

MIGRATION AND REFUGEES IN INTERNATIONAL LAW

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Abstract: Migration as a complex phenomenon encompasses political, economic, security, sociological, historical, legal, and other issues. All migrants are human beings with human dignity regardless their migratory status. Any migrant is exposed to various kinds of vulnerability. There are different types or categories of migrants which include “legal” and “illegal” (undocumented) migrants, “voluntary” or involuntary ones, “labor”, “economic”, “humanitarian” and “boat” migrants etc. Forced migration covers refugees, stateless persons, or asylum seekers. Underdevelopment and armed conflicts are the main causes of migration. We already have “environmental” or “climatic” migrants. It is often rather difficult to assign one “designation” or “term” to a particular migrant. There is no clear, universally agreed definition of migration. “Migrants” and “refugees” are mostly considered as separate and distinct categories.

The year 2021 marked the 70th anniversary of the UN Convention relating to the Status of Refugees of 28 July 1951. On 31 January 1967 was signed by the President of the UNGA the Protocol relating to the Status of Refugees. The convention was an important cornerstone in the international law protection of refugees. The devastating nature of armed conflicts, environmental disasters, and our era of increasing globalization pose serious challenges to the capacity of states and the international community as a whole to respond consistently to a resolution of long-standing migration and refugee problems. Trafficking and smuggling of people, abuse of asylum procedures, and a clear imbalance in burden – and responsibility of sharing of irregular migration and of hosting refugees are additional factors complicating the situation in which migrants and refugees' protection has to be realized. Migration is very politicized question. There are several international conventions that have an impact on the rights of migrants and refugees. Correct implementation of these rules is crucial. The power of state to protect its security is a basic attribute of state sovereignty. The study is analyzing e.g., the UN Global Compact on Migration or the UN Global Compact on Refugees. Special attention is devoted to the critical scrutiny of the New Pact of Migration and Asylum, particularly to the principles of solidarity and shared responsibility in the framework of the EU, including the Court of Justice of the European Union.

Keywords: Migration, refugees, asylum, sovereignty, human rights, Global Compact on Refugees

I. INTRODUCTION

International human migration is a crucial feature of contemporary international relations which has a serious impact on political, social, and economic lives of individual countries and the international community as a whole. The human migration issue is closely related to the protection of state sovereignty and to the exercise of state power. In some way, migration affects all countries, whether the state of origin, transit state, or finally a “host state”. Mass migration represents a geopolitical phenomenon. Migration influxes in Europe since 2015 have had a serious impact on foreign affairs, security, and economic development in this region. Some extend the present migration reflexes to increasing globalization and interdependence among states, requiring international cooperation and solidarity at global, regional, and local levels. A general comprehensive regulation of all migrant issues does not exist so far. No general definition of “migrants” or “migration” is

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available in international positive law. There are only fragmented legal regulations of specific migrant regimes (e.g., refugees or migrant workers). There are also many gaps in migrants' protection. Some international legal rules are far from useful, to be precise, they are often underdeveloped or in process of emerging.

Human migration is as old as the human population itself. It is an integral and natural part of the whole of human history. Over time migration has changed its character. Starting with early migration of “hunters and gatherers”, who often moved for supplies through transition to agriculture, seafaring, and pastoralists migrations to migration in individual historical epochs. The process of migration as a permanent feature of history has only been regulated by international law quite recently. It is difficult to say that “migration was at the heart of in the first reflection about international law” or that it was “framed by international law for ages” and to equate migration control with “hospitality”.¹

History knows forced migrations caused by wars, human suffering, the contest for new territories, trade with slaves etc. The European slave traders from the 16th to 19th centuries delivered about twenty million slaves to American market alone. In 1840 began so-called “Great Atlantic Migration” from Europe to North America, especially from Ireland and Germany. The number of European migrants to the US between 1820 and 1980 amounted about forty million. Between 1788 and 1869 Great Britain deported about 150,000 convicts to Australia. There were of course other waves of voluntary or forced migration after the First and Second World Wars. The birth of the Lausanne Treaty of 1923 resulted in a massive forced migration between Turkey and Greece. The largest mass expulsion in modern era was imposed of course by Nazi Germany, that deported about eight million persons, including five million Jews, most of whom were exterminated in concentration camps. In 1945, in Potsdam, the Great Powers decided on transfer several million Germans. During Stalin's era one million members of minorities were exiled to central Asia.²

The free movement of people across borders was historically not controlled by the real international law procedure of migration. In the Middle Ages, international law did not have a symbiotic relationship with regulation of migration. Hospitality or charity to aliens are not identical with the rights of migrants under contemporary international law. Besides the right to “hospitality” is not discussed in the textbooks of international law. Until the nineteenth century there existed a widespread freedom of migration. Passports were unnecessary for much of international travel.³ Classical international law did not play any real role in regulation of migration policy. Migration has its history in Africa, India, Pakistan, and other regions. Forced migration has been large e.g., after the partition of British

¹ An opposite view was expressed by V. Chetail who maintained that the free movement was acknowledged by Vitoria and Grotius in contrast to Puffendorf and Wolf who insisted on state's discretion to refuse admission of aliens on the basis of state sovereignty. See CHETAİL, V. Sovereignty and Migration in the Doctrine of Law of Nations: An Intellectual History of Hospitality from Vitoria to Vattel. *EJIL*. 2017, Vol. 27, No. 4, p. 901.

² To the history of human migration see *The New Encyclopaedia Britannica*. Chicago, London: Macropaedia, Vol. 25, 2004, p. 1036. FERRIE, J. P., HATTON, T. J. *Two Centuries of International Migration*. Bonn: IZA Institute of Labor Economics, 2013; RYSTAD, G. Immigration History and the Future of International Migration. *International Migration Review*. 1992, Vol. 26, No. 4, pp. 1168–1199.

³ NEFF, S. C. Short History of International Law. In M. D. Evans. *International Law*. Oxford: Oxford University Press, 2003, p. 45.

India into India and Pakistan. Nearly fourteen million persons deserted their homes. In our time several million people fled from armed conflicts in Afghanistan, Iraq, Libya, and Syria. Some thirteen million migrants have become permanent residents of Western Europe since the 1960s till 2002.⁴

Currently, mass migration influxes to Europe constitute an important geopolitical factor which may also negatively influence international security, conditions of health (not only because of present Covid-19), and the whole political and economic situations in Europe and in the world. On the other hand, regular migration may have a positive effect, particularly on the economic and cultural life in “host” countries. It is possible to say, that migration was always a natural feature of life not only of human beings, but also for a large part of animal population. There are regular seasonal movements of many birds, animals, whales, seals, or fishes.⁵ Migration in the context of globalization brings migrants not only opportunities but also challenges of vulnerability and discrimination. There are different human migration issues requiring more or less of international legal regulations. They include the sovereignty and responsibility of states with regard to migration, protection of human rights, humanitarian aspects, forced and illegal migration, labor migration, “boat” migration (rescue at sea), child migration, economic aspects of migration, trade, security issues etc. The power of a state to regulate migration (immigration and emigration) is not unlimited. There are established constraints by the rules and norms of international law or EU law that limit state authority over migration. There are also other regional efforts and initiatives dealing with refugees and migration policies in Europe, North America, Australia, and Africa.

This study examines the challenges posed by migration to international law, to the state sovereignty and to the protection of human rights. There is a growing tension between international migration law/IML/ and different interests of individual states/security, economics/. IML has been formed by legal principles and norms of various “branches” of international public law. It is encompassing international human rights law, refugee law, humanitarian law, labor and trade law, sea law, air law, etc. There is no comprehensive international convention governing all aspects of migration. IML is largely fragmented. The existing legal framework is not sufficient to address current migration crisis.

II. MIGRATION AND INTERNATIONAL MIGRATION LAW

People migrate for different reasons and migrants include different categories of persons. Many migrants are escaping armed conflicts, human rights abuses, inhuman treatment, persecutions, torture etc. They are victims of human trafficking or smuggled persons. This study deals with international migration and not with internally displaced

⁴ The New Encyclopaedia Britannica, supra note 2 p. 1036.

⁵ The US e.g., adopted on July 3, 1998 the Migratory Bird Treaty Act which prohibited the killing, capturing or selling the migratory birds, included in the treaty with Great Britain on 8 December 1916. It recited that many species of birds in their annual migration traversed many parts of the United States and of Canada. See HENKIN, L., PUGH, R. C., SCHACHTER, O., SMIT, H. *International Law, Cases and Materials*. 2nd edition. West Publishing, 1987, p. 190.

persons, also called “*internal migrants*”. Many international migrants have been primarily driven by economic reasons. Therefore, it is possible to differentiate between “*forced*” and “*voluntary forced*” or “*voluntary*” migrants. Sometimes the terms as “*legal*”, “*illegal*” or “*undocumented*” migrants have been also used.⁶ International law does not enclose a comprehensive legal migration regime. There are various definitions of “*migrants*”. Today, there are over 258 million migrants around the world living outside their country of birth.⁷

II.1 The notion of international migration

International human migration means the movement of persons from their countries of origin or their places of permanent or habitual residence across the countries’ international borders to another country. The UN Department of Economic and Social Affairs (DESA) defined an “*international migrant*” as a person “*who changes his or her country of usual residence*”. The DESA from definition of migrants excludes movements that are due to “*recreation, holiday, visits to friends and relatives, business, medical treatment or religious pilgrimages*”.⁸ The term “*migrant*” is not generally defined in international law. It is a term reflecting the common understanding that the migrant is a person who moves across international borders for various reasons. Migrants may be compelled to leave their countries by humanitarian reasons, including consequences of armed conflicts or by natural and environmental disasters. Persecution, threats to life, armed conflicts, serious public disorders, and gross violence are classical reasons for the need of migrants’ international protection. Migration flow crossing international borders may occur several times over the course of time or may be realized by an influx wave of migrant persons.⁹ On the other hand, human migration has been described as “*the permanent change of residence by an individual or group*” which “*excludes such movement as nomadism, migrant labor, commuting, and tourism, all of which are transitory in nature*”.¹⁰ This definition limits the notion of “*human migration*” to permanent change of residence. Any temporary movement of human beings is excluded. It is true there is no clear universally agreed definition of a migration.¹¹ The International organization for Migration (IOM) defined “*migration*” briefly as “*the movement of persons away from their place of usual residence and across an international border to a country of which they are not nationals*”.¹² In another place, the IOM defined international migration as the “*movement of persons who leave their country of origin, or the country of habitual residence, to establish themselves either permanently*

⁶ *Glossary on Migration, International Migration Law*. Geneva: International Organization for Migration (IOM), 2019.

⁷ Global compact for migration. In: *Refugees und Migrants* [online]. [2022-01-21]. Available at: <<https://refugeesmigrants.un.org/migration-compact>>.

⁸ Recommendations on Statistics of International Migration, Revision 1, 1998. Para 32.

⁹ *Ibid.*

¹⁰ *The New Encyclopedia Britannica, Micropaedia, Vol. 6*. Chicago, London 2002, pp. 136-7.

¹¹ Immigration & Migrants Rights. In: *International Justice Resource Center (IJRC)* [online]. [2022-01-21]. Available at: <ijrcenter.org/thematic-research-guides/immigration-migrants-rights/>.

¹² Key Migration Terms. In: *IOM* [online]. [2022-01-21]. Available at: <<https://www.iom.int/key-migration-terms>>, p. 10.

or temporarily in another country”.¹³ According to another definition of the IOM “migration” is encompassing “any kind of movement of people, whatever its length, composition and causes”. It includes “migration of refugees, displaced persons unprotected people and economic migrants”.¹⁴

Regular migration occurs in compliance with the rules of international law, the laws of the country of origin, transit, and destination. Irregular migration has been defined as the movement of persons that “takes place outside the law regulations, or international agreements governing the entry into or exit from the State of origin, transit or destination”.¹⁵ A universally accepted definition of irregular migration in international law does not exist. This notion is generally used to term persons (migrants) who are moving outside a regular migration procedure. Irregular migration does not relieve migrants of their human rights. States have legal obligations under international law to protect them, including legal protection for asylum seekers, who are fleeing from armed conflicts, persecution, or other forms of violence. Irregular migrants must not be penalized for illegal entry or stay in foreign country, if they were coming “directly from the territory where their life or freedom was threatened”.¹⁶ Irregular migrants may include refugees, victims of trafficking, or unaccompanied children. Irregular migrants are also called “non-documented migrants”.

Environmental migration has been described as migration due to a catastrophic change in environment, this includes climate change when persons are forced by these changes to leave their place of habitual residence or outside their countries of origin. Climate migration is considered to be a subcategory of environmental migration. There is no international agreement regulating migration for environment or climate changes as a special legal category.¹⁷ Climate migration means the movement of persons who for reasons of sudden or progressive change in the environment due to climate change, are obliged to leave their habitual place of residence, or choose to do so either temporarily or permanently, within a state or across an international border.¹⁸

Labor migration describes the movement of persons from one state to another for the purpose of employment. Labor migration is defined in International Conventions on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMW) adopted on 18 December 1990 and entered into force on 1 July 2003.¹⁹ The conventions provide basic protections of migrant workers and their families. Migrant workers shall be free from slavery, serfdom, and forced labor. These persons are protected from collective

¹³ *International Migration Law, Glossary on Migration*. Geneva: IOM, 2014, p. 41.

¹⁴ *Ibid.* p. 41.

¹⁵ Key Migration Terms. In: *IOM* [online]. [2022-01-24]. Available at: <<https://www.iom.int/key-migration-terms>>, p. 11.

¹⁶ Convention Relating to the Status of Refugees, adopted 28 July 1951, entered into force 22 April 1954, UNTS N. 2545, Vol. 189, p. 137, Art. 31(1).

¹⁷ COUNCIL OF THE INTERNATIONAL ORGANIZATION FOR MIGRATION (IOM). *Outlook on Migration, Environment and Climate Change*, 2014.

¹⁸ Key Migration Terms. In: *IOM, UN Migration* [online]. [2022-01-24]. Available at: <<https://www.iom.int/key-migration-terms>>, p. 3.

¹⁹ 2220 UNTS 3, Art. 4.

expulsion and have the right to equal remuneration as nationals of the “*host*” country. They have also the right to join local trade unions.

II.2 Human smuggling and victims trafficking

The smuggling of migrants has a negative impact to the regulation of migration and on the whole of migration law. On 15 November 2000, the UN Convention against Transnational Organized Crime was adopted by UNGA resolution 55/25 and entered into force on 29 September 2003.²⁰ This UN Convention was supplemented by the Protocol against the Smuggling of Migrants by Land, Sea and Air of 12 December 2000, which imposes on parties the duty to criminalize smuggling of persons. Smuggled persons have been forced to pay smugglers for smuggling them into Europe, mostly on unseaworthy vessels within the Mediterranean. The Protocol defines smuggling of migrants as the “*procurement, in order to obtain directly or indirectly, a financial or other material benefit, of the illegal entry of person into a State Party of which the person is not national or a permanent resident*”.²¹ Smuggling persons into the third countries also supports illegal immigration in violation of the immigration laws of these countries. The Protocol stipulates that smuggled migrants should not be liable to criminal prosecution for having been smuggled (Articles 5 and 6).

The Protocol to Prevent, Suppress and Punish Trafficking in Persons was adopted on 12 December 2000 by UNGA resolution 55/25 with the aim to adopt necessary preventive measures for the suppression of trafficking and punishment of traffickers. Besides preventive and punitive measures, the Protocol recommends to state parties to adopt remedies “*for the physical, psychological, and social recovery*”, which includes appropriate housing, information on their rights, medical, psychological, and material assistance, employment, educational, and training opportunities. The Protocol also encourages the parties to permit victims of trafficking to remain in their territories. In general, “*trafficking*” is defined as “*the recruitment, transportation, or harboring of persons, involving the threat or use of force, coercion, fraud, deception, or abuse of power or of a position of vulnerability for the purpose of exploitation*” (Article 3).²² The protocol entered into force on 25 December 2003. Both protocols mentioned above criminalize certain acts and call for interstate cooperation and return of smuggled and trafficked persons.

II.3 High seas and air carriers

States have the right to deter unlawful entries of their territory by sea and air beyond their borders. They may stop and board ships that have entered their territorial waters. In international waters their immigration laws may be enforced on ships with foreign flags only with the consent of the flag country. Ships with migrants are very often overcrowded. This fact so presents real risk and danger to these “*boat*” migrants. Under international law ships on the high sea have a duty to rescue persons.²³ States also have a duty to adopt

²⁰ UN Doc A/55/383, UNTS 2225, p. 209; entry into force 29 September 2003.

²¹ UN Doc. A/55/383, UNTS Vol. 2241, p. 507, Art. 3(a).

²² G. A. Res. 55/25 of 15. Nov. 2000, UNTS Vol. 2237, p. 319.

²³ UNCLOS, Art. 98(1); International Convention for the Safety of Life at Sea, 1 November 1974, Chapter V.

penal legislation for violations of the duty to rescue.²⁴ It was not clear for a long time however, where the migrants/refugees should exactly be taken or where they should disembark of a vessel.

The obligation to come to the aid of those in peril at sea exists without any doubts. But there was “a lack of clarity, and possible lacunae” when it came to determining the delivery of migrants to a place of safety. Faced with this gap in the law, the UNHCR has argued “for prompt disembarkation at the next port of call.”²⁵ In 2004 member states of International Maritime Organization/IMO/ adopted amendments to the 1974 International Convention for the Safety of Life at Sea and 1979 International Convention on Maritime Search and Rescue.²⁶

Member states of the IMO have obligation to “identify the most appropriate place(s), disembarking persons”. A Guide to principles and practice as applied to the Refugees and Migrants the UNHCR prospect proclaimed that Member States of the IMO have obligation to “coordinate and cooperate so that persons rescued at sea are disembarked in a place of safety as soon as possible.”²⁷

Migrants who are crossing safe frontiers by air are subject to inspection and admissibility procedures of the state of arrival. The Chicago Convention on International Civil Aviation of 7 December 1944 stipulates that air carriers must “*take precautions at the point of embarkation*” to ensure that passengers possess valid travel documents as required by the state of disembarkation”.²⁸ Passengers who were found inadmissible may be transferred to the place where they began their journey or to other places where they may still be admissible. The air carrier is responsible for this “*back transfer*”.

II.4 International migration law

International migration law (IML) is a body or entirety of legal rules governing international migration, that are derived from various branches of public international law, particularly of international human rights law, international humanitarian law, refugee law, nationality law, law of the sea, maritime law, consular law etc. International legal protection is accorded to persons who as migrants are outside their countries, that are unable or unwilling to protect them. In some cases, the migrants are even persecuted by their own countries. International migration law does not constitute an independent branch of international law with its own set of rules and norms, but it is composed of principles, rules, and norms from various branches of public international law. The IOM described “*international migration law*” as “*an umbrella term used to describe the various bodies of laws, principles and norms that together regulate migration*”.²⁹ International migration law has been characterized in similar sense as “*a detailed and comprehensive overview of the*

²⁴ Ibid.; see also International Convention on Maritime Search and Rescue 1979, Annex, Chapter 2, para 2.1.

²⁵ UNHCR, Background on the Protection of Asylum – Seekers and Refugees rescued at sea, 18. March 2002, p. 4.

²⁶ Resolutions MSC.153 (78), 20. May 2004, Adoption of amendments, Annex 3; Resolution MSC 155/78, 20. May, Chapter 3, Article 3.1., Chapter 4., Article 4.8.

²⁷ A Guide Rescue at Sea, IMO, UNHCR. January 2015.

²⁸ ICAO Convention on International Civil Aviation, Doc 7300/9, Ninth Edition (revised eight times).

²⁹ *Immigration & Migrants' Rights*, supra note 11, p. 10

*international legal framework applicable to the movement of peoples” where “is no single source for the international law governing migration”.*³⁰ Very shortly was IML described by the IOM in its “*Glossary on Migration*”, as “*instruments of international law applicable to migration*”.³¹

III. REFUGEES

Throughout history there have been numerous waves of refugees, mostly as a result of religious and racial intolerance for many centuries. Until the emergence of fixed and closed state frontiers in the 19th century, there was no international refugee law problems. Politically motivated refugee movements started from the beginning of the 20th century, mainly in connection with the Russian Revolution of 1917 and the following civil war (1917-21). These events caused the exodus of 1,500,000 refugees. Between 1915 and 1923, over 1,000,000 Armenians left their homes before and after the Turkish violence. There were many major refugee movements in Europe, Asia, and Africa in the 20th century. There was e.g., eviction of Jews from Germany, Austria, and other countries in 1930s, the transfer of German minorities from a number of European countries on the decision of Potsdam Conference of 1945. Several major refugee movements have been caused by the territorial partition (India – Pakistan in 1947, creation of Bangladesh in 1971). Also, the exodus of Palestinian Arabs in the wake of military confrontation between Israel and neighboring Arab countries, or large numbers of Vietnamese refugees after the fall of South Vietnam to communist forces may be mentioned. Afghanistan and the breakup of Yugoslavia have been mentioned as new sources of the world’s refugees.³² Historically, examples of such movements include e. g., the expulsion of Jews from Spain in the late 15th century or the exodus of Huguenots from France after the revocation of the Edict of Nantes in 1685. The international law of refugees may be traced back to the League of Nations and the appointment of Fridtjof Nansen of Norway by the League of Nations as High Commissioner for Refugees in 1921. He devised a League of Nations Passport, called informally as the “*Nansen Passport*”. In October 1933 the Convention relating to the International Status of Refugees was adopted, which obliged contracting states to grant Russian, Armenian, and assimilated refugees so called Nansen passports. Nansen died in 1930 and protection of refugees was entrusted successively to several organizations: Nansen International Office for Refugees (its mandate expired in 1938), then Intergovernmental Committee on Refugees (1938-47), the UN Relief and Rehabilitation Refugee Organization (1947-52), and the Office of the United Nations High Commissioner for Refugees (established in 1950). The Intergovernmental Committee for Migration was founded in 1951 (renamed the Intergovernmental Committee for Migration in 1980).

It is correct to distinguish between migrants and refugees. Refugees are a particular group of migrants who were forced to leave their own country for various reasons, mostly

³⁰ CHETAİL, V. *International Migration Law*. Oxford: Oxford University Press, 2019, pp. 1–7.

³¹ *International Migration Law, Glossary on Migration*. Geneva: IOM, 2004, p. 33.

³² *The New Encyclopaedia Britannica, Micropaedia, Vol. 9*. Chicago, London, 2002, pp. 998–9.

for political and other persecutions (for reasons of race, religion, nationality), armed conflicts or natural disasters. The Convention Relating to the Status of Refugees of 1951 defines the notion of refugee as

“any person” who “is outside the country of his nationality and is unable or owing to such fear unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or owing to such fear is unwilling to return to it”.³³

The term “refugee” shall apply also to “any persons” who has been considered a refugee under the Arrangements of 12 May 1926 and 30 June 1928 or under the Conventions of 28 October 1933 and 10 February 1938, the Protocol of 14 September 1939 or Constitution of the International Refugee Organization. There are different definitions of “refugees”. The Encyclopaedia Britannica characterizes “refugee” as “any uprooted, homeless, involuntary migrant who has crossed a frontier and no longer possess the protection of his former government”.³⁴

In 1976, the Protocol Relating to the Status of Refugees was adopted.³⁵ Both of these main legal instruments established the basic special legal protection of refugees under international law. The Convention’s (Article 2) stipulates that every refugee has duties to the country of their stay, particularly to conform to its laws and regulations, including measures for the maintenance of public order. This Convention contains favorable provisions for refugees, concerning non-discrimination, religion, personal status property, right of association, access to courts, employment, housing, education, public relief, or freedom of movement. The Protocol in its appendix contains definitions in section 1 of “refugee” according to agreements, conventions, and protocols in the pre-war period of the Second World War. They include: the Arrangement of 12 May 1926 concerning the Russian pre-war or Nansen refugees and American pre-war or Nansen refugees; the Arrangement of 30 June 1928 concerning Assyrian or Assyro-Chaldean and assimilated refugees and Turkish refugees; the Convention of 28 October 1933, concerning Spanish refugees; the Convention of 10 February 1938, concerning refugees coming from Germany; the Protocol of 14 September 1939 regulating the position of Austrian refugees and stateless persons who left the territories which in the past constituted Pact of Austria. Section 2 relates to refugees in the Second World War and post-war period in connection with the Constitution of International Refugee Organization. Among these refugees are expressly mentioned victims of Nazi or fascist regimes, Saar refugees, refugees from “Sudetenland” (defined in resolution of the League of Nations, dated 19 January 1939), any other refugees or de facto stateless persons who were refugees before the war, persons of Jewish origin who, having resided in Germany or Austria, were victim of Nazi persecution. The Protocol (Appendix) applies the term “refugee” also to unaccompanied children, who were war orphans or

³³ Convention Relating to the Status of Refugees of 28 July 1951, Art. 1, (2), UNTS N. 2545, Vol. 198, p. 137.

³⁴ Supra note 29, p. 998.

³⁵ Protocol Relating to the Status of Refugees of January 1967, in force 4 October 1967, UNTS, No 8791, Vol. 606, p. 367.

whose parents disappeared and who were outside their countries of origin.³⁶ The notion of “*refugee*” has its historical coherence and continuity. The Agreement Relating to Refugee Seamen and Protocol to this Agreement were adopted on 23 November 1957 and 12 June 1973, both in The Hague.³⁷

The real danger of prosecution of refugees at the present time requires special legal protection which is embodied in the principle of non-refoulement. Article 33 of the Convention provides that “*no Contracting State shall expel or return (refouler) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion*”. This benefit, however, may not be claimed by a refugee who represents a danger to the security of the country in which they were convicted by a final judgement of a particularly serious crime and constitute a danger to the community of that country. The non-refoulement principle also constitutes a rule of international customary law and is binding for all states.

In resolution 319 (IV), of 3 December 1949, the UNGA decided to establish a High Commissioner’s Office for Refugees (UNHCR) as of 1 January 1951. The Office of the UN High Commissioner for Refugees was established by the UNGA in December 1950 with the aim to lead and coordinate international action to protect refugees and resolve refugee problems worldwide. The Office came into being on 1 January 1951 and performs some supervisory functions over the application of the Convention and Protocol.³⁸ The statute was adopted by the UNGA on 14 December 1950 as an Annex to Resolutions 428 (V). The functions of High Commissioner are defined in this statute and various resolutions subsequently adopted by the UNGA resolutions. The UNHCR annually reports to the UNGA. An Advisory Committee was established by Economic and Social Council. There are some other conventions designed to protect refugees as the Agreement relating to Refugee Seamen (1957), the OAU Convention covering the Specific Aspects of Refugee Problems in Africa (1965), the European Agreement on the Abolition of Visas for Refugees (1959), and the European Agreement in the Transfer of Responsibility for Refugees (1980). A state

“normally has the right to refuse entry into its territory to any alien, and to deport from its territory such aliens as it finds no longer acceptable”. But *“exercise of this rights can be the cause of serious problems in the case of persons who are fleeing form areas of active hostilities or from political or social circumstances which they find intolerable”*.³⁹

There is very extensive literature on the refugee protection.⁴⁰ Non –Refoulement is a basic principle of international refugee law. It refers to the obligation of states not to

³⁶ UNGA Res. 2198 (XXI), UNTS: No. 2004, Vol. LXXXIX (89), p. 47 No. 3663, Vol. CLIX (159), p. 1999; No. 4661, Vol. CXCII (192), p. 59; No. 4634, Vol. CXCVIII (198), p. 141; UNTS No. 283, Vol. 18, p. 3.

³⁷ UNTS No. 7384, Vol. 506, p. 125; UNTS N. 1398.

³⁸ The first UN High Commissioner was appointed by the UNGA resolution 319 (IV) in 1949.

³⁹ JENNINGS, R., WATTS, A. *Oppenheim’s International Law, Vol. I, Parts 2 to 4*. London: Longman, 1992, p. 891.

⁴⁰ See e. g. HATHAWAY, J. C., FOSTER, M. *The Law of Refugee Status*. Cambridge: Cambridge University Press, 2014; GOODWIN-GILL, G. *The Refugee in International Law*. Oxford: Oxford University Press, 2007; GAUCI, J. P., GIUFFRÉ, M., TSOURDI, E. (eds.). *Exploring the Boundaries of Refugee Law*. Leiden: Brill Nijhoff, 2015; CHIMNI, B. S. *International Refugee Law: A reader*. New Delhi: Sage Publications, 2000; LAMBERT, H. (ed.). *International Refugee Law – Law*. Routledge, 2010.

“expel or return /refouler / a refugee in any manner whatsoever to the frontiers where his or her life or freedom would be threatened on account of race, religion, nationality, membership in particular social group or political opinion.”⁴¹ This benefit, however, may not be claimed by a refugee, who represents a serious crime and constitute a danger to the community of the country danger to the security of the country in which they were convinced by a final judgement of a particularly serious crime and constitute a danger to the community of that country. The principle of non-refoulement has been also included in human rights treaties, such as the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment /Art.3/⁴² or the International Conventions for the Protection of All Persons from Enforced Disappearance.⁴³ This principles considered to form part of customary international law. Some authors even note that the principle of non-refoulement has acquired the status of jus cogens in international law.⁴⁴ On the other hand this character of the principle of non-refoulement as jus cogens is considered as a controversial issue.⁴⁵

IV. ASYLUM

The Universal Declaration of Human Rights (UDHR) of 1948 stipulates that “*everyone has the right to seek and to enjoy in other countries asylum from persecutions*”. This right may not be invoked, however, “*in the case of prosecutions genially arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations*”.⁴⁶ On the other hand, states have the right and in case of an existing treaty even the duty to extradite fugitive criminals. The constitutions of many countries grant the right to persons who are persecuted for political reasons. In 1967, the UNGA adopted the Declaration on Territorial Asylum.⁴⁷ The 1967 Declaration recalling Article 14 of the UDHR, maintains, that “*everyone has the right to seek and to enjoy in other countries asylum from persecution*”. Also, recalling Article 13 of the UDHR, the 1967 Declaration states, that “*everyone has the right to leave any country, incl. his own and to return to his country*”.⁴⁸ Migrants

⁴¹ Article 33(1), Convention relating to the Status of Refugees, Geneva 28. July 1951, UNTS N. 2545, Vol. 189, p. 137.

⁴² UNTS, Vol. 1465, p. 85; the Convention adopted by G. A. Resolution 39/46 on 10 December 1984, entry into force 26 June 1987.

⁴³ UNTS, Vol. 2716, p. 3, adopted on 20 December 2006, by G. A. Resolution A/RES/61/177, entry into force 23 December 2010.

⁴⁴ ALLAIN, J. The jus cogens Nature of non-refoulement. *Journal of Refugee Law*. 2001, No. 4, pp. 533–558. See also UNHCR and the Executive Committee which have argued that the principle of non-refoulement is progressively acquiring the character of jus cogens, Executive Committee Conclusion N. 25 para (b), UN 1987 Docs A/AC96/694 para 21; A/AC96/660 para 17, A/AC96/643 para 15; A/AC96/609/Rev. 2 para 5.

⁴⁵ See COSTELLO, C., FOSTER, M. *Non-refoulement as Custome and Jus Cogens? Putting the Prohibition to the Test*. Netherlands: Yearbook of International Law, 2015, pp. 273–327.

⁴⁶ UNGA Res. 217A(III) of 10 Dec. 1948, Art. 14.

⁴⁷ UNGA Res. 2312/XXII. This resolution was recalling its previous resolutions concerning the right of asylum 1839/XVII of 19 December 1962, 2100/XX of 20 December 1965, 2203/XXI of 16 December 1966. The right to asylum was incorporated also in several multilateral treaties, mainly in countries of American continent: e. g. Convention of Asylum of 20 February 1928, Havana; Convention on Territorial Asylum of 28 March 1954, Caracas; Convention on Diplomatic Asylum of 28 March 1954.

⁴⁸ UNGA Res. 2312 (Preamble).

and refugees have right to seek asylum, but states are under no duty to admit persons on their territory or to grant them asylum. In other words, an individual may seek and ask for asylum, but has no right to get it. The 1967 Declaration stressed that granting asylum by state is “*the exercise of its sovereignty*”. In this sense, “*it shall rest with the State granting asylum to evaluate the grounds for the grant of asylum*”.⁴⁹ No person referred to in Article 1 shall not be subjected to “*rejection at frontiers*” or if they have already entered the territory in which they seek asylum to “*expulsion or compulsory return to any State*” where they may be “*subjected to persecution*”. This formulation is not itself clear enough, if states are obliged to receive any asylum-seeker on its territory for asylum procedure. The same article of the Declaration mentioned that “*exceptions may be made to the foregoing principle only for overriding reasons of national security or in order to safeguard the population as in the case of a mass influx of persons*”.⁵⁰ The mass influx of persons is nowadays an enormous geopolitical and humanitarian problem, particularly in Europe.

Any sovereign state has power to protect its sovereignty and security. States therefore have the sovereign authority to regulate movement of aliens across their borders. Despite this fact there are heavy conflicts in the practice of the adoption of migrants and refugees on the territory of individual states. In Oppenheim’s International Law, it was e. g., explicitly stated: “*The so-called right of asylum is not a right possessed by the alien to demand that the state into whose territory he has entered should grant protection and asylum*”.⁵¹ The authors resolutely declared: “*Since a state need not receive aliens at all, it can receive them only under certain conditions*”.⁵² The position of aliens is subject to the territorial supremacy of the state in which aliens are present. Nevertheless, states are obliged to respect the norms of international law protecting them. One of the ILC topics since 2012 was e. g., the “*expulsion of aliens*”. The draft articles on the expulsion of aliens seems to be an important contribution to the codification and progressive development of international law.⁵³ The UN Declaration on Territorial Asylum of 14 December 1967 is not a legally binding international treaty. But some stipulation on treatment of aliens, particularly norms on international human rights protection, have the character of jus cogens. In 1977, a special conference on territorial asylum was held with the aim to draw up a convention on this matter. The conference was not successful in this respect and possibility of a further conference on this subject was left open.⁵⁴

This study is dealing particularly with migration, refugees, and asylum-seekers in Europe. In this connection it is possible to mention some resolutions of the Council of Europe such as Resolution 14 (1967) on the Asylum to Persons in Danger of Persecution or the Declaration on Territorial Asylum of 18 November 1977. All these documents reaffirm the willingness to act in a particularly liberal and humanitarian spirit to persons who seek

⁴⁹ Ibid., Art. 1.

⁵⁰ Ibid., Art. 3.

⁵¹ JENNINGS, R., WATTS, A. *Oppenheim’s International Law, Vol. I, Peace*, p. 902.

⁵² Ibid. p. 899.

⁵³ ŠTURMA, P. *The International Law Commission at the Mid-Point of its Quinquennium, Vol. 5 Czech Yearbook of Public & Private International Law*. Praha: ČSMP, 2014, p. 454.

⁵⁴ UNGA Res. 3465/XXX, 1975; UNYB 1977, pp. 625–626.

asylum on their territory and their “*right to grant asylum*” as a “*peaceful and humanitarian act*”.⁵⁵ Earlier, in 1961, the Consultative Assembly of the Council of Europe adopted a “*Recommendation*” stating that it is desirable that Member States

*should confer upon such persons a right to seek, receive and enjoy asylum to the extent compatible with safeguarding their own legitimate interest.*⁵⁶ In 2013 the European Parliament endorsed the Common European Asylum System in an effort to ensure the fair and humane treatment of asylum seekers in Europe, regardless of the country in which they arrive. The refugee and migrant crisis in Europe has exposed the need for reform of this “Dublin system”.

On 4 May 2016, the Commission proposed a very modest reform of the Dublin procedure without changing the existing criteria for determining which Member States are responsible for examining an asylum application (as suggested by the European Parliament).⁵⁷

V. MIGRATION AND STATE SOVEREIGNTY

Any sovereign state has power to protect its sovereignty and security. States therefore have the sovereign authority to regulate the movement of persons across their borders. In Oppenheim’s International Law it was explicitly stated:

*By customary international law no state can claim the right for its nationals to enter into, and reside on, the territory of a foreign state. The reception of aliens is a matter of discretion, and every state is by reason of its territorial supremacy, competent to exclude aliens from the whole or any part, of its territory.*⁵⁸

This authority, however, is subjected to conventional and customary rules of international law. International law’s protection of human rights basically limits the scope of the state’s power to regulate migration flows. States in principle have wide discretion in migratory policies. There are various grounds for state refusing admission of migrants to its territory. It may be terrorism, other criminal activities, risk for national security, diseases, violation of country’s immigration laws etc.

National security grounds may bring limitations on the rights of migrants. The International Covenants on Civil and Political Rights stipulates the freedom of movement within a state territory and the right to leave a state:

⁵⁵ Collection of International Instruments concerning Refugees, UNHCR, Geneva 1979, pp. 305–6.

⁵⁶ *Ibid.* p. 304.

⁵⁷ International Justice Resource Center, Migration Crisis; Recent Developments. In: *IJRC* [online]. 4 September 2015 [2022-01-24]. Available at: <ijrcenter.org/2015/09/09/migration-crisis-recent-developments-human-rights-standards-and-european-court-decision>. Reform of the Dublin system. In: *European Parliament Think Tank* [online]. 30. 9. 2020 [2021-05-21]. Available at: <[https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI\(2016\)586639](https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI(2016)586639)>.

⁵⁸ JENNINGS, R., WATTS, A., *supra* note 39, p. 897.

Article 12(3) states that migrants “*shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with other rights recognized in the present Covenant*”.⁵⁹

Under Article 13, “*an alien lawfully in the territory of a State Party...may be expelled there from only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed*”⁶⁰

Article 4(1) provides, that state parties may derogate from certain obligations “*in time of public emergency which threatens the life of the nation...to the extent strictly required by the exigencies of situations provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, color, sex, language, religion or social origin*”.⁶¹

The CCPR General Comment No 15 of 11 April 1986 to the position of aliens under the Covenant e.g., stated: “*The Covenant does not recognize the right of aliens to enter or reside in the territory of a State party. It is in principle a matter for the State to decide who it will admit to its territory. However, in certain circumstances an alien may enjoy the consideration of non-discrimination, prohibition of inhuman treatment and respect for family life arise*”.⁶²

Security grounds may also provide an exception to the right of non-refoulement under international refugee law. But the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984 does not provide for this exception. It appears that a decision of return deportable persons where they will be tortured on security grounds would violate norms of international human rights law and humanitarian law. Article 4 stipulates that “*no State party shall expel, return (‘refouler’) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture*”. To determine whether there are such grounds, the competent authorities shall take into account the existence of a consistent pattern of gross, flagrant, or mass violations of human rights in a relevant state.⁶³

VI. HUMAN RIGHTS PROTECTION OF MIGRANTS

All universal human rights belong to all human beings without exception. There are of course some limitations. No migrant may be deprived of their human rights because they entered foreign country in contravention of the national immigration rules. The universality of human rights is often illusory in practice of some states, however. There are several

⁵⁹ International Covenant on Civil and Political Rights, UNTS vol. 999 p. 174.

⁶⁰ Ibid.

⁶¹ Ibid.

⁶² Office of the High Commissioner for human Rights, CCPR General Comment No 15: The Position of Aliens Under the Covenant, adopted at the Twenty-seventh session of HRC on 11 April 1986.

⁶³ UNGA Res. 39/46 of 10 December 1984, entry into force on 26 June 1987.

relevant international treaties that have important relevance on the rights of migrants and refugees. Regardless of their migration status migrants are entitled under international law to basic human rights embodied in basic human rights instruments. We may start with protecting migrants under the European Convention on Human Rights (ECHR) and the European Social Charter (ESCH) in comparison with the International Covenants on Civil and Political Rights (ICCPR) and Protocols thereto, and with International Covenant on Economic, Social and Cultural Rights (ICESCR) of 1966.⁶⁴ The international human rights applicable to migrants may be found in variety of other legal instruments. The rights protecting migrants in particular are:

- the right to life (Article 2 ECHR; Article 6 ICCPR);
- the right to be protected from torture, inhuman or degrading treatment or punishment (Article 3 ECHR; Article 7 ICCPR);
- the right to be free from slavery or involuntary servitude (Article 4 ECHR; Article 8 ICCPR);
- the right to liberty and security of person (Article 5 ECHR; Article 9 ICCPR);
- the right to fair trial by an independent and impartial tribunal, the right to legal redress (Article 6 ECHR; Article 14 ICCPR);
- the right to respect for their private and family life, their home and their correspondence with exception of cases in accordance with the law democratic society and in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others (Article 8 ECHR; Article 17 ICCPR);
- the right to freedom of thought, conscience, and religion (Article 9 ECHR; Protocol 12 ECHR; Article 21 of the EU Charter of Fundamental Rights; Article 18 ICCPR);
- the right to equality and non-discrimination (Article 14 ECHR; Protocol 12; Article 26 ICCPR);
- the right to freedom of movement (Article 2, Protocol 4, Article 12 ICCPR)
- the right to freedom of peaceful assembly and to freedom of association with others (Article 11 ECHR; Article 21 ICCPR); and
- the right to protection of economic and cultural rights (The European Social Charter; European Convention on Social Security, International Covenant on Economic, Social and Cultural Rights of 16 Dec. 1966).

The ECHR underwent an important evolution, particularly with Protocol 11, which aims to rationalize the machinery for the enforcement of rights and liberties through the Court of Human Rights. The Court deals with individual and inter-state petitions.⁶⁵ The Court has been sometimes characterized as a quasi-constitutional court for Europe in the

⁶⁴ ICESCR, vol. 999, December 1966, p. 171, entry into force 3 January 1996.

⁶⁵ Protocol No. 11 to the Convention for the Protective of Human Rights and Fundamental Freedoms; Explanatory Report to Protocol 14 to the Protection of Human Rights, Council of Europe Treaty Series No 194.

field of human rights.⁶⁶ Human rights, as they are guaranteed in international law, have an essential role in protecting all migrants and refugees. No-one may be deprived of their human rights because they have entered or remained in a foreign country in violation of the national immigration rules. On the other hand, the power of a state to protect its security is a core attribute of sovereignty. Various international instruments call upon states to effectively manage international migration, but migrants, particularly their children are very often vulnerable in the whole migration process.⁶⁷ There are a number of books and studies dealing with the legal regulations of various aspects of international migration and migrants. Unfortunately, international law does not establish a comprehensive international migration regime.⁶⁸ The interconnection between state sovereignty, security concerns, and migration raises challenges often for governments and their political practice.⁶⁹

VII. THE UN GLOBAL COMPACT FOR SAFE, ORDERLY AND REGULAR MIGRATION

The decision to adopt the UN Global Compact for Safe, Orderly and Regular Migration (GCM) was taken on 19 September 2016 at a conference of heads of states and governments under the auspices of the UNGA in New York. The UN Secretary General Ban Ki-moon called for the adoption of the GCM in his report in May 2016.⁷⁰ At the same time this report called for the adoption of a Global Compact on Refugees (GCR). A commitment to adopt a separate GCR and GCM was confirmed in the New York Declaration for Refugees and Migrants, issued at the September 2016 gathering and approved by 193 UN Members.⁷¹ The text of the GCM was agreed on by the UNGA in July 2018 and formally adopted at an inter-governmental conference in Marrakech in December 2018.⁷² The aim of the GCM is “to hasten international co-operation on migration in a comprehensive manner, to facilitate safe, orderly, and regular migration and to reduce the incidence and negative impact of irregular migration”. The GCM declared 23 objectives to achieve safe, orderly, and regular

⁶⁶ BATES, E. *The Evolution of the European Convention on Human Rights*. Oxford: Oxford University Press, 2010, p. 432.

⁶⁷ Article 9 of the UN Convention on the Rights of Child of 1989 stipulates e. g. that “State Parties shall ensure that a child shall not be separated from his or her parents against their will except when...such separation is necessary for the best interest of the child”, GAR 44/25, 20. Nov. 1989, entry into force 2 September 1990, 1577 UNTS, 1989.

⁶⁸ There is an extensive literature on the rights of migrants and refugee items, see e. g., ALEINKOFF, T. *International dialogue on Immigration, International legal norms and migration*. Geneva: IOM, 2002; BETTS A. *Forced Migration and Global Politics*. Oxford: Wiley–Blackwell, 2009; COSTELLO, C. *The Human Right of Migrants and Refugees in European Law*. Oxford: Oxford University Press, 2016; KTISTAKIS, Y. *Protecting Migrants under the European Convention on Human Rights and European Social Charter, A Handbook for legal practitioners*. Council of Europe, 2013; PLENDER R. *International Migration Law*. Leiden: Martinus Nijhoff Publishers, 1988; CHETAIL, V. *International Migration Law*. Oxford: Oxford University Press, 2019; BATSAIKHAN, U., DARVAS, Z., RAPOSOL, G. *People on the Move: Migration and Mobility in the European Union*. Brussels: Bruegel 2018 etc.

⁶⁹ *Ibid.*

⁷⁰ Report of the Secretary-General in Safety and Dignity: Addressing Large Movements of Refugees and Migrants, UN GA 9 May 2016.

⁷¹ A/RES/71/1, adopted on 19 Sept. 2016.

⁷² A/RES/73/195, Annex, adopted on 19 December 2018.

migration. The text of the GCM is a “*legally non-binding, cooperative framework*”. According to the GCM, states have the “*sovereign right*” to determine their national migration policy in conformity with international law. The Compact recognizes that the “*rule of law, due process and access to justice*” are fundamental to all aspects of migration governance.⁷³ In December 2017, The US government refused to participate in the GCM, stating that it was “*inconsistent with the US immigration principles*” and “*incompatible with US sovereignty*”. Between July and December of 2018 Hungary, Austria, Australia, Bulgaria, Slovakia, Poland, and Israel indicated that they would not be participating in the Compact. Switzerland and Italy announced that they would be abstaining. The Belgian government collapsed in December 2018 due to disputes within the ruling coalition.⁷⁴

The GCM was adopted by acclamation by the representatives of 164 governments at the conference in Marrakech on 10 December 2018. The UN General Assembly finally adopted the GCM on 19 December 2018 by 152 votes in favor, with 5 countries voting against, and with 12 countries abstaining. The countries voting against were the US Hungary, Poland, Israel, and the Czech Republic. Abstaining were Algeria, Austria, Bulgaria, Chile, Italy, Latvia, Libya, Lichtenstein, Romania, Singapore, and Switzerland. Brazil was originally voting in favor of the GCM, but later the new president Jair Bolsonaro refused the Compact. The main arguments of the opposition to the GCM were the allegations that the GCM would declare migration as a “*human right*”, criminalize the criticism of migration, and encourage mass migration. The US approach to the Compact since the adoption of the New York declaration was that “it is not compatible with US sovereignty” and that decision on immigration policies “*must always be made by Americans and Americans alone*”.⁷⁵ Austrian Chancellor S. Kurz e. g., on 31 October 2018 expressed fear of “*a danger to national sovereignty*” and stressed that “migration is not and cannot become a human right”.⁷⁶ Hungarian Foreign Minister P. Szijjártó in July 2018 said that the GCM was “totally at odds with the country’s security interests” and “*in the conflict with common sense and also with the intent to restore European security*”.⁷⁷ On 20 November 2018, the Israeli Prime Minister Benjamin Netanyahu announced that Israel “*will not accede to and will not sign*” the GCM. He declared that Israel is “*committed to guarding our borders against illegal migrants*” and “*this is what we have done, and this what we will continue to do*”.⁷⁸ Scott Morrison and his foreign affairs Minister issued a joint statement on 21 November 2018 that the GCM is “*inconsistent*

⁷³ Ibid., point 15 (b)(c) and 16 (Objectives). Resolution in point 6 (Annex), declares that Global Compact is a “milestone” in the history of the global dialogue and cooperation on migration.

⁷⁴ GOTEV, G. Nine EU members stay away from UN migration pact. In: *Euractiv* [online]. 20. 12. 2018 [2022-01-24]. Available at: <<https://euractiv.com/section/global-europe/news/nine-eu-members-stay-away-from-un-migration-pact>>.

⁷⁵ Trump Administration Ends Participation in Global Compact on Migration, Citing Concerns Regarding US Sovereignty. *AJIL*. 2018, Vol. 112, No. 2, pp. 311–313.

⁷⁶ See MOULSON, G. Austria says it won’t sign UN global migration pact. In: *AP News* [online]. [2022-01-24]. Available at: <<https://apnews.com/article/b05e7af353464426aaffb2f6f12d07a4>>.

⁷⁷ SZIJJÁRTÓ, P. Hungary Votes against UN Migration Compact. In: *HUNGARY today* [online]. 20. 12. 2018 [2022-01-24]. Available at: <<https://hungarytoday.hu/hungary-votes-against-un-migration-compact>>.

⁷⁸ Israel won’t sign global migration pact, must protect its borders. In: *timesofisrael.com* [online]. [2022-01-24]. Available at: <https://time_of_israel-wont-sign-global-migration-pact-netanyahuannounces/>.

with our well-established policies and not in Australia's interests". Both Australians also criticized that "*the Compact fails adequately to distinguish*" between people who enter Australia illegally and those who come to Australia the right way". Besides, in their view, the Compact would risk encouraging, illegal entry to Australia.⁷⁹ At the Conference in Marrakech the UN Secretary-General criticized "*many falsehoods*" disseminated about the Compact. The UN Special representative for International Migration L. Arbour stated that the Compact "*reinforces, unambiguously, the fundamental principle that migrants should be treated with dignity and fairness*". She stressed, that the GCM does not create "*any new right to migrate*" and it is not correct to state that GCM imposes an obligation on member states and infringes state sovereignty. She confirmed that the GCM "*is not binding, as a treaty law*". In her interview with the Associated Press on 27 November 2018, she repeated that the GCM is not legally binding and that there is no obligation for a single country "*to do anything that it doesn't want to*".⁸⁰

The European Commission strongly supported the GCM and regretted the decision by some EU countries not to support the GCM. According to the Commission, the GCM will help to improve the situation for migrants, to reduce irregular migration, address the drivers of migration, fight trafficking, and migrant smuggling.⁸¹ Several countries expressed their criticism for rejecting the GCM, including commitment to a global migration framework. Many representatives welcomed the adoption of the Compact. Germany's Chancellor A. Merkel e.g., declared that the "*go it alone approach will not solve the issue and that multilateralism is the only possible way forward*". She confirmed that Germany needed more skilled labor from outside the EU and vested in "*legal migration*". But she at the same time confirmed that states must tackle illegal migration and improve border protection to prevent human trafficking.⁸²

In the Global Compact for Migration the states are encouraged to

develop and use country-specific migration profiles, which include disaggregated data on all migration – relevant aspects in a national context, including those on labor market needs, demand and availability of skills, the economic, environmental and social impacts of migration, remittance transfer costs, health, education, living and

⁷⁹ Austria refuses to sign UN migration pact, citing risks to turn backs and deliberation. In: *The Guardian* [online]. [2022-01-24]. Available at: <<https://theguardian.com/australia-news/2018/nov/21/australia-refuses-to-sign-un-migration-pact-citing-risks-to-turnbacks-and-detention>>.

⁸⁰ U-turns on Global Compact, reflect poorly on countries concerned: senior UN migration official. In: *United Nations* [online]. 27. 11. 2018 [2022-01-24]. Available at: <news.un.org/en/story/2018/11/1026791>. Near verbatim transcript of the Press conference by L. Arbour, Special Representative of the Secretary-General for International Migration 28 November 2018. In: web.int.report/world/near-verbatim-transcript-press-conference-louise-arbour-special-representative.

⁸¹ See a speech to European Parliament on 13 November 2018 by the European Commissioner for Humanitarian Aid and Crisis Management Ch. Stylianides.

⁸² Germany's Merkel voices support for UN migration pact. In: *ARC* [online]. [2022-01-24]. Available at: <arc.com.tr/en/europe/gemany-s-merkel-voices-support-for-xin-migration-pact/1317493>; see also speech of A. Merkel at the conference in Marrakech on 10 December 2018.

*working conditions, wages and the needs of migrants and receiving communities in order to develop evidence – based migration policies.*⁸³

The Global Compact for Migration is the intergovernmentally negotiated, legally non-binding agreement which was prepared in the framework of the UNGA to cover all aspects of international migration in a comprehensive manner. It is comprised of 23 objectives for better managing migration at local, national, regional, and global levels. The compact stipulates that it is grounded in values of state sovereignty, responsibility-sharing, non-discrimination, and human rights.

Today there are over 258 million migrants around the world living outside their country of birth.⁸⁴ There are various international governmental and non-governmental organizations and institutions dealing with the agenda of migration.⁸⁵ Several international non-governmental organizations expressed concerns regarding the human rights situations of migrant, refugees, and asylum seekers. The European Network of National Human Rights Institutions (ENNHRI) e.g., criticized increasing violence at the European borders and the increasing numbers of “*pushbacks*” of migrants and refugees across borders and in the Mediterranean. The ENNHRI called upon all European states, the EU, the Council of Europe, and all the involved international organizations to undertake all necessary actions in the “*spirit of responsibility, solidarity and sincere cooperation*”.⁸⁶ Within the International Organization on Migration (IOM) the International Migration Law Unit (IMLU) was established to strengthen and promote the organization’s involvement in international migration law. The main objective of this IMLU is to encourage the dissemination of the international legal standards that govern migration and provide protection of the rights of migrants. There is no international comprehensive legal convention for the governance of migration. The IMLU assists governments to develop and implement migration legislation and procedure. It cooperates with human rights organizations and agencies, particularly it works closely with the UN Special Rapporteur on the Human Rights of Migrants.⁸⁷ Some rules are enshrined in multilateral and bilateral treaties or already in customary international law.

⁸³ UN Doc. A/RES/73/195, Global Compact for Safe, Orderly and Regular Migration, 19 January 2019, Objective 1, para 17(j).

⁸⁴ Refugees and Migrants 2018. In: *refugeesmigrants.un.org* [online]. [2022-01-24]. Available at: <refugeesmigrants.un.org/migration-compact>.

⁸⁵ They are e. g., the International Organisation for Migration (IOM); the Office of the High Commissioner for Refugees (UNHCR); the Global Migration Group (GMG); International Migrant Alliance (IMA); Global Coalition on Migration (GCM); International Catholic Commission for Migration. Besides, there are also various research institutes dealing with problems of migration e. g., the Migration policy Institute (MPI) in Washington D.C. or the Institute Universitaire de Hautes Etudes Internationales in Geneva etc.

⁸⁶ European Solidarity in the field of Migration: Coming together to Promote and Protect Human Rights, ENNHRI General Meeting, Geneva 6 March 2017.

⁸⁷ IOM, UN Migration. In: *ION* [online]. [2022-01-24]. Available at: <<https://www.ion.int/international-migration-law>>.

VIII. THE GLOBAL COMPACT ON REFUGEES

The UNGA resolution N. 73/151 adopted on 17 December 2018 emphasizes the importance of the Global Compact of Refugees (GCR).⁸⁸ The GCR was contained in UNGA resolution N. 73/12 (Part II).⁸⁹ The comprehensive refugee response framework was contained already in Annex I of the New York Declaration for Refugees and Migrants, adopted by the UNGA on 19 September 2016.⁹⁰ The New York Declaration contained a stipulation on the establishment of a separate Global Compact on Refugees (GCR), with the aim of achieving a more equitable distribution of the burden and responsibility connected with world's refugees. The first draft of the GCR was published in January 2018 and final draft in July 2018. The UN Refugee Agency was an originator of this project. The GCR was endorsed by the UNGA on 17 December 2018 with 181 votes in favor, 2 against, and 3 abstentions. Against voted the US and Hungary. Eritrea, Libya, and the Dominican Republic abstained. The GCR is not legally binding. It provides a basis for predictable and equitable “burden and responsibility-sharing” among all United Nations Member States.⁹¹ The comprehensive refugee response framework set out in Annex 1 of the New York Declaration forms an integral part of the Global Compact for Refugees. The Global Compact “emanates from fundamental principles of humanity and international solidarity”.⁹² The aim of the Compact on Refugees was to establish a more equitable and inclusive protection of refugees based on international cooperation. The Compact calls for greater support of refugees, including financial assistance, education, health care, resettlement, and the right to work. Periodic global refugee forums are to be convened. The international community as a whole should provide support for countries of origin and voluntary repatriation. Success under the Compact should be assessed in terms of progress in four objectives to:

- ease pressure on host countries;
- enhance refugee self-reliance;
- expand access to third country solutions; and
- support conditions in countries of origin for return in safety and dignity.⁹³

The UNGA resolution. N. 73/151 emphasized that the protection of refugees is primarily the responsibility of states, whose full and effective cooperation, action, and political resolve are required to enable the Office of the High Commissioner to fulfil its function.⁹⁴

⁸⁸ UNGA Res. 73/151, 17 December 2018.

⁸⁹ UNGA Res. 73/12 Part II, 2 August 2018, Report of the UN High Commissioner for Refugees.

⁹⁰ UNGA Res. 71/1, 19 September 2016.

⁹¹ UNGA Res. 73/1951, points 17, 20, 23, 24, 60. See e.g. UN Global Compact on Refugees, New York, 2018, p. 2. In: [unhcr.org](https://www.unhcr.org/5c658aed4.pdf) [online]. [2022-01-24]. Available at: <[unhcr.org/5c658aed4.pdf](https://www.unhcr.org/5c658aed4.pdf)>.

⁹² UN Global Compact, *ibid.*, p. 3.

⁹³ *Ibid.*, para 7, p. 4.

⁹⁴ A/RES/73/151, point 8, p. 2.

IX. MIGRATION IN THE EU, THE PRINCIPLE OF SOLIDARITY AND COMMON RESPONSIBILITY

A major problem of the common European policy seems to be in sharing the burden of migrants among EU countries, particularly in the relocation of migrants and refugees. In line with Article 78(3) on the Treaty on the Functioning of the European Union, the European Commission, European Council, and European Parliament with support of the Court of Justice of the European Union (CJEU, CURIA) derive the legal obligation of EU members to receive migrants in an adequate number. While both universal Compacts are non-binding instruments allegedly respecting state sovereignty, the situation in the framework of a supranational EU seems to be different. Article 78(3) stipulates:

In the event of one or more Member States being confronted with an emergency situation characterized by a sudden inflow of nationals of third countries, the Council of the Proposal from the Commission, may adopt provisional measures for the benefit of the members State(s) concerned, financial support to first-entry countries to overcome unequal burdens is inevitable.

Relocation of refugees from “overburdened” countries has been the preferred EU strategy. But the question may be raised “*what are those provisional measures*” in the meaning of Article 78(3)? Integration of migrants into new country (society) and granting of citizenship (nationality) to immigrants are not a temporary effect. Only limited number of migrants may wish to return to their countries of origin (return migration). In June 2016, the European Commission published the first action plan on integration, with the aim to coordinate a common policy for integration of third-country nationals into EU Member States.⁹⁵

Today’s European Union and Europe as a whole are facing serious migration and refugee challenges. In the previous years, mainly since 2015, Europe has experienced a heavy influx of asylum seekers from “*war-torn*” countries. The rest of the migration was driven by economic motives and family reunification. With the aim to limit the enormous influx of migration, the EU provides financial assistance to Turkey and to North African countries with the aim to contain illegal border crossings into Europe. Some countries in Europe are more supportive of immigration than others.

X. THE DECISION OF THE COUNCIL OF THE EU 2015/1601

In the summer of 2015, the Council of the European Union adopted the decision 2015/1601 in order to help Italy and Greece with the massive influx of migrants. This decision stipulated the relocation of 120,000 persons from those two Member States to other EU states, over the period of two years. The decision was adopted on the basis of Article

⁹⁵ Action Plan on Building inclusive societies (2016–2019). Integration and inclusion of migrants is supported by the IOM, see Integration and Inclusion of Migrants and People with a Migrant Background, IOM 21 October 2020.

78(3) of the treaty on the Functioning of the European Union (TFEU), which stipulates that

in the event of one or Member States being confronted by an emergency situation characterized by a sudden inflow of nationals of third countries, the Council on a proposal from the Commission and after consulting the European Parliament, may adopt provisional measures for the benefit of the Member State(s) concerned.

According to Article 80 of the TFEU, the policies of the Union in the areas of border checks, asylum, immigration, and their implementation are to be governed by the “*principle of solidarity and fair sharing of responsibility*” between the EU Member States. Union acts adopted in this area shall contain “*appropriate measures to give effect to this principle*”.⁹⁶ On 20 July, the representatives of the Member States adopted a resolution on relocating from Greece and Italy 40,000 persons in the need of international protection at a Council meeting by consensus. Over a period of 2 years, 24,000 persons were to be relocated from Italy and 16,000 persons from Greece. On 14 September 2015, the Council adopted Decision 2015/1523.⁹⁷

The European Council, the European Parliament and the Commission adopted several documents in favor of relocation and international protection of migrants on the basis of solidarity and Article 78(3) of TFEU. These measures envisaged for the benefit of Italy and Greece were termed as a “*provisional nature*” only.⁹⁸ According to the Council Decision, 120,000 applicants were already to be relocated to other Member States. The Member State of relocation was offered a lump sum of EUR 6,000 for each relocated person.⁹⁹ There are some EU funds for migration, asylum integration, or internal security. Most of the EU funds are allocated under the Multi-Annual Framework (MFF). The Asylum, Migration, and Integration Fund was founded “*to promote the efficient management of migration flows and the implementation, strengthening and development of a common Union approach to asylum and migration*”.¹⁰⁰

XI. THE JUDGEMENT OF THE ECJ IN JOINT CASES C-643/15 AND C-647/15 AND SOLIDARITY

The Czech Republic, Slovakia, Hungary, and Romania voted in the Council against the adoption of Decision 2015/1601. The Slovak Republic and Hungary have asked the Court of Justice of the European Union (CJEU) to annul this decision, adopted by the Council

⁹⁶ Council Decision (EU) 2015/1601 of 22 September 2015, establishing provisional measures in the area of international protection for the benefit of Italy and Greece, Official Journal of the European Union 248/80, 24 September 2015, p. 1.

⁹⁷ Council Decision 2015/1523, establishing provisional measures in the area of international protection in the benefit of Italy and of Greece, OJL 239, 15 September 2015, p. 146.

⁹⁸ EUR-Lex-12012E/TXT-EN-EUR; OJC 326, 26 October 2012 P.0001-0390.

⁹⁹ Ibid. p. 10, see Art 4 and 10.

¹⁰⁰ In: *ec.europa.eu* [online]. [2022-01-24]. Available at: <<https://ec.europa.eu/home-affairs/financing/gundings/migration-asylum-borders/asylum-migration-integration-fund-en>>.

by a qualified majority. The Slovak Republic brought forward for annulment of six pleas in law and Hungary's action contained ten pleas. Poland by its intervention supported some of these pleas, while Belgium Germany, Greece, France, Italy, Luxembourg, Sweden, and the Commission intervened in support of the Council's decision. The CJEU (Grand Chamber) dismissed the actions brought by Slovakia and Hungary in their entirety. The Court held that Article 78(3) of the TFEU enables the EU institutions to adopt all the provisional measures necessary to respond effectively and swiftly to an emergency situation. The Court rejected the argument that a legislative procedure, as referred to in Article 289 of the TFEU, should have been followed, because Article 78(3) of the TFEU provides that the European Parliament is to be consulted when a measure based on that provision is adopted. The Court noted that this procedure can be followed only where a provision of treaties expressly refers to it. The Court also stated that the decision is not legislative act, and its adoption was therefore not subject to the participation of national parliaments and to the public nature of the deliberations and vote in the Council. In the Court's view, the Council was not required to act unanimously when adopting the contested decision.¹⁰¹ This position of the Court was not new. Previously, in case 39/72, *Commission v. Italy*, the Court maintained that a state cannot breach EU rules for the sake of protecting its conception of national interest. The judgement of 1972 e.g., on its grounds, para 24 stated:

In permitting Member States to profit from the advantages of the Community, the Treaty imposes on them also the obligation to respect its rules. For a State unilaterally to break, according to its own conception of national interest, the equilibrium between advantages and obligations flowing from its adherence to the Community brings into question the equality of Member States before the Community law and creates discrimination at the expense of their nationals, and above all of the nationals of the state itself which places itself outside the Community rules.¹⁰²

The judgement in fact solved a conflict of law between a national (Italian) legal system and European Union law.

The solidarity principle should, according to the EU, play a crucial role in EU law and policy on human migration. But no precise content of this principle exists. There is no established principle of “solidarity” in public international law either. In general terms, the notion “solidarity” means “understanding” or “support” (mostly moral). In some legal systems it is also a term of civil law expressing “solidary obligation” e. g., of debtors. The CJEU and EU often refer to the “duty of solidarity”. But the interpretation of the role of “solidarity” in EU migration policy differ, however. Slovakia at the Court argued that solidarity is not a legally binding principle but merely a non-compulsory source of policy inspiration. The CJEU rejected the view that application of the principle of solidarity between EU and

¹⁰¹ CJEU – Joined Cases C-643/15 and C-647/15 Slovak Republic and Hungary in Council of the European Union, 6 September 2017; CURIA, Judgement of the Court, in joined cases C-643/15 and C-647/15, 6 September 2017.

¹⁰² Judgement of 7. 2. 1973 – Case 39/72, *Commission v. Italy*, para 41, p. 116. In: *eur-lex.europa.eu* [online]. [2022-01-24]. Available at: <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61972CJ0039&from=EN>>.

Member States is based on voluntarism.¹⁰³ The concept of solidarity was not codified in any EU instruments, nevertheless the CJEU and EU bodies regard solidarity as legally binding and even principle of EU law. But, e.g., Article 3(3) of the TEU stipulates on the other hand that EU aims at promoting “*economic, social and territorial cohesion, and solidarity among member states*”. Solidarity as a “*legal principle was not mentioned here*.”¹⁰⁴ *The Charter of Fundamental Rights of the EU of 2012 in its preamble mentioned solidarity among “universal values”* upon which EU was founded.¹⁰⁵ In the preamble of the TEU the Member States of the EU only expressed their intention to confirm the solidarity which binds Europe and the overseas countries.¹⁰⁶ Despite an unclear legal content of the notion of “*solidarity*” and its conception as a “*value*”, it seems to be clear that the CJEU confirmed the value of solidarity as a legal rule directly binding and enforceable under the EU law on migration. It does not mean, however, that all stipulations on solidarity embedded in the TEU and other EU instruments have the same value. Article 122(1) e.g., does not establish the duty of solidarity among Member States in respect to starting of financial responsibilities arising in the framework of the European Monetary Union. The Court’s inconsistency in the interpretation of legal effect of various clauses on the solidarity of EU instruments was also criticized. This criticism originated in the presumption that the principle of solidarity can be a source of legally enforceable obligations only when concrete legislative measures are adopted.¹⁰⁷

The judgment is controversial with regard to the relocation of migrants and migrant quotas on the basis of the principle of solidarity among member states. The judgement is based on Article 78 of the TFEU which should empower the EU to adopt laws for benefit of states overwhelmed by a flow of migrants and Article 80, which provides that such decisions must be governed by the principle of solidarity and fair sharing of responsibility among Member States. The Visegrad group of EU countries has been persistently refusing to comply with decision on the relocation of migrants. The CJEU in the judgment rejected this position and upheld enforceability of solidarity as a legal principle and a legally enforceable obligation. In the view of the Court, this principle imposes on EU Member States a legal obligation to act for the benefit of other Member States, even when such actions are not in their own interests.¹⁰⁸

¹⁰³ Cases C-643 and C-647/15, Enforcing solidarity in EU migration policy, European Law Blog, 29 September 2020. In: *researchgate.net* [online]. [2022-01-24]. Available at: <https://www.researchgate.net/publication/330134525_The_principle_of_solidarity_between_voluntary_commitment_and_legal_constraint_Comments_on_the_judgment_of_the_court_of_justice_of_the_european_union_in_joine_cases_c-64315_and_c-64715>.

¹⁰⁴ Treaty on European Union (TEU). In: *eur-lex-europa.eu* [online]. [2022-01-24]. Available at: <eur-lex-europa.eu/legal-content/EN/TXT/?uri=celex%3A1201214%2FTXT>.

¹⁰⁵ Charter of Fundamental Rights of the European Union OJEU, C 326/391, 26 October 2012. In: *eur-lex-europa.eu* [online]. [2022-01-24]. Available at: <eur-lex-eu/legal-content/EN/TXT/?uri=ceLEX:12012P/TXT>.

¹⁰⁶ Supra note 92.

¹⁰⁷ OBRODOVIC, D. Cases C-žč3 and C-6č7/15: Enforcing solidarity in EU migration policy, 2 October 2017. In: *europeanlawblog.eu* [online]. [2022-01-24]. Available at: <<https://europeanlawblog.eu/2017/10/02/cases-c-643-and-e-64715-enforcing-solidarity-in-eu-migration-policy/>>.

¹⁰⁸ See para 291 of the Judgment.

XII. NEW PACT ON MIGRATION AND ASYLUM

In October 2020, the EU proposed the New Pact for Migration and Asylum (un Nouveau Pacte sur la Migration et l'Asyle).¹⁰⁹ The New Pact stressed that the proper functioning of migration and asylum policy inside the EU needs “reinforced cooperation on migration” with partners outside the EU. Therefore “a comprehensive approach” which acknowledges “collective responsibilities” is needed. The Pact shall introduce “a common European framework and better governance of migration and asylum management as well as a new solidarity mechanism”.¹¹⁰ The Pact aims at resolving longstanding differences over asylum and migration policy to help “frontline countries (Greece, Italy, Malta and Spain). According to European Commission the New Pact offers “a fresh start” to build “a system that manages and normalizes migration for the long term and which is fully grounded in European values and international law”.¹¹¹ The Pact proclaims that no Member State should “shoulder a disproportionate responsibility and that all Member States should contribute to solidarity on a constant basis”.¹¹² This concept of solidarity differs of course from the responsibility of states for international wrongful acts and from other forms of state responsibility. The Communication offers a comprehensive approach, bringing together policy in the areas of migration, asylum, integration, and border management. The new plan presupposes screening of migrants arriving at Europe’s border without permission. The Commission proposed to set up “a fully fledged European Union Agency for Asylum”. The new “Union Resettlement and Humanitarian Admission Framework” should be “a stable framework for the EU contribution to global resettlement effort”. One of the key priorities is the amendment of the Return Directive with the aim to choose loopholes and streamline procedures so that asylum and return work as a part of single system.¹¹³

The Commission required “an integrated approach for migration and asylum policy” which ensures a “fair sharing of responsibility”. A new solidarity mechanism should embed “fairness” into the EU asylum system, so that the needs created by the irregular arrivals of migrants and asylum seekers would not be handled by individual EU Member States alone, but by the EU as a whole. In view of the Commission, “solidarity” implies that “all Member States should contribute, as clarified by the European Court of Justice”.¹¹⁴ This expression is not clear enough, however. How should this contribution through solidarity ought to be divided in practice? The Commission proposed several key actions, including an “Asylum and Migration Regulations” with: 1. new solidarity mechanism; 2. a screening procedure at the

¹⁰⁹ See European Commission, Communication from the Commission to the European Parliament, the Council the Europe Economic and Social Committee and the Committee of the Region on A New Pact on Migration and Asylum, COM (2020)609 final, Brussels, 23 September 2020. In: *eur-lex.europa.eu* [online]. [2022-01-24]. Available at: <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52020DC0609>>.

¹¹⁰ *Ibid.*, p. 3.

¹¹¹ *Ibid.*, p. 1.

¹¹² *Ibid.*, p. 2.

¹¹³ *Ibid.*, p. 3.

¹¹⁴ *Ibid.*, p. 5, see also Judgment in Joined Cases C-715/17, C-718/17 and C-719/17, Commission v. Poland, Hungary and the Czech Republic. In: *europesources.info* [online]. [2022-01-24]. Available at: <<https://www.european-sources.info/record/cjeu-joined-cases-c-715-17-c-718-17-c-719-17-commission-v-poland-hungary-and-the-czech-republic/>>.

external border; 3. new Asylum Procedures, including a new border procedure; 4. An amendment of Eurodac Regulation; 5. The appointment of a Return Coordinator within the Commission; and 6. a new strategy on voluntary returns and reintegration. The European Parliament and the Council decided by June 2021 to adopt “the Asylum and Migration Management Regulation”, the Screening Regulation and the revised Asylum Procedure.¹¹⁵ Integrated border management was characterized as an “*indispensable policy for the EU to protect the EU external border and safeguard the integrity and functioning of a Schengen without internal border controls*”. The management of EU external borders is considered to be “*a shared responsibility of all Member States and Schengen Associated Countries, and its agencies*”.¹¹⁶ The integration of migrants and their families is a key part of the EU agenda to promote social inclusion.¹¹⁷ The aim of the New Pact is to set out the “*end-to-end approach*” to make migration management in a common European framework for migration “*fair, efficient and sustainable*”.¹¹⁸

European Commission issued a short “*commentary*” (46 p.) called the “*New Pact on Migration and Asylum: Questions and Answers with the aim to explain the main issues of the New Pact*”. One of the key elements of the 2016 reform, “*The Dublin regulation*” was withdrawn by the Commission. The commentary informs that a series of interactives will be presented in the coming months, regarding an action plan on integration and inclusion, a strategy of the future of Schengen, a strategy on voluntary returns and reintegration, an operational strategy on returns, and an EU action plan against migrant smuggling and a skills and talent package. The Commission was proposing amendments to its 2016 proposal for an asylum procedure, the new screening procedure shall ensure fast identification of migrants entering the EU without fulfilling the entry conditions.¹¹⁹ The New Pact recognises that no EU country should shoulder a disproportionate responsibility and that all EU countries should constantly contribute to solidarity. Solidarity through relocation the Pact widened and complemented by “*return sponsorship*” schemes. Member States will also receive a financial contribution from the EU budget for relocation. Member States may choose an alternative to relocation. They can choose to contribute through either relocation and/or return sponsorship. Moreover, Member States will have the possibility to contribute “*capacity-building measures*”.¹²⁰ These stipulations theoretically enable two alternative solution of the migrant situation. It is possible to expect that some countries would be reluctant to pay for a rather expensive departure of illegal migrants. The Pact should develop a full system of governance for migration management. The EU and its Member States should act in unity, bringing together a wide range of policy and financing tools in areas such as development cooperation, investment, trade, employment, visa policy, education, and research.¹²¹

¹¹⁵ Ibid., pp. 9–10.

¹¹⁶ Ibid., p. 11.

¹¹⁷ Ibid., p. 27.

¹¹⁸ Communication contains Annexes with Road map to implement the New Pact on Migration and Asylum, COM (2020)609 final, Brussels 23 September 2020.

¹¹⁹ European Commission, New Pact on Migration and Asylum: Questions and Answers. In: *ec.europa.eu* [online]. [2022-01-24]. Available at: <https://ec.europa.eu/commission/presscorner/detail/en/ganda_20_1707>.

¹²⁰ Ibid., p. 25.

¹²¹ Ibid., p. 42.

XIII. CONCLUSIONS

There are various definitions of international migrants. In principle the notion “*migrants*” has been defined as a person who changes their place of residence (domicile) to another, not including businesspeople, students, or tourists. Migration is one of the most and controversial topics in today’s Europe and the world. In Europe it is possible to speak of possible migration and refugee crisis which have serious political security and economic impact on the lives of individual countries and international community as well. Refugees have been generally characterized by the Convention Relating to the Status of Refugees as those persons who, “*owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion*” and are outside the country of their nationality and cannot seek protection in that country or, owing to such fear are unwilling to return to it (Article 1(2)). Most of these refugees are as a rule “*asylum seekers*”, who have submitted their application to seek asylum. Refugees and irregular migrants may be considered in fact as two groups of migrants. But from the point of international law, they are already separate and distinct categories. There is no comprehensive international legal instrument at the universal level for the regulation of international migration. One exception is the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMW) of 18 December 1990, which entered into force on 1 July 2003. But only a limited number of countries (54) have so far ratified this Convention which was adopted by the UNGA without a vote. No migrant receiving states in Western Europe or North America has ratified this Convention yet.

Migration and refugees require global international cooperation. Migrants and refugees are legally two distinct human groups governed by different international instruments. Refugees are entitled to protection under international law, defined by international refugee law (IRL). International refugee law safeguards the right to seek asylum and protect refugees against forcible return to a country, where one would face danger of persecution (non-refoulement). In the last decades Europe has experienced a major wave of refugees fleeing devastating armed conflicts in former Yugoslavia, Afghanistan, Iraq, Syria, and other countries. International human migration is a matter of common interest of the whole international community. Very important is to reduce the main causes of major international flows of migrants and refugees, particularly produced by armed conflicts, political, and religious persecutions, flagrant human rights violations or by economic, environmental, and generally by humanitarian disasters.

The UNGA adopted by all 193 Member States of the UN on 19 September 2016 the New York Declaration for Refugees and Migrants (resolution 71(1)). This Declaration included a commitment to develop and adopt a “*separate Global Compact on Refugees*” (GCR) together with the “*Global Compact for Safe, Orderly and Regular Migration*” (GCM). The GCM is an intergovernmentally negotiated agreement which was agreed to at a conference in Marrakech in December 2018. The text of the GCM stipulates that it is only a “*legally non-binding*” instrument and that states have “*the sovereign right*” to determine “*their national policy...in conformity with International law*”. The opposition to the GCM involved e.g., claims that the GCM would make the criticism of migration a “*criminal offence*” or and mainly that it would declare “*migration as a human right*”. The GCR outlines a “*compre-*

hensive refugee response framework” and stresses its grounding in the 1951 Refugee Convention.

There is also a “*New Pact on Migration and Asylum*”, which provides a comprehensive approach, bringing together policy in the area of migration, asylum, integration, and border management. The European Commission after communication with the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Region proposed on (23 September 2020) a new common European framework for migration and asylum policy, mainly to help front-line Mediterranean countries like Greece, Italy, Malta, and Spain. Refugees and migrants are entitled to the same basic human rights and fundamental freedoms. Discussions about international migration and refugees at the United Nations level are not new. Pursuant to the UNGA decision 70/539 of 22 December 2015 the Secretary General elaborated on the report titled “*In safety and dignity: addressing large movements of refugees and migrants*”. The UNGA resolution 73/151 reaffirmed the 1951 Convention and the 1967 Protocol thereto as the foundation of the international refugee protection. This resolution strongly condemns attacks on refugees, asylum seekers, stateless persons, and internationally displaced persons. The movement of people between states, whether refugees or migrants, has a serious impact on sovereign competences of states to exercise their exclusive jurisdiction over their territories. In addition to measures adopted at the universal level, the international legal protections of refugees and migrants benefit from regional instruments.

International migration influxes constitute a major geopolitical factor of international community. The two Compacts mentioned above present legally non-binding instruments, which confirm that migrants and refugees face many challenges. The New EU Pact on Migration and Asylum represents a common European framework in this field. The main problem is of increasing numbers of “illegal” migrants. A state has the right on the basis of territorial sovereignty to decide on the admission or exclusion of migrants from its territory. This right, however, is subject to limitations imposed by the rather vague international migration law/, treaty and customary as well, including the principle of non-refoulement. The flows of migration to Europe has been primarily driven by economic motives and calls for family reunification. In recent years Europe has experienced an overwhelming wave of refugees, fleeing from armed conflicts in Afghanistan, Iraq, Syria, Libya, and other countries.