supply migrants. Recipient countries benefit much less from international cooperation. A number of provisions that were rejected by the opponents of the Compact contributed to the liberalization of migration regimes – measures to legalize illegal migrants, simplify family reunification procedures for migrants with any level of qualification, and so on. The text spoke a lot about the responsibility of receiving states to protect the rights of migrants and their integration, but less about the responsibility of the donor countries to regulate migration flows, and it did not refer to the obligation of migrants themselves to respect the laws and cultural heritage of the countries where they were going to settle. Despite the fact that populists in governments and parliaments undoubtedly distorted the content of the Compact for their own purposes, manipulating public opinion, the lack of enthusiasm among the recipient countries seemed quite understandable.

## Conclusions

Thus, it is not surprising that in Europe, in the course of many public political debates and disputes, the migration issue has become a key point. Some political actors see only threats in migrants, while others see more pros than cons; however, they note that the current situation is extremely complex and diverse. However, it should be emphasized that the negative attitude towards migrants usually prevails, creating a threat with the growth of not just anti-migrant attitudes in society, but sometimes those that closely border on nationalistic ones.

The Global Compact for Migration was presented for approval in Marrakesh at a time when countries hosting migrants were experiencing a rise in populism and the popularity of parties and governments that supported anti-migrant slogans and opposed global governance in all its manifestations. At a time when not only in Europe, but also in other parts of the world, there was a clear demand from the population to tighten migration policy and provide protection, the Compact was aimed rather at liberalizing the migration regime, which explained its rejection by many governments and political forces.

Rejection of the Compact by a number of countries that have accepted migrants has reduced the potential effect of its application. However, it can be useful for improving the efficiency of legal migration, regulating the employment of skilled labor, which is of interest to the recipient countries.

The cautious position of the Ukrainian side is caused primarily by its status as a country that has mainly accepted migrants and served as a transit destination for them. However, many provisions of the Compact can be the basis for establishing creative, pragmatic relationships with countries that send their citizens to work in Ukraine, or for academic and student exchanges.

Harmonization of the EUs protection policy in practice meant only following not general but rather minimum standards for the protection of refugees and asylum seekers. The crisis has shown that the low level of harmonization of national legislation on refugees has significantly contributed to the spread of the disaster and the widening gap in the number of asylum seekers that countries have had to accept.

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# The Phenomenon of Labor Migration as a Determining Factor of Global Problems

**Abstract:** Based on a theoretical analysis, the most urgent problems of labor migration as a legal phenomenon that is global in nature and carries both positive and negative features that depend on the subjective and objective factors of the region of each country are characterized. The relationship of labor migration to the potential for economic development of the country is shown. The focus is on the need for the legislative attention of the national legislator to the mechanisms of legal protection of labor rights of migrants.
**Keywords:** labor migration, migration policy, migration processes, economic strategy, labor resources.

## Introduction

Migration processes, which have become one of the main factors of social and economic transformation, have gained global proportions, covering all continents of the planet. The last decades can truly be marked as an era of population migration.

An important issue for states that have entered the agenda is the issue of whether migration, as such, contributes to or impedes the further socio-economic development of a particular country. The formation of a labor market that is global in nature is seen as the result of the growth and interaction of three factors of production – capital, labor, and information – which create the integrity of the economic platform in the world. Therefore, their interconnection and interaction are becoming more influential and significant. Acquiring a pronounced character, labor migration makes adjustments to the political, economic, social, and cultural life of society, thereby acquiring a globalist character.

## 1. Migration Processes as Global Phenomena

Currently, all the relevant determinants of research approaches to the study of the phenomenon of migration at the international and state levels are undergoing significant changes due to the intensification of migration processes, which naturally transform under the influence of the geopolitical unification of socio-legal and cultural-economic space. It agrees with a statement that global migration consists of many diverse narratives with specific causes, socio-economic consequences for all participants, and contextual and political responses[1].

According to British researchers, modern concepts raise questions about political allegiance, cultural and performative expression, and emotional affinity, in addition to material concerns relating to development, citizenship, and the possibilities of economic integration[2].

The achievements of the industrial and information epochs form its future, more dangerous than ever, and richer in opportunities. Depending on the choice that humanity will make, hope or fear will prevail in the world[3].

The gradual development of the economic and social spheres, as a result of progress, over the past decades in different countries of the world changes the place of each country in the world hierarchy, thereby changing the design and place of each country in the world economic system. This, in turn, leads to a certain type of cooperation between states in certain sectors of the economy and, at the same time, to dependence, which can either increase or decrease. Such dependence can be expressed, first of all, in international production cooperation, both in foreign trade

1 Europe and Central Asia Economic Update, Fall 2019: Migration and Brain Drain. WorldBankPublications 2019, p. 25.

2 K. Mitchell, R. Jones and J.L. Fluri, Handbook on Critical Geographies of Migration, Cheltenham 2019, p. 11.

3 Globalnyie tendentsii. Paradoks progressa. Yanvar 1917 g. Publikatsiya Natsionalnogo soveta po razvedke (Global trends: The paradox of progress), https://www.dni.gov/files/images/globalTrends/documents/GT-Core-Russian.pdf (accessed 01.06.2020).

and in international economic relations as a whole. In each country, there may be a shortage of labor resources, which, accordingly, provides the necessary inflow of missing labor. In the last decade, one can note the constant presence of foreign labor in the labor markets, which ensures the simultaneous competitiveness and stability of the development of the economy of each developed state.

The migration process is really insurmountable since it is based on the globalization of the world economy, the all-encompassing development of communications, transport, trade, and, as a result, the interpenetration of cultures. Interstate borders are gradually losing their significance. The ideology of free trade, free exchange of information, and business without borders inevitably leads to the activation of migration processes[4]. The pattern of this movement is obvious.

People have been moving from place to place since time immemorial. While some relocate in search of a better job, education, economic benefits, or family reunion, others are forced to flee from conflict, terrorism, or human rights violations. The number of those who are being removed from their places as a result of the effects of climate change, natural disasters, or other environmental factors is growing.

In today's world, we are witnessing the movement of people on an unprecedented scale. More than ever, more people do not live in the countries in which they were born. According to statistical studies conducted by B. Dogramaci and K. Pinther last year, worldwide migration increased from 173 million in the year 2000 to 244 million in the year 2015, with two-thirds of the migrant population living in only twenty nations, e.g. in the US (47 million), followed by Germany and Russia (each of them with 12 million), and Saudi Arabia (10 million). In particular, the number of refugees increased from 1975 (2.5 million) to an estimated 66 million today – with an upward tendency[5].

In 2019, the number of migrants reached the mark of 272 million. In 2000, the number of migrants in the world was about 173 million people. Women make up 48% of the total number of migrants, about 38 million are children, 4.4 million are international students and 164 million are labor migrants. 75% of migrants are people of working age (20–64 years old). Almost 31% of all migrants live in Asia, 30% in Europe, 26% in the Americas, 10% in Africa and 3% in Oceania. However, the share of international migrants in the total number of inhabitants of the planet has not changed much over the past decades: 3.4% in 2017, 2.8% in 2000, and 2.3% in 1980.

The problem of migration and the regulation of migration flows is on the agenda in all countries, including Ukraine. According to the State Statistics Service, the main

4 V.V. Mynaev and V.B. Zhyromskaia, Myrovaia polytyka y hlobalnye problemy sovremennosti (World politics and global problems of our time), https://cyberleninka.ru/article/n/migratsii-globalnaya-problema-sovremennosti-1 (accessed 01.06.2020).

5 B. Dogramaci and K. Pinther, Design Dispersed: Forms of Migration and Flight, Bielefeld 2019, pp. 11–12.

countries of destination for Ukrainian migrant workers are neighboring countries: Russia, Poland, the Czech Republic, Hungary, as well as countries in southern Europe (Italy, Spain, Portugal). A comparison of the results of 2008, 2012, and 2017 shows that the distribution of migrants by destination countries has gradually changed: the share of the Russian Federation has been declining, while European countries, primarily Poland, have increased. It is the Republic of Poland today that is the main destination country for labor migrants from Ukraine, which is due to the needs of the country's labor market, favorable for temporary (up to 6 months a year) employment of foreigners by legislation, territorial, and cultural proximity[6].

Changes in the geographical origin of workers are, inter alia, related to the military conflict in the east of the country. So, according to a study conducted by the National Bank of Poland in 2016, among Ukrainian migrants who first arrived in Poland in 2014 and 2015, 28.4% were from the eastern part of the country. But by 2014, the proportion of people from this region was only 6.3%. During 2016 alone, 24.1 thousand Ukrainians received EU citizenship. They took first place among naturalized foreigners in the Czech Republic, Poland, and Romania. And if in Romania it can be assumed that we are talking about Ukrainians in neighboring Bukovina, who have the right to Romanian citizenship, although they do not migrate to Romania, then in the case of the Czech Republic and Poland, acquiring citizenship is possible only for immigrants. According to the United Nations Population Department, the number of international migrants of Ukrainian origin outside Ukraine, as of July 1, 2019, is 5,900,000. From 2015 to 2019, the number of international migrants from Ukraine has grown by approximately 200,000 points[7].

Sociological data says that 37% of Ukrainians want to work in Germany. In this country, subject to official work, the Ukrainian will have the same rights as local residents, as well as receiving help for children (if the children live in Germany). "Many European countries are claiming Ukrainians because of problems with low birth rates and the aging of the nation". "Ukrainians work well, quickly socialize in European countries and are geographically close to them". Larger Germany may require 1,500,000 workers, and little Lithuania only 100,000. "But they are united by an interest in attracting Ukrainians not only to work but also for permanent residence"[8].

6 Trudova mihratsiia hromadian Ukrainy za kordon: Vyklyky i shliakhy reahuvannia (Labor of Ukraine's countrymen for the cordon: Wikimedia Commons), https://niss.gov.ua/sites/default/files/2018–09/Malynovska-d28e1.pdf (accessed 01.06.2020).

7 Dopovid OON sprostovuie tverdzhennia pro mihratsiinu kryzu v Ukraini [The UN report refutes allegations of a migration crisis in Ukraine], https://www.ukrinform.ua/rubric-society/2783092-dopovid-oon-sprostovue-tverdzenna-pro-migracijnu-krizu-v-ukraini.html#:~:text=%D0%D1%80 (accessed 01.06.2020).

8 Ukrainskyi trudovyi mihrant: vyhoda sohodni i kolaps vzhe zavtra (Ukrainian labor migrant: benefit today and collapse tomorrow), https://www.ukrinform.ua/rubric-society/2822268-ukrainskij-trudovij-migrant-vigoda-sogodni-i-kolaps-vze-zavtra.html (accessed 01.06.2020).

In accordance with the results of the review of the economic situation in Europe and Central Asia at the end of 2019, produced under the auspices of the World Bank, labor mobility is certainly able to solve many of the long-term problems that the regions of Europe and Central Asia are facing, such as, primarily, a burden created by demographic pressure due to aging populations and low birth rates. At the same time, the main difficulty lies in the development of policies that will allow regions to maximize the benefits derived from labor mobility and reduce migration costs. The benefit arises from a more efficient distribution of labor across sectors and geographic areas, which corresponds to unmet demand in many professions[9].

A serious challenge for Ukraine is due to the fact that in recent years the number of citizens working abroad without proper permits has increased. Given unfavorable demographic trends, the gradual transformation of part of temporary labor migration into resettlement is for Ukraine the most serious danger caused by migration[10]. As this problem is global in nature, the ILO has adopted a number of conventions on these issues. So, in particular, the ILO Convention "Migrant Workers" no. 97 of 06.24.1975 stipulates that each member of the organization that has ratified it must provide immigrants who are legally located in its territory with no less favorable conditions than those used by its own citizens in relation to various issues listed in this Convention and to the extent that these issues are regulated by law or are subject to control by administrative authorities[11].

The ILO Convention "On the abuse of migration and on ensuring equal opportunities and equal treatment for migrant workers" no. 143 of 12.09.1978 states that measures are taken to promote educational programs and the development of other activities aimed at fully familiarizing migrant workers with the adopted policies, with their rights and obligations, as well as with activities aimed at providing them with effective assistance in ensuring their rights and protection. In addition, within the framework of national legislation or rules, measures are envisaged for the effective detection of the illegal employment of migrant workers and for the determination and application of administrative, civil, and criminal penalties, including imprisonment for the illegal use of the labor of migrant workers, and for organizing the migration of workers in order to obtain work, which is defined as related to abuse[12].

9 Europe and Central Asia Economic Update, Fall 2019: Migration and Brain Drain. World Bank Publications 2019, p. 25.

10 Trudova mihratsiia hromadian Ukrainy za kordon: Vyklyky i shliakhy reahuvannia (Labor of Ukraine's countrymen for the cordon: Wikimedia Commons), https://niss.gov.ua/sites/default/files/2018–09/Malynovska-d28e1.pdf (accessed 01.06.2020).

11 Konventsiia pro pratsivnykiv-mihrantiv (Convention on Migrant Workers) N 97 от 24.06.1975, https://zakon.rada.gov.ua/laws/show/993_159 (accessed 01.06.2020).

12 Konventsiia "Pro zlovzhyvannia v haluzi mihratsii i pro zabezpechennia pratsivnykam--mihrantamy rivnykh mozhlyvostei i rivnoho stavlennia" (The convention "On discrimination in the migration sector and on ensuring equal opportunities and equal treatment for migrant

In Ukraine, the Concept of State Migration Policy was also approved by a decree of the President of Ukraine in 2011. Accordingly, the need was noted for improving the system of state management of migration processes, which is due to political and socio-economic factors affecting the situation in Ukraine and the world, which are mainly: the integration of Ukraine into the international labor market, accompanied by the outflow of labor from Ukraine; population decline in Ukraine and other European countries; the active immigration policy of foreign states aimed at attracting foreign labor; the inconsistency of the legislative acts of Ukraine on migration with the requirements, in particular, due to the lack of legislative acts in the field of protection of foreigners and stateless persons who are not granted refugee status in Ukraine, in the event that it is impossible to return them to their states of citizenship or former permanent residence, taking into account the need for Ukraine to fulfill its international obligations, as well as the impossibility of residence or stay of such persons in the territory of their state of origin, due to environmental, industrial, or other circumstances of an emergency nature; insufficiency of staffing, material, and technical support of state bodies for the implementation of the state migration policy of Ukraine; lack of automated information systems for registration of citizens of Ukraine, as well as foreigners and stateless persons residing or temporarily staying on the territory of Ukraine legally[13].

The concept of state migration policy contains a number of provisions where migration is considered as an important component of not only the socio-economic but also the demographic development of Ukraine. In addition, on this basis, the goal of the concept is to attract investors and highly qualified specialists from developing sectors of the economy.

A recurring question arises: for all the negative manifestations of migration, does this phenomenon have positive features, or is it a tangle of unresolved problems within the country that can be solved outside it? One thing is clear – migration is that legal phenomenon that cannot be assessed unambiguously since it would be wrong. It carries both positive and negative traits, which depend on the subjective and objective factors of the region of each country. One of the positive characteristics of migration is the solution to the demographic problem, which also helps to find the most favorable conditions for the self-realization of a person as a professional. It is also always a redistribution of labor.

There is no sector of the economy where migrants do not work. In the context of an aging population and low birth rates, rural and industrialized cities are especially

workers") N 143 vid 09.12.1978 r., https://zakon.rada.gov.ua/laws/show/993_163 (accessed 01.06.2020).

13 Kontseptsiia derzhavnoi mihratsiinoi polityky skhvalena Ukazom Prezydenta Ukrainy vid 30.05.2011 r. no. 622/2011 (The concept of state migration policy was approved by the decree of the President of Ukraine), https://zakon.rada.gov.ua/laws/show/622/2011 (accessed 01.06.2020).

in need of labor migration. The advantages of migration are also that this process is a simultaneous convergence of cultural traditions and their enrichment. Therefore, all countries tend to actively benefit from migration.

Many countries of the world have gained and continue to derive a lot of positive effects from migration. And some have made migration policy part of their socio--economic development strategy. Australia, New Zealand, South Africa, the USA, Canada, Brazil, Argentina – this is not a complete list of countries that emerged and developed as a result of external migration as host countries. And Spain, Italy, Portugal, Great Britain, the Netherlands, France, thanks to emigration, created entire "diasporal states" outside their borders, still using the migration factor also in their interests[14].

On the other hand, migrants increase the birth rate, including of the indigenous population, which is not always so cloudless – as the traditions of the indigenous population die. Be that as it may, it is also necessary to take a sober look at the fact that migration has always intensified and intensifies competition in the struggle for jobs, worsens the material situation and working conditions of the working indigenous population, and, as a result of this, increases unemployment, which leads to criminal situations, and to ethnic and religious conflicts.

Taking into account the positive in migration, it is necessary for the national legislator to pay attention to the mechanisms of legal protection of migrant labor rights. It is necessary to study the causes of migration dependence of citizens within each region and those subjective and objective factors that contribute, alas, to its dependence and strengthening.

## 2. The Impact of Migration on the Economic Potential of the Country

The low level of economic development can be defined as the main factor among the reasons for migration of citizens of Ukraine. The decline in the level of economic development, and against this background the bankruptcy of enterprises, including artificial ones, the low level of wages and their unjustified differentiation among different sectors of the population, the lack of jobs, imperfections in the labor market, military operations in the east of the country caused by Russian aggression, and many other factors determine favorable conditions for the migration of the population of Ukraine.

States have always stimulated temporary labor migration if labor has served as a stable source of income, with one difference only: incomes in some countries

14 S.V. Riazantsev, Zovnishnia mihratsiina polityka yak faktor demohrafichnoho rozvytku (Foreign migration policy as a factor in demographic development), https://cyberleninka.ru/article/n/vneshnyaya-migratsionnaya-politika-kak-faktor-demograficheskogo-razvitiya-rossii (accessed 01.06.2020).

are used effectively for economic development, in others they are in shadow. Unfortunately, the funds that should be directed to the Ukrainian economy were and are steadily shadowy in nature.

Even the economic recovery, which has been going on in Ukraine for some time, since 2000, has not led either to a real improvement in the living conditions of wide sections of the population, or to an increase in demand for labor. Most indicators of socio-economic development are still far from European standards. Employment opportunities in the official labor market of Ukraine remained limited; moreover, employment in the registered sector of the state economy not only does not guarantee well-being, but often does not provide for the reproduction needs of the workforce[15]. Therefore, migration processes in Ukraine, as a rule, are always involved in the economic factor.

At the same time, according to Glenda Bonifacio, these factors are neither mutually exclusive nor absolute, since each determinant is independent of the others, starting from a combination of adverse economic opportunities enhanced by environmental factors, ending with family reunion, social prestige, and the desire for freedom[16].

Since labor emigration is associated with the departure of the able-bodied population outside the country, it is precisely due to changes in the quantitative and qualitative characteristics of the labor potential of society, in particular, the impact on the professional structure of the able-bodied population, its gender and age composition, and affects the economic potential of the country as a whole. A particularly acute problem of reproducing domestic labor potential is a significant deterioration in the age structure of the population[17]. According to statistics from the Institute for Demography of Social Research of the National Academy of Sciences of Ukraine, the working-age population of Ukraine aged 20–40 years by 2030 will decrease by about three million people.

However, it should be borne in mind that researchers note the positive effect of the outflow of labor when there is a high level of unemployment in the country – as a result of migration, the officially registered unemployment rate may decrease. Emigration can also contribute to social stability and economic development. At the same time, as noted, migrants who have left the country do not pay direct taxes,

15 Naselennia Ukrainy. Trudova emihratsiia v Ukraini (The population of Ukraine: Labor emigration in Ukraine), https://idss.org.ua/monografii/poznyak_2010.pdf (accessed 01.06.2020).

16 G. Bonifacio, Global perspectives of gendered youth migration: Subjectivities and modalities, Bristol 2019, p. 8.

17 I.O. Pinchuk and O.O. Yurenko, Vplyv trudovoi mihratsii na ekonomichnyi potentsial Ukrainy (The impact of labor migration on the economic potential of Ukraine), no. 2 (58), 2013, http://www.irbis-nbuv.gov.ua/cgi-bin/irbis_nbuv/cgiirbis_64.exe?I21DBN=LINK&P21DBN=UJRN&Z21ID=&S21REF=10&S21CNR=20&S21STN=1&S21FMT=ASP_meta&C21COM=S&2_S21P03=FILA=&2_S21STR=Nvpusk_2013_2_11 (accessed 01.06.2020).

therefore revenues to the country's budget are reduced. In addition, the burden on social security and the working population is increasing[18].

But be that as it may, it is worth noting that migration, which is international in nature, has an economic impact on all countries without exception, and on those that accept labor as well as those that give it away. Therefore, migration will always be considered by all states as a resource, including a cheap one, on which success and the potential for economic development of the country will depend. Therefore, a certain analysis of the interaction of labor migration and the economic development of each particular country is needed, which, when studied, should affect the following areas:

- the interaction of migration and economic processes that occur at the macro level: the relationship of migration and inflation processes, differentiation of wages, tax levels, interdependence, and the effect of remittances by migrants on the country's balance of payments.
- And of course, the impact of labor migration and the social policy of the state on the country's unemployment rate.

The problems of international labor migration and the study of its essence is one of the key tasks of modern economic science. International labor migration influences not only the development of the national labor market; it has become one of the main elements of the international economic relations of many developed countries.

## Conclusions

Despite the fact that the processes of labor migration are regular and irreversible, we need to pay attention to the alarming indicators that characterize the structural differentiation of labor migration in general. Therefore, it is necessary to regulate the processes of labor migration with reference to the state migration policy as an element of the social and economic development strategy of each country.

Each country should clearly assess its domestic needs for foreign labor and, accordingly, develop legal mechanisms to remove certain barriers on the way to employing foreign workers, specialists, and scientists. There must be a balance of labor resources.

When balancing labor resources, it is necessary to link them with demographic policies in order to replenish the population in those regions that suffer from both labor shortages and population growth, especially in rural areas.

18 Y.A. Kurunova, Mizhnarodna mihratsiia robochoisyly yak factor ekonomichnoho rozvytku krain (na prykladi mihratsiinykh potokiv mizh EU i Ukrainoiu) (International labor migration as a factor in the economic development of countries (using migration flows between the EU and Ukraine as an example), 2015, 216 c, https://www.lnu.edu.ua/wp-content/uploads/2015/12/dis_kurunova.pdf (accessed 01.06.2020).

A transparent policy of each country regarding a residence permit and citizenship is needed. It is necessary not only to adopt relevant laws, but also to create effective mechanisms to remove bureaucratic obstacles in this matter.

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# The Provision of the Protection of the Rights of Internally Displaced Persons

**Abstract:** This article is devoted to the protection of the rights of internally displaced persons. The purpose of the present study is to analyze the current state of the rights of internally displaced persons, to identify problems in their implementation and to propose effective mechanisms for their protection. The author considers the rights of internally displaced persons depending on their specification, such as: social and pension assistance, housing, education and employment. The problem of the protection of the property of internally displaced persons is considered. It is determined that the protection of the property rights of internally displaced persons should be entrusted to the state, and effective mechanisms should be established at the legislative level to ensure the return of property or reimbursement of its value in the case of destruction or damage. The author draws attention to the fact that the realization of the rights of internally displaced persons is possible with the support not only of the state, but also of local authorities. The following scientific methods were used in writing the article: analysis and synthesis, the method of specific sociological research, systemic, structural-functional, synergetic, comparative-legal and other methods.
**Keywords:** internally displaced persons, law, protection of rights, occupied territory.

## Introduction

Due to the armed conflict in the East of Ukraine and the annexation of the Autonomous Republic of Crimea, the biggest internal displacement of citizens happened in Ukraine. The emergence of such a category as internally displaced persons is new to Ukrainian national legislation and for Ukrainian society in general. The requirement to determine their status and content prompted the state to develop and adopt new legislation. Despite the fact that in Ukraine, at present, the regulatory

framework is formed on the basis of which rights of internally displaced persons are protected, there are problems that need further solution.

Such scholars as I. Zhilinkova, V. Borisova, O. Bandurka, S. Britchenko, E. Gerasimenko, O. Goncharenko, N. Grabar, I. Kovalyshyn, N. Bortnyk, O. Matsegorin, T. Podolyaka, D. Tsvigun, E. Mykytenko, S. Zakirova, I. Khomyshyna and M. Malykhahave studied the problems of protection of citizens' rights, including the rights of internally displaced persons. However, there is currently no unambiguous scholarly view on certain aspects of the protection of the rights of internally displaced persons, which is why they need to be further studied and developed in practice.

The rights of internally displaced persons are protected by the state in various ways. Legislation has been passed defining the rights and freedoms of internally displaced persons; a state body was set up to deal directly with the problems of internally displaced persons – the Ministry of the Temporarily Occupied Territories and Internally Displaced Persons. But, as it turned out, most of the steps taken or currently being taken are unfortunately not effective, and some are generally contrary to the Constitution of Ukraine and to international law.

## 1. The areas of the rights of internationally displaced persons

It is not possible to determine which of the problems are the main ones and need immediate solution on the state level. All of them concern the human life, rights and interests of citizens who left their places of permanent residence. If we consider social rights, and the protection of the social rights of internally displaced persons, they still remain at a rather low level of realization.

Due to the temporary loss of control over the occupied part of the territory of the Donetsk and Luhansk regions, both the functioning of public authorities in this territory and the payment of pensions and social benefits at the place of residence of the recipients were suspended. The state does not define a clear procedure for social benefits for internally displaced persons. On the contrary, in 2016 a number of legislative acts were adopted which made it difficult for internally displaced persons to access social benefits.

The government of Ukraine has introduced a procedure for restoring social and pension benefits to residents of uncontrolled territories only in cases of the transfer of a person to the controlled territory and on obtaining a certificate of registration as an internally displaced person (Resolution of the Cabinet of Ministers of Ukraine of November 5, 2014 no. 637 "On realization of social payment for persons moved from the temporarily occupied territory of Ukraine and areas of the anti-terrorist operation"). The state did not define any mechanisms for persons who were entitled to pension payments but remained in the occupied territories. That is, such persons

were deprived of the opportunity to exercise their constitutional right to social protection.

Internally displaced persons are deprived of the freedom to choose the method and place of receiving pensions and social assistance. There is a mandatory procedure for receiving social and pension benefits only at the State Savings Bank of Ukraine, where there are queues and problems with payments at present.

With regard to the protection of citizens' rights to pensions, it should be noted that the Supreme Court, in considering the case no.263/7763/17 (K / 9901/202/17) of 06.02.2018, in its decision clarified that it is impossible to stop paying pensions to internally displaced persons due to their absence at the place of residence. After lengthy disputes, the Supreme Court upheld the right of internally displaced persons to receive pensions independently of their place of residence.

Issues of the protection of social rights of internally displaced persons require the definition of a mechanism for the implementation of pension and social benefits to persons living both in government-controlled territory and in temporarily uncontrolled territories. There is also an unresolved issue regarding the resumption of pensions to citizens of Ukraine who, with the beginning of the armed conflict, moved to and live in other countries.

Other issues related to the protection of the social rights of internally displaced persons include housing. Article 47 of the Constitution of Ukraine states that everyone has the right to housing. Due to the imperfection of the current legislation, Ukraine cannot regulate the issue of providing housing for internally displaced persons. In Ukraine, there are no comprehensive government programs for soft loans, construction, renovation or purchase of new housing for the affected population. The experience of the city of Mariupol is positive; the local government provides such people with social housing at the expense of the local budget. But this problem needs to be addressed at the state level by developing soft loan mechanisms.

The rights of internally displaced persons with regard to employment in the context of discriminatory treatment from the local population towards displaced persons need additional protection. The problem arises from the fact that internally displaced persons are perceived as temporary workers. The regions from which internally displaced persons originate have huge industrial facilities where the majority of citizens worked. Therefore, it is difficult for such persons to find a job corresponding with their professional skills due to the lack of similar facilities in other regions of the country. The legislator needs to give personal attention to women who are raising children and are deprived of the opportunity to work full-time. It is impossible to find a job for this category of people at all. Therefore, the state must determine guarantees for the employment of such persons.

With regard to the right to education, the state has taken some steps to protect this right of internally displaced persons. Additional places in primary and secondary schools were allocated for internally displaced children; 18 higher education

institutions were relocated from Crimea, the non-controlled territories of the Donetsk and Luhansk oblasts, and some issues of ensuring their activities at the legislative level were settled[1]; a simplified procedure for the admission campaign for entrants has been introduced[2]; a more flexible mechanism was developed for confirming the qualifications, educational level and transfer of students from universities from the occupied territory of Ukraine, creating conditions for such students to receive a social scholarship.

Ensuring the realization of the rights of internally displaced persons to receive education is extremely important for the development of children, adolescents and young people, and their opportunities in the future. Equal access to education is an important indicator of the integration of internally displaced persons into host territorial communities[3]. In Ukrainian legislation, the exercise of the right to education of internally displaced persons is defined by Article 7 of the Law of Ukraine "On Ensuring the Rights and Freedoms of Internally Displaced Persons". Local state administrations and local self-government bodies, within the limits of their powers, ensure the placement of children in preschool and general educational institutions in state ownership[4]. According to the Law of Ukraine "On Higher Education", the state provides targeted support to children registered as internally displaced persons, including children who study full-time in higher education institutions, for obtaining higher education in state and municipal educational institutions until graduation, but not after they have reached 23 years of age.

At the legislative level, the state has provided opportunities for children from the occupied territories to obtain a document of the state standard of Ukraine on basic or complete general secondary education (certificate) in a simplified way, and to enter Ukrainian educational institutions under a simplified procedure through the educational centers "Donbass-Ukraine" or "Crimea-Ukraine". These provisions should be considered a positive step by the state, because it demonstrates the state's concern for the citizens of Ukraine who remained in the occupied territories.

1 Law of Ukraine, "On amendments to certain laws of Ukraine concerning the activities of higher educational institutions, scientific institutions relocated from the temporarily occupied territory and from settlements in the territory of which public authorities temporarily do not exercise their powers" (November 3, 2016 no.1731–VIII), http://zakon2.rada.gov.ua/laws/show/1731–19 (accessed 17.04.2020).

2 Order of the Ministry of Education and Science of Ukraine, "On Approval of the Procedure for Admission to Higher and Vocational Education of Persons Living in the Temporarily Occupied Territory of Ukraine" (May 24, 2016 no. 560), http://old.mon.gov.ua/files/normative/2016–06-07/5622/nmon_560.pdf (accessed 17.04.2020).

3 Order of the Cabinet of Ministers of Ukraine, "On approval of the strategy for integration of internally displaced persons and implementation of long-term decisions on internal displacement until 2020" (November 15, 2017 no.909), http://mtot.gov.ua/5891–2/ (accessed 17.04.2020).

4 Law of Ukraine, "On Ensuring the Rights and Freedoms of Internally Displaced Persons" (October 20, 2014 no.1706–VII), http://zakon3.rada.gov.ua/laws/card/1706–18 (accessed 17.04.2020).

The realization of the educational rights of internally displaced persons is possible with the support not only of the state, but also of local communities in providing appropriate conditions for obtaining education, taking into account the needs of such persons.

Ukraine, as a democratic and legal state, cannot develop without ensuring the social rights of its citizens, including internally displaced persons. In order to regulate relations in the field of protection of these rights, in particular the right to housing, employment and education, it is necessary to apply appropriate amendments to the current Ukrainian legislation.

The newly appeared category of persons who need social protection identified social problems that existed both before and after the hostilities. The situation demonstrated the imperfection of the existing social protection system. It is possible that the situation in the Donetsk and Luhansk oblasts will contribute to a rethinking of the state's social policy in general. The settlement of social problems will become more definite and the discretionary powers of the authorities will be limited, which will undoubtedly have a positive effect on the better implementation of the principle of legal certainty[5]. The example of a real urgent social problem in a state that seeks to become legal, and the search for ways to solve it successfully, demonstrate the connection between the rule of law and the social state. Without ensuring the necessary (sufficient) level of material well-being for oneself and one's family members, which would be sufficient for food, clothing, housing, proper education, medical care, etc., human dignity will be declarative, and the principles of the rule of law, and the rule of law itself, can become a non-functioning doctrinal abstraction[6].

According to Article 3 of the Constitution of Ukraine, a person, his life and health, honor and dignity, inviolability and security are recognized in Ukraine as the highest social value. Human rights and freedoms and their guarantees determine the content and direction of the state. The state is accountable to human for its activities. The establishment and protection of human rights and freedoms is the main duty of the state. The declaration in Article 47 of the Constitution of Ukraine, the right to housing, is an inseparable part of the right to respect for human dignity, as housing belongs to basic needs, without which self-realization of a person as an individual is impossible. The lack of housing for internally displaced persons puts them in a discriminated position compared to other citizens of Ukraine. The legislator must develop a clear, step-by-step procedure for obtaining housing, provide effective, efficient guarantees for the protection of this right, revise the provisions and eliminate those that are almost impossible to implement.

5 T. Podoliak, Peculiarities of realization of the right to housing of internally displaced persons in Ukraine, "Scientific notes of NaUKMA" 2018, vol. 1, pp. 78–83.

6 M. Kozyubra, General Theory of Law, Kyiv 2015, p. 193.

The problem of the protection of property rights of internally displaced persons remains relevant. To date, there is no normative act in Ukraine on the real protection of the property rights of internally displaced persons. The issue of property located in territories where armed conflicts, temporary occupation or other circumstances continue, due to which the owners of such property were forced to leave their place of permanent residence, needs to be resolved. Most often there is an illegal unauthorized seizure of someone else's home, vehicles, etc. in the temporarily occupied territories.

If the property has been destroyed or damaged, the only means of judicial protection of property rights that can be used to restore the violated property rights by internally displaced persons is a claim for damages. However, there are also significant difficulties with such claims, as in the context of armed conflict and occupation it is almost impossible to identify the person who is the direct perpetrator of the damage[7].

It should be noted that ensuring the proper protection of the property rights of internally displaced persons should be the responsibility of the state, and effective mechanisms should be in place at the legislative level to ensure the return of property or reimbursement in the event of destruction or damage. World experience confirms that the most effective means of protection of property rights is restitution, but the relevant legal mechanism in a similar format is not reflected in the current legislation of Ukraine. The practice of Ukrainian courts in imposing the obligation to compensate for the damage caused to victims by the armed aggression in eastern Ukraine against the Russian Federation has a positive effect. The state is the guarantor of the property rights of internally displaced persons, but legislation or judicial acts are sometimes impossible to enforce due to the fact that enforcement problems require not only legal but also political solutions.

The issue of the statute of limitations is also relevant. Due to the fact that the first illegal actions against destroyed or damaged property were committed in 2014, there is a problem of the expiration of the statute of limitations, which is three years in accordance with the Civil Procedure Code of Ukraine and the Code of Administrative Procedure of Ukraine. This issue needs to be reviewed at the legislative level.

## 2. The problem of access to justice of internally displaced persons

The protection of the rights of internally displaced persons in court remains relevant due to the problem of access to justice, i.e. the ability of people to obtain protection of their rights through justice.

7 O. Rogach and Y. Panina, Actual problems of protection of property rights by internally displaced persons, "Implementation and protection of the rights of internally displaced persons": Materials of the second international scientific-practical conference (April 20, 2018, Uzhhorod), pp. 124–130.

First, the hostilities and lack of security led to the impossibility of real protection for persons in the territory temporarily out of Ukraine's control. There are a number of issues related to the protection of human rights, including access to justice. The population living in the Donetsk and Luhansk regions have difficulties accessing courts located in territories controlled by the Ukrainian government, including through the loss or destruction of case materials before and during the process of moving or changing territorial jurisdiction. Persons living in non-government--controlled areas are forced to travel long distances from the conflict zone to file lawsuits or attend court hearings in Ukrainian-controlled areas[8].

Another issue is the situation when it is impossible to implement or review court decisions made by the courts of the Luhansk or Donetsk regions and the Autonomous Republic of Crimea. It is impossible to demand such cases from the judicial authorities in the territories temporarily not under the control of the Ukrainian authorities for their implementation in the controlled territories. An option to get out of this situation is the procedure provided by procedural law to restore a lost case. Documents or their copies shall be attached to the application for resumption of lost proceedings, even if they are not duly certified, preserved by the applicant or in the case.

Secondly, there are rights protection issues that can be identified depending on the categories of participants, for example, the realization of the protection of children's rights. Children living in the occupied territories are restricted in recognizing or exercising their family rights and freedoms. There are problems not only in deciding on cases of evasion of parental responsibilities, deprivation of parental rights, child abuse, recognition of the child's right to live with one parent or illegal maintenance (relocation) of children, but also in the implementation of such decisions in the occupied territories. Difficulties arise due to the impossibility of carrying out executive actions in the territories temporarily not under Ukraine's control.

Also, one of the problems that arises in protecting the rights of internally displaced persons is the problem of recovering lost documents that are evidence in the case, the subject of the claim, as well as those that can confirm the right to representation in court. These issues are of particular importance in view of the significant deterioration of the property and material situation of internally displaced persons, their loss of property, as well as the threat of loss of the right to inheritance. Thus, starting from December 1, 2014, documents, even those bearing the Ukrainian seal, issued in the territory temporarily not controlled by Ukraine, are considered invalid and have no legal force. However, as an exception such documents may be

8 Thematic report: Access to justice in the context of the conflict in Ukraine, December 2015. OSCE Special Monitoring Mission to Ukraine 2015, http://www.osce.org/uk/ukraine-sm-m/212321?download=true (accessed 17.04.2020).

taken into account by the court and assessed together with other evidence in their entirety and interrelation in the proceedings.

In Ukrainian judicial practice, there are already facts of the acceptance of documents issued in the temporarily uncontrolled territory of Ukraine. However, it does not mean that the court recognizes documents issued by the occupying power or legitimizes this power; in this case, these documents are accepted and evaluated together with other evidence as an exception[9]. The panel of judges of the Administrative Court of the Cassation of the Supreme Court ruled that documents issued by the occupying power should be recognized if their non-recognition restricts the rights of citizens (Supreme Court Decision of October 22, 2018 in case no.235/2357/17).

A possible solution to the problem of access to justice for internally displaced persons is to use the latest information technologies in court proceedings. E-justice is beginning to develop in many countries around the world and, depending on the technical and legal level, various possibilities of using Internet resources are allowed, such as electronic filing of applications and other documents in court, court hearings using electronic means (videoconferencing) and other proceedings. With the help of the introduction of a single judicial information and telecommunication system in Ukraine, not only will the registration of applications, complaints and other documents received and sent by the court be carried out, but cases will be divided, as well ast he exchange of documents (sending and receiving documents) in electronic form between courts, between the court and the participants in the trial, between the participants in the trial, sending court decisions and other procedural documents to the official e-mail addresses of the participants of the trial and performing other procedural actions in electronic form. But the full implementation of e-justice in Ukraine requires a set of organizational, legislative, technical and political measures not only at the state level but also at the level of citizens. Numerous problems of electronic declaration have revealed technical problems with the existence of documents in electronic form. In addition, the legislation does not specify the mechanism for creation and existence of electronic cases, liability for entering false information or destruction of information. That is, the introduction of e-justice should be based on a comprehensive analysis of the financial feasibility of such implementation; ease of use, not only for judges, but also for participants in the process; development of a mechanism for translating cases into electronic form; determining the mechanism for evaluating evidence, etc. Only the gradual introduction of e-justice will make it possible to improve this mechanism in the light of experience. The introduction of e-justice will ensure the implementation of the

9 O. Zdebsky, G.Yurovska and O. Shapovalova, Problematic issues of protection of the rights of internally displaced persons, http://yurradnik.com.ua/wp-content/uploads/2017/03/Zdebskiy-SHapovalova_YUrovska.pdf (accessed 18.04.2020).

principle of concentration, but will lose the significance of the principle of immediacy, which provides the personal research and evaluation of all evidence by the court.

## Conclusions

Based on the analysis, it is possible to conclude that despite the general compliance of Ukrainian legislation with international standards for the protection of the rights of internally displaced persons, as well as the positive changes in the legislation, there are some shortcomings in the legislation that need to be improved or supplemented. At the state level it is required:

- to determine the procedure for payment of pensions and other social benefits to citizens living in the territories of the Donetsk and Luhansk oblasts temporarily not controlled by the government of Ukraine;
- to introduce a program of preferential lending for construction or purchase of housing;
- to determine the forms, methods and procedure for determining the amount of compensation that the state must pay to internally displaced persons in the event of destruction or other damage to property located in the conflict zone;
- to provide access to justice not only to citizens living in the territories of the Donetsk and Luhansk oblasts temporarily not controlled by the government of Ukraine, but also to citizens living in the territory controlled by the government of Ukraine.

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# Poland's Stance on the Refugee and Migration Crisis in the European Union

**Abstract:** The increased influx of refugees into Europe in 2015 put a strain on Europe's common asylum system. The European Union was faced with the challenge of solving this urgent problem, and was forced to take interim measures. In September 2015, the Council took two decisions: the first to relocate 40,000 applicants and the second to relocate 120,000 applicants to Member States. The relocation decisions were based on the principles of solidarity and fair sharing of responsibility as expressed in Article 80 of the TFEU. 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. However, states cannot, on the basis of security considerations, arbitrarily decide not to fulfill the obligations arising from the relocation decisions. Poland's stance on the solutions adopted by the EU has evolved; the changes were dictated by internal as well as external factors.
**Keywords:** Refugee-migration crisis, relocation, principle of solidarity, national security

## Introduction

The area of freedom, security, and justice is a field of shared competence between the European Union and the Member States. The EU's asylum policy aims to grant appropriate status to any third-country nationals who require international protection in one of the Member States. To this end, the Common European Asylum System has been introduced. A key solution in this system is the adoption of the mechanism, criteria, and procedures for determining the Member State responsible for examining an asylum application. The increased influx of immigrants to European Union countries has been a major challenge to the existing system.

In 2015–2016, a huge number of foreigners came to Europe seeking refuge. They were mainly people fleeing war and terror from countries in the Middle East and Africa. In 2015, 1,255,600 people applied for refugee status or another form of protection in EU countries. This was a significant increase of 123% compared to 2014 when the number of applicants was 562,680. Those seeking refuge were mainly citizens of Syria (362,800 people), whose numbers doubled, Afghanistan (178,200 people), whose numbers nearly quadrupled, and Iran (121,500 people), whose numbers increased sevenfold compared to 2014. Applications by nationals of these countries accounted for more than half of all asylum applications[1].

UNHCR data shows that more than 1 million refugees and migrants arrived in Greece alone in 2015 and early 2016[2]. In October 2015, arrivals to Greece peaked at 10,000 people per day[3]. The problem of mass influx has also affected other countries, most notably Turkey and Italy.

The European Union faces a huge challenge in solving the migration crisis. This paper shows what temporary measures the European Union has taken to handle this emergency situation. The stance of Poland, which held a parliamentary election during the migration crisis, is also significant in this situation. Did the election affect the implementation of the commitments? In the context of the relocation cases considered by the Court of Justice of the European Union, which resulted from the application of the temporary solutions adopted, it seems appropriate to present the stance of Poland, in particular with regard to the principle of solidarity in the implementation of asylum and relocation policy versus state security.

## 1. Measures Taken by the EU in the Face of the Migration Crisis

As a part of the creation of the Common European Asylum System, the European Union introduced criteria and mechanisms for the responsibility of a single state for examining an asylum application. The principles first adopted in the Convention Implementing the Schengen Agreement and in the Dublin Convention were refined in internal acts of the European Parliament and of the Council, commonly referred to as the Dublin II Regulation, and as Dublin III, which amended the former. Criteria were adopted to determine which country would examine the application: the principle of family unity, the issuance of a residence permit or visa, irregular bor-

1 Eurostat news release 44/2016, 4.03.2016, https://ec.europa.eu/eurostat/documents/2995521/7203832/3–04032016-AP-EN.pdf/790eba01–381c-4163-bcd2-a54959b99ed6 (accessed 18.02.2020).

2 Data cited fromhttps://www.unhcr.org/greece.html?query=migrants%202015 (accessed 29.02.2020).

3 EU and... the migration crisis, https://op.europa.eu/webpub/com/factsheets/migration-crisis/pl/ (accessed 18.02.2020).

der crossing or residence, and legal entry[4]. In practice, however, the entry criterion was used most often, with the result that Greece and Italy had to bear a disproportionate share of the burden of examining asylum applications. This created huge disparities and plunged the European asylum system into chaos. The already-inefficient asylum system in Greece[5] completely collapsed.

The mass influx of immigrants exposed the weaknesses of the European asylum system. Questions arose about the responsibility of individual states and their solidarity in implementing the European Union's asylum policy. Pursuant to Article 67(2) of the TFEU[6], "[The Union] shall ensure the absence of internal border controls for persons and shall frame a common policy on asylum, immigration and external border control, based on solidarity between Member States, which is fair towards third-country nationals. For the purpose of this Title, stateless persons shall be treated as third-country nationals." Similarly, Article 80 of the TFEU provides that "[t]he policies of the Union [including the asylum policy] (…) and their implementation shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States." Whenever necessary, the Union acts adopted pursuant to this Chapter shall contain appropriate measures to give effect to this principle.

Such a deep crisis prompted the institutions of the European Union to take action. Initially, the European Council, at its extraordinary meeting held on April 23, 2015, decided, among other things, to increase assistance to the frontline countries and to consider options for organizing emergency relocation of migrants on a voluntary basis[7]. However, as early as the meeting held on June 25 and 26, 2015, the European Council decided on the need for relocation from Italy and Greece in which all countries would participate, and addressed the issues of return, readmission, reintegration, and cooperation with countries of origin and transit[8].

4 M. Zdanowicz, Rozporządzenia Dublin II i Dublin III z polskiej perspektywy, (in:) L. Brodowski and D. Kuźniar-Kwiatek (eds.), Unia Europejska a prawo międzynarodowe. Księga pamiątkowa dedykowana Prof. Elżbiecie Dyni, Rzeszów 2015, pp. 399–402.

5 *Ibidem*, p. 404.

6 Treaty on the Functioning of the European Union (consolidated version) (O.J.C 326, 26.10.2012, pp. 0001–0390).

7 European Council, Press Release, Extraordinary European Council Meeting (23 April 2015), https://www.consilium.europa.eu/pl/press/press-releases/2015/04/23/special-euco-statement/ (accessed 18.02.2020).

8 European Council, Conclusions, European Council Meeting (25 and 26 June 2015), EUCO 22/15, https://data.consilium.europa.eu/doc/document/ST-22–2015–INIT/pl/pdf (accessed 18.02.2020).

In September 2015, the Council made two decisions: first to relocate 40,000 applicants[9] and second to relocate 120,000 applicants to Member States[10]. In addition, Greece and Italy received support in creating so-called "hotspots," or rapid registration points for migrants. They were supposed to improve the management of the incoming migrants. The EU also deployed experts from Member States to assist in the screening and registration of these individuals.

With most immigrants coming to Europe through Turkey, cooperation with the Turkish government was inevitable[11]. In March 2016, at the initiative of Germany, an agreement was signed whereby, starting from March 20, 2016, "all new irregular migrants entering Greece from Turkey will be sent back to Turkey." Instead, "each return of a Syrian from the Greek islands to Turkey will be accompanied by resettlement of another Syrian from Turkey to the EU"[12]. In addition, the EU allocated EUR 6 billion under the EU Facility for Refugees in Turkey. As emphasized by Joanna Dobrowolska-Polak, the legal basis for readmission of migrants was to be the 2001 Greek–Turkish agreement on readmission of irregular migrants and the EU Asylum Directive of 2013. However, the author points at doubts related to considering Turkey as a "safe third country" when implementing the procedures contained in these acts[13].

In 2016, the European Commission proposed a reform of the EU asylum policy that provided for, among other things, a permanent refugee distribution system that would be triggered automatically in a crisis, as well as the possibility to buy out of the relocation obligation[14]. This proposal was met with criticism from states, and in 2017 the European Parliament proposed a solution that, among other things, moved

9 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 (O.J.L 239, 15.9.2015, pp. 146–156).

10 Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece (O.J.L 248, 24.9.2015, pp. 80–94).

11 M. Ineli-Ciger, Time to Activate the Temporary Protection Directive: Why the Directive can Play a Key Role in Solving the Migration Crisis in Europe, "European Journal of Migration and Law" 2016, vol. 18, p. 11.

12 European Council, EU–Turkey Statement, 18 March 2016, https://www.consilium.europa.eu/pl/press/press-releases/2016/03/18/eu-turkey-statement/(accessed 18.02.2020).

13 J. Dobrowolska-Polak, Turcja, Unia Europejska i uchodźcy. Porozumienia w sprawie zarządzania kryzysem migracyjnym, "Biuletyn Instytutu Zachodniego" (special series "Uchodźcy w Europie") 2016, no. 229, pp. 3–4. Similarly, K.M. Greenhill notes that the EU treats Turkey as a safe country, despite growing human rights violations and repression of the free Turkish press. K.M. Greenhill, Open Arms Behind Barred Doors: Fear, Hypocrisy and Policy Schizophrenia in the European Migration Crisis, "European Law Journal" 2016, vol. 22, no. 3, p. 326.

14 Proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, COM (2016) 270 final.

away from placing excessive burdens on the state of first entry and introduced relocation based on a permanent corrective allocation system to states with the lowest admission rate[15]. Barbara Mikołajczyk assesses the Commission's draft as restrictive, both to Member States and to persons seeking international protection. On the other hand, according to that author, the amendments of the European Parliament refer more to the principle of solidarity contained in Article 80 of the TFEU and take greater account of the rights of migrants[16]. Also, Sophie Capicchiano Young believes that the Commission's draft exacerbates inequalities in the burden placed on Member States, mainly due to the removal of financial safeguards for countries that are particularly vulnerable to an influx of refugees[17].

In its meeting held in June 2018, the European Commission highlighted, among other things, the need to dismantle the "smugglers' business model"[18] and to tackle migration at source, i.e. to develop a partnership with Africa, and pointed to the need to build consensus on the Dublin Regulation in order to reform it based on a balance between responsibility and solidarity[19].

## 2. Poland's Stance on the Implementation of the Relocation Decisions

Of the numerous instruments used by the EU institutions to address the migration crisis, the acts on relocation have been of fundamental importance. In September 2015, the Council adopted two such decisions. Council Decision (EU) 2015/1523 of 14 September 2015 provided for relocation of persons in clear need of international protection, from Greece and Italy to other EU Member States. Over two years, 40,000 people would be affected: 24,000 from Italy and 16,000 from Greece (Article 4). Member States were to report regularly, at least every three months, the number of applicants they could rapidly relocate to their territory (Article 5(2)). The decision therefore gave Member States the possibility to decide how many people

15 Draft European Parliament Legislative Resolution on the proposal for a regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, COM (2016) 0270 – C8–0173/2016 – 2016/0133(COD).

16 B. Mikołajczyk, Mechanizm dubliński na rozdrożu – uwagi w związku z pracami nad rozporządzeniem Dublin IV, "Europejski Przegląd Sądowy" 2018, no. 3, p. 9.

17 S. Capicchiano Young, Dublin IV and EXCOM: Aspirational Blunders and Illusive Solidarity, "European Journal of Migration and Law" 2017, vol. 19, p. 373.

18 For more on the crime of migrant smuggling in the context of the migrant crisis, see C. Briere, Defining the Offence of Migrant Smuggling: When the Migration Crisis Revives Old Debates, (in:) E. Kużelewska, A. Weatherburn and D. Kloza (eds.), Irregular Migration as Challenge for Democracy, Cambridge/Antwerp/Portland 2018, pp. 139–164.

19 European Council, Conclusions, European Council Meeting (28 June 2018), EUCO 9/18, https://data.consilium.europa.eu/doc/document/ST-9–2018–INIT/pl/pdf (accessed 18.02.2020).

they would admit and when. Council Decision 2015/1523 was adopted by qualified majority with the Czech Republic, Hungary, Romania, and Slovakia voting against (Finland abstained from the vote). Poland voted in favor of the decision.

Due to the ongoing high influx of migrants to Europe caused by the continued instability and conflicts in the immediate vicinity of Italy and Greece, there was a need to complement the actions taken so far to address the crisis situation more efficiently. On September 22, 2015, the Council adopted Decision 2015/1601 to relocate 120,000 applicants to other Member States. According to the commitments, 15,600 immigrants from Italy and 50,400 from Greece were to be relocated in accordance with the annexes to the Decision (Article 4(1)). Poland was therefore required to admit 1,201 applicants from Italy (Annex I) and 3,881 applicants from Greece (Annex II). The remaining 54,000 persons were to be distributed in proportion to the figures given in Annexes I and II (Article 4(1)(c)). As before, the Council made its decision by qualified majority. The Czech Republic, Hungary, Romania, and Slovakia voted against this proposal, and the Republic of Finland abstained from voting. Poland voted in favor of the resolution.

The government formed by the Civic Platform referred to the principle of solidarity and initially declared its intent to accept 2,000 refugees. The prime minister emphasized that Poland was able to provide such a number of immigrants with decent living conditions. At the same time, Prime Minister Kopacz noted that many foreigners from across our eastern border, mainly Ukrainians, were coming to Poland. These people worked legally in Poland[20]. The government advocated the separation of refugees from economic migrants, the sealing of the external borders of the European Union, and the full vetting of persons Poland intended to accept by Polish security services[21]. In its efforts to solve the refugee and migration crisis, the government of Prime Minister Ewa Kopacz also advocated stricter protection of the EU's external borders, fighting the smuggling of people, and providing assistance to refugee camps in Syria, Lebanon, and Jordan.

As emphasized by Konrad Pędziwiatr and Agnieszka Legut, the government of Ewa Kopacz justified not only its restraint with regard to the declared quota, but also its selectivity in the selection of the refugees. The conservative nature of such a stance was also connected with the demand for a shift in the emphasis on the actions taken outside the EU area or at its external borders[22].

20 Prime Minister Ewa Kopacz, "Poland will accept 2,000 refugees. This is an expression of European solidarity," 21 July 2015, https://www.premier.gov.pl/wydarzenia/aktualnosci/premier-ewa-kopacz-polska-przyjmie-2000-uchodzcow-to-wyraz-solidarnosci.html (accessed 18.02.2020).

21 Prime Minister Ewa Kopacz, "Poland is and will be safe, pro-European, and tolerant," 20 September 2015, https://www.premier.gov.pl/wydarzenia/aktualnosci/premier-ewa-kopacz-polska-jest-i-bedzie-bezpieczna-proeuropejska-i.html (accessed 18.02.2020).

22 K. Pędziwiatr, A. Legut, Polskie rządy wobec unijnej strategii na rzecz przeciwdziałania kryzysowi migracyjnemu, p. 684, https://www.academia.edu/30941600/Polskie_rz%C4%85dy_wobec_

As Mieczysław Stolarczyk has pointed out, before the parliamentary election (October 25, 2015), the discussion concerning refugees and migrants intensified. Refugee and migration issues became an important part of the pre-election debate in Poland[23]. The parliamentary election held in Poland on October 25, 2015 was won by the Law and Justice (PiS) party, which was endowed with the mission to form a new government. On the day of her appointment as Prime Minister, Beata Szydło said that her government would honor the decisions that had been taken on the European level. However, she emphasized that on the issue of acceptance of refugees, the most important goal would be to ensure the security of Polish citizens[24]. In her statement, Prime Minister Szydło said: "the refugee issue also makes us aware of the need to be clear about solidarity. It should consist in sharing what is good and being ready to help when extraordinary or dangerous events occur"[25].

In its first months, Szydło's government postulated preparation of the process of selection of the refugees to be relocated in such a way as to minimize the risk of entry into Poland of persons who could pose a threat to national security, mainly terrorists. In addition, a great deal of emphasis was placed in EU discussions on the issue of measures that needed to be taken to reduce the flow of refugees to Europe. This plan was to be based on three pillars:

- firstly, on the maximum sealing of the EU's borders and developing procedures to separate economic migrants from real refugees;
- secondly, on helping countries located next to areas of instability so that a maximum number of refugees can stay in camps in their territory;
- thirdly, on conducting activities aimed at ending conflicts so that it becomes possible for those displaced by hostilities to return to their homes[26].

The PiS government expressed its readiness to accept the first group of 100 refugees by the end of March 2016, as a part of the relocation from Italy and Greece.

unijnej_strategii_na_rzecz_przeciwdzia%C5%82ania_kryzysowi_migracyjnemu (accessed 18.02.2020).

23 M. Stolarczyk, Stanowisko Polski wobec kryzysu migracyjno-uchodźczego Unii Europejskiej, "Krakowskie Studia Międzynarodowe" 2017, no. 2, p. 32.

24 Prime Minister Beata Szydło, "We will do everything to make Poles feel safe," 16 November 2015, https://www.premier.gov.pl/wydarzenia/aktualnosci/premier-beata-szydlo-zrobimy-wszystko-aby-polacy-czuli-sie-bezpiecznie.html (accessed 18.02.2020).

25 The Sejm of the Republic of Poland, statement of Prime Minister Beata Szydło,18 November 2015, https://www.premier.gov.pl/expose-premier-beaty-szydlo-stenogram.html (accessed 18.02.2020).

26 "The Szydło government will not change the decisions of the Kopacz government on refugees," 16 November 2015, https://wiadomosci.dziennik.pl/polityka/artykuly/505626,polska-przyjmie-uchodzcow-rzad-szydlo-nie-zmieni-ustalen-rzadu-kopacz-w-sprawie-imigrantow.html (accessed 18.02.2020).

They were supposed to be Christians from Syria or Iraq[27]. After the terrorist attacks in Brussels on March 22, 2016, the PiS government stiffened its stance on the acceptance of refugees under the EU relocation scheme.

On April 1, 2016, the Sejm held a debate followed by a resolution on Poland's immigration policy. The Polish parliament negatively assessed the decision of the Council of the European Union of September 22, 2015 on the relocation of 120,000 refugees. It called on the Polish government to apply particularly carefully the national criteria of refugee policy, which should extend special protection to single women, children, large families, and religious minorities. It expressed strong opposition to any attempt to establish permanent EU mechanisms for allocation of refugees and migrants[28].

The stance of the Polish government on admission of Christian families and the stance of the Sejm on protection of particular groups, as expressed in the resolution, raise serious doubts. This is because granting protection only to selected groups of persons in need of international protection results in unequal treatment of foreigners and constitutes a violation of Article 3 of the 1951 Refugee Convention, which provides that "the Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin"[29]. Atle Grahl-Madsen has emphasized that a person who meets the criteria specified in Article 1 of the Convention (the definition of a refugee) is entitled *ipso facto* to the benefits provided by the Convention[30]. Bogdan Wierzbicki has emphasized that the act of recognition as a refugee is only declarative and not constitutive[31]. Of key importance in this respect is the stance of the UNHCR, which indicates that a person is a refugee within the meaning of the 1951 Convention if he or she fulfils the criteria contained in its definition. This must be the case before refugee status is formally granted. Therefore, recognition of refugee status does not make someone a refugee, but merely confirms the fact that they are one[32]. Therefore, even at the procedural

27 "The first refugees will arrive in Poland by the end of March. They are to be thoroughly vetted," 8 January 2016, https://tvn24.pl/wiadomosci-z-kraju,3/szydlo-polska-przyjmie-pierwszych-uchodzcow-do-konca-marca, 608966.html (accessed 18.02.2020).

28 The Sejm of the Republic of Poland, Resolution of the Sejm of the Republic of Poland of 1 April 2016 on Poland's immigration policy, 1 April 2016, http://orka.sejm.gov.pl/proc8.nsf/uchwaly/18_u.htm (accessed 18.02.2020).

29 Convention Relating to the Status of Refugees, Geneva 28 July 1951, Journal of Laws of 1991, no. 119, item 515.

30 A. Grahl-Madsen, The Status of Refugees in International Law, Leyden 1966, pp. 157, 340.

31 B. Wierzbicki, Uchodźcy w prawie międzynarodowym, Warsaw 1993, p. 57.

32 Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees HCR/IP/4/Eng/REV.1. Reedited, Geneva January 1992, UNHCR 1979, p. 7, https://www.unhcr.org/4d93528a9.pdf (accessed 18.02.2020).

stage, the provisions of the Convention cannot be applied in a discriminatory manner that results in unequal treatment.

On July 26, 2017, the Commission released a report that shows that Poland had not relocated or declared the number of applicants for admission since December 2015. Similarly, Hungary had not taken any action since relocation began, and the Czech Republic had not relocated any persons at all since August 2016 and had not made any new commitments for over a year. The Commission called on these countries to immediately start relocation[33].

## 3. Relocation and the Principle of Solidarity and Fair Sharing of Responsibility between Member States (in the Context of Proceedings before the CJEU in Cases C643/15 and C647/15)

Hungary and Slovakia had a negative attitude towards the relocation of refugees from Greece and Italy from the very beginning. They voted against Council Decision (EU) 2015/1523 and Council Decision (EU) 2015/1601. This resulted in the filing of actions by the Republic of Slovakia (C643/15) and the Republic of Hungary (C647/15) for the annulment of Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection in favor of Italy and Greece. By order of the president of the Court[34], Poland was admitted as an intervene or supporting the demands of Slovakia and Hungary. On September 6, 2017, the Court of Justice, sitting in the Grand Chamber, delivered its judgment dismissing the actions[35].

The applicants' allegations concerned several issues. One of them was incorrect reference to Article 78(3) of the TFEU as the legal basis for the contested decision. The applicants alleged that, although Decision (EU) 2015/1601 was adopted under the non-legislative procedure and is therefore formally a non-legislative act, due to its content and effects, it must nevertheless be regarded as a legislative act. They pointed

33 European Commission, Report from the Commission to the European Parliament, the European Council and the Council, Fourteenth report on relocation and resettlement, COM (2017) 405 final, 26 July 2017, https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/20170726_fourteenth_report_on_relocation_and_resettlement_en.pdf (accessed 18.02.2020).

34 By order of the president of the Court of 29 April 2016, the Kingdom of Belgium, the Federal Republic of Germany, the Hellenic Republic, the French Republic, the Italian Republic, the Grand Duchy of Luxembourg, the Kingdom of Sweden, and the Commission were admitted as intervenors supporting the demands of the Council in cases C643/15 and C647/15.

35 Court of Justice, Judgment of the Court (Grand Chamber) of 6 September 2017, Slovak Republic (C643/15) and Hungary (C647/15) / Council of the European Union (Joined Cases C643/15 and C647/15), 6 September 2017,http://curia.europa.eu/juris/document/document.jsf;jsessionid=18E2D9F5DDD0645EE9D1C90BA3F79020?text=&docid=194081&pageIndex=0&doclang=PL&mode=lst&dir=&occ=first&part=1&cid=6962956 (accessed 18.02.2020).

out that it amended, in a fundamental manner, a number of legislative acts of EU law. The Court emphasized that a legislative act can be considered to be a legislative act of the Union only if it is adopted on the basis of a provision of the Treaty which expressly makes reference either to the ordinary legislative procedure or to a special legislative procedure (paragraph 62 of the judgment). The Court referred to Article 78(3) of the TFEU, which provides that the Council adopts provisional measures on a proposal from the Commission and after consulting the parliament, and in no way directly refers to either the ordinary legislative procedure or the special legislative procedure (paragraph 65 of the judgment). Consequently, the Court held that since the measures that may be adopted on the basis of Article 78(3) of the TFEU are not adopted in the context of a legislative procedure, they must be classified as "non--legislative acts" (paragraph 66 of the judgment).

The Slovak Republic and Hungary claimed that Article 78(3) of the TFEU is not a valid legal basis for adoption of the contested decision, since it is not provisional. In the opinion of those states, it cannot be regarded as a "provisional measure" because its term was set at two years with the possibility of extension. The Court pointed out that Article 78(3) of the TFEU, which was the legal basis for the adoption of the Decision, allows adoption of "provisional measures" only (paragraph 89 of the judgment). The Court argued that an act should be regarded as "provisional" only if its purpose is not to regulate a matter permanently and, moreover, if its duration is strictly limited (paragraph 90 of the judgment). The decision to apply measures for a period of 24 months is justified due to the fact that relocation of such a large number of persons as envisaged in the contested decision is an unprecedented and complex operation. Preparing and carrying it out requires coordination between administrative bodies of the various states and thus takes time (paragraph 97 of the judgment). The Court also rejected the allegations concerning infringement of essential procedural requirements.

The allegations concerning the merits of the case should also be indicated. The Slovak Republic, supported in that regard by Poland, argued that the contested decision was not appropriate for attaining the objective which it pursued and, therefore, violated the principle of proportionality. Hungary also raised a plea of breach of the principle of proportionality. In the opinion of those countries, the relocation mechanism provided for in the decision was inadequate as it could not address the structural deficiencies of the asylum systems of Greece and Italy. The Court pointed out that the relocation mechanism was only one part of a whole spectrum of measures designed to alleviate the difficulties faced by Greece and Italy. The decision also provided for other forms of aid, including operational and financial support (paragraphs 212–216 of the judgment).

The Court pointed out that, where one or more Member States are in an extraordinary situation, the burden resulting from the application of provisional measures must be shared by all the other Member States in accordance with the principle of

solidarity and fair sharing of responsibility between the Member States. The Court emphasized that under Article 80 of the TFEU, it is on this principle that the EU's common asylum policy is based (paragraph 291 of the judgment). Iwona Wróbel points out that the Polish version of the discussed judgment contains the phrase "the common EU asylum policy is based on this principle." The English version contains a stronger phrase, i.e. "that principle governs EU asylum policy," which is in line with the wording of Article 80 of the TFEU in English. This principle therefore governs the EU's asylum policy[36].

Also, Advocate General Yves Bot, in his opinion[37], considered that Decision (EU) 2015/1601 was an expression of solidarity between Member States. In view of the actual inequality between Member States on account of their geographical location and their vulnerability to mass migratory flows, the nature of the adoption of measures on the basis of Article 78(3) of the TFEU is overriding. The measures contained in the Decision allow for the implementation of the principle of solidarity and fair sharing of responsibility between Member States, as laid down in Article 80 of the TFEU (points 16 and 22 of the opinion). The Advocate General noted that the contested decision had effect in all Member States and required that a balance be struck between the various interests of the states. Consequently, the search for such a balance, taking into account the situation of all the Member States of the European Union and not the specific situation of one Member State only, cannot be regarded as contrary to the principle of proportionality. The Advocate General invoked the principle of solidarity and fair sharing of responsibility between the Member States laid down in Article 80 of the TFEU, which implies that the burdens arising from temporary measures adopted under Article 78(3) of the TFEU in favor of one or more Member States in a situation of extreme migratory pressure should be borne by all other Member States (point 303 of the opinion)[38].

This raises the key question of defining the essence of solidarity in European Union law. Cezary Mik has pointed out that in EU law, solidarity is embedded in various normative structures. He distinguishes solidarity as an objective and a value, solidarity as a legal principle, and solidarity as a rule of conduct. In the author's opinion, sol-

36 I. Wróbel, Tymczasowy mechanizm relokacji osób ubiegających się o ochronę tymczasową jako gwarancja prawa do azylu w Unii Europejskiej – glosa do wyroku Trybunału Sprawiedliwości z 6.09.2017 r. sprawy połączone C-643/15 i C-647/15, Republika Słowacka i Węgry przeciwko Radzie Unii Europejskiej, "Europejski Przegląd Sądowy" 2017, no. 12, p. 35.

37 Opinion of Advocate General Yves Bot delivered on 26 July 2017, Cases C643/15 and C647/15, Slovak Republic, Hungary v. Council of the European Union, 26 July 2017, https://eur-lex.europa.eu/legal-content/PL/ALL/?uri=CELEX:62015CC0643 (accessed 18.02.2020).

38 The principle of solidarity was also referred to by the Advocate General in Case C715/17, European Commission v. Republic of Poland, stating that the Court had repeatedly called for solidarity over the years and that the principle of solidarity sometimes inevitably means acceptance of the sharing of burdens (points 249–251 of the opinion). Case C715/17 will be further discussed in section 4.

idarity is certainly regarded as a legally recognized objective of the European Union. Solidarity as an objective of the European Union cannot be the basis of a claim, for it is not a rule that governs conduct. Solidarity as a principle of EU law has no single legal basis. In a substantive sense, a principle should be understood as a generally applicable method (way) of operation of the EU, seen as an integrating relationship between the institutions and the Member States. The principle of solidarity does not generally allow claims to be made directly on the basis of this principle (however, as an exception, it can be the basis for more specific obligations), but it has high interpretative significance or is a determinant of specific rules of conduct. Solidarity can also be a rule of conduct that occurs most often not as a single legal norm, but as a set of norms[39].

Article 80 of the TFEU explicitly provides that asylum policy and its implementation are governed by the principle of solidarity and fair sharing of responsibility between Member States. Sonia Morano-Foadi identifies three types of solidarity/responsibility of a Member State: 1) towards refugees and migrants; 2) towards another Member State; and 3) towards the EU itself[40]. Anna Doliwa-Klepacka has pointed out that solidarity between Member States has been repeatedly invoked in crisis situations[41].

Neža Kogovšek Šalamon has expressed the view that it is clear from the wording of this provision that it does not impose concrete and practical legal obligations on EU institutions and Member States, but rather sets out a binding guiding principle for shaping policies and their implementation[42]. Esin Küçük also sees the principle of solidarity as a tool for interpretation. Therefore, in the author's opinion, both primary and secondary EU law that regulates the principles of border control, asylum, and immigration should be based on Article 80 of the TFEU. If a provision concerning these areas may be interpreted in different ways, this should be done in the light of Article 80 of the TFEU, i.e. in such a way as to give effect to the principle of solidarity and fair sharing of responsibility[43].

Sonia Morano-Foadi notes that the terms "solidarity" and "responsibility" are used together in the same article, which suggests that the two concepts are related.

39 C. Mik, Solidarność w prawie Unii Europejskiej. Podstawowe problemy teoretyczne (in:) C. Mik (ed.), Solidarność jako zasada działania Unii Europejskiej, Toruń 2009, pp. 48–52.

40 S. Morano-Foadi, Solidarity and Responsibility: Advancing Humanitarian Responses to EU Migratory Pressures, "European Journal of Migration and Law" 2017, vol. 19, pp. 241–249.

41 A. Doliwa-Klepacka, Case Comment –Joined Cases C-643/15 and C-647/15 Slovak Republic and Hungary v. Council of the European Union, 6 September 2017, "Polish Review of International and European Law" 2019, vol. 8, issue 2, p. 153.

42 N. Kogovšek Šalamon, The Principle of Solidarity in Asylum and Migration within the Context of the European Union Accession Process, "Maastricht Journal of European and Comparative Law" 2017, no. 24, p. 698.

43 E. Küçük, The Principle of Solidarity and Fairness in Sharing Responsibility: More than Window Dressing?, "European Law Journal" 2016, no. 22, p. 463.

The author explains that equitable sharing of responsibility, i.e. burden-sharing between Member States, is a direct consequence of solidarity, while the latter is the motivation for burden-sharing. Together, they are the constitutive elements of a single principle applicable to the asylum policy[44].

Daniel Thym and Evangelia (L.) Tsourdi indicate that Article 80 of the TFEU requires the EU to establish immigration, asylum, and border control policies on the basis of the principle of solidarity. At the same time, the EU institutions have a margin of discretion in determining the requirements[45]. Alberto Miglio stresses that both Articles 67(2) and 80 of the TFEU establish solidarity between Member States as a fundamental legal principle of the EU that concerns border control, asylum, and immigration policies. According to the author, the use of the phrases "*shall* frame a... policy...*based* on solidarity" and "*shall* be governed" indicates that the principle was intended to be legally binding. Furthermore, Article 80 of the TFEU places specific obligations on the EU institutions to take action[46]. It should therefore be pointed out that the relocation decision implements the principle of solidarity enshrined in Article 80 of the TFEU and details the division of responsibilities between the Member States.

In addition, Poland also formulated the argument that states that are "almost ethnically homogeneous, such as Poland, "whose population significantly differs, culturally and linguistically, from the migrants, would have to make much greater efforts and bear a greater burden than other receiving Member States in meeting the mandatory relocation quotas (paragraph 302 of the judgment). Because Poland's arguments in the intervenor's comments go well beyond those of Hungary, they are inadmissible (paragraph 303 of the judgment). However, the Court pointed out that if relocation were to be made strictly conditional on the existence of cultural and linguistic links between each applicant for international protection and the Member State to which the applicant was to be relocated, adoption of a binding relocation mechanism would be impossible (paragraph 304 of the judgment). Izabela Wróbel rightly points out that building EU policy and law in any area on ethnic, cultural, and linguistic differences would be contrary to the fundamental principles of the EU's operation[47].

44 Morano-Foadi, Solidarity and Responsibility, *op. cit*., pp. 230–231.

45 D. Thym and E. (L.) Tsourdi, Searching for Solidarity in the EU Asylum and Border Policies: Constitutional and Operational Dimensions, "Maastricht Journal of European and Comparative Law" 2017, no. 24, pp. 611–612.

46 A. Miglio, Solidarity in EU Asylum and Migration Law: A Crisis Management Tool or a Structural Principle?, (in:) E. Kużelewska, A. Weatherburn and D. Kloza(eds.), Irregular Migration as a Challenge for Democracy, Cambridge/Antwerp/Portland 2018, pp. 36–37.

47 I. Wróbel, Tymczasowy mechanizm relokacji, *op. cit*., p. 35.

## 4. Relocation and Safeguarding of Public Order and Internal Security (in the Context of the Proceedings before the CJEU in Cases C715/17, C718/17, and C719/17)

As a consequence of Poland's failure to accept even a single applicant under the relocation procedures envisaged by Council Decisions (EU) 2015/1523 and 2015/1601, despite the Commission's repeated calls and the submission of a reasoned opinion on July 26, 2017, the Commission brought an action before the Court of Justice on December 21, 2017. On December 22, 2017, the Commission brought analogous actions against Hungary (C718/17) and the Czech Republic (C719/17). The Court decided to hear the cases together.

The Commission alleged that Poland had failed to comply with its obligations under Article 5(2) of the relocation decision, namely, among other things, to regularly specify the number of applicants who can be relocated to its territory, that it had breached further obligations under Article 5(4–11) of those two decisions, and that it had failed to carry out the actual relocation.

Judgment in the combined cases was scheduled for April 2, 2020. On October 31, 2019, Advocate General Eleanor Sharpston delivered her opinion[48]. The Advocate General did not agree with the parties' arguments concerning the admissibility of complaints (points 91–152 of the opinion). In the complaints on the merits, the key issue that arises is protection of public order and protection of internal security. Poland claimed that implementation of the relocation decision would prevent it from maintaining public order and safeguarding internal security (it invoked Article 72 of the TFEU in conjunction with Article 4(2) of the TEU). It pointed out that these were matters for which it retained exclusive competence (point 172 of the opinion).

Referring to Poland's stance on this matter, the Advocate General first recalled two earlier judgments of the Court, which stated in their reasoning that the "concept of 'public order' entails, in any event, the existence –in addition to the disturbance of the social order which any infringement of the law involves –of a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society." The Court further held that, in relation to the fundamental rights of third--country nationals, concepts such as "security" cannot be "determined unilaterally by each Member State without any control by the institutions of the European Union" (points 196–197 of the opinion).

48 Opinion of Advocate General Eleanor Sharpston delivered on 31 October 2019, Case C715/17 European Commission v. Republic of Poland, Case C718/17 European Commission v. Republic of Hungary, Case C719/17 European Commission v. Czech Republic, 31 October 2019, http://curia.europa.eu/juris/document/document.jsf;jsessionid=B29EF27095845EDA5B7B-D98CD73E6077?text=&docid=219670&pageIndex=0&doclang=pl&mode=lst&dir=&occ=-first&part=1&cid=7123291 (accessed 18.02.2020).

The Advocate General explained that the *acquis communautaire* regarding asylum, in particular the Dublin III Regulation and the Qualification Directive, uses the principle of individual assessment of the applicant as a basis for the decision (point 99 of the opinion). The Advocate General pointed out that Article 72 of the TFEU[49] expressly recognizes the competence and responsibility of Member States for maintaining public order and safeguarding internal security. The relocation decisions, on the other hand, provide that Member States may decide to refuse to relocate an applicant only if there are reasonable grounds to indicate that the person concerned could pose a threat to national security or public order. On the other hand, in cases where a Member State has reasonable grounds to believe that an applicant poses a threat to its security, it informs other Member States of this fact (points 202–204 of the opinion). Article 72 of the TFEU is not a conflict-of-law rule that grants priority to the competences of Member States over measures adopted by the European Union legislator. It is a rule that governs coexistence of laws. Member States retain competence to act in a given area (it is not transferred to the European Union). Nevertheless, the measures taken must comply with the overarching principles that Member States accepted when they became Member States (point 212 of the opinion). The derived law of the European Union, as part of the acq*uis communautaire* pertaining to asylum matters, offers an appropriate legal framework within which a Member State's legitimate concerns about national security, public order, and protection of the public may be taken into account in relation to an individual applicant for international protection (point 221 of the opinion).

It should be emphasized that a feature of proceedings for the granting of the status of a refugee is individual assessment of each case. The UNHCR points out that each person's situation must be assessed on its own merits[50]. Article 4(3) of the Qualification Directive[51] states explicitly: "The assessment of an application for international protection is to be carried out on an individual basis". The Dublin III Regulation[52] also adopts a case-by-case application assessment approach, as clearly demonstrated by the need for a personal interview (Article 5). A number of specific provisions of the Regulation refer explicitly to an individual assessment, e.g. assess-

49 Article 72 of the TFUE: "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."

50 Handbook on Procedures, *op. cit.*, p. 9.

51 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 (O.J.L 337/9, 20.12.2011).

52 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 (O.J.L 180/31, 29.06.2013).

ments of the "risk of absconding" (Article 2(n)), the situation of a minor (Article 8(2)), detention (Article 28(2)), and exchange of information (Article 34(10)).

In 2015, the number of applicants for international protection per million residents in Poland was only 270. This represented 0.8% of the total number of applications submitted in the EU. In comparison, the highest numbers of registered protection applicants per million inhabitants in 2015 were recorded in Hungary (17,699, which accounted for 13.8% of the total amount of applications submitted in the EU), Sweden (16,016 – 12.4%), Austria (9,970 – 6.8%), Finland (5,876 – 2.6%), and Germany (5,441 – as much as 35.2%)[53].

The above data indicates that Poland did not have a real and genuine problem resulting from the mass influx of foreigners to Europe. The area of security is a competence shared between the EU and the Member States (Article 4(2) of the TFEU). The relocation decisions explicitly state (Article 5(7)) 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. Therefore, each Member State, including Poland, has the full and sovereign right to assess whether extension of international protection to a particular person could constitute a threat to national security. However, states cannot, on the basis of security considerations, arbitrarily decide not to fulfil the obligations arising from the relocation decisions.

## Conclusions

The mass influx of immigrants exposed the weaknesses of the European asylum system. The European Union has taken a number of actions, mainly ones establishing provisional measures in the area of international protection in favor of Italy and Greece. This solution provided for the relocation of applicants to other Member States of the European Union. Decision 2015/1523 introduced a voluntary relocation mechanism for 40,000 people from Greece and Italy, while Decision 2015/1601 to relocate 120,000 applicants allocated mandatory quotas of people to be accepted by individual Member States. Poland voted in favor of both resolutions.

However, later on, Poland's stance on the refugee crisis evolved, due to both internal and external factors. Initially, the government formed by the Civic Platform referred to the principle of solidarity and initially declared its intent to accept 2,000 refugees. As a result of the election held on October 25, 2015, the Law and Justice Party was victorious and formed a government headed by Prime Minister Szydło. She announced that her government would honor the decisions adopted on the refugee issue and declared its readiness to receive the first group of 100 people. However, quickly after the terrorist attacks in Brussels, the lower chamber of the Polish parlia-

53 Eurostat news release 44/2016, *op. cit.*

ment expressed its opposition to the EU's permanent refugee allocation mechanisms. Declarations to accept only Christians from Syria or single women, children, or religious minorities raise serious doubts about equal and non-discriminatory treatment of foreigners. In the end, Poland did not accept a single applicant under the relocation scheme.

Some Member States showed a negative attitude towards the relocation decisions, which resulted, among other things, in an action before the Court of Justice to annul Decision (EU) 2015/1601. Poland was an intervenor in this case. The Court dismissed the action. Article 80 of the TFEU establishes the principle of solidarity and fair sharing of responsibility between Member States in the implementation of asylum policy. It follows that the burden arising from the provisional measures adopted under Article 78(3) of the TFEU in favor of one or more Member States in a situation of extreme migratory pressure should be borne by all other Member States. Decision (EU) 2015/1601 is based on the principle of solidarity expressed in Article 80 (EU) of the TFEU and implements this principle. It is only the decision that defines the specific obligations and share of responsibilities for Member States.

Due to the failure of Poland, Hungary, and the Czech Republic to accept any applicants under the relocation procedures, the Commission brought an action for failure to fulfil the obligations under Decisions (EU) 2015/1523 and 2015/1601 before the Court of Justice. In her opinion, the Advocate General rejected Poland's arguments related to maintenance of public order. 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. However, states cannot, on the basis of security considerations, arbitrarily decide not to fulfil the obligations arising from the relocation decisions.

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# Internal Forced Migration in Ukraine: Legal Aspects

**Abstract:** The article is devoted to the study of the problems of forced internal migration in Ukraine. Forced migration significantly affects the geography, structure and dynamics of the population of Ukraine and its regions, the level of development of productive forces in the regions, the state of the labor market and the socio-economic characteristics of living standards of different categories of the population.

At present, migration processes in Ukraine are difficult to track, given that the last demographic census was conducted in 2001, and therefore it is difficult to establish the actual number of people in our country, and, accordingly, almost impossible to determine the number of internally displaced persons.

According to the results of the study, the authors conclude that internally displaced persons (under current legislation) have the same rights and freedoms as other citizens of Ukraine permanently residing in Ukraine. However, in practice, internally displaced persons face restrictions on their rights and freedoms due to subjective factors. The basic rights that the state guarantees to internally displaced persons include: the right to employment, pensions, compulsory state social insurance, education, suffrage and economic rights. It is expedient to introduce tax benefits for enterprises founded by internally displaced persons, as well as to provide these benefits for enterprises that employ internally displaced persons.

**Keywords**: internal forced migration, internally displaced persons, Ukraine.

## Introduction

The issue of internal migration in Ukraine during the hybrid war in the East is currently in the public spotlight for several reasons. First, it is important to respect the rights of internally displaced persons under the Convention for the Protection of Human Rights and Fundamental Freedoms. Second, this issue is significant and important for the country's economy. Third, proper protection of the rights and interests of internally displaced persons will facilitate the end of the war in the East as soon as possible.

In the recent past (during the Soviet era), the issue of internal migration was very acute, as a large part of the population of the Soviet Union for a long time did not even have passports. Older people do remember the times when, even to go to the bazaar, they had to ask for a certificate from the head of the village council. If he wanted to, he would give it; if he didn't want to, you wouldn't go to the market or to city relatives. In Soviet times, the passport less status of peasants, especially collective farmers, until 1974 could not be called anything but enslavement[1].

Forced migration significantly affects the geography, structure and dynamics of the population of Ukraine and its regions, the level of development of productive forces in the regions, the state of the labor market and the socio-economic characteristics of living standards of different categories of the population. Both statistical and sociological data confirm that internally displaced persons are a resource for the development of communities, regions and countries in general, and mass examples of successful implementation of labor, entrepreneurial, scientific, educational and cultural activities of migrants provide a basis for optimistic assessments of their role and prospects, and the development of society, economy and state[2]. From the economic aspect, as a result of internal forced migration, the sex and age composition, and educational and professional levels, of the population of the donor region and the recipient region undergo significant changes. On the one hand, it leads to the elimination of labor shortages, increasing competitiveness, labor efficiency, economic growth and curbing inflation, on the other, increasing competition, reduction in the quality of work (through retraining displaced persons),

1 Seliany i pasporty: radianske "kriposne pravo" (Peasants and passports: Soviet "serfdom"), https://www.poglyad.tv/selyany-i-pasporty-radyanske-kriposne-pravo/ (accessed 12.03.2020) (in Ukrainian).

2 O.F. Novikovaand O.V.Pankova, Vymushena mihratsiia vnutrishno peremishchenykh osib Ukrainy: stan, problemy, shliakh y rozv'iazannia (Forced migration of internally displaced persons of Ukraine: state, problems, solutions),"Problemy ekonomiky" 2018, no. 3. p. 224 (in Ukrainian).

an increase of the burden on the housing market and often an increase in the level of economic and other crime, and so on[3].

Normative legal acts still do not clearly define the term "internal forced migration." In the scholarly literature in this regard, it is proposed to understand internal forced migration as forced territorial movement of citizens within administrative-territorial units without crossing the state border, due to armed conflict, environmental catastrophe, and so on[4].

Forced internal migration in Ukraine has a "hybrid" character – being both group and family, partly permanent (some migrants do not want to return to the places where they lived before the military conflict), partly temporary (some migrants returned in less than six months), partly alternating (some migrants periodically return to the conflict zone for work, and then go again to a new place of residence); migration from the conflict zone in eastern Ukraine is political, military and economic, and the main causes are hostilities, economic crisis and lack of work in the conflict zone[5].

At present, migration processes in Ukraine are difficult to track, given that the last demographic census was conducted in 2001, and therefore it is difficult to establish the actual number of people in our country, and, accordingly, almost impossible to determine the number of internally displaced persons. The Ministry of Social Policy registers these persons in accordance with the Procedure for Registration and Issuance of a Certificate of Registration of an Internally Displaced Person, which was approved by the Resolution of the Cabinet of Ministers of Ukraine no. 509 of October 1, 2014.

Pursuant to paragraph 2 of the above-mentioned procedure, an adult or a minor internally displaced person applies for a certificate in person, and a minor or an incapacitated person or a person with limited legal capacity applies, through a legal representative with an application for registration approved by the Ministry of Social Policy, to the structural subdivision on social protection of the population of the district, the district in Kyiv state administrations, executive bodies of the city, or the district in cities (in case of formation) of councils[6]. According to the Ministry

3 Y.V. Soloviov, Vnutrishnia vymushena mihratsiia yak ob'iekt derzhavnoho rehuliuvannia (Internal forced migration as an object of state regulation), "Teoriia ta praktyka derzhavnoho upravlinnia" 2016, no. 3., p. 149 (in Ukrainian).

4 O. Kapinus, Derzhavne rehuliuvannia vnutrishnoi vymushenoi mihratsii: poniatiino-katehorialnyi apparat (State regulation of internal forced migration: conceptual and categorical apparatus), "Public Administration and Local Government" 2017, no. 3, p. 20 (in Ukrainian).

5 Y. Soloviov, Determinatsiia osnovnykh poniat mihratsiinykh protsesiv, shcho protikaiut v Ukraini, v rakursis u chasnykh realii (Determination of the basic concepts of migration processes taking place in Ukraine, in the perspective of modern realities), "Aspekty publichnoho upravlinnia" 2019, no. 6–7, T. 7, p. 26 (in Ukrainian).

6 Poriadok oformlennia I vydachi dovidky pro vziattia na oblik vnutrishno peremishchenoi osoby, yakyi zatverdzhenyi postanovoiu Kabinetu Ministriv Ukrainy (The procedure for registration and

of Social Policy of Ukraine, the number of internally displaced persons in the period 2016–2020 fluctuates on average around 1,500,000 people. More exact detail is given in the corresponding diagram (fig. 1)[7].

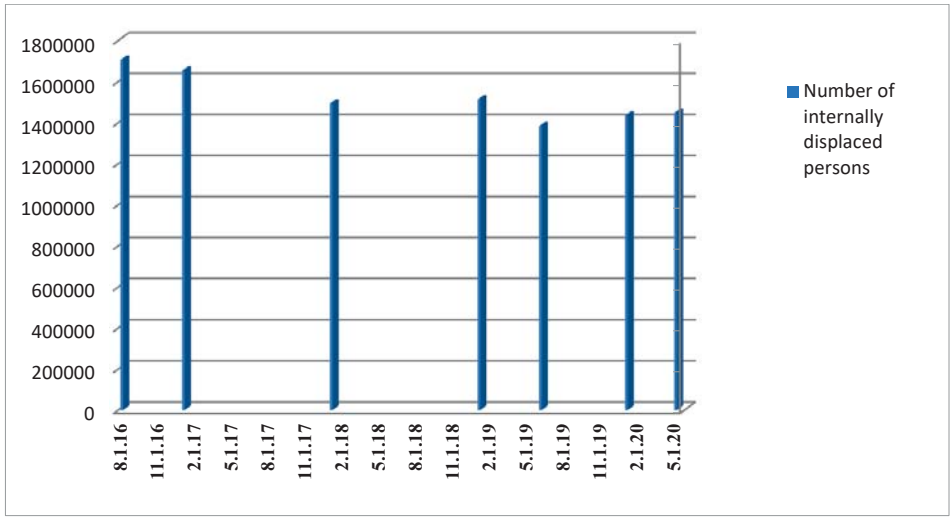


*Fig. 1. Dynamics of the number of internally displaced persons in Ukraine for 2016–2020*

The main legal act that regulates the rights of internally displaced persons is the Law of Ukraine "On Ensuring the Rights and Freedoms of Internally Displaced Persons." Article 1 of this Law states that an internally displaced person is a citizen of Ukraine, as is a foreigner or a stateless person who is on the territory of Ukraine legally and has the right to permanent residence in Ukraine, who was forced to leave or left his place of residence as a result or to avoid adverse effects of armed conflict, temporary occupation, widespread violence, human rights violations and natural or man-made emergencies[8].

K.O. Krakhmalyova notes that the main features of the administrative and legal status of internally displaced persons in Ukraine are its temporary nature; the endowment of internally displaced persons with special additional rights and

issuance of a certificate of registration of an internally displaced person, which was approved by the Cabinet of Ministers of Ukraine) no. 509 vid 1 zhovtnia 2014 r., https://zakon.rada.gov.ua/laws/show/509–2014-p#Text (accessed 12.03.2020) (in Ukrainian).

7 Vnutrishno peremishcheni osoby (Internally displaced persons), Ministerstvo sotsialnoi polityky Ukrainy, https://www.msp.gov.ua/timeline/Vnutrishno-peremishcheni-osobi.html (accessed 12.03.2020) (in Ukrainian).

8 Pro zabezpechennia prav I svobod vnutrishno peremishchenykh osib (On ensuring the rights and freedoms of internally displaced persons), Zakon Ukrainy vid 20.10.2014 no.1706–VII, https://zakon.rada.gov.ua/laws/show/1706–18#Text (accessed 12.03.2020) (in Ukrainian).

responsibilities due to the peculiarities of their situation and needs; the dependence of the scope and procedure for the exercise of such rights and obligations on whether such internally displaced persons are citizens of Ukraine, foreigners or stateless persons by their general administrative and legal status; and being common to a certain group of persons recognized by law as internally displaced[9].

It is important for internally displaced persons that they enjoy the same rights and freedoms in accordance with the constitution, laws and international treaties of Ukraine as other citizens of Ukraine permanently residing in the country. Thus, the state guarantees internally displaced persons the observance of the following basic rights: employment, pensions, compulsory state social insurance, education, suffrage, etc. In addition, the state seeks to ensure an adequate level of material security for internally displaced persons (economic rights). Let us consider in more detail each category of the rights of internally displaced persons.

*The right to employment.* Employment is provided by establishing relations governed by employment agreements (contracts), conducting business and other activities not prohibited by law. As rightly noted by U.Y. Sadova, O.T. Ryndzak and N.I. Andrusyshyn, in order to develop measures to address the most pressing problems of IDPs, and the problems of their employment in particular, their plans for the future are of key importance. After all, different patterns of behavior of internal migrants require appropriate methods of regulation[10]. The territorial bodies of the central executive body, which implements the state policy in the field of employment and labor migration, are responsible for clarifying plans for the future of internally displaced persons.

H.A. Kaplina points out that the difficulty of employing migrants from Donbass is partly explained by their professional specifications. The most vulnerable to unemployment were workers in the coal industry and metallurgy, whose employment is limited by the lack of demand for their profession in other regions of Ukraine. For such migrants, the issue of vocational retraining for more popular and widespread professions is relevant[11].

9 K.O. Krakhmalyova, Administratyvno-pravove zabezpechennia status vnutrishno peremishchenykh osib (Administrative and legal support for the status of internally displaced persons), dys. kand. yuryd. nauk: 12.00.07 / Instytut derzhavy i prava imeniV.M. Koretskoho NAN Ukrainy, Kyiv 2017, p. 169 (in Ukrainian).

10 U.Y. Sadova, O.T. Ryndzak and N.I. Andrusyshyn, Aktualni problem zainiatosti vnutrishno peremishchenykh osib: rehionalnyi aspect (Actual problems of employment of internally displaced persons: regional aspects), "Demohrafiia ta sotsialna ekonomika" 2016, no. 3 (28), p. 181 (in Ukrainian).

11 H.A. Kaplina, Trudovi prava ta zainiatist vnutrishno peremishchenykh osib v Ukraini (Labor rights and employment of internally displaced persons in Ukraine), "Aktualni problem prava: teoriia I praktyka" 2016, no. 32, p. 66 (in Ukrainian).

Legal regulation of employment is carried out on the basis of the Law of Ukraine "On Employment". This law, in Article 24, defines special measures to promote the employment of internally displaced persons, namely:

- compensation to the registered unemployed person from among internally displaced persons of actual transport costs for moving to another administrative-territorial unit of the place of employment, as well as costs for passing a preliminary medical and narcological examination in accordance with the legislation, if necessary for employment;
- compensation of the employer's labor costs for employment of registered unemployed persons from among internally displaced persons on the terms of fixed-term employment contracts lasting not more than six calendar months;
- reimbursement of the expenses of the employer who employs the registered unemployed from among internally displaced persons for a period of not less than twelve calendar months, for retraining and advanced training of such persons[12].

An internally displaced person who resigned (terminated another type of employment), in the absence of documents confirming the fact of dismissal (termination of another type of employment), periods of employment and insurance history, is registered as unemployed and receives unemployment benefits, social and other services under the obligatory state social insurance in case of unemployment, according to the legislation. An internally displaced person who does not have the documents required to be granted unemployment status is granted unemployment status without the requirements applicable under the normal procedure. Until the receipt of documents and information on periods of employment, wages (income) and insurance history, unemployment benefits are granted to such persons in the minimum amount established by law in case of unemployment.

*Pension provision.* A citizen of retirement age, a person with a disability, a child with a disability or another person in difficult life circumstances who is registered as an internally displaced person has the right to receive social services in accordance with Ukrainian legislation at the place of registration of the internally displaced person.

The problem of paying pensions is very acute given that a certain number of pensioners remained in the occupied territory of Donbass and did not register as internally displaced persons. In this regard, the question arose as to whether such a person is entitled to receive pensions from the state budget of Ukraine. The answer

12 Pro zainiatist naselennia (On employment of the population), Zakon Ukrainy vid 05.07.2012 no. 5067–VI, https://zakon.rada.gov.ua/laws/show/5067–17#Text (accessed 12.03.2020) (in Ukrainian).

to this question was provided by the Grand Chamber of the Supreme Court in a ruling of September 4, 2018, which states the following:

The person filed a lawsuit in court, stating that she is a pensioner and receives an old-age pension. In connection with the fighting and anti-terrorist operation in the village at her place of residence, she was forced to leave her permanent residence and move to the Bakhmut district of the Donetsk region, where she was registered as an internally displaced person. However, on April 1, 2017, the defendant suspended the payment of her pension on grounds not provided for in Article 49 of the Law of Ukraine of July 9, 2003, no. 1058–IV "On Compulsory State Pension Insurance": the right to a pension and its receipt cannot be linked to a person's place of residence.

The Grand Chamber of the Supreme Court upheld the recognition and cancellation of the order of the Pension Fund of Ukraine dated March 24, 2017 to terminate the plaintiff's pension until clarification and the obligation of the Pension Fund of Ukraine to resume payment of the plaintiff's old-age pension from April 1, 2017. At the same time, the court pointed out that by terminating the accrual and payment of the plaintiff's pension in the absence of the grounds provided by the laws of Ukraine, the defendant violated the plaintiff's right to receive a pension. The right to a pension is protected under Article 1 of Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms of November 4, 1950. The defendant's interference with the plaintiff's right to peaceful possession of their property in the form of a pension is not based on the law. The establishment by the court of the illegality of the interference, i.e. the commission of acts not in the manner prescribed by law, is sufficient grounds for concluding that the plaintiff's right to peaceful possession of their property has been violated. In view of the above, according to the court of first instance, the termination of the plaintiff's pension from April 1, 2017 was not carried out in the manner prescribed by Law 1058–IV, but in the context of Article 1 of Protocol No. 1 to the Convention, such interference was not lawful[13].

*Compulsory state social insurance.* Internally displaced persons from the temporarily occupied territory are entitled to receive material support, insurance benefits and social services under the obligatory state social insurance in connection with temporary disability, from an accident at work oran occupational disease that caused disability, directly from the working bodies of the Social Insurance Fund of Ukraine at the actual place of residence. Material support and insurance payments are assigned in the presence of the necessary documents confirming the right to these payments, and in their absence, according to the State Register of Compulsory State

13 Postanova Velykoi Palaty Verkhovnoho Sudu (Resolution of the Grand Chamber of the Supreme Court), vid 4 veresnia 2018 roku u spravi no. 805/402/18, http://www.reyestr.court.gov.ua/Review/76945461 (accessed 12.03.2020) (in Ukrainian).

Social Insurance, in the manner prescribed by the Board of the Social Insurance Fund of Ukraine.

*The right to education.* A registered internally displaced person has the right to continue to obtain a certain level of education in other regions of Ukraine at the expense of the state budget or other sources of funding. Children of internally displaced persons or children who have the status of a child affected by hostilities and armed conflicts, who study in primary school, secondary or vocational schools, regardless of subordination, types and forms of ownership, are provided with free meals according to the order established by the Cabinet of Ministers of Ukraine.

The process of social adaptation of internally displaced children is important. In this regard, I. Khomyshyn notes that conflicts between peers who are internally displaced children in secondary and high school, in addition to common causes related to the specifics of age, arise on the basis of different identification and the increased sensitivity of migrant children to the negative[14].

*The right to vote.* An internally displaced person exercises his/her right to vote in elections for the president of Ukraine, the people's deputies of Ukraine, local elections and referendums in accordance with the procedure established by law. However, internally displaced persons have the right to vote in a nationwide constituency (for political parties), but they cannot vote in single-member constituencies under a majority system, which effectively restricts their voting rights.

*Economic rights.* Ensuring compliance with this category of rights is the most difficult, as it requires the allocation of funds from the state budget of Ukraine. As noted by L.A. Veselska, despite the difficult situation in Ukraine and financial tensions in the country, a comprehensive program to address the problems of internally displaced persons is being implemented. To date, Ukraine has developed and implemented an appropriate regulatory framework, taking into account the specifics of state regulation of migration processes. At the same time, at the local level, the socialization of internally displaced persons is hampered by the insufficient financial independence of the regions, and the overloading of social services[15].

Ukraine is taking all measures to provide material support to internally displaced persons, which is reflected in the provision of:

– financial assistance;
– affordable housing;
– employment benefits.

14 I. Khomyshyn, Realizatsiia prava na osvitu vnutrishno peremishchenymy osobamy (Realization of the right to education by internally displaced persons), http://science.lpnu.ua/sites/default/files/journal-paper/2018/jun/13343/30.pdf (accessed 12.03.2020) (in Ukrainian).

15 L.A. Veselska, Spetsyfika derzhavnoho rehuliuvannia vymushenoi mihratsii v Ukraini za umov antyterorystychnoi operatsii (Specifics of state regulation of forced migration in Ukraine under the conditions of anti-terrorist operation), "Investytsii: praktyka ta dosvid" 2017, no.19, p. 62 (in Ukrainian).

In particular, Ukraine has a procedure for providing monthly targeted assistance to internally displaced persons to cover living expenses, including housing and communal services, approved by the Cabinet of Ministers of Ukraine no. 505 of October 1, 2014, which defines the mechanism for providing this assistance. Financial assistance is provided to internally displaced persons who have moved from the temporarily occupied territories of the Donetsk and Luhansk regions, the Autonomous Republic of Crimea and the city of Sevastopol. The total amount of family allowance is calculated as the sum of the amount of assistance per family member and may not exceed UAH 3,000 (equivalent to 110 euros)[16].

The state also provides a subvention to local councils for the purchase of housing for temporary use by internally displaced persons. At the same time, the state subvention is 70% of the cost of housing, and the rest is financed by local councils. In addition, it is possible to provide a mortgage loan to internally displaced persons to purchase their own housing at 3% per annum. Such a loan is provided for up to 20 years, but not more, until the borrower reaches retirement age.

It is important to improve state programs to promote employment and the employment of internally displaced persons, to create vacancies that would meet the educational and qualification characteristics of internally displaced persons. The Ministry of Veterans, Temporarily Occupied Territories and Internally Displaced Persons of Ukraine has announced a new project, "Housing + Work", which will allow IDPs to find available housing and jobs in Ukraine. According to Ruslan Kalinin, Deputy Minister of the Ministry for Veterans, Temporarily Occupied Territories and Internally Displaced Persons of Ukraine, an interactive map should be introduced, on which every IDP can see available housing, jobs and also "Housing + Work". There are companies that want to hire migrants and provide them with temporary housing[17].

It should be noted that subventions from the state budget of Ukraine do not cover all the necessary costs to ensure the economic rights of internally displaced persons, in connection with which we propose the introduction of tax benefits for enterprises founded by internally displaced persons. We also consider it appropriate to provide tax benefits for companies that employ internally displaced persons. The

16 Poriadok nadannia shcho misiachnoi adresnoi dopomohy vnutrishno peremishchenym osobam dlia pokryttia vytrat na prozhyvannia, v tomu chysli na oplatu zhytlovo-komunalnykh posluh, zatverdzhenyi postanovoiu Kabinetu Ministriv Ukrainy (The procedure for providing monthly targeted assistance to internally displaced persons to cover living expenses, including housing and communal services, was approved by the Resolution of the Cabinet of Ministers of Ukraine), no. 505 vid 1 zhovtnia 2014 r., https://zakon.rada.gov.ua/laws/show/505–2014-%D0%BF (accessed 12.03.2020) (in Ukrainian).

17 U Min veteraniv anonsuvaly novyi proekt dlia pereselentsiv "Zhytlo+robota" (The Ministry of Veterans announced a new project for displaced persons "Housing + Work"), https://www.unn.com.ua/uk/news/1853407-u-minveteraniv-anonsuvali-noviy-proekt-dlya-pereselentsiv-zhitlo--robota (accessed 12.03.2020) (in Ukrainian).

proposed tax benefits will not lead to direct payments from the budget, but will only encourage internally displaced persons and businesses that will use the work of internally displaced persons.

## Conclusions

Internally displaced persons (under current legislation) have the same rights and freedoms as other citizens of Ukraine permanently residing in the country. However, in practice, internally displaced persons face restrictions on their rights and freedoms due to subjective factors. The basic rights that the state guarantees to internally displaced persons include: the right to employment, pensions, compulsory state social insurance, education, suffrage and economic rights. It is advisable to introduce tax benefits for enterprises founded by internally displaced persons, as well as to provide these benefits for enterprises that employ internally displaced persons.

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# Migration Problems at the Regional Security Level: Reasons for Georgian Migration Abroad

**Abstract:** Migration has become one of the most current themes in the reality of Georgian society since the destruction of the Soviet Union. However, this process dates backs to the twentieth century in the history of Georgian migration. Wars, chaos and turmoil, geopolitical location, and social and political conflicts constantly triggered the population to migrate either within the country or abroad. The most recent history of Georgian migration can be divided into several waves or phases: 1. Before the 1950s (Soviet Union regime), when the population was forced to leave their living place by brutal political repressions; 2. In the period of the 1950s to the 1990s, when Georgians migrated within the territory of the Soviet Union Republic; 3. The mass migration of the 1990s, which was caused by social crisis, economic hardship, political turmoil, military conflicts (including inter-ethnic conflicts in Abkhazia (1992–1993) and South Ossetia (1988–1992) and the civil war of 1993, against the democratically elected Georgian president Zviad Gamsakhurdia; 4. The later migration outflow from Georgia was mainly recorded in 2000, when a huge wave of migrants went to Russia but, as the visa regime had been restricted, Georgian citizens had to choose another destination. This time migrants headed to European countries and the USA. It has to be mentioned that since 2002, the emigration process has become more and more diverse as the motivation of migrants varied as well as the places of destination. Unfortunately, the data that reflects the precise picture of migration in Georgia does not exist. Even the official data cannot be acknowledged as accurate information about the migrants or migration because of the absence of a precise mechanism that collects reliable statistical information. It depicts data based on various sources and methodologies that should be taken into consideration when highlighting the number of migrants.
**Keywords:** Migrants, migration, remittance, gender models, transnational mothers, stigma.

## Introduction

Currently, in a time of globalization and interdependence, some problems conceived some time ago as less plausible from an international security perspective are seen as more drastic and rigid. Among them could be named the factor of migration. It is a complex phenomenon as it is. It is mainly accumulated by different factors, such as socio-economic reasons, political turmoil, private reasons, etc. Massive labor migration in Georgia began in the 1990s. In 1991 Georgia became an independent country, which was followed by political turmoil, two armed, and the intra-border conflicts in Abkhazia and South Ossetia proved devastating to the struggling Georgian economy, which had collapsed with the breakdown of the Soviet Union. A large part of the population of what had been one of the USSR's richest and most prosperous republics found themselves jobless and impoverished. Employment guarantees prosperity – salaries, especially in the public sector, were low. The private sector, where wages were higher, could not provide a sufficient number of jobs to satisfy the demand for employment. It is thus hardly surprising that a significant part of the Georgian population resorted to emigration in order to survive economic hardship. In the years 1990–2000, Georgia was abandoned by 800,000 to 1,000, 000 citizens. The major point in Georgians' decision to emigrate was the regression of economic aspects, unemployment, and political instability in the country (in the period when Georgia became independent).

## 1. How is the Migration Process Organized?

There are some specific methods how migration is organized:
- The departure of migrants occurs with the assistance of relatives or friends (private invitations).
- It might also be organized by travel agencies or student exchange programs.
- Labor migration is often arranged by state employment services and invitations of specific employment (from the factors mentioned above, private contacts and student exchange programs occur the most often).

Hence, so-called "random" migrants are people who live and work illegally.

## 2. Gender Models in Georgian Migration

During the first years of Georgian independence, labor migration from Georgia consisted predominantly of males and was directed toward Russia. Georgian migrant laborers were occupied mostly in construction and petty trade. The problems that were intensively emerging in Russia for Georgians made migrants think about identifying different destinations, in order to gain higher income These new destinations

were Europe and the USA. Here Georgians had to meet new challenges, had new opportunities and the possibility to start a new life. With the dramatic increase of migrant women in this process who were trying to shape their destiny, there were several sharp features outlined in Georgian reality. As an old, traditional country, Georgia does not recognize migration as a suitable way to survive for Georgian women. The main function for them is thought to be caring mothers, devoted wives and housekeepers. Second, "gender as well as social equality for ancient and medieval societies is not a relevant issue. However different cultures have different traditions in this regard. According to the oral and written sources one can trace tendencies of liberalization to some extent in Georgia for different times. Georgia is a country with a women's cult and the elevated role of a woman in the society. It is emphasized by different expressions in the Georgian language: mother pillar, motherland, mother tongue, and mother-father[1]. As a woman was believed to be a caring mother, it was necessary for her to be educated. Throughout the middle ages Georgian women got educated in European educational institutions; the first institutions of higher education for women in the Caucasus – "Women's higher courses" – were opened in the capital Tbilisi in the early 20th century. After the establishment of Soviet power, women got the right to elect and to be elected. There was no difference in the salaries of men and women. Women can easily adopt men's professions[2]. Another good precondition for the total elimination of illiteracy was giving the right to girls and women to be enrolled in schools and higher institutions. As a result, there were a lot of successful women in different fields: education (successful teachers, managers), medicine (doctors, nurses), culture and art (painters, artists, actresses, etc.), the food industry. In reality, women somehow still occupy the leading position in a family workplace.

In spite of the fact that migration is challenging, as it is influenced by gender, even now, in our reality some people still have negative attitudes to women's migration, because they blame mothers for leaving their children without care. More importantly, female migrants present a greater threat to traditional ideals of family and gender relations in comparison to male migration. Male migrants maintain their traditional breadwinner roles, while female migrants cannot easily maintain their roles as mothers and housekeepers from abroad. Migrant mothers are portrayed as selfish, abandoning their children. Male migrants are viewed as altruistic, sacrificing themselves for the good of their families

1 I. Badurashvili, Illegal Migrants from Georgia: Labor Market Experiences and Remittance Behavior. Georgian Centre of Population Research (March 24, 2012), http://www.carim-east.eu/media/CARIM-East-2012-RR-39.pdf (accessed 12.09.2020).

2 N. Javakhishvili, N. Buthsashvili, Domestic Violence in Georgia: State and Community Responses, 2006–2015 (in:) M. Barkaia, A. Waterson (ed.), Gender in Georgia: Feminist Perspectives on Culture, Nation and History in the South Caucasus, New York 2018.

Young, unmarried female migrants are viewed especially negatively. By living abroad, they are not subject to traditional sources of family and community control, placing them at risk of dishonorable behavior. In the many instances where women migrate in spite of the challenge it presents to local gender norms, little is known about how women adapt to such norms[3]. Substantial demand for female immigrant workers in many industrialized countries pulls women to labor markets abroad. High rates of female labor-force participation in many industrial societies create demand for workers in traditionally female jobs such as companions for the elderly, housekeepers, and nannies. Pay in these sectors tends to be low, but as housing is often provided within the terms of employment, female immigrants may find migration cheaper and easier than men do. Additionally, women may find it easier than men to migrate without legal documents. Often working in private homes, female undocumented migrants are not always in the public eye, and therefore have some protection from deportation.

To sum up everything mentioned above, it should be underlined that due to the gradual changes in gender models, Georgian migration history has also been changed. If it has been inappropriate for women to migrate, now in the 21st century it seems to be a progression from a gender perspective, and as women's emancipation. While the feminization of migration is considered to be a progressive sign in the West, as it is associated with gender equality, it is neither socially nor culturally acceptable for Georgians. Some people believe that women's migration impacts on the demographic potential and decreases labor capacity. Today, women compete in sports, and succeed at all levels in the workplace: they occupy high positions in governmental institutions, are MPs, etc. The ground has been changed and stereotypes have been destroyed. Perceptions about men and women are impacted by societal expectations. These expectations are reflected in a set of opinions about males and females. According to some critics, people expect gender-related characteristics, such as roles, traits, physical appearance, etc. to shape an orderly pack. The gender belief system influences an understanding of women's nontraditional roles[4]. The studies of Paul Rosenhrants and Inge Broverman studied characteristic features of woman and men, and identified "competences associated with men, that include characteristics such as confident, independent, controlling and warmth expressiveness cluster, typically associated with woman, that includes traits such as warm, kind and concerned for others welfare"[5]. In spite of the fact that in the modern world Georgian women could

3 J.R.B. Palmer, S.W. Yale-Loehr and E. Cronin, Why Are So Many People Challenging Board of Immigration Appeals Decisions in Federal Court? An Empirical Analysis of the Recent Surge in Petitions for Review. Cornell University Law School 2005, https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1860&context=facpub (accessed 15.04.2020).

4 T. Shioshvili, American Ethnicity, Tbilisi 2016, pp. 115–120.

5 I.K. Broverman, S. Raymond Vogel, D.M. Broverman, F.E. Clarkson and P.S. Rosenkrantz, Sex--role stereotypes: A Current Appraisal, "Journal of Social Issues" 1972, vol. 28, pp. 59–78.

resist so many difficulties, and express readiness and flexibility to defeat challenges, Georgians still preserve the tradition of considering maternity the primary role for Georgian women. They believe that women's migration impacts on the demographic potential and decreases labor capacity, besides taking into consideration the fact that Georgian families are considered to be traditionally more patriarchal than matriarchal, so it is not hard to understand why the social stigma is still attached in their minds. They know that up to now some negative comments made by their relatives, neighbors, even family members will overlap in their minds.

## 3. The Vital Role of Georgian Migrant Women in Georgia's Budget

But the reality is completely different, as their contribution to their family well--being (even now) is vital. Employment in the United States significantly increases and improves the economic condition of many Georgian families, the remittance became the only way of income. The average income of migrants is 750–800 USD a week. The major percentage of the income of the immigrants is sent to Georgia. These remittances play a crucial role in covering the external budgetary deficit as well as the basic needs of the population. According to Georgian researchers, the majority of Georgian immigrants in the USA are women between 20 and 50; most of them are skilled professionals, knowing foreign languages. However, some are employed as domestic servants, or nurses for the sick and old people. Crossing the border of the USA, they have to make decisions, take action, plan their life, and realize their labor roles in the family independently. Speaking about the feminization of transnational migration, we have to take into consideration that it has been prompted by rising global demand for labor in specific female-type domestic jobs. According to the statistics, more than 80% of immigrants support their families with remittances, and 4% send clothes or various domestic appliances. Money is sent by means of bank transfer; on average migrants sent 21% of their income. It is important to mention that Georgian migrant women suffer from 'quilt complex', being parted from their family and children. According to the studies of the United Nations Development Program, leaving their families and starting a new life abroad, for a woman, is a novelty for such a traditional society as Georgia. The women have the new role: a bread-earner or breadwinner, which is controversial to the traditional role of women as mothers. Female migrants from Georgia become "transnational mothers," taking care of other people's children and leaving their own children in the care of husbands and/or other members of their families, such as grandparents. The division of labor in Georgian households is undergoing major changes as female emigrants have become families' primary breadwinners. International labor migration has become a key feature of the social, economic, and political development of Georgia. Migration has dramatic consequences for the demographic structure of some

Georgian regions, and remittances sent through official channels are still beneficial for many Georgian families. If the migration policy is created correctly, migration will have positive impacts on further development of the country's solid economic and political system. It will also help social problems to be solved and the budget deficit to be covered. In order to gain benefits from migration and turn the process to the positive side, it is important for Georgian policy makers to focus on the needs of people who migrate. It is essential to estimate their personal data, their destination, and reasons for migration.

## 4. Migration Data

I planned to focus on qualitative and quantitative data collection during my dissertation writing process and I intended to use my questionnaires and interviews in order to find out:

- *the real reasons for the migration of Georgian women to the US*
- *how the migrant women could defeat the challenges in the foreign country*
- *whether economic factors influence their decision to leave their homes*
- *if Georgian women migrants suffer from being neglected by their families (just demanding money from them)*
- *if the fear of social stigma still exists among migrant women*

I have interviewed Georgian women migrants and also tried to recruit their family members in the process. I wanted to find out the reasons for their migration, the obstacles they had to defeat, if they had ever been neglected by their families, etc.

I was able to conduct a total of 36 interviews – 5 Skype interviews and 31 online. I interviewed 20 women who used to live in Tbilisi and 13 from different regions of Georgia. All of them live in the different states of the US. Respondents ranged in age from 35 to 67 and were fairly well educated; 21 graduated from different Georgian universities and gained diplomas in different fields (or got an MA degree), 9 had post-secondary professional education, the others had a high school education.

What was most important for me is that I still found evidence of social stigma surrounding them, as a majority of them are guilt-ridden. They still suffer from stigma, cannot resist criticism from their husbands and family members, and are ashamed of their decision, which is considered to be wrong and inappropriate for Georgian women. Most respondents described migration as a decision they had to make because of different reasons, unwillingly. As they complain, migration is particularly harmful for mothers who had to abandon their children and cannot have them around. Some of them had regrets about their old parents who died in grief and sorrow without seeing their beloved daughters; most of their husbands have new wives, leaving children with ex-wives' parents or relatives. But many respondents said that people in general pitied migrant women, rather than condemning them, because

migration is not seen as a voluntary act. Most of them confessed that they nearly did not have to suffer from culture shock as they had lived in trouble, had a string of problems (mainly financial), and America seemed to be a "paradise" for them. The only thing they wish for is reunion with their families.

This is the detailed information about the result of the survey: there were 9 questions in the questionnaire. All of them dealt with migrants, the migration process, and reasons for migration. The first question was about the reasons for migration. 50% of migrants presented unemployment as the main reason, 42% of Georgian women migrate because of the political situation, while 8% shared the following reason: family conditions and to study abroad. The next question inquired about their adaptability to the American lifestyle, how easily they could adjust to completely new ways of living. Out of 36 women, 20 found it easy to adapt, 10 found it difficult to live in a foreign country without family. 5 women answered that it is still very difficult for them to adopt a new lifestyle. The third question was: "Do you think that the remittances Georgian women labor migrants send to their families in Georgia are still crucial for them?" 92% of migrants considered the financial support of their families as the major responsibility and the main reason for their migration to the US. Question 4 intended to find out if migrants had suffered from culture shock. 20 migrants think that they had, while 13 of them did not agree and claimed that in comparison to the shock they used to have in Georgia because of financial and social problems, the US seemed to be paradise. Only 5 migrants had to defeat the problem of culture shock. The fifth question was asked to the migrants in order to gain information about the factors that played a crucial role in the process of defeating culture shock. 56% could realize the reasons for her migration and their roles in the family, 22% percent believed that if there were no other Georgian migrants, they would not survive (they used literally this word – to survive) and the rest of the migrants thought that it was helpful for them when they could get in touch with their family members via mobile connection. On question 6, whether they are still "bread winners," 80% of migrant women answered that they still are, 15% disagreed and claimed the opposite. Setting the seventh question, I wanted to know what they missed most of all. As I found out, 58% of migrants missed their family members, 28% missed their mother country, while 8% dreamed about family atmosphere, Georgian cuisine and family dinners. The following question represented Georgian society's attitude towards Georgian migrant women. I wanted to find out if they are still being criticized for leaving family and children without care. Unfortunately, 69% of migrants are still surrounded with stigma and feel guilty about their decision. Finally, I wanted to know when they plan their final return to Georgia. As they explained, they cannot return as the socio--economic problems have not improved and still exist in their mother country. They doubt they will get employed in Georgia.

## Conclusions

International labor migration has become a key feature of the social, economic, and political development of Georgia. Migration has dramatic consequences for the demographic structure of some Georgian regions and the remittances sent through official channels are still beneficial for many Georgian families. Migration plays and will continue to play a central role in Georgia's political, economic, and social development

Moreover, migration has become the main challenge in national policy making. Many countries consider it as a national security and foreign policy priority. For migrant-receiving countries, understanding what types of people most commonly migrate is crucial for developing effective immigration policy. For migrant-sending countries, knowing who migrates is important to predict the ways in which migration will shape the country's political and economic future.

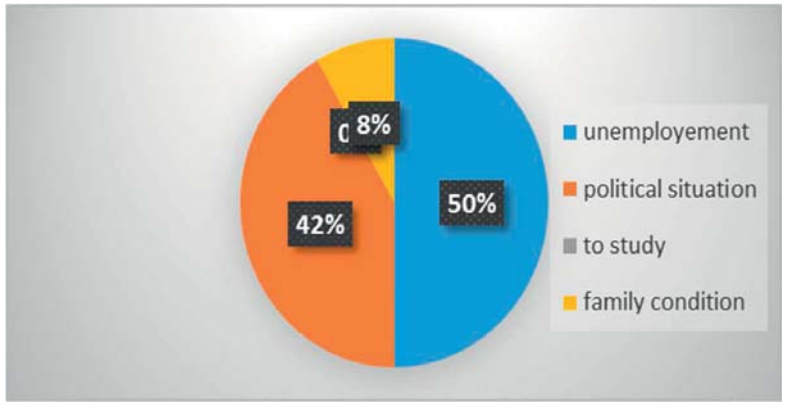
Appendix 1. Questionnaire on Georgian Migrant Women's Social and Economic Conditions – Circle the acceptable answer

| Questions | Possible answers |
|---|---|
| 1. What was the main reason for your migration? | Poor economic system of Georgia and unemployment |
| | Political situation |
| | To study |
| | Family conditions |
| | Other reasons |
| 2. How easily could you adapt the ways of the American lifestyle? | Very easily |
| | It was difficult for me |
| | I haven't yet adapted |
| 3. Do you think that the remittances Georgian women labor migrants send to their families in Georgia are still crucial for them? | Yes |
| | No |
| | I don't think so |
| 4. Did you suffer from culture shock? (a stressful situation which may occur when one changes working place, living place, different cuisine, traditions, etc) | Yes |
| | No |
| 5. In case you had (or still have) culture shock, what factors helped (helps) you to defeat it? | Socializing with Georgian migrants |
| | Using Skype calls |
| | Realizing my role in my family |
| | Other factors |

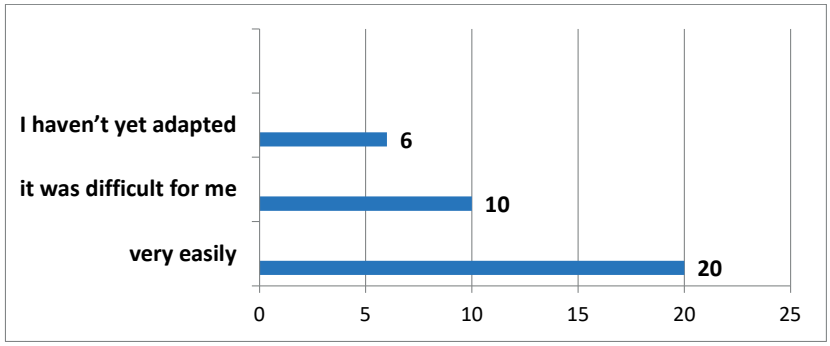
| | |
|---|---|
| 6. Do you share the opinion about the new role of Georgian women as "bread winner? | Yes |
| | No |
| | I don't think so |
| 7. Write one thing you miss most of all about Georgia. | |
| 8. Have you experienced criticism and stigmatization? | Yes |
| | No |
| 9. Are you planning your return to Georgia? | |

Appendix 2. Analysis of the Online Interview Questions

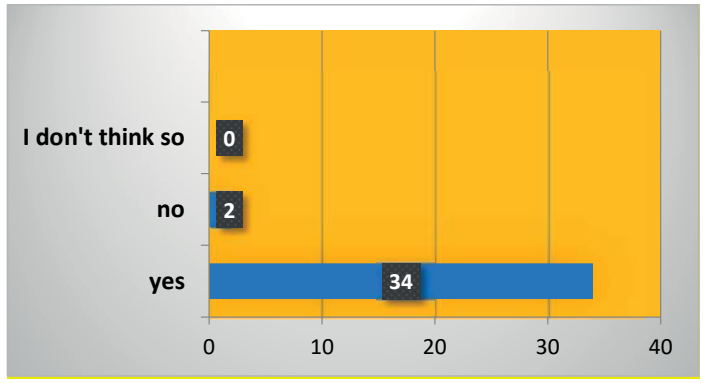
*Question 1: What was the main reason for your migration?*



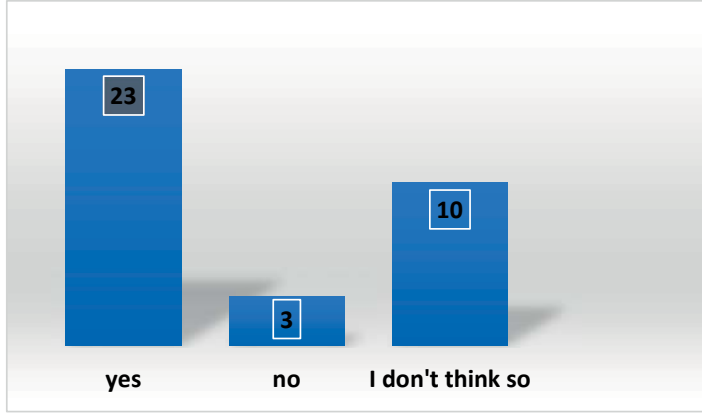

*Question 2: How easily could you adapt the ways of the American lifestyle?*



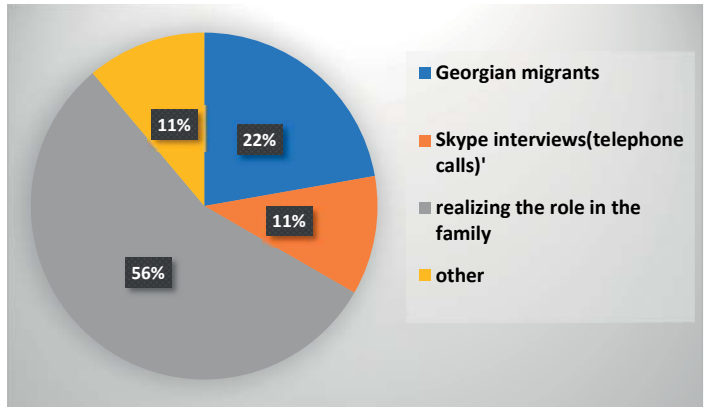
*Question 3: Do you think that the remittances Georgian women labor migrants send to their families in Georgia are still crucial for them?*



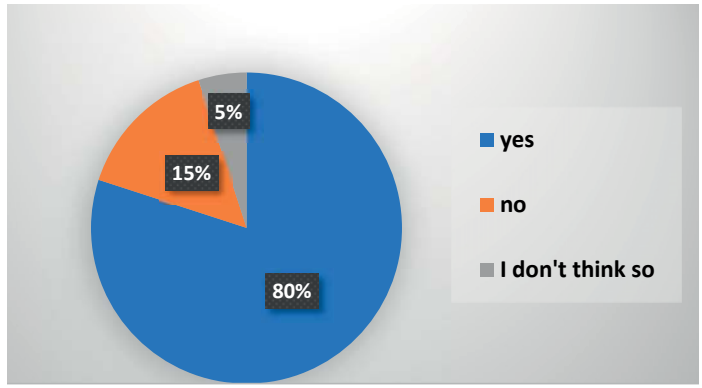

*Question 4: Did you suffer from culture shock?*



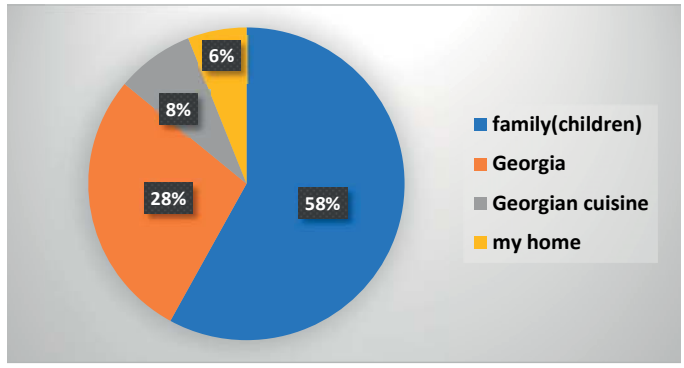

*Question 5: In case you had (or still have) culture shock, what factors helped (helps) you to defeat it?*



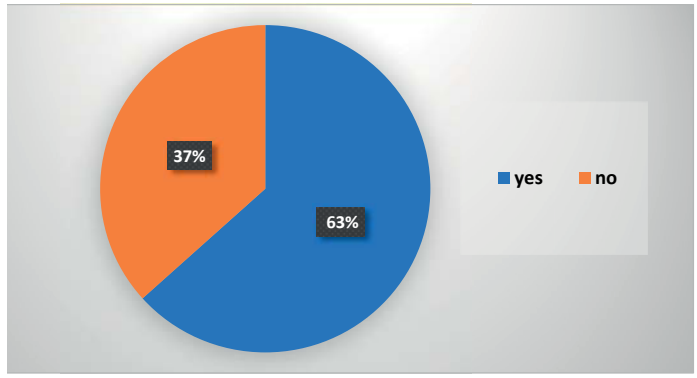
*Question 6: Do you share the opinion about the new role of Georgian women as "bread winner?*




*Question 7: Write one thing you miss most of all about Georgia.*




*Question 8: Have you experienced criticism and stigmatization?*



*Question 9: Are you planning your return to Georgia?*

– 98% of Georgian migrant women are willing to return to their families, but are not ready yet.

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# Extradition of European Union Citizens anywhere except the Russian Federation: The Case of I.N.

**Abstract:** In its recent practice, the Court of Justice of the European Union has held that European Free Trade Association (EFTA) nationals enjoy the same level of protection against extradition to a third state as EU citizens. This article analyses the reasoning of the Court and establishes a link with previous decisions on extradition matters. The author concludes that the test for extradition is still forming and its application lacks clarity and consistency.
**Keywords:** Extradition, EU citizenship, mutual recognition

## Introduction

The question of the possibility of extraditing an EU citizen to a third country is under close consideration by the Court of Justice of the European Union (CJEU). Its recent practice has shown several attempts to establish a complete and reliable test in such cases. The first attempt was made by the Court of Justice (CJ or the Court) in the Petruhhin case in 2016, then in the Adelsmayr case in 2017, then in the Pisciotti judgement of 2018 and, finally, in the most recent case of I.N. in April 2020. Although there are numerous other cases dealing with various aspects of the expulsion of EU citizens, these selected cases are compatible by their background and, more importantly, by the continuing attempt of the CJ to formulate the test for a legitimate extradition.

## 1. Background

According to the facts of the case C897/19 PPU[1],I.N. is a citizen of the Russian Federation who also obtained Icelandic citizenship on 19 June 2019. Since 20 May 2015 he was the subject of a notice for international wanted persons issued by Interpol's bureau in Moscow. The Russian authorities were seeking I.N.'s extradition on corruption charges. In 2015, I.N. escaped to Iceland, applied for asylum protection and was granted refugee protection in that country. After his attempt on 30 June 2019 to cross the border between Croatia and Slovenia as a tourist, he was arrested by the Croatian authorities. Later, under the request of the Russian authorities and the subsequent decision of the Croatian court, he was supposed to be extradited to the Russian Federation for further prosecution there. However, due to his appeal on the matter of the application of EU law to the case as a reason precluding his extradition, and referring to the Petruhhin case[2], the national court suspended proceedings and referred to the CJ.

## 2. The Judgement of the Court

In its decision, the CJ dealt with several questions, such as the general application of EU law to the matter, EU–Iceland relations and international treaties governing them, the principle *aut dedere aut iudicare* (extradite or prosecute) and human rights protection. Since I.N. did not possess EU citizenship, the Court found it impossible to apply the same line of argumentation as in the Petruhhin case, namely Art. 18 TFEU and Art. 21 TFEU. At the same time, they found it is possible to apply EU Law through the direct application of the Agreement on the European Economic Area[3] (the EEA Agreement), which belongs to the body of EU Law. Some other international treaties and "special relations" between the EU and Iceland have also been considered as crucial for the application of EU law, such as the implementation of the Schengen acquis by Iceland and the Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the surrender procedure[4], as well as its participation in the European asylum system.

1 Judgment of the Court of 2 April 2020 on the case of criminal proceedings against I.N., C 897/19 PPU.

2 Judgment of the Court of 6 September 2016 on the case of proceedings relating to the extradition of Aleksei Petruhhin, C 182/15.

3 Agreement on the European Economic Area (O.J. L 1, 3.01.1994, p. 3–522).

4 Council Decision (EU) No.2014/835 of 27 November 2014 on the conclusion of the Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the surrender procedure between the Member States of the European Union and Iceland and Norway (O.J. 2014 L 343, 28.11.2014, p. 1–2).

Despite numerous systems being applicable simultaneously to the present case, the decision of the Court is based primarily on the question of legitimate restrictions on the freedom to provide services. The starting point for the Court here was the identical interpretation of Art. 56 TFEU and Art. 36 of the EEA Agreement, both of which provide for the freedom to provide and receive services. According to the Court's opinion, I.N. had been enjoying this right to travel and receive tourist services during his family trip to Croatia. Moreover, the nationality of the EFTA state (Iceland in this case) has been interpreted as similar to EU citizenship in terms of an area of freedom, security and justice. This way of interpretation allowed the Court to focus its attention on the legitimate restrictions on the freedom to provide services, which are objective considerations, and proportionality to the legitimate objective[5].

Following the reasoning in the Petruhhin case, the Court confirmed prevention of the risk of impunity as being a legitimate objective. However, the requirement for less restrictive measures and their necessity has been interpreted in a narrow matter. Since I.N. was granted asylum by Iceland in relation to the criminal offence committed in Russia, it was perceived by the Court as an impossibility to return him for prosecution to the requesting third state. Thus, the only remaining and less restrictive option was to inform Icelandic authorities about the case and extradite I.N. there on the basis of the Agreement on the surrender procedure[6]. The Court has put cooperation and mutual assistance between the EU and Iceland, as well as the lack of an extradition treaty between the EU and Russia, as a basis for the implementation of the Petruhhin case by analogy with EFTA nationals, even though they do not possess EU citizenship. In conclusion, the Court formulated the rule of the obligation of the Member State to inform the EFTA state about the extradition request from the third state towards its nationals. And if the EFTA state confirms its jurisdiction to prosecute that person for the offences outside its territory (in the present case, on Russian territory), he must be surrendered there[7].

## 3. Opinion of the Advocate General

It is worth mentioning that the reasoning expressed by the advocate general in his opinion differs from the one delivered by the CJ. Providing the broad picture of the legal systems at stake, the advocate general mentioned in particular national (Iceland, Croatia, Russia), transnational (EU, Council of Europe, European Economic Area) and international (Geneva Convention on the status of refugees) legal systems. However, none of them prevails over another; rather, all of them create a complicated

5 Judgment of the Court of 2 April 2020, *op. cit*., point 59.
6 Council Decision (EU) No, 2014/835, *op. cit*.
7 Judgment of the Court of 2 April 2020, *op. cit*., point 76.

net of legal regulation[8]. Still, EU law applies here since I.N.'s right to receive services was restricted and in such cases there is no uncertainty about the application of EU law.

The part from the reasoning of the advocate general which is missing in the Court decision is the application of the law of refugees to the case. According to the opinion, there is a less restrictive measure to prevent impunity than extradition to Russia. It is called mutual trust, and although the advocate general did not find it in the law of the European Economic Area, he did find it in the European Asylum System represented by the Dublin III Regulation[9] and its correct application by Iceland (Iceland is the participating state responsible under Chapter III of the Dublin Regulation)[10].

Despite the differences in legal argumentation, the advocate general comes to the same conclusion on the existence of an obligation on the Croatian side (as the EU Member State) to inform Iceland (EFTA State) about the case of I.N. and, should Iceland issue an arrest warrant, to extradite I.N. to Iceland rather than to Russia.

## 4. Comment

The decision on the Petruhhin case was delivered by the CJ on 6 September 2016 and it has established a test for the surrender of EU citizens to third states under the extradition procedure. Aleksei Petruhhin was an Estonian national who was arrested on Latvian territory and was expected to be extradited to Russia on its request and on the basis of the Agreement between the Republic of Latvia and the Russian Federation on Judicial Assistance[11]. In his home country (Russia), he was accused of large-scale, organized drug-trafficking. However, the CJ decided on the impossibility of his extradition from the territory of the EU because of the potential violation of freedom of movement under Art. 21 TFEU. Restrictions on freedom of movement are interpreted by the CJ widely and in fact cover any situation where an EU citizen has been put in a disadvantaged position while exercising his or her right to move freely within the Union[12]. And as has been correctly pointed out, in such cases the

8 Opinion of Advocate General Tanchev of 27 February 2020 on the case of Ruska Federacija v I.N., C 897/19 PPU, points 78–79.

9 Regulation (EU) No. 604/2013 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 (O.J. L 180, 29.06.2013, p. 31–59).

10 Opinion of Advocate General Tanchev, *op. cit*., points 97, 105.

11 Договор между Российской Федерацией и Латвийской Республикой о правовой помощи и правовых отношениях по гражданским, семейным и уголовным делам от 03.02.1993. (Dogovor miezdu Rossiiskoi Fiedieraciei i Latviiskoi Respublikoi o pravovoi pomoszczi i pravovych otnoszeniach po grazdanskim, siemieinym i ugolovnym dielam ot 03.02.1993)

12 M. Böse, Mutual recognition, extradition to third countries and Union citizenship: Petruhhin, "Common Market Law Review" 2017, vol. 54, no. 6, p. 1786.

lack of protection against extradition to a third state will always trigger violation of freedom of movement[13]. Thus, in the Petruhhin case, requirements for his extradition have also become connected with justification of the restriction of economic freedom. These criteria are the legitimate objective[14] and proportionality[15]. The objective of preventing the risk of impunity was considered by the Court as a legitimate objective. In the case of Petruhhin, the Latvian courts lacked the jurisdiction to prosecute him, since the crime was committed on the territory of the third state (Russia) and Petruhhin himself was an Estonian national. However, to escape the risk of impunity the Court found a less restrictive measure than extradition to Russia, which is extradition to Estonia for prosecution. Thus, the Court formulated a complete test for national courts in the cases of extradition of EU citizens to third states based on the existence of a legitimate objective and the proportionality of a measure, which must be the least harmful alternative.

While a legitimate objective seems a clear and established criterion, the requirement of a "less restrictive alternative" is not that clear at all. It obviously leaves open questions: firstly, to whom it must be the least prejudicial (to the EU citizen or to the EU Member State) and, secondly, which criteria justify such a measure. In the Petruhhin case, the "less prejudicial alternative" and "equally effective" measure have been seen through the sincere cooperation principle (Art. 4 (3) TEU) and mutual recognition, which is enshrined in the Framework Decision 2002/584[16] in the form of facilitation of judicial cooperation between Member States[17]. The second argument in line with the "less restrictive measure" has been discovered by the Court in the protection of EU citizens in EU relations with the wider world in the form of extradition agreements between the EU and third countries (Art. 3 (5) TEU).[18]

In substance, the complete test offers to apply the European arrest warrant mechanism if the case concerns the EU citizen being requested by the third state or, alternatively, to extradite the EU citizen in the case of the existence of an extradition agreement between the EU and a third state. Although it was not stated by the Court which criterion should be applied earlier (the extradition agreement or the issuance of the EAW), the reasoning is based primarily on the significance of the judicial cooperation between the Member States on criminal matters, which leaves to the extradition agreement between the EU and a third country the position of the background criterion for a general consideration of the possibility of extraditing a person there.

13 *Ibidem*, p. 1787.
14 Judgment of the Court of 6 September 2016, *op. cit*., point 34.
15 *Ibidem*, point 38.
16 Council Framework Decision (JHA) 2002/584 of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (O.J. L 190, 18.7.2002, p. 1–20), Art. 1 (2).
17 Judgment of the Court of 6 September 2016, *op. cit*., points 42–43.
18 *Ibidem*, points 44–45.

This line of argumentation was extended by the Court in the Pisciotti case[19]. This case concerned an Italian national who was arrested in Frankfurt am Main airport on his way from Nigeria to Italy because of the arrest warrant issued against him by the United States back in 2010. As a matter of the preliminary ruling request, the case went to the CJ with the main question of whether Romano Pisciotti is eligible for the same level of protection against expulsion as German nationals. This case differs from the Petruhhin case because of the existence of the EU–USA extradition agreement[20], whereas in the Petruhhin case there was only the bilateral agreement between Russia and Latvia. And although the Court mentioned the EU–USA extradition agreement in its decision, the criterion of a "less restrictive measure" was not evaluated on its basis, which leaves an open question on the real significance of such agreements in the two-step test for the extradition of EU citizens to third states.

The Court came to the same conclusion as in the Petruhhin case that absence of the possibility to prosecute Pisciotti in Germany creates the risk of impunity and thus there is a legitimate objective to extradite him. The only question was the place of extradition. According to the logic of the Petruhhin case, the priority must be given to the less restrictive measure, i.e. informing the Italian authorities and the extradition of Pisciotti to Italy upon issuance of the European arrest warrant. However, the EU–US extradition agreement corrected this logic. Firstly, the Court mentioned that this agreement does not address the question of different treatment between nationals of the requested Member State (Germany in our case) and nationals of other Member States (Italy in our case)[21]. Secondly, the Court referred to Art. 17 of the EU–US extradition treaty which allows a Member State to prohibit extradition of its own citizens on the basis of either the bilateral treaty or rules of its constitutional law[22]. However, the Court still concluded that neither the EU–US agreement nor the bilateral agreement between Germany and the US nor the constitutional law of Germany can overrule the EU norms. Thus, despite the existence of the extradition agreement concluded between the EU and a third state, this fact has been treated by the Court not as a criterion for a "less restrictive measure," as in the Petruhhin case, but as a preliminary question, which has still been set aside by the norms of EU law. Stating this, the Court further referred to the Petruhhin test, but the requirements of an alternative and less restrictive measure were diminished significantly. The Court briefly mentioned that the Italian authorities had been informed about the Pisciotti case and they expressed no interest in the issuance of the European arrest warrant.

19 Judgment of the Court of 10April 2018 on the case of Romano Pisciotti v Bundesrepublik Deutschland, C 191/16.

20 Agreement on extradition between the European Union and the United States of America of 25 June 2003 (O.J. 2003 L 181, 19.07.2003, p. 27–33).

21 Judgment of the Court of 10 April 2018, *op. cit*., point 38.

22 *Ibidem*, point 41.

This fact alone was considered by the Court as a sufficient reason to allow extradition of the Italian national to the US, where he served the remaining term of imprisonment calculated after consideration of the time spent in Germany.

This case, compared to the Petruhhin judgement, does not contain one of the core elements of the analysis of the "mutual trust" and "sincere cooperation" questions on which the CJ based its decision in the Petruhhin case, giving the priority to extradite to Estonia rather than to Russia. This shifts the benefit of the "less restrictive measure" criterion to the Member State side rather than the side of the EU citizen. But this approach does not provide more clarity to the two-step test, since human rights have also been considered by the CJ as one of the elements precluding extradition.

In the case C473/15[23], the Court based the reasoning of its order on another idea– human rights protection. The case concerned Eugen Adelsmayr, a national of Austria who was sentenced in the United Arab Emirates to life imprisonment for alleged murder and manslaughter as a result of an unsuccessful medical operation. He moved to Austria to escape imprisonment and potential death penalty; however, he was unsure if his travel to Germany would trigger the extradition procedure to the United Arab Emirates. In this case, the logic of the Court was based on human rights protection and the possibility of the exposure of Adelsmayr to the death penalty. One might argue that the reasoning in the order of the Court was justified by the wording of the preliminary questions formulated by the referring court. However, it was the decision of the CJ to deal with the second question on human rights protection, and not the first one on the potential discrimination between German nationals and nationals of other Member States in extradition cases, which could have been based on the Petruhhin two-step test. Moreover, in the Petruhhin judgement, the CJ referred to human rights protection as a separate issue and not as a matter within the proportionality of the "less restrictive measure"[24]. This lack of stability in the application of the two-step Petruhhin test by the CJ creates an uncertainty for future cases and, more importantly, puts the requesting third state and the requested person in a disadvantaged position.

In the case of I.N., the Petruhhin test was applied partially and in far from its complete form. After the CJ made EFTA nationals "objectively comparable"[25] to EU citizens, it allowed evaluation of the case of I.N. in the same manner as Petruhhin and Pisciotti, even though the case concerned a non-EU Member State national. And while the risk of impunity was still in place as a legitimate objective to extradite I.N., consideration of the "less restrictive measures" was reduced to human rights protection, namely Art. 19 (2) of the Charter. This, however, does not meet the

23 Order of the Court of 6 September 2017 on the case of Peter Schotthöfer and Florian Steiner GbR v Eugen Adelsmayr, C473/15.

24 Judgment of the Court of 6 September 2016, *op. cit*., point 51.

25 Judgment of the Court of 2 April 2020, *op. cit*., point 58.

criteria for the Petruhhin test, while only half of it has been applied. The reason for this shift towards human rights protection rather than the strict proportionality test can be found in the lack of "mutual trust" in EEA Law and the inapplicability of the Framework Decision 2002/584 to Iceland not being a Member State[26]. In his opinion, the advocate general offered another source for the "mutual trust" obligation arising from the Common European Asylum System[27], but this opportunity went unnoticed by the CJ. Thus, the only option left for the Court was to substitute "mutual trust" and "sincere cooperation" as a basis for a "less restrictive measure" with human rights protection.

However, the justification of the "less restrictive" and "equally effective" measure through the human rights protection mechanism is also controversial. As has been correctly pointed out after the Petruhhin and Pisciotti cases, surrendering a person to a state other than the requesting one can potentially create more issues than benefits: it is time-consuming and most of the evidence is available at the place where the crime was committed, also justice will be better served there[28]. In the I.N. case, his surrender to Iceland rather than to Russia will require the establishment of a whole new criminal procedure. Apart from that, I.N. was present on the territory of Iceland before his travel to and arrest in Croatia, and Iceland showed no interest in arresting or investigating his case, despite the active international wanted person notice issued by Interpol's bureau in Moscow[29]. Moreover, he had been granted asylum by the Icelandic authorities specifically on the basis of the criminal investigation in Russia and, according to the oral hearings, "Iceland stated it might have jurisdiction to try I.N. under the Icelandic Criminal Code, but this is a matter for the decision of the independent public prosecutor"[30]. The Pisciotti case, however, provides a different example of a lack of obligation for a Member State to issue an arrest warrant. And while the Petruhhin case offered protection of EU citizens' rights against third states, the Pisciotti case diminished this protection and supported Member States' right to either protect the rights of their nationals being requested by the third state or decline such protection[31]. In relation to the Italian national in the Pisciotti case, the Court came to the conclusion that the second-best option was to surrender him to the US, while in the I.N. case, surrender to Russia was never an option. And as has been shown above, the absence of an EU–Russia extradition agreement is not the main obstacle, since even the existence of the EU–US extradition agreement in the

26 Opinion of Advocate General Tanchev, *op. cit.*, points 97–98.
27 *Ibidem*, point 104.
28 M. Böse, *op. cit.*, p. 1791.
29 Judgment of the Court of 2 April 2020, *op. cit.*, point 18.
30 Opinion of Advocate General Tanchev, *op. cit.*, point 54.
31 S. Coutts, From Union citizens to national subjects: Pisciotti, "Common Market Law Review" 2019, vol. 56, no. 2, p. 527.

Pisciotti case was not the core element in the "less restrictive measure" consideration part of the decision.

Another question is the complicated layer of international and bilateral (Member State–third country or the EU–third country) extradition agreements. In the Petruhhin case, Latvia's decision to extradite the Estonian national to Russia was based on the bilateral Agreement on Judicial Assistance and Judicial Relations in Civil, Family and Criminal Matters. However, the CJ did not consider this agreement, despite the fact of its ratification before Latvia acceded to the EU and the fact that obligations under this agreement must be respected in the first place[32]. In the Pisciotti case, both agreements were in place (the EU–US extradition agreement and the Germany–US extradition agreement), but the CJ did not connect these agreements with the "less restrictive measure" criterion. In the I.N. case, Croatia's decision to extradite the Russian and Icelandic national to Russia was not based on the bilateral extradition agreement. However, the European Convention on Extradition[33] was still in place. And while this Convention in Art. 28 (3) allows deviation from its provisions in certain cases, contracting parties are obliged to provide notifications about it. The Czech Republic has made such a declaration on the applicability of the legislation implementing the Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the surrender procedure. However, Croatia has not made an analogous statement, thus even in the absence of a Croatia–Russia extradition agreement, the norms of the European Convention on Extradition are still applicable to the case.

## Conclusion

It has been pointed out that recent practice of the Court of Justice on extradition cases is marking the emergence of an EU extradition law[34]. However, this practice implies different applications of the established test even to comparable cases. For the moment, it seems that the Court is trying to protect EU citizens from extradition to third states, but some states enjoy more trust from the EU side than others. This reasoning is not based on the existence of extradition agreements between the EU and a third state, since the CJ still opines on the superiority of EU law. And while the interests of the EU Member States are protected in all cases, third states and even EU citizens themselves are left in a situation of uncertainty.

32 M. Böse, *op. cit*., p. 1790.

33 European Convention on Extradition, signed in Paris on 13 December 1957.

34 M.J. Costa, The emerging EU extradition law: Petruhhin and beyond, "New Journal of European Criminal Law" 2017, vol. 8, no. 2, p. 213.

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Opinion of Advocate General Tanchev of 27 February 2020 on the case Ruska Federacija v I.N., C 897/19 PPU, points 78–79.

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# COMMENTARY

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# Human Dignity and a Dignified Standard of Living: The Judgment of the Court of Justice in the Case of Zubair Haqbin (C233/18)

**Abstract:** Directive 2013/33/EU (the Reception Conditions Directive) lays down the reception conditions that should be granted to asylum seekers and also their rights of documentation, to education and to access to the labour market and health care. In the judgment of the Court of Justice of 12 November 2019 in Case C233/18 concerning Zubair Haqbin, the Court of Justice holds that the withdrawal – even if only temporary – of the full set of material reception conditions or of material reception conditions relating to housing, food or clothing would be irreconcilable with the requirement to ensure a dignified standard of living for Mr Haqbin. After all, such a sanction deprives him from being allowed to meet his most basic needs.
**Keywords:** asylum, reception conditions, human dignity, unaccompanied minor, EU Charter on Fundamental Rights

## Introduction

Directive 2013/33/EU (the Reception Conditions Directive) lays down the reception conditions that should be granted to asylum seekers and also their rights of documentation, to education and to access to the labour market and health care[1]. In addition, the directive provides for conditions under which asylum seekers can be

1 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 (O.J. L 180/96, 2013) (Reception Conditions Directive). See also prof. mr. A.B. Terlouw en mr. dr. K.M. Zwaan,

detained. On the basis of the Reception Conditions Directive, asylum seekers have a right to "material reception conditions. "Material reception conditions are defined in the directive as the reception conditions that include "housing, food and clothing, and a daily expenses allowance"[2]. These conditions must be available from the moment an asylum seeker has applied for international protection, and until a final decision on the application has been taken. Furthermore, the directive stipulates that Member States should provide an adequate standard of living for asylum seekers, which guarantees their subsistence and protects their physical and mental health[3].

In this contribution, the case of Zubair Haqbin, an Afghan national, will be discussed[4]. Zubair Haqbin arrived in Belgium as an unaccompanied minor. After he lodged an application for international protection, he was hosted in a reception centre (in Broechem), where he was involved in a brawl. Hereafter, the director of the reception centre decided to exclude Mr Haqbin from material support in a reception centre for a period of 15 days. According to his own statements, Mr Haqbin spent the nights in a park in Brussels and in houses of friends and acquaintances.

A few days after the imposition of the measure of exclusion, the appointed guardian sought to suspend its application before the Antwerp Labour Court, but the case was dismissed due to lack of urgency. The guardian brought another challenge before the Brussels Labour Court seeking to cancel the measures imposed and asking for compensation for damages. The action was dismissed and an appeal with the Higher Labour Court of Brussels was lodged. That court decided to stay the proceedings and to submit a reference for a preliminary ruling on the exhaustive nature of cases that may incur reduction/withdrawal of reception conditions, the obligation of the authorities to guarantee a dignified standard of living and considerations applying in cases where minors are involved.

The Higher Labour Court of Brussels referred, in summary, the following three preliminary questions to the Court of Justice:

Firstly, does Article 20(4) of the Reception Conditions Directive allow for a Member State to reduce or withdraw from material reception conditions in cases of serious breaches of the rules relating to reception centres and serious acts of violence?

Secondly, which concrete steps should the competent national authorities take in order to guarantee applicants –which also includes an applicant who is temporarily

Menselijke waardigheid en een waardige levensstandaard; de uitspraak van het Hofvan Justitie inzake Zubair Haqbin, NtER 2020, nr. 3/4, p. 51–56.

2 Article 2(g) Reception Conditions Directive.

3 Article 17(2) Reception Conditions Directive.

4 Judgment of CJEU of 12 November 2019, C233/18, ECLI:EU:C:2019:956, Zubair Haqbin v. Federaal Agentschap voor de opvang van asielzoekers, Belgium. See also: C.H. Slingenberg, Hof van Justitie: overlastgevende asielzoekers mogen niet uit de opvang worden gezet, ook niet tijdelijk, on verblijfblog.nl; S. Progin-Theuerkauf and M.H. Zoeteweij, Case C-233/18 Haqbin: The human dignity of asylum seekers as a red line, on europeanlawblog.eu (accessed 01.02.2021).

excluded from reception conditions in a reception centre –the right to a dignified standard of living, as is stipulated in Articles 20(5) and (6) of the Reception Conditions Directive?

Thirdly, should Articles 20(4), (5) and (6) of the Reception Conditions Directive, read in conjunction with Articles 14, 21, 22, 23 and 24 thereof and with Articles 1, 3, 4 and 24 of the Charter of Fundamental Rights of the European Union (Charter), be interpreted as meaning that a sanction of temporary (or definitive) exclusion from the right to material reception conditions is possible, in respect of an unaccompanied minor?

The Court of Justice takes all the three questions together and responds that the sanction as laid down in Article 20(4) of the directive may, in principle, relate to the material reception conditions. On the basis of Article 20(5) of the directive, such sanctions should be objective, impartial, reasoned and proportionate to the particular situation of the applicant and must, under all circumstances, ensure a dignified standard of living for the applicant. According to the Court of Justice, the exclusion of the full set of material reception conditions or of material reception conditions relating to housing, food or clothing, albeit temporarily, is incompatible with the requirement for Member States to ensure a dignified standard of living for the applicant. After all, such a sanction deprives him from being allowed to meet his most basic needs.

In the case of a sanction of the reduction of material reception conditions, like the withdrawal or reduction of the daily expenses allowance, the Court of Justice specifies that the competent national authorities should ensure, under all circumstances, that such sanctions, taking into account the specific situation of the applicant and all circumstances of the case, comply with the principle of proportionality and do not impair the dignity of the applicant in question.

If the applicant in question is an unaccompanied minor and therefore should be considered as a vulnerable person within the meaning of the Reception Conditions Directive, the national authorities should particularly have regard to the specific situation of the minor and of the principle of proportionality. When imposing sanctions, the national authorities should, according to Article 24 of the Charter, take particularly into account the best interests of the child.

## 1. Discussion of the Haqbin judgment

The Court of Justice has on two previous occasions decided on preliminary questions on the material reception conditions. The Cimade and GISTI case concerned questions relating to reception conditions of Dublin claimants[5]. The Saciri

5 Judgment of CJEU of 27 September 2012, C179/11, ECLI:EU:C:2012:594 (Cimade and GISTI).

case concerned a situation in which a benefit had been granted instead of actual reception conditions[6]. The Haqbin case, as discussed in this contribution, deals with Article 20 of the Reception Conditions Directive. This Article stipulates that Member States may, in some cases, reduce or withdraw from material reception conditions. On the basis of Article 20(4) of the directive, Member States may "determine sanctions applicable to serious breaches of the rules of the accommodation centres as well as to seriously violent behaviour."

The Reception Conditions Directive not only regulates in which cases Member States may reduce or withdraw from reception conditions, but also gives a number of safeguards for asylum seekers. According to Article 20(5) of the Reception Conditions Directive, there are – in brief – three limitations on the possibility of Member States to restrict or withdraw from reception conditions:

a) decisions for the reduction or withdrawal should be taken individually, objectively and impartially, and in a reasoned manner;
b) decisions shall be based on the specific situation of the asylum seeker, particularly with regard to vulnerable persons and in accordance with the principle of proportionality;
c) Member States should ensure that asylum seekers have, under all circumstances, access to health care and should ensure a dignified standard of living for all asylum seekers[7].

The Court of Justice judges that the provisions concerning sanctions contained in Article 20(4) of the Reception Conditions Directive may – in principle – relate to the withdrawal of material reception conditions[8]. Nevertheless, the Court of Justice notes that it is determined in Article 20(5) of the directive that every sanction within the meaning of Article 20(4) must be taken objectively, impartially, must be reasoned and proportionate to the particular situation of the applicant and must, under all circumstances, ensure a dignified standard of living for the applicant[9]. The Court of Justice also points out that respect for human dignity requires that Mr Haqbin should not be placed in a state of extreme material poverty which would render him incapable of meeting his most basic needs such as living, eating, clothing and personal hygiene, which would harm his physical or mental health, or puts him in a state of degradation incompatible with human dignity[10].

The Advocate General, Campos Sánchez-Bordona, acknowledges in his conclusion that the first two preliminary questions of the Belgian Labour Court

6 Judgment of CJEU of 27 February 2014, C79/13, ECLI:EU:C:2014:103 (Saciri).
7 Haqbin, points 33–36.
8 Haqbin, point 43.
9 Haqbin, point 45.
10 Haqbin, point 46. The Court of Justice refers to the Jawocase: Judgment of CJEU of 19 March 2019, C163/17, ECLI:EU:C:2019:218 (Jawo), point 92.

concern the treatment of every applicant, regardless of his or her age and situation, while the third question is specifically directed at minors. It is therefore remarkable that his research focuses exclusively on the specific situation of unaccompanied minors when the questions were actually asked more broadly.[11]

The Court of Justice has taken a broader view of the questions and has, contrary to the Advocate General, expressly ruled that imposing a sanction which amounts to a violation of human dignity and a dignified standard of living for asylum seekers is not permitted. This also applies to adults.[12]

## 2. Human Dignity

In the Haqbin case, human dignity plays a very important role.[13] The Court of Justice holds that:

> With regard specifically to the requirement to ensure a dignified standard of living, it is apparent from recital 35 of Directive 2013/33 that the directive seeks to ensure full respect for human dignity and to promote the application, inter alia, of Article 1 of the Charter of Fundamental Rights and has to be implemented accordingly. In that regard, respect for human dignity within the meaning of that article requires the person concerned not finding himself or herself in a situation of extreme material poverty that does not allow that person to meet his or her most basic needs such as a place to live, food, clothing and personal hygiene, and that undermines his or her physical or mental health or puts that person in a state of degradation incompatible with human dignity (see, to that effect, judgment of 19 March 2019, Jawo, C163/17, EU:C:2019:218, paragraph 92 and the case-law cited)[14].

Because I wanted to get a bird's eye view of the use of Article 1 (human dignity) of the EU Charter, for this contribution I have selected and examined 24 relevant Court of Justice cases[15]. 14 of these 24 cases concerned asylum cases. From this brief

11 ECLI:EU:C:2019:468, AG Opinion delivered on 6 June 2019, point 35.

12 See on human dignity, J. Habermas, "Das Konzept der Menschenwürde und die realistische Utopie der Menschenrechte" (in:) J. Habermas (ed.), Zur Verfassung Europas. Ein Essay. Berlin: edition suhrkamp, 2011, pp. 13–38.

13 Groenendijk and Minderhoud point out that Article 1 of the Charter should be viewed independently. See K. Groenendijk and P. Minderhoud, Unierecht en uitgeprocedeerden, "A&MR" 2015, p. 178.

14 Haqbin, point 46.

15 Judgments of the Court of Justice mentioning Article 1 Charter can be found in the database of the European Law Expertise Centre of the Ministry of Foreign Affairs, https://ecer.minbuza.nl/ecer/eu-essential/charter fundamental rights (last accessed 1 March 2021). Searching for Article 1 Charter gives 31 judgments mentioning Article 1. The database is in Dutch. Excluded from examination were civil (servants) law and social law judgments.

study it emerged that Article 1 Charter receives relatively little attention from the Court of Justice; when this provision is mentioned, it is often only in combination with other provisions of the Charter and without any further explanation.

In the Selver Saciri et al case, concerning the minimum standards on reception of asylum seekers, the Court of Justice holds that the general scheme and the purpose of the Reception Conditions Directive (Directive 2003/9/EC)[16] and the observance of fundamental rights, specifically the requirements of Article 1 of the Charter, preclude the asylum seeker from being deprived of the protection of the minimum standards as laid down by this directive, even if only temporarily[17].

In the case of Cimade and GISTI, concerning the minimum requirements on reception conditions of asylum seekers, the Court of Justice holds that the general scheme and the purpose of the Reception Conditions Directive (Directive 2003/9/EC) and the observance of fundamental rights, specifically the requirements of Article 1 of the Charter, preclude the asylum seeker from being deprived of the protection of the minimum standards laid down by that directive[18]. This also applies to the period between lodging an application for asylum and the actual transfer to the responsible Member State.

The Court of Justice pays particular attention to the interrelation between human dignity and the existence of adequate reception conditions. This has also been pointed out by the European Court of Human Rights (ECtHR) in the cases of MSS/Belgium and Greece, and of Budina/Russia, in which the ECtHR attaches "considerable importance" to the applicant's status as an asylum seeker "and, as such, a member of a particularly underprivileged and vulnerable population group in need of special protection." According to the ECtHR, "state responsibility can arise under Article 3 of the European Convention on Human Rights (ECHR) for "treatment" where an applicant, in circumstances wholly dependent on state support, found herself faced with official indifference when in a situation of serious deprivation or want incompatible with human dignity."[19]Also, when dealing with the complaint in the Hunde case, which was incidentally dismissed as manifestly unfounded, the ECtHR ruled that Article 3 of the ECHR obliges states to take action in situations of the most extreme poverty, even if it concerns irregular migrants[20]. In Haqbin, the Court of Justice now also explicitly mentions Article 1 Charter in its ruling on

16 Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers (O.J.L 31/18). This directive is the predecessor of the current Reception Conditions Directive 2013/33/EU.

17 CJEU 27 February 2014, case C79/13, ECLI:EU:C:2014:103, JV 2014/143 (Saciri), point 35.

18 CJEU 27 September 2012, case C179/11, ECLI:EU:C:2012:594 (Cimade and GISTI).

19 Judgment of ECtHR of 21 January 2011, appl. no. 30696/09, ECLI:CE:ECHR:2011:0121 (M.S.S./Belgium and Greece); Judgment of ECtHR of 18 June 2009, appl.no. 45603/05 (Budina/Russia).

20 Judgment of ECtHR of 5 July 2016, appl. no. 17931/16, ECLI:CE:ECHR:2016:0705DEC001793116 (Hunde/the Netherlands).

the preliminary question.[21] The fact that Article 1 EU Charter has an independent meaning to Article 3 ECHR is not only evident from the fact that Article 3 ECHR has its equivalent in Article 4 EU Charter and that Article 1 EU Charter therefore must offer something extra, but it is also evident from the explanatory notes to Article 1 EU Charter:

> The dignity of the human person is not only a fundamental right in itself but constitutes the real basis of fundamental rights. (…) In its judgment of 9 October 2001 in Case C-377/98 *Netherlands v European Parliament and Council* [2001] ECR I–7079, at grounds 70–77, the Court of Justice confirmed that a fundamental right to human dignity is part of Union law. It results that none of the rights laid down in this Charter may be used to harm the dignity of another person, and that the dignity of the human person is part of the substance of the rights laid down in this Charter. It must therefore be respected, even where a right is restricted.

### 3. Reception of Minors

With regard to minor asylum seekers, the Court of Justice holds that Member States, when imposing a sanction, must in particular take "due account" of the specific situation of the asylum seeker and the principle of proportionality (this also follows from Articles 3 and 22 of the Convention on the Rights of the Child (UNCRC))[22]. In doing so, the Member States must be guided primarily by the best interests of the child, pursuant to Article 23(1) of the Reception Conditions Directive. This obligation already exists, of course, under Article 3 of the Convention on the Rights of the Child, which has been incorporated into Article 24 EU Charter. Recital 35 of the Reception Conditions Directive refers to the EU Charter as the framework for interpreting the Reception Conditions Directive. It states:

> This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. In particular, this Directive seeks to ensure full respect for human dignity and to promote the application of Articles 1, 4, 6, 7, 18, 21, 24 and 47 of the Charter and has to be implemented accordingly.

Here, not only reference to human dignity can be seen, but also an explicit referral to Article 24 Charter. According to Article 23(2) of the Reception Conditions

21 See also C. McCrudden, Human Dignity and Judicial Interpretation of Human Rights, "The European Journal of International Law" 2008, vol. 19, no. 4, pp. 655–724.

22 Convention on the Rights of the Child, General Assembly resolution 44/25 of 20 November 1989; See also European Union Agency for Fundamental Rights and Council of Europe, Handbook on European law relating to the rights of the child, Belgium 2015.

Directive, the Member States must, when assessing these interests, take due account, in particular, of factors such as the minor's well-being and social development, with particular attention to the minor's background, as well as considerations relating to his or her safety and security[23]. In addition, the Court of Justice stresses that the three guarantees as set out in Article 20(5) of the Reception Conditions Directive must always be met when imposing a sanction. In the case of an unaccompanied minor asylum seeker (a vulnerable person within the meaning of Article 21 of the Reception Conditions Directive), Member States must take the specific situation of the minor and the principle of proportionality into "due account"[24].

The Convention on the Rights of the Child also contains other relevant provisions under which a withdrawal of the right to reception conditions of (unaccompanied) minors cannot be used as a sanction. These provisions are not referred to in the Charter, but they are, of course, binding on all EU Member States, because they all are parties to the Convention on the Rights of the Child. Article 20(1) is such an example. Also of importance is Article 22(1):

> States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.

Article 26(1) recognized the right to benefit from social security. Furthermore, States Parties to the Convention on the Rights of the Child recognize, on the basis of Article 27(1), the "right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development." Finally, Article 40(1) is important with regard to the rights of the child in penal law.

Apparently, Mr Haqbin's situation was not about a criminal offence, but where the more applies, the less should apply as well. If a minor has misbehaved without the act being a criminal offence, the sanction must not affect his dignity[25]. It strikes us that the best interests of the child are usually weighed against the interests of the state, but in this case these interests seem to converge. It is also in the interest of the state to protect (unaccompanied) minors and not to send them out onto the streets, where they not only may fall victim to crime, but could also end up in crime. The

23 Haqbin, point 54.

24 Haqbin, point 53.

25 See also Asylum Information Database (AIDA), Withdrawal of reception conditions of asylum seekers. An appropriate, effective or legal sanction? July 2018.

Convention on the Rights of the Child contains a whole series of provisions which oblige States Parties to ensure that children are being protected against this. Denial of access to the necessary material provisions is therefore certainly not an adequate sanction when it comes to minors[26].

## 4. The consequences of the Haqbin judgment in the Netherlands

In the Netherlands, nuisance-causing asylum seekers are transferred to an Extra Guidance, Support and Supervision Location (Extra Begeleidings- en Toezichtlocatie, EBL)[27]. This is not in conflict with the judgment of the Court of Justice in Haqbin, provided that in all cases the formal, substantive and minimum conditions of Article 20(5) of the Reception Conditions Directive are met.

In addition, the Central Agency for the Reception of Asylum Seekers (Centraal Orgaan Opvang Asielzoekers, COA) applies Internal Regulations on Abstention from Granting Asylum Seekers (Reglement Onthouding Verstrekkingen, ROV). The ROV provides a policy framework developed by the COA. The ROV has various (types of) options for imposing a measure, tailored to the negative impact of the incident/ shown behaviour of the resident. The ROV contains 11increasing measures, of which measure number 1 (withholding of pocket money for 1 week) is the lightest and measure number 11 (withholding of all Rva[28] benefits for an indefinite period of time) the heaviest. If there is an incident or behaviour with a "very high impact," all the facilities are withdrawn and access to the reception location is denied for a number of weeks or, in the worst case, forever. Recently, the State Secretary announced that the COA would again consider the (temporary) denial of reception as an appropriate sanction[29]. This sanction must, considering the Haqbin ruling, be abandoned[30]. Although the Haqbin judgment suggests that there is a theoretical possibility that the withdrawal of material conditions may be permitted –namely, if it had been established objectively and impartially in the individual case and in a manner that

26 See also K. Mets, The fundamental rights of unaccompanied minors in EU asylum law: a dubious trade-off between control and protection, "ERA Forum" 2020.

27 See Parliamentary documents II 2018/19, 19637, no. 2510. All translations are my own, so non-official.

28 Rva is an abbreviation for the Regeling verstrekkingen asielzoekers en andere categorieën vreemdelingen 2005 (Regulation on benefits in kind for asylum seekers and other categories of migrants 2005).

29 Parliamentaty Documents II 2018/19, 19637, no. 2510. See also a letter of the State Secretary of Justice to the Parliament, 1 July 2020 (https://www.rijksoverheid.nl/documenten/kamerstukken/2020/07/01/tk-arrest-eu-hof-van-justitie-in-de-zaak-haqbin).

30 See also L. Slingenberg, Hof van Justitie: overlastgevende asielzoekers mogen niet uit de opvang worden gezet, ook niet tijdelijk, verblijfblog.nland the case note of Slingenberg, "Jurisprudentie Vreemdelingenrecht" 2019/197.

would not deprive the asylum seeker of his or her sustenance and human dignity –in practice, such a situation will not occur very often.

For example, the president of the District Court of Groningen ruled that withdrawal from reception due to misconduct is contrary to the Reception Conditions Directive. He therefore granted an interim measure[31].Also the highest Dutch administrative Court, the Council of State ruled along the same lines[32]. The Council of State ruled that the Haqbin judgment showed that a Member State could not impose the proposed measure, irrespective of the seriousness of the misconduct of the migrant concerned. The State Secretary's assertion that the Haqbin judgment applies only to minors was dismissed by the court. The Council of State in interim measures proceedings deduced this from, among other things, paragraph 55, read in conjunction with paragraphs 47 to 52 of the judgment of the Court of Justice. These considerations of the Court of Justice show that the Reception Conditions Directive does not permit a sanction that consists of the withdrawal of material reception conditions relating to housing, food and clothing from any asylum seeker. The Court of Justice does, however, provide for alternative sanctions to be imposed in the event of misconduct by a resident of a reception centre.[33]

## Conclusions

The Haqbin judgment is relevant for at least three reasons. Firstly, because the Court of Justice makes it clear that, when imposing sanctions depriving asylum seekers of material reception conditions, the individual circumstances of the asylum seeker must be assessed (such as age, social development, health, background, security). Secondly, because, on the basis of the Reception Conditions Directive and the EU Charter, the Court of Justice holds that such sanctions must not have the effect of placing the asylum seeker in a situation below the minimum living standards guaranteed by the Reception Conditions Directive. In that regard, the right to respect for human dignity, as laid down in Article 1 EU Charter, is essential. Respect for human dignity requires that asylum seekers are not placed in a situation of extreme material poverty which would prevent them from meeting their most basic needs such as living, eating, clothing and personal hygiene, which would harm his or her physical or mental health, or puts him or her in a state of degradation incompatible

31 Judgment of District Court, president Rb. Den Haag (z.p. Groningen) 23 January 2020, ECLI:NL:RBDHA:2020:669.

32 Judgment of Council of State of 15 July 2020, ECLI:NL:RVS:2020:1622. See also Parliamentary documents II, 2019/20, 19 637, no. 2642. From1 August 2020, reception centres have a so-called "time-out" facility.

33 See also P. Rodrigues, Protection of minors in European migration law, in: M.A.K. Klaassen, S. Rap, P. Rodrigues & T. Liefaards, Safeguarding Children's Rights in Immigration Law, Mortsel Belgium: Intersentia Publishing NV 2020, p. 1–16.

with human dignity. The Haqbin, Jawo, Hamed and Omar rulings also showed that asylum seekers must be able to meet their basic needs in all circumstances. The obligations of the Member States in this regard apply throughout the whole asylum procedure[34]. Thirdly, this obligation applies to minors and adults alike.

Last significance of the Haqbin judgment lies in the confirmation by the Court of Justice that, even in the case of imposing sanctions on minors who reside in reception centres, the best interests of the child should be the first consideration. In assessing these interests, the Court of Justice has held that Member States should take due account, in particular, of factors such as the minor's well-being and social development, with particular attention to the minor's background, as well as considerations relating to his or her safety and security. Here, the Court of Justice has referred explicitly to Article 24 of the EU Charter. If the case concerns an unaccompanied minor asylum seeker, Member States should take even greater account of the specific situation of the minor concerned and the principle of proportionality.

For the Netherlands, it means that the practice in which the reception can be determined on grounds of misconduct is no longer tenable if this sanction results in the minor asylum seeker ending on the streets without a bed, bath or bread.

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34 See, to that extent, Preamble 8 Reception Conditions Directive, where it is stated that this directive "should apply during all stages and types of procedures concerning applications for international protection, in all locations and facilities hosting applicants and for as long as they are allowed to remain on the territory of the Member States as applicants."

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