Doctoral PhD Dissertation

The Interaction between the Asylum Policies of the Visegrád Group and International and EU Obligations

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Dedication

To the memory of my mother, who told me as a child that education is the most powerful weapon a woman can possess.

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To conclude, I want to thank me for believing in me, for never giving up, and for completing this dissertation.

Table of content

Acronyms and Abbreviations

CAT	Committee Against Torture
CEAS	Common European Asylum System
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CERD	Committee on the Elimination of Racial Discrimination
CJEU	Court of Justice of the European Union
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
CSR51	The 1951 Convention Relating to the Status of Refugee
ECHR	European Convention on Human Rights
ECRE	European Council of Refugees and Exiles
ECtHR	European Court of Human Rights
EU	European Union
EUAA	EU Agency for Asylum
GCR	Global Compact for Refugees
GCM	Compact for Safe, Orderly, and Regular Migration
HHC	Hungarian Helsinki Committee
HRC	Human Rights Committee
IARMLJ	International Association of Refugee and Migration Law Judges
Ibid.	*Ibidem* refers to the source cited in the preceding footnote
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights.
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social, and Cultural Rights abbreviation
ICL	International Criminal Law
ICPPED	International Convention for the Protection of All Persons from Enforced Disappearance

ICRC	International Committee of the Red Cross
IHRL	International Human Rights Law
IOM	International Organization for Migration
IRL	International Refugee Law
NGOs	Non-Governmental Organization
OAU	Organization of African Unity
OHCHR	Office of the United Nations High Commissioner for Human Rights
Op.cit.	*Opus citatum* refers the same source but different page
OPU	Organization for Aid to Refugees
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNCAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
UNDESA	United Nations Department of Economic and Social Affairs
UNDP	United Nations Development Program
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNGA	United Nations General Assembly

UNHCR	United Nations High Commissioner for Refugees
UNODC	United Nations Office on Drugs and Crime
VCLT	Vienna Convention on the Law of Treaties

I. Introduction

For centuries, people have been oppressed, discriminated, and forced to flee their homes because of conflict, political, racial, and religious persecution, natural disasters, and inhuman treatment in their societies. In exile, they tried to seek either refuge or the protection of other countries.[1]

Since the Treaty of Westphalia in 1648,[2] the refugee regime has progressed a lot with the modern state system, mirroring changes in international law, politics, economics, and ideology.[3] The modern international legal system can be traced back nearly 100 years to the League of Nations' (the predecessor of the United Nations (hereafter UN')) which adopted the 1933 Convention Relating to the International Status of Refugees, the first international treaty on the Status of Refugees.[4] The 1933 Convention's Preamble mentions the establishment of the Nansen International Office for Refugees (the predecessor of the United Nations High Commissioner for Refugees (hereafter 'UNHCR')) under the authority of the League of Nations.[5] The 1933 Convention was a major turning point in refugee protection,[6] serving as a model for the 1951 Convention Relating to the Status of Refugees (hereafter 'CSR51')[7] which, was adopted in the aftermath of World War II,

[1] *E.g.* When Muslim persecution increased in Makkah, in 629, Muslims fled to Abyssinia (known today to be in Ethiopia), where a Christian king known as the Negus respected their right to practice their faith in peace; Following the Alhambra Decree, an edict issued on 13 March 1492, by which Spain expelled all Jews from its territory, many Jews fled to Muslim societies where they found refuge. Source: Gunny, Ahmad. "Assessment of Material Relating to Prophet Muḥammad by Some French-Speaking Writers: From The Eighteenth Century Onwards." *Islamic Studies*, vol. 50, no. 2, 2011, p.185; Ray, Jonathan. "Iberian Jewry between West and East: Jewish Settlement in the Sixteenth-Century Mediterranean." *Mediterranean Studies*, vol. 18, 2009, pp. 49–51.

[2] Fassbender, Bardo. "Westphalia, Peace of (1648)." *Max Planck Encyclopedias of International Law*. Oxford Public International Law, Oxford University Press, 2011. Retrieved from https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e739 Accessed 2 December 2021.

[3] Barnett, Laura. "Global Governance and the Evolution of the International Refugee Regime". *International Journal of Refugee Law*, Vol. 14, no. 2/3, 2002, p.1.

[4] League of Nations, *Convention Relating to the International Status of Refugees*, (adopted 28 October 1933, entered into force on 13 June 1935) 159 LNTS 3663. This convention has been signed by 9 States and ratified by 8 states, *i.e.*, Belgium, Bulgaria, Czechoslovakia, Denmark, France, Italy, Norway, and UK some of which made important reservations.

[5] Goodwin-Gill, Guy S. "The International Law of Refugee Protection." *The Oxford Handbook of Refugee and Forced Migration Studies*, Edited by Elena Fiddian-Qasmiyeh, *et al.*, 2014. Retrieved from https://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199652433.001.0001/oxfordhb-978019965243 Accessed 2 December 2021; The Nobel Prize. "Nansen International Office for Refugees: History." Retrieved from https://www.nobelprize.org/prizes/peace/1938/nansen/history/ Accessed 2 December 2021.

[6] Jaeger, Gilbert "On the history of the international protection of refugees." *IRRC September 2001*, vol. 83, no 843, p.727.

[7] UN General Assembly (hereafter 'UNGA'), 1951 Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137.

following the displacement of 40 million refugees across Europe.[8] The CSR51 was created with greater detail to consolidate the existing international instrument and broaden its scope to include additional groups of refugees, as well as to establish a uniform legal status for the existing groups of 'United Nations protected persons' within the contracting states.[9] It should be noted that the CSR51 had both a temporal and a geographic limitation. Accordingly, one is only recognized as a refugee in relation to events that occurred in Europe prior to 1 January 1951. Such restrictions were lifted sixteen years later, with the adoption of the 1967 Protocol Relating to the Status of Refugees.[10] The latter broadened the scope of the CSR51 and removed the geographical and time constraints. Article 1 of the 1967 Protocol states that countries that ratify it agree to abide by the CSR51 as well – even if they are not parties to it. As a result, it is only through the 1967 amendments that the CSR51 has truly become a valuable universal instrument for refugee protection.

Today, despite the development of the international refugee protection system through the adoption of a number of international [11]and regional instruments,[12] obtaining asylum in a number of countries is becoming increasingly difficult. While the general idea that persecuted people should be granted asylum is universally recognized, the source of the debate lies in the specific details. Against this background, asylum issues are currently regarded as the European Union's (hereafter 'EU') most serious challenge.

1. Choice of the subject

The years 2015-16 will be remembered as the years when an unprecedented number of asylum seekers arrived in the EU, causing a crisis. The issue of dealing with asylum seekers has dominated Western headlines, calling into question the EU's asylum and

[8] Fengler, Susanne & Monika Lengauer. "Matters of Migrants and Refugees - Challenges of the 21st Century."
Reporting on Migrants and Refugees Handbook for Journalism Educators, edited by Susanne Fengler *et al.* UNESCO, 2021, p. 21.
[9] Weiss, Paul. "The International Protection of Refugees." *The American Journal of International Law*, vol. 48, no. 2, 1954, p.193.
[10] UN General Assembly (hereafter 'UNGA') Protocol Relating to the Status of Refugees, (adopted 31 January 1967 entered into force 4 October 1967) 606 UNTS 267.
[11] The 1948 Universal Declaration of Human Rights (hereafter 'UDHR'), 10 December 1948, A/RES/3/217 A.
[12] *E.g.* Protocol 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain Rights and Freedoms other than those already included in the Convention and in the First Protocol thereto (Adopted 16 September 1963 entered into force 2 May 1968), ETS No. 046; the 1969 American Convention on Human Rights, 'Pact of San Jose', Costa Rica, (Adopted 18 July 1978, entered into force 22 November 1969) 1144 UNTS 123; the 1981 African Charter on Human and Peoples' Rights Adopted 27 June 1981, entered into force on 21 October 1986, Nairobi, 1520 UNTS 217.

refugee policies. Several points are at the root of the distortions in the EU asylum system and explain many of the tensions and divisions among EU member States when it comes to addressing asylum challenges.

The Visegrád group (hereafter the 'V4 group')[13] took a strong and distinct stance on the hotly debated issue. The group's position principally contradicted the open-door policy attributed to other EU countries such as Germany and Sweden, and as a result, the four countries and their suggestions sparked interest throughout Europe and the world. A variety of new policy proposals were made in all four countries to stem the influx of asylum seekers. Despite the fact that the policy change's orientation was similar across the four countries, the policy instruments chosen, the tools and mechanisms developed for their implementation, as well as the style and content of policy actors attempting to legitimize public discourse, differed. The V4 group appears to have enacted restrictive asylum policies. The question that arises is: what does a restrictive asylum policy mean? There is no precise definition of a restrictive asylum policy, but it can be defined as a policy that prioritizes border security control over the protection of asylum seekers.[14] Restrictive policies and practices can be divided into four categories: those designed to deter irregular migrants, whether genuine asylum seekers or not; those designed to expedite the consideration of applications by those asylum seekers who do manage to reach their destination or to shift the determination procedure to other countries; restrictive interpretations of international refugee law (hereafter 'IRL'), particularly the refugee definition; and deterrence measures for asylum seekers awaiting a decision.[15] Generally, the restrictive asylum policy can be interpreted as the inverse of the 'generous asylum policy'[16] or the 'open door asylum policy.'[17]

[13] Hungary, Poland, the Czech Republic, and Slovakia make up this group.
[14] Boswell, Christina. "The 'External Dimension' of EU Immigration and Asylum Policy." *International Affairs*, vol. 79, no. 3, 2003, pp. 619-622 ; Jeannet, Anne-Marie *et al.* "What Asylum and Refugee Policies Do Europeans Want? Evidence from a Cross-National Conjoint Experiment." *European Union Politics*, vol. 22, no. 3, 2021, pp. 357.
[15] Parliamentary Assembly of the Council of Europe, Committee on Migration, Refugees and Demography. "Restrictions on asylum in the Member States of the Council of Europe and the European Union." Doc. 8598, 21 December 1999. para.3.
[16] Stern, Rebecca. ""Our Refugee Policy is Generous": Reflections on the Importance of a State's Self-Image." *Refugee Survey Quarterly*, Vol. 33, no.1, 2014, pp. 25-43.
[17] Koca, Burcu Togral. "Deconstructing Turkey's "Open Door" Policy towards Refugees from Syria." *Migration Letters,* vol.12, no. 3, 2015, pp.209–225; Sinambela, Stivani Ismawira. "Migrant Crisis, Open Door Policy Analysis." *Jurnal Power in International Relations*, vol. 2, no. 1, 2017, pp.50-68.

Restrictive asylum policies are generally characterized by a securitizing trend. Hence, the four countries' asylum policies appear to be categorized in the context of securitization and protection of national identity and culture with regards to both their policies and rhetoric. On the one hand, it is assumed that the four countries should have inclusive asylum policies since they are built upon EU and international obligations and principles. On the other hand, it is argued that the V4 countries have the right to control their borders and decide whom they want to exclude, isolate, ban, or impose restrictions on. As states become increasingly preoccupied with irregular migration, it has become increasingly difficult to strike a balance between national sovereignty and border security while also guaranteeing the right to seek asylum, and the human rights of people on the move. This makes the interpretation of the V4 asylum policies during the 2015-16 refugee crisis and its aftermath a particularly intriguing case.

2. Objective of the thesis

This thesis aims to explain how, in theory and practice, the V4 countries' asylum policies shifted in a restrictive direction following the 2015-16 refugee crisis and whether or not this has harmed the right to seek asylum. More clearly, the objectives of this thesis are:

a. To examine and interpret the international legal framework that protects asylum seekers. It will investigate IRL and other areas of public international law that can help to support and strengthen IRL's application and interpretation. A special focus will be on how international human rights law (hereafter 'IHRL') can be best applied to strengthen the protection of asylum seekers at all stages of the refugee cycle. It will also demonstrate how IRL can draw on international criminal law (hereafter 'ICL') when determining which individuals are ineligible for refugee status under Article 1F(a) of the CSR51.
b. To analyse and understand the Common European Asylum System, a legal and policy framework designed to ensure standardized and harmonised criteria for individuals seeking international protection within the EU. EU asylum law - strongly inspired by the 1951 Geneva Convention and its 1967 Protocol and other pertinent international instruments as the EU Treaties mandate so – sets out a dense, detailed and enforceable regulatory framework that all EU Member States, the Visegrád countries included, are bound to comply with when framing their own asylum policies. One may even argue that, from a practical perspective,

complete adherence to the EU acquis on asylum actually means the fulfilment of the obligations imposed by IRL.

c. To describe how the V4 group developed more restrictive asylum policies, and the reasons that the four countries advocated to legitimize the restriction of the right to seek asylum.
d. To highlight how some of the V4 countries' legislation and measures to protect their borders, public security, national order, and cultural identity may, in some cases, can amount to a violation of their international and EU obligations.

3. Hypothesis

Following the 2015-16 refugee crisis, the V4 countries enacted restrictive asylum policies in order to protect their national security, public order, and cultural identity. However, it appears that the V4 countries failed to strike a fair balance between their legitimate national interests and their EU and international obligations related to the protection of asylum seekers. Notably, the introduction of unilateral, sovereign solutions was often not in compliance with international obligations undertaken by the V4 countries, alongside the EU asylum acquis. The conformity evaluation of the V4 countries' asylum policies with undertaken international obligations, and with the relevant EU acquis, in the spirit of a 'joined up approach' to the European protection of fundamental rights, revealed a lack of compliance.

4. Research questions

This thesis focuses on asylum seekers' protection and their right to seek asylum in the V4 countries. The research questions for this thesis are formulated as follows:

Question 1: What is the reasoning behind the V4 countries' restrictive asylum policies?

By answering this question, the thesis seeks to provide an overview of the key reasons behind the V4's restrictive asylum policy. Since the 2015-16 refugee crisis, the V4 group has been widely criticized from all sides, including EU institutions and other EU Member States, for its lack of solidarity; however, little effort has been made to truly understand why those countries are restricting their asylum and refugee policy. That's why it's important to go beyond the rhetoric and get to the facts and realities of this restrictiveness. It makes more sense to look for factors generally believed to influence asylum policy at the regional or state level as individual host governments are still regarded as 'the agents

primarily responsible for refugee policies' even in the EU,[18] especially that the Common European Asylum System has failed because of the growing challenges that Member States have faced in the aftermath of a significant increase in the number of asylum applications.[19]

The V4 group has advanced political, ideological, and cultural explanations for the states' willingness to reduce the capacity to admit asylum seekers and recognized refugees, this has been a prominent argument among governments favouring restrictive asylum policies.[20] Besides that, the V4 group supported the policy of externalization of the outsourcing of asylum policies to third countries. The general changes in asylum policies and asylum legislation in the V4 group will be identified and discussed in the thesis. Since the refugee crisis of 2015-16, the evolution of the V4 countries' rules on asylum and borders can be represented as a story of continuous tightening of access to territory and asylum procedures.

Question 2: To what extent are the V4's asylum policies compliant with EU and international obligations?

The thesis will question the legality of certain legal and practical measures enacted in the aftermath of the 2015-16 refugee crisis, such as the denial and deterrence of access to asylum procedures, detention, and push-back of asylum seekers. Indeed, certain amendments to the V4 group' asylum legislation, as well as the enactment of new legislation, demonstrate a significant incompatibility between national, EU, and international rule of law regarding the fundamental rights and status of asylum seekers.[21] Because of the restrictive nature of post-crisis asylum policies, it appears that there is a lack of national protection of asylum seekers' fundamental rights in the V4 group in some cases. Besides, the practice of the V4 countries revealed a rather restrictive application and

[18] Jacobsen, Karen. "Factors Influencing the Policy Responses of Host Governments to Mass Refugee Influxes." *International Migration Review*, vol. 30, no. 3, 1996, p. 656.

[19] See *e.g.* Trauner, Florian. "Asylum policy: the EU's 'crises' and the looming policy regime failure." *Journal of European Integration*, vol.38, no.3, 2016, pp. 311-325; En Heijer, Maarten *et. al.* " Coercion, Prohibition, and Great Expectations. The continuing failure of the Common European Asylum System." *Common Market Law Review,* vol.53, no. 3, 2016 pp.607-642; Servent, Ariadna Ripoll. "The EU's refugee 'crisis': Framing policy failure as an opportunity for success." *Politique Européenne,* vol.3, no. 65, 2019, pp. 178- 210.

[20] Sandelind, Clara. "Can the welfare state justify restrictive asylum policies? A critical approach." *Ethical Theory and Moral Practice,* vol.22, no.2, 2019, p. 331.

[21] Nagy, Boldizsár. "Sharing the Responsibility or Shifting the Focus? The Responses of the EU and the Visegrád Countries to the Post-2015 Arrival of Migrants and Refugees." Global Turkey in Europe issue working paper 17, Central European University, Budapest, 2017, pp. 2-15.

interpretation of international instruments that apply directly or indirectly to asylum seekers.

Question 3: What is V4's position on the Global Compact on Refugees?

It has been argued that the 2015-16 refugee crisis, as well as the need to outline a series of short- and long-term measures to address upcoming refugee crises, was one of the factors that pushed the Global Compact for Refugees (hereafter 'GCR')'s adoption.[22] It seems necessary to analyse the position and approach taken by the V4 group with regard to this soft non-binding instrument. By examining the V4 group's position on the GCR we tested, on the one hand, the degree of unification of the V4 countries as a group toward asylum issues, and on the other, the extent to which the GCR could make a difference in government policy and practice, and whether it is ultimately improving asylum seekers' protection.

Question 4: To what extent can the V4 asylum policy influence the development of new EU asylum policy?

The different EU Member States' positions on asylum policy created political tension throughout the EU. According to Agustín and Jørgensen, 'from an EU perspective, the worst aspect was that the EU had lost its legitimacy and was met by a lack of trust in combination with a reluctance of governments to cooperate with one another.'[23] The restrictive asylum policy taken by some Member States, including the V4 group, have already had some success in the EU, elevating the issue to the top of the agenda. It is impossible to deny that the V4 group has a clear vision and shared agenda for the future of their asylum policy. The group is more than just a policy recipient in the EU; it is also a policy shaper in the field of asylum. The group was successful in promoting the concept of 'flexibility' or 'effective solidarity' as a comprehensive asylum strategy in the V4 group and throughout the EU.[24]

This regional cooperation contributes to the ambition of influencing the EU's present and near future on asylum issues. In the EU and elsewhere, there is a growing trend toward

[22] Carlier, Jean-Yves *et al*. "From the 2015 European "Migration Crisis" to the 2018 Global Compact for Migration: A Political Transition Short on Legal Standards." *International Journal of Sustainable Development Law and Policy*, vol. 16, no.1, 2020, pp. 37-81.
[23] Agustin, Oscar Garcia & Martin Bak Jørgensen. *Solidarity and the 'Refugee Crisis' in Europe*, Palgrave Macmillan, 2018, p.18.
[24] European Commission. "New Pact on Migration and Asylum: A fresh start on migration in Europe." Retrieved from https://ec.europa.eu/info/strategy/priorities-2019-2024/promoting-our-european-way-life/new-pact-migration-and-asylum_en Accessed 17 December 2021.

more restrictive asylum policies.[25] Strict controls are implemented through various tactics such as visa regimes, carrier sanctions, and 'push-back' operations by EU Member State border authorities**,** to deter asylum seekers from accessing EU Member State territory to access asylum procedures and claim asylum.

Question 5: How can the V4 group improve the alignment of international treaties and existing asylum policy?

To avoid undermining the international regime for refugee protection, it is essential to ensure that states' legitimate security interests are consistent with all of their obligations under international treaties to which they are parties, and that border controls do not indiscriminately affect asylum seekers in need of international protection. Ensuring that the rights granted to asylum seekers under EU and international law are fully respected on the one hand, while maintaining national security, cultural and religious identity on the other, appears to be a 'difficult formula' in the context of the V4 group. In the context of the V4 group, it appears that there is no balanced approach focusing on both national security, public order, and national identity protection on the one hand, and international protection on the other. Recognizing that state security and international protection are complementary and mutually reinforcing, and that asylum seekers 'protection can be reconciled with state security interests,'[26] is essential.

5. Research methodology

This thesis presents a policy and legal approach to the protection of asylum seekers in the V4 group. The study will be pursued principally from an explanatory approach, drawing on existing literature such as doctrine, jurisprudence, and other legal sources of international law such as treaties, conventions, and the relevant secondary sources of EU law such as directives, regulations, as applicable. It will be carried out in an empirically qualitative manner under the premise of positivist epistemology. It is positivist because the answer is limited to what can be observed in the social world. Qualitative methods will be used to collect and analyse data from the literature on IRL, EU asylum policy, and V4 country asylum policies. In this type of study, the importance of qualitative approaches cannot be overstated. By purposefully selecting settings and informants that differ from one another, qualitative research seeks to make the most of a plethora of specific information that can

[25] Hatton, Timothy J. "Asylum Migration to the Developed World: Persecution, Incentives, and Policy." *The Journal of Economic Perspectives*, vol. 34, no. 1, 2020, pp. 75-93.
[26] Sadako Ogata. "Opening Comments, Report of the Regional Meeting on Refugee Issues in the Great Lakes."1998.

be derived from and about that context.[27] Qualitative methods are strongly intertwined with interpretative epistemology, which primarily refers to data collection and analysis methods that rely on discernment as well as the importance of meaning.

Thus, in this thesis, qualitative content analysis will be used to conduct a systematic analysis of qualitative data. The goal in this case is to describe how the V4 countries have developed restrictive policies on asylum policy since the 2015-16 refugee crisis, as well as to discuss the points of divergence and convergence between the four countries' policies. It is important to mention that the emphasis will be placed separately on each of the V4 countries. However, the disparity between some aspects of their asylum policy will be highlighted at times, while it will be overlooked at others. In other words, the V4 group will be viewed as a deviant case throughout the dissertation because it appears to be the only group in the EU that reject the open door policy during the 2015-16 refugee crisis. This position puts V4 in the spotlight and demonstrates publicly the group's repeated opposition to the open-door policy, making the group a meaningful targeted study case. It will, also, examine the extent to which these policies are in full compliance with EU and international norms and standards.

It is important to note that secondary sources will be massively used, but primary sources will include UN and EU documentation, as well as V4 government publications, official statements by leaders in the V4 countries, official publications and interview in national media, public speeches and appearances, transcripts of speeches addressing governments, parliaments and cabinets, and official documents such as the joint statements of the V4 group, as applicable. The thesis will cover, on the one hand, an overview of these four countries' national legislation, and, on the other, the V4 official speeches and documents from early 2015 to December 2021. These sources are an important component of the evidential value required for this study.

The use of content analysis is important because, researchers can get material on decision-making without interviewing the decision-makers. As it can be challenging for the academic researcher to interview directly heads of states and government representatives, the analysis of the official statements is the preferred alternative to collect data on the official stances and opinions of such elites. The limitation of this method is the limited availability of material and the fact that it does not provide primary data to the

[27] Babbie, Earl. *The Practice of Social Research.* Wadsworth Publishing, 2003, p.277.

researcher. Furthermore, the language barrier is difficult to overcome because we are dealing with four different countries and languages. In addition, this thesis will not be based on fieldwork or questionnaires.

Four schools of thought - neorealist, social constructivist, nationalist, and Copenhagen schools of thought - have been used in the development of this thesis. The neorealist school of thought was used to interpret the V4's asylum policy. As an ideology, neorealism was outlined by Kenneth Waltz in his 1979 book titled Theory of International Politics.[28] Neorealism, often known as structural realism, is a theory of international relations that emphasizes the importance of power politics, sees competition and conflict as enduring characteristics, and finds limited potential for collaboration.[29] From the point of view of the realist approach, the state plays the key role of a guardian of the 'national interest' and security in the international arena. Its principal mission is to make every effort and the potential to protect its sovereignty and increase its power. Thus, the actions of states cannot be judged by universal moral standards.[30] This school of thought could help explain why the V4 countries perceived the 2015-16 refugee crisis and the EU-imposed supranational solution as a threat to their sovereignty and territorial integrity. In light of this and according to this school of thought, state interests and nothing else determine the asylum policy of a given country.

It is also possible to understand the V4's asylum policy using the social constructivist school of thought. Constructivism is the assertion that the important aspects of international relations are historically and socially constructed, rather than inevitable consequences of human nature or other essential characteristics of world politics. [31] In other words, international relations are viewed by social constructivism as a network of social relations. This school of thought gives norms, identities, and interests a special emphasis, and it investigates the identities and interests of the actors in state-society relations. Social constructivism is a useful tool for comprehending the reasons why the V4 group rejected an open door policy. From the constructivist perspective, international migration in the post-communist countries of Central and Eastern Europe has undergone a

[28] Waltz, Kenneth. *Theory of international politics*. Addison-Wesley Publishing company, 1979, pp.1-128.
[29] *Ibid.* p. 117; Donnelly, Jack. Realism and International Relations. Themes in International Relations. Cambridge: Cambridge University Press, 2000, p.7.
[30] *Ibid.* Donnelly, Jack, pp. 7-8.
[31] See *e.g.* Checkel, Jeffrey T. "The Constructivist Turn in International Relations Theory." *World Politics*, vol. 50, no. 2, 1998; Guzzini, Stefano (2000), "A Reconstruction of Constructivism in International Relations", European Journal of International Relations, 6(2): 147-182;

historical evolution. Hungary, Poland, Czechia, and Slovakia became a space for new and dynamic international population movements.[32] This has changed the once predominant character of the V4 group as 'sending' migrant countries into 'sending and receiving' ones. So what is new is that these countries have themselves become the destination for significant population flows. Based on the constructivist narrative, the lack of historical experience with asylum and migration and the socialist past made the societies of the Visegrád region 'less welcoming to foreigners', including asylum seekers and refugees. Because they were less prepared to receive asylum seekers, as well as in order to defend their ethnicity, nationality, and maintain their cultural and religious identities, the four countries have enacted restrictive asylum policies.

Nationalism is another school of thought that was used to comprehend the V4's asylum policy. Gellner defines nationalism as a political principle that advocates for the congruence of national 'nation' and political units 'state'.[33] The goal of nationalism is to give the political entity, or the state, a homogeneous identity.[34] Gellner adopts Max Weber's view that 'the state is an entity within society that possesses the monopoly of legitimate violence' to support his claim that the state is particularly concerned with maintaining social order.[35] Nationalist discourses typically work to dehumanize asylum seekers in order to justify stricter border protection measures and the ensuing isolation of this group from the nation-state.[36] According to this school of thought, borders serve to designate sovereign zones in accordance with supposed cultural similarities and norms, making it feasible to separate people who 'belong' from those who do not. This emphasis on 'security,' which includes growing funding for border control, the employment of military troops and upgraded surveillance technologies, and stricter laws on unlawful entry, represents a 'rebordering' of the state.[37] This 'rebordering' comprises a shift toward policing, which is justified by discourses of 'dangerous mobilities', and it serves to

[32] Wallace, Claire & Stola, Dariusz. "Introduction: Patterns of Migration in Central Europe." *Patterns of Migration in Central Europe*, edited by: Claire Wallace & Dariusz Stola. London: Palgrave Macmillan, 2001, 3-44; Rovny, Jan. "Communism, Federalism, and Ethnic Minorities: Explaining Party Competition Patterns in Eastern Europe." *World Politics*, vol. 66, no. 4, 2014, pp. 669-702.
[33] Gellner, Ernest. *Nations and Nationalism*. Oxford: Basil Blackwell Publishers, 1983, p.1.
[34] Fox, Jon E., and Cynthia Miller-Idriss. "Everyday Nationhood." *Ethnicities*, vol. 8, no. 4, Dec. 2008, p.536.
[35] *Op.cit* p. 4.
[36] Saxton, Alison. 'I certainly don't want people like that here': The discursive construction of 'Asylum Seekers'. *Media International Australia Incorporating Culture and Policy*, vol. 109, 2003, pp. 109-103.
[37] Carrington, kerry. "Law and order on the borders in the neo-colonial antipodes." *Borders, Mobility and Technologies of Control*, edited by Leanne Weber & Sharon Pickering, Berlin: Springer Verlag, 2006, pp. 179–206.

separate the 'unwanted from the wanted', excluding people who are deemed to be threatening (such unlawful asylum seekers) from within the state.[38] The thesis will show that following the 2015-16 refugee crisis, many discourses and practices about asylum seekers in the visegrád countries can be interpreted as nationalistic in nature, i.e., by 'protecting' a sovereign state and upholding border control. As a result, border security measures, safety precautions, and surveillance techniques have increased, which has an impact on the right to seek asylum.

Lastly, the asylum policy of the V4 was be analysed using the Copenhagen school of thought and the securitization theory. Securitization, which was first introduced to the security studies agenda by the so-called Copenhagen School of Security Studies,[39] is when a securitizing actor invokes the rhetoric of an existential threat on a topic in order to elevate it from the realm of regular politics to that of emergency politics, where any appropriate measure can be taken to mitigate the threat. Following the refugee crisis in 2015–16, the politics of the V4 countries - in terms of both their policies and rhetoric- can be characterized in the framework of securitization and protection of national and cultural identity. Accordingly, asylum policies are frequently justified and shaped by considerations of public security and cultural and religious identity.

6. Structure and demarcation of the thesis

The thesis will be divided into seven chapters. The introductory chapter covers: the choice of subject; objective of the thesis; hypothesis; the research questions; the research methodology; structure and demarcation of the thesis; and the outlay of the subsequent chapters. The second chapter of the thesis will provide an analysis of IRL. It will attempt to cut through the complexities of the IRL by clearly examining its current legal and normative framework. The third chapter will cover the organizational framework of the EU's asylum and refugee policy as well as the organizational framework of the V4 asylum policies. The second and third chapters are crucial because this thesis is predicated on the assumption that V4 asylum policy cannot be thoroughly studied unless it is contextualized in relation to other regimes, both EU and international. The fourth chapter looks at how the 2015-16 refugee crisis influenced Visegrád' asylum policies. It will focus on the various

[38] Walters, William. "Border/control." *European Journal of Social Theory*, vol.9, no.2, 2006, pp.187–188.
[39] Buzan, Barry. *People, states, and fear: The national security problem in international relations*. North Carolina: University of North Carolina Press, 1983, pp. 1-262; Wæver, Ole. "Politics, Security, Theory." *Security Dialogue*, vol. 42, no. 4–5, 2011, pp. 465-480.

factors that led the four countries to adopt a rather restrictive asylum policy and reject the open-door policy. The fifth chapter questions the legality of certain legal and practical measures enacted in the aftermath of the 2015-16 refugee crisis, as well as their compatibility with the Visegrád group's EU and international obligations. The sixth chapter reveals the V4 groups' position on GCR and identifies some of its potential legal and political implications, if any. The last chapter, chapter seven, is a summary and findings of the entire thesis, based upon the research question and secondary questions posed at the outset. It will also make an attempt to propose some *de lege ferenda* proposals.

Three demarcations will be used to direct this thesis: conceptual, geographic, and temporal demarcations. Conceptually, the focus of this thesis is on international protection rather than on migration in general. While there is some overlap, it is important to keep categories of migrants separated as we cannot assume that all movements across international borders raise the same issues. It will be clarified in the following chapter that 'asylum seekers' and 'refugees' are not 'migrants,' and this distinction is essential. It will be assumed for the sake of this thesis that those rejected at the V4 group's border were, in fact, seeking asylum. It should be noted, however, that some of them would probably not meet the criteria for refugee status if admitted to the national territory.

Geographically, this thesis will concentrate on asylum seekers in the V4 group. It would attempt to capture the geographical context of the V4 group, with the caveat that it would be avowedly EU-centric. This will be achieved by investigating and integrating various legal disciplines, such as international law, EU law, and the V4 group's domestic law. In this regard, it is essential to know that the Visegrád Group, Visegrád Four, or V4 is an informal regional format of cooperation between the four Central European countries: Hungary, Poland, Czechia, and Slovakia. The Group's origins can be traced back to the summit meetings of leaders from Czechoslovakia, Hungary, and Poland in 1991.[40] Following the dissolution of Czechoslovakia in 1993, Czechia and Slovakia joined the group as independent members, bringing the total number of members to four.[41] The group functions as a kind of inter-state cooperation between states that are connected not just by neighbourhood and similar geopolitical situation but above all, by common history,

[40] According to some, the Visegrád Group's origins can be traced back to 1335, when John of Luxembourg, King of Bohemia, Charles I, King of Hungary, and Casimir III, King of Poland met in Visegrád to strengthen relations and cooperation between the three Central European kingdoms. Source: CEFTA. "The Visegrád Group and CEFTA." Retrieved from https://www.cvce.eu/en/collections/unit-content/-/unit/df06517b-babc-451d-baf6-a2d4b19c1c88/6edd6d7a-aa5a-4b7b-86bd-7268a36170cb Accessed 9 August 2022.

[41] Shabad, Goldie, *et al*. "When Push Comes to Shove: An Explanation of the Dissolution of the Czechoslovak State." *International Journal of Sociology,* vol. 28, no.3, 1998, pp. 43-73.

traditions, culture, and values.[42] The four countries joined the EU in 2004, and their membership in the EU opened up a number of new topics that have strengthened V4-based cooperation.[43] These topics included politics and economics, as well as culture and foreign policy. The 2015-16 refugee crisis marks a special period in the Visegrád Group's history, as the group's focus broadened to include a new topic: asylum and migration policy.[44] The four countries identified their common interests and goals at the start of the crisis, and began to collaborate more closely and develop common positions.[45] In February 2016, they denied the implementation of the provisional mechanism for the mandatory relocation of asylum seekers[46] due to the sharp increase of asylum applications,[47] and later in March 2019, they succeeded in effectively taking this topic off the agenda of the EU Council meeting.[48]

The temporal demarcation is the 2015-16 refugee crisis. The study will thus highlight the recent regulations and legislation, as well as several amendments to existing asylum laws that have been implemented in the V4 group in the aftermath of the 2015-16 refugee

[42] According to some, the Visegrád Group's origins can be traced back to 1335, when John of Luxembourg, King of Bohemia, Charles I, King of Hungary, and Casimir III, King of Poland met in Visegrád to strengthen relations and cooperation between the three Central European kingdoms. Source: The Central European Free Trade Agreement. Source: "The Visegrád Group and The Central European Free Trade Agreement." Retrieved from https://www.cvce.eu/en/collections/unit-content/-/unit/df06517b-babc-451d-baf6-a2d4b19c1c88/6edd6d7a-aa5a-4b7b-86bd-7268a36170cb 6 December 2021; Visegrád Group. "History of the Visegrád Group." Retrieved from https://www.visegradgroup.eu/history/history-of-the-visegrad 25 January 2022.

[43] EUR-Lex. "The 2004 enlargement: the challenge of a 25-member EU."; Braun, András "The European Union and the V4 Fifteen Years Together Part 2." *AJKC Digital.* 2019. Retrieved from https://digitalistudastar.ajtk.hu/en/research-blog/the-european-union-and-the-v4-2 Accessed 8 December 2021.

[44] The Visegrád Group. "Joint Statement of the Heads of Government of the Visegrád Group Countries." 4 September 2015. Retrieved from https://www.visegradgroup.eu/calendar/2015/joint-statement-of-the-150904 25 January 2022.

[45] Macek, Lukáš. "What is Left of the "Visegrád Group"?". Democracy and citizenship. Policy Brief, Institute Jacques Delors, Paris, March 2021, p. 5. Retrieved from https://institutdelors.eu/wp-content/uploads/2021/03/PB_210311_What-is-left-of-the-Visegrad-Group_Macek_EN.pdf Accessed 25 January 2022.

[46] The Visegrád Group. "Joint Statement on Migration." 15 February 2016. Retrieved from https://www.visegradgroup.eu/calendar/2016/joint-statement-on Accessed 25 January 2022; Maciej Duszczyk, *et al.* "From mandatory to voluntary. Impact of V4 on the EU relocation scheme." *European Politics and Society*, vol. 21, no.4, 2020, pp.470 -474; Šelo Šabić, Senada. "Implementation of Solidarity and Fear the Relocation of Refugees in the European Union." Friedrich-Ebert-Stiftung, Zagreb, 2017, pp.1-3. Retrieved from https://library.fes.de/pdf-files/bueros/kroatien/13787.pdf Accessed 25 January 2022.

[47] Zachová, Aneta *et al.* "V4 united against mandatory relocation quotas." Visegrád INFO, 13 July 2018. Retrieved from https://visegradinfo.eu/index.php/archive/80-articles/566-v4-united-against-mandatory-relocation-quotas. Accessed 9 December 2021.

[48] Janning, Josef & Möller, Almut ."Untapped potential: How new alliances can strengthen the EU." European Council on Foreign Relations. 2019.
Retrieved from https://ecfr.eu/publication/untapped_potential_how_new_alliances_can_strengthen_the_eu/ Accessed 9 December 2021.

crisis. In this thesis, the term 'Refugee Crisis of 2015-16,'[49] also known as 'the 2015-16 European Refugee Crisis,'[50] 'humanitarian crisis' [51] or 'the European Migrant Crisis,'[52] 'the EU migration crisis'[53] refers to the period beginning in January 2015 when 1.3 million people sought asylum in Europe, the highest number since World War II.[54] The term 'crisis' is not neutral. It is, however, used to situate this work within the discourse that has developed around this catchphrase in the media, the public, and most importantly in academia. According to some academics, the crisis stems not from the arrival of the 'wave of people,' but rather from the failure to deal with external pressures that have caused the number of asylum seekers to skyrocket,[55] and from the failure to build a fully functional common asylum system.[56] For instance, Gunnarsdóttir observes that the 2015-16 European Refugee Crisis, was caused by the reaction of European States as well as the EU, rather than the inflow of people itself.[57] In the same vein, Roth argues that if there is a crisis, it is one of politics rather than capacity.[58]

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[49]Zanfrini, Laura. "Europe and the Refugee Crisis: A Challenge to Our Civilization." UN. Retrieved from https://www.un.org/en/academic-impact/europe-and-refugee-crisis-challenge-our-civilization Accessed 4 December 2021; Amaro, Silvia. "Europe fears a repeat of 2015 refugee crisis as Afghanistan collapses." CNBC. 18 August 2021. Retrieved from https://www.cnbc.com/2021/08/18/europe-fears-a-repeat-of-2015-refugee-crisis-as-afghanistan-collapses.html Accessed 4 December 2021; Jones, Will, *et al*. "Europe's Refugee Crisis: Pressure Points and Solutions." American Enterprise Institute, Washington, 2017, pp.1-16. Retrieved from https://www.aei.org/wp-content/uploads/2017/04/Europes-Refugee-Crisis.pdf?x91208 4 December 2021; Bolliger, Larissa, & Arja R. Aro. "Europe's Refugee Crisis and the Human Right of Access to Health Care: A Public Health Challenge from an Ethical Perspective." *Harvard Public Health Review*, vol. 20, 2018, pp. 1–11.

[50] "The 2015 European Refugee Crisis." The University of British Colombia. Retrieved from https://cases.open.ubc.ca/the-2015-european-refugee-crisis/ Accessed 4 December 2021; Kürschner Rauck, Kathleen & Kvasnicka, Michael "The 2015 European Refugee Crisis and Residential Housing Rents in Germany." IZA Institute of Labour Economics, Bonn, 2018, p.1. Retrieved from https://ftp.iza.org/dp12047.pdf Accessed 4 December 2021.

[51] Abbott, Esme. "Europe's Refugee Crisis Is a Crisis of Humanity, not Migration." *Impakter*. 16 October 2021 Retrieved from https://impakter.com/europes-refugee-crisis-lacks-humanity/ Accessed 4 December 2021.

[52] Tagliapietra, Alberto. "The European Migration Crisis: A Pendulum between the Internal and External Dimensions." Istituto Affari Internazionali, Rome, 2019, pp. 1-2.

[53] Parkes, Roderick & Pauwels, Annelies. "The EU Migration Crisis: Getting the Numbers Right." European Union Institute for Security Studies, Paris, 5 April 2017, pp.1- 4.

[54] Dumont, Jean-Christophe & Scarpetta, Stefano. "Is this humanitarian migration crisis different? Migration Policy Debates." The Organization for Economic Co-operation and Development, 2015, p.1. Retrieved from https://www.oecd.org/migration/Is-this-refugee-crisis-different.pdf Accessed 4 December 2021.

[55] *Op.cit.* Servent, Ariadna Ripoll, p.191; Karolewski, Ireneusz Pawel & Roland Benedikter. "Europe's Refugee and Migrant Crisis: Political Responses to Asymmetrical Pressures." Karolewski, Ireneusz Pawel & Benedikter, Roland. "Europe's refugee and migrant crisis Political responses to asymmetrical pressures." *Politique Européenne,* 2018/2, n. 60, 2018, pp. 109-105.

[56] *Op.cit.*Trauner, Florian, p.311.

[57] Kristínardóttir Gunnarsdóttir, Arndís Anna. "The 2015 Migrant Crisis as an Identity Crisis for Iceland." *The Small States and the European Migrant Crisis,* edited by Tómas Joensen *et al*. Palgrave Macmillan, 2021, pp 191-192.

[58] Roth, Kenneth. "The Refugee Crisis That Isn't." *Huffington Post*. 3 September 2015. Retrieved from https://www.huffpost.com/entry/the-refugee-crisis-that-isnt_b_8079798 Accessed 5 December 2021.

II. Observations on International Refugee Law

1. Overview

This chapter attempts to cut through the complexities of the IRL by clearly demonstrating its current legal and normative framework. IRL may be viewed as a distinct field of international law dealing with a specific matter. It 'is designed only to provide a back-up source of protection to seriously at-risk persons.'[59] More specifically, it protects people seeking asylum from persecution as well as those who have been recognized as refugees.

After World War II, the CSR51 and UNHCR were established to provide a permanent framework for dealing with the refugee problem at the global level. Since the end of the Cold War, the 'international refugee protection regime'[60] has experienced a 'radical transformation',[61] pushing the UNHCR to re-evaluate the understanding of the nature of refugee emergencies and its role in dealing with them. The post-Cold War era for the UNHCR has been characterized by institutional transformation, operational growth, and conceptual innovation in relation to international protection.[62]

This change has had a greater impact on how national law and policy are implemented.[63] Since then, IRL has continued to evolve over years.[64] Notably, as it evolves, the IRL is becoming increasingly entwined with various fields of international law. International law scholars contend that IRL has a relationship and interaction with IHRL and ICL.

A starting point will be the clarification of the term 'asylum seeker'. There is a lot of misunderstanding about the distinction between an 'asylum seeker', a 'refugee', and a 'migrant', the terms are frequently used interchangeably or incorrectly (2). Besides, this chapter will attempt to analyse the dynamism of IRL by interpreting this field of international law through the lens of various approaches and schools of thought. This

[59] Hathaway, James C. "International Refugee Law: The Michigan Guidelines on the Internal Protection Alternative." *Michigan Journal of International Law*, vol. 21, no. 1, 1999, p. 131

[60] The term the 'international refugee protection regime" referred to those laws, policies and practices set up to deal with 'refugees' as defined by CSR51.

[61] Mertus, Julie. "The State and the Post-Cold War Refugee Regime: New Models, New Questions." *Michigan Journal of International Law*, vol. 20, no. 1, 1998, p.59.

[62] UNHCR has expanded the scope of the global refugee regime in response to shifting world politics and state interests.

[63] Barnett, Michael. "Humanitarianism with a Sovereign Face: UNHCR in the Global Undertow." *The International Migration Review*, vol. 35, no. 1, 2001. pp. 244–277.

[64] Gallagher, Dennis. "The Evolution of the International Refugee System." *The International Migration Review*, vol.23, no. 3, 1989, pp.579-598; Kanstroom, Daniel. "The "Right to Remain Here" as an Evolving Component of Global Refugee Protection: Current Initiatives and Critical Questions." *Journal on Migration and Human Security* vol. 5, no. 3, 2017, pp.614-644.

divergence of interpretation is visible in the way certain specific IRL concepts are understood. It will begin by examining how natural law and positive law have influenced IRL. Later, it will demonstrate how, over time, a growing body of literature has emerged that goes beyond the dominant positivist legal approaches, focusing on interdisciplinarity (3). This chapter will also seek to explore the interdisciplinary exchange between IRL and IHRL, and ICL. It argues that the interaction between IRL and other fields of law is not one of fragmentation, conflict, parallelism, or convergence, but rather one of complementarities. All three fields of international law are seen as part of a larger normative system aimed at protecting the rights of all human beings, including asylum seekers and refugees, always (4).

Assessing the relationships between IRL, IHRL, and ICL is essential for identifying the full range of states' obligations and, as a result, informing their practice toward asylum seekers. One side of the debate views human rights guarantees as representing a complimentary source of legal protection for asylum seekers because the CSR51 gives them very few, if any, rights. While IRL and ICL may serve distinct functions, the CSR51's use of 'serious non-political crimes' as grounds for denial of refugee status in Article 1F (a) (b) (c) results in interaction between the two areas.

This chapter, which provides a general international background, is absolutely necessary before discussing the V4 group's asylum policy in its EU and national context in the subsequent chapter. First, it clarifies the well-established legal boundaries between 'asylum seeker' and 'refugee' on the one hand, and 'migrant' and 'irregular migrant' on the other. This means that either intentionally or accidentally conflicting them could lead to issues for both asylum seekers and the V4 countries attempting to deal with mixed migratory flows. Second, it helps to define the obligations and duties related to international protection that the V4 countries should respect and protect.

2. Definitions matter: asylum seeker, refugee, migrant, and immigrant

The terms 'asylum seeker,' 'refugee,' and 'migrant' are used to describe people who are on the move, who have left their countries and crossed borders. However, the terms are frequently used interchangeably, but it is important to distinguish between them because there is a legal distinction and different rights.

2.1. Asylum seeker and refugee: two sides of the same coin?

No international binding instrument, including CSR51 and its Protocol, defines the term 'asylum seeker.'[65] An internationally accepted definition of an asylum seeker can be observed in multiple UNHCR documents, as asylum seekers are acknowledged as persons of concern by UNHCR.[66] According to the latter, 'asylum seekers are individuals who have sought international protection but whose claims for refugee status have not yet been determined.'[67] Therefore, 'asylum seekers' refers to individuals seeking international protection, refugee status, or subsidiary protection status.[68] A person who is given 'refugee status' is originally an 'asylum seeker' since he applied for asylum in the host country, but an asylum seeker is not always a refugee, but can become one if he falls under the provisions of CSR51.[69] Broadly, an asylum seeker is someone whose 'claim has not yet been finally decided on by the country in which the claim is submitted.'[70] Not every asylum seeker will eventually be granted a 'refugee status.' Besides, an asylum seeker may apply for CSR51 status or for complementary forms of protection.[71] The latter involves, mainly, the subsidiary protection status[72] and temporary protection visa.[73] Thus, asylum is a category that encompasses various forms of protection. Once the decision is delivered, the asylum seeker holds either CSR51 status or a complementary form of protection and can remain in the country. In case of the rejection of the asylum application, the asylum

[65] *Op.cit.* Goodwin-Gill, Guy S., 2014.
[66] UNHCR. "Global Trends: Forced displacement 2019." 2019, p.23. Retrieved from https://www.unhcr.org/statistics/unhcrstats/5ee200e37/unhcr-global-trends-2019.html Accessed 3 December 2021.
[67] *Ibid.*
[68] Glossary, UNHCR. "Global Report 2014." p. 228. Retrieved from https://www.unhcr.org/enin/5575a7942.pdf Accessed 3 December 2021.
[69] Intergovernmental Consultations on Migration, Asylum and Refugees "Asylum Procedures. Report on policies and practices in IGC participating States." 2012, p. VII. Retrieved from https://publications.iom.int/system/files/pdf/asylum_procedures_2012_web_may2015_0.pdf Accessed 3 December 2021.
[70] Glossary, UNHCR. "Global Appeal 2013 Update." p.118. Retrieved from https://www.unhcr.org/50a9f81ca.pdf Accessed 3 December 2021.
[71] Mandal, Ruma. "Protection Mechanisms Outside of the 1951 Convention ('Complementary Protection')." UNHCR Legal and Protection Policy Research Series, UNHCR. PPLA/2005/02. 2005, p. 63.
[72] Subsidiary protection is an international protection for a person who seeks asylum but does not qualify as a refugee in terms of the CSR51. It serves as an alternative to applying for asylum for those who do not meet the CSR51's requirement of having a well-founded fear of persecution. Thus, the refugee in this broader sense includes not only those who have a well-founded fear of persecution, but also those who have a substantial risk of being subjected to torture or to severe harm if they are returned to their country of origin, for reasons that include war, violence, conflict, and massive violations of human rights. Source: Goodwin-Gill, Guy S. "Asylum: The Law and Politics of Change." *International Journal of Refugee Law,* vol. 7, no. 1, 1995, pp. 3-7; Gil-Bazo, Maria-Teresa. "Refugee Status, Subsidiary Protection, and the Right to Be Granted Asylum Under Ec Law." Research Paper no. 136, UNHCR, 2006, p.10.
[73] Temporary Protection Visas are a type of visa available to people who arrive without a visa and are found to be owed protection obligations. Source: Asylum Seeker Resource Centre. Australia. Retrieved from https://asrc.org.au/resources/factsheet/temporary-protection-visas/. Accessed 4 December 2021.

seeker must leave the country. To be guaranteed refugee status, an asylum seeker must go through a refugee status determination process, which is operated by the government of the country of asylum or the UNHCR, and is based on international, regional, or national law.[74]

Because the CSR51 lacks a clear definition of an asylum seeker, the distinction between an 'asylum seeker' and 'refugee' 'remains ambiguous in many countries. This thesis contends that being an 'asylum seeker' or 'refugee' and having 'refugee status' are not the same thing. To be more precise, the thesis is more concerned with 'asylum seekers' than 'refugees who are granted refugee status.' It is crucial to understand the difference between being an 'asylum seeker,' a 'refugee,' a 'refugee claimant or applicant,' or a 'potential refugee,' and being 'recognized as a refugee.' Being an 'asylum seeker' or 'refugee' stems from the individual's experience, which was central to their claim, rather than from the grant of status. But a person must be recognized as a refugee to benefit from CSR51. Thus, the term 'refugee' includes an asylum seeker whose application has not yet been determined, and who is subject to the limitations laid down in Article 31 CSR51.[75]

The terms 'asylum seekers' and 'refugees' may cross and overlap in some places throughout the dissertation, but in most cases, they refer to people who have not yet been granted asylum status. This is further evidenced by the fact that the term 'refugee,' as it is used in common parlance, encompasses all types of asylum seekers, rather than just refugees under the technical legal definition. In particular, when states take action to provide protection, it is explicitly couched in humanitarian rather than legal terms.[76]

The question is whether or not asylum seekers have any rights. If so, what kind of rights do they have? At first glance, the CSR51 and its 1967 protocol appeared to be largely silent on the rights of asylum seekers. A closer examination reveals, however, that there are some provisions in the convention that specifically defend two fundamental rights. The first and most fundamental right is the right to seek asylum. The most frequently accepted definition of asylum is the protection offered by one state to a national of another state

[74] UNHCR. "Refugee Status Determination." Retrieved from https://www.unhcr.org/refugee-status-determination.html Accessed 4 December 2021.

[75] *Khaboka v. Secretary of State for the Home Department*, (appl) Imm AR 484 CA. judgment of 25 March 1993.

[76] Azfer, Ali Khan. "Can International Law Manage Refugee Crises?" *Oxford University Undergraduate Law Journal*, vol. 5. 2016, pp. 54-66.

against that other state.[77] It is significant to remember that even though CSR51 does not explicitly mention it, the right to seek asylum can be deduced from the definition of a refugee. This is further supported by the fact that CSR51 builds upon Article 14 UDHR, which recognizes the right of persons to seek asylum from persecution in other countries.

Asylum may be sought when persecution occurs, or may occur, within the meaning of Article 1 CSR51. The right to seek asylum stems from the definition of a refugee, as stated in Article 1 CSR51. The 'well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion is the main drive to seek asylum.' The second right derives from the state's obligation not to *refouler* or forcibly return asylum seekers where there are reasonable grounds to believe they will face persecution. Simply put, if a person is qualified as a refugee he has the right to seek asylum and therefore cannot be returned to a country where he/she face persecution.

However, part of the difficulty faced by asylum seekers stems from the obvious gap between the existence of a right to asylum[78] and the lack of a corresponding state duty to grant asylum.[79]

While there is no obligation under CSR51 to grant refugee status to asylum seekers, states are still bound by the principle of *non-refoulement*.[80] Each state is free to set its own criteria for granting refugee status. The receiving state determines 'by itself who it grants asylum to, *i.e.* it is not granted on the basis of an individual, unconditional right.'[81]This is due to the lack of a proper monitoring mechanism authorized to interpret and enforce CSR51 authoritatively, as is the case with most other international human rights treaties. UNHCR is responsible for supervising its implementation but lacks the authority to issue

[77] Art.1, "L'asile en droit international public (*à l'exclusion de l'asile neutre*)." Session de Bath – 1950, 11 septembre 1950 (Rapporteurs : MM. Arnold Raestad et Tomaso Perassi) Institut de Droit international.
[78] The relevant international and regional treaties that express the right to seek asylum directly or indirectly include, but are not limited to, UDHR (art. 14), CSR51 and its 1967 Protocol, the EU Charter of Fundamental Rights (hereafter 'CFR') (art. 18);
Article 1 of The 1954 Convention on Territorial Asylum adopted by the Organization of American States, (Adopted 28 March 1954, entered into force on 29 December 1954) Treaty Series no. 19, no. 24378;
Section III.4 of the 1984 Cartagena Declaration (Adopted 22 November 1984); Article 2 (1)-(2) of the 1969 Addis-Ababa Convention Governing the Specific Aspects of Refugee Problems in Africa (Adopted 10 September 1969, entered into force on 20 June 1974) 1001 UNTS 45, *etc*.
[79] For example, CSR51 makes no mention of such a duty. During the negotiations leading to the adoption of the Convention, attempts to include any mention of asylum and admission were vigorously rejected.
[80] The *non-refoulment principle* is discussed in detail in chapter V.
[81] Molnár, Tamás. "The Right to Asylum in International Law." *Migrants and Refugees in Hungary : a legal perspective*, edited by Ádám Rixer, Károli Gáspár Református Egyetem 2016, p.39.

mandatory interpretations.[82] In this regard, the UNHCR has insisted on a broader interpretation of the concept of refugee as it appears in CSR51.[83]

The establishment of asylum proceedings and the determination of refugee status is left to each state party to develop, and this is dependent in large part on domestic asylum policy and how states interpret the CSR51 and its 1967 Protocol. The legal interpretation of the convention or protocol may result in different meanings and criteria.[84] As a result, a refugee in Hungary or Poland may not be a refugee in the United States and vice versa. Thus, concerning the different cultural, religious, and ethical contexts, some terms like 'refugee', 'persecution', '*non-refoulement*', 'protection', 'coming directly, 'without delay' may raise issues when it comes to their interpretation.

When it comes to the interpretation of the CSR51 and its 1967 Protocol, it is crucial to take into account the customary norms of treaty interpretation as codified in the 1969 Vienna Convention on the Law of Treaties (hereafter 'VCLT').[85] The latter confirms the principle of general international law that a treaty 'shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in the context and in the light of its object and purpose'.[86] In the case of CSR51, this entails interpretation in light of the object and purpose of the protection of the international community to refugees, and guaranteeing to 'refugees the widest possible exercise of…fundamental rights and freedoms'.[87]

And it would seem, as will examined in the next chapters, that the V4 countries who consider cases of asylum do not stick to the letter of the CSR51 definition but work with a different understanding of who can be a refugee. Professor Cole observes that the CSR51, as it stands allows states to interpret who is a refugee more or less broadly, and while they

[82] Goodwin-Gill, Guy S. "The Office of the United Nations High Commissioner for Refugees and the Sources of International Law." *International & Comparative Law Quarterly*, vol. 69, 2020, pp.1-41.
[83] UNHCR. "Refugee Protection: A Guide to International Refugee Law." 1 December 2001, p.19.
[84] North, Anthony M. & Chia, Joyce. "Towards Convergence in the Interpretation of the Refugee Convention: A Proposal for the Establishment of an International Judicial Commission for Refugees*." Australian Yearbook of International Law*, vol. 25, no. 5, 2006. Retrieved from http://classic.austlii.edu.au/au/journals/AUYrBkIntLaw/2006/5.html Accessed 6 March 2022.
[85] Vienna Convention on the Law of Treaties (Adopted 23 May 1969, entered into force, 27 January 1980) 1155 UNTS 331.
[86] *Ibid.* Art. 31 (1).
[87] Preamble of CSR51.

may apply the broad understanding to asylum seekers from one region, they may well apply a much stricter understanding to asylum seekers from another region.[88]

Also, the difference of languages has an impact when it comes to the interpretation of some terms in legal in the international instruments. For example, in the context of the V4 group, except for the Czech and Slovak that understand each other, every country of the V4 group is defined by its unique language, which is spoken nowhere else or among minority groups in neighbouring countries of the region. Besides, at the EU level, the Member States use the same concepts and terms when discussing international protection; however, the meanings of these concepts and terms are not equivalent, as each state uses and interpret them differently due to the difference in the languages.[89]

At this point, a brief reference to the definitions of 'asylum seeker' and 'refugees' under EU law is appropriate. EU law defines asylum seeker, or to be more precise, an applicant for international protection, as 'a third-country national or a stateless person who has submitted an application for international protection but not yet received a final decision.[90] Therefore, the applicant who meets the criteria is considered a 'refugee' or 'beneficiary of international protection'. It is crucial to make clear that under EU law, 'beneficiaries of international protection', goes beyond the refugee status and encompasses also the so-called 'beneficiaries of subsidiary protection'. The latter is an international protection status given to asylum seekers who do not qualify for refugee status but are at substantial risk of harm in their country of origin.[91] Subsidiary protection is complementary and additional to the refugee protection enshrined in CSR51. [92] In my view, 'subsidiary protection' is an attempt by the EU to broaden the CSR51 definition of a refugee. It is intended to prevent asylum seekers from being *refouled* or attempting to stay in Europe irregularly if they do not meet the criteria for refugee status. It essentially offers asylum seekers one more opportunity to 'survive.' This means that it's crucial to carefully consider

[88] Cole, Phil: "What's Wrong with the Refugee Convention?" *E-international relations.* 2015, pp.1-3. Retrieved from https://www.e-ir.info/pdf/59474 Accessed 5 March 2022

[89] Jiménez-Ivars, Amparo & León-Pinilla, Ruth. "Interpreting in refugee contexts. A descriptive and qualitative study." *Language & Communication*, vol. 60, 2018, pp.28-43; Scott, Matthew. "Interpreting the Refugee Definition." *Climate Change, Disasters, and the Refugee Convention*. Cambridge University Press 2020, pp. 89-95.

[90] Art. 2(i) of the Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) OJ L 337, 20 December 2011, p. 9-26. (hereafter 'Qualification Directive')

[91] *Ibid.* e.g. Art. 6 & 13.

[92] *Ibid.* Art. 33

both EU asylum legislation and IRL when assessing who can be considered a refugee in the V4 countries. The Court of Justice of the European Union (hereafter 'CJEU') considered that the CSR51 is 'the cornerstone of the international legal regime for the protection of refugees and that [the Qualification Directive was] adopted to guide the competent authorities of the Member States in the application of [CSR51] on the basis of common concepts and criteria.'[93] Although it was once proposed,[94] the EU has not ratified CSR51 and not all of the articles of the Convention have been acknowledged as being part of EU law. [95] This is debatable and beyond the scope of the dissertation.

After making an attempt to clarify and identify the differences between an applicant for international, an asylum seeker, and a refugee, it would be worthwhile considering what rights this category has, if any. As will be discussed in the next subchapter, provisions of other instruments, including but not limited to human rights treaties,[96] could be used to protect the rights of asylum seekers. States may turn to other human rights treaties to provide more rights to asylum seekers, particularly given that CSR51 is largely silent on the rights of asylum seekers awaiting the outcome of their claim.

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[93] *H.N. v Minister for Justice, Equality and Law Reform and Others*, case no. (c-604/12) Judgment of the Court (Fourth Chamber), 8 May 2014, CJEU, para. 27 citing *Minister voor Immigratie en Asiel v. X, Y and Z* Joined Cases no. C-199/12, C-200/12 and C-201/12, Judgment of the Court (Fourth Chamber) 7 November 2013, CJEU, para. 39.

[94] European Council. Stockholm Programme: An Open and Secure Europe Serving and Protecting Citizens [2010] OJ C 115/1, paraS. 6.2.1.

[95] *E.g.* In *Qurbani*, the CJEU refused to interpret Article 31 of the CSR51 on the grounds that it did not comply with EU law. See *Mohammad Ferooz Qurbani,* case no. C-481/13, Judgment of the Court (Fourth Chamber), 17 July 2014, CJEU, para. 29.

[96] *E.g.***(1)** European Convention on Human Rights (hereafter 'ECHR') Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force on 3 September 1953) 213 UNTS 221**(2)** Convention on the Elimination of All Forms of Racial Discrimination (hereafter 'ICERD') (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195; **(3)** Convention on the Elimination of All Forms of Discrimination against Women (hereafter 'CEDAW'); (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13; Supplemented by Optional Protocol to the Convention on the Elimination of Discrimination against Women (OP-CEDAW) (adopted 6 October 1999, entered into force 22 December 2000) 2131 UNTS 83; **(4)** Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereafter 'UNCAT') (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85; Supplemented by the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OP-CAT) adopted 18 December 2002, entered into force 22 June 2006) 2375 UNTS 237; **(5)** Convention on the Rights of the Child (hereafter 'CRC') (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3; Supplemented by (i) Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in armed conflict (OP-AC) (25 May 2000 and entered into force on 12 February 2002) 2173 UNTS 222; (ii) Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (OP-CRCSC) (adopted 25 May 2000, entered into force 18 January 2002) 121 UNTS 177; **(6)** Convention for the Protection of All Persons from Enforced Disappearance (hereafter 'ICPPED') (adopted 20 December 2006, entered into force 23 December 2010) 2716 UNTS 3;**(7)** Convention on the Rights of Persons with Disabilities (hereafter 'CRPD') (adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3; Supplemented by Optional Protocol to the Convention on the Rights of Persons with Disabilities (OP-CRPD) (adopted 13 December 2006, entered into force 3 May 2008) 2518 UNTS 283.

2.2. Asylum seeker and migrant: A crucial difference

Traditionally, the term 'migrant' has been used to describe people who move for personal reasons rather than to flee conflict or persecution, usually across an international border as 'international migrant.'[97] However, there is no universal definition of the term 'migrant'. Different sources define 'migrant' in different ways based on a variety of criteria. [98] Even though it is typically applied for statistical purposes, the United Nations Department of Economic and Social Affairs (hereafter 'UNDESA') has one of the most accepted definitions of an 'international migrant'. UNDESA defines an 'international migrant' as 'any person who transfers his or her country of regular residence.'[99]Generally, who counts as a migrant in quantitative data[100] is not the same as who counts as a migrant in law[101] or public opinion.[102]

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[97] UNHCR. "Migrant definition." *UNHCR Emergency Handbook*, 4th edition, 2015. p.1.

[98] The terms 'migrant', 'immigrant', 'alien' 'foreign' 'non-national' are used in the context of non-native residents of a country. However, there are some definite distinctions between these words. There is no precise definition of 'migrant', 'immigrant', alien in law. Simply put, a 'migrant' is a broad term that applies to an individual who voluntarily leaves home and moves from one place to another, most often in search of employment. Migrants can return to their home country when they choose to do so. Meanwhile, an immigrant is an individual who willingly leaves their country of origin and legally enters another country where they are granted permission to permanently resettle, thus qualifying them to work without restriction. Their reasons for wanting to resettle can be many, from a longing for economic prosperity or a better education, to the fulfilment of a dream or reunion with family. The term 'migrant' and 'immigrant', as well as 'foreigner', are often used interchangeably in public debate and even among research specialists.

[99] The United Nations Recommendations on Statistics of International Migration, Revision 1, 1998, para.32.

[100] In quantitative data, the definition of 'migrant' is based mainly on two criteria: country of birth and length of stay. **(1)** The first criterion is related to nationality. Migrants can refer to 'foreign-born' (also no native) or 'foreign nationals.' For example, a study across all EU and the Organization for Economic Co-operation and Development countries on indicators of immigrant integration announced that variations between foreign-born and native-born people in self-reported unmet medical needs were recognized mostly in central and eastern European countries (e.g. Poland). Source: "Indicators of immigrant integration 2015." The Organization for Economic Co-operation and Development, publishing for the Organization for Economic Co-operation and Development and the European Union 2 July 2015, p. 64; **(2)** The second criterion is based on the length of stay in host country. The United Nations Recommendations on Statistics of International Migration, Revision 1 'defines an international migrant 'as any person who changes his or her country of usual residence.' The UN differentiates between short- and long-term international migrants. A person who migrates to a country other than that of his or her usual residency for a period of at least three months but less than a year (12 months) is considered a short-term migrant, unless the movement is for purposes of recreation, holiday, visits to friends or relatives, business, medical treatment, or religious pilgrimage. A long-term migrant is described as "a person who moves from his or her place of usual residence for at least one year." Source: UN. "Recommendations on Statistics on International Migration." Statistical Papers Series M, No. 58, Rev. 1, E.98.XVII.14., 1998, paras. 31-77.

[101] In law, there are many ways to interpret the term 'migrant' and each state has its own definition of who counts as a 'migrant.' Generally, the definition of a migrant in national legislation includes key sentences like persons 'subject to immigration control', 'deportable persons' and 'non-citizen' *etc*. Also, an examination of glossaries of definitions from the literature revealed no universally accepted definition for migrants at an international level, with interpretations varying based on factors like residency, documentation, length of stay, and purpose for migration. Source: Anderson, Bridget & Blinds, Scott. Who Counts as a Migrant? Definitions and their Consequences. Briefing, Migration Observatory at the University of Oxford, 10 July 2019, p.2. Retrieved from https://migrationobservatory.ox.ac.uk/wp-content/uploads/2017/01/Briefing-Who-

Clearly, unlike asylum seekers, migrants choose to move not because they face a direct threat or persecution but rather to improve their lives. Furthermore, unlike asylum seekers and refugees, who cannot safely return home, migrants can return home if they want. This distinction is essential for governments because countries handle migrants and asylum seekers under two distinct legal frameworks. Despite some overlap at the national level,[103] where certain provisions of migration law can apply to asylum and vice versa, the legal frameworks governing migration and asylum remain distinct.

However, it should be noted that the terminology used in the asylum field is frequently perplexing. In the media and in political speeches, the term 'migrant' may be used incorrectly to refer to asylum seekers. This was clearly observed during the thesis's literature review and analysis. In this context, Campani declared that 'whilst the media's stereotyped images of are manifestations of racist mentalities, an absence of professional ethics or, sometimes, just plain ignorance, such images are also part of political battles and the fight for specific power interests…'[104] For example, as discussed further below, during the 2015-16 refugee crisis, several European leaders, including the leaders of the V4 group, used the terms 'economic migrant'[105] and 'undocumented or irregular migrant'[106] to cast

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Counts-as-a-Migrant-Definitions-and-their-Consequences.pdf Accessed 4 March 2022; The International Organization for Migration (hereafter 'IOM') has acknowledged that there is no single definition that is universally accepted and asserted that "the term migrant" is typically understood to refer to all situations in which the decision to migrate was made voluntarily by the individual in question for "personal convenience" without the involvement of an external compelling factor. Source: IOM. "Glossary on migration." IML Series no.34., 2019, pp.132-133.

[102] In the media and public opinion, who counts as a 'migrant' is usually unclear. For instance, "migrants" are frequently confused with ethnic or religious minorities or with asylum seekers. They are described as escaping from dangerous situations in their home countries. The image of migrants fleeing from troublesome situations is a common theme in migration discourse. Research reveals that the media has a central role in creating negative narratives about migration-related groups and asylum seekers. Source: Canoy, Marcel *et al.* "Migration and Public Perception." Bureau of European Policy Advisers, European Commission, Brussels, 2006, pp. 2-13; Gabrielatos, Costas & Baker, Paul. "Fleeing, Sneaking, Flooding A Corpus Analysis of Discursive Constructions of Refugees and Asylum Seekers in the UK Press, 1996-2005." *Journal of English Linguistics*, vol.36, no. 1, 2008, pp. 5-9.

[103] See the organizational framework of visegrád's asylum policies, which is discussed in the following chapter.

[104] Campani, Giovanna "Migrants and the Media – The Italian case." *Media and Migration. Construction of Mobility and Difference*, edited by Russell King *et al.* Routledge, 2001, 1st. ed., p. 39

[105] An "economic migrant" is someone who leaves their home country solely for economic reasons unrelated to the refugee definition, in order to improve their standard of living. He does not meet the criteria for refugee status and, as a result, is ineligible for international protection as a refugee. An economic migrant is sometimes referred to as an economic refugee, but this is an incorrect use of the term. Source: Glossary, UNHCR. "UNHCR Master Glossary of Terms." June 2006. p.14.

[106] Undocumented migrants are those who live in a country without having the proper documentation. There is still no standard or uniformly accepted term for undocumented migrants. Migration researchers, governments, and journalists use different terms, including, 'illegal migrants', 'illegal', "undocumented migrants" and are rarely based on a substantive conceptual justification of the selection of one term over

doubt on the legitimacy of newcomers' claims to international protection.[107] As a result, the term has acquired a pejorative connotation.[108]

While the distinction between 'asylum seeker' and 'undocumented or irregular migrant' or 'undocumented or irregular migrant' is clear in law, it may be difficult to differentiate between different categories on the ground. As will be discussed in chapter IV, states may be unable to distinguish between the two categories, especially given that asylum seekers may use similar modes of travel as other irregular migrants. Indeed, illegal entry and/or use of false documentation by asylum seekers may result in prosecution in countries that do not have an open asylum policy, such as the V4 group.

3. The evolution of international refugee law

The contemporary refugee system emerges from a willingness to provide protection and assistance to those who have a 'well-founded fear of persecution.' IRL incorporates both customary law and peremptory norms, as well as international legal instruments.[109] IRL can be interpreted and viewed from a variety of perspectives, approaches, and schools of thought.

This subchapter attempts to interpret IRL from both the natural law approach and legal positivism (3.1) It will also investigate two other emerging IRL approaches: the transnational approach and the participatory approach (3.2.)

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another. The UN General Assembly recommended in 1975 that all UN bodies use the term 'undocumented or irregular migrants/workers' as a standard.
Source: UNGA, Resolution 3449(XXX), Measures to ensure the human rights and dignity of all migrant workers, UN Doc. A/RES/32/120, 9 December 1975, para.2; Similarly, in its 1998 Recommendations on Statistics of International Migration, the UN describes '...foreigners who violate the rules of admission of the receiving country and are deportable, as well as foreign persons attempting to seek asylum but who are not permitted to claim asylum and are not permitted to stay in the host country on any other grounds" as citizens leaving the country without the necessary admission documents "and" foreigners whose entry or stay is not authorized.' Source: *Op.cit.* UN. "Recommendations on Statistics on International Migration." para. 38.

[107] Dearden, Lizzie. "Refugee crisis: "Economic migrants" and asylum seekers are coming to Europe for the same reasons, report says." *The Independent.* 19 December 2015. Retrieved from https://www.independent.co.uk/news/world/europe/refugee-crisis-economic-migrants-and-refugees-are-coming-to-europe-for-the-same-reasons-report-says-a6779616.html Accessed 5 December 2021 ; Fourquet, Jérôme. "European reactions to the Migrant Crisis." Fondation Jean-Jaurès. Retrieved from https://www.feps-europe.eu/Assets/Publications/PostFiles/348.pdf Accessed 5 December 2021.

[108] *Op.cit.* Roth, Kenneth. 2015.

[109] Mason, Elisa. "Sources of International Refugee Law: A Bibliography." *International Journal of Refugee Law*, Vol. 8 no.4, 1996, pp. 597-621.

3.1. International refugee law through the lenses of natural law approach and legal positivism

3.1.1. International refugee law and natural law approach

Natural law, as defined by moral, legal, and social theorists, has a wide range of meanings. This section does not intend to go into detail about the scope and history of these definitions.[110]

IRL arose from a recognition of the existence of certain fundamental rights, the interconnectedness of humanity, and the need to assist others.[111] Natural law has a significant impact on IRL because it promotes three essential components. First, natural law emphasizes that all individuals are endowed with basic rights, referred to as 'natural', because they originate from one's existence as a person, referring to 'the rights that one has simply because one is human.'[112] One could assert that in the classical natural law tradition, there was no need to enumerate these rights because they were frequently found in or defined by religious texts. In contrast, these fundamental rights are frequently interpreted in the modern era through human rights legal mechanisms such as treaties, conventions, and declarations.[113] Thus, a core principle of IRL and natural law is the acknowledgment that international society must intervene when egregious human rights violations occur as a result of the acceptance that all peoples have fundamental human rights, dignity, and equal rights that allow sovereignty to be challenged.[114] Reus-Smit, in contrast, contends that the protection of human rights is integral to the moral goal of the modern state, to the dominant rationale that empowers the organization of power and authority into territorially defined sovereign units.[115] For instance, the principle of *non-refoulement*, which is based on human rights norms, is thus the clearest manifestation of natural law within the IRL regime: the individual's right not to face persecution or threats,

[110] Bourke, Vernon J. "Two Approaches to Natural Law." *The American Journal of Jurisprudence*, vol.1, no.1, 1956, pp. 92-96; Crowe, M. B. "The Irreplaceable Natural Law." *Studies: An Irish Quarterly Review*, vol. 51, no. 202, 1962, pp. 268-85; Finnis, John. "Natural Law Theories." *The Stanford Encyclopedia of Philosophy*, edited by Edward N. Zalta. 2007 (updated 3 June 2020). Retrieved from https://plato.stanford.edu/archives/sum2020/entries/natural-law-theories/ Accessed 1 October 2021.

[111] Kfir, Isaac. "Natural law and International Refugee Law." University of Melbourne, 2019. Retrieved from https://arts.unimelb.edu.au/school-of-social-and-political-sciences/our-research/comparative-network-on-refugee-externalisation-policies/blog/natural-law-and-international-refugee-law Accessed 1 October 2021.

[112] Donnelly, Jack. "The Relative Universality of Human Rights." *Human Rights Quarterly*, vol. 29, no. 2, 2007, pp. 281-306.

[113] Donnelly, Jack. "Human Rights as Natural Rights." *Human Rights Quarterly*, vol. 4, no.3, 1982, pp.391–405.

[114] Hedley, Bull. *The anarchical society: a study of order in world politics*. Palgrave Macmillan, 1977, pp 122-155.

[115] Reus-Smit, Christian. "Human Rights and the Social Construction of Sovereignty." *Review of International Studies*, vol. 27, no. 4, 2001, p. 519.

such as loss of life, torture, degrading, and cruel treatment, which international society accepts in exchange for agreeing not to reject the person seeking asylum.[116]

Second, natural law recognizes that people have a desire for basic security, which is defined as 'freedom from fear' and 'freedom from want.'[117] Basic security received a boost after the United Nations Development Program (hereafter 'UNDP') developed and promoted the concept of human security, which maintains that security is more than the protection of national interests in foreign and defence policy or security from nuclear war.[118] According to UNDP, security also includes protection from hunger, disease, and repression, as well as protection from 'sudden and hurtful disruptions in daily life patterns.'[119]

Notably, when viewing asylum seekers as seeking basic security, it becomes very difficult to dissuade a person from seeking basic security, as it is something to which every person is entitled, needs, and desires, as the alternative is unthinkable. As a result, the desire for basic security, as a human security, helps to explain why people fleeing persecution and hardship will do whatever they can to achieve security for themselves and their families, which is why the focus on refugees is on protection and empowerment.

3.1.2. International refugee law and positivism

From a positivist perspective, IRL has been viewed as a self-contained international legal regime with roots in extradition law and laws governing nationality and aliens,[120] so very much 'hooked on to traditional concepts of state territorial jurisdiction, for example, the sovereign right of states to decide on admission and expulsion of all those not linked by the bonds of nationality.'[121] Positivism regards the CSR51 and its 1967 Protocol as the most important pieces of international law because they define who is a refugee and what rights and benefits people recognized as refugees are entitled to, including *non-refoulment.*

In this sense, the only international instruments that directly apply to refugees are the CSR51 and its 1967 Protocol. Both instruments have been referred to as 'the bedrock of

[116] Goodwin-Gill, Guy S. & McAdam, Jane. *The Refugee in International Law*, 3rd ed., Oxford University Press, 2007, p. 600.
[117] Suhrke, Astri "A Stalled Initiative." *Security Dialogue.* vol. 35, no. 3, 2004, pp. 365.
[118] UNDP."Human Development Report."1994. p.22.
[119] *Ibid.* p.25.
[120] Grahl-Madsen, Atle. "The European Tradition of Asylum and the Development of Refugee Law." *Journal of Peace Research*, vol. 3, no. 3,1966, pp. 278–289; Lambert, Hélène. "International refugee law: dominant and emerging approaches" *Routledge Handbook of International Law*, edited by David Armstrong, Routledge, 2009, p.345.
[121] Gowlland-Debbas, Vera. "United Nations A-Z." *Security Dialogue*, vol. 27, no. 3, 1996, p. x.

the international regime for refugee protection'[122] and are open to states; however, each may be signed separately. [123] To maximize accession 'they were carefully framed to define minimum standards, without imposing obligations going beyond those that states can reasonably be expected to assume.'[124] UNHCR clearly declares that the underlying values of the CSR51 are humanitarian, human rights, and people-oriented; non-political and impartial; international cooperation; and universal and general character.[125]

The CSR51 defines a refugee as someone who 'owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality, and is unable to, or owing to such fear, is unwilling to avail himself of the protection of that country.'[126] Persons who meet the definition of a refugee under the CSR51 are automatically considered refugees, regardless of whether they are formally recognized as such. Paragraph 28 of the UNHCR Handbook illustrates this point: 'When a person meets the definition's requirements, they are considered refugees within the meaning of the CSR51. This would have to happen before it is officially decided whether he is a refugee. Therefore, acknowledging his refugee status does not make him a refugee; rather, it declares him to be one. He does not become a refugee as a result of recognition; rather, he is recognized as a refugee.'

It should be emphasized once more that the distinction between being a refugee and being recognized as a refugee is central to the CSR51. Being a refugee stems not from the granting of status but from the individual's experience, which was central to their claim. It is also worth noting that the CSR51 imposes a duty on states not to obstruct individuals' right to seek asylum,[127] rather than providing individuals with the right to seek asylum.[128]

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[122] Türk, Volker "Keynote Address to the International Association of Refugee Law Judges." UNHCR, 29 November 2017. Retrieved from https://www.unhcr.org/admin/dipstatements/5a1e68417/keynote-address-international-association-refugee-law-judges.html Accessed 4 October 2021.

[123] The Protocol has been ratified by 146 States, while the Convention has been ratified by 145. These instruments only apply in countries that have ratified them, and some countries have ratified these instruments with various reservations.

[124] UNHCR. "Implementation of the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees
EC/SCP/54, 7 July 1989. Retrieved from https://www.unhcr.org/excom/scip/3ae68cbe4/implementation-1951-convention-1967-protocol-relating-status-refugees.html Accessed 4 October 2021.

[125] UNHCR. "Human Rights and Refugee Protection." Self-study Module 5, vol. I. 15 December 2006, p.89. Retrieved from https://www.unhcr.org/45a7acb72.pdf Accessed 4 October 2021.

[126] Art. 1 (A)(2) CSR51.

[127] *Op.cit.* Goodwin-Gill, Guy S. & McAdam, Jane, 2007, p. 358.

[128] Lentini, Elizabeth J. "The Definition of Refugee in International Law: Proposals for the Future." *Boston College Third World Law Journal,* vol. 5, no. 2, 1985, p.185.

However, every country has its own system for handling asylum claims, recognizing asylum seekers, and granting refugee status. The issues of procedures, such as how to decide on refugee status, were never directly a matter of international law, leaving states with the option of implementing at the national level.[129] And it is in this context that the importance of the principle of 'good faith' in international law emerges, requiring states to provide fair and efficient asylum procedures to comply with the CSR51.[130] The common denominator among states is that the asylum seeker cannot be returned to their home country while their claim is being processed. Thus, one of the most important principles in the CSR51 is the principle of *non-refoulement.*

The definition implies that the concept of refugee in IRL is based on the restrictive concepts of persecution and alienation.[131] This definition has been scrutinized in refugee status determination procedures, yielding a substantial body of jurisprudence.[132] However, in the absence of an independent international body capable of interpreting the CSR51, each contracting party is free to use its own interpretation.[133] This means that there is currently significant divergence in how each state interprets and applies IRL. For example, CSR51's lack of a precise definition of the term 'persecution,' a key component of the refugee definition, leaves room for several interpretations.

In 1979, the UNHCR released 'Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status,' in which 'persecution' was defined as any threat to life or freedom, the existence of which had to be determined using both objective and subjective criteria.[134] However, this definition of persecution falls short, on the one hand because it is still very broad[135] and thus difficult to implement, and on the other hand because it is contained in a non-legally binding document.[136] As a result, depending on

[129] Pestrova, Katya. "The evolution of international refugee law: A review of provisions and implementation". *Cambridge Review of International Affairs*, vol. 9, no. 2, 1995, pp. 36-59.
[130] *Op. cit.* Goodwin-Gill, Guy S. & McAdam, Jane, 2007. p.458.
[131] Shacknove, Andrew E. "Who Is a Refugee?" *Ethics*, vol. 95, no. 2, 1985, p. 274.
[132] *Op.cit.* Lambert, Hélène 2009. p. 346.
[133] *Ibid.*
[134] UNHCR. "Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees." April 2019, HCR/1P/4/ENG/REV. 3, para. 11.
[135] *op.cit.* Goodwin-Gill, Guy S. "The International Law of Refugee Protection."2014; Rempell, Scott. "Defining Persecution." *Utah Law Review*, vol. 2013, no. 1, 2013, pp. 283–285; Hathaway, James C. & Foster, Michelle. *The Law of Refugee Status.* Cambridge University Press, 2014. p.183.
[136] Andrade, José Henrique Fischel de. "On the Development of the Concept of 'Persecution' in International Refugee Law." *Anuario brasileiro de direito internacional*, vol. 3, no. 2, 2008, pp.114-116.

national interpretations, what constitutes persecution 'remains very much a question of degree and proportion.'[137]

While positivist advocacy approaches to IRL are prevalent in scholarship,[138] there is a growing literature that moves beyond the limits of this approach, embracing interdisciplinarity.[139] Today, IRL scholarship is arguably a much broader field. Several scholars expressly distance themselves from positivist approaches, instead employing a variety of legal approaches to refugee law, including critical legal theory,[140] post-colonial and third-world approaches,[141] feminist theory,[142] realism,[143] law and economics,[144] and transnational law,[145] to name a few.

3.2. International refugee law through the lenses of the transnational approach and the participatory approach

These emerging approaches provide a dynamic picture of the evolution of IRL in an increasingly globalized world marked by the emergence of a 'common public order.'[146] States, non-state actors, and networks are increasingly collaborating to address cross-border issues like asylum seeker flows, irregular migration, crime, and terrorism. These networks come in a variety of shapes and sizes, and they serve a variety of purposes.[147] Single-issue networks coexist with larger, more general refugee law networks. Government networks, made up of judges and policymakers, as well as intergovernmental organization networks, are being established alongside academic and activist networks.[148] According to Chimni, the expansion of networks and activities is resulting in the formation of a 'global

[137] *Op. cit.* Goodwin-Gill, Guy S. & McAdam, Jane, 2007. p.92.
[138] Byrne, Rosemary & Thomas Gammeltoft-Hansen "International Refugee Law between Scholarship and Practice." *International Journal of Refugee Law*, vol.32, no. 2, 2020, pp. 181–199.
[139] *Ibid.*
[140] Neylon, Anne. "Ensuring Precariousness: The Status of Designated Foreign National under the Protecting Canada's Immigration System Act 2012." *International Journal of Refugee Law*, vol.27, no.2, 2015, pp. 297–326; Spijkerboer, Thomas. "Analysing European Case-Law on Migration." *EU Migration Law: Legal Complexities and Political Rationales*, edited by Loïc Azoulai *et al.*, Oxford University Press, 2014, p.189.
[141] Juss, Satvinder Singh. "Complicity, Exclusion, and the Unworthy in Refugee Law." *Refugee Survey Quarterly*, vol. 31, no. 3, 2012, pp. 1-39.
[142] Bailliet, Cecilia M. "Examining Sexual Violence in the Military Within the Context of Eritrean Asylum Claims Presented in Norway." *International Journal of Refugee Law*, vol.19, no. 3, 2007, p. 471
[143] Harvey, Colin. "Talking about Refugee Law." *Journal of Refugee Studies*, vol.12, no.2, 1999, pp.103-105.
[144] Schuck, Peter H. "Refugee Burden-Sharing: A Modest Proposal, Fifteen Years Later." *Yale Law & Economics* 2013, p. 144.
[145] Goodwin-Gill, Guy S. & Lambert, Hélène. *The Limits of Transnational Law: Refugee Law, Policy Harmonization and Judicial Dialogues in the European Union*, Cambridge University Press, 2010, p.261.
[146] *Op.cit.* Lambert, Hélène 2009. p.349.
[147] IOM. "World Migration Report 2020." pp. 353-354. Retrieved from https://publications.iom.int/system/files/pdf/wmr_2020.pdf Accessed 4 October 2021.
[148] Oliver, Caroline *et al.* "Innovative strategies for the reception of asylum seekers and refugees in European cities: multi-level governance, multi-sector urban networks, and local engagement." *Comparative Migration Studies*, vol.8, no.30, 2020, pp. 2-5.

state.'[149] Likewise, Slaughter finds that the concept of states is 'disaggregating' in an age of global governance, with states now confronted with a new range of actors that they have invented.[150] In the context of asylum seekers and refugees, there are three types of transnational networks to consider : judicial, based around an IGO-UNHCR, and based around the EU.[151]

The International Association of Refugee and Migration Law Judges (hereafter 'IARMLJ'), [152] is an example of a judicial transnational network. It aims to develop 'consistent and coherent refugee jurisprudence.'[153] This need was felt especially acutely in this area of law due to the absence of a supranational court capable of developing authoritative legal standards based on the Refugee Convention.[154] According to Hathaway, the IARLJ is 'one of the most exciting developments in refugee law' because it provides clear evidence of an 'ongoing transnational judicial conversation.'[155] The IARLJ promotes a shared understanding of IRL principles among the world's judiciary and quasi-judicial decision-makers, as well as the use of fair practices and procedures to resolve refugee law issues.

Several decisions of superior courts in states parties to the CSR51 have indeed contributed to the advancement of IRL.[156] For instance, Storey advocated for 'a principle of convergence, and that courts and tribunals in different countries should seek to apply the same basic principles as far as possible.'[157] It is within this context that, the IARLJ played an important role in facilitating formal and informal communication and dialogue among

[149] Chimni, B. S. "International Institutions Today: An Imperial Global State in the Making*." European Journal of International Law*, vol.15, no. 1, 2004, pp.1-3.
[150] Slaughter, Anne-Marie. "Disaggregated Sovereignty: Towards the Public Accountability of Global Government Networks." *Government and Opposition*, vol. 39, no.2, 2004, p. 159.
[151] *Op.cit.* Lambert, Hélène 2009. p. 349.
[152] The International Association of Refugee and Migration Judges. Retrieved from https://www.iarmj.org/ Accessed 5 October 2021; IARLJ. Fact Sheet No. 11. 1997, pp. 1-4. Retrieved from https://www.ejtn.eu/Documents/About%20EJTN/Partner%20pages/10_International%20Association%20of%20Refugee%20Law%20Judges%20(IARLJ).pdf Accessed 5 October 2021.
[153] Storey, Hugo. "The Advanced Refugee Law Workshop Experience: An IARLJ Perspective." *International Journal of Refugee Law*, vol.15, no.3, 2003, pp. 422–423.
[154] Mackey, Allan & John Barnes. "International Association of Refugee Law Judges Assessment of Credibility in Refugee and Subsidiary Protection claims under the EU Qualification Directive Judicial criteria and standards." The "Credo Project", HHC, 2013, p. 25. Retrieved from https://helsinki.hu/wp-content/uploads/Credo_Paper_March2013-rev1.pdf Accessed 6 October 2021.
[155] Hathaway, James C. "A Forum for the Transnational Development of Refugee Law: The IARLJ's Advanced Refugee Law Workshop." *International Journal of Refugee Law*, vol. 15, no.3, 2003, p.418.
[156]*e.g. INS v. Elias-Zacarias*, 502 US 478, 2 (1992*); Appellant S395/2002 v. Minister for Immigration and Multicultural Affairs; Appellant S396/2002 v. Minister for Immigration and Multicultural Affairs*, HCA 71, Australia: High Court, 9 December 2003; *HJ (Iran) and HT (Cameroon) v. Secretary of State for the Home Department*, UKSC 31, United Kingdom: Supreme Court, 7 July 2010.
[157] *op.cit.* Storey, Hugo. 2003, p. 423.

refugee law judges worldwide. Many of this kind of decisions were entered into the database thanks to the IARLJ's role as 'agents of normative change.'[158] This role, however, is limited because 'of necessity, those cases are dependent on their own facts and have no binding qualities outside their own jurisdiction.'[159]

Networks of national government representatives can assist participants in developing trust and positive relationships. It has been claimed that judges not only exchange information about different approaches to common legal issues, but also 'provide technical assistance and professional socialization to members from less developed nations.'[160] This is something that could be expanded upon in refugee law to address some of the criticisms levelled at these networks. Chimni, for example, contends that a growing network of international institutions -economic, social, and political - is forming an imperial global state, and that this 'emerging global state' notably lacks the elements required for a strong dialogue between south and north.[161]

Several networks are also centred on UNHCR. One such network is the UNHCR's Global Consultations on International Protection,[162] which are fundamentally driven by an internationally led process.[163] The adoption of the Agenda for Protection was the first result of the Global Consultations Process.[164] Since then, the UNHCR has issued several guidelines to supplement its Handbook on Procedures and Criteria for Determining Refugee Status.

At this point, it is reasonable to examine whether UNHCR guidelines on international protection as quasi-authoritative soft law instruments interpreting key concepts of international refugee law have been picked up by domestic or regional case law. Findings

[158] The IARLJ has its own database, set up by German judge Dr Paul Tiedemann, in cooperation with the Europäische EDV–Akademie des Rechts in Merzig, Germany, and which offers free access to international case law on asylum.
[159] *Op.cit.* Lambert, Hélène. 2009. p.350.
[160] Slaughter, Anne-Marie. "Sovereignty and Power in a Networked World Order." *Stanford Journal of International Law*, vol. 40, 2004, p. 290.
[161] *Op.cit.* Chimni, B. S. 2004, p.1
[162] UNHCR. "UNHCR Mid-Year Progress Report." 2002, pp. 1-4. Retrieved from https://www.unhcr.org/afr/3e6e1623a.pdf Accessed 6 October 2021.
[163]It aims to promote the Convention's full and effective implementation, as well as the development of complementary new approaches, tools, and standards to ensure the availability of international protection where Convention coverage is required. Throughout the process, special emphasis was placed on dialogue and cooperation, as well as broad-based participation. As a result, an international dialogue was held to promote the participation of refugees as key stakeholders in the system as well as non-governmental organization. Source: Turk, Volker. "UNHCR's Global Consultations on International Protection: Progress and Outlook." *Refugee Survey Quarterly*, vol. 21, no. 3, 2002, pp. 219–220.
[164] "Global Consultations Process, Agenda for Protection UNHCR's Global Consultations on International Protection." *Refugee Survey Quarterly*, Vol.22, no. 2 and 3, 2003, pp. 17.

showed that UNHCR has intervened before the CJEU on a rare occasions [165] (four cases calculated by Krommendijk & van der Pas).[166] The case of *N.S. and M.E.* is particularly intriguing because UNHCR strategically intervened before the referring UK Court of Appeal and the Irish High Court.[167] The judgment placed a new obligation on Member States to refrain from transferring cases when 'systematic deficiencies' are evident in the responsible state's asylum procedure.[168] In addition to these official interventions, the UNHCR has issued its observations in a number of cases before the CJEU.[169]Besides, UNHCR has been able to get its observations included in the appendix to the observations of the asylum seeker's attorney.[170] In this way, the CJEU was reached in a unique and informal manner.

The UNHCR's intervention before the European Court of Human Rights [171] looks to be more flexible than the CJEU's; here, however, we are not referring to direct interventions but rather indirect interventions (unofficial intervention).[172] Perhaps this is due to the fact that judgments issued by the CJEU are binding on all EU Member States, but judgments made by the ECtHR are solely binding on the parties to a case even though they are regarded as having *res interpretata* consequences. Also, the UNHCR has issued its observations in a number of cases before the ECtHR.[173]

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[165]*E.g. N.S. v United Kingdom and M.E. v Ireland.* Joined Cases C-411/10 & C-493/10, Judgment of the Court (Grand Chamber) of 21 December 2011, CJEU, paras. 90; *El Kott and Others v. Hungary*, Case C-364/11 (Reference for a preliminary ruling from the Fővárosi Bíróság (Hungary) Opinion of Advocate General Sharpston of 13 September 2012 CJEU, paras. 18 45; *Op. cit*. *Minister voor Immigratie en Asiel v. X, Y and Z* ; see also: UNHCR. UNHCR intervention before the Court of Justice of the European Union in the cases of Minister voor Immigratie en Asiel v. X, Y and Z, 28 September 2012, C-199/12, C-200/12, C-201/12.

[166] Krommendijk, Jasper & Van der Pas, Kris. "To intervene or not to intervene: intervention before the court of justice of the European Union in environmental and migration law." *The International Journal of Human Rights*, 2022, p.6.

[167] *Ibid. N.S. v United Kingdom and M.E. v Ireland.*, para. 90.

[168] *Ibid.* para. 123.

[169] Written observations of the United Nations High Commissioner for Refugees in case C-349/20 *NB & AB v Secretary of State for the Home Department* before the CJEU , 30 November 2020; Written observations of the United Nations High Commissioner for Refugees in case C-349/20 NB & AB v Secretary of State for the Home Department before the Court of Justice of the European Union, Letter from UNRWA to UNHCR in the case of *NB and AB v. SSHD* before the CJEU (Case C-349/20); UNHCR. UNHCR Revised Statement on Article 1D of the 1951 Convention in relation to Bolbol v. Bevándorlási és Állampolgársági Hivatal pending before the CJEU, October 2009.

[170] *E.g. Aboubacar Diakité v Commissaire général aux réfugiés et aux apatrides (Request for a preliminary ruling from the Conseil d'État (Belgium))* Case C-285/12, Opinion of Advocate General Mengozzi, 18 July 2013, fn 14.

[171]E.g. UNHCR. UNHCR intervention before the European Court of Human Rights in the case of *Hirsi and Others v. Italy* , March 2010, Application no. 27765/09; UNHCR. UNHCR intervention before the European Court of Human Rights in the case of *Said v. Hungary*, 30 March 2012, Application No. 13457/11.

[172] *Op.cit.* Krommendijk, Jasper & Van der Pas, Kris, p. 1.

[173] *E.g.* Submission by the Office of the United Nations High Commissioner for Refugees in the case of *Abdi Ali Mahamud v. the Netherlands* (Appl. no. 64534/19) before the ECtHR ;Submission by the Office of the

Interventions before courts by UNHCR and other organizations are an important tool for fostering a consistent implementation of refugee law and developing protection standards.

In addition, the Convention Plus Process is an additional step in that direction.[174] A special emphasis was placed on dialogue, cooperation, and broad-based participation. As a result, an international dialogue was held to encourage refugees and NGOs to participate as key stakeholders in the system.[175]

Thus, a mutually agreed-upon understanding of 'the rules of the game' (asylum, assistance, and burden-sharing) may provide a basis for starting to change behaviour. [176] For instance, Pallis agrees that IRL should evolve through dialogue among a diverse range of participants around the world.[177] The first of a series of Dialogues on Protection Challenges began in 2007.[178] This annual event in Geneva fosters a lively and informal debate on new or emerging global protection issues.[179]

In terms of an example of a transnational judicial dialogue, the EU Agency for Asylum (hereafter 'EUAA'), established by Regulation (EU) 2021/2303,[180] has been running an

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United Nations High Commissioner for Refugees in the case of *Ilias and Ahmed v. Hungary* (case no. 47287/15) before the Grand Chamber of the ECtHR, 8 January 2018.

[174]In 2003, Convention Plus began as a 'ad hoc response to the Agenda for Protection.' Its specific goals were twofold: 'to increase the level and predictability of burden-sharing' and 'to channel this new, abstract commitment toward finding long-term solutions to specific protracted refugee situations.' Its overarching goal was to establish 'a normative framework for global burden-sharing.' Convention Plus, as an interstate process, entailed the establishment of structures to facilitate dialogue between countries. It also encouraged coalition and convergence among specific states. Convention Plus was supposed to result in the creation of special agreements which could be either legally binding or have a soft law nature. The 'Plus' will be a series of special agreements aimed at addressing today and tomorrow's refugee challenges in a spirit of international cooperation. Source: UNHCR. "Convention Plus: Framework of understandings on resettlement." 3 November 2003, FORUM/CG/RES/0, pp. 1-14; UNHCR. "Convention Plus at A Glance." pp.1-6. Retrieved from https://www.unhcr.org/403b30684.pdf Accessed 7 October 2021.

[175]*e.g.* UNHCR's action plan to improve refugee and asylum seeker protection by highlighting existing gaps in the refugee protection regime.

[176] Betts, Alexander & Jean-François Durieux. "Convention Plus as a Norm-Setting Exercise." *Journal of Refugee Studies*, Vol.20, no. 3, 2007, p. 515.

[177] Pallis, Mark P. "The Operation of UNHCR's Accountability Mechanisms." *New York University Journal of International Law and Politics* vol. 37, 2005, p. 869.

[178] UNHCR. "Concept Paper on the High Commissioner's Dialogue on Protection Challenges." 30 July 2007, pp.1-3.

[179] *Op.cit.* Lambert, Hélène, 2009. p.351.

[180]EUAA is an EU agency tasked with assisting Member States in enforcing the package of EU laws governing asylum, international protection, and reception conditions. It new mandate became effective on 19 January 2022 following agreement between the European Parliament and the Council of the EU on the European Commission's proposal. It replaced the European Asylum Support Office (hereafter 'EASO') with more tools in order to assist Member States in bringing asylum and reception practices closer to the high standards of the EU. Regulation (EU) 2021/2303 of the European Parliament and of the Council of 15 December 2021 on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2020, (OJ L 468, 30.12.2021, p. 1).

EU-wide network of members of courts and tribunals. The EUAA plays a crucial role in managing and storing information related to case law regarding the Common European Asylum System's implementation at the national and EU levels, as well as serving as a one-of-a-kind source of accurate information on new asylum jurisprudence issued by national and international courts.[181] Accordingly, it contributes to a greater degree of convergence in asylum procedures and reception conditions as well as the implementation of EU law on asylum.

The problem with these accomplishments is that they do not provide legal norms and cannot serve as an authoritative source of legal rights. From a legal point of view, states, parties to several binding treaties, have an international legal obligation of *non-refoulment* based on the requirement of complying with the object and purpose of the conventions and implementing legal obligations in good faith. However, as mentioned above, while the state must admit asylum seekers to their territories and process asylum requests, they do not have a duty to grant refugee status to asylum seekers.

Interpreting the IRL through the lens of 'participatory' or 'dialogue' reflects the need to shift from a top-down, policy-driven approach to a more inclusive, horizontal decision-making process. Although participatory approaches to refugee and asylum policy have long been advocated, there are significant limitations and risks associated with using this approach. First, this approach operates under soft law norms, so no legal rights or obligations are expected to be produced. Second, the participatory process has the potential to spark conflict among the various stakeholder groups by bringing opposing viewpoints to the surface and exposing underlying tensions. Finally, this approach may constitute interference in government political matters as well as a threat to the smooth operation of government affairs, especially if the host nation views the mobilization of refugees as a potential threat to national security. In this instance, the 'participatory' approach might not be consistent with the country's strategic plan or asylum policy. This approach appears to have no place in countries, like the V4 countries, that defend a more or less restrictive asylum policy, with a focus on reducing asylum flows and combating irregular migration.

[181]Website of the EUAA Case Law Database. Retrieved from https://caselaw.euaa.europa.eu/Pages/default.aspx Accessed 12 August 2022.

4. The interaction between international refugee law and other fields of law: Fragmentation, divergence, convergence, parallelism, or interchange?

There is an obvious interdependence and complementarity between IRL and human right, and criminal law, and other bodies of law. There is no hierarchical relationship between these substantive fields of international law. They are, however, interconnected. IRL protects individuals who have fled their home countries to seek refuge from persecution, and some of its provisions regarding the legal protection overlap with IHRL.

4.1. The interaction between international refugee law and international human rights law

Although IRL and IHRL were initially thought to be separate field of public international law, their multifaceted interaction is now universally acknowledged in both state practice and scholarly literature.[182] IRL and IHRL are inextricably linked, as human rights violations have been identified as the primary cause of refugee movements. Asylum seekers flee governments that are either unable or unwilling to protect their fundamental human rights. According to UNHCR, human rights violations are a significant contributor to the exodus of refugees and a barrier to their safe and voluntary return home. Safeguarding human rights in countries of origin is therefore important both for the prevention and for the solution of refugee problems. The protection of refugees in countries of asylum also depends on respect for human rights.[183]

It is obvious that respect for the rule of IRL and IHRL is at the heart of refugee protection. A starting point is that seeking asylum is a fundamental human right. This implies that everyone should be able to enter another country to seek asylum.[184] In its Article 14, UDHR supports the right of all people to be able to seek asylum from persecution. The declaration is widely regarded as a milestone in IHRL. Although the UDHR is not a legally binding agreement, it expressly states that it was intended to serve as a 'common standard of achievement' that could lead to a binding agreement. So, it served as the basis for more specific international human rights treaties and declarations, regional human rights conventions, and domestic human rights legislation. Furthermore, when it comes to universal human rights, the International Covenant on Civil and Political

[182] Chetail, Vincent. "Are Refugee Rights Human Rights? An Unorthodox Questioning of the Relations between Refugee Law and Human Rights Law." *Human Rights and Immigration*, edited by Ruth Rubio-Marín, Oxford Scholarship Online, 2014, p. 68.
[183] UNHCR. "Statement by Mrs. Sadako Ogata, United Nations High Commissioner for Refugees, to the Forty-ninth Session of the Commission on Human Rights." 1993.
[184]Amnesty International. "Refugees, Asylum-seekers, and Migrants." Retrieved from https://www.amnesty.org/en/what-we-do/refugees-asylum-seekers-and-migrants/ Accessed 10 October 2021.

Rights (hereafter 'ICCPR'),[185] as well as the International Covenant on Economic, Social, and Cultural Rights (hereafter 'ICESCR'),[186] should be mentioned because they are, to some extent, equally important to the UDHR and make up all together the International Bill of Human Rights.[187]

Asylum seekers and refugees have other rights under IHRL based on their humanity. All the universally recognized human rights clearly apply to all people, citizens and non-citizens alike. Therefore, the question arises: what are the major human rights that asylum seekers may have?

International and regional human rights instruments, that are binding on state parties normally guarantee the human rights and physical security of asylum seekers. Asylum seekers have the right to life. This right is the most important because 'the enjoyment of this right is a necessary condition of the enjoyment of all other human rights.'[188] All persons, regardless of their legal status, have the right to life, and states must guarantee that no one is arbitrarily deprived of this right. Besides, all persons, regardless of their legal status, have the right to life, and states must guarantee that no one is arbitrarily deprived of this right.

Also, international human rights instruments ensure freedom from discrimination in the enjoyment of human rights for all people, including asylum seekers. For instance, Article 2(2) ICESCR stipulates that 'the States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.'[189] Also, when asylum seekers belong to one of the groups protected by CEDAW, CRC, or ICERD, the equality and non-discrimination provisions are also applicable to them.

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[185] International Covenant on Civil and Political Rights, (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171; Supplemented by (1) Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR-OP1) (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171; (2) Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the Abolition of the Death Penalty (adopted 15 December 1989, entered into force 11 July 1991) 1642 UNTS 414.

[186] International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1996) 993 UNTS 3; Supplemented by the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (OP-ICESCR) (adopted 10 December 2008, entered into force 5 May 2013) 2922 UNTS 29.

[187] UNGA, International Bill of Human Rights, 10 December 1948, A/RES/217(III)A-E.

[188] Franciszek, Przetacznik. "The Right to Life as a Basic Human Right." *Revue des droits de l'homme/Human Rights Journal*, vol., no.1, 1976, pp. 589-603

[189] Art. 2(2) of the ICESCR.

In addition, asylum seekers should not be subjected to arbitrary arrest or detention under IHRL.[190] A state must not arbitrarily arrest and detain an asylum seeker and must show that other less intrusive measures besides detention have been considered and found to be insufficient to prove detention is not arbitrary.[191]

Besides, every state, regardless of the international treaties it has ratified, is still bound by the obligation to support the prohibition of collective expulsion of asylum seekers, which is part of customary international law.[192] The prohibition of the collective expulsion of aliens, including asylum seekers, is consecrated by many of the several human rights instruments.[193] For instance, although the ICCPR does not include a provision that explicitly prohibits the collective expulsion of aliens, the Human Rights Committee (hereafter 'HRC') has determined that the prohibition can be interpreted through the provisions of the ICCPR and declared that 'collective expulsion may amount to a crime against humanity.'[194] According to the Committee, the 'deportation or forcible transfer of population without grounds permitted under international law [under the Rome Statute of the International Criminal Court],[195] in the form of forced displacement by expulsion or other coercive means from the area in which the persons concerned are lawfully present, constitutes a crime against humanity.'[196]

Asylum seekers should also be protected from torture and inhuman treatment. The prohibition of torture is a *jus cogens* norm of international law, which means that states must implement the prohibition of torture even if that state has not ratified a relevant treaty. Article 2(2) UNCAT stipulates that a state 'may never cite exceptional circumstances, including war or a public emergency, to justify torture. Additionally, regional human rights treaties prohibit torture and cruel, inhuman, or degrading

[190] *E.g.* Art. 17 ICRMW; Art. 9 ICCPR.
[191] *E.g.* Art.5 ECHR; Art. 9 ICCPR.
[192] Third report on the expulsion of aliens by Mr. Maurice Kamto, Special Rapporteur. A/CN.4/581, 19 April 2007, para. 69; Eggli, Ann Vibeke. *Mass Refugee Influx and the Limits of Public International Law.* Kluwer Academic Publisher, 2002, p.165.
[193] Art. 4 of the Protocol 4 to ECHR; Art. 22(9) of American Convention; Art. art. 26(2) ArCHR; Art. 12(5) of the African Charter; Art. 22(1) ICRMW also prohibits the collective expulsion of migrants and requires States to decide each migrant worker's case individually.
[194] General Comment No. 15. "The position of aliens under the Covenant." 11 April 1986., para. 10.
[195] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force on 1 July 2002) 2187 UNTS 90.
[196] HRC. General Comment No. 29. "States of Emergency." CCPR/C/21/Rev.1/Add.11, 31 August 2001, para. 13(d).

treatment.'[197] Within this framework, ICRMW guarantees asylum seekers, for example, the right not to be tortured or subjected to cruel, inhuman, or degrading treatment.[198]

Moreover, HRL requires countries to provide remedies and reparation to victims of human rights violations, including asylum seekers.[199] The HRC determined that when a substantive human right can be violated during an individual expulsion, extra procedures are required to secure the expulsion proceeding.[200] Additionally, under Article 22 of the ICRMW, states must ensure that procedural safeguards are in place to protect asylum seekers during individual deportation proceedings if their asylum claim is rejected. These safeguards include, but are not limited to, communicating the decision to expel to an asylum seeker in a language he/she understands; providing the decision and reasoning in writing except if doing so would jeopardize national security; permitting an asylum seeker to provide an explanation as to why he/she should not be expelled; and making sure that the expulsion decision is reviewed by a qualified authority, during which the person may request a stay of removal.

It is worth noting that some specific human rights instruments may apply to specific categories of vulnerable asylum seekers, such as children, the elderly, *etc*. For example, the CRS is important to refugee children because it sets comprehensive standards. Despite the fact that the CRC is not a convention for refugees, all minors under the age of 18 are entitled to all CRC rights, therefore refugee children who have fled their countries are protected.[201] without discrimination of any kind.[202]

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[197] Art. 3 ECHR; Art.8 ArCHR ; Art. 5 African Charter; Art.7 ICCPR; Art. 5(2) American Convention on Human Rights.

[198] Art. 10 ICRMW.

[199]*E.g.* Art. 2(3) ICCPR; Art.14 CAT; Art. 2 CEDAW; Art. 6 CERD; UNGA, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, A/RES/60/147, 21 March 2006.para. V.

[200] See *e.g. Ahani v. Canada*, Communication No. 1051/2002, Human Rights Committee, 15 June 2004, paras. 10.6-10.8.

[201]Art. 1 CRC stipulates that "for the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.'; Ar. 22 (1), which is more specific and addresses children who are refugees or who are applying for asylum, states stipulates that 'States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties."

[202]Art. 2 (1) CRC stipulates that "states Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the

All of the aforementioned human rights relevant to asylum seekers will be interpreted in Chapter V in the context of the V4 group.

Universal human rights treaties are inherent to human beings regardless of their status in each country. Certainly, an asylum seeker enjoys human rights. Most states have ratified international instruments reflecting the principle that all persons, including all persons irrespective of their migration status, are entitled to have their human rights respected, protected, and fulfilled. However, measuring the rights of asylum seekers and refugees exclusively through a 'human rights-based approach', an approach that only recognizes international human rights instruments, does not encompass the full range of their rights.[203] In addition to human rights, this category has specific rights.

Being a refugee or an asylum seeker includes more than simply being an alien. It entails living in exile and relying on others to meet your basic necessities, including food, clothing, and shelter.[204] The protection of asylum seekers must therefore be seen in the broader context of the protection of human rights. Asylum seekers have rights which should be respected prior to, during, and after the process of seeking asylum. In practical terms, the task of international protection includes preventing *refoulement*, assisting with the processing of asylum seekers, providing legal counsel and aid, promoting arrangements for the physical safety of refugees, promoting and assisting voluntary repatriation, and assisting refugees with resettlement.[205]

IHRL supplements and promotes IRL when it comes to the human rights of asylum seekers. The interaction and overlapping between these fields of law can be seen, for example, in the incorporation of the *non-refoulment* principle in both the UNCAT [206]and

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child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or another opinion, national, ethnic or social origin, property, disability, birth or other status."

[203]Migration Data Portal. "Migrant Rights" Last updated on 29 December 2021. Retrieved from https://www.migrationdataportal.org/themes/migrant-rights Accessed 11 October 2021.

[204] Office of the United Nations High Commissioner for Human Rights (hereafter 'OHCHR'). Human Rights and Refugees. Fact Sheet No.20, p.1. Retrieved from https://www.ohchr.org/Documents/Publications/FactSheet20en.pdf Accessed 26 January 2022.

[205] UNGA, Statute of the Office of the UNHCR, A/RES/428(V), 14 December 1950, para. 8.

[206] UNCAT, Art. 3 (1) '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.'

the ICPPED,[207] which prohibits state parties from returning a person to another state if there is a substantial risk of torture or enforced disappearance.

Some scholars have discussed regime entanglement between IRL and IHRL, which means that these two fields of international law are not only interacted but also fundamentally entwined and mutually influenced.[208] As a result of this mutual interaction, both fields of international law have been fundamentally reshaped and something new has emerged. In this context, Gammeltoft-Hansen and Madsen observe that 'Human rights are no longer simply a complementary or supplementary angle in refugee and migration law, but a primary vantage point for both national and international litigation on refugee and migration matters.'[209] As an example, they consider international refugee litigation. Due to the lack of a dedicated international court or quasi-judicial monitoring mechanism for the refugee, scholars and practitioners have historically focused on domestic legal venues.[210] It should be mentioned that some jurisdictions and legal institutions have chosen a broader interpretation of the IHRL and have used all available means, including human rights treaties,[211] to defend and protect the human rights of asylum seekers at the national level.[212] To put it another way, while some legal institutions and jurisdictions have been hesitant to play a bigger role in this area, others have enthusiastically embraced the opportunity to fill this judicial gap based on IHRL treaties and jurisprudence.[213]

The coupling between IRL and IHRL created normative and institutional changes. Gammeltoft-Hansen discussed the so-called 'human rights turn' in migration and refugee

[207] ICPPED, Art. 16 (1). No State Party shall expel, return (*'refouler'*), surrender or extradite a person to another State where there are substantial grounds for believing that he/she would be in danger of being subjected to enforced disappearance.
[208] Krisch, Nico. *Entangled Legalities Beyond the State*. Cambridge University Press, 2021, p. 522; Krisch, Nico & Hannah Birkenkötter "Multiple Legalities: Conflict and Entanglement in the Global Legal Order." *VerfBlog*, 12 January 2021. Retrieved from https://verfassungsblog.de/multiple-legalities-conflict-and-entanglement-in-the-global-legal-order/ Accessed 12 October 2021.
[209] Gammeltoft-Hansen**,** Thomas & Madsen, Mikael Rask. "Regime Entanglement in the Emergence of Interstitial Legal Fields: Denmark and the Uneasy Marriage of Human Rights and Migration Law." *Nordiques*, vol. 40, 2021, p.2.
[210] *Op.cit*. Gammeltoft-Hansen**,** Thomas & Madsen, Mikael Rask. 2021, p. 2.
[211] Rubio-Marín, Ruth. *Human Rights and Immigration*. Oxford University Press, 2014, pp. 33 - 41.
[212] Kosta, Vasiliki & Bruno de Witte. "Human Rights Norms in the Court of Justice of the European Union." *Human Rights Norms in 'Other' International Courts,* edited by Martin Scheinin, Cambridge University Press, 2019, pp. 263-266.
[213] Amnesty International. "Going to court to protect the rights of refugees and migrants: An overlooked tool for positive change. 18 August 2020. Retrieved from https://www.amnesty.org/en/latest/research/2020/08/going-to-court-to-protect-the-rights-of-refugees-and-migrants/ Accessed 13 October 2021; Nicholson, Frances & Kumin, Judith. "A guide to international refugee protection and building State asylum systems." *Handbook for Parliamentarians,* no. 27, the Inter-Parliamentary Union & UNHCR, 2017, pp. 36-37.

law, which has had a huge impact, broadened frameworks of argumentation and opened new and important avenues for international adjudication.[214] Numerous key cases involving refugee rights have been brought before regional human rights courts such as the ECtHR, the outcome of which has repeatedly forced states to abandon or significantly modify national refugee and asylum policies. Individual petitions relating to asylum and refugee issues have also become a major focus of various UN human rights treaty bodies.[215] *Non-refoulment* cases, for example, make up most of the pending petitions before the Committee Against Torture (hereafter 'CAT').[216] In a similar vein, the United Nations Committee on the Elimination of Discrimination Against Women has recognized an implied prohibition on *refoulement* and heard individual communications involving refugee authors.[217] Similarly, the Committee on the Rights of the Child, which only began receiving individual communications in 2014, has received increasing complaints about refugee children.[218]

There appears to be a growing body of case law on *non-refoulement*,[219] and border issues related to asylum seekers' issues. It is a body of law that derives rights from broadly defined provisions such as the right to life or the prohibition on torture.[220] As the thesis has a focus on the V4 group, it begs the question of whether asylum and refugee law has gained legal momentum and judicial empowerment because of increasingly engaging human rights law and institutions. This will be addressed in the subsequent chapters.

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[214] Gammeltoft-Hansen, Thomas. "The Role of International Refugee Law in Refugee Policy." *Journal of Refugee Studies*, vol. 27, no. 4, 2014, pp. 574-575.
[215] *Ibid.*
[216] Çali, Başak & Cunningham, Stewart. "A Few Steps Forward, a Few Steps Sideways and a Few Steps Backwards: The CAT's Revised and Updated GC on Non-Refoulement." *EJIL: TALK*. 20 March 2018. Retrieved from https://www.ejiltalk.org/part-1-a-few-steps-forward-a-few-steps-sideways-and-a-few-steps-backwards-the-cats-revised-and-updated-gc-on-non-refoulement Accessed 14 October 2021.
[217] CEDAW. "General Recommendation No. 32: Gender-Related Dimensions of Refugee Status, Asylum, Nationality and Statelessness of Women." CEDAW/C/GC/32, 5 November 2014, paras. 17 to 20.
[218] Committee on the Rights of the Child. "Views adopted by the Committee under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, concerning communication" No. 11/2017, CRC/C/79/D/11/2017, 18 February 2018, paras. 2-3.
[219] For **ECtHR case law**, see *e.g. Saadi v. Italy*, case no. (37201/06), Judgment of the court (Grand Chamber) of 28 February 2008, ECtHR; *M.S.S. v Belgium and Greece*, case no. (30696/09), Judgment of the Court (Grand Chamber) of 21 January 2011, ECtHR; *Hirsi Jamaa and Others v. Italy*, case no. (27765/09), Judgment of the court (Grand Chamber) of 23 February 2012, ECtHR; *Ilias and Ahmed v. Hungary*, case no. (47287/15) (2019) Judgment of (the Grand Chamber) of 21 November 2019, ECtHR.; For **CJEU case law**, see *e.g. M and Others v Commissaire général aux réfugiés et aux apatrides*, Joined Cases C-391/16, C-77/17 and C-78/17, Judgment of the Court (Grand Chamber) of 14 May 2019, CJEU; *Commission v. Hungary*, case no. (C-808/18) (*Accueil des demandeurs de protection internationale*), Judgment of the Court (Grand Chamber) of 17 December 2020, CJEU.
[220] *Op.cit*. Gammeltoft-Hansen**,** Thomas & Madsen, Mikael Rask. 2021, p.6.

4.2. The interaction between international refugee law and international criminal law

ICL is the body of laws, norms, and rules that govern international crimes and their repression, as well as rules that govern conflict and cooperation among national criminal law systems.[221] It must be said that ICL and IRL are not inextricably linked, but there are some overlaps. In other words, ICL is increasingly being applied to IRL. This is due to an exclusion clause in the CSR51, which prohibits asylum seekers from obtaining refugee status if they have committed a crime against peace, a war crime, or a crime against humanity.[222] The CSR51 established grounds for the inadmissibility of an asylum application in Article 1(F). This article is intended to exclude individuals from receiving refugee protection if there are serious grounds to believe they have committed certain serious crimes and are attempting to avoid being brought before international or national justice to account for their actions.[223] It is intended to protect the host state and the integrity of the asylum process from abuse, but it is not a punitive measure, and it must be used responsibly, keeping in mind the humanitarian nature of the CSR51 and the consequences of exclusion for the individual.[224]

The determination of refugee status includes determining whether a person falls under the exclusion clauses. The States Parties to the CSR51 have developed what are known as 'refugee status determination procedures' or 'asylum procedures' to determine whether or not a person meets the criteria contained in the definition of refugee status.[225] In this context, evidence presented in international criminal proceedings may be relevant in the context of procedures for determining refugee status, which is one of the demonstrations of the interaction between IRL and ICL. According to the UNHCR's Guidelines on the

[221] Werle, Gerhard & Jessberger, Florian. *Principles of International Criminal Law*, Oxford University Press, 4th ed., 2020, pp.116-118; Schabas, William A. "International Criminal Law." *Encyclopedia Britannica*. 2020. Retrieved from https://www.britannica.com/topic/international-criminal-law Accessed 20 October 2021; Cryer, Robert *et al. An Introduction to International Criminal Law and Procedure*, 4th ed., Cambridge University Press, 2019, pp.15-17.

[222] Rikhof, Joseph. "Complicity in International Criminal Law and Canadian Refugee Law: A Comparison." *Journal of International Criminal Justice*, Vol. 4, no. 4, 2006, p. 702.

[223] Li, Yao. *Exclusion from Protection as a Refugee, An Approach to a Harmonizing Interpretation in International Law*, Brill Nijhoff, 2017, pp.50-53.

[224] Gilbert, Geoff. "Current issues in the application of the exclusion clauses." *Refugee Protection in International Law,* edited by Erika *Feller et al.,* Cambridge University Press, 2003, pp. 429-432; Webber, Frances. "Exclusion From Refugee Status under Article 1F of the Refugee Convention." Refugee legal Aid information for lawyers Representing Refugee legally. Retrieved from https://www.refugeelegalaidinformation.org/exclusion-refugee-status-under-article-1f-convention Accessed 19 October 2021.

[225] UNHCR. "Key messages: Who is a refugee?". pp. 1-6. Retrieved from https://www.unhcr.org/4d944d089.pdf Accessed 20 October 2021.

Application of Exclusion Clauses, 'an indictment by an international criminal tribunal creates a rebuttable presumption of excludability.'[226]

The practice of several countries creating 'war crimes units' as part of their asylum and immigration authorities deserves to be mentioned.[227] War crimes units or small teams have been set up within immigration authorities in various countries[228] in order to prevent a person suspected of having committed a serious violation of international law from entering the country undetected and subsequently applying for asylum, refugee status, or another status.[229] Specialized units may refuse entry into the country, revoke refugee status, refuse to grant refugee status, or ultimately turn the person over to the authorities. Undoubtedly, the existence of such war crimes units makes it easier to apply the CSR51 exclusion clauses in a practical manner.

Other pertinent questions concern concepts of extended liability, which are still evolving in ICL and are essential in determining exclusion cases under IRL.[230] While the Exclusion Clauses are absolute and restrictive in their interpretation, states that invoke 'national security' to reject refugee status, as if it were a new 'Exclusion Clause,' are in fact breaching the spirit and provisions of the CSR51.[231]

In a related vein, the application of exceptions from Article 33(2) CSR51 must be the *ultima ratio* to deal with a case reasonably. In other words, given the serious consequences of returning an asylum seeker or a refugee to a country where he/she faces persecution, the exception provided for in Article 33(2) CSR51 should be used with extreme caution.[232] Within this context, the UNHCR reiterates that the security exception to the prohibition on expulsion or return, as set forth in Article 33(2) CSR51, is not an additional ground for exclusion, but rather an exception to be invoked only in exceptional circumstances by the state.

It is also important to discuss the connections between international criminal justice and forced displacement when discussing the interaction between IRL and ICL. The linkage

[226] UNHCR. "Guidelines on International Protection No. 5: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees." 4 September 2003, HCR/GIP/03/05, para. 34.
[227] Varga, Réka. "Challenges of domestic prosecution of war crimes with special attention to criminal justice guarantees." PhD thesis, Pázmány Péter Katolikus Egyetem Jog-és Államtudományi, 2012, p. 218-221.
[228] *Ibid.* The author used Belgium, Denmark, Finland, and United Kingdom, as examples.
[229] *Ibid.*p.221.
[230] UNHCR. "Complementarities between International Refugee Law, International Criminal Law and International Human Rights Law: Concept Note" April 2011, pp.1-3. .
[231] Murillo, Juan Carlos. "The legitimate security interests of the State and international refugee protection." *Sur - International Journal on Human Rights* , vol. 6, no. 10, 2009, pp. 116-121.
[232] UNHCR. "Note on the Principle of Non-Refoulement." November 1997, para. (f).

ranges from deportation and forcible transfer, which are classified as war crimes or crimes against humanity by international criminal courts and tribunals, to persecution. According to the CSR51's drafting history, the definitions of 'crime against peace,' 'war crime,' and 'crime against humanity' in the exclusion clauses are not limited to those found in 'international instruments' existing at the time the Convention came into force. As a result, UNHCR relied on guidance from instruments such as the Statute of the International Criminal Tribunal for the Former Yugoslavia and the Statute of the International Criminal Tribunal for Rwanda in interpreting the exclusion provision.[233] In this regard, the Statute of the Tribunal will be another authoritative international instrument that will guide UNHCR and states in interpreting concepts used in the exclusion provision.[234]

In addition, the term 'persecution' should be highlighted since it is used by both the ICL and the IRL.[235] Given that displacement is frequently the result of widespread deprivation of human rights, it appears likely that intersections and cross-referencing possibilities exist. Persecution, on the one hand, is classified as a crime against humanity under Article 7(1) (h) of the ICC Statute.[236] It is also considered under Article 7(2) (g) of the ICC Statute as 'intentional and severe deprivation of fundamental rights contrary to international law because of the identity of the group or collectively.' Persecution, on the other hand, is included in the definition of a refugee in Article 1(A) of the CSR51. According to Yao Li, when comparing the crime against humanity of persecution and persecution as a core element of the refugee definition, it is striking that both phenomena have a similar structure: The basis is a serious violation of human rights based on discrimination.[237] Nonetheless, the author claims that cross-referencing carries some risks. Because of the similar meaning and wording, authorities may be tempted to adapt interpretation and applications too hastily.[238] As a result, the various objects and purposes, as well as the varying standards of proof, must be considered: 'For persecution as a crime, the individual criminal responsibility and the character of this heinous crime to affect mankind as such are crucial points, whereas in refugee status determination, the vulnerability of the

[233] UNHCR. "UNHCR and the establishment of an international criminal court: some comments on the draft statute." 1998. Para. 5.
[234] *Ibid.*
[235] *Op.cit.* UNHCR. "Complementarities between International Refugee Law …" 2011, pp.1-3.
[236] Art. 7 (1) (h) of the ICC Statute "persecution against any identifiable group or collectively on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognised as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court."
[237] Li, Yao. "Persecution in International Criminal Law and International Refugee Law." *ZIS*, vol. (6/2020), 2020, p.310.
[238] *Ibid.*

individual refugee and lacking state protection is in the foreground.'[239] Yao Li concludes that persecution in a refugee context does not imply a crime against humanity, as far too many additional elements are needed to establish the latter. However, whenever a crime against humanity of persecution can be proven, persecution within the definition of a refugee is almost certainly proven.[240]

UNHCR strongly advocated for the establishment of an ICC more than two decades ago. [241] Thus, an ICC with jurisdiction over international crimes would have a deterrent effect on such crimes, thereby positively impacting situations that give rise to refugee flows. This raises the question of the scope of the ICC's jurisprudence and practice in terms of protecting the rights of asylum seekers and refugees. In Chapter VI, this point will be treated in more detail.

Furthermore, while complicated, the interactions between the international trafficking and smuggling regime,[242] IRL, and ICL are undeniable. While human trafficking can take many forms, one constant is the abuse of victims' inherent vulnerability.[243] This brings up the question of the link between asylum seekers and human trafficking. In practice, asylum seekers can become victims of trafficking when they travel irregularly in search of protection or when they seek livelihoods while lacking legal rights, such as when they are awaiting the outcome of a protracted status determination or when they live without the right to work.[244]

Asylum seekers may fall victim to human smuggling. Smugglers frequently place asylum seekers in dangerous situations, and as a result, they may become victims of other crimes, including serious human rights violations, during the smuggling process. [245] Although identified victims of trafficking are classified as a 'particular social group' under the CSR51, asylum seekers are frequently required to demonstrate other vulnerabilities to

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[239] *Ibid.*
[240] *Ibid.*
[241] *Op.cit.* UNHCR. "UNHCR and the establishment of an International Criminal Court..." 1998. Paras. 1 to 7.
[242] Trafficking is voluntary but nevertheless carries serious risks to the lives of those involved, unlike human trafficking which is involuntary and the victims are exploited.
[243] UN. "Human Trafficking 'Takes Many Forms, Knows No Borders', Secretary-General Says in Message for World Day." SG/SM/19146-OBV/1807, 27 July 2018.
[244] Briddick, Catherine & Vladislava Stoyanova. "Human Trafficking and Refugees." *The Oxford Handbook of International Refugee Law* edited by Cathryn Costello et *al.* Oxford Handbooks online, 2021, pp.7-14.
[245] United Nations Office on Drugs and Crime (hereafter 'UNODC'). "Human trafficking and migrant smuggling." Retrieved from https://www.unodc.org/e4j/en/secondary/human-trafficking-and-migrant-smuggling.html 23 October 2021.

be granted refugee status.[246] A negative conclusive grounds decision will almost certainly harm the person's credibility in the asylum system.[247]

In recent years, governments have redoubled their efforts to prevent irregular migration and combat human smuggling and trafficking, particularly when carried out by organized criminal groups.[248] International law criminalizes human trafficking. An internationally recognized definition of human trafficking can be found in Article 3(a) of the Protocol to Prevent, Suppress, and Punish Human Trafficking in Persons, Especially Women and Children. [249] The definition of human trafficking was more or less adopted by the 2005 Council of Europe Convention on Action against Trafficking in Human Beings in its Article 4.[250]

However, while many countries define human trafficking as a crime under domestic law, it is not a crime under the ICC's Statute.[251] Human trafficking can indeed be regarded as a crime against humanity under the Rome Statute. It could be classified as such only if the ICC considers it on its own.[252] The ICC is mandated by its Statute to prosecute individuals for the most heinous international crimes, including genocide, crimes against humanity, and war crimes.[253] Nonetheless, these include elements that are frequently associated with human trafficking, such as enslavement, imprisonment, torture, rape, and sexual slavery. In any case, the ICC seeks to hold those responsible accountable for their

[246] While UNHCR does not have a specific mandate to assist victims of trafficking and smuggling, it is recognized that victims or potential victims of smuggling with aggravating circumstances or trafficking may be persons of concern to UNHCR in some cases. Source: UNHCR. "Trafficking in persons." Retrieved from https://www.unhcr.org/human-trafficking.html 24 October 2021; UNHCR. "Guidelines on International Protection: The application of Article 1A (2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees to victims of trafficking and persons at risk of being trafficked." 7 April 2006, HCR/GIP/06/07, para.4

[247] Soroya, Katherine. "Briefing: the support system for migrant victims of human trafficking." *Free Movement*, United Kingdom, Retrieved from https://www.freemovement.org.uk/briefing-the-support-system-for-migrant-victims-of-human-trafficking/ 24 October 2021.

[248] Organization for Security and Cooperation in Europe. "Combating trafficking as modern-day slavery: a matter of rights, freedoms, and security." Annual Report of the Special Representative and Coordinator for Combating Trafficking in Human Beings. 2010, p.7 Retrieved from https://www.osce.org/files/f/documents/5/f/74730.pdf 24 October 2021.

[249] Art. 3(a) of Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children (adopted 15 November 2000, entered into force 25 December 2003) 2237 UNTS 319.

[250] Council of Europe. Council of Europe Convention on Action Against Trafficking in Human Beings, 16 May 2005, CETS 197.

[251] Crawford, Julia. "Could the ICC Address Human Trafficking as An International Crime?" *Justiceinfo Net*, 2019. Retrieved from https://www.justiceinfo.net/en/41684-could-icc-address-human-trafficking-international-crime.html 25 October 2021.

[252] Obokata, Tom. "Trafficking of Human Beings as a Crime against Humanity: Some Implications for the International Legal System." *The International and Comparative Law Quarterly*, vol. 54, no. 2, 2005, p. 446.

[253] ICC. "About the Court." Retrieved from https://www.icc-cpi.int/about 25 October 2021.

crimes while also assisting in the prevention and reduction of this type of crime.[254] These objectives cannot be met solely by the Court. As a court of last resort, it seeks to supplement, rather than replace, national courts. For example, data on criminal investigations into asylum seeker trafficking should be collected by national criminal courts. To combat the trafficking of asylum seekers, a criminal justice perspective that places responsibility for trafficking and exploitation on organized criminal networks and protects trafficked asylum seekers from criminalization is required. As previously stated, the ICC is not meant to replace national courts. Domestic judicial systems continue to be the first line of accountability when it comes to prosecuting these crimes. The ICC complements already-existing national jurisdictions. This 'principle of complementarity'[255] gives states the primary responsibility and duty to prosecute the most serious international crimes,[256] while allowing the ICC to intervene only as a last resort if states fail to carry out their obligations.[257]

Not only the courts, but also a variety of stakeholders, such as border and coast guard staff, police, prosecutors, judges, Frontex,[258] Europol,[259] and Interpol,[260] could play a

[254] *Ibid*.
[255] Art. 1 of the ICC Statute.
[256] Solera, Oscar. "Complementary jurisdiction and international criminal justice." IRRC, vol. 84, no. 845, 2002, pp.148-149; Mayans-Hermida, Beatriz E & Barbora Holá. "Balancing 'the International' and 'the Domestic': Sanctions under the ICC Principle of Complementarity." *Journal of International Criminal Justice*, vol.18, no. 5, 2020, p. 1129.
[257] Mayerfeld, Jamie. "Who Shall Be Judge? The United States, the International Criminal Court, and the Global Enforcement of Human Rights." *Human Rights Quarterly*, vol. 25, no. 1, 2003, p.103. "Justice should be done, but where? The Relationship between National and International Courts." Proceedings of the Annual Meeting, *American Society of International Law*, vol. 101 2007, p. 297.
[258] The full name of Frontex is European Border and Coast Guard Agency. It was established by Council Regulation (EC) 2007/2004 on 26 October 2004 and has its headquarters in Warsaw, the capital of Poland. It assists EU Member States and Schengen Associated Countries in managing the EU's external borders, combating cross-border crime, and keeping up with changing border control trends. Source: Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624, PE/33/2019/REV/1, OJ L 295, 14.11.2019, p. 1-131 (hereafter 'the Frontex Regulation'); website of Frontex. Retrieved from https://frontex.europa.eu/ Accessed 27 January 2022; EU Agenda. "Frontex at a Glance." p.1-2. Retrieved from https://euagenda.eu/upload/publications/untitled-6365-ea.pdf Accessed 27 January 2022.
[259] The full name of Europol is the European Union Agency for Law Enforcement Cooperation. The Treaty provisions on Europol fall under article 88 of the TFEU. The Europol Convention was signed on 26 July, 1995, and after being ratified by all EU Member States, it became effective in October 1998. The European Union Agency for Law Enforcement Cooperation regulation (EU) 2016/794, which was adopted on May 11, 2016, gave Europol a new legal foundation. The new rule harmonizes Europol's existing regulatory structure (Council Decision 2009/371/JHA) with the Treaty of Lisbon's requirements. Europol's goal is to make Europe safer by improving cooperation among EU countries' police forces and law enforcement agencies. Also, its mission is to assist EU countries in preventing and combating international crime and terrorism. Its headquarters are in The Hague, the Netherlands. Source: Regulation (EU) 2016/794 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Law Enforcement Cooperation (Europol) and replacing and repealing Council Decisions 2009/371/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA and 2009/968/JHA OJ L 135, 24.5.2016, p. 53–114; EUR-Lex.Glossary of

significant role in combating asylum seeker trafficking.[261] It is also important to strengthen the capacity of asylum authorities[262] to identify trafficked asylum seekers, as well as the capacity of anti-trafficking stakeholders to identify trafficked people among those using asylum routes.[263] The Visegrád countries, as will be discussed extensively in the fourth chapter, advocate for stronger EU external border defence, primarily by strengthening Frontex capacity. [264]

Human traffickers frequently operate with impunity, and their crimes go unnoticed. As a result, much work remains to be done to combat asylum seeker trafficking. First, it is essential to strengthen the legal framework for combating human trafficking, including by ratifying and effectively implementing the two protocols: the Protocol against the Smuggling of Migrant by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized crime (hereafter 'smuggling Protocol');[265]and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (hereafter 'Trafficking Protocol').[266] Second, improving international, regional, and local cooperation, monitoring asylum routes to prevent trafficking, collaborating in cross-border investigation and prosecution of perpetrators, and providing

summaries. "Europol: European Union Agency for Law Enforcement Cooperation." Retrieved from https://eurlex.europa.eu/summary/glossary/europol.html Accessed 27 January 2022; Website of Europol. Retrieved from https://www.europol.europa.eu/about-europol Accessed 27 January 2022.

[260] The International Criminal Police Organization is Interpol's official name. The International Criminal Police Commission was established in 1923 in Vienna, Austria, and was renamed the International Criminal Police Organization-Interpol in 1956. Its headquarters are in Lyon, France. Interpol's goal is to support law enforcement agencies in each of its 195 member countries to combat all forms of transnational crime. It provides police with a high-tech infrastructure of technical and operational support to meet the growing challenges posed by criminals and crimes that cross borders, both physically and virtually. Source: Website of Interpol. Retrieved from https://www.interpol.int/en/Who-we-are/What-is-INTERPOL Accessed 27 January 2022.

[261] Healy, Claire. "The Strength to Carry On: Resilience and Vulnerability to Trafficking and Other Abuses among People Travelling along Migration Routes to Europe." International centre for Migration Policy Development, Brussels, 2019, pp. 243- 246.

[262] Jean-David Ott. Asylum authorities an overview of internal structures and available resources. European Council on Refugees and Exiles *(*hereafter 'ECRE') (Updated on 30 June 2019), pp.2-22. Retrieved from https://asylumineurope.org/wp-content/uploads/2020/11/aida_asylum_authorities_0.pdf. Accessed 27 January 2022.

[263] *Ibid.*

[264] Visegrád Group. "Joint Declaration of the Ministers of the Interior." 16 October 2018. Retrieved from https://www.visegradgroup.eu/calendar/2018/joint-declaration-of-th Accessed 6 March 2022.

[265] Protocol against the Smuggling of Migrants by Land, Sea, and Air, Supplementing the United Nations Convention against Transnational Organized Crime (Adopted15 November 2000, entered into force on 28 January 2004) 2241 UNTS 507.

[266]Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 25 December 2003, 2237 UNTS 319).

protection and assistance to those vulnerable to or victims of human trafficking at any stage of the asylum seekers' journey is essential.[267] Third, identify, refer, and assist asylum seekers who have been victims of human trafficking in a timely manner in order to protect their rights and dignity, as well as to support their psychosocial recovery and social reintegration into society.[268]

Borrowing from ICL, IRL determines who is worthy of refugee status by excluding those who have committed serious international crimes. [269] ICL, when applied collaboratively, brings perpetrators to justice, whereas IRL excludes those who seek safe havens by obtaining refugee status and the corresponding protection.[270]

5. Conclusion

It can be concluded that although the chapter largely focused on IRL, it also covered how IRL and ICL interact with IRL to improve asylum and refugee protection. The fundamental component of protecting refugees and asylum seekers is respect for the law and for human rights. States must respect the well-established legal boundaries between 'asylum seekers', 'refugees', 'migrants, and 'irregular migrants.' States are required, in accordance with this distinction, to refrain from *refouler* asylum seekers who are unable to return home because of the fear of persecution. They must also establish and maintain effective national asylum systems that are in line with international standards in order to protect their rights.

[267] UNODC. "Statement by the United Nations Network on Migration on the World Day Against Trafficking in Persons "Victims' Voices Lead the Way."" 30 July 2021. Retrieved from https://www.unodc.org/unodc/press/releases/2021/July/statement-by-the-united-nations-network-on-migration-on-the-world-day-against-trafficking-in-persons.html 6 March 2022.
[268] UNHCR. "Guidance for Partnering with UNHCR." 7th Draft v2, May 2019, p.18. Retrieved from https://www.unhcr.org/uk/5cf8c21c7.pdf 26 October 2021.
[269] Poon, Jenny. "The Crime of Aggression under International Criminal Law: Links with Refugee Law." *IntLawGrrls,*10 December 2017. Retrieved from https://ilg2.org/2017/12/10/the-crime-of-aggression-under-international-criminal-law-links-with-refugee-law/ 26 October 2021.
[270] *Ibid.*

III. The Organizational Frameworks of the EU and the V4's Asylum Policies

1. Overview

The main goal of this chapter is to provide a brief overview of both the organizational framework of the EU's asylum policy and the organizational framework of the V4 asylum policies, as well as to demonstrate the basic treaties, standards, and directions that the V4 asylum policy must follow.

Human rights are an essential component of the EU's founding values.[271] The EU is bound by its CFR',[272] which is a unique and modern human rights instrument aimed at strengthening fundamental rights protection in the EU.[273] The CFR enshrines all fundamental rights protected in the EU as they result from the established case-law of the CJEU, ECtHR,[274] and common constitutional traditions of the Member States.[275] Therefore, the promotion and protection of human rights is a priority for the EU, both within the EU and in its relations with third countries.[276] It can be argued that the EU legal order offers 'a high standard of human rights protection.'[277] It is within this context that the EU portrays itself as a safe area for people fleeing persecution or serious harm in their home country. The EU Member States share responsibility for accepting asylum seekers in a respectful manner, ensuring that they are treated with dignity and respect, and that their asylum claims are examined in accordance with uniform standards. This assumes that asylum seekers are treated similarly in each Member State, ensuring consistency of outcome regardless of where an applicant applies. The second subchapter will examine the organizational framework of the EU's asylum policy (2), while the third subchapter will investigate the organizational framework of the V4'asylum policies (3).

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[271] Art. 2 of Treaty on European Union (Consolidated Version) (hereafter 'TEU') Treaty of Maastricht, Official Journal of the European Communities C 325/5, 24 December 2002.
[272] Art. 51 CFR.
[273] Charter of Fundamental Rights of the European Union, OJ C 326, 26 December 2012, p. 391- 407.
[274] European Convention on Human Rights. Convention for the Protection of Human Rights and Fundamental Freedoms, (Adopted 4 November 1950, entered into force on 3 September 1953,) 213 UNTS 221.
[275] European Network of National Human Rights Institutions. "Implementation of the EU Charter of Fundamental Rights Activities of National Human Rights Institutions." 2019, p. 3. Retrieved from http://ennhri.org/wp-content/uploads/2019/11/Implementation-of-the-EU-Charter-of-Fundamental-Rights-Activities-of-NHRIs.pdf Accessed 28 January 2022.
[276] Arts. 2, 3, 6, 21 of TEU; Art. 205 of the Treaty on the Functioning of the European Union (hereafter 'TFEU') Consolidated version of the Treaty on the Functioning of the European Union OJ C 326, 26.10.2012, p. 47–390.
[277] Ktistakis, Yannis. "Protecting Migrants under the European Convention on Human Rights and the European Social Charter." Council of Europe Publishing, Paris, 2013, p.10.

2. The organizational framework of the EU's asylum policy

As a starting point, the EU's asylum policy is a shared competence[278] and, therefore, subject to the principle of subsidiarity.[279] Some provisions reserve specific competence to Member States, but Article 67(2) TFEU assigns general competence to the EU to implement a common policy in the fields of external border control, immigration, and asylum, based on solidarity between EU Member States, specified by subsequent provisions for each of these fields.

In accordance with Article 78 TFEU, the EU sought to develop a Common European Asylum System, subsidiary protection, and temporary protection to provide appropriate status to all non-EU nationals in need of international protection and to ensure that the principle of *non-refoulement* was followed. This policy must be in accordance with the CSR51 and its 1967 protocol and other relevant treaties.

The adoption of common asylum policies in areas enlisted in Article 78 TFEU should be governed by the principle of solidarity, as outlined in Article 80 TFEU. It might be argued that Article 80 TFEU adopts the preambular clause of CSR51, which calls for more than just interstate cooperation between states. Solidarity and 'fair sharing of obligations' are directly linked in the provision. The use of two different terminology to express the drafters' intentions is fairly telling; the concept of solidarity is primarily concerned with solving a problem collaboratively and in support of one another, whereas fair sharing of duties is connected to a specific division of labor.[280] Depending on the situation, solidarity and fair sharing, as stated in Article 80 TFEU, are to be implemented to the highest degree that is actually and legally possible.[281]

When talking about the EU's asylum framework, respect for human rights and the rule of law are indispensable. The CFR includes a right to seek asylum with due respect for the rules of the CSR51 in Article 18, and an explicit prohibition of *refoulement* in Article 19. According to the explanations, Article 18 CFR is based on Article 78 TFEU, which states that the CSR51 and its 1967 Protocol must serve as the foundation for the EU's refugee

[278] Art. 4(2)(j), Art. 67(2), Art. 77, Art.78, and Art. 80 TFEU; Art. 18 CFR. See also: Carrera, Sergio *et al.* "Constitutionalising the External Dimensions of EU Migration Policies in Times of Crisis. Legality, Rule of Law, and Fundamental Rights Reconsidered." Research Paper, Centre for European Policy Studies, Brussels, 2019. p.3; European Parliament. "Fact Sheets on the European Union: Asylum Policy." Retrieved from https://www.europarl.europa.eu/factsheets/en/sheet/151/asylum-policy Accessed 15 July 2021

[279] Art. 69 TFEU; Art.5 (3) TEU.

[280] Karageorgiou, Eleni. "The law and practice of solidarity in the Common European Asylum System: Article 80 TFEU and its added value." European Policy Analysis, 2016 (14) p.4.

[281] *Ibid.*

policy.[282] It is important to remember that the CJEU reaffirms that the CSR51 is: the cornerstone of the international legal regime for the protection of refugees and that [the Qualification Directive was] adopted to guide the competent authorities of the Member States in the application of [the CSR51] on the basis of common concepts and criteria.[283] Since the majority of asylum law falls under the competence of the EU, state asylum laws will typically be seen as implementing Union law, and the CFR thus applies.

The CJEU has delivered judgments on asylum and refugee-related cases. One was the action brought by the European Parliament against the Council's decision about their respective authority over the establishment of the common list of safe countries of origin.[284] The case concerns two provisions of the Asylum Procedures Directive,[285] Articles 29 and 36, that set out a simplified decision-making procedure for the adoption of safe third countries of origin and safe European third countries, which the CJEU annulled.[286] This significant decision offers vital confirmation of the significance of institutional balance in the decision-making process and the delegation of powers. In more detail, its real significance is related to questions of secondary legal basis, the rule of law, and the legitimacy of the decision-making process, especially in politically delicate policy areas like asylum.[287]The incorporation of asylum and refugee issues into the competence of the EU is a key advancement in the IRL.

Asylum seekers entering the EU must adhere to the laws established by the Common European Asylum System. It should be noted that the Common European Asylum System has evolved through two phases[288] and will presumably continue to do so.[289] Without going into too many details, according to the aims and limitations of our research, the Common

[282] Explanations relating to the Charter of Fundamental Rights, OJ C 303, 14.12.2007, p. 17–35.

[283] *Op.cit. H.N. v Minister for Justice, Equality and Law Reform and Others*.

[284] *European Parliament v Council of the European Union,* case no C-133/06, Judgment of the Court (Grand Chamber) of 6 May 2008 , CJEU.

[285] Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection OJ L 180, 29 June 2013, p. 60-95 (hereafter 'Asylum Procedures Directive').

[286] *Op.cit. European Parliament v Council of the European Union* para. 69.

[287] Richard, Ball & Dadomo, Christian . "Case C-133/06, European Parliament v. Council [2008] ECR I-3189." *European Public Law*, vol.15, no. 3, 2009, p.335.

[288] European Commission. "Common European Asylum System." Retrieved from https://ec.europa.eu/home-affairs/pages/glossary/common-european-asylum-system-ceas_en Accessed 15 July 2021; European Commission. "Policy Plan on Asylum, COM." 2008 Retrieved from https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0360:FIN:EN:PDF Accessed 15 July 2021.

[289] Giordano, Antonella. "EU asylum policy: The past, the present and the future." *The New Federalist*, 2019 Retrieved from https://www.thenewfederalist.eu/eu-asylum-policy-the-past-the-present-and-the-future?lang=fr Accessed 15 July 2021.

European Asylum System was 'heralded as a historic achievement.'[290] It emerged following the adoption of the Schengen Agreement on the abolition of internal border controls of signatory states and its subsequent incorporation into the EU legislative framework by the Amsterdam Treaty.[291] The Common European Asylum System establishes common standards and cooperation to ensure that all asylum seekers are treated equally in an open and fair system, regardless of where they apply. More specifically, the Common European Asylum System unifies minimum asylum standards while leaving it up to EU Member States to establish procedures for obtaining and withdrawing international protection.[292]

The first phase of the Common European Asylum System included secondary legislation enacted between 2000 and 2005 based on defining common minimum standards to which the Member States were to adhere in connection with the reception of asylum seekers; qualification for international protection and the content of the protection granted; and procedures for granting and withdrawing refugee status.[293] All these points became legislation, namely the Dublin II[294] Regulation, which replaced the Dublin Convention; the Reception Conditions Directive;[295] the Qualification Directive;[296] and the Asylum Procedures Directive.[297] These acts, however, had a low common denominator and were nothing more than the result of difficult compromises among states that were opposed to

[290] Tsourdi, Evangelia Lilian. "The Emerging Architecture of EU Asylum Policy: Insights into the Administrative Governance of the Common European Asylum System." *EU Law in Populist Times: Crises and Prospects*, edited by Francesca Bignami, Cambridge University Press, 2020, p. 191.
[291] "Summaries of EU legislation: The Schengen area and cooperation." The Publications Office of the EU.
[292] European Commission. "Reforming the Common European Asylum System: Frequently asked questions." 13 July 2016 pp.1-8. Retrieved from https://ec.europa.eu/commission/presscorner/detail/fr/MEMO_16_2436 Accessed 16 July 2021.
[293] It is worth noting that the 1990 Dublin Convention, which later became the Dublin II Regulation (2003) and Dublin III (2013) was the first to address the movement of asylum seekers in legislative form. The Dublin Convention established criteria for determining the State responsible for examining asylum applications lodged in one of the European Communities' Member States. Source: Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities - Dublin Convention, OJ C 254, 19 August 1997, p. 1-12. No longer in force, Date of end of validity: 16 Mach 2003.
[294] Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national OJ L 50, 25 February 2003, p. 1–10. No longer in force, Date of end of validity: 18 July 2013.
[295] Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) OJ L 180, 29 June 2013, p. 96–116. (hereafter 'Reception Conditions Directive')
[296] *Op. cit.* Qualification Directive'.
[297] *Op.cit.* 'Asylum Procedures Directive'.

any extension of rights for asylum seekers to maintain their own flexibility. Harmonization, on the other hand, had to be achieved.[298]

The second phase of the Common European Asylum System marked a significant advancement, which effectively began in September 2008 with the European Commission's European Pact on Asylum.[299] The aim and content of the second phase of the Common European Asylum System were detailed in the Lisbon Treaty.[300] With the entry into force of the Treaty, the CFR also became legally binding on 1 December 2009. The Charter is considered a full component of EU primary law, binding upon the EU institutions and its Member States when they implement EU law.[301] During the second phase, it was decided to rewrite all of the aforementioned legislative measures. The Dublin II Regulation became the Dublin III Regulation,[302] and the above-mentioned directives were amended. The Dublin III establishes the criteria and mechanisms for determining which Member State is responsible for examining an asylum claim made in the EU.[303] Mutual trust, a key concept in the EU, is the backbone of this system.[304] In the field of asylum, this principle essentially means that all Member States have common rules and standards based on human rights, democracy, and the rule of law. Thus, if a person moves to a second country and is then returned to the first, their human rights, as well as democracy and the rule of law, will undoubtedly be respected.

Despite mutual trust and the rule of the country of first entry, it was quickly realized that these principles existed in theory but were not fully respected in practice. In this context, the CJEU delivered a number of judgments related to preliminary rulings on interpreting CEAS. For instance, the Asylum Procedures Directive's applicability was

[298] The Hague Programme: strengthening freedom, security and justice in the European Union OJ C 53, 3 March 2005, p. 1-14.
[299] European Council. "European Pact on Immigration and Asylum." EU Doc 13440/08, 24 September 2008.
[300] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, (adopted on13 December 2007, entered into force on 1 December 2009) OJ C 306, 17 December 2007, p. 1–271.
[301] Declaration concerning the Charter of Fundamental Rights of the European Union, annexed to the Final Act
of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007, in (2012) OJ C 326/339.
[302] Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, OJ L 180, 29 June 2013, p. 31–59 (hereafter 'Dublin III regulation')
[303] Art. 7 to Art. 15 Dublin Regulation III. Using a hierarchy of criteria, the Dublin III Regulation identifies the Member State responsible for determining an asylum application. These include family considerations, possession of residence documents or visas, irregular entry or stay, and visa-waived entry.
[304] Art. 22 Dublin Regulation III.

examined by the CJEU in light of the Member States' competence to provide international protection as well as the role that judicial institutions in reversing first instance rulings. In *Bundesrepublik Deutschland v Adel Hamed and Amar Omar*, the CJEU came to the conclusion that Directive 2013/32 should be interpreted as prohibiting Member States from using their discretion to deny requests for international protection as inadmissible when an applicant has been granted protection status elsewhere if the applicant's living situation and the asylum process in that State would put them at serious risk of receiving inhumane or degrading treatment.[305] The CJEU further specifies in *Bashar Ibrahim and Others v Bundesrepublik Deutschland and Bundesrepublik Deutschland v Taus Magamadov* that Article 33(2)(a) of the Asylum Procedures Directive must be interpreted as not precluding a Member State from exercising its right to deny refugee status, without examination, when another Member State has provided the applicant with subsidiary protection.[306]

In a similar spirit, the CJEU addressed the revocation of the status of international protection based on Articles 14(4) to (6) of the Qualification Directive in light of the TFEU, TEU, and the EU Charter in *M and Others v Commissaire général aux réfugiés et aux apatrides*.[307] The Court determined that the Qualification Directive's Articles 14(4) to (6) had disclosed no factor to affect the validity of TFEU Article 78(1) and EU Charter Article 18 provisions.[308] An individual from a third country whose refugee status has been terminated due to criminal activity will continue to be a refugee but will no longer have the formal refugee status, making them ineligible for the full range of rights and benefits that the directive reserves for those with refugee status.[309]

Arguably, the CJEU assesses the legality of actions taken by EU institutions, guarantees that basic and secondary European Union laws are correctly interpreted and applied, and determines whether Member States have complied with their legal responsibilities to protect asylum seekers and refugees.

In light of the EU Charter, the CJEU clarified preliminary concerns and provided an interpretation of the Dublin system's key concepts and technical aspects. According to well-established CJEU case law, a Dublin transfer is regarded as unlawful if it exposes the

[305] *Bundesrepublik Deutschland v Adel Hamed and Amar Omar*, Joined Cases (C-540/17 and C-541/17) Order of the Court (Tenth Chamber) of 13 November 2019, CJEU, Case Reports not yet published.
[306] *Bashar Ibrahim and Others v Bundesrepublik Deutschland and Bundesrepublik Deutschland v Taus Magamadov* Joined Cases (C-297/17 and C-318/17, C-319/17 and C-438/17), Judgment of the Court (Grand Chamber) of 19 March 2019, CJEU, para. 103.
[307] *Op.cit. M and Others v Commissaire général aux réfugiés et aux apatrides*, para. 113.
[308] *Ibid.* para. 113.
[309] *Ibid.* para. 112.

person to a genuine risk of a serious violation of the prohibition of inhuman or degrading treatment under Article 4 of the Charter in the destination country.[310]

Besides, the country of first entry rule has been recognized as burdening countries at external borders, owing to the Dublin III Regulation's lack of burden-sharing provisions. It became even more apparent with the refugee crisis of 2015-16, which made the EU aware of the Common European Asylum System's inadequacy. The refugee crisis of 2015-16 has been presented as a failure of the Common European Asylum System.[311] But what sort of failure are we referring to? Is it a failure to deal with external pressures that has resulted in an increase in the number of asylum seekers or a failure to build a fully functional common asylum system?

The failure to deliver a comprehensive and effective EU asylum policy can be attributed to three fundamental structural reasons.[312] First, the system of shared competencies, which allows Member States to pursue their own policies alongside EU policy. It is understandable that the Union's competence will have to coexist together with that of the Member States. However, the shared competence severely limited the EU's consolidation and coordination roles, resulting in fragmentation. Implementing a comprehensive, coherent, and efficient asylum policy is a difficult mission due to the shared competence.[313] In a sector as delicate as asylum, the Member States does not accept to lose their competence. Furthermore, domestic asylum policies influence how decision-makers implement the Common European Asylum System's common rules and procedures.[314] While the primary goal of the EU's asylum policy is to provide appropriate status to any non-EU national in need of international protection, Member States link asylum matters to sovereignty and security concerns. Second, the coexistence of too many actors who want to have a say in asylum policies and come from very different policy areas with varying, if not conflicting, interests. Third, fragmented, and in some cases, overlapping funding

[310] *C. K. and Others v Republika Slovenija (Request for a preliminary ruling from the Vrhovno sodišče Republike Slovenije)* case no C-578/16 PPU, Judgment of the Court (Fifth Chamber) of 16 February 2017, CJEU, para. 98; *Abubacarr Jawo v Bundesrepublik Deutschland Request for a preliminary ruling from the Verwaltungsgerichtshof Baden-Württemberg,* case no. C-163/17, Judgment of the Court (Grand Chamber) of 19 March 2019, CJEU, para.99.

[311] The failure of Common European Asylum System is discussed in detail in the next chapter.

[312] Faure, Raphaëlle *et al.* "Challenges to a comprehensive EU migration and asylum policy." European Centre for Development Policy Management, Netherlands, 2015, p. 5. Retrieved From https://cdn.odi.org/media/documents/10166.pdf Accessed 17 July 2021.

[313] Jiménez, Gemma Pinyol. "Is It Possible to Develop a Common European Policy on Immigration and Asylum?" IEMed Mediterranean Yearbook, 2019. Retrieved from https://www.iemed.org/publication/is-it-possible-to-develop-a-common-european-policy-on-immigration-and-asylum/ Accessed 3 March 2022.

[314] Schittenhelm, Karin. "Implementing and Rethinking the European Union's Asylum Legislation: The Asylum Procedures Directive." *International Migration*, vol. 57, no.1, 2019, p. 229.

instruments.[315] In addition, the fact that the shared competence of the EU and its Member States is not entirely clear where the line between the two is found contributed significantly to the Common European Asylum System's failure.

To address the failure, the European Commission issued a first package of legislative proposals in 2016 that included a recast Dublin Regulation 'Dublin IV,' a recast Eurodac-Regulation, and a proposal to establish a European Union Agency for Asylum as the first step in a full revision of the Common European Asylum System.[316] Despite this appearing to be a promised 'fresh start', the EU is still struggling to reform the bloc's asylum rules.[317]

On 23 September 2020, the European Commission presented the New Pact on Migration and Asylum,[318] which places a strong emphasis on better management of external borders and returns, thus strengthening the security dimension, which has been the main approach of asylum and migration management over the years.[319]

In addition, the New Pact on Migration and Asylum outlines the European Commission's new approach to asylum in the EU.

It pursues an 'integrated approach that combines migration management, border control, and refugee and asylum policies. The new asylum approach revolves around three main

[315] *Op.cit* Faure, Raphaëlle *et al.*, 2015, p. 5.
[316] COM (2016) 197 final. "Communication From the Commission to the European Parliament and the Council Towards a Reform of the Common European Asylum System and Enhancing Legal Avenues to Europe." 6 April 2016.
Retrieved from https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016DC0197 Accessed 17 July 2021.
[317] Maiani, Francesco. "A "Fresh Start" or One More Clunker? Dublin and Solidarity in the New Pact." *EU Migration Law Blog*, 20 October 2020. Retrieved from https://eumigrationlawblog.eu/a-fresh-start-or-one-more-clunker-dublin-and-solidarity-in-the-new-pact/ Accessed 17 July 2021.
[318] COM (2020) 609 final. Communication From the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a New Pact on Migration and Asylum. 23 September 2020.
[319] The New Pact is based in part on the European Commission' seven legislative proposals from 2016, which were drafted in response to the 2015-16 refugee crisis and reflected the first period of 'success' of the March 2016 agreement with Turkey in terms of a reduction in asylum seeker arrivals in Greece. It is based on solidarity and responsibility, and it includes the following provisions: external border management that is effective and equitable, including identity, health, and security checks; asylum rules that are fair and efficient, as well as procedures for asylum and return; a new mechanism of solidarity for search and rescue, pressure, and crisis situations; Improved foresight, preparedness, and response to crises; returns approach that is efficient and EU-coordinated; comprehensive EU governance to improve the management and implementation of asylum and migration policies; mutually beneficial agreement with key third-country origin and transit countries; development of long-term legal pathways for those in need of protection, as well as attracting talent to the EU; support to effective integration policies. Source: European Commission. "New Pact on Migration and Asylum A fresh start on migration in Europe." Retrieved from https://ec.europa.eu/info/strategy/priorities-2019-2024/promoting-our-european-way-life/new-pact-migration-and-asylum_en Accessed 21 July 2021; "EU: The New Pact on Migration and Asylum." *Info Migrant*, 20 July 2021. Retrieved from https://www.infomigrants.net/en/post/30751/eu-the-new-pact-on-migration-and-asylum Accessed 21 July 2021.

points: first, the reform of Dublin Regulation III by the Asylum and Migration Management Regulation, a newer, more comprehensive tool for a shared framework for asylum and migration management; [320] second, the establishment of a solidarity mechanism for search and rescue cases;[321] and third, the implementation of a new set of mandatory border procedure,[322] which includes pre-entry screening for asylum border procedures and return border procedures. The latter are the subject of two legislative proposals that borrow some of the unfinished measures envisaged in the 2016 asylum reform bill. Put it simply, as part of the legislative package related to the EU Pact, the Commission presented a separate Proposal for a Screening Regulation on 23 September 2020, which introduced the pre-entry screening.[323] Furthermore, the Amended Proposal for an Asylum Procedure Regulation, which was simultaneously introduced to amend the 2016 Proposal for an Asylum Procedure Regulation,[324] addressed the asylum border procedure intended to examine asylum applications as well as the return border procedure for carrying out the return of asylum seekers whose application have been rejected in the asylum border procedure.[325]

The proposal for a new Regulation on Asylum and Migration Management[326] and the proposal for a new crisis and force majeure regulation[327] must both be given more consideration. The first proposal's objective is to provide a common framework for the actions of the Union and of the Member States in the sphere of asylum and migration management policy and to address the structural flaws in the conception and implementation of the Dublin system. The major goal of the second proposal is to simultaneously adjust solidarity criteria while allowing Member States to deviate from

[320] COM (2020) 610. Final. Proposal for a Regulation on Asylum and Migration Management and amending Council Directive (EC) 2003/109 and the proposed Regulation (EU) XXX/XXX [Asylum and Migration Fund], 23 September 2020.
[321] Member States will be able to choose between three types of solidarity: relocation, return sponsorship, and capacity building. *Op.cit.* COM (2020) 609 final.
[322] COM (2020) 612 final. Proposal for a Regulation of the European parliament and of the Council Introducing a Screening of Third Country Nationals at The External Borders and Amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817. 23 September 2020; COM (2020) 611 final Amended Proposal for a Regulation of the European Parliament and of the Council Establishing a Common Procedure for International Protection in the Union and Repealing Directive 2013/32/EU, 13 July 2016.
[323] *Op.cit.* COM (2020) 612 final.
[324] *Op.cit.* COM(2020) 611 final.
[325] COM(2016) 467 final Proposal for a Regulation European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU
[326] *Op.cit.* COM (2020) 610.
[327] COM/2020/613 final. Proposal for a Regulation of the European Parliament and of the Council Addressing Situations of Crisis and Force Majeure in the Field of Migration and Asylum.23 September 2020; *op.cit.* COM (2020) 610.

some Asylum and Migration Management Regulation-related responsibilities when they are confronted with a crisis or other event that constitutes a *force majeure*.

Finally, consideration should be given to the 2020 proposal to amend the Eurodac Regulation.[328] The 2020 amendment to the Eurodac Regulation seeks to make Eurodac a shared EU database to support asylum, resettlement, and irregular migration policy.

To sum up, the new EU Pact is 'a complex package of reforms' meant to 'refresh' EU asylum, refugee, and immigration policies, accompanied by Commission-presented legislative proposals. However, it has sparked fierce debate among governments, policymakers, academics, civil society organizations, and the EU's legislative machinery.[329]The EU Member States, for example, have different opinions about the New Pact.[330] While many Member States praised it as a step in the right direction toward ensuring a comprehensive and common European approach to asylum (*e.g.* Germany, France), others have criticized it either for not being enough to bring real change (*e.g.* Italy, Greece) or for being too much for the Member States to bear (*e.g.* Visegrád countries, Austria, Slovenia).

The EU's 27 Member States have struggled and continue to struggle to find an effective common approach to asylum.[331] The positions are polarized, ranging from a desire to limit asylum seeker reception to supporting an open-door policy, a more equitable

[328] COM/2020/614 final Amended proposal for a Regulation of the European Parliament and of the Council on the establishment of 'Eurodac' for the comparison of biometric data for the effective application of Regulation (EU) XXX/XXX [Regulation on Asylum and Migration Management] and of Regulation (EU) XXX/XXX [Resettlement Regulation], for identifying an illegally staying third-country national or stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes and amending Regulations (EU) 2018/1240 and (EU) 2019/818.23 September 2020; *Op.cit*.COM/2020/611 final.

[329] Hein, Christopher. "Old wine in new bottles? Monitoring the debate on the New EU Pact on Migration and Asylum." Heinrich Böll Stiftung, Berlin, 16 June 2021. Retrieved from https://eu.boell.org/en/2021/06/16/old-wine-new-bottles-monitoring-debate-new-eu-pact-migration-and-asylum Accessed 21 July 2021.

[330] News European Parliament. "New Migration Pact proposal gets mixed reactions from MEPs Society." 28 September 2020.
Retrieved from https://www.europarl.europa.eu/news/en/headlines/society/20200924STO87803/new-migration-pact-proposal-gets-mixed-reactions-from-meps Accessed 28 January 2022; *Schengen Visa Info*. "EU Member States Show Mixed Reactions to New Migration Pact." 30 September 2020.
Retrieved from https://www.schengenvisainfo.com/news/eu-member-states-show-mixed-reactions-to-new-migration-pact/ Accessed 28 January 2022.

[331] Reidy, Eric. "'No more Morias': New EU migration policy met with Scepticism." *The New Humanitarian*, 23 September 2020. Retrieved from https://www.thenewhumanitarian.org/news/2020/09/23/EU-new-pact-migration-asylum-policy Accessed 28 January 2022.

distribution of asylum seekers within the EU, and an improvement in conditions in reception camps.

Since the 2015-16 refugee crisis, the V4 countries, which are the thesis's focus, have supported restrictive asylum policies.[332] The reasons and consequences of such a policy will be discussed in detail in the following chapters, but first it is important to highlight the organizational framework of the V4 group' asylum policies.

3. The organizational framework of the Visegrád's asylum policies

The adoption of asylum legislation is essential to the development of a state asylum system and allows the provisions of CSR51 and its 1967 Protocol to be effectively implemented. It is also necessary to ensure that the national system takes into account the state's unique legal tradition and resources. National legislation on expulsion, extradition, nationality, and penal codes, as well as legislation on a variety of issues ranging from access to health care, housing, employment protection, and trafficking, are all relevant to international protection. In other words, several pieces of legislation relating to migration, criminal law, and so on can have an impact on asylum seekers' enjoyment of rights.

Asylum legal frameworks in all the V4 countries have been in large part influenced by accession to the EU in 2004, and the Schengen area in 2007. Therefore, they comply with all specific EU regulations governing asylum. Separately, the legislative and institutional framework regarding international protection in each country of the V4 group will be highlighted.

3.1. The Hungarian legislative and institutional framework in the field of asylum

In accordance with the Hungarian Fundamental Law, [333] domestic law should be in compliance with international obligations undertaken by Hungary under international law.[334] As stated in Article 1(1), human rights are recognized by the Fundamental Law as fundamental rights to be respected and the primary obligation of the Hungarian Republic

[332] Nič, Milan. "The Visegrád Group in the EU: 2016 as a turning-point?" *European View,* vol. 15, 2016, pp.281-290.
[333] Hungary's Fundamental Law was approved by Parliament on 18 April 2011, and it entered into force on 1 January 2012. Between 1949 and 1989.The Fundamental Law was amended numerous times between 1949 and 1989, with the most significant changes made in 1989.
[334] Art. Q(2) Fundamental Law of Hungary, 25 April 2011.

should be to protect them and make them respectable.[335] Indeed, Hungary is part of the CSR51 and the central international human rights treaties.[336]

The core rules on asylum are set out in Act LXXX of 2007 of 1 January 2008 on Asylum.[337] After 2010, the policy concerning asylum seekers and beneficiaries of international protection changed 'from permissive to a rather restrictive policy', and Hungary mainly adopted the stricter rules of the Common European Asylum System.[338] Besides, following the refugee crisis of 2015-16, the Hungarian government has adopted restrictive asylum policy changes[339] through several amendments.[340] Chapter IV will discuss the amendments, the reasons for, and the consequences of the asylum policy's restrictiveness.

Act LXXX of 2007 on Asylum differentiates between two types of protection 'refugee status' and 'subsidiary protection and temporary protection'.[341] Firstly, refugee status is

[335] *Op.cit.* Art. 1(1).
[336] The treaties include, but are not limited to, CSR51 and its 1967 Protocol; CEDAW; CAT and Optional Protocol on Prevention of Torture; CPT; ECHR and its Protocols (with the exception of the ratification of Protocol No. 12); the 1953 UN Convention on the Status of Stateless Persons; CRC and its Optional Protocols, Smuggling Protocol; Trafficking Protocol; *etc.*
[337] Act LXXX of 2007 of 1 January 2008 on Asylum.
[338] Ceccorulli, Michela *et al.* "National case studies: terms, definitions, and concepts on migration." The European *Migration System and Global Justice: A First Appraisal*, edited by Enrico Fassi *et al.* Centre for European Studies, Oslo, 2017, pp.127-128.
[339]Cantat, Céline. "Governing Migrants and Refugees in Hungary: Politics of Spectacle, Negligence, and Solidarity in a Securitizing State." *Politics of (Dis) Integration.* Edited by Sophie Hinger *et al.* IMISCOE Research Series, Springer, Cham, 2020, p. 217.
[340] Art. 93(2) of Asylum Act, as amended by Act CVI of 2015; Art. 51 of Act LXXX of 2007 of 1 January 2008 on Asylum, as amended by Act CXXVII of 2015; Former Art. 53(2a) of Act LXXX of 2007 of 1 January 2008 on Asylum, as amended by Act CXL of 2015, and abolished by Act CXLIII of 2017; Former Art. 53(2) of Act LXXX of 2007 of 1 January 2008 on Asylum, as amended by Act CXXVII of 2015, and amended by Act CXLIII of 2017; Art. 5 of Act LXXXIX of 2007 on the State Border, as amended by Act CXXVII of 2015; Art 15/A of Act LXXXIX of 2007, as amended by Act CXL of 2015; Art 80/A of Act LXXX of 2007 of 1 January 2008 on Asylum, as amended by Act CXL of 2015; Art 80/G of Asylum Act and Act CXLII of 2015 on the Amendments of Certain Acts Related to the More Efficient Protection of Hungary's Border and the Management of Mass Migration; Art. 352 of Act C of 2012 on the Penal Code, as amended by Act CXL of 2015; Art 60(2a) of Act C of 2012 on the Penal Code, as amended by Act CXL of 2015; Chap XXVI/A of Act XIX of 1998 on Criminal Proceedings, as amended by Act CXL of 2015; Art. 542 of Act XIX of 1998, as amended by Act CXL of 2015; Art. 32 of Act LXXX of 2007 of 1 January 2008 on Asylum, as amended by Act XXXIX of 2016 on the Amendment of Certain Acts Relating to Migration and Other Relevant Acts; Art. 7 and 14 of Asylum Act, as amended by Act XXXIX of 2016; Art. 5 of Act LXXXIX of 2007, as amended by Act XCIV of 2016; Art. 80 of Asylum Act, as amended by Act XX of 2017; Art. 62 and Art 110 of Act II of 2007 on the Admission and Right of Residence of Third-Country Nationals; Art. 92 of Asylum Act, as amended by Act XX of 2017; Government Decree no. 191/2015 (VII. 21.) on safe countries of origin and safe third countries; Government Decree 269/2015. (IX. 15.) announcing crisis situation caused by mass migration; Government Decree no. 41/2016. (III. 9.) on ordering the crisis situation caused by mass migration in relation to the entire territory of Hungary, and other relevant rules concerning the declaration, existence and termination of the crisis situation; Government Decree no. 292/2020. (VI. 17.) on the designation of embassies concerning the statement of intent for the purpose of lodging an asylum application.
[341] Art. 1 Act LXXX of 2007 of 1 January 2008 on Asylum.

destined for those who, in their country of origin, are subject to persecution due to race or nationality, membership in a specific social group, religious or political conviction, or whose fear of persecution is well-founded.[342] Additionally, refugee status can be granted to family members of refugees and to children born to refugees in Hungary, in exceptional circumstances, in the absence of conditions for refugees recognized by another state. It is granted for an indefinite period, mandatory status review every 3 years.[343] As a rule, refugees are entitled to the same rights as Hungarian nationals, except for participation in elections and employment confined to Hungarian nationals.[344] Secondly, subsidiary protection is given to those who do not qualify as refugees but are at risk of serious harm if they return to their country of origin and are unwilling to seek protection there.[345] Furthermore, subsidiary protection can be granted to children born to beneficiaries of subsidiary protection in Hungary or family members of beneficiaries of subsidiary protection if they apply together.[346] The status is for an indefinite period with a mandatory status review every 3 years.[347] Beneficiaries of subsidiary protection are entitled to the same rights as refugees. The main differences are that there is no access to facilitated family reunification or naturalization. Additionally, there is the permitted status of 'person authorized to stay' or 'humanitarian protection,' which is a particular form of protection guaranteed in case that the requirements for recognition as a refugee are not met.[348]

The Hungarian framework on asylum is a centralized system at the national level concerning both legislative and institutional design. Local government authorities are not involved in the process.[349] It is the Minister of Interior who is responsible for policy making in the field of asylum and migration, as well as for related EU matters.[350] He works

[342] *Ibid.* Art. 6-7.
[343] *Ibid.* Art. 7 A
[344] *Ibid.* Art. 10.
[345] *Ibid.* Art.12.
[346] *Ibid.* Art. 13.
[347] *Ibid.* Art. 14
[348] Ibid. Art. 7 (4)
[349] Gyollai, Daniel & korkut, Umut. "Hungary-Country Report Working Papers Global Migration: Consequences and Responses Paper 2018/05, Glasgow Caledonian University, 2018, p. 32.
[350]The Ministry of Interior is in charge of tasks related to immigration and citizenship, which include: coordination of border and immigration security and policing; stipulating conditions for onward migration and foreign travel, and promoting the social integration of foreigners and refugees; Municipal development, planning and the functioning of municipalities, which also include construction affairs and the supervision of public space (in collaboration with municipalities); Asylum procedure; policies on refugees and beneficiaries of international protection; Oversight of transit-migration monitoring activities; and detention and deportation of illegal immigrants. Source: European Committee of Region. "Hungary- Immigration and Asylum." Retrieved from https://portal.cor.europa.eu/divisionpowers/Pages/Hungary-immigration.aspx Accessed 23 July 2021.

in cooperation with other ministries in charge of relevant issues, such as the Minister for National Economy, the Minister of Human Resources, and the Minister of Foreign Affairs and Trade.

Since 1 July 2019, the National Directorate-General for Aliens Policing (*Országos Idegenrendészeti Főigazgatóság*),[351] has been in charge of matters related to asylum and alien policing.[352] It is the only competent authority dealing with administrative duties related to asylum.[353] Despite having its own budget and acting as a law enforcement agency in accordance with the Police Act, the Directorate is overseen by the Ministry of Interior.[354] Asylum applications shall be submitted to the National Directorate-General for Aliens Policing, and the latter shall examine and adjudicate the applications. Besides, asylum seekers' open reception centres, closed asylum detention facilities, and transit zones (out of operation as of 21 May 2020) are all managed by the National Directorate-General for Aliens Policing.[355] The latter operates in close partnership with the police, the military, and civil security services.[356] The Hungarian Police have responsibility for border control, removal, return procedures, and monitoring of detention in shelters. In addition, the National Directorate-General for Aliens Policing maintains a relationship with the Regional Representation of the UNHCR.'[357] Until October 2017, the National Directorate-General for Aliens Policing had cooperation agreements with NGOs that authorized oversight of the sites it operated, which were later terminated.[358]

In connection with integration, Hungary adopted in 2013 its first migration strategy that lasted for seven years, from 2014 to 2020. Integration is covered in Chapter VI of the Migration Strategy. It is mainly based on the provisions of the Asylum Act, which provides that refugees and beneficiaries of subsidiary protection are entitled to the same rights and bound by the same obligations as Hungarian nationals. This means that they enjoy the

[351] Established by Art. 13(1) of Government Decree no. 126/2019 (V.30.) on the appointment of the aliens policing body and its powers.
[352] Prior to 1 July 2019, the Asylum and Immigration Office was in charge of asylum matters.
[353] It continues to deal with matters relating to the entry, stay, and settlement of foreign nationals; all these duties are performed with nationwide jurisdiction in 7 regional directorates and 24 branch offices. Source: Website of Hungarian National Directorate-General for Aliens Policing.
[354] *Ibid.*
[355] See Chapter V.
[356] Bernát, Anikó, *et al.* "Borders and the Mobility of Migrants in Hungary." Ceaseval Research on the Common European Asylum System, no. 29, 2019, p. 8-9. Retrieved from http://ceaseval.eu/publications/29_WP4_Hungary.pdf Accessed 26 February 2022.
[357] UNHCR. "Hungary". Retrieved from https://www.unhcr.org/hungary.html Accessed 23 July 2021.
[358] HHC. "Authorities Terminated Cooperation Agreements with the HHC." https://www.helsinki.hu/en/authorities-terminated-cooperation-agreements-with-the-hhc/ Accessed 23 July 2021.

same rights to employment, healthcare, social assistance, education, *etc*.[359] Since June 2016, the Hungarian government has totally stopped offering integration services to people under international protection.[360]

The Hungarian legislative and institutional framework in the area of asylum has been impacted by the refugee crisis of 2015–16 and the 'state of crisis,' which has been in place continuously since 9 March 2016. This significantly affects access to territory and access to asylum processes. The following two chapters will go into more detail on this.

3.2. The Polish legislative and institutional framework in the field of asylum

In accordance with the Polish Constitution, the domestic legal system should be in compliance with international obligations, and the Republic of Poland shall respect international law binding upon it.[361] Hence, anyone, being under the authority of the Polish state, shall enjoy the freedoms and rights guaranteed by the Constitution,[362] and exceptions from this principle concerning foreigners should be defined by statute.[363] Thus, when it comes to asylum and refugee, the Constitution of Poland states only a general protection of rights and access to international protection,[364] indicating that the details are explained in the relevant laws. However, some other general provisions of the Constitution are relevant for asylum and refugee policy and people of different legal statuses in Poland.[365] Also, the country is part of the most important treaties and conventions dealing with the rights of asylum seekers, either directly or indirectly.[366]

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[359] Website of Hungarian Ministry of Interior "The Migration Strategy and the seven-year strategic document related to Asylum and Migration Fund established by the European Union for the years." 2014, p.18. Retrieved from http://belugyialapok.hu/alapok/sites/default/files/Migration%20Strategy%20Hungary.pdf Accessed 24 July 2021.

[360] Asylum Information Database ."Country Report: Hungary." Updated 2020, p.5. Retrieved from https://asylumineurope.org/wp-content/uploads/2021/04/AIDA-HU_2020update.pdf Accessed 30 January 2022.

[361] Art. 7. Constitution of the Republic of Poland, 2 April 1997.

[362] *Ibid*. Art. 37(1).

[363] *Ibid*. Art. 37(2).

[364] *Ibid*. Art. 56(1) which stipulates that: "Foreigners shall have the right of asylum in the Republic of Poland in accordance with principles specified by statute' (in this provision asylum, in Polish 'azyl', is understood as a national form of protection), and is followed by Paragraph 2 stating that: 'Foreigners who seek protection from persecution in the Republic of Poland, may be granted the status of a refugee in accordance with international agreements to which the Republic of Poland is a party."

[365] *E.g.* Art. 32; Art. 40; Art. 41; Art. 47; Art. 68; Art. 70.

[366] The treaties include, but are not limited to, CSR51 and its 1967 Protocol; CEDAW; CAT and Optional Protocol on Prevention of Torture; CPT; ECHR and its Protocols (with the exception of the ratification of Protocol No. 12); the 1953 UN Convention on the Status of Stateless Persons; CRC and its Optional Protocols, Smuggling Protocol; Trafficking Protocol; *etc.*

The main legislative acts regarding asylum policy in Poland are the Act of 12 December 2013 on Foreigners [367] and the Act of 13 June 2003 on Granting Protection to Aliens within the Territory of the Republic of Poland, [368] which regulate entry regulating grants of international and national protection status. Also, other acts are relevant to asylum procedures, reception conditions, and detention.[369]

The main types of protection in Poland are 'refugee status', 'subsidiary protection, 'permit for tolerated stay', and 'temporary protection'.[370] The refugee status in Poland shall be granted to an asylum seeker who fulfils the conditions for being recognized as a refugee, as specified in CSR51.[371] Those who are seeking asylum but are not qualified for 'refugee status' may nevertheless obtain subsidiary protection.[372] subsidiary protection may be granted, if an asylum seeker is unwilling to return to their country of origin due to a genuine risk of suffering serious harm from the death penalty or execution, torture, inhuman or degrading treatment or punishment, or a serious and personal threat to their life or health resulting from the widespread use of violence against civilians in an external or internal armed conflict. Particular focus should be placed on the other two types of protection, 'the permit for tolerated stay'[373] and 'temporary protection.'[374] A permit for tolerated stay is granted either in respect of human rights enshrined in international instruments or in situations when deportation would be impossible due to practical constraints.[375] For example, if a foreigner's return obligation would be contrary to the ECHR or CRC, a foreigner may be granted a residence permit for humanitarian reasons.

If a foreigner cannot be granted 'the permit for tolerated stay', 'temporary protection' may be provided. Temporary protection shall be offered on the terms and within the limits outlined in the decision of the Council of the European Union, for the duration stated each time in the decision.[376]

Major actors are involved in the asylum and refugee policies. At the central level, the Ministry of the Interior and Administration is in charge of immigration and asylum policy, immigration control and prevention of illegal immigration, integration and registration of

[367] Act of 12 December 2013 on foreigners.
[368] Act of 13 June 2003 on granting protection to foreigners within the territory of the Republic of Poland.
[369] *E.g.*Act of 14 June 1960 Code of the administrative procedure; Act of 6 June 1997 Penal Code.
[370] *Ibid.* Art.3
[371] *Ibid.* Art. 13.
[372] *Ibid* Art. 90.
[373] *Ibid.* Art. 97.
[374] *Ibid.* Art.106.
[375] *Ibid.* Art. 97 (1).
[376] *Ibid.* Art. 106.

legal immigrants, and the issuance of identity documents through the network of voivodships. The Office for Foreigners (*Urzd do Spraw Cudzoziemców*), on the other hand, is in charge of granting or rejecting refugee status, subsidiary protection, or temporary protection status; coordinating the management of the refugee centres; maintaining a database of records and registers; and granting and implementing social assistance for refugees. Last but not least, it must be noted that the Polish Border Guard is the body in charge of protecting the state border and carrying out actions related to immigration control.[377]

At the regional level, on the one hand, regions are responsible for the coordination of the integration of foreigners who have been given refugee status or temporary protection status, as well as granting residence permits. On the other hand, county authorities are in charge of giving social assistance to foreigners under refugee or temporary protection status.[378]

At the local level, local authorities are responsible for the grant and payment of benefits aimed at foreigners, including asylum seekers and refugees. Also, a special role is played by NGOs, such as the UNHCR, which provide legal support for asylum seekers and refugees.[379]

Regarding integration, there are two institutions responsible for the integration of asylum seekers and, later, that of refugees. During the asylum procedure for a person's pre-integration, the responsible institution is the Office for Foreigners. If the foreigner is granted refugee status, the Ministry of Family, Labour, and Social Policy is responsible for the integration process.[380] However, it should be underlined that in the present system, the integration policy is not part of the local government's general remit. That is why the key role of the EU as a provider of funding and NGOs as actors responsible for the implementation of various integration projects should be highlighted.[381] The integration policy in Poland was challenged when the government was faced with three crises: firstly,

[377] European Committee of regions. "Poland - Immigration and Asylum." Source: Retrieved from https://portal.cor.europa.eu/divisionpowers/Pages/Poland-Immigration.aspx Accessed 27 July 2021
[378] *Ibid.*
[379] UNHCR. "Poland". Retrieved from https://www.unhcr.org/poland.html Accessed 2 July 2021.
[380] European Website on Integration. "Governance of migrant integration in Poland." Retrieved from https://ec.europa.eu/migrant-integration/country-governance/governance-migrant-integration-poland_en Accessed 2 July 2021.
[381] Piłat, Anna & Potkańska, Dominika. "Local responses to the refugee crisis in Poland Reception and integration." The Institute of Public Affairs, Warsaw, 2017, p.9.

the 2014 Ukrainian crisis;[382] secondly, the 2015-16 refugee crisis, and thirdly, the 2021 Afghan Crisis.[383] With the political tensions and restrictiveness on asylum policy, both local authorities and various organizations are facing various challenges relating to the reception and integration of newcomers.[384]

3.3. The Czech legislative and institutional framework in the field of asylum

In accordance with its Constitution, Czechia 'shall observe its obligations resulting from international law.'[385] Indeed, Czechia is part of the most important treaties and conventions relating to the rights of asylum seekers, either directly or indirectly.[386] Some other general provisions of the Constitution are relevant for asylum policy and people of different legal statuses in Czechia.[387]

The main legislative acts regarding asylum policy in Czechia are Act No. 326/1999 Coll., of 1 January 2000 on the Residence of Foreign Nationals in the Territory of the Czech Republic;[388] Act No. 325/1999 Coll. of 11 November 1999 on Asylum;[389] and Act No. 221/2003 Coll. of 26 June 2003, on Temporary Protection of Aliens, [390] which serve as the basis for international protection. Also, in relation to asylum seeking, the Act No.

[382] The term "Ukrainian Crisis" refers to Ukraine's ongoing political upheaval, which began in 2013 with protests in Kiev against Ukrainian President Viktor Yanukovych's decision to reject a deal for greater economic integration with the EU. In July 2014, the situation in Ukraine erupted into an international crisis, putting the US and EU at odds with Russia. As a result, the term is misleading as it refers to a situation that is about much more than domestic Ukrainian politics. Source: Fishermax, Max. "Everything you need to know about the Ukraine crisis." *Vex News*, 3 September 2014. Retrieved from https://www.vox.com/2014/9/3/18088560/ukraine-everything-you-need-to-know Accessed 30 January 2022; Council on Foreign Relations. "Global Conflict Tracker: Conflict in Ukraine." (Updated on 28 January 2022). Retrieved from https://www.cfr.org/global-conflict-tracker/conflict/conflict-ukraine Accessed 30 January 2022.

[383] The War in Afghanistan was a conflict that lasted from 2001 to 2021 in the South-Central Asian country of Afghanistan. It started when the United States and its allies invaded Afghanistan and overthrew the Taliban-ruled Islamic Emirate. The Taliban returned to power two decades after US-led forces toppled their rule in what led to America's longest war. Source: "The US War in Afghanistan 1999 – 2021." Retrieved from https://www.cfr.org/timeline/us-war-afghanistan Accessed 28 July 2021.

[384] *Op.cit.* Piłat, Anna & Potkańska, Dominika. 2017, p. 9.

[385] Art.1(2) Constitution of the Czech Republic, 16 December 1992.

[386] The treaties include, but are not limited to, CSR51 and its 1967 Protocol; CEDAW; CAT and Optional Protocol on Prevention of Torture; CPT; ECHR and its Protocols (with the exception of the ratification of Protocol No. 12); the 1953 UN Convention on the Status of Stateless Persons; CRC and its Optional Protocols, Smuggling Protocol; Trafficking Protocol; *etc*.

[387] *E.g.* Art. 1(1). "The Czech Republic is a sovereign, unitary, and democratic State governed by the rule of law, founded on respect for the rights and freedoms of man and of citizens"; Art. 3 "the Charter of Fundamental Rights and Basic Freedoms forms part of the constitutional order of the Czech Republic."

[388] Act No. 326/1999 Coll., of 1 January 2000 on the Residence of Foreign Nationals in the Territory of the Czech Republic.

[389] Act No. 325/1999 Coll. of 11 November 1999 on Asylum.

[390] Act No. 221/2003 Coll. of 26 June 2003, on Temporary Protection of Aliens.

273/2008 Coll. of the 11th of August 2008 on the Police of the Czech Republic regulates state border protection, identification, detention, and expulsions, as well as relations between the Police and the Ministry of the Interior regarding sharing information from registers.[391]

According to the Czech asylum law, there are two categories of protection: 'asylum status' [392]and 'subsidiary protection.'[393] Asylum status is granted to a foreigner who is persecuted for exercising political rights and freedoms or has a legitimate fear of being persecuted because of race, gender, religion, nationality, belonging to a social group, or for holding political opinions in the state in which he/she is a citizen. [394] Additionally, family members of an asylum status holder may be granted asylum status for family reunification or humanitarian motives. The status of asylum is conferred indefinitely. Holders of this type of protection have equal access to the labour force, the health system, the social protection system, education, *etc*, like citizens.

Subsidiary protection is granted to a foreigner who does not meet the criteria for asylum. However, there exists a legitimate concern that if the applicant is returned to the country of origin, he/she would face a genuine risk of serious harm such as the death penalty, torture, inhuman or degrading treatment or punishment, a serious threat to life or human dignity, and he/she is unable or unwilling, due to such risk, to accept the protection of the country of origin.[395] Subsidiary protection is often only given for a limited period (between one and two years) and must be renewed; the justifications for protection are always reviewed. Beneficiaries of subsidiary protection have access to the labour market, health care system, the welfare system, schooling, etc. under the same conditions as citizens.

The Ministry of the Interior is the central body responsible for asylum-related issues in Czechia,[396] both at legislative and strategic levels, and at the level of implementation.[397] It

[391] Act No. 273/2008 Coll. of the 11th of August 2008 on the Police of the Czech Republic.
[392] Arts.12 & 13, and 14 of Act No. 325/1999 Coll. of 11 November 1999 on Asylum.
[393] *Ibid.* Arts. 14(a) &14 (b).
[394] *Ibid* Art. 12.
[395] *Ibid.* Art.14 (a).
[396] Website of Ministry of the interior of the Czech Republic. "Asylum, Migration, Integration." Retrieved from https://www.mvcr.cz/mvcren/article/asylum-migration-integration-asylum.aspx Accessed 30 January 2022; Website of Ministry of the interior of the Czech Republic. "Integration of Recognized Refugees." Retrieved from https://www.mvcr.cz/mvcren/article/integration-of-recognized-refugees-913320.aspx Accessed 30 July 2021; Website of Ministry of the interior of Czech Republic. "Procedure for Granting International Protection in the Czech Republic." Retrieved from

is responsible for: facilitating the granting of international protection and the withdrawal of asylum or subsidiary protection; determining which Member State of the European Union is competent to examine an application for granting international protection unless this falls within the competence of Czechia; integration measures for migrants; asylum reception and housing; and management of the Asylum Migration Integration Fund.

3.4. The Slovakian legislative and institutional framework in the field of asylum

Article 1(2) of the Constitution states that the Slovak Republic acknowledges and complies with broad principles of international law, international treaties by which it is bound, and its other international obligations.[398] Indeed, the Slovak Republic is party to the most important treaties and conventions pertaining to the rights of asylum seekers, whether directly or indirectly.[399] Besides, other general provisions of the Constitution are relevant for asylum seekers and people of different legal statuses in Slovakia.[400]

In the Slovak Republic, laws relevant to asylum and refugee are passed by the National Council[401],the Parliament, and enacted by the Government. The main legislative acts governing asylum and international protection are covered by Act. No. 480/2002 Coll. of 20 June 2002 on Asylum and on the Changes and Amendments of Some Legal Acts,[402] and

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https://www.mvcr.cz/mvcren/article/procedure-for-granting-international-protection-in-the-czech-republic.aspx Accessed 30 July 2021.

[397] *Ibid.*

[398] Constitution of the Slovak Republic, 1 October 1992. It is important to mention that Art.7 (4)(5) stipulates that 'the validity of international treaties on human rights and fundamental freedoms, international political treaties, international treaties of a military character, international treaties from which a membership of the Slovak Republic in international organizations arises, international economic treaties of a general character, international treaties for whose exercise a law is necessary and international treaties which directly confer rights or impose duties on natural persons or legal persons, require the approval of the National Council of the Slovak Republic before ratification; International treaties on human rights and fundamental freedoms and international treaties for whose exercise a law is not necessary, and international treaties which directly confer rights or impose duties on natural persons or legal persons and which were ratified and promulgated in the way laid down by law shall have precedence over laws.'

[399] The treaties include, but are not limited to, CSR51 and its 1967 Protocol; CEDAW; CAT and Optional Protocol on Prevention of Torture; CPT; ECHR and its Protocols (with the exception of the ratification of Protocol No. 12); the 1953 UN Convention on the Status of Stateless Persons; CRC and its Optional Protocols, Smuggling Protocol; Trafficking Protocol; *etc.*

[400] *E.g.* Art.12 ; Art. 15.

[401] Act No. 221/1996 of 24 July 1996 on the Slovak Republic Territorial and Administrative Organization, last amendment 453/2001; Act No.222/1996 of 3 July 1996 on the Organization of Local State Administration, last amendment 180/2014; Act No.302/2001 of July 1996 on the Government of higher territorial units (Law on the region), last amendment 177/2018; Act No. 416/2001 of 31 May 2001 on the transfer of some competences from State administration to Municipalities and higher territorial units, last amendment 440/2015.

[402] Act. No. 480/2002 Coll. of 20 June 2002 on Asylum and on the Changes and Amendments of Some Legal Acts.

Act No. 404/2011 Coll. of 21 October 2011 on the Stay of Foreigners and on the Changes and Amendments of Some Legal Acts, which regulate the entry and legal stay of foreigners.[403]

According to the Slovak asylum law, there are two categories of protection: 'asylum status' and 'subsidiary protection.[404] Asylum status is granted to a foreigner who is persecuted for exercising political rights and freedoms or has a legitimate fear of being persecuted because of race, gender, religion, nationality, belonging to a social group, or for holding political opinions in the state in which he/she is a citizen.[405] In addition, family members of an individual with an asylum status may be awarded asylum for humanitarian or family reunion reasons. The status of asylum is conferred indefinitely. Holders of this type of protection have equal access to the labour force, the health system, the social protection system, education, etc, like citizens.[406] Those who did not receive asylum but who assert that returning to their country of origin would put them in real danger of serious harm are given subsidiary protection.[407] Family members of those having subsidiary protection may also be granted this protection.[408] The duration of subsidiary protection is one year, then can be prolonged for two years repeatedly. Beneficiaries of subsidiary protection have access to the labour market and education under the same conditions as citizens but concerning health care there is a problem because of the different regime of reimbursement of expenses, and the welfare system is limited. Beneficiaries of subsidiary protection have equal access to the labour market and to education as citizens, but there is an issue with health care due to a distinct system of payment for costs, and the welfare system is limited.

Aspects of asylum fall under the auspices of three ministries: the Ministry of the Interior; Ministry of Foreign Affairs, and the Ministry of Labour, Social Affairs, and Family. The Ministry of Interior is in charge of guarding and managing the country's borders, as well as the admission of foreigners into the territory of the Slovak Republic and the stay of foreigners on its territory, the issuance of identity documents to refugees and transmigrants.

[403] Act No. 404/2011 Coll. of 21 October 2011 on the Stay of Foreigners and on the Changes and Amendments of Some Legal Acts regulates the entry and legal stay of foreigners.
[404] Art. 2 of Act. No. 480/2002 Coll. of 20 June 2002 on Asylum and on the Changes and Amendments of Some Legal Acts.
[405] *Ibid.* Art. 8.
[406] *Ibid.* Art. 10.
[407] *Ibid.* Art. 13 (a).
[408] *Ibid.* Art. 13 (b).

The Ministry of Interior's Migration Office has the jurisdiction to grant requests for asylum and additional protection, and it also oversees facilities for reception and integration. Additionally, the Ministry of Interior implements relevant policies mainly through the Migration Office and the Bureau of the Border and Alien Police. [409] The Ministry of Labour, Social Affairs, and Family is in charge of providing work permits to refugees, overseeing the dispersal mechanism for incoming asylum seekers and beneficiaries of international protection, and making sure the conditions of their reception correspond with the law. [410] At the regional level, the self-governing regions do not have any competence in the field of asylum. At the local level, local municipalities provide reception facilities for asylum seekers, including accommodation, food, and basic sanitary products. Municipalities can apply to implement social inclusion measures benefiting migrants via national managing authorities, drawing funds from the European Structural Investment Funds.

At the regional level, the self-governing regions do not have any competence in the field of asylum. At the local level, local municipalities offer shelter, food, and basic hygienic supplies to asylum seekers as part of their welcome services. Municipalities can apply to use funds from the European Structural Investment Funds to develop social inclusion programs that assist refugees through national management bodies.[411]

4. Conclusion

In conclusion, the national laws in the V4 group were adopted in compliance with international treaties and the EU instruments covering asylum matters. The years 2000 to 2005 could be referred to as the 'Europeanization' period, during which the V4 countries' asylum laws were significantly impacted by the adoption of the Dublin II Regulation and alignment with EU regulations. Thus, the asylum and refugee legal frameworks in Hungary, Poland, Czechia, and Slovakia comply with their traditional pillars and support new forms of protection following the new challenges faced by the international community. On a practical level, however, there is a conflict between the V4 group's asylum law and the asylum policy. In other words, there is a distinction to be made between the law in books and the law in practice. Thus, in the asylum field, the distinction between a 'policy' and a 'law' must be emphasized. I can say that both are important and

[409] Website of Ministry of Interior of the Slovak Republic. Retrieved from https://www.minv.sk/?ministry-of-interior Accessed 1 August 2021.
[410] European Committee of the Regions. "Slovakia - Immigration and Asylum." Retrieved from https://portal.cor.europa.eu/divisionpowers/Pages/Slovakia-Immigration.aspx Accessed 1 August 2021.
[411] *Ibid.*

complementary, but I think that policy is more powerful than the law, as policy informs when and how the law is applied. So, the asylum law in a given state is guided by the asylum policy and not *vice versa*. The 2015-16 refugee crisis has influenced the interpretation and enforcement of the four countries' existing asylum laws. In addition, new provisions and measures relating to asylum were introduced, as will be clarified further in the following chapter.

IV. The Impact of the 2015-16 Refugee Crisis on Visegrád Asylum Policies

1. Overview

In all four Visegrád countries, a range of new policy proposals were launched to stem the mixed migratory flow of 2015-16. Although the direction of policy change pointed in a similar restrictive direction, the determination of policy means differed, as did the way and content of the policy. The four cases illustrate how the 2015-16 refugee crisis was construed in a similar way in the different national public spheres of the group and generated different kinds of policy responses. In other words, as it will be discussed below, the V4 group adopted a securitization process, which resulted in increasing security practices governing the asylum process, making access to international protection more restrictive than before the crisis.

In this picture, Hungary and Poland have taken an anti-asylum stance. The main ruling party in Hungary, Fidesz, has positioned itself as a defender of mainstream society, citing the threat that asylum seekers pose to national security and cultural identity.[412] Similarly, in Poland, the main ruling party PiS considered the 2015-16 refugee crisis to be of enormous political and symbolic importance, going well beyond the numbers involved and raising vital concerns about national sovereignty, identity, and security.[413] Czechia and Slovakia tend to be positioned somewhere between their two neighbours. The two countries adopted the moderate 'pragmatic narrative.'[414] Both Czechia's government attempts to present itself as moderate while keeping the more radical aspects of its asylum policy in the background.[415] Czechia's pragmatic and moderate approach can be seen through the rejection of the provisional mechanism for the mandatory relocation of asylum seekers, on the one hand, and the refrain from joining the Hungarian and Slovak

[412] Ehmsen, Stefanie & Scharenberg, Albert. "The Far Right in Government: Six Cases from Across Europe." The Rosa Luxemburg Stiftung, Berlin, 2018, pp. 4-5. Retrieved from https://www.rosalux.de/fileadmin/rls_uploads/pdfs/sonst_publikationen/farrightingovernmenten.pdf Accessed 15 December 2020 ; Hegedüs, Dániel. "Hungary." Freedom house. Retrieved from https://freedomhouse.org/country/hungary/nations-transit/2016 Accessed 15 December 2020.

[413] Frelak, Justyna Segeš "Migration climate, discourse, and politics in Poland. Migration politics and policies in Central Europe." Globsec Policy Institute, Bratislava, 2017, p.23.

[414] Möller, Almut & Nič, Milan. "Can Slovakia and the Czech Republic overcome Europe's east-west divide?" European Council on Foreign Relations, 11 February 2019. Retrieved from https://ecfr.eu/article/commentary_can_slovakia_and_the_czech_republic_overcome_europes_east_west_d/ Accessed 15 December 2021.

[415] Hanley, Seán & Vachudova, Milada Anna "Understanding the Illiberal Turn: Democratic Backsliding in the Czech Republic." *East European Politics*, vol. 34, no. 3, 2018, pp. 276-296.

governments in taking legal action against the Council's decision, on the other hand.[416] Czechia's pragmatic and moderate narrative' seems to resemble that of Slovakia. The narrative of political parties in Slovakia oscillates between anti-asylum discourse and European values.[417]

Undoubtedly, the 2015-16 refugee crisis shaped, to varying degrees, the V4 countries' asylum policies. Hence, the V4 governments' asylum politics can be categorized in the context of securitization and protection of national identity with regards to both their policies and rhetoric. The second subchapter will show how the conjuncture was favourable to a more restrictive implementation and interpretation of asylum policies (2). The third subchapter will attempt to examine the various legal measures and practical actions related to asylum policy that the V4 group implemented, at the national level, in the aftermath of the 2015-16 refugee crisis. (3). The fourth subchapter will demonstrate how the V4 group supports policies and practices that seek to externalize asylum policy (4).

2. Conjuncture of the growing restrictiveness of the asylum policies

There are several reasons for the V4 governments' increasingly anti-asylum, restrictive, and closed-door asylum policies and practices in the aftermath of the 2015-16 refugee crisis. At the national level, two main reasons explain the preference for a more restrictive implementation and interpretation of asylum policies: first, the preservation of public security; and second, the protection of cultural and religious identity (2.1). At the EU level, the failure of the Common European Asylum System could explain to a large extent why the V4 group opted for more restrictive implementation and interpretation of asylum policies (2.2).

[416] Macek, Lukáš. "The Czech general elections: and now three "illiberal" Eurosceptic governments in Central Europe?" European Issues and Interviews, Robert Schuman Foundation (Paris and Brussels) 23 October 2017. Retrieved from https://www.robert-schuman.eu/en/european-issues/0448-the-czech-general-elections-and-now-three-illiberal-eurosceptic-governments-in-central-europe Accessed 15 December 2020.
[417] Bauerova, Helena. "Migration Policy of the V4 in the Context of Migration Crisis." Politics in Central Europe vol. 14, no. 2, 2018, pp. 99-120.

2.1. National concerns

2.1.1. Public security reasons

The V4 group perceived the 2015-16 refugee crisis as introducing potential security risks and threats, [418] necessitating both defensive and preventive measures to protect public security.[419] It is essential to comprehend why the V4 group regarded the 2015-16 refugee crisis as a threat to public security.

First, there is concern that 'irregular migrant' exploit the asylum system by falsely claiming asylum. The 2015-16 refugee crisis was a complicated situation in which both asylum seekers and 'economic migrants', as well as those who do not fit comfortably into either category, sought economic opportunities.[420] This type of situation is referred to as a 'mixed migration flow' or a 'complex migratory population movement', and it includes economic migrants, asylum seekers, stateless people, and trafficked people, who travel the same routes and use the same modes of transportation.[421] The problem is exacerbated by the fact that Afghans, Iraqis, Iranians, and North Africans have moved in 2015-16, to the EU among the asylum seekers from the war in Syria,[422] despite the fact that they are not

[418] There is a consensus in security studies that the term security is itself an 'ambiguous' and 'elusive' concept both in content and in format. The concepts of threat and risk are debatable, just like security. Generally, there are five levels of security threat, 'certain', 'expected', 'probable,' 'possible', 'not expected'. When a nation state feels threatened, it takes the necessary steps to protect itself and its citizens, through detection (perception), deterrence, self-protection (defence), and avoidance of the perceived threat, regardless of the nature of the threatening object (state, non-state actors, *etc*). Source: Walt, Stephen M. "Alliance formation and the balance of world power." *International Security*, vol. 9, no. 4, 1985, pp. 3-43; Haftendorn, Helga. "The Security Puzzle: Theory-Building and Discipline-Building in International Security." *International Studies Quarterly*, vol. 35, no. 1, 1991, pp. 3–17; Fearon, James D. "Rationalist Explanations for War." *International Organization*, vol. 49, no. 3, 1995, pp. 379–414; Keely, Charles B. "How Nation-States Create and Respond to Refugee Flows." The International Migration Review, vol. 30, no. 4, 1996, pp. 1046–1066; Rousseau, David L. "Identity, power, and threat perception: A cross-national experimental study." *Journal of Conflict Resolution*, vol. 51, no. 5, 2007, pp. 744-771; McSweeney, Bill. *Security, identity, and interest: A sociology of international relations*. Cambridge University Press, 1999, pp.13-16; Paleri, Prabhakaran. *National security: imperatives and challenges*, Tata McGraw-Hill, 2008, pp. 85-87; Wolfers, Arlond. "National security as an ambiguous symbol." *Security Studies: A Reader*, edited by Christopher W. Hughes *et al*., Routledge, 2011, pp. 5-10; Estevens, João. "Migration crisis in the EU: developing a framework for analysis of national security and defence strategies." *Comparative migration studies* vol. 6, no.1, 2018, pp. 2-5.

[419] Visegrád Group. "Joint Declaration of the Visegrád Group Prime Ministers." 8 June 2016. Retrieved from https://www.visegradgroup.eu/documents/official-statements/joint-declaration-of-the-160609 Accessed 21 December 2020.

[420] IOM. "Mixed Migration Flows in the Mediterranean and Beyond Flow Monitoring Compilation." Annual Report, 2015, p.1417.
Retrieved from https://www.iom.int/sites/g/files/tmzbdl486/files/situation_reports/file/Mixed-Flows-Mediterranean-and-Beyond-Compilation-Overview-2015.pdf Accessed 31 January 2022.

[421] Glossary, UNHCR. "The 10-Point Action Plan in Action." 2016. p. 282

[422] Batha, Emma. "Factbox: How big is Europe's refugee and migrant crisis?" Thomson Reuters Foundation, 30 November 2016. Retrieved from https://www.reuters.com/article/us-women-conference-refugee-crisis-factb-idUKKBN13P22P Accessed 31 January 2022; Archick, Kristin & Margesson, Rhoda. "Europe's

eligible for refugee status under CSR51. Therefore, differentiating between 'genuine asylum seekers', and 'economic migrant' or 'irregular migrant' was a challenging task for the border and asylum authorities of the V4 countries. Indeed, the difference between groups in mixed migration flows has raised concerns about determining asylum seekers' status and rights on the one hand, and the country's security concerns on the other. While the distinction between 'asylum seeker' and people who do not fit the legal definition of asylum seeker is clear in law, realities on the ground differ because states are frequently unable to differentiate between the two categories. The V4 group perceives that distinguishing between asylum seekers and 'economic migrants' is important. Hungarian Prime Minister Orbán, for example, has claimed that the 'overwhelming majority' of migrants in Europe are not refugees but merely seeking a better life.[423] Fico, his Slovak counterpart, said 'up to 95% are economic migrants.'[424] According to him, European countries must offer refuge or other types of protection to asylum seekers who can demonstrate that they are fleeing war or persecution. In contrast, countries owe no such obligation to those seeking better opportunities, 'even if they have left behind lives of destitution.'[425] So, 'if Messrs Orbán and Fico are right, the majority of Europe's migration dilemma is a problem with border management and repatriation, not with relocation, integration, or and the rest of it. Are they?'[426]

Second, there are security concerns that may be raised not because of the presence of asylum seekers, but because of those whose applications for refugee status or other forms of protection have been denied. When asylum seekers without a legal right to stay are unable to be expelled from the country's territory, security problems may arise. There are numerous difficulties associated with the return of rejected asylum seekers.[427] Individual resistance to return is one of the most common challenges of returning rejected asylum seekers. Also, greater difficulties in obtaining travel documents, compounded by the fact

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Refugee and Migration Flows." Congressional Research Service, 20 March 2019, pp.1-2. Retrieved from https://sgp.fas.org/crs/row/IF10259.pdf Accessed 31 January 2022.

[423] Novak, Benjamin. " Orbán: Tens millions of migrants poised to invade Europe." *The Budapest Beacon*, 4 September 2015. Retrieved from https://budapestbeacon.com/orban-tens-million-migrants-poised-to-invade-europe/ Accessed 27 February 2022.

[424] "How many migrants to Europe are refugees?" *The Economist*, 8 September 2015. Retrieved from https://www.economist.com/the-economist-explains/2015/09/07/how-many-migrants-to-europe-are-refugees Accessed 27 February 2022.

[425] *Ibid.*

[426] *Ibid.*

[427] European Commission. "The Return of Rejected Asylum Seekers: Challenges and Good Practices." EMN Inform, 2020, p.1.

that asylum seekers are more frequently undocumented, make the return policy difficult.[428] When rejected asylum seekers pose a threat to public security and cannot be returned due to legal or practical obstacles, the problem becomes more complicated.[429]

Third, in general, both governments and citizens of the V4 countries view asylum seekers from Islamic and African countries negatively, associating them with security, violence, and crime issues, as well as a threat to national security.[430] In 2015-16, there was an increase in fears and perceptions that the mixed migratory flow would bring criminals, violent people, and terrorists who would attempt to seek asylum.[431] Asylum seekers can be potential terrorists, posing a threat to public security. Although there is no current agreement regarding the universal legal definition of terrorism,[432] almost every state has a definition in its own laws, and they might be different, but the difference in itself does not necessarily create a problem in counter-terrorism.[433] The definition of terrorism, however,

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[428] *Ibid.*

[429] Cantor, David James *et al.* "Undesirable and Unreturnable? Policy challenges around excluded asylum seekers and other migrants suspected of serious criminality who cannot be removed." Conference report and policy brief, Refugee Law Initiative, School of Advanced Study, University of London (UK) and Centre for International Criminal Justice, VU University Amsterdam (Netherlands) 2016, pp.7-9.

[430] Loescher, Gil. "Blaming the Victim: Refugees and Global Security." *Bulletin of the Atomic Scientists*, vol. 58, no. 6, 2002, p.49; Innes, Alexandria J. "When the Threatened Become the Threat: The Construction of Asylum Seekers in British Media Narratives." *International Relations*, vol. 24, no. 4, 2010, pp. 456-459; Koslowski, Rey. "Immigration, Crime, and Terrorism." *Oxford Handbook of the Politics of International Migration*, edited by Marc R. Rosenblum & Daniel J. Tichenor, Oxford University press, 2012, pp. 1-33.

[431] De Coninck, David. "Fear of Terrorism and Attitudes Toward Refugees: An Empirical Test of Group Threat Theory." *Crime & Delinquency*, 2020, pp. 2-3.

[432] Terrorism is a difficult concept to define comprehensively, and it has been a source of debate in academia and policy for several years, given that it can be utilized in several contexts and for a wide range of objectives. The challenge in defining "terrorism" is reaching consensus on a standard for judging whether the use of violence (directed at who, by whom, and for what reasons) is legitimate. For instance, Leonard Weinberg, Ami Pedahzur, and Sivan Hirsch Hoefler examined 73 definitions of terrorism published in four prestigious terrorism-related journals and arrived at a consensus definition based on the lowest common denominator, which was only feasible at a very high level of abstraction. Terrorism is a politically motivated strategy comprising the threat or use of force or violence in which the pursuit of publicity plays a crucial part. Source: Weinberg, Leonard *et al.* "The Challenges of Conceptualizing Terrorism, The Challenges of Conceptualising Terrorism." *Terrorism and Political Violence*, vol.16, no.4, 2010, p.777; Additionally, Neumann and Smith provide a strategic definition of terrorism, which they define as "the deliberate creation of a sense of fear, usually by the use or threat of use of symbolic acts of physical violence,
in order to affect the political behaviour of a specified target group." Source: Walter, Christian. "Defining terrorism in national and international law." *Terrorism as a Challenge for National and International Law: Security Versus Liberty?* edited by Christian Walter *et al.*, Springer, 2004, p.22; Neumann, Peter R. & Smith, M. L. R. "Strategic terrorism: The framework and its fallacies." *Journal of Strategic Studies*, vol. 28, no. 4, 2005, pp. 571-595; Di Filippo, Marcello. "The Definition(s) of Terrorism in International Law." *Research Handbook on Terrorism and International Law*, edited by Ben Saul, Edward Elgar Publishers, 2014, p.2-3.

[433] The EU's strategy is detailed in the Council Common Position 2001/931/CFSP on the application of specific measures to combat terrorism and the Council Framework Decision 2002/475/JHA on combating terrorism. The decisions outline the definitions of terrorist offenses as well as offenses connected to terrorist organizations or offenses related to terrorist activities, and they lay out the rules for transposition in EU countries. Source: Council Common Position of 27 December 2001 on the application of specific measures to combat terrorism OJ L 344, 28.12.2001, p. 93–96. (Current consolidated version 15 November 2017); Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating

has been an area of international law where there has been a major difference in viewpoints between states.[434] It is significant to highlight that the political rhetoric linking asylum to terrorism from the V4 leadership has been used to fuel and spread public terror and fear. Such rhetoric, as will be discussed below, may increase the percentage of a nation's citizens who are wary, terrified, or furious about allowing asylum seekers to enter their countries.

The V4 group became increasingly concerned about the threat of terrorism following the 2015-16 refugee crisis,[435] particular after the November 2015 Paris attacks. Many amendments have been adopted, particularly in Hungary [436]and Poland, [437] to expand the powers of the police, military police, and secret services. These changes include making it easier to trace personal communications and tougher penalties for terrorism. At the height of the refugee crisis in 2015-16, the case of Syrian Ahmed H., sentenced to five years after being convicted of terrorism for throwing stones at the police and trying to enter Hungary, is a perfect illustration.[438]

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terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA OJ L 88, 31.3.2017, p. 6–21.

[434] Dumitriu, Eugenia. "The E.U.'s Definition of Terrorism: The Council Framework Decision on Combating Terrorism." *German Law Journal*, vol. 05, no. 05, 2004, pp. 585-602.

[435] Visegrád Group. "Joint Statement of the Visegrád Group Countries." 3 December 2015. Retrieved from https://www.visegradgroup.eu/calendar/2015/joint-statement-of-the-151204 Accessed 2 February 2022; Visegrád Group. "Joint Declaration of Ministers of the Interior." 19 January 2016. Retrieved from https://www.visegradgroup.eu/calendar/2016/joint-declaration-of Accessed 2 February 2022.

[436] On 24 March 2016, the Hungarian government announced plans for a proposed legislative package to curb illegal migration and strengthen counter-terrorism efforts. On 7 June 2016, the package was passed by the Hungarian Parliament. Source: The Sixth Amendment to the Fundamental Law of Hungary 14 June 2016; Act LVII of 1 July 2016 on amending certain laws in relation to the terror emergency situation; Act LXIX of 17 July 2016 on the amendment of certain acts related to counter-terrorism.

[437] The Polish government adopted an anti-terrorism law to pursue suspected foreign terrorists. On 10 June 2016, the Polish Parliament passed the Act on Counter-Terrorism and Amendments to Other Acts, including but not limited to the Act of 6 April 1990 on Police, the Act of 12 October 1990 on the protection of state borders, the Act of 12 October 1990 on Border Guard, the Act of 24 August 1991 on fire protection, the Act of 24 August 2001 on Military Gendarmerie and military law and order forces, the Act of 24 May 2002 on the Agency for Internal Security and Intelligence Agency, the Act of 9 June 2006 on the service of the officers of the Army Counter-Intelligence Service and Army Intelligence Service, the Act of 14 July 2006 on entry into, stay and exit from the territory of the Republic of Poland of citizens of Member States of the European Union and members of their families, *etc.*

[438] A Syrian man who participated in a confrontation between police and asylum seekers on the Serbian border in 2015 was found guilty of terrorism and sentenced to ten years in prison. Under international and EU pressure, Ahmed H.'s jail sentence was reduced from ten to seven, then to five years. Human rights groups and EU officials have condemned Hungary's treatment of the man, arguing that it was preposterous to charge him with terrorism over the border clash and give him such a long sentence. In this context, Eda Seyhan, Amnesty's campaigner on counterterrorism in Europe, said: "The prosecution and ensuing conviction of Ahmed H was a blatant misuse of terrorism-related provisions against a man who was simply helping his family flee Syria.' In interaction to the case, the European Parliament adopted a resolution listing the case as one of the reasons for a rule of law investigation into Hungary, considering it an 'unfair trial.' Source: Amnesty international. "Hungary: Syrian man's conviction for alleged 'complicity in an act of terror' is a travesty of justice." 14 March 2018 Retrieved from

The V4 governments' political linkage of the mixed migratory flow to potential terrorist threats is somehow logical because the mixed flow can be a backdoor for terrorists. The latter can enter a country through asylum channels. This only applies to 'genuine asylum seekers who are fleeing persecution and seeking refugee status, nor to asylum seekers who have pending asylum claims, nor to asylum seekers who have been granted refugee status, but rather to 'bogus asylum seekers.'

Besides, asylum seekers as vulnerable to 'radicalization and recruitment,' and 'the refugee flow as a back door' have shaped a number of concerns linking terrorism with the asylum situation.[439] The majority of refugees' origins and religions have allowed far-right political actors to not only politicize identity, religious, and value-based differences in their campaigns, but also to link asylum and migration to terrorism.[440] 'Foreign terrorists fighters'[441] may be able to enter the EU via mixed migratory flows from Islamic State-controlled areas (hereafter 'Da'esh')[442] in the Middle East. For instance, a review of the profiles of the Paris attackers and their accomplices reveals a group of people with European roots, many of whom had travelled to the Middle East as 'foreign fighters.'[443]

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https://www.amnesty.org/en/latest/news/2018/03/hungary-syrian-mans-conviction-for-alleged-complicity-in-an-act-of-terror-is-travesty-of-justice/ Accessed 27 December 2021; Amnesty International UK "Hungary: Retrial of Syrian charged with terrorism for throwing stones to conclude". Press releases Online, 08 January 2018. Retrieved from https://www.amnesty.org.uk/press-releases/hungary-conviction-upheld-syrian-accused-terrorism-throwing-stones Accessed 27 December 2021; The European Parliament. Resolution no. 2017/2656(RSP) on the situation in Hungary. 17 May 2017; "Appeals court upholds Syrian rioter's terrorism conviction." *Budapest Business Journal*, 21 September 2018. Retrieved from https://bbj.hu/issues/polls/politics/appeals-court-upholds-syrian-rioter-s-terrorism-conviction Accessed 27 December 2021.

[439] Crone, Manni *et al*. "Introduction: Europe's Refugee Crisis and the Threat of Terrorism: An Extraordinary threat?" DIIS Report 2017:05, Danish Institute for International Studies, Copenhagen, 2017. p.10.

[440] Erisen, Cengiz & Vasilopoulou, Sofia & Kentmen-Cin, Cigdem. "Emotional reactions to immigration and support for EU cooperation on immigration and terrorism." *Journal of European Public Policy*, vol. 27, no. 6, 2020. pp. 795-796.

[441] The 2017 EU Directive on Combating Terrorism clarified the issue of so-called foreign fighters, designating them as individuals who travel abroad for the purpose of terrorism. Most EU Member States have viewed the return of foreign fighters and their families as a security threat, and as a result, have implemented repressive measures to provide an expedient, short-term response to this perceived threat (preamble 4).

[442] The Islamic State, also known as 'the Islamic State of Iraq and Syria', 'the Islamic State of Iraq and the Levant', or 'Da'esh', is a jihadist group with a particularly violent ideology that declares itself a caliphate and asserts religious authority over all Muslims. It has a particularly brutal ideology. Al Qaida served as its inspiration, but it was later openly ousted from it. Source: Mitch, Ian & Rhoades, Ashley L. "The Islamic State (Terrorist Organization)." The RAND National Security Research Division & The International Security and Defence Policy Centre (United States). Retrieved from https://www.rand.org/topics/the-islamic-state-terrorist-organization.html Accessed 8 January 2022.

[443] Funk, Marco & Parkes, Roderick. "Refugees versus terrorists." European Union Institute for Security Studies, Paris, January 2016. pp.1- 2. Retrieved from https://briguglio.asgi.it/immigrazione-e-asilo/2016/marzo/art-funk-parkes-terrorismo.pdf Accessed 3 January 2022.

Opinion polls suggest that most Europeans believe that accepting asylum seekers will increase the chances of terrorist attacks on European soil.[444] In Czechia, for example, the numbers of asylum seekers traversing the border or applying for asylum have been low, [445] but the 2015-16 refugee crisis was nevertheless largely present in public debates, and media coverage on the issue was to a certain 'extent self-constructed.'[446] The political discourse as well as the government focus to a large extent on threats related to public security. In this sense, Czechia President Zeman has been particularly vocal about the danger that refugees pose.[447] He claimed that there are 'terrorist groups' among them [asylum seekers] and that by admitting 'the wave of migrants', European countries would be doing a favour to Da'esh, helping it to increase its influence.[448] He considers that asylum seekers are carrying out an 'organized invasion' orchestrated by the Muslim Brotherhood.[449]

Similarly, in Slovakia, even though the numbers of asylum seekers traversing the border or applying for asylum have been low, the country perceived their presence as a security threat. The securitization rhetoric is constructed in a manner that connects terrorism with asylum and the Muslim faith, assigning terror identities to specific groups.[450] Thus, most of the Slovak parties and politicians, with the distinguished exception of the former President of Slovakia, Kiska, adopted anti-asylum and refugee rhetoric.[451] It is in this context that the former Prime Minister Fico announced, after the Paris terrorist attack in November 2015, that state intelligence services were following 'every single Muslim' in

[444] Haner, Murat *et al.* "Public Concern about Terrorism: Fear, Worry, and Support for Anti-Muslim Policies." *Socius*, January 2019, pp.1-5; *Op.cit.* Erisen, Cengiz et *al.*, 2020, p.798.
[445] Jelínková, Marie. "A Refugee Crisis Without Refugees: Policy and media discourse on refugees in the Czech Republic and its implications." *Central European Journal of Public Policy*, vol. 13, no.1, 2019, pp. 33-45.
[446] Triandafyllidou, Anna. ""Refugee Crisis" Unfolding: "Real" Events and Their Interpretation in Media and Political Debates." *Journal of Immigrant & Refugee Studies*, vol. 16, no.1, 2017, pp. 1–19.
[447] "Zeman: Accepting refugees plays into Islamic State's hands." *Prague Post*, 5 November 2016. Retrieved from https://www.praguepost.com/czech-news/48577-zeman-accepting-refugees-plays-into-is-hands Accessed 17 January 2021.
[448] *Ibid.*
[449] "Czech president Zeman says the refugee wave is an organized invasion" *DW News*, 26 December 2015. Retrieved from https://www.dw.com/en/czech-president-zeman-says-refugee-wave-is-organized-invasion/a-18943660 Accessed 17 January 2022.
[450] Kovanic, Martin. "The construction of threats by intelligence agencies: analysing the language of official documents in Slovakia." *Critical Studies on Terrorism*, vol. 14, no. 1, 2021, pp. 117-138.
[451]Bertelsmann Foundation. "Transformation Index BTI. Slovakia Country Report." 2018. Retrieved from https://bti-project.org/fileadmin/api/content/en/downloads/reports/country_report_2018_SVK.pdf Accessed 19 January 2021.

the country in order to ensure they were not terrorists.[452] He claimed that preventing Muslims from establishing 'compact' communities is 'the only way' to reduce the threat of terrorism in the country.[453]

However, combining the 2015-16 refugee crisis with terrorism, this policy effectively gives the government 'carte blanche' in suspending some rights.[454] Governments can resort to a wide range of structures to defend their unilateral exceptions to human rights in the name of combating terrorism.[455] The absence of a universal definition of terrorism has facilitated the politicization and misuse of the term terrorism. In this sense, public safety and security measures should not be used to criminalize asylum seekers. The increased emphasis on preventing terrorism through border management in the V4 group should not jeopardize asylum seekers' right to seek asylum. When countering terrorism, states are always required to respect human rights and carry out their obligations under treaties and customary international law.[456]

While terrorism is a ground for exclusion from refugee status within the meaning of Article 1F CSR51,[457] it is important to note that a person denied refugee status may still be protected separately under IHRL from return to a country where they may face other serious human rights violations.[458] *Non-refoulement* also applies as a general, *non-*

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[452] "Fico: Security more important than migrants' rights." *The Slovak Spectator*, 16 November 2015. Retrieved from https://spectator.sme.sk/c/20063953/fico-security-more-importantthan-migrants-rights.html Accessed 19 January 2022.

[453] "Prosecutor's office deals with Fico's statements." *The Slovak Spectator*, 13 January 2016. Retrieved from https://spectator.sme.sk/c/20071847/prosecutors-office-deals-with-ficosstatements.html Accessed 19 January 2022.

[454] Hungarian Europe Society. "The Refugee Crisis and the Reactions of the Visegrád Countries." Final Report September 2016, p.26. Retrieved from https://www.europesociety.hu/sites/default/files/the_refugee_crisis_and_the_reactions_of_the_visegrad_countries_final_version_g.emma_.pdf Accessed 2 February 2022.

[455] Scheinin, Martin & Vermeulen, Mathias. "Unilateral Exceptions to International Law: Systematic legal Analysis and Critique of Doctrines that seek to Deny or Reduce the Applicability of Human Rights Norms in the Fight against Terrorism." EUI LAW, 2010/08, Cadmus, European University Institute Research Repository, Fiesole, 2010, p.20.

[456] UNDOC. "Counter-Terrorism in the International Law Context." 2021, pp. 45-62. Retrieved from https://www.unodc.org/pdf/terrorism/CTLTC_CT_in_the_Intl_Law_Context_1_Advance_copy.pdf Accessed. 3 February 2022.

[457] See *e.g. MH v. Secretary of State for the Home Department & DS v. Secretary of State for the Home Department*, United Kingdom: Court of Appeal (England and Wales), 24 March 2009, EWCA Civ 226; *Conseil du Contentieux des Étrangers*, 13 January 2011, no. (54.335) (Belgium); *Commissaire général aux réfugiés et aux apatrides v. Mostafa Lounani* (Request for a preliminary ruling from the Conseil d'État, Belgium) Case no. (C573/14), Judgment of the court (Grand Chamber) of 31 January 2017, CJEU, paras. 66-79.

[458] UNHCR. "Guidance Note on Extradition and International Refugee Protection." April 2008, paras. 21 - 23; UNHCR, "Addressing Security Concerns without Undermining Refugee Protection" (Rev. 2), 2015, paras. 31-32.

derogable human rights norm, barring everyone's removal who would be subjected to ill-treatment in the place of return. Although the IRL does not present a barrier to extradition where a person is excluded from refugee status under article 1F CSR51, it is debatable whether exceptions or derogations to the principle of *non-refoulment* are permitted if the terrorist poses a threat to a country's public security.[459]

Notwithstanding a longstanding debate, there is no credible evidence or data to suggest that asylum seekers pose a national security risk. The highly debated relationship between asylum, irregular migration, and terrorism raises a number of acute dilemmas in terms of law and policy. To date, there is little evidence that terrorists use asylum flows to commit terrorist acts or that asylum seekers are more prone to radicalization than others, and research shows that very few refugees have actually committed terrorist acts. According to research published in 2017 by the Institute for the Study of War, there is no concrete evidence that terrorist travellers systematically use those flows of refugees to enter Europe unnoticed.[460] However, opinion polls suggest that the majority of Europeans think that allowing refugees will make terrorist attacks on European soil more likely.[461] In a similar vein, a study by the Danish Institute for International Studies found that no refugees were implicated in any terrorist incidents in Europe between January 2016 and April 2017.[462] According to this report, three rejected asylum seekers and two asylum seekers who arrived prior to the 2015-16 refugee crisis were involved in attacks, and as a result, the vast majority of terror attacks in Europe are carried out by EU citizens, many were foreigners, and most were already known to the European authorities.[463]

It seems that the relationships between asylum seekers and terrorism are much more complicated and deserve much more sober analysis. The term 'terrorism' is a broad concept and cannot be limited only to asylum seekers and refugees. Terrorism as a global phenomenon is not exclusive to one nation, religion, or race. As a result, there are no easy solutions to this issue.

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[459] Gillard, Emanuela-Chiara. "There's no place like home: states' obligations in relation to transfers of persons." *International Review of Red Cross*, vol. 90, no. 871, 2008, pp.703-704.
[460] Dearden, Lizzie. "Parsons Green attack: No evidence Isis is systematically using refugees for terror plots, research finds." *The Independent Online*, 19 September 2017. Retrieved from https://www.independent.co.uk/news/uk/home-news/parsons-green-attack-isis-evidence-refugees-terror-plots-jihadis-terrrorist-islamic-state-paris-brussels-greece-syria-iraq-a7955026.html Accessed 27 December 2021.
[461] *Op.cit.* Haner, Murat *et al*., 2020, p.798.
[462] Crone, Manni *et al*. 2017, p. 4.
[463] *Ibid.*

2.1.2. Protection of cultural and religious identity

Cultural and religious reasons could explain why the V4 group opted for more restrictive asylum policies. Findings from the research on attitudes towards asylum seekers prove that cultural and religious ethical factors can explain the restrictiveness of asylum policy.[464] For instance, in the Hungarian context, the idea of an official Hungarian national identity has been a major factor in the recent debate around asylum and refugee in the country. In this respect, Németh, the Hungarian head of parliament's foreign affairs committee, said that Hungary's national identity and sovereignty are 'not just parts of its history' but 'crucial preconditions' for the nation's survival.[465] For several reasons, including cultural and religious, the Hungarian government was against the open-door asylum policies. Hungarian Prime Minister Orbán first mentioned his plans to regulate asylum in Hungary clearly in the wake of the Charlie Hebdo attacks, after which the government launched a coordinated securitization campaign to protect not only the national security but also cultural identity.[466] Cultural threat posed by asylum seekers or refugees beyond its current conceptualization as symbolic, collective-level threats to Hungarian cultural identity.[467] Hungary was opposed to welcoming 'minorities with different cultural characteristics and backgrounds (…) [in order to] keep Hungary as Hungary.'[468] From the Hungarian perspective, migration in general puts national traditions, including religion, in peril, especially that most of refugees and migrants 'grew up in a different environment and represent a completely different culture and religion.'[469] Asylum and migration could be seen as a threat to Europe's Christian roots. Since 2012, Hungary's constitution has officially recognized 'the role of Christianity in preserving nationhood.' Article 7(1) of the Hungarian constitution's wording leaves no doubt that people with other religious beliefs are tolerated.[470] However, in practical terms, Christian values, or a particular interpretation

[464] Brunner, Beatrice & Kuhn, Andreas. "Immigration, Cultural Distance and Natives' Attitudes Towards Immigrants." IZA DP, no. 8409, IZA Institute of Labour Economics, Bonn, 2014, pp.1-7.
[465] "Hungary's national identity and sovereignty are "crucial preconditions" for the nation's survival. About Hungary." *About Hungary*, 2017. Retrieved from http://abouthungary.hu/news-in-brief/hungarys-national-identity-and-sovereignty-are-crucial-preconditions-for-the-nations-survival/ Accessed 13 January 2021.
[466] Szalai, András & Gőbl, Gabriella. "Securitizing Migration in Contemporary Hungary." Working paper, Centre for EU Enlargement Studies, 30 November 2015. p. 2.
[467] *Ibid.*
[468] *Op.cit.* Sidło, Katarzyna & Gigitashvili, Givi. 2019, pp. 3 4.
[469] Matthew, Karnitschnig. "Orbán says migrants threaten 'Christian' Europe." *Politico Pro*, 3 September 2015. Retrieved from https://www.politico.eu/article/orban-migrants-threaten-christian-europe-identity-refugees-asylum-crisis/ Accessed 13 January 2021.
[470] Art. 7 Fundamental Law of Hungary, 25 April 2011.

of them, could serve as a basis for the call to some of the asylum regulations restrictions mostly in the matter of irregular migration, border management, and asylum policy.[471]

In the same vein, Poland was also concerned about the preservation of its cultural and religious identity.[472] As a little aside, Poland has faced two types of 'crisis', firstly, the '2014 Ukrainian Crisis' and secondly, the 2015-16 refugee crisis.[473] As will be discussed in the following chapter, while asylum seekers from Ukraine are generally welcomed in Poland because they share similar religious and cultural backgrounds, this was not the case for asylum seekers from other religious and cultural backgrounds. Although Poland was not affected directly by the 2015-16 refugee crisis, [474] the issue has impacted Polish political discourse and politics since the parliamentary elections in 2015.[475] During the 2015-16 refugee crisis, Poland experienced an increase in anti-asylum and refugee attitudes on the part of the natives.[476] A poll found that a majority of Poles expressed an anti-asylum and refugee attitude towards asylum seekers from the Middle East and Africa because the culture and religion of people from these regions vary considerably from those of their Polish counterparts.[477] However, given the fact that Poland has traditionally been an emigration country and the Polish diaspora is spread all over the world, one could assume that Poles would be more welcoming towards refugees.[478] This has not actually been the case. Therefore, it is essential to understand the factors behind the attitudes change, and consequently, the asylum policy changes in Poland. The influx of asylum seekers has created a high level of insecurity and a fear of identity loss. As a reaction, Poles 'cling to their traditions and values even more strongly in an attempt to reaffirm their identity' and

[471] Schmitt, Caroline. "Hungary ready to fight European Commission." *DW News*, 4 October 2017. Retrieved from https://www.dw.com/en/hungary-ready-to-fight-european-commission/a-40805133 Accessed 13 January 2021.
[472] Narkowicz, Kasia. "'Refugees Not Welcome Here': State, Church and Civil Society Responses to the Refugee Crisis in Poland." *International Journal of Politics, Culture, and Society*, vol 31, 2018, p. 364.
[473] Piłat, Anna & Dominika Potkańska. "Local responses to the refugee crisis in Poland. Reception and integration." *The Institute of Public Affairs*, Warsaw 2017, p.7.
[474] In general, Poland has never faced mass migrant flows and it has not experienced any major increase in asylum requests from outside the EU in the course of the 2015-16 refugee crisis. Source: Pachocka, Marta. "Understanding the Visegrád Group States' response to the migrant and refugee crises 2014+ in the European Union." *The Yearbook of Polish European Studies*, vol. 1, 2016, pp. 104 -105.
[475] Győri, Gábor. "The Political Communication of the Refugee Crisis in Central and Eastern Europe." Foundation for European Progressive Studies, Brussels, 2016, pp. 47-50
[476] Morath, Annika. "Poland for the Polish? Taking a Closer Look at the Polish Rejection of Refugees." Heinrich Böll Stiftung, Berlin, 2017, Retrieved from https://eu.boell.org/en/2017/06/14/poland-polish-taking-closer-look-polish-rejection-refugees Accessed 16 January 2021
[477] *Ibid.*
[478] Pacyga, Dominic A. "Polish Diaspora." *Encyclopedia of Diasporas. Immigrant and Refugee Cultures Around the World*, edited by Ember Carol R. *et. al.*, Springer, 2005. p. 254.

create a feeling of stability and security.[479] Cienski observes another reason for the anti-asylum and refugee attitudes towards asylum seekers and refugees, which is the special character of Polish national identity, which has to be understood in the context of Poland's history. The author claims that due to its geographical position between Germany and Russia, Polish territorial and political sovereignty has thus often been violated during its more than a thousand-year-old history. [480] For this reason, the 2015-16 refugee crisis was accompanied by the need to strengthen the protection of polish internal sovereignty and identity. [481] Furthermore, some of the anti-asylum and refugee arguments can be summed up under the heading of religious fear. In Poland, national identity is strongly connected to Catholicism, which is seen as one of the main pillars of Polish national identity. In Poland, national identity is strongly connected to Catholicism which, is seen as one of the main pillars of Polish national identity. Many people believe that the perceived 'otherness' of asylum seekers and refugees, particularly those from the Middle East and Africa, poses a big challenge to their successful integration.[482]

In Czechia, the identity-based discourse was also produced in the wake of the 2015-16 refugee crisis. Even though Czechia was not directly affected by the crisis, as aforementioned, several factors explain the country's approach to preserving national identity. [483] Czechia's national identity has been shaped by several events that have happened in the past and have had a significant influence on the country's national identity. Czechia's national identity has been shaped by several events that have happened in the past and have had a significant influence on the country's national identity. [484] For this reason, defensive nationalism has been a defining feature of the modern history of the Czechs.[485] The 2015-16 refugee crisis raised the importance of debates about asylum and the future of Czechia. Part of the Czech media, politicians, and ordinary citizens met it

[479] Cienski, Jan. "Why Poland doesn't want refugees an ethnically homogenous nation battles EU efforts to distribute asylum." *Politico Pro,* 27 May 2017. Retrieved from https://www.politico.eu/article/politics-nationalism-and-religion-explain-why-poland-doesnt-want-refugees/ Accessed 16 January 2021
[480] *Ibid.*
[481] Pedziwiatr, Konrad. "Islamophobia in Poland. National Report 2015." European Islamophobia Report 2015, edited by Enes Bayraklı & Hafez Farid, SETA, Istanbul, 2016, pp.14-16.
[482] *Ibid.*
[483] Tabosa, Clarissa. "Constructing Foreign Policy vis-a`-vis the Migration Crisis: The Czech and Slovak Cases." *Czech Journal of International Relations*, vol. 55, no. 2, 2020. p11.
[484] Budden, Heather. "Management Implications of a Czech National Identity in The European Union." *International Business & Economics Research Journal*, vol 8, no. 2, 2009, pp. 64-66.
[485] Čulík, Jan. "Why is the Czech Republic So Hostile to Muslims and Refugees." *Semantic scholar*, 2017, pp. 2-4.

with fearful attitudes towards asylum seekers and refugees.[486] As mentioned above, although Czechia has experienced relatively low levels of asylum seekers, negative attitudes toward the issue were high. This is because of the country's history and its relatively limited experience of asylum seekers and refugees. This is also because of the strong anti-asylum, and anti-refugee, and anti-Muslim signals sent by political leaders have had powerful effects on public attitudes.[487] Czechia stood firm, particularly against asylum seekers from Muslim countries. It would appear that the interaction of several historical, cultural, political, and religious factors has created this anti-asylum and refugee reaction.[488] The Czechs seem to be 'scared of anything new: different culture, people, and religion.' The 'others' must return home because 'they have their culture, and [Czechs] have [their own] culture; and ' they have their values, but [Czechs] want to keep [their] values.'[489] Indeed, the reasons for Czechia's 'negative attitude' toward foreigners are 'a widespread fear of the unknown', a largely homogeneous society and little exposure to people from various cultural backgrounds.[490] In this context, Rozumek, the head of OPU, stated that '99% of Czechs have never seen a refugee,' and that 'despite this, 81% are against refugees.'[491]

Similarly, although the number of asylum seekers in Slovakia was low, many representatives of parliamentary parties and citizens describe asylum seekers and refugees as a threat to the country's identity.[492] According to the Slovak government, it is important to protect the country from the threat of 'a compact Muslim community' and to preserve 'Slovakia's national identity.'[493] The Slovak public discourse on asylum and refugee has evoked fears and debates that mostly focus on potential risks. According to the Eurobarometer survey in autumn 2018, as many as 81% of Slovak citizens hold negative

[486] Brožová Kristýna *et al.* "The wages of fear attitudes towards refugees and migrants in the Czech Republic." Foundation Institute of Public Affairs, 2018, Warsaw, pp. 6-11. Retrieved from https://www.britishcouncil.pl/sites/default/files/czech_pop.pdf Accessed 17 January 2022.
[487] Janicek, Kaerel. "Europe's far-right leader's campaign in Prague for EU vote." *AP NEWS*, 25 April 2019. Retrieved from https://apnews.com/article/cba307d731ce4d1c8e217248f25deb24 Accessed 17 January 2022.
[488] *Ibid.*
[489] Wintour, Patrick. "Migrants to Europe "need to go home", says Czech prime minister." *The guardian*, 25 October 2018. Retrieved from https://www.theguardian.com/world/2018/oct/25/europe-migrants-need-to-go-home-says-czech-prime-minister Accessed 17 January 2022.
[490] Schultheis, Silja. "The Refugee Policy of the Visegrád Countries: "No one invited you."" Heinrich-Böll-Stiftung, Berlin, 15 September 2015. Retrieved from https://cz.boell.org/en/2015/09/15/refugee-policy-visegrad-countries-no-one-invited-you Accessed 27 February 2022.
[491] *Ibid.*
[492] Cuprik, Roman. "Asylum seekers avoid Slovakia." *The Slovak spectator*, 11 July 2017. Retrieved from https://spectator.sme.sk/c/20579285/asylum-seekers-avoid-slovakia.html .Accessed 19 January 2022.
[493] *Ibid.*

feelings toward foreigners from non-EU countries.[494] Understandably, Slovaks are cautious about people from other cultures. Perceiving Muslim refugees as an existential threat to Slovak society and culture, the Slovak parliament passed an amendment to the law on churches in 2016.[495] The amendment imposed tighter requirements for the registration of churches or religious societies. The new legislation mandates that religious groups seeking government recognition must provide evidence of having 50,000 adult members, an increase from the previous 20,000-member requirement that had been in place since 2007. According to its authors, the amendment would prevent the speculative registration of false churches and religious societies to receive money from the state.[496] As a result, Slovakia, which has a population of only 5.4 million people, has the strictest registration requirements for religious groups in the EU, and there is almost no possibility for religions such as Buddhism, Hinduism, and Islam to register.[497] This restriction based on religious factors could probably be the reason for future restrictions on some regulations related to asylum policy.

The four countries agreed that the large mixed migratory flow of Muslim asylum seekers in 2015-16 poses a threat to European Christian civilization. References to radical Islam and Muslims signify the 'identitarian boundaries' between 'us' Christian Europeans and 'them', the others.[498] This demonstrates that the fear stems not from the asylum seekers themselves, but from their religious background and beliefs. Despite the fact that Muslims constitute a minority in the V4 countries, polls show that Islamophobic attitudes are among the highest in Europe.[499] According to a Pew Research Centre survey published in April 2015, the Muslim community in Poland, Hungary, and Czechia does not exceed an estimated 0.1 % of the total population, and in Slovakia, it comprises only 0.2% of the total

[494] Letavajová, Silvia & Divinský, Boris. "Migration and development in Slovakia." *Caritas Slovakia, Kapitulská* 18, Bratislava, 2019, pp. 5-6.
[495] Act No. 308/1991 Coll. on the Freedom of Belief and the Position of Churches and Religious Societies of the Slovak Republic.
[496] Ondrasek, Lubomir Martin. "Slovakia's New Religious Registration Law is a Step in the Wrong Direction." *Providence*, 1 March 2017. Retrieved from https://providencemag.com/2017/03/slovakias-new-religious-registration-law-step-wrong-direction/ Accessed 19 January 2022.
[497] Havelková, Mária. "The Amendment of the Religious Registration Law and Its Impact on Freedom of Religion in the Slovak Republic." *Public Governance, Administration and Finances Law Review*, vol. 3. no. 2, 2018, pp. 37-41.
[498] *Op.cit.* Tabosa, Clarissa, 2020, p.11
[499] Bichara, Khader. "Muslims in Europe: The Construction of a "Problem".OpenMind , 2016, Retrieved from https://www.bbvaopenmind.com/en/articles/muslims-in-europe-the-construction-of-a-problem/ Accessed 19 January 2022; Hafez, Farid. "Street-level and government-level Islamophobia in the Visegrád Four countries." *Patterns of Prejudice*, vol. 52, no. 5, 2018, pp.438-439.

population.[500] Simultaneously, according to a Pew Research Centre study published in July 2016, Eastern and southern European countries have the most negative views on Muslims. Hungary has the most negative responses (72%), followed by Poland (66%). Furthermore, 37% of Hungarian citizens and 35% of Poles believe that Muslims are more likely to support extremist groups.[501] Although there is no data on Slovakia or Czechia in this survey, the World Values Survey reveals that rejection of Muslims is widespread in these two countries. Both countries ranked highest in terms of anti-Muslim attitudes. In Czechia, 45.5% and in Slovakia, 68.4 % of respondents stated that they refused to have Muslims as neighbours.[502]

Understanding the V4 asylum policy requires an understanding of the religious, cultural, and national identity contexts. Opponents of open asylum policies frequently argue that the presence of asylum seekers, who may later be granted refugee status, may distort the native population's national identity. The indigenous people of the V4 group defend restrictive asylum policies because they are afraid of losing their sense of belonging to their nation, as represented by distinct traditions, religions, culture, and language. As Coleman observes, European populations are becoming much more diversified in their languages, ethnic groups, and religion. According to the author, if recent trends continue, the self-identity and even the physical appearance of Europe's people will be changed.[503]

2.1.3. Political choice: closed-door asylum policy

The political context favoured the V4 group's preferences for closed-door asylum policy. Thus, policymaking in the wake of the 2015-16 refugee crisis took place within a wider, largely nationally confined, public discourse, where the media played an important role in framing the issue. In relation to the V4 group, Nič observed that the 2015-16 refugee crisis was a turning point in these countries, because the policy towards asylum seekers has gone right to the top of the political agenda.[504] Asylum policy was put on the political agenda by

[500] Pew Research Centre. "Religious Composition by Country, 2010-2050." 2 April 2015. Retrieved from https://www.pewforum.org/2015/04/02/religious-projection-table/ Accessed 19 January 2022.
[501] Pew Research Centre. "5 facts about the Muslim population in Europe." 29 November 2017. Retrieved from https://www.pewresearch.org/fact-tank/2017/11/29/5-facts-about-the-muslim-population-in-europe/ Accessed 19 January 2022.
[502] *Op.cit.* Hafez, Farid. 2020, p.439.
[503] Coleman, David. "Migration and Its Consequences in 21st Century Europe." *Vienna Yearbook of Population Research*, vol. 7, 2009, pp. 1-2.
[504] *Op.cit.* Nič, Milan, 2016, pp.281–290.

several political parties as an issue of security 'both national and cultural, direct and symbolic.'[505]

Before the 2015-16 refugee crisis, asylum and refugee questions were usually addressed by radical right parties who could thrive in the political environment of the EU by advocating issues like national sovereignty, international terrorism, and globalization after the 2008 financial crisis.[506] Following the 2015-16 refugee crisis, asylum became the number one priority issue. Indeed, the radical right parties increased their support among voters, and party competition increased as well. This indicates that if radical right parties obtain support from the voters, pressure starts to mount on conservative and moderate right-wing parties, forcing them to move their position stance on asylum to the right to avert further success of the radical right parties.[507]

By evaluating the results of the latest election in the V4 countries and comparing them to previous, it has come to be recognized that radical-wing parties have become stronger and have gained the confidence of voters.[508] According to Stojarová, the influx of asylum seekers has caused a significant shift in the V4 political landscape.[509] The author showed how much the 'negative reactions' toward asylum seekers were instrumentalized and politicized not only by the extremist and radical right parties but also by the newly emerged populist formations as well as the well-established mainstream parties across the whole political spectrum.[510]

Noticeably, the policies toward asylum seekers, in the V4 group should be understood as the outcome of political choices.[511] The rise of anti-asylum radical right parties has

[505] Klaus, Witold. "Security First: New Right-Wing Government in Poland and its Policy Towards Immigrants
and Refugees". *Surveillance & Society*, vol.15, no. 3/4, 2017, p. 523.
[506]Kallis, Giorgos. "Imaginaries of Hope: The Utopianism of Degrowth." *Annals of the Association of American Geographers*, Vol. 105, no. 2, 2015, pp. 360-368.
[507] Steinmayr, Andreas. "Did the Refugee Crisis Contribute to the Recent Rise of Far-right Parties in Europe?" Ifo DICE Report, The Ifo Institute (Leibniz Institute for Economic Research at the University of Munich), Munich, vol. 15, no. 4, 2017, pp. 24-27; Davis, Lewis & Deole, Sumit S. "Immigration and the Rise of Far right Parties in Europe." Ifo DICE Report, The Ifo Institute (Leibniz Institute for Economic Research at the University of Munich), Munich, vol. 15, no. 4, 2017, pp. 10-15.
[508] Backlund, Anders & Ann-Cathrine Jungar. "Populist Radical Right Party-Voter Policy Representation in Western Europe." *Journal of Representative Democracy*, vol. 55, no. 4, 2019, pp. 393-413.
[509]Stojarová, Věra. "Populist, Radical and Extremist Political Parties in Visegrád countries vis à vis the migration crisis. In the name of the people and the nation in Central Europe." *Open Political Science*, vol.1, 2018, pp. 32–45.
[510] *Ibid.*
[511] *Op.cit.* Bauerova, Helena. 2018, pp.106-108.

impacted the party systems and asylum policy in the V4 group.[512] In this sense, after analysing origin-specific asylum recognition rates in 27 EU Member States from 2000-2018, Winn asserted that domestic politics impact how asylum claims are adjudicated.[513] According to her, right-wing parties in government are associated with lower asylum recognition rates. This effect is strongest for far-right parties. When far-right parties win legislative seats and cabinet positions, there is a substantive decrease in recognized asylum claims.[514] Accordingly, based on the partisan effects in the V4 group, right-wing parties are more likely to introduce restrictive policies on asylum seekers, as they consider the 2015-16 refugee crisis to be of enormous political and symbolic importance, going well beyond the numbers involved and raising vital concerns about national sovereignty, identity, and security. [515]

2.2. Regional concerns: the failure of the Common European Asylum System

As discussed in the previous chapter, the EU's asylum framework comprises legal policy and coordination frameworks aimed at enhancing asylum in a comprehensive manner. The legal provisions consist of hard laws in the form of founding treaties, protocols, and conventions, regulations, directives, and decisions; as well as soft laws in the form of declarations.

The 2015-16 refugee crisis tested the effectiveness of the Common European Asylum System. The effectiveness of the latter has proven to be limited. The crisis was a destabilizing factor, leading to disagreements and divisions between Member States.[516] Accordingly, asylum questions have been the focus of a sharp struggle that has affected relations between the V4 countries, the EU institutions, and Western European states. Asylum policy continues to be high on the EU's policy agenda. Seven years after the peak of Europe's refugee crisis, the EU is still not able to manage it effectively because of many legal and political troubles linked to the practical implementation of EU legislation related to asylum and borders. At the legislative level, the problem of asylum in the EU is not related to the absence of laws, but rather to the lack of harmonisation and implementation

[512] Miller, Michelle. "Far Right, Left Out: European Far-Right Parties and the Implications for Refugees." *Thesis,* the Croft Institute for International Studies and the Sally McDonnell Barksdale Honors College, University of Mississippi, 2017, pp. 8-35.
[513] Winn, Meredith. "The far-right and asylum outcomes: Assessing the impact of far-right politics on asylum decisions in Europe." *European Union Politics,* vol. 22, no. 1, 2020, pp.71-73.
[514] *Ibid.* p.76.
[515] *Ibid.* p.72.
[516] *Op.cit.* Pachocka, Marta, 2016. p.101.

of EU legislation governing asylum procedures between Member States. While the EU has worked to harmonize its Member States' asylum laws and procedures, policy coordination between governments and the implementation of law varies greatly.[517] More specifically, issues persist during the application stage as a result of the Qualifications and Asylum Procedures Directive's poor implementation in some Member States.[518] In addition, the application of standards varies across Member States, resulting in significant differences in the quality of reception conditions, the length of asylum procedures, and the rates of recognition. Convergence is also lacking in the decision to grant refugee status or subsidiary protection, and national authorities receive insufficient monitoring and guidance on all of these issues.[519]As a result, some EU Member States bear a greater burden than others. [520] This does not deny the fact that some of the EU legislation and regulations related to asylum and border management suffer from shortcomings. It seems that the Dublin system is the best example to give when it comes to the ineffectiveness of some EU provisions on asylum. Thus, the distribution of responsibilities that had been imagined did not have the expected effects. [521] Political tensions prevent EU Member States from implementing a unified and harmonized asylum policy. During the 2015-16 refugee crisis, there was tension between Member States that adopted an open-door asylum policy and those that adopted a closed-door policy.

Undeniably, there is a growing divergence on asylum policy between the V4 group and the majority of the EU Member States on the one hand, and between the group and the EU institutions on the other hand. In terms of legal regulation and the regulatory framework, what exactly is the problem? Yet the policies of the EU institutions and the Member States seem to have had little success in preventing and effectively managing the unwanted flows. At least two types of reasons for policy failure exist: factors arising from the EU asylum policy itself and factors linked to the non-compliance between EU institutions and V4 countries.

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[517] Van Ballegooij, Wouter & Navarra, Cecilia. "The Cost of Non-Europe in Asylum Policy. European Parliament." 2018, pp. 20-21. Retrieved from https://www.europarl.europa.eu/RegData/etudes/STUD/2018/627117/EPRS_STU(2018)627117_EN.pdf Accessed 4 February 2022.

[518] Beirens, Hanne. "Cracked Foundation, Uncertain Future: Structural Weaknesses in the Common European Asylum System." Migration Policy Institute Europe, Brussels, 2018, pp.9-10.

[519] *Ibid.*

[520] Amouri, Baya. "The Interaction Between the EU And V4 Countries on the European Refugee Crisis." *The Visegrád Group facing New Challenges*, edited by Garai Nikolett, Institute for Foreign Affairs and Trade, Budapest, 2018. pp. 4-17.

[521] *Ibid.*

Following the crisis, the EU asylum policy has been heavily criticized because it seems to be no longer able to manage human inflows and there is a need for a radical change in EU policies and laws on asylum-seekers and refugees. To start, the functionality of the Common European Asylum System, which is, as discussed in the third chapter, the legal and policy framework developed to guarantee harmonised and uniform standards for people seeking international protection in the EU, has been brought into question. The Common European Asylum System fails to create a system of solidarity and fair sharing of responsibilities, especially when considering Dublin III regulation and Member States' failure to comply with European standards.[522] It has not reached its objectives of shared responsibility to process applicants for international protection in a dignified manner and ensure fair treatment and similar procedures in examining cases.[523] The awaited responsibility distribution did not produce the desired results.

One of the shortcomings of the Common European Asylum System is the Dublin III regulation, which is the cornerstone of the Common European Asylum System itself. The 2015-16 refugee crisis has demonstrated the already acknowledged, discussed, and analysed deficiencies in the Dublin system.[524] This system, which sets the criteria and mechanisms for determining the Member State competent to consider an asylum application lodged in one of the Member States by a third-country national,[525] suffers from a set of gaps. The real problem is that the Dublin III regulation does not attempt to fairly distribute responsibility for asylum seekers and refugees between the various member states but rather to set the state responsible for processing each application quickly based

[522] Moreno-Lax, Violeta. "Solidarity's Reach: Meaning, Dimensions, and Implications for EU (External) Asylum Policy' (forthcoming)." *Maastricht Journal of European and Comparative Law*, vol. 24, no. 5, 2017, pp.740-762; Beches, Ivonna. "To what extent has the Common European Asylum system been able handle the Syrian refugee crisis?" Faculty of Law of the Tilburg University, The Netherlands, 2017, pp. 6-9. Retrieved from http://arno.uvt.nl/show.cgi?fid=142883 Accessed 28 December 2021.

[523] Ineli-Ciger, Meltem *et al. Seeking Asylum in the European Union: Selected Protection Issues Raised by the Second Phase of the Common European Asylum System*. Brill Nijhoff, 2015, p.297.

[524] The establishment of a European free movement area (the 'Schengen area') has created the necessity to harmonize the asylum policies within the EU. This led to the negotiation of what came to be called the Dublin Convention (1990) and its successors, the Dublin II Regulation (2003) and Dublin III (2013). The Dublin regulations were criticized even before the 2015-16 refugee crisis. Since 2008, the regulation has failed to provide fair, efficient, and effective protection. The Council of Europe's Commissioner for Human Rights has also criticized the settlement as undermining the rights of refugees. Source: Montanari, Stefano. "The 'Dublin Regulation' undermines refugee rights." Office of the Commissioner for Human Rights, Press Release, 12 November 2010, pp.1-2. Retrieved from https://rm.coe.int/168071e49f Accessed 29 December 2020; Goldirova, Renata. "Greece under fire over refugee treatment." *EUobserver*, 3 April 2008. Retrieved from https://euobserver.com/justice/25910 Accessed 29 December 2021.

[525] European Commission. "Country responsible for asylum application (Dublin Regulation)." Retrieved from https://ec.europa.eu/home-affairs/what-we-do/policies/asylum/examination-of-applicants_en Accessed 29 December 2021.

on some pre-established criteria.[526] The system has negative repercussions for asylum seekers and EU Member States.

On the one hand, asylum seekers and their human rights under the Dublin system have aroused the interest of several academics. For example, scholars Noll[527] and Guild[528] have focused on the impact of the regulation on applicants and their fundamental rights to liberty, private and family life, and *non-refoulement.* Thus, under this system, asylum seekers have only one opportunity to apply for asylum in the EU, and if the claim is denied, this is recognized by all Member States. Under this criterion, asylum seekers are exposed to a risk of refoulement, as rejected asylum seekers may be sent back to their country of origin without any serious examination of the merits of their application and without having had access to an effective remedy. Another issue with the Dublin Regulation is that the standards for both asylum processing and practical accommodation and support vary widely among the European countries.[529] In 2011, before the refugee crisis, the case *MSS v Belgium and Greece* showed that the living conditions in Greece were so bad that an asylum seeker's life and human rights would be threatened if they were to be sent back.[530] The example of Greece revealed the impossibility of assuming that the rights of asylum seekers are guaranteed in all Member States.

On the other hand, the Dublin system is unfair to border countries, which are the first countries of entry for most asylum seekers.[531] Due to their geographical locations, some EU countries, like Hungary, receive more asylum seekers and are therefore expected to

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[526] Garcés-Mascareñas, Blanca. "Why Dublin "Doesn't Work."" Barcelona Centre for International Affairs, Barcelona, 2015, pp.1-5.
Retrieved from https://www.cidob.org/en/publications/publication_series/notes_internacionals/n1_135_por_que_dublin_no_funciona/why_dublin_doesn_t_work Accessed 29 December 2020.

[527] Noll, Gregor. Negotiating Asylum. *The EU acquis, Extraterritorial Protection, and the Common Market of Deflection.* Martinus Nijhoff Publishers, 2000, pp. 353-390.

[528] Guild, Elspeth. "The Europeanisation of Europe's Asylum Policy'." *International Journal of Refugee Law*, vol. 18, no. 3-4, 2006, pp. 630-651.

[529]Bendixen, Michala Clante. "The Dublin Regulation." *Refugees.dk.* 20 July 2020. Retrieved from http://refugees.dk/en/facts/the-asylum-procedure-in-denmark/the-dublin-regulation/ Accessed 30 December 2021.

[530] *Op.cit M.S.S. v Belgium and Greece*, paras. 249 to 263. The Court ruled that asylum conditions in Greece were so bad that not only Greece had violated the ECHR but also Belgium for having returned an asylum seeker back to Greece. According to the judgment, asylum seekers may not be transferred to the other Member States if they could be exposed there to the risk of a serious breach of the fundamental rights which they are guaranteed under CFR.

[531] Moses, Lauren. "The Deficiencies of Dublin: An Analysis of the Dublin System in the European Union." *Policy Analysis,* vol. 6, no. 2, 2016, pp. 6-16; Schmitt, Mathilde. "The Dublin Regulation, A Nightmare for Asylum Seekers." *Sensus Journal,* 29 October 2019. Retrieved from https://sensusjournal.org/2019/10/19/the-dublin-regulation-a-nightmare-for-asylum-seekers/ Accessed 30 December 2021.

process more asylum cases than other European countries.[532] Following the refugee crisis of 2015-16, responsibility under the Dublin system has been perceived as a blockage to asylum burden-sharing in the EU.[533] In other words, the system does not include a distribution mechanism that obliges other EU countries to relieve those countries that take responsibility on behalf of the rest of the EU. To get out of the crisis, the EU adopted in 2015 a provisional mechanism for the mandatory relocation of asylum seekers that required other EU countries to receive asylum seekers to reduce pressure in countries such as Italy and Greece.[534] The decision was met with strong opposition from the V4 countries, which refused to accept the numbers imposed on them. Since then, however, tensions between the V4 group and the EU institutions on asylum policy have been triggered. In other words, the failure of EU asylum policy to deliver a comprehensive and effective EU approach to the refugee crisis and the uneven distribution of responsibilities have led to tensions within the EU. It is in this context that the tension between the EU institutions and the V4 group has occurred. As mentioned above, the countries of the V4 group have been demonstrating a position of non-compliance with the provisional mechanism for the mandatory relocation of asylum seekers, for varying reasons.[535] Hungary and Slovakia sought the annulment of the relocation decision.[536] The two countries asked the CJEU to annul the decision, claiming that there were procedural flaws and that the decision was neither a suitable response to the refugee crisis nor necessary to deal with it.[537] The V4 group considered that the decision of relocation was a violation of their sovereignty and territorial integrity.

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[532] Christophersen, Eirik. "A few countries take responsibility for most of the world's refugees." Norwegian Refugee Council, Oslo, 2020 (updated 24 June 2021). Retrieved from https://www.nrc.no/shorthand/fr/a-few-countries-take-responsibility-for-most-of-the-worlds-refugees/index.html Accessed 31 December 2021.

[533] Mouzourakis, Minos "'We Need to Talk about Dublin' Responsibility under the Dublin System as a blockage to asylum burden-sharing in the European Union." Working Paper Series, no. 105, Refugee Studies Centre, 2014, pp. 15-16.

[534] Council Decision (EU) 2015/1523 of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece, OJ L 239, 15 September 2015, p. 146–156 (No longer in force, Date of end of validity: 17 September 2017); 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, OJ L 248, 24 September 2015, p. 80–94 (No longer in force, Date of end of validity: 26 September 2017).

[535] The contested mandatory quota system was a strategy that detailed the compulsory relocation and redistribution of asylum applicants and created a quota system based on each EU country's GNP, population, unemployment rate, and previous refugee-supporting measures. The decision was adopted based on Article 78(3) TFEU. Although Slovakia and Hungary, like the Czech Republic, voted against the adoption of the contested decision in the Council, the decision was approved by a majority vote of Member States.

[536] *Slovak Republic and Hungary v Council of the European Union*, Joined Cases no. (C-643/15) and (C-647/15), Judgment of the Court (Grand Chamber) of 6 September 2017, CJEU.

[537] *Ibid.*

The V4 group argued that the EU broke its own rules and exceeded its powers when it approved the quota system.[538] On this basis, interior ministers of the V4 countries have declared that decisions on asylum should be made at a prime ministerial level. In this context, the Hungarian Minister of Interior, Pintér, declared that 'the redirection of refugees should not be decided at ministerial level by the Council of the EU, but at a higher, head of government and state level; the European Council must make a unanimous decision.'[539] The CJEU dismissed the actions brought by Slovakia and Hungary against the provisional mechanism for the mandatory relocation of asylum seekers.[540] The Court believes that the relocation mechanism included in the contested decision is part of a package of measures designed to relieve pressure on Greece and Italy.[541] The Court also holds that the measures were legally taken by the EU Council and did not require ratification by individual governments, and the legality of the decision cannot be called into question based on retrospective assessments of its efficacy.[542]

For many reasons [543], the provisional mechanism for the mandatory relocation of asylum seekers has not been implemented in the V4 group.[544] As a result, Hungary, Poland, and Czechia were referred to the CJEU together for non-compliance with their legal obligations on relocation. Slovakia was let off because of the 16 relocated persons. In

[538] Brändlin, Anne-Sophie. "Slovak Foreign Minister Lajcak: 'Our people have not been exposed to Muslims and they are frightened.'" *DW News*, 20 July 2016. Retrieved from https://www.dw.com/en/slovak-foreign-minister-miroslav-lajcak-our-people-havent-been-exposed-to-muslims-and-theyre-frightened/a-19414942 Accessed 3 January 2022.

[539] Website of the Hungarian Government. 13 June 2017. Retrieved from https://akadalymentes.2015-2019.kormany.hu/en/ministry-of-interior/news/the-redirection-of-refugees-must-be-decided-by-the-eu-unanimously-at-prime-ministerial-level Accessed 3 January 2022.

[540] *Op.cit. Slovak Republic and Hungary v Council of the European Union*, para. 345.

[541] *Ibid.* para. 215.

[542] *Ibid.* para. 221.

[543] The Hungarian government considers the decision by the CJEU 'to be appalling and irresponsible.' Also, in reaction to that, the Polish Prime Minister declared that the decision 'does not change the position of the Polish government on migration policy.' Initially, the V4 group was in favour of maintaining the voluntary nature of EU solidarity and the creation of other alternatives to manage the migration crisis. Source: Crisp, James & Matthew Day. "European divisions over migration brutally exposed by EU court judgment on refugee quotas." *Telegraph news*, 6 September 2017. Retrieved from https://www.telegraph.co.uk/news/2017/09/06/eu-court-rejects-refugee-quota-challenge-hungary-slovakia/ Accessed 4 January 2022; Grimmel, Andreas & My Giang, Susanne. *Solidarity in the European Union: A Fundamental Value in Crisis*. Springer International Publishing, 2017, p. 83.

[544] Hungary, which was due to relocate 1294 refugees, refused to take any part in the mandatory refugee quotas. Poland, which was due to relocate 7,082 refugees, initially declared it would accept 100 migrants but ended up receiving none. The Czech Republic, which was due to relocate 2691 refugees, accepted only 12 refugees. Slovakia, which was due to relocate 902 refugees, has now relocated 16 people—all single mothers with children. Source: "Poland, Hungary, and the Czech Republic 'failed to fulfil their obligations under European Union law'-the CJEU ruled." *NIEM*. 7 April 2020. Retrieved from http://www.forintegration.eu/pl/poland-hungary-and-the-czech-republic-failed-to-fulfill-their-obligations-under-european-union-law-the-ecj-ruled Accessed 4 January 2022; *Op.cit.* Zachová, Aneta *et al.* 2018.

a judgment rendered on 2 April 2020, the CJEU considered that none of the V4 countries 'had fulfilled the commitments.'[545] The judgment was perceived as adding 'another chapter to a dispute that simmered for years, even after the relocation mechanism's two-year lifespan had expired.'[546] In 2020, the European Commission abandoned the idea of mandatory refugee quotas, as it revived an attempt to change Europe's asylum rules after more than four years of deadlock.

Broadly speaking, the EU was not prepared for the crisis and there was no crisis management plan to be promptly implemented. In addition, immediate actions, such as the previously discussed provisional mechanism for the mandatory relocation of asylum seekers, have failed. Besides, most EU initiatives and measures did not go far enough to address the underlying issue of the refugee crisis, and as a result, several major issues remain unresolved.[547] This has been further complicated by the absence of a strong Common European Asylum System. Firstly, in the registration stage, some Member States have been incapable or unwilling to register all who enter their territory, due to asylum seekers' refusal to provide fingerprints or due to a lack of capacity.[548] Secondly, many national governments fail to put EU legislative requirements into effect during the reception stage, with some asylum systems 'suffering from chronic underinvestment and many lacking the design flexibility to respond to sudden migratory movements.'[549] It can be said that the V4 group, particularly Hungary as an EU external border State was not prepared for the 2015-16 refugee crisis in terms of infrastructure or even legislation to

[545] *Commission v. Poland, Hungary, and the Czech Republic,* Joined Cases no. (C-715/17, C-718/17), and (C-719/17), Judgment of the Court (Third Chamber) of 2 April 2020, CJEU, para. 193.
[546] Bornemann, Jonas. "Coming to terms with relocation: the infringement case against Poland, Hungary, and the Czech Republic." *EU Immigration and Asylum Law - Blog of the Odysseus Network*,17 April 2020. Retrieved from https://eumigrationlawblog.eu/coming-to-terms-with-relocation-the-infringement-case-against-poland-hungary-and-the-czech-republic/ Accessed 5 January 2022.
[547] On 13 May 2015, the European Commission adopted the European Agenda on Migration, a political document that set out a series of steps the EU would take to 'build up a coherent and comprehensive approach to reap the benefits and address the challenges deriving from migration' (para. 2). It described various immediate measures to mitigate the crisis and improve refugee policy in the medium and long term. Acknowledging the fragmentation of Common European Asylum System as a result of mistrust between the Member States, the Agenda included the formation of a new monitoring process to ensure implementation of asylum rules and to bring about trust. The document highlighted the need for shared responsibility among the Member States and called for better management of migration policy. Importantly, the Agenda proposed mandatory quotas for the relocation of asylum seekers to the Member States, a temporary derogation from the Dublin system. Source: Com (2015) 240 final. Communication from the commission to the European Parliament, the Council, the European Economic, and Social Committee, and the Committee of the Regions, a European Agenda on Migration.13 May 2015.
[548] *Op.cit.* Beirens, Hanne. p.1.
[549] *Ibid.*

effectively manage the large migratory flow.[550] Hungary's registration and reception system, for example, was inadequate and unprepared to handle hundreds of asylum seekers each day.[551] Thirdly, under the pressure of an increasing number of applicants, some Member States found it impossible to apply the Common European Asylum System-outlined asylum procedures in a timely and consistent manner, resulting in increased blockage, long wait times, and inconsistencies in which time of asylum procedure is applied to which cases.[552] Fourthly, EU Member States' approaches to asylum claims differ significantly.[553]

The Common European Asylum System's structural deficiencies, both legal and operational, have an impact on Member States' ability to move toward greater responsibility sharing as well as the EU's emergency management and ability to maintain control over who enters its borders during a period of immense terrorism concerns. The failure of the Common European Asylum System explains why some EU Member States, including the V4 group, have increased control and strengthened border security to prevent unauthorized crossings. However, as will be discussed further below, certain newly implemented measures and regulations endanger asylum seekers' fundamental rights at various stages of the asylum process. The new dimension in the V4 countries' securitization of asylum policy, manifested through border-control measures, may even put the right of seeking asylum itself at the stake.

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[550] World Health Organization. "Hungary: assessing health-system capacity to manage sudden, large influxes of migrants." Joint report on a mission of the Hungarian Ministry of Human Capacities and the WHO Regional Office for Europe, 2016, p. 6-9.
Retrieved from https://www.euro.who.int/__data/assets/pdf_file/0016/317131/Hungary-report-assessing-HS-capacity-manage-sudden-large-influxes-migrants.pdf Accessed 5 January 2022.

[551] Murray, Don. "At Serbian border, flow of refugees continued unabated into Hungary." UNHCR, 8 September 2015. Retrieved from https://www.unhcr.org/news/latest/2015/9/55eedde56/serbian-border-flow-refugees-continued-unabated-hungary.html Accessed 5 January 2022; UNHCR. "Statement by Vincent Cochetel, UNHCR's Regional Refugee Coordinator for the Refugee Crisis in Europe." 8 September 2015. Retrieved from https://www.unhcr.org/news/press/2015/9/55ef16616/statement-vincent-cochetel-unhcrs-regional-refugee-coordinator-refugee.html Accessed 4 February 2022 ; Human Rights Watch. "Fleeing Syria and Stranded in Hungary." 9 September 2015. Retrieved from https://www.hrw.org/video-photos/interactive/2015/09/09/fleeing-syria-and-stranded-hungary Accessed 4 February 2022

[552] *Op.cit.* Beirens, Hanne, 2018, p.1.

[553] *Ibid.*

3. The internal dimension: Legal reforms and restrictive interpretation of asylum policies in the Visegrád Group

State sovereignty is important to the discussion of asylum seekers and national security, as well as a guiding principle in international law.[554] Sovereignty, in the eyes of liberal interdependence theorists, is the state's capacity to control individuals and activities within and across its borders.[555] State sovereignty relates to its borders and its ability to control and regulate who enters and leaves that state. Asylum seekers, as non-nationals of the state, may breach the state's sovereignty when an unauthorised entrance occurs. To address the challenges resulting from the 2015-16 refugee crisis, the four countries implemented a variety of legal and practical measures. The crisis triggered a 'new period of activity' marked by reforms to asylum policy, primarily in Hungary and Poland, as well as a restrictive interpretation and implementation of existing asylum policies in Czechia and Slovakia.

3.1. The case of Hungary

Hungary has not only urged the EU to change its asylum policy, but it has been suggesting the 'solution' to the asylum problem since 2015. It is within this context that the so-called 'Hungarian Solution' has emerged.[556] During the crisis, Hungary 'acted as a small, interest-maximizing Member State constrained by domestic political interests,' refusing to participate in common European policy proposals to solve the crisis and instead 'engaged in unilateral actions perceived as solutions.'[557] The country was regarded as a 'norm entrepreneur.'[558] The main features of the Hungarian government's newly implemented rules and measures will be addressed sequentially.

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[554] Rudolph, Christopher. "Sovereignty and Territorial Borders in a Global Age." *International Studies Review*, vol. 7, no. 1, 2005, pp. 1–20; Hansen, Randall. "State Controls: Borders, Refugees, and Citizenship"
The Oxford Handbook of Refugee and Forced Migration Studies, edited by Elena Fiddian-Qasmiyeh *et al.*, Oxford University Press. 2014, p. 259.

[555] Thomson, Janice E. "State Sovereignty in International Relations: Bridging the Gap between Theory and Empirical Research." *International Studies Quarterly*, vol.39, no.2, 1995, p. 213; Krasner, Stephen D. "Sovereignty." *Foreign Policy*, no. 122, 2001, pp. 20-29.

[556] The Hungarian government first used the term 'Hungarian solution' in its discourse in 2016. Source: Kumar, Rajaram Prem. "Europe's "Hungarian solution."" *Radical Philosophy*, 2016, pp. 1-7. Retrieved from https://www.radicalphilosophyarchive.com/issue-files/rp197_rajaram_europeshungariansolution.pdf Accessed 8 January 2022.

[557] Czina, Veronika. "Hungary as a Norm Entrepreneur in Migration Policy." *Intersections*, vol. 7, no.1, 2021, p.22.

[558] *Ibid.*

A major change to the legal framework governing asylum was the law passed by Parliament allowing the government to adopt a list of 'safe third countries'[559] In July 2015, government Decree 191/2015 promulgated the list of 'safe third countries', which includes, among others, all countries along the Western Balkans route.[560] Asylum claims are considered inadmissible if the asylum seeker entered Hungary via one of the 'safe third countries'.[561]

The first change is related to the refugee status determination procedure. Act CXXVII of 2015 established a temporary security border closure and amended asylum laws.[562] On the one hand, the new law transposes the content of the 2013 recasts of the EU asylum acquis, including accelerated asylum procedures, ineligible applications, reception conditions, and enhanced minor protection; on the other hand, it provides a legal basis for the construction of a physical barrier at the Serbian-Hungarian border. Furthermore, the Act imposed shorter deadlines for authorities to make a decision on asylum seekers' claims. It also affects the applicants' right to remedy and expands the list of potential detention places. The Act also had the effect of allowing people to be deported from the country before the first judicial review of their applications had even begun. [563] This amendment did not introduce any new elements to the EU acquis; however, it is worth noting that legislators chose the options that were least favourable to asylum seekers.[564] Besides, it is important to note that by designating Serbia as a safe country, a significant burden was placed on the country. The interpretation of the concept of 'safe third country, 'as well as the challenges resulting from Serbia's designation as a 'safe third country,' will be discussed in the subsequent chapter.

The construction of a fence on Hungary's southern borders began in 2015, and this action was followed by a series of legislative acts aimed at reducing the number of asylum seekers.[565] The next round of amendments, passed by the Hungarian Parliament in an

[559] Act CVI of 2015 on the amendment of Act LXXX of 2007 of 1 January 2008 on Asylum.
[560] *Op. cit.* Government Decree 191/2015 of 21 July 2015 on the National Designation of Safe Countries of Origin and Safe Third Countries.
[561] Art. 51(2) (e) and Art. 51(4) (a)-(b) of Act LXXX of 2007 of 1 January 2008 on Asylum.
[562] Act CXXVII of 6 July 2015 on the Establishment of Temporary Border Security Closure and on Amending Acts related to Migration.
[563] Nagy, Boldizsár. "Hungarian Asylum Law and Policy in 2015–2016: Securitization Instead of Loyal Cooperation." *German Law Journal*, vol.17, no.6, 2016, p.1065.
[564] *Ibid.*
[565] The first section of barbed wire was built along the 175-kilometer border between Hungary and Serbia in 2015.

extraordinary session in September 2015,[566] went far beyond the already restrictive measures of July 2015, and essentially established a separate regime for asylum seekers crossing the fenced external border. These amendments deprived asylum seekers of certain basic guarantees and established a state of exception. They were created to provide a legal framework for the newly constructed fence along the Hungarian-Serbian border.[567] The following are the main characteristics of the newly introduced amendments: Firstly, the fence at the Serbian-Hungarian border has been designated as a 'temporary security border closure.'[568] Secondly, the irregular crossing of the 175-kilometer-long fence is considered a crime.[569] Thirdly, the construction of the so-called 'transit zones' as part of the fence.[570] The 'transit zones', which will be discussed in detail in the subsequent chapter, serve as official checkpoints for asylum seekers as well as detention centres. Fourthly, it introduced a new concept, the 'crisis situation brought about by mass immigration.' The 'crisis situation' was defined as 'the development of any circumstance related to the migration situation directly threatening the public security, public order, or public health of any settlement, in particular the breakout of unrest or the occurrence of violent acts in the reception centre or other facilities used for accommodating foreigners located within or on the outskirts of the settlement concerned.' [571] The situation may be declared in a government decree and may apply to portions or the entire country. In fact, it was declared immediately for the counties bordering the Hungarian-Serbian border. Fifthly, a new border procedure, only applicable in the transit zone, was implemented[572] combining detention without court control with an accelerated procedure that includes no real access to legal assistance and limits legal remedies.[573] Asylum seekers may be detained in the transit zone for the duration of the asylum procedure. Also, a number of criminal procedural rules have been altered in such a way that the irregular entry of asylum seekers through the fence has been criminalized. As a practical result of the new amendments,

[566] *Op.cit.* Act CXL of 4 September 2015 on the Amendment of Certain Acts relating to the Management of Mass Immigration.
[567] The amendments, which affected ten different acts, including the Asylum Act, the Criminal Code, the Borders Act, and the Act on Construction, to name a few, gave the government the authority to disregard laws governing the environment, new building construction, and criminal procedures.
[568] Government resolution 1401/2015 (VI. 17) on certain measures necessitated by the exceptional immigration pressure (No 83 of 2015) referred to this as "a provisional fence serving border control.
[569] Art. 352 (a)(b)(c) of Act C of 2012 on the Penal Code, as amended by Act CXL of 2015.
[570] Art. 5(a)(d) and art. 15 of Act LXXXIX of 2007 on State Borders.
[571] *Op.cit.* Government Decree no. 41/2016. (III. 9.) on ordering the crisis situation caused by mass migration in relation to the entire territory of Hungary, and other relevant rules concerning the declaration, existence, and termination of the crisis situation.
[572] Art. 71(A) of Act LXXX of 2007 of 1 January 2008 on Asylum.
[573] *Op.cit.* Nagy, Boldizsár, p.1048.

asylum seekers are now required to wait in the 'transit zone' for the outcome of the admissibility procedure. So far, almost all applications submitted by asylum seekers who came through Serbia have been ruled inadmissible on the basis of the 'safe third country' concept. Those whose asylum claims are denied do not have the right to an effective remedy against the refusal of their asylum application or against a deportation order, and they are also pushed back to the Serbian border by a police officer.[574] These measures resulted in a drop in asylum applications between October 2015 and January 2016, demonstrating the impact of the 'fences.'[575] The interpretation of the 'criminalization' of irregular entry of asylum seekers, the detention in a 'transit zone', and 'push back policy' is further examined in the following chapter.

In 2016, a second round of amendments will take place in a more restrictive direction, with an emphasis this time on combating irregular migration, including the irregular entry of asylum seekers. New amendments to the Hungarian Asylum Act and the Act on the State Border were introduced.[576] Based on the amendments, a second fence was constructed on the Croatian-Hungarian border, consisting mainly of barriers on minor sections of the Croatian border not separated by the Drava River. Also, the amendments allow Hungarian police to automatically send asylum seekers apprehended within 8 kilometres of the Hungarian- Serbian or Hungarian -Croatian border to the other side of the border fence, without registering their data or allowing them to claim asylum, in a summary procedure lacking the most basic procedural safeguards.[577] Therefore, asylum claims could only be made from the outside, on the Serbian side, via official checkpoints in 'transit zones.'

While Hungary 'insisted that building the fence is legally within its rights'[578] and that it is needed to support the country in meeting serious challenges such as combating irregular migration,[579] some human rights organizations[580] 'have castigated the country for

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[574] *Ibid.*

[575] Asylum Information Database. "Country Report: Hungary." 2016, p.7. Retrieved from https://asylumineurope.org/wp-content/uploads/2017/04/report-download_aida_hu_2016update.pdf Accessed 1 March 2022.

[576] *Op.cit.* Act XCIV of 2016 on the amendment of necessary modification in order to the broad application of the border procedures.

[577] *Op.cit.* Asylum Information Database. "Country Report: Hungary." 2016, p.17

[578] Bilefsky, Dan. "Hungary's Plan to Build Fence to Deter Migrants Is Criticized." *The New York Times*,18 June 2015. Retrieved from https://www.nytimes.com/2015/06/19/world/europe/hungarys-plan-to-build-fence-to-deter-migrants-is-criticized.html Accessed 8 January 2022.

[579] *E.g.* in this context, the Hungarian Minister of Foreign Affairs and Trade Szijjártó stressed that the government is not violating any EU or international laws with the measure. According to him, the country did not take "a unique measure and there is such a border closure on the Greek-Turkish and Bulgarian-

tightening its asylum policies' because asylum seekers can only apply for asylum in border transit zones.[581] The two approaches will be discussed in depth in the following chapter.

On 28 March 2017, an additional package of legislative amendments entered into force.[582] According to section 11 of Act XX of 2017, which added a new subparagraph 1b to Section 5 of Act LXXXIX of 2007 on State Borders, crisis situation caused by mass immigration, the police may apprehend foreign nationals who are irregularly residing in Hungary and escort them beyond the gate of the nearest facility, unless they are suspected of having committed a crime. Indeed, the previously mentioned territorial restriction of pushbacks to the eight-kilometre border perimeter is being suspended, and the police are given authority to apprehend and automatically escort through the border fence any irregular migrants apprehended anywhere on the territory of Hungary.

The government's rhetoric behind its measures was that it wanted to limit irregular migration, completely secure the Schengen country borders, and provide proper treatment to asylum seekers who have legal documentation to apply for asylum.[583] In 2018, Hungary went one step farther in preventing irregular migration by enacting the so-called 'Stop Soros' package of laws, which creates a new category of crime called 'promoting and supporting illegal migration.'[584] The legislation criminalizes any assistance offered by any person on behalf of national, international, and NGOs to asylum seekers intending to claim asylum inside the country.[585] It drew immediate criticism from the European Commission

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Turkish borders and Spanish towns are also defending themselves this way." Source: Global Security organization. "Border Fence with Serbia and Croatia."
Retrieved from https://www.globalsecurity.org/military/world/europe/hu-border-fence.htm Accessed 8 January 2022.

[580] Mainly the Hungarian Helsinki committee (hereafter 'HHC') and the Open Society Foundations.

[581] Bilefsky, Alasdair. "Hungary completes a new anti-migrant border fence with Serbia." *Euronews* 28 April 2017. Retrieved from https://www.euronews.com/2017/04/28/hungary-completes-new-anti-migrant-border-fence-with-serbia Accessed 11 January 2022.

[582] Act XX of 2017 on the Amendment of Certain Acts Relating to Strengthening the Procedure Conducted in Border Surveillance Areas which amended the following pieces of legislation: the Act on Asylum, the Act on the Admission and Right of Residence of Third-Country Nationals, the Act on State Border, the Act on Minor Offences and the Act on Child Protection and Guardianship Management.

[583] Székely, Tamás. "Hungarian Parliament Passes Law Amendments To Tighten Immigration Rules." *Hungary Today*, 6 July 2015. Retrieved from https://hungarytoday.hu/hungarian-parliament-passes-law-amendments-tighten-immigration-rules-56850/ Accessed 28 February 2022.

[584] Art. 353 (A) of Act C of 2012 on the Penal Code. The package defines support for illegal immigration in the Penal Code as offering to initiate an application for asylum to anybody who has arrived from, or passed through on the way to Hungary, any country in which that person was not persecuted.

[585]Kingsley, Patrick. "Hungary Criminalizes Aiding Illegal Immigrants." *New York Times*. 20 June 2018. Retrieved from https://www.nytimes.com/2018/06/20/world/europe/hungary-stop-soros-law.html Accessed 11 January 2022.

and several human rights organizations and international institutions.[586] It has been perceived as a breach of the ECHR and EU Asylum Law. It is within this context that the European Commission referred Hungary to the CJEU for non-compliance of its asylum legislation with EU law.[587] In the same vein, both Open Society Foundations[588] and HHC filed a complaint before the Hungarian Constitutional Court and the CJEU, considering that the legislation breaches the guarantees of freedom of expression and association consecrated in the ECHR. [589]

The Hungarian government's closed-door asylum policy is designed to protect public and national security and cultural identity. It also aims to secure the border, prevent irregular migration, and reduce 'unwanted' migration flows. When entering through these 'irregular channels', asylum seekers are perceived as a threat to national sovereignty because they have entered without the state's authorisation, thus breaching its sovereignty. It is important to note that the restrictive asylum policy reflects the willingness of Hungarian citizens. For example, the 'National Consultation on Immigration and

[586] ""European Commission. "Venice Commission concerned about Stop Soros." *Budapest Business Journal*, 23 June 2018. Retrieved from https://bbj.hu/politics/foreign-affairs/eu/ec-venice-commission-concerned-about-stop-soros Accessed 11 January 2021; Gotev, Georgi. "European Commission steps up infringement procedures against Hungary." *EURACTIV*, 13 July 2017. Retrieved from https://www.euractiv.com/section/justice-home-affairs/news/european-commission-steps-up-infringement-procedures-against-hungary/ Accessed 11 January 2021.

[587] The European Commission notes that the Hungarian legislation falls short of the requirements of the Asylum Procedures Directive on several counts. Among these, it says that: (1) the border procedure implemented by Hungary is not in compliance with EU law as it does not respect the maximum duration of four weeks in which someone can be held in a transit centre and fails to provide special guarantees for vulnerable applicants;(2) Hungary fails to provide effective access to asylum procedures as irregular migrants are escorted back across the border even if they wish to apply for asylum;(3)The indefinite detention of asylum seekers in transit zones without respecting the applicable procedural guarantees is in breach of EU rules as set out in the Reception Conditions Directive; and (4) Hungarian law does not comply with the EU's Return Directive as it fails to ensure that return decisions are issued individually and encompass information on legal remedies. Source: European Commission. "Migration and Asylum: Commission takes further steps in infringement procedures against Hungary." 28 September 2018. Retrieved from https://ec.europa.eu/commission/presscorner/detail/en/IP_18_4522 Accessed 12 January 2022; case C-821/19(*Incrimination de l'aide aux demandeurs d'asile),* Judgment of the *Commission v. Hungary* Court (Grand Chamber) of 16 November 2021, CJEU, paras. 115 to 164.

[588] Open Society takes legal action over the 'Stop Soros' law. The complaint argues that these measures breach Open Society's rights under Article 11 of the ECHR, which protects the rights to freedom of assembly and association. The application also argues that the legislation has a wider, chilling effect on the rights of civil society groups in Hungary and establishes a dangerous precedent restricting the Open Society's right to freedom of expression, protected under Article 10 of the ECHR. Source: "Soros foundation turns to Strasbourg court to get Hungary's NGO law repealed." *Reuters*, 24 September 2018. Retrieved from https://www.reuters.com/article/us-hungary-soros-court-idUSKCN1M41H4 Accessed 12 January 2022.

[589] "HHC takes legal action to challenge the anti-NGO laws." *Pressenza Budapest.* 26 September 2018. Retrieved from https://www.pressenza.com/2018/09/hungarian-helsinki-committee-takes-legal-action-to-challenge-the-anti-ngo-laws/ Accessed 12 January 2022; HHC. "ECtHR Rights – Application, concerning criminalizing aides of asylum seekers." September 2018, pp. 1-6. Retrieved from https://www.helsinki.hu/wp-content/uploads/Application_HHC_SS3.pdf Accessed 13 January 2022.

Terrorism,' held between April and July 2015,[590] was viewed as an immigration and asylum policy measure that could help to solve the problems and conflicts associated with the migratory flow.[591] The government communicated the results through the media and through billboard advertisements as a huge success by using these slogans: 'The Hungarians have decided: they do not want illegal migrants' and 'The Hungarians have decided: the country should be defended!'[592]

Also, it is crucial to mention that the rejection of the provisional mechanism for the mandatory relocation of asylum seekers was presented as reflecting the will of Hungarian citizens. Under the provisions of Article 8 of the Constitution of 2012, the Hungarian government initiated a referendum in response to the EU's proposal for a provisional mechanism for the mandatory relocation of asylum seekers.[593] The referendum was held in Hungary on 2 October 2016. On the ballot was a simple question: 'Do you want the EU to be entitled to prescribe the mandatory settlement of non-Hungarian citizens in Hungary without the agreement of the National Assembly?' [594] Almost all Hungarians who voted in the referendum rejected the EU's provisional mechanism for the mandatory relocation of asylum seekers. The referendum result reflects the willingness of Hungarian citizens to preserve their cultural, religious, and linguistic heritage.

The 'Hungarian solution' was based on legislative measures such as amendments to the Hungarian asylum law and the law on state border; the 'safe third country' rule, 'the situation of the crisis', and the law on fences. The government insisted on the fact that those measures reflect the will of Hungarian citizens and comply with their EU and international obligations. It has taken the steps to protect not only the internal European freedoms but also the security of Hungary's and Europe's citizens. However, changes to

[590] Website of the Hungarian Government. "National consultation on immigration to begin." 24 April 2015. Retrieved from https://2015-2019.kormany.hu/en/prime-minister-s-office/news/national-consultation-on-immigration-to-begin Accessed 1 March 2022.

[591] On 24 April 2015, the Hungarian Post Office began delivering printed consultation letters to all Hungarian citizens over the age of 18. The letter included a questionnaire with 12 questions about immigration and terrorism. The consultation received a wide range of criticism because it suggested that immigration and terrorism are inherently related issues. Source: Bocskor, Ákos. "Anti-Immigration Discourses in Hungary during the 'Crisis' Year: The Orbán Government's 'National Consultation' Campaign of 2015." *Sociology*, vol. 52, no. 3, June 2018, p. 551.

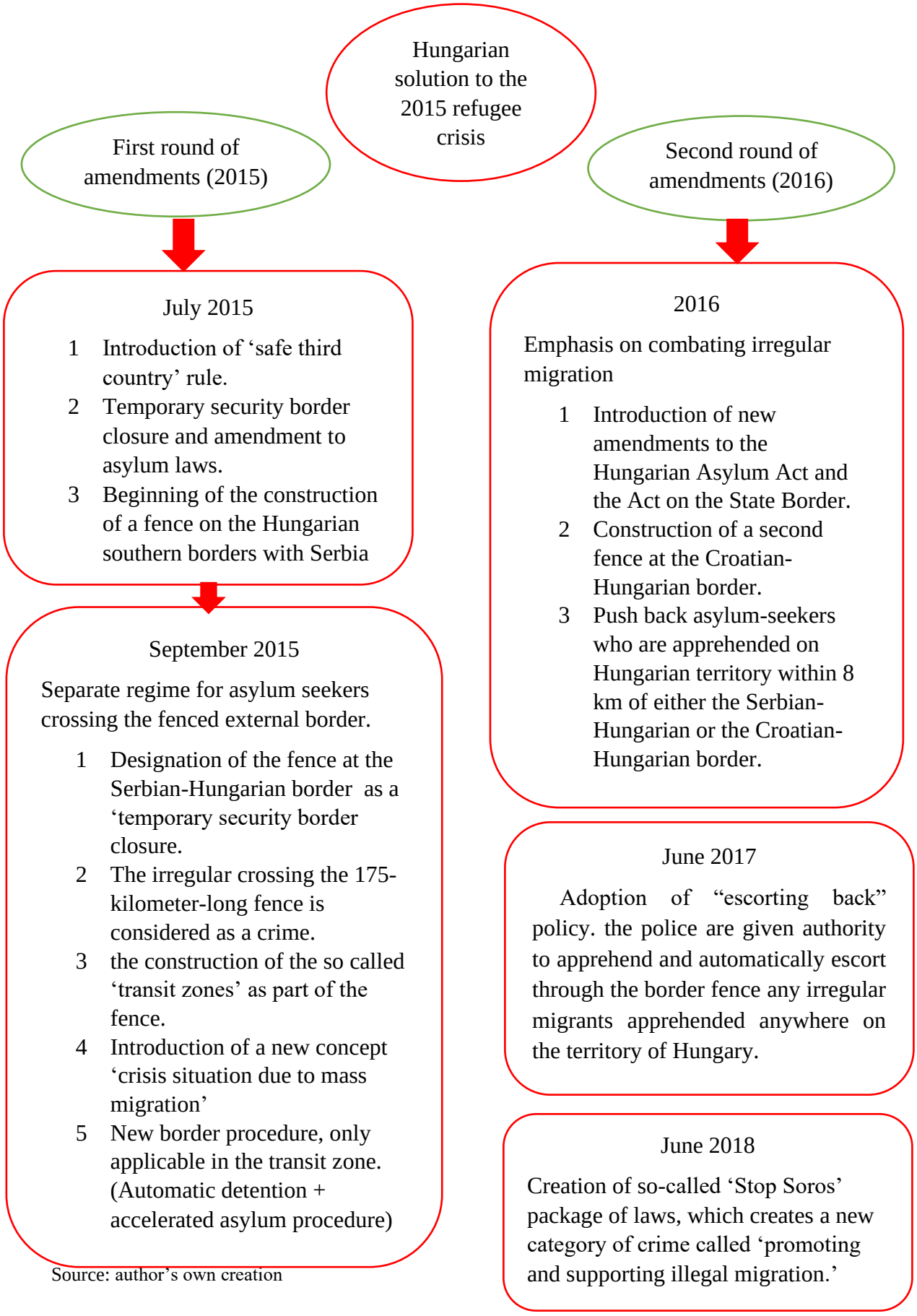
[592] Kiss, Eszter. ""The Hungarians Have Decided: They Do Not Want Illegal Migrants" Media Representation of the Hungarian Governmental Anti-Immigration Campaign." *Acta Humana*, vol. 6, 2016, p. 48.

[593] European Commission. "*Refugee Crisis: European Commission takes decisive action."* Press release, 2015. Retrieved from https://ec.europa.eu/commission/presscorner/detail/en/IP_15_5596 Accessed 12 January 2022.

[594] Gessler, Theresa. "The 2016 Referendum in Hungary." *East European Quarterly*, vol. 45, no. 1-2, 2017, pp. 85-97.

Hungarian asylum law resulted in a closed-door and restrictive asylum policy. A policy aimed at limiting and deterring access to asylum procedures in the country, as discussed in detail in the subsequent chapter.

Chart No.1. : The Hungarian Solution: A unique one



Source: author's own creation

3.2. The case of Poland

As previously stated, Poland has faced two types of 'crises', the 'Ukrainian Crisis' and the 2015-16 refugee crisis. The latter coincided with the Polish parliamentary electoral campaign. For the first time in Poland, right-wing political parties included asylum and migration policies on a large scale in their political agenda.[595] The 2015-16 refugee crisis was framed as a threat to public security and national identity.[596] It is claimed that the 2015-16 refugee crisis was a major factor in PiS's victory.[597] It is important to note that Poland's position on the 2015-16 refugee crisis, as displayed in 2015 and early 2016, is not the same as the position of the two governments, which is different.

Poland's national asylum policy is based on the need to prevent irregular migration and potential threats to national security, as well as the need to protect national values and cultural identity.[598] In other words, the Polish political debate and securitization approach on asylum has been dominated by the following points: the fear of a potential mass influx of asylum seekers to Poland from politically unstable Eastern Ukraine; the implementation of the EU provisional mechanism for the mandatory relocation of asylum seekers, and the threat of terrorism.[599]

The 2017 Draft Amendment to the Act of 13 June 2003 on Granting Protection to Aliens on the Territory of the Republic of Poland, [600] which introduces a border procedure

[595] Krzyżanowski, Michał. "Discursive Shifts in Ethno-Nationalist Politics: On Politicization and Mediatization of the "Refugee Crisis" in Poland." *Journal of Immigrant & Refugee Studies,* vol.16, no. 1/2, 2018, pp.76-79. Troszyński, Marek & El-Ghamari, Magdalena. "A Great Divide: Polish media discourse on migration 2015–2018." *Humanities and Social Sciences Communications,* vol. 9, 2022, pp.1-3.

[596] Witold, Klaus. Security First: The New Right-Wing Government in Poland and its Policy towards Immigrants and Refugees. *Surveillance Society*, vol.15, no.3/4, 2017, p. 523.

[597] Sengoku, Manabu. "Parliamentary election in Poland: Does the migrant/refugee issue matter?" *Journal of the Graduate School of Letters,* vol. 13, 2018, p. 35

[598] Narkowicz, Kasia. "'Refugees Not Welcome Here': State, Church and Civil Society Responses to the Refugee Crisis in Poland." *International Journal of Politics, Culture, and Society,* vol 31, 2018, p.364; Szulecka, Monika. "Border Management and Migration Controls in Poland." RESPOND Multilevel Governance of Migration and Beyond Project, paper 2019/24, 2019, pp.29.

[599] Sadowski, Piotr & Szczawińska, Kinga. "Poland's Response to the EU Migration Policy." *The Migrant Crisis:European Perspectives and National Discourses,* edited by Melani Barlai et *al.*, Lit Verlag Publisher, Zürich, 2017, pp. 220-221.

[599] In January 2017, the Minister of the Interior and Administration presented a Draft Amendment to the Act of 12 December 2013 on Foreigners and other acts including the act of 13 June 2003 on granting protection to aliens within the territory of the Republic of Poland, which introduces a border procedure for granting international protection. The Draft Amendments have been introduced since 2017, but will not be adopted until 2021, following several changes to the proposal. Act of 14 October 2021 Amending the act of 12 December 2013 on Foreigners and other acts including the act of 13 June 2003 on granting protection to aliens within the territory of the Republic of Poland (adopted on 14 October 2021 and entered into force on 26 October 2021).

[600] *Ibid.*

for granting international protection, is the first step that reveals the new government's preference for a restrictive asylum policy. The proposed Draft Amendments to asylum law imposed stricter border asylum procedures, including the option of detaining people during border procedures, accelerated procedures, and the broad application of detention of asylum seekers.[601] It applies to persons who claim asylum at the border, do not meet the entry requirements, and fall into one of the following categories: they presented other reasons than persecution in the asylum application, they came from a 'safe country of origin' or a 'safe third country', they lodged a subsequent asylum application based on the same circumstances, *etc*. [602] Asylum seekers subjected to the border procedure will be automatically detained without access to alternatives to detention, and their asylum proceedings will be accelerated. There are serious doubts about whether border procedures can be carried out on state territory rather than at the border. According to the justification to the Draft Amendments, border proceedings will be conducted in two detention centres, in *Biala Podlaska* (about 30 kilometres from the border) and in *Lesznowola* near Warsaw, creating a legal fiction in which asylum seekers who have de *facto* crossed the border will not be authorized to enter Poland.[603] Furthermore, based on the Draft Amendments, rejected asylum seekers may be deported without the opportunity to appeal a negative decision at the border. [604] In addition, persons, including asylum seekers, who are apprehended after crossing the Polish border irregularly, will be required to leave Polish territory.[605] They will be barred from entering the country for a period ranging from 'six months to three years.'[606] Also, Article 2 of the Draft Amendments modifies Article 33 of the Act on Granting Protection to Foreigners on the Territory of the Republic of Poland by allowing the Head of the Office of Foreigners to refuse to examine an application for international protection where a foreigner is apprehended immediately after crossing the Polish border. This means that Polish authorities will have the authority 'to leave

[601] The proposed Art. of 33 Act of 13 June 2003 on Granting Protection to Foreigners in the territory of the Republic of Poland.
[602] *Ibid.*
[603] Białas, Jacek. "Poland: Draft amendment to the law on the protection of foreigners – another step to seal Europe's border." ECRE, 10 March 2017. Retrieved from https://ecre.org/poland-draft-amendment-to-the-law-on-protection-of-foreigners-another-step-to-seal-europes-border-op-ed-by-polish-helsinki-committee/ Accessed 1 March 2022.
[604] The proposed Art. 303 of Act of 13 June 2003 on Granting Protection to Foreigners in the territory of the Republic of Poland.
[605] Art. 49(A)Act of 24 August 2001 on the Code of Practice for Petty Offences states that illegal individual border crossing is a minor offense, punished with a fine; Art. 264(2) of the Penal Code of Poland stipulates that if someone crosses the Polish border using violence, threat, deception, or in cooperation with others they may face imprisonment for up to 3 years.
[606] Provisions 2 (A)(B) of the regulation of the Ministry of Interior and Administration of 13 March 2020 on temporary suspension or restriction of border traffic at certain border crossing points.

unexamined' an asylum application filed by a foreigner who is apprehended immediately after entering the country irregularly.[607]

The Draft Amendments also include lists of 'safe countries of origin' and 'third safe countries.'[608] These lists will be created in accordance with government regulations and will be updated every two years. Concerns have been raised about the possibility of designating Belarus and Ukraine as 'safe third countries', as well as the Russian Federation as a 'safe country of origin'.[609] As a result, all asylum seekers would face border proceedings and would be effectively barred from entering the country.

In addition, the Draft Amendment will establish a new governmental body, the Foreigners Board. It would be in place of the current Refugee Board. The main distinction is that the Foreigners Board is intended to function as a court, with the authority to hear appeals against both asylum and return decisions.[610] The analysis of the proposed provisions, however, raises concerns about the Foreigners Board being treated as a court, with concerns that it is actually dependent on the Ministry of Interior and automatically upholds first instance negative asylum decisions.[611]

The Polish government was in favour of a more restrictive asylum policy. The explanatory Memorandum prepared in support of this Draft Amendment discussed the need for asylum law reform.[612] The rationale for these amendments, as outlined in the Explanatory Memorandum for the Draft Amendments, can be summarized as follows: First, 'deformalizing' procedures at the border in order to ensure swift removal of a foreigner from Polish territory; second, accelerated returns; and third, prohibition of re-entry into Poland and Schengen countries. The overarching goal of the Explanatory Memorandum indicates that the rationale for this is to prevent abuse of the international protection system, to ensure internal order and security, and to protect the Polish state and

[607] "Poland passes law allowing migrant pushbacks at border." *InfoMigrants*, 15 October 2021. Retrieved from https://www.infomigrants.net/en/post/35768/poland-passes-law-allowing-migrant-pushbacks-at-border Accessed 1 March 2022.
[608] The safe country of origin concept is no longer applicable in Poland as a result of the 2015 law reform. However, the draft law, submitted in 2017 (and updated in February 2019, and adopted in 2021), introduces the concept of 'safe country of origin' and calls for the creation of national lists of both safe countries of origin and safe third countries. According to recent data, Poland does not yet have a 'safe third country' in its national legal framework. No further information is available
[609] *Op.cit.* Białas, Jacek, 2017.
[610] *Ibid.*
[611] *Ibid.*
[612] According to the Explanatory Memorandum, 'according to this petitioner, this Bill is not inconsistent with EU law' and was not submitted to European Union institutions. The Bill is premised in the Regulatory Impact Assessment (Section 2) as an obligation to protect the European Union's external border, as required by the Schengen Border Code.

its residents from 'radicalized representatives of various cultures and religions, or even extremists.'[613] The justification connects this to terrorist atrocities in Europe in 2015 and 2016. According to the Explanatory Memorandum, these measures are being imposed to protect Europe's external borders and are mandated by EU law.[614]

The Drat Amendments have been considered incompatible with Poland's international legal obligations.[615] For example, the proposed asylum procedure has been perceived as failing to provide the necessary safeguards and guarantees. The limiting grounds for requesting international protection, as well as the lack of individual risk assessment of the cases that people present to border guards, can lead to a violation of the obligation of indirect *non-refoulement*, as established by Article 33 CSR51 and pursuant to positive obligations under Articles 2 and 3 ECHR. [616] The proposed provisions will unjustifiably limit the right to an effective remedy for asylum seekers in Poland, either at the border or on Polish territory, by limiting the possibility of making claims for international protection and failing to provide an effective right of redress and appeal.[617]

Despite criticism and recommendations to substantially revise or drop the draft amendments,[618] the most recent version of the draft act was approved on 14 October 2021.[619] It is worth noting that the Draft Amendments took four years to be approved. [620] Since 2017, the draft has gone through several different versions, and its adoption has been

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[613] This source provided the information. Source: Organization for Security and Co-operation in Europe. "Urgent opinion on draft amendments to the aliens' act and the act on granting protection to aliens on the territory of the republic of Poland and ministerial regulation on temporary suspension of border traffic at certain border crossings." Opinion-Nr.: MIG-POL /428/2021, 10 September 2021, Warsaw, pp. 11. Retrieved from https://www.osce.org/files/f/documents/3/3/498252_0.pdf Accessed 6 February 2022

[614] *Ibid.* p.11

[615] Human Rights Watch. "Eroding Checks and Balances Rule of Law and Human Rights Under Attack in Poland." 24 October 2017, pp. 5-6. Retrieved from https://www.hrw.org/sites/default/files/report_pdf/poland1017_web.pdf Accessed 1 March 2022; The Association for Legal Intervention (*Stowarzyszenie Interwencji Prawnej*). "New draft law on refugees violates international legal standards." 21 September 2021. Retrieved from https://interwencjaprawna.pl/en/the-draft-law-limiting-refugees-rights-we-comment/ Accessed 6 February 2022; *Op.cit.* Urgent opinion on draft amendments to the aliens' act." 2021; Commissioner for Human Rights. Draft Amendments to the Aliens Act. Opinion of OSCE/ODIHR, 16 September 2021. Retrieved from https://bip.brpo.gov.pl/en/content/draft-amendments-aliens-act-opinion-osceodihr Accessed 6 February 2022.

[616] UNHCR. "UNHCR observations on the draft law amending the Act on Foreigners and the Act on Granting Protection to Foreigners in the territory of the Republic of Poland." (UD265), 16 September 2021, paras. 8-18-23.

[617] *Ibid.* paras. 23-25.

[618] *Ibid.; Op.cit.* Urgent opinion on draft amendments to the aliens' act…" 2021.

[619] *Op.cit.* Act of 14 October 2021 Amending the act of 12 December 2013 on Foreigners and other acts including the act of 13 June 2003 on granting protection to aliens within the territory of the Republic of Poland.

[620] Website of the Republic of Poland. "Changes in the Act on Foreigners." 25 January 2022. Retrieved from https://www.gov.pl/web/udsc-en/changes-in-the-act-on-foreigners Accessed 1 March 2022.

postponed several times. The Afghan crisis in 2021, as well as the pressure on the Polish border, appear to have accelerated the approval of the Draft Amendments. Even prior to the adoption of the aforementioned Draft Amendments, alleged denial of access to the asylum procedure, alleged criminalization of irregular entry of asylum seekers, and alleged push back policy have been observed in practice since 2015, as will be discussed in the following chapter.

Aside from that, special attention should be paid to a document titled 'Polish Migration Policy-Baseline Analysis' prepared in 2019 by the Ministry of the Interior and Administration.[621] While the document addresses a variety of people on the move, the emphasis on international protection was dominated by the 'anti-refugee narrative.'[622] The executive document discusses international protection in the context of a security threat as well as challenges related to the growing burden on public administration resulting from state responsibilities to foreign nations seeking international protection. In the draft, asylum seekers are frequently associated with illegal migration, [623] national security threats, and forced expulsions.[624] Asylum seekers fleeing persecution and wars are presented as 'bogus refugees who violate migration laws.'[625] The document conceives further restrictions on the reception and boundaries of the types of persons who could claim asylum, which limit and endanger the rights of asylum seekers in Poland.[626] Besides, the draft mentioned the high cost of social assistance and medical care for applicants, abuse of asylum procedures by applicants; and the negative impact of appeal options on the length of proceedings; and the potential security threats posed by foreign nationals seeking international protection.[627]

In the wake of the terrorist attack in Brussels, Poland passed the so-called anti-terrorism law in anticipation of potential security threats from foreigners.[628] While it makes no

[621] Polish Migration Policy – Baseline Analysis ("Polityka migracyjna Polski – diagnoza stanu wyjściowego"). There is no English version available.
[622] Szczutowska, Alicja. "Poland: New Migration Policy Document Announced." Project 'V4NIEM: Visegrad Countries National Integration Evaluation Mechanism Retrieved from http://www.forintegration.eu/pl/poland-new-migration-policy-document-announced 6 February 2022.
[623] Pędziwiatr, Konard. "The new Polish migration policy-false start." *Open Democracy,* 2019. Retrieved from https://www.opendemocracy.net/en/can-europe-make-it/the-new-polish-migration-policy-false-start/ Accessed 6 February 2022.
[624] Pędziwiatr, Konard. "Migration Policy and Politics in Poland." Centre of Migration Research, Warsaw, 20 August 2019. Retrieved from https://respondmigration.com/blog-1/migration-policy-politics-poland Accessed 16 January 2021.
[625] *Ibid*
[626] *Ibid.*
[627] *Op.cit.* Szczutowska, Alicja. Poland: New Migration Policy Document Announced.
[628] Act of 10 June 2016 on anti-terrorist activities and on the amendments to other Acts.

mention of asylum seekers, the law does demonstrate the country's securitization strategy. For instance, Poland refused to accept asylum seekers and to participate in the provisional mechanism for the mandatory relocation of asylum seekers for 'security' reasons, citing the perception that every refugee is a potential terrorist. As quoted by TVP Info, the Polish Member of the European Parliament, Czarnecki, proclaimed that 'Poland has no terrorist attacks because [it] withdrew from a plan approved by the previous government to accept thousands of migrants, known as refugees.'[629]

Under the anti-terrorism law, the Chief of the Internal Security Agency will be authorized to order 3-months wiretapping of a foreigner without a judicial order if there is a risk that he/she is involved in terrorist activities.[630] Besides, in accordance with the law, every foreigner in Poland can be put under surveillance without a court order, for essentially an indefinite period of time.[631] Additionally, it gives the Internal Security Agency, the police, and the Border Guard the authority to get foreigners' fingerprints, facial photos, and even biological material (DNA) if there are any suspicions about their identity. However, it is unclear whether the absence of a reference to EURODAC[632] in the terrorism law is intentional or unintentional.

Critical voices were expressed by several human rights organizations.[633] The anti-terrorism law has been perceived as 'controversial' and containing measures that are inconsistent with the Polish Constitution, the CFR, and the Convention for the Protection of Human Rights and Fundamental Freedoms.[634] The list of controversies includes the

[629] Claudia, Ciobanu. "Poland follows Hungary's footsteps in corralling migrants." *Politico Online*, 2017. Retrieved from https://www.politico.eu/article/refugees-europe-poland-follows-hungarys-footsteps-in-corralling-migrants/ Accessed 15 January 2022.
[630] *Op.cit*. Art. 9 of Act of 10 June 2016 on anti-terrorist activities and on the amendments to other Acts.
[631] *Op.cit*. Frelak, Justyna Segeš, 2017, p.23
[632] Eurodac is a large-scale IT system that has been helping with the management of European asylum applications since 2003 by storing and processing the digitalized fingerprints of asylum seekers and irregular migrants who have entered a European country. Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice OJ L 180, 29 June 2013, pp. 1–30.
[633] Including the Commissioner for Human Rights in Poland, Helsinki Foundation for Human Rights, Amnesty International Poland, and the Polish Data Protection Authority.
[634] Panoptykon Foundation."Poland adopted a controversial anti-terrorism law." 22 June 2016. Retrieved from https://en.panoptykon.org/articles/poland-adopted-controversial-anti-terrorism-law Accessed 16 January 2021.

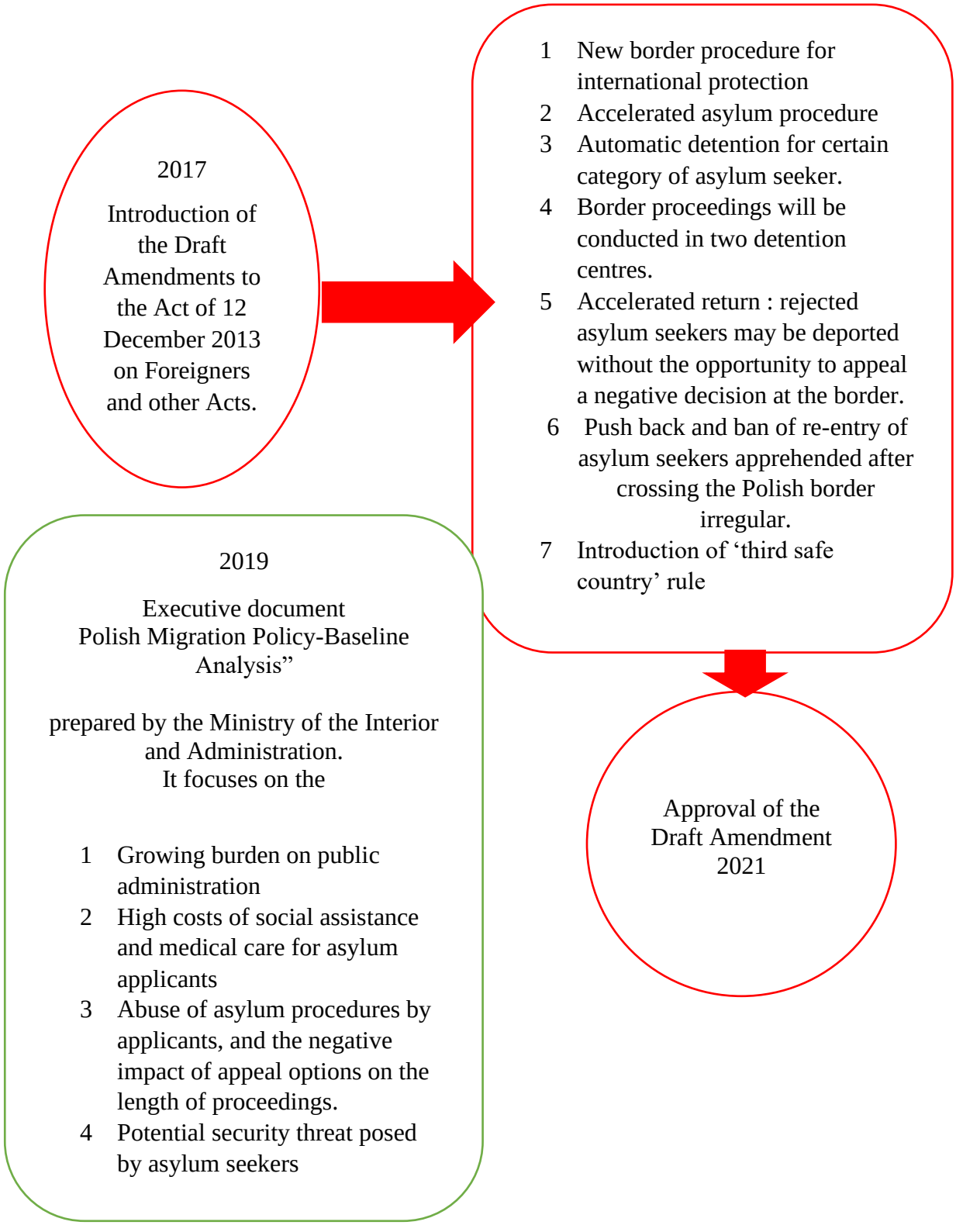
violation of the rights of asylum seekers.[635] In this context, the Polish Commissioner for Human Rights challenges the anti-terrorism Act before the Constitutional Tribunal to clarify whether the law complies with the Polish Constitution.[636]

To sum up, the Polish orientation towards tightening asylum procedures and restricting access to asylum was visible in the Draft Amendments to the Polish asylum law. Two observations should be made. First, the Draft Amendments, which had been introduced in 2017 and changed several times, took more than four years to be adopted in 2021. Second, it appears that Poland was influenced by Hungarian asylum policy, *e.g.* the notion of 'safe third country' rule and 'transit zones' where asylum seekers could claim asylum. The question is: why did it take Poland more than four years to approve the Draft Amendments? Is it because of the significant EU and international criticism and recommendations not to amend asylum law, or because it was not a priority for the country? I presume that the delay in adopting the Draft Amendment is irrelevant because the country already has a restrictive asylum policy in practice. Asylum denial, criminalization of irregular entry of asylum seekers, and, most notably, the practice of push-back have all been observed, as will be discussed in the following chapter.

[635] *Ibid.*

[636] On 2 May 2018, Commissioner Adam Bodnar withdrew his motion from the Constitutional Tribunal concerning the Act of 10 June 2017 on Counter-Terrorism Measures. Mr. Adam Bodnar had experienced harassment and reprisals. The ruling party PiS applied intense political pressure, while Parliament cut the commissioner's budget by 20% and changed regulations to make it easier to remove the commissioner's legal immunity. The government obstructed the functioning of the Constitutional Court which is responsible for monitoring the conformity of laws with the constitution and responsible for reviewing the compliance of laws with the constitution. Source: OHCHR. A/HRC/42/30, 9–27 September 2019; OHCHR. A/HRC/45/36. 14 September–2 October 2020; Cirillo, Jeff. "Political Attacks on Eastern Europe Watchdogs Compound Threats to Democracy. Just Security." *Just Security,*14 August 2020. Retrieved from https://www.justsecurity.org/71593/political-attacks-on-eastern-europe-watchdogs-compound-threats-to-democracy/ Accessed 6 February 2022.

Chart No.2.: Poland follows Hungary's lead in terms of asylum policy



Source: author's own creation.

3.3. The Case of Czechia

Although the 2015-16 refugee crisis gained media and political coverage, there was no sudden legislative 'turning point' in Czech asylum policy.[637] Even so, the crisis was framed as a threat to public security [638], and cultural and religious identity.[639] Since then, there has been a push for restrictive asylum policies based on a 'security paradigm',[640] protection of the EU border,[641] eliminating all forms of irregular migration,[642] and increased 'immigrant selectivity.'[643]

Some legal initiative show that Czechia is moving towards a more restrictive asylum policy.[644] On 3 December 2015, Czechia amended its Act No. 325/1999 Coll. of 11 November 1999 on Asylum; Act No. 326/1999 Coll., of 1 January 2000 on the Residence of Foreign Nationals in the Territory of the Czech Republic.[645] The amendment expanded the list of grounds for detention of asylum seekers and increased the period of detention. Asylum seekers can be detained for up to 180 days as asylum.[646]

Also, the government increased detention capacity and sent police and army patrols to search trains arriving from Hungary.[647] According to the Czech interior minister, these detention measures were designed to send a 'message' to refugees hoping to enter the

[637] *Op.cit.* Marie Jelínková. 2019, p. 43
[638] Jurečková, Adéla. "Refugees in the Czech Republic? Not a trace – but still a problem." Heinrich-Böll-Stiftung, Berlin, 24 May 2016. Retrieved from https://eu.boell.org/en/2016/05/24/refugees-czech-republic-not-trace-still-problem Accessed 1 March 2022.
[639] Kluknavská, Alena & Bernhard, Jana & Boomgaarden, Hajo G. "Claiming the Crisis: Mediated Public Debates about the Refugee Crisis in Austria, the Czech Republic and Slovakia." *Journal of Refugee Studies*, Vol. 34, no.1, 2021, pp.241-263.
[640] Drbohlav, Dušan & Janurová, Kristýna. "Migration and Integration in Czechia: Policy Advances and the Hand Brake of Populism." Migration Policy Institute, Washington, 6 June 2019. Retrieved from https://www.migrationpolicy.org/article/migration-and-integration-czechia-policy-advances-and-hand-brake-populism Accessed 1 March 2022.
[641] *Schengen Visa Info*. "Over 7,000 Illegal Migrants Detained by Czechia's Police in 2020." 12 February 2021 Retrieved from https://www.schengenvisainfo.com/news/over-7000-illegal-migrants-detained-by-czechias-police-in-2020/ Accessed 1 March 2022.
[642] Ministry of Interior of Czech Republic. "The Czech Government's Migration Policy Principles." Retrieved from https://www.mvcr.cz/mvcren/article/the-czech-government-s-migration-policy-principles.aspx Accessed 1 March 2022; Denková, Adéla. "Czech government insists migration controls should precede relocation demands." *EURACTIV.cz*, 24 Jul 2017. Retrieved from https://www.euractiv.com/section/development-policy/news/czechs-insist-migration-controls-should-precede-relocation-demands/ Accessed 1 March 2022.
[643] *Op.cit.* Drbohlav, Dušan & Janurová, Kristýna, 2019.
[644] *Op.cit.* Schultheis, Silja, 2015.
[645] Art. 2 of Act No. 314/2015 Coll.
[646]Global detention project. "Immigration Detention in the Czech Republic" 2018. Retrieved from https://www.globaldetentionproject.org/countries/europe/czech-republic Accessed 1 March 2022.
[647] Basch, Robert & Marta Miklušáková. "The Refugee Crisis in the Czech Republic: Government Policies and Public Response." ARIADNE: European Funders for Social Change and Human Rights, 2017, Retrieved from https://www.ariadne-network.eu/refugees-europe-perspective-czech-republic/ Accessed 1 March 2022.

country.[648] As a result, as will be discussed in the following chapter, systematic detention of asylum seekers has occurred in the country.

Similarly, Czechia's government refused to participate in the EU's provisional mechanism for the mandatory relocation of asylum seekers, citing a fear of losing control over its borders and sovereignty.[649] In this context, the Czech Former prime minister Babiš insisted on his country's right to determine its asylum policy. [650] Thus, priority should be given to combating illegal migration and reducing asylum applications.[651]

With the exception of the amendment extending the grounds for the detention of asylum seekers, the 2015-16 refugee crisis did not lead to major changes in asylum law in Czechia. However, it can be said that the crisis was farmed as a security threat to both national security and identity. Border management and the fight against irregular migration have dominated the Czech political agenda and media coverage. Despite Czechia's privileged geographical position, as its international airports are the only external borders with third countries, and despite the low rate of asylum seekers, the country seems to have restrictively interpreted its asylum policy. Denial of access to asylum procedures, alleged arbitrarily detention of asylum seekers, and a push back policy have been observed in the country since the 2015-16 refugee crisis, as discussed in the following chapter.

3.4. The case of Slovakia

Similarly to Czechia, although the 2015-16 refugee crisis gained media and political coverage,[652] there was no sudden 'turning point' in Slovakia's asylum policy. Slovakia did not make any restrictive changes to its asylum law. However, like its Visegrád group counterpart, Hungary, Poland, Czechia, Slovakia used anti asylum rhetoric. The country has framed the 2015-16 refugee crisis as a security issue as well as a 'cultural incompatibility issue', as most of the asylum seekers come from different religions and

[648] *Ibid.*
[649] To be more precise, the government has accepted 12 of the more than 2,000 asylum seekers it was designated Source: The Amnesty International. "Czech Republic 2017/2018." The Amnesty International Report 2017/18, 2018 Retrieved from https://www.amnesty.org/en/countries/europe-and-central-asia/czech-republic/report-czech-republic/Accessed 1 March 2022.
[650] *Op.cit.* Wintour, Patrick, 2018.
[651] *Ibid.*
[652] Cunningham, Benjamin. "'We protect Slovakia.'" *Politico,* 10 February 2016. Retrieved from https://www.politico.eu/article/slovakia-fico-migrants-refugees-asylum-crisis-smer-election/ Accessed 3 March 2022; Willoughby, Ian. "Slovak PM set for election win with anti-migrant rhetoric." *DW News* 4 March 2016. Retrieved from https://www.dw.com/en/slovak-pm-set-for-election-win-with-anti-migrant-rhetoric/a-19089588 Accessed 3 March 2022.

cultures.[653] One of the most visible manifestations of Slovakia's securitization strategy was the rejection of the EU provisional mechanism for mandatory relocation of asylum seekers.[654]

In terms of access to the asylum procedure, it was argued that the asylum determination process in Slovakia is perceived as rather restrictive.[655] The low number of successful applications and the lengthy asylum procedure are frequently explained as follows: first, Slovakia's geographical position at the Schengen Area's external border, which leads state authorities to take a tougher stance in order to 'protect' the EU external borders; second, asylum seekers generally are not interested in staying in Slovakia and leave the country during the asylum procedure; and finally, the adverse attitude of Slovak society towards asylum seekers.[656] Besides, during and after the 2015-16 refugee crisis, alleged violations of the right to seek asylum, as well as arbitrary detention and collective expulsion, have been observed in Slovakia, as discussed in the following chapter. [657]

4. The external dimension: externalization of asylum policy

The V4 countries emphasize the importance of focusing on the 'external dimension' of EU asylum policy, which is not a novel approach, [658] and propose seeking solutions outside of the EU.[659] Unlike some EU Member States, such as Germany and France, which insist on making crisis decisions on European soil, the V4 group is concerned with long-term and external actions.[660]

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[653] *Op.cit.* Zachová, Aneta *et al.*,2018.

[654] Later, Slovakia agreed to admit 200 Christian asylum seekers but refused to accept Muslim asylum seekers. The Slovak Ministry of Interior Affairs explained this decision by the absence of Muslim places of worship in Slovakia, which will allegedly complicate the refugees' integration into Slovak society. Source: Hole House, Matthew & Justin Huggler. "Slovakia refuses to accept Muslim migrants." *The Telegraph*, 19 August 2015.
Retrieved from https://www.telegraph.co.uk/news/worldnews/europe/slovakia/11811998/Slovakia-refuses-to-accept-Muslim-migrants.html Accessed 19 January 2022.

[655] *Op.cit.* Letavajová, Silvia *et al.* 2019, p.37.

[656] *Ibid.*

[657] Global Detention Project. "Country Report Immigration detention in Slovakia: Punitive conditions paid for by the detainees." 2019, p.16. Retrieved from https://www.globaldetentionproject.org/immigration-detention-slovakia-punitive-conditions-paid-detainees Accessed 10 February 2022.

[658] Since the late 1990s, the EU has worked to expand the so-called "external dimension" of immigration and asylum cooperation to manage asylum and migration through collaboration with sending or transit countries. This main goal has been most explicitly stated in a series of European Council Conclusions urging the integration of asylum and migration goals into EU external policy. Source: European Council Presidency Conclusions, Tampere, SN, 200/99, 15-16 October 1999, Laeken, 14-15 December 2001, SN 300/1/01 REV 1; European Council Presidency Conclusions, Seville, 21 and 22 June 2002, SN 200/1/02 REV 1.

[659] *Op.cit.* Joint Statement of the Heads of Government of the Visegrád Group Countries. 4 September 2015.

[660] Ivanova, Diana. "Migration Crisis - The Main Priority for the Fifth Polish Presidency of the Visegrád Group." *International conference* Knowledge based Organization, vol. 24, no. 2, 2018, pp.194 -199.

As discussed, the group's approach to asylum is primarily one of securitization, which allows for the use of various securitization tools, policies, and strategies. This approach prioritizes the protection of the integrity of the EU's security, national identity, and culture, while implementing measures to reduce asylum seeking and irregular migration. While, as earlier indicated, each of the V4 countries has varying levels of securitization of asylum policy within their political discourses and legal practices, the group shares the goal of defending the EU's long-term state and societal security and integrity. From the group's perspective, the EU requires reform programs that have more than just the support of a few like-minded Member States but a strong consensus on the future of the European asylum system, migration and asylum policy, and border protection.

What exactly does 'externalization of asylum policy' mean? Externalization refers to actions taken by wealthy, developed countries to keep asylum seekers and irregular migrants from entering their borders, frequently with the help of neighbouring states or private entities.[661] From a human rights perspective, however, the externalization of the asylum policy is interpreted pejoratively.[662] It refers to the simple delegation of obligations related to asylum seekers to other countries, mainly origin or transit countries, which may lead to human rights violations and undermine the international refugee regime. At the EU level, externalization refers to 'activities carried out by the EU and the Member States on the territory of third countries with the aim of externalizing the management of migration, as well as [externalization refers] to the responsibilities [that are] shifted to third countries of origin and transit of migrants.'[663]

Despite the fact that externalization is a highly contested policy, I consider it essential to look into some of the ways it operates in practice. Externalization takes place through formalized asylum and migration policies, 'through bilateral and multilateral policy initiatives between states, as well as through ad hoc policies and practices.'[664]

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[661] Stock, Inka *et al.* "Externalization at work: responses to migration policies from the Global South." *Comparative Migration Studies*, vol. 48, no. 3, 2019, p. 48-49.
[662] Crisp, Jeff. "What is Externalization and Why is it a Threat to Refugees?" *Chatham House*. 14 October 2020. Retrieved from https://www.chathamhouse.org/2020/10/what-externalization-and-why-it-threat-refugees Accessed 18 August 2022; UNHCR. "UNHCR Note on the "Externalization" of International Protection." 28 May 2021, paras. 1 to 7.
[663] Santos Vara, Juan & Pascual Matellán, Laura. 'The Externalisation of EU Migration Policies: The Implications Arising from the Transfer of Responsibilities to Third Countries'. *The Evolving Nature of EU External Relations*, edited by Wybe Th. Douma *et al.* , The Hague: T.M.C. Asser Press/ Springer, 2021, p.316.
[664] Frelick, Bill *el al.* "The Impact of Externalization of Migration Controls on the Rights of Asylum Seekers and Other Migrants." *Journal on Migration and Human Security*, vol. 6, no. 6., 2016, p.194.

4.1. Strengthening EU external border protection and partnerships with countries of origin and transit

From a distance, strengthening EU external border protection and the partnerships with countries of origin and transit could appear to have distant links with either the asylum policies or their external externalization. However, a deeper look reveals that the externalization of asylum policy is a complex 'puzzle' made up of several elements. The 'externalization' of asylum is a complicated approach that involves numerous actors and encompasses a wide range of practices and operations, from border controls to rescue operations to actions that address the causes of asylum. Also, the implementation of externalization policy requires partnership or/and cooperation with both the countries of origin and transit. The partnership or cooperation may take the form of logistical, financial, or political support or may be demonstrated directly through the exchange of assistance. Incentives and readmission programs between third countries and countries of origin could potentially be developed as a result.[665]

4.1.1. Robust management of external borders

The external border is where the externalization of asylum policy starts. The major goals of externalizing borders are to control irregular migration by establishing a buffer zone surrounding external borders and to establish a security perimeter in neighbouring territories so that the state is ready to respond to and defend against irregular migration.

It is certain that the V4 group has defended the idea of improving EU external border protection[666] and has advocated for stronger EU border defence.[667] It supports 'tough policies' to combat irregular migration and to be prepared for any unexpected mixed migrant pressure on the EU.[668] The V4 group made progress in considering how police and armed forces can be used in a regional framework to meet border challenges.[669] It is within

[665] Hyndman, Jennifer, & Alison Mountz. "Another Brick in the Wall? Neo-"Refoulement" and the Externalization of Asylum by Australia and Europe." *Government and Opposition*, vol. 43, no. 2, 2008, p. 253.
[666] The insistence on protecting the EU's external borders was emphasized in all Joint Statements of the V4 from 4 June 2015 to 9 July 2021.
[667] "Visegrád countries urge stronger EU border defense." *DW News*. 21 June 2018. Retrieved from https://www.dw.com/en/visegrad-countries-urge-stronger-eu-border-defense/a-44336264 Accessed 3 November 2021.
[668] Gotev, Georgi. "Visegrád Group spells out its vision of EU's future." *EURACTIV*. 3 March 2017. Retrieved from https://www.euractiv.com/section/central-europe/news/visegrad-group-spells-out-its-vision-of-eus-future/ Accessed 3 November 2021.
[669] Michelot, Martin. "The V4 on Defence: The Art of Disagreement." European leadership Network. 26 June 2018. Retrieved from https://www.europeanleadershipnetwork.org/commentary/the-v4-on-defence-the-art-of-disagreement/ Accessed 3 November 2021.

this background that the group called during the 2015-16 refugee crisis for the most effective use of all relevant instruments, frameworks, and resources available within the EU, NATO, or, where appropriate, to protect external borders.[670] The V4 group went even further, urging the EU to create a common army to better handle defence and border protection issues. [671] In addition, the V4 group calls for robust action 'against human traffickers and smugglers profiting from the human tragedy.'[672] For instance, Hungary, as a frontline and EU external Member State, redoubled its efforts to combat smuggling after the 2015-16 refugee crisis.[673] Such measures would be invaluable in combating transnational crime, such as human trafficking and the smuggling of asylum seekers, while also reducing irregular migration.

This is accomplished by supporting plans to strengthen the capacities of European agencies, primarily Frontex[674] and EASO, at the Schengen Area's borders.[675] In this regard, the group stated that it intends to lobby for the effective implementation of Frontex's new mandate, [676] especially that several Frontex operations in the Mediterranean Sea involving irregular migrants and 'boat people' are unsatisfactory. Clearly, this is more of a neighbourhood and cooperation issue than a border issue.

4.1.2. Balkan border reinforcement

The 2015-16 refugee crisis opened up new avenues for collaboration between the V4 countries and the Western Balkans to improve control over migratory flows.[677] The four

[670] *Op.cit.* Joint Statement of the Visegrád group on Migration. 15 February 2016.
[671] "Visegrád countries urge EU to build a common army." *DW News.* 26 August 2016. Retrieved from https://www.dw.com/en/visegrad-countries-urge-eu-to-build-a-common-army/a-19507603 Accessed 3 November 2021.
[672] Visegrád Group. "Joint Communiqué of the Visegrád Group Ministers of Foreign Affairs." 11 September 2015 Retrieved from https://www.visegradgroup.eu/calendar/2015/joint-communique-of-the-150911 Accessed 6 March 2022.
[673] Kovács, Zoltán. "Hungary will not yield to migration pressure." *About Hungary*, 15 September 2021. Retrieved from https://abouthungary.hu/blog/hungary-will-not-yield-to-migration-pressure Accessed 6 March 2022.
[674] Tyburski, Maciej, "Assessment of the Polish Presidency in the Visegrád Group." Warsaw Institute, Warsaw, 14 December 2020. Retrieved from https://warsawinstitute.org/assessment-polish-presidency-visegrad-group/ Accessed 3 November 2021.
[675] *Ibid.*
[676] Visegrád Group. "2020/2021 Polish Presidency."
Retrieved from https://www.visegradgroup.eu/documents/presidency-programs/2020-2021-polish Accessed 3 November 2021.
[677] Visegrád Group. Joint Declaration of Ministers of Interior. 19 January 2016. Retrieved from http://www.visegradgroup.eu/calendar/2016/joint-declaration-of . Accessed 3 November 2021.

countries recognized that the issues of asylum could not be resolved without collaboration with the countries along the so-called Balkan migration route.[678]

Following the 2015-16 refugee crisis, the scope of asylum and affairs cooperation has significantly expanded, not only as a matter of bilateral cooperation but also as a regional joint approach of the V4 to the Western Balkans. Despite tensions stemming primarily from border closures, the governments of the V4 and the Western Balkans have made significant efforts to address the asylum and migration challenges while also ensuring the security of their societies. For example, V4 police officers travelled to Serbia and Macedonia to contribute their human resources and border management expertise to the management of the 2015-16 refugee crisis.[679]

According to the V4 group, the EU must provide the Western Balkans with 'a clear vision of the European perspective' and a 'seat at the table in the EU', so that they can be more involved in the management of common challenges such as asylum management, migration, and border management.[680] Thus, the V4 group believes that the EU's expansion through the accession of Serbia and Montenegro to the Union,[681] as well as the Schengen Area's expansion through the admission of Bulgaria, Romania, and Croatia,[682] are the most effective tools for supporting stability and security in both the EU and the Western Balkans.[683]

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[678] Amouri, Baya. "The Visegrád Countries and Western Balkans: Main Cooperation Areas on Migration Issues." *The Migration Conference 2020 Proceedings: Migration and Integration,* edited by Ibrahim Sirkeci & Merita Zulfiu Alili, Transnational Press London, 2020, pp. 157-162.
; Groszkowski, Jakub. "Behind the scenes of plan B: the migration crisis seen from the perspective of the Visegrád Group." Centre for Eastern Studies, Warsaw, 17 February 2016. Retrieved from https://www.osw.waw.pl/en/publikacje/analyses/2016-02-17/behind-scenes-plan-b-migration-crisis-seen-perspective-visegrad Accessed 4 November 2021.

[679] *Op.cit.* The Visegrád Group. "Joint Statement on Migration." 15 February 2016.

[680] Government of the Czech Republic. "The EU must offer the Western Balkans a clear vision of European perspective, V4 representatives agreed in Prague." 12 September 2019.
Retrieved from https://www.vlada.cz/en/media-centrum/tiskove-zpravy/meeting-of-the-prime-ministers-of-the-visegrad-group-and-partners-from-western-balkan--176079/ Accessed 4 November 2021.

[681] The idea of expanding the EU to include Albania, Bosnia and Herzegovina, Croatia, the former Yugoslav Republic of Macedonia, Serbia, and Montenegro dates back to the 21 June 2003 EU-Western Balkans Summit in Thessaloniki. Source: European Commission. "EU-Western Balkans Summit Thessaloniki." 21 June 2003. C/03/163.10229/03 (Presse 163)
Retrieved from https://ec.europa.eu/commission/presscorner/detail/en/PRES_03_163 Accessed 5 November 2021.

[682] "The Czech Republic: The Balkans are non-integrated; we have to help Bulgaria and Macedonia regarding the refugees." 01 February 2016. Retrieved from http://society.actualno.com/chehijabalkanite-sa-neintegrirani-trjabva-da-pomognem-na-bylgarija-i-makedonija-s-bejancitenews_521405.html Accessed 5 November 2021.

[683] Zgut, Edit *et al.* "Transforming words into deeds – the Visegrád Group and Western Balkans' EU integration." *EURACTIV.* 18 June 2019.

In recent years, the EU has placed a lot of focus on strengthening the capacity of Balkan countries to gather and exchange data. Europol, Frontex, and EASO[684] asked for the development of a new 'social network monitoring system' in January 2020.[685] In the document, it is discussed how important it is to fight smuggling networks and 'irregular' migration in the Balkans.[686] EASO previously conducted these surveillance-related tasks. But ultimately, this method was denounced by the European Data Protection Supervisor. His decision stated that EASO did not have a legitimate justification for collecting personal information. Therefore, determining a new actor to take on this role is important.[687]

The European Council reaffirms its commitment in its conclusions on the 5th of January 2020 to 'reflect on and promote the development by partners in the Western Balkans of interoperable national biometric registration/data-sharing systems on asylum applicants and irregular migrants.'[688] In the same vein, the EU-funded IPA program 'Regional support to protection-sensitive migration management in the Western Balkans and Turkey Phase II' demonstrates this ambition to improve the Balkan states in terms of data collection and exchange.[689] The Western Balkan partners reaffirmed their commitment to enhancing information exchange with the EU and throughout the area through the creation of interoperable national information systems that track immigrant data and are based on the Eurodac standards. The EU stated its willingness to offer technical assistance.[690] The various EU delegations in the Balkan nations have stated that Frontex would be in charge of assessing the work required for each country to ensure the regional interconnectivity of national databases and their interoperability with European databases.[691]

Retrieved from https://www.euractiv.com/section/enlargement/news/transforming-words-into-deeds-the-visegrad-group-and-western-balkans-eu-integration/ Accessed 5 November 2021.

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685 EUROPOL, FRONTEX, and EASO, Joint Report: Tackling Migrant Smuggling in the Western Balkans. pp. 20-22. Retrieved from https://www.statewatch.org/media/documents/news/2020/feb/eu-europol-frontex-easo-wb-smuggling-report.pdf Accessed 20 August 2022.

686 *Ibid.* p.3

687 European Data Protection Supervisor. "Formal consultation on EASO's social media monitoring reports."(case 2018-1083) p. 10.

688 General Secretariat of the Council. "Council conclusions on enhancing cooperation with Western Balkans partners in the field of migration and security." 5 June 202. Retrieved from https://data.consilium.europa.eu/doc/document/ST-8622-2020-INIT/en/pdf Accessed 20 August 2022.

689 IPA II project 'Regional Support to Protection-Sensitive Migration Management systems in the Western Balkans and Turkey' (July 2019 – June 2021) – Phase II Retrieved From https://euaa.europa.eu/sites/default/files/IPA-II-phase-II.pdf Accessed 20 August 2022.

690 Council of the European Union. "EU-Western Balkans Justice and Home Affairs Ministerial videoconference on 22 October 2020 - summary of discussions."

691 Presidency of the European Council. Agenda for the EU-Western Balkans Ministerial videoconference on Justice and Home Affairs on 22 October 2020 (Annex 3).

A remark has to be made. The EU is advancing toward a new cutting-edge of partnership and cooperation that goes beyond the classical cross-border security and defence cooperation. The collaboration that defines the modern practice of asylum and migration control in Europe increasingly relies on public-private cooperation based on innovative border technologies that are developed and deployed with the dual purpose of controlling irregular migration and, simultaneously, securing the European border. Modern mechanisms for data gathering and exchange are increasingly being provided to the Balkan countries by the EU. Bosnia and Herzegovina were the second countries, after Serbia,[692] to have 'automated Fingerprint Identification System technology' installed, which enables automatic fingerprint identification. This is essential for the establishment of the Eurodac database.

However, before the accession process is complete, connecting Eurodac and the databases of the Balkan countries constitutes a blatant violation of European law for the protection of personal data. It is unclear whether the EU's adoption of biometric data collection systems for migrants and asylum seekers in the Balkan countries is merely intended to prepare them for possible membership or is just a strategy of externalization to safeguard the EU's external borders. One may argue that this approach secures the EU's external border while also preparing the western Balkans for membership.

When the security situation in Afghanistan deteriorated in 2021, the V4 countries reaffirmed 'their unequivocal support for Western Balkans accession' and their firm belief that the region's future lies in the EU. [693] The group emphasized that cooperation with third countries, particularly with Western Balkan partners, could help prevent a resurgence of the refugee crisis.[694]

The approach of expanding the EU to include some Balkan countries has the potential to reduce migratory pressure on several Member States, including the V4 countries. This approach, however, has limitations. First, Europe is under migratory pressure from several directions, including not only Africa and the Middle East but also from the East, which is

[692] Government of the Republic of Serbia. "Development Strategy of the Ministry of Interior for the period 2018-2023" Annex 4.
[693] Visegrád Group. "Joint Statement of the Prime Ministers of the Visegrád Group." 9 July 2021. Retrieved from https://www.visegradgroup.eu/calendar/2021/joint-statement-of-the-210713 Accessed 5 November 2021.
[694] Szekeres, Edward *et al.* "The governments of all four Visegrád countries warn of a resurgent migrant crisis, this time stemming from Afghanistan." *Balkan Insight*, 10 September 2021. Retrieved from https://balkaninsight.com/2021/09/10/democracy-digest-slovakia-and-czechia-join-the-afghan-hounding/ Accessed 6 November 2021.

being exacerbated by a new asylum wave from Afghanistan through Belarus.[695] Second, future Balkan enlargement may have a detrimental effect on the EU by bringing new challenges, particularly given the Western Balkan countries' numerous geopolitical, economic, humanitarian, and social issues.[696] This could be complicated further because problems that 'surfaced during the last enlargement wave have come back as residuals in the next, and not all are dissolved over time.'[697]

4.1.3. Extra-territorial asylum vision: Claiming asylum 'from the outside'

The extraterritorial management of asylum seekers, particularly on islands, is a global trend that has historically been linked to territorial measures that keep dissent and discontent within the provinces or colonies of powerful nations.[698] In Europe, the three groups of islands that make up Europe's Mediterranean borders.[699] The 'frontline' EU Member States have received more attention through the hotspot approach since the Agenda on Migration was published in 2015. The hotspots' 'are first receiving facilities that attempt to better coordinate EU agencies' and 'national authorities' efforts on initial reception, identification, registration, and fingerprinting of asylum seekers and migrants at the external frontiers of the EU.'[700] Hotspots created a zone at the external maritime frontiers where new actors and substantial funding were directed at the local management of asylum for the entire EU, focused on the borders.[701] The hotspots approach and the implementation of the EU-Turkey agreement[702] seem to be a prelude to the idea of claiming asylum from outside the EU.

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[695] "Belarus Border Crisis: How are migrants getting there?" *BBC*. 26 November 2021. Retrieved from https://www.bbc.com/news/59233244 .Accessed 7 December 2021.

[696] "Western Balkans Futures." *Visegrád Insight.* 12 May 2021. Retrieved from https://visegradinsight.eu/wb_futures/. Accessed 7 November 2021.

[697] Balfour Rosa. "Judy Asks: Is Central Europe Damaging EU Enlargement?" Carnegie Europe. 28 February 2018. Retrieved from https://carnegieeurope.eu/strategiceurope/75667 Accessed 7 November 2021; Quinn, Colm. "Future Balkan enlargement may have a detrimental effect on the EU itself by bringing new challenges." *Foreign Policy*. 6 October 2021. Retrieved from https://foreignpolicy.com/2021/10/06/eu-western-balkans-enlargement-albania-north-macedonia/ Accessed 7 November 2021.

[698] The Andaman Islands in Southeast Asia, Norfolk Island, Palm Island, Bruny Island, and Rottnest Island in Australia; as well as Guantanamo in the Caribbean, are historical examples of island confinement outside of Europe that give light on the contemporary tendency. Source: Magner, Tara. "A Less than 'Pacific' Solution for Asylum Seekers in Australia." *International Journal of Refugee Law*, vol. 16, no.1, 2004, pp. 53–90; Nethery, Amy. "A Carceral History of Australian Islands." *Shima Journal*, vol.6, no. 2, 2012, pp.85-98; Anderson, Clare & Mazumdar, Madhumita & Pandya, Vishvajit. *New Histories of the Andaman Islands: Landscape, Place, and Identity in the Bay of Bengal, 1790–2012.* Cambridge: Cambridge University Press. 2016.

[699] The Canary Islands to the west, Lampedusa and Linosa to the south, and the Aegean Islands to the east.

[700] European Commission. "Explanatory Note on the ' Hotspot' Approach." 2015. p. 4.

[701] Bousiou, Alexandra & Papada, Evie. "Introducing the EC Hotspot Approach: A Framing Analysis of EU's Most Authoritative Crisis Policy Response." *International Migration, vol*. 58, 2020, p. 139–140.

[702] Council of the EU. EU-Turkey statement, 18 March 2016.

In this spirit, the V4 group agrees that asylum applications should be processed and decided outside of the EU. The transfer of asylum seekers to external processing facilities to evaluate their status may be viewed as the pinnacle of external control.[703] From the group's perspective, the necessary assessments must be completed outside of EU territory in administrative centres protected and supplied with the assistance and contribution of the EU and its Member States.[704] According to the V4 group, this could help distinguish between asylum seekers and 'economic migrants.'[705]

Following the refugee crisis in 2015-16, Hungary expressly declared its support for this type of external processing. The Hungarian Prime Minister Orban has suggested that the EU construct a 'giant refugee city' on the Libyan coast in order to handle the asylum requests of refugees arriving in Libya from other parts of Africa.[706] He argued that the exterior borders of the EU should be in 'complete control' and that the Libyan government could aid in the camp's establishment.[707] In the same line, Libya's neighbour, Tunisia, adamantly rejects the creation of more official 'refugee reception facilities' in the country as recommended by the EU and is wary of becoming 'trapped' by EU external migration policy.[708]

This approach has several deficiencies, but there is also room for compromise. Indeed, the idea of completing assessments of people's asylum claims outside of EU territory exists.[709] Countries do this all the time, frequently with the assistance of government officials or NGOs within the country to identify people who can be transferred to another country for protection. The problem arises when this is presented as the only option for granting asylum.

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[703] Visegrád Group. "Joint Statement by the Prime Ministers of V4 Countries on migration ."19 July 2017. Retrieved from https://www.visegradgroup.eu/download.php?docID=327 Accessed 5 November 2021.
[704] "Sympathy for the Visegrád Group? A look at the V4's migration proposals." *Migration Voter*. 26 July 2017.
Retrieved from https://migrationvoter.com/2017/07/26/sympathy-for-the-visegrad-four-a-look-at-the-v4s-migration-proposals/ Accessed 7 November 2021.
[705] "How many migrants to Europe are refugees?" *The Economist*. 7 September 2015. Retrieved from https://www.economist.com/the-economist-explains/2015/09/07/how-many-migrants-to-europe-are-refugees Accessed 8 November 2021 ; *Op.cit.* Novak, Benjamin, 2015.
[706] Dunai, Marton. "Hungary PM says Europe should process refugees in Libya." 24 September 2016. Retrieved from https://www.reuters.com/article/uk-europe-migrants-hungary-libya-idUKKCN11U0H1 Accessed 21 August 2022.
[707] *Ibid.*
[708] Tarhini, Dima. Refugee centres in Tunisia 'out of the question,' says the president. 31 October 2022, DW News. Retrieved from https://www.dw.com/en/refugee-centers-in-tunisia-out-of-the-question-says-president/a-46115181 Accessed 21 August 2022.
[709] Committee on Migration, Refugees and Displaced Persons. "Extra-territorial processing of asylum claims and the creation of safe refugee shelters abroad." Doc. 14314, 7 June 2018.

I contend that externalization policies, which focus on asylum claims from outside the EU, could lessen the burden on some frontline EU countries if they are implemented in a way that respects asylum seekers' and other human rights, but at the same time, this approach represents an alarming erosion of the right to apply for asylum.

4.1.4. Tackling the root causes of asylum

The V4 group advocated for Fortress Europe's walls to be extended far beyond the continent's physical borders to cut off asylum closer to its source because 'the best way to protect refugees and displaced people is to prevent them from having to leave their homes.'[710] Root causes, such as safety or political, economic, and environmental factors, can all contribute to conditions that lead to a hazardous event that forces people to seek asylum in other countries.[711] The four countries have repeatedly stated that effective management of the root causes of migratory flows, is essential to reducing the number of asylum seekers and irregular migrants.[712] The group's approach is primarily concerned with tackling the political and economic root causes.[713]

Primary consideration must be provided to the political solution of the Syrian conflict and the combat against Da'esh and other terrorist organizations because the principal wave of asylum seekers in 2015 is from Syria and Iraq. According to the group, it is important to continue supporting 'the international coalition fighting Da'esh in Iraq and Syria and providing various means of contribution, political, military and humanitarian, to the efforts of the coalition and to the stabilization of Iraq as tangible forms of tackling the root causes of the unwanted migration flows'[714] The four countries proclaim their willingness to provide financial assistance to 'countries with significant refugee populations, such as Turkey, Jordan, Iraq/Kurdistan, and Lebanon, including refugee camps.'[715]

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[710] UNFPA East and Southern Africa Regional Office. "Tackle root causes of migration to protect refugees and displaced people from leaving their homes." 31 May 2019. Retrieved from https://esaro.unfpa.org/en/news/tackle-root-causes-migration-protect-refugees-and-displaced-people-leaving-their-homes Accessed 8 November 2021.

[711] Wester, Archbishop John C. "Root Causes of Migration. People of God." 2017. Retrieved from https://d2y1pz2y630308.cloudfront.net/17613/documents/2017/12/1708RootCausesofMigration.pdf Accessed 8 November 2021.

[712] *E.g. Op.cit.* "Joint Statement of the Heads of Government of the Visegrád Group Countries. 4 September 2015; *Op.cit.* Visegrád Group. "Joint Declaration of the Visegrád Group Prime Ministers." 8 June 2016.

[713] *Ibid.*

[714] *Ibid. 2015.*

[715] In this regard, Szijjártó, Minister for Foreign Affairs and Trade, emphasized the importance of the 'Hungary Helps' programme in stabilisation efforts by providing sanitation, medication, education, food, and shelter for communities in Iraq and Syria, as well as creating stable conditions for the safe return of displaced persons, to eliminate the push factors fuelling illegal mass migration. Similarly, between 2014 and 2019, Poland provided $51 million USD in humanitarian aid to civilian populations throughout the Middle East

However, humanitarian aid alone will not solve the asylum and refugee crises; addressing the underlying causes of poverty, conflict, discrimination, and exclusion of all kinds is required. Indeed, solutions to displacement necessitate long-term, sustainable alliances with and foster true partnerships with third-country partners, particularly African countries, to work toward a more stable and prosperous shared future for all. More direct European economic assistance to Africa, both in the form of development aid and investment, is essential.[716] The 2015-16 refugee crisis confirmed the four countries' growing interest in Africa and, to some extent, accelerated their engagement both in this region and in the EU arena.[717]A concerted effort and long-term solution to protect and aid the forcibly displaced in their home countries while contributing to economic growth could reduce, but not eliminate, the number of asylum seekers to the EU. It is unrealistic to expect some investment opportunities or aid to change the region's economies adequately to reduce motivation to leave within a few years.

A root causes strategy must be more inclusive, taking into account the perspectives of bilateral, multilateral, and private sector partners as well as civil society; combating corruption, strengthening democratic governance, and advancing the rule of law; promoting respect for human rights; combating and preventing violence, extortion, and other crimes perpetrated by criminal gangs, trafficking networks, and other organized criminal organizations.

The V4 group supports the externalization of asylum and migration management, a strategy in which states act outside their borders to discourage the arrival of irregular migrants who do not have permission to enter their intended destination country. In addition, the four countries advocate an approach based on asylum determination procedures outside the EU in order to differentiate genuine asylum seekers from economic

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region. The Czech Republic is also providing humanitarian assistance to the people of Syria and neighbouring countries affected by the Da'esh crisis. A current government program for Syria and the region disburses more than $2 million USD per year, with a primary focus on refugees and internally displaced persons, as well as support for medical, sanitation, and school capacity. Source: The Global Coalition. 'Hungary.' Retrieved from https://theglobalcoalition.org/en/partner/hungary/ Accessed 10 November 2021. ; The Global Coalition. "Poland." Retrieved from https://theglobalcoalition.org/en/partner/poland Accessed 10 November 2021; The Global Coalition. "The Czech Republic." Retrieved from https://theglobalcoalition.org/en/partner/czech-republic/ Accessed 10 November 2021.

[716] "How Europe can stop African migration." *Politico*. 12 October 2018. Retrieved from https://www.politico.eu/article/europe-can-stop-african-migration-symposium-experts/ Accessed 10 November 2021.

[717] *E.g.* the V4 countries have decided to increase their contributions to the Africa Trust Fund since 2015. Source: Chmiel, Oskar. "The Engagement of Visegrád Countries in EU- Africa Relations." Discussion Paper 24/2018, German Development Institute, Bonn, 2018, pp.9-11. Retrieved from https://www.die-gdi.de/uploads/media/DP_24.2018.pdf Accessed 11 November 2021.

migrants. Externalization, however, could be interpreted as an attempt by the V4 group to shift asylum responsibilities and avoid international obligations.

5. Conclusion

In light of the 2015–16 refugee crisis, it may be said that there have been significant changes and dynamics in asylum law and policymaking in the V4 countries. In all the four countries, the crisis was linked to state sovereignty and border protection. As the crisis was a mixed migratory flow, it was framed as a threat to both public security as well as cultural and religious identity. Asylum seekers from different cultures and religions were clearly not welcomed in all of the V4 countries. Additionally, the V4 countries found it challenging to fulfil both their EU and international duties due to the mixed migratory flow in 2015–16 and the collapse of the common European asylum system. In the absence of robust mechanisms to identify genuine asylum seekers in the V4 countries, and in the presence of security threats such as the violent and aggressive behaviour of some person at the border,[718] the whole masses were treated in the same manner. This action or decision demonstrated, to a large extent, that the V4 countries prioritized border security over identifying 'genuine asylum seekers' and ensuring their rights, including access to asylum.

The pressure on the Hungarian-Serbian border during and in the aftermath of the 2015-16 refugee crisis compelled Hungary to implement a restrictive asylum policy. Hungary made relevant legal changes to its asylum policy, and used measures and practical actions, such as the erection of a fence, the use of the 'safe third country' rules, *etc*. All of the amendments were made quickly and in ascending order, reflecting the country's choice of a closed door asylum policy. Despite the fact that Poland was not directly affected by the 2015-16 refugee crisis, the phenomenon was viewed as a threat to its national security and cultural identity. Following Hungary's lead, Poland attempted to amend its asylum law in 2017. The Draft Amendments to its Asylum Law, which were approved in 2021, demonstrate that the country prefers a more restrictive policy. Factors such as the 2014 Ukrainian crisis, the 2015-16 refugee crisis, and the 2021 Afghan crisis could explain this change. Despite the fact that their governments' policies and rhetoric can be classified as securitization and national identity protection, Czechia and Slovakia did not change their

[718] The majority of the violence has been reported along the Hungarian-Serbian border. Some persons threw objects, including stones and bricks, at Hungarian police, from the Serbian side of the border. Source: "Migrant crisis: Clashes at Hungary-Serbia border." *BBC*, 16 September 2015. Retrieved from https://www.bbc.com/news/world-europe-34272765 Accessed 31 January 2022; "Hungary border clashes: Children were crying because of the gas, people retching." *Euronews*, 16 September 2015. Retrieved from https://www.euronews.com/2015/09/16/hungary-border-clashes-children-were-crying-because-of-the-gas-people-retching Accessed 31 January 2022.

asylum laws. The two countries, however, implement and interpret their current asylum policy in a restrictive manner. When it comes to the external dimension of the asylum policy, it may be claimed that the V4 group defends a fortress EU, stringent border controls, and the externalization of asylum management through collaboration with third countries, primarily western Balkan countries.

While the V4 countries have the authority to ensure border security and control, they must also ensure that their legitimate security interests are consistent with their international obligations and that border controls do not prevent asylum seekers from claiming asylum. Any action taken at border crossings must be proportionate to the goals pursued, non-discriminatory, and fully respect key fundamental rights of asylum seekers. Regulations and policies aimed at preventing irregular migration, as discussed in the following chapter, may have unintended consequences for asylum seekers, such as restricting their right to seek asylum.

V. The Lack of National Protection of Asylum Seekers' Fundamental Rights and Freedoms in the Visegrád Group

1. Overview

Since 2015, all four V4 countries have been moving toward more restrictive 'governmental' asylum policies, as stated in the previous chapter. The restrictive nature of asylum policies is reflected in various amendments to asylum law, such as those passed in Hungary and Poland, as well as restrictive interpretations of existing asylum law in Czechia and Slovakia. In line with the previous chapter, I presume that the recently imposed restrictive asylum policies have directly or indirectly undermined the rights of asylum seekers to protection. With the presence of certain rules such as the application of the 'safe third country' or similar restrictive practices or accelerated procedures that may not allow for a fair consideration of the asylum claim, the right to seek asylum is becoming increasingly at stake (2). Furthermore, there appears to be consistent evidence that the majority of asylum seekers are detained during the asylum process without regard for the criteria and standards governing asylum seeker detention (3). Besides, it seems that the push-back policy is becoming more widespread, which may amount to the *refoulement* of asylum seekers (4). Lastly, it looks like there are challenges in the enjoyment of the right to an effective remedy (5).

2. Access to asylum: at the stake?

Article 18 CFR specifies that the right to asylum shall be guaranteed in compliance with the rules of CSR51 and its 1967 Protocol. Likewise, Article 19 CFR prohibits collective expulsions and expelling foreigners to states where a serious risk of being subjected to the death penalty, torture or other inhuman or degrading treatment or punishment exists. As mentioned previously, specific regulations on the right to asylum are consecrated in the EU secondary legislation acts establishing the Common European Asylum System. Notably, the Schengen Borders Code,[719] the Frontex Regulation,[720] the Anti-Trafficking Directive

[719] Art. 3(b) and 4 of Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) OJ L 77, 23.3.2016, p. 1–52.
[720] Art. 20 the Frontex Regulation.

[721] all guarantee the rights of persons seeking international protection as well as those who are refugees.

Regarding access to the asylum process, it is outlined in the Asylum Procedures Directive, [722] which is applicable to all asylum claims made on EU territory, including at borders. Since the 2015-16 refugee crisis, the evolution of the V4 countries' rules on asylum and borders can be represented as a story of continuous tightening of access to territory and asylum procedures. As mentioned in the second chapter, although the V4 countries are part of CSR51 and international human rights treaties, allegations of denial and restriction of access to the asylum procedure are becoming more frequent. The question is: what makes claiming asylum in the V4 group difficult after the 2015-16 refugee crisis?

2.1. The concept of safe country: A rule to limit access to asylum?

To begin, the concept of 'safe countries' or 'safe third countries' lacks a clear legal basis in IRL and IHRL.[723] It has existed alongside the legal evolution of international human rights and protection obligations.[724] Nonetheless, the background to the concepts of 'safe third country' and 'country of first asylum' can be found in EXCOM Conclusion 58 (XL).[725] This instrument addresses the phenomenon of asylum seekers who 'move irregularly from countries where they have already found protection in order to seek asylum or permanent

[721] Art. 11(6) of the Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, OJ L 101, 15.4.2011, p. 1–11.

[722] The Directive identifies three consecutive stages of the application procedure: (1) making an application for international protection, (2) lodging an application, and (3) registration of the application. The provisions do not obligate applicants to fulfil any formal conditions to claim asylum; hence, they can show an intention to be granted asylum in any form and towards any authority. Only subsequent stages, for example, lodging and registering the application, must fulfil formal requirements to be effective, such as filing the official application form. Once the asylum seeker makes an application, he/she is considered an asylum applicant and, from that moment on, they profit from the rights consecrated in the EU asylum law. Source: Art. 6-Art. 12 of the Asylum Procedures Directive (2013/32/EU).

[723] OHCHR. ""Safe" countries: A denial of the right of asylum." May 2016, pp. 5-7. Retrieved from https://www.ohchr.org/Documents/Issues/MHR/ReportLargeMovements/FIDH2%20.pdf Accessed 11 February 2022; ECRE. "Debunking the "safe third country" myth: ECRE's concerns about EU proposals for expanded use of the safe third country concept." Policy Note, 2017, p.2. Retrieved from https://www.ecre.org/wp-content/uploads/2017/11/Policy-Note-08.pdf Accessed 16 December 2021.

[724] "The Concept of Safe Third Countries: Legislation and National Practices." Mysen Consulting. 2017, p.1. Retrieved from https://www.udi.no/globalassets/global/forskning-fou_i/asyl/the-concept-of-safe-third-countries.pdf Accessed 21 February 2022.

[725] UNHCR. "ExCom Conclusion No 58 (XL), Problem of Refugees and Asylum Seekers Who Move in an Irregular Manner from a Country in Which They Had Already Found Protection." 1989, paras. (f) and (g).

resettlement elsewhere.'[726] Conclusion 58(XL) allows individuals to be returned to the country where they have already found protection.[727] And it is this return that countries have sought to facilitate through the signing of international bilateral and multilateral treaties. The conclusion discusses the movement of asylum seekers who have already found protection.'[728] However, it does not define protection and does not address asylum seekers in transit in another safe country. This ambiguity sparked international debate among states,[729] which led to a controversy over what constitutes a 'safe third country' and a 'first country of asylum.'

In the context of asylum, 'safe third country' and 'first country of asylum' can refer to countries that do not produce refugees or where refugees can apply for asylum without fear of persecution.[730] Therefore, the concept of 'safe third country' is applicable in two situations, each requiring its own set of considerations: first, in the context of a 'safe country of origin', and second, in the context of a 'safe country of asylum.'[731]

Both the concept of 'safe third country'[732] and 'first country of asylum'[733] are part of EU asylum law. The two concepts are mirrored in Article 3 of the Dublin III Regulation, which reinforces the principle that asylum seekers should make their claim in the first safe country they arrive in and as soon as they enter the territory of the Dublin States.

The question here is: is it mandatory for asylum seekers to seek asylum in the first safe country they reach? This question is not easy to answer because there are various

[726] *Ibid.* The following are the defining elements of the phenomenon under consideration: "1) The movement does not originate in countries of origin, but rather in countries where protection has already been found; 2) The purpose of the movement is to seek asylum or permanent resettlement in another country; and 3) The movement is irregular."
[727] *Ibid.* para. (f).
[728] The Conclusion applied only to recognized refugees as defined by CSR51, as well as asylum seekers who had already found protection in the first country of asylum. Source: UNHCR. "Interpretative declarations or reservations relating to the conclusions and decisions of the committee: Conclusions on the Problem of Refugees and Asylum-Seekers who move in an Irregular Manner from a Country in which they had already found Protection." 1990, pp. 156-157.
[729] *E.g.* concerning the criteria that allow the country of final destination to return a refugee or asylum seeker to the country of first asylum, Germany and Austria asserted that the words "permitted to remain there" in paragraph (f) did not require a formal residence permit. Turkey presumed that the Conclusion did not apply to refugees and asylum seekers who were simply transiting through another country. Source: *Ibid.*
[730] UNHCR. "Background Note on the Safe Country Concept and Refugee Status." EC/SCP/68. 26 July 1991, paras. 5-8.
[731] *Ibid.*
[732] Art. 38(1) of the Asylum Procedures Directive.
[733] Art. 35 of Asylum Procedures Directive defines "'first country of asylum' as a country in which an applicant for international protection has either (a) been recognised as a refugee and they can still avail themselves of that protection; or (b) otherwise enjoys sufficient protection, including benefiting from the principle of non-refoulement, provided that they will be readmitted to that country."

interpretations and state practices.[734] There is no explicit or implicit obligation under international law, particularly under CSR51, for an asylum seeker to claim asylum in the first safe country reached.[735] In principle, states are required to determine asylum claims made by anyone within their territory. However, the CSR51 'neither expressly authorizes nor prohibits reliance on protection elsewhere policies.'[736] The concept itself is not, in general, considered to be in breach of states' international obligations.[737]

There is a large body of scholarly literature that examines the concept through the lenses of individual rights protection and international cooperation.[738] It can be argued that the concept of a 'safe third country' has become embedded in international cooperation.[739] Adoption of international agreements that implement the concepts of 'safe third country' and 'country of first asylum' is one expression of international cooperation among states in the field of refugee protection. However, a country should only transfer responsibility for processing an asylum application to another safe country if both have an asylum system of the same standard. Additionally, there should be a clear understanding between the two countries regarding who is in charge of what.[740]

In contrast, some authors, in turn, have criticized the concept of a 'safe third country', calling it 'dangerous'[741] and questioning its legality.[742] Critics point out that the agreement

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[734] *E.g.* under the terms of the Dublin III Regulation, there is no requirement for asylum seekers to claim in the first country they enter. Rather, the system established a hierarchy of criteria for states to use in determining which country should be in charge of processing the asylum application. However, the Member State in which the asylum seeker first entered or claimed asylum is one of the relevant factors in determining responsibility.

[735] Art. 1 CSR51.

[736] Foster, Michelle. "Protection Elsewhere: The Legal Implications of Requiring Refugees to Seek Protection in Another State" *Michigan Journal of International Law,* vol. 28, no. 2, 2007, p.237.

[737] UNHCR. "Considerations on the 'Safe Third Country' Concept." July 1996, pp. 1-7. Retrieved from https://www.refworld.org/docid/3ae6b3268.html Accessed 21 February 2022.

[738] Hurwitz, Agnès. "Safe Third Country Practices, Readmission, and Extraterritorial Processing." *The Collective Responsibility of States to Protect Refugees*, Oxford University Press, 2010; Morgades-Gil, Sílvia. "The "Internal" Dimension of the Safe Country Concept: The Interpretation of the Safe Third Country Concept in the Dublin System by International and Internal Courts." *European Journal of Migration and Law,* vol. 22, no.1 2020, pp. 82-113; Freier, Luisa Feline *et al.* "The Evolution of Safe Third Country Law and Practice." *The Oxford Handbook of International Refugee Law,* edited by Cathryn Costello *et al.,* Oxford University Press, 2021.

[739] Gil-Bazo, María-Teresa. "The Safe Third Country Concept in International Agreements on Refugee Protection Assessing State Practice." *Netherlands Quarterly of Human Rights*, vol. 33, no. 1, 2015, p. 42.

[740] Christophersen, Eirik. "What is a safe third country?" Norwegian Refugee Council, Oslo, 9 March 2016. Retrieved from https://www.nrc.no/news/2016/march/what-is-a-safe-third-country/ Accessed 22 February 2022.

[741] Linden-Retek, Paul. "'Safe Third Country': A Theory of a Dangerous Concept and the Democratic Ends of International Human Rights." 2021, p.1.

[742] Moreno-Lax, Violeta. "The Legality of the "Safe Third Country" Notion Contested: Insights from the Law of Treaties." *Migration and Refugee Protection in the 21st Century, International Legal Aspects,* edited by Guy S. Goodwin-Gill & Philippe Weckel, Brill Nijhoff, 2015, p. 721.

based on the concept of a 'safe third country' or 'safe transit country' increases the risk of direct and indirect *refoulement*, delays status recognition, and may result in violations of asylum seeker rights.[743]

In the context of the V4 group, the concept of 'safe country' or 'safe third country' is relevant in Hungary and has a broader application in asylum management. Despite having relevant legislation, neither Poland,[744] Czechia,[745] nor Slovakia[746] have a predetermined list of 'third safe countries' in their national legal framework.

Table No.1.: Legal provisions related to the concept of third safe country in the V4 countries

Country	Safe third country list	Legal provisions	Concept applied in practice
Hungary	• EU Member States • EEA Member States • EU candidate countries • Australia • Bosnia and Herzegovina • Canada • Kosovo • New Zealand • Switzerland • United States* (States that do not apply death penalty)	• Government Decree No 191/2015. (VII.21) determines safe countries of origin and safe third countries.	Yes
Poland	• Not fixed list yet. • The Draft Amendments, submitted in 2017 (and updated in February 2019, and adopted in 2021), introduces the concept of	• Act of 14 October 2021 Amending the act of 12 December 2013 on Foreigners and other acts including the act of 13 June 2003 on granting	No

[743] *Ibid*. p.713.
[744] Act of 14 October 2021 Amending the act of 12 December 2013 on Foreigners and other acts including the act of 13 June 2003 on granting protection to aliens within the territory of the Republic of Poland.
[745] Decree No. 328/2015 Coll. implementing the Asylum Act and the Act on Temporary Protection of Aliens as amended in 2019.
[746] Coll. Regulation of the Government of the Slovak Republic issuing the list of safe third countries and safe countries of origin (as amended by Government Regulation No 288/2004 Coll., 695/2006 Coll., 205/2013 Coll)

	'safe country of origin' and calls for the creation of national lists of safe countries of origin and safe third countries.	protection to aliens within the territory of the Republic of Poland.	
Czechia	No fixed list yet.	Decree No. 328/2015 Coll. implementing the Asylum Act and the Act on Temporary Protection of Aliens as amended in 2019.	No
Slovakia	No fixed list yet.	Coll. Regulation of the Government of the Slovak Republic issuing the list of safe third countries and safe countries of origin (as amended by Government Regulation No 288/2004 Coll., 695/2006 Coll., 205/2013 Coll)	No

Source: author's own creation

In Hungary, the concept of a 'safe third country' was introduced into the Hungarian asylum procedure by the 2010 amendment to the Act on Asylum.[747] The legal approach adopted was that the concept should be applied on a case-by-case basis rather than on the basis of a legally mandated national list of safe third countries.[748] As discussed in the previous chapter, in 2015, Hungary amended its Act on Asylum by issuing a list of 'safe third countries.'[749] Based on the amendment, the asylum authorities must refuse as inadmissible all asylum claims lodged by applicants who came through a 'safe third country' since the applicant could have applied for protection there.[750]

Therefore, if an asylum seeker reaches Hungary by travelling through Serbia, then his/her claim can be rejected in the admissibility procedure without being referred to the in-merit procedure, and the applicant can be returned to Serbia, as Serbia is regarded as a 'safe third country' and 'safe transit country' by the Hungarian authorities. The fact that over 99% of asylum seekers entered Hungary in the years 2015–16 from the Serbian–

[747]Act CXXXV of 22 November 2010 amending certain migration-related acts for the purpose of legal harmonization.
[748] *Ibid.* Art.2(i)(ic).
[749] *Op.cit.* Act CXXVII of 6 July 2015 on the Establishment of Temporary Border Security Closure and on Amending Acts related to Migration; *Op.cit.* Government Decree 191/2015 of 21 July 2015 on the National Designation of Safe Countries of Origin and Safe Third Countries.
[750] *Op.cit.* Art. 51(2) (a) and Art. 51(4) (a)-(b) of Act LXXX of 2007 of 1 January 2008 on Asylum.

Hungarian border section showed the quasi-automatic rejection at first glance of over 99% of asylum claims without taking the necessity for protection into account.[751]

The question here is whether Serbia is really a 'safe third country' to asylum seekers. Hungary regards Serbia as a 'safe third country,' and it relied on three major arguments to bolster its position. The first argument is Serbia's candidature for EU membership. [752] The second argument is Serbia's agreement to be bound by all relevant international treaties and EU requirements.[753] The third argument is that Serbia benefits from EU assistance for reforms and upgraded asylum facilities.[754] Therefore, the Hungarian government considered that the utilization of the 'safe third country' concept in relation to Serbia was justified and required in the face of the unprecedented mixed migratory flow, complicated by ever-increasing abuse of the right to asylum, including 'fake asylum seekers' and 'asylum shopping' by genuine asylum seekers.'[755] Hungary's classification of Serbia as a 'safe third country' was met with criticism, mainly by UNHCR[756] and HHC.[757] Serbia has deficiencies in its asylum system, generally stemming from poor implementation of existing legislation.[758]

In *Ilias and Ahmed v Hungary*, the Grand Chamber of the ECtHR held that the applicants' expulsion to Serbia violated Article 3 ECHR.[759] The Court found that Hungary

[751] HHC. "Building a Legal Fence: Changes to Hungarian asylum law jeopardize access to protection in Hungary." Information note. 7 August 2015, pp.1-6.
Retrieved from https://helsinki.hu/wp-content/uploads/HHC-HU-asylum-law-amendment-2015-August-info-note.pdf Accessed 3 February 2021.
[752] *Ilias and Ahmed v. Hungary*, case no. (47287/15) (2019) Judgment of (the Grand Chamber) of 21 November 2019, ECtHR, para. 112.
[753] *Ibid.*
[754] *Ibid.*
[755] *Ibid.*
[756] The UNHCR, for example, contends that Serbia should not be considered a safe third country. Source: UNHCR. "Hungary as a country of asylum. Observations on restrictive legal measures and subsequent practice implemented between July 2015 and March 2016." May 2016, paras. 76-78.
[757] Since 2011, the HHC examined whether the utilisation of the 'safe third country' concept in relation to Serbia is justified. The HHC stated that Serbia cannot be regarded a safe third country for asylum seekers, and Hungarian asylum authorities wrongly consider it as such for the following reasons: There is limited access to protection and access to a fair and efficient procedure in Serbia, and asylum seekers returned there face a real danger of chain *refoulement* and destitution. The HHC believed that applying the safe third country concept to Serbia violated Article 3 of the ECHR by placing asylum seekers at danger of torture and other cruel or inhumane treatment or punishment through *refoulement*. Source: HHC. "Serbia As a Safe Third Country: A Wrong Presumption."2011, pp.12-14. Retrieved from https://helsinki.hu/wp-content/uploads/HHC-report-Serbia-as-S3C.pdf Accessed 11 February 2022.
[758] Asylum Information Database. "Country Report: Serbia." 2016, p.14 Retrieved from https://asylumineurope.org/wp-content/uploads/2017/02/report-download_aida_sr_2016update.pdf Accessed 21 February 2022 ; According to an update to the report in 2020, Serbia's asylum system has improved slightly. Source: Asylum Information Database. "Country Report: Serbia." 2020, pp.11-13
Retrieved from https://asylumineurope.org/wp-content/uploads/2021/03/AIDA-SR_2020update.pdfAccessed 21 February 2022.
[759] *Op.cit. Ilias and Ahmed v. Hungary*, (2019) para. 260 (3).

had 'failed to discharge its procedural obligations under Article 3' by failing to assess the risks of the applicants not having access to an 'effective asylum procedure in Serbia' or being 'removed from Serbia to North Macedonia and then Greece.' [760]Any presumption that a particular country is 'safe,' if relied on in decisions involving an individual asylum seeker, must be adequately supported at the outset by an analysis of the relevant conditions in that country, particularly its asylum system.[761]

A report on the concept of a 'safe third country' in the ECtHR case law, found that the Court has never questioned the legitimacy of national lists of 'safe third countries,' nor has it deemed that a given third country was (or was not) safe.[762] The current approach of the ECtHR is primarily procedural; it is concentrated on examining the procedural guarantees that must necessarily underpin the evaluation conducted by domestic authorities.[763]

In Poland, Czechia, and Slovakia, the concept of a 'safe third country' does not evoke the same level of concern as it does in Hungary.[764] As mentioned in the previous chapter, Poland has recently adopted a provision on 'safe third countries' but has not yet drawn up a list. [765] Similarly, despite the adoption of relevant legal provisions, Czechia [766] and Slovakia have yet to put this concept into practice. The two countries have not established a list of 'third-safe countries.'

Practice shows that Slovakia denied asylum seekers coming from a safe country of origin or transit to claim asylum.[767] While the law obliges authorities to ensure that the asylum seekers are not threatened if deported to a non-EU-safe country, some observers

[760] *Ibid.* 163.
[761] *Ibid.* 152.
[762] ECHR. "Articles 2, 3, 8, and 13 The concept of a "safe third country" in the case-law of the Court." Research and Library Division, 2018, p.3.
Retrieved from https://www.echr.coe.int/Documents/Research_report_safe_third_country_ENG.pdf Accessed 21 February 2022.
[763] *Ibid.*
[764] *Op.cit.* Coll. Regulation of the Government of the Slovak Republic issuing the list of safe third countries and safe countries of origin (as amended by Government Regulation No 288/2004 Coll., 695/2006 Coll., 205/2013 Coll).
[765] *Op.cit.* Act of 14 October 2021 Amending the act of 12 December 2013 on Foreigners and other acts including the act of 13 June 2003 on granting protection to aliens within the territory of the Republic of Poland.
[766] *Op.cit.* Decree No. 328/2015 Coll. implementing the Asylum Act and the Act on Temporary Protection of Aliens as amended in 2019.
[767] "2018 Country Reports on Human Rights Practices: Slovakia." *United States Department of State Bureau of Democracy, Human Rights and Labor.* Retrieved from https://www.state.gov/reports/2018-country-reports-on-human-rights-practices/slovakia/ Accessed 9 February 2021.

criticized the Slovak Bureau of Border and Alien Police for lacking the knowledge needed to decide whether a country would be safe for persons facing deportation there.[768]

Due to conceptual ambiguity and far-reaching adverse procedural consequences for the individual asylum seeker, the concept of 'safe third country' remains an unsafe concept in asylum procedures. Using the concept of 'safe third country' as a screening technique could have severe consequences for asylum seekers' rights, as claims are more likely to be rejected if not inadmissible. The concept, as applied by Hungary, appears to be a measure aimed at restricting access to territory and asylum systems. It is also used as an interdiction tool to obstruct the transit of asylum seekers to another EU Member State or to summarily return those who have arrived in Hungary before claiming asylum.

2.2. Denial or restriction of access to the asylum procedure

An initial question is the following: are states obligated to accept an asylum seeker who presents him/herself at the border? States have a legal obligation to uphold the principle of *non-refoulement*. It is crucial to provide a brief overview of the principle before delving deeper into its meaning and content in the following section. [769] The principle of *non-refoulement*, which is reflected in various bodies of international law,[770] prevents any person from being transferred (returned, expelled, or extradited) from one country to another when there are substantial grounds for believing that the person would face torture, cruel, inhuman, or degrading treatment or punishment, and other irreparable harm.

Although *non refoulement* is often described as prohibiting return, that is, transfer to a person's state of nationality, the principle in fact prohibits the transfer of a person to any state where he/she may be at risk.[771] The principle has been interpreted as also prohibiting the removal of a person to a state from where he/she may be subsequently sent to a territory where she or he would be at risk of the so called 'secondary *refoulement.*'[772] The prohibition covers any form of return, rejection, expulsion, or refusal, regardless of where it occurs (*e.g.*, at the border, in an internationalized zone), as well as deportation and extradition. This also includes any act of transfer whereby effective control over an

[768] *Ibid.*
[769] *Non refoulement* is discussed in the next section.
[770] E.g. Art. 33 CSR51, Art. 3 UNCAT & Art.7 ICCPR, Art.18 and 19 CFR & Art.78 TFEU, *etc.*
[771] Gillard, Emanuela-Chiara. "There's no place like home: states' obligations in relation to transfers of persons." *International Review of Red Cross*, vol. 90, no. 871, September 2008, p.712.
[772] *Op.cit.* UNHCR. "ExCom Conclusion No 58 (XL)."1989, para. (f); *T.I. v. The United Kingdom*, Application. no. (43844/98), Judgment of the Court (Third Section) of 7 March 2000, ECtHR, p.15.

individual changes from one state to another.[773] However, nothing in the *non-refoulement* principle prohibits a state from sending an asylum seeker to a place where he will not be persecuted.[774]

A case-by-case examination appears necessary to determine whether an asylum seeker's rejection will result in his/her deportation to a place where he/she faces persecution, particularly if there is no consensus on whether the country from which he/she came is a 'safe country' or not.[775] In principle, every person who expresses the need to claim asylum should be given the possibility to submit an asylum application and enter the asylum procedure. The state should accept the asylum claim and then decide whether the asylum seeker is entitled to international protection or not. It should not deny anyone access to the asylum procedure even if that person did not fulfil all the entry conditions.[776] Fair and efficient asylum procedures are important to the full and inclusive implementation of CSR51.[777] According to EU law, it is important that asylum seekers, regardless of the Member State in which they apply for international protection, receive high protection standards, fair and effective procedures,[778] and equal treatment in terms of reception conditions.[779]

As discussed in the third chapter, the national legal framework governing asylum in the V4 group is *de facto* based on international and EU standards and guarantees the right to access asylum procedures. However, as it will be addressed below, new regulations, as well as several amendments to existing asylum and border law and practices by authorities, affect, if not deny, the right to seek asylum.

As stated earlier in the previous chapter, based on the legislative amendments to the Asylum Act and the State Borders Act, Hungary closed its southern and eastern borders to

[773] CAT. "General Comment No. 1: Implementation of Article 3 of the Convention in the Context of Article 22 (*Refoulement* and Communications)" A/53/44, annex IX, 21 November 1997, para. 2. According to the CAT, the phrase 'another State' in Article 3 of the UNCAT refers to the state to which the individual concerned is being expelled, returned, or extradited, as well as to any state to which the author may subsequently be expelled, returned, or extradited.
[774] Weis, Paul. "The Draft United Nations Convention on Territorial Asylum." *British Yearbook of International Law*, vol. 50, no.1, 1979, p.166.
[775] *E.g.* In the context of Hungary, there is no consensus on whether Serbia is a safe country for asylum seekers. This point is discussed in the previous section.
[776] Art. 31-33 CSR51.
[777] UNHCR. "Safeguarding Asylum No. 82 (XLVIII)." 1997, para. (d); UNHCR. "Asylum Processes (Fair and Efficient Asylum Procedures)." EC/GC/01/12, 31 May 2001, paras. 4-5; UNHCR. "UNHCR public statement in relation to *Zuheyr Freyeh Halaf v. the Bulgarian State Agency for Refugees* pending before the CJEU." August 2012, C-528/11, para 2 -9.
[778] Recital 4 and 8 Asylum Procedures Directive; Recital 5 of the Dublin III Regulation.
[779] Recital 5 of Reception Conditions Directive.

stem the mixed migratory flow and ensure border security by preventing irregular entry, including irregular entry of asylum seekers. Accordingly, asylum seekers must enter Hungarian territory through official checkpoints in 'transit zones', [780] and claim asylum. In other words, asylum claims can only be submitted in the special 'transit zones' at the border unless the applicant is already residing lawfully in the territory of Hungary. Based on the aforementioned legislative amendments to the Asylum Act and the State Borders Act, at least two interconnected elements made access to the asylum procedure strict, if not impossible. First, the notion of 'safe third country' [781], and second, the construction of the fences.

The construction of fences along Hungary's borders with Serbia and Croatia has made claiming asylum more difficult. First, asylum seekers had to wait outside the fence in order to enter the transit zone and register as asylum seekers in Hungary. Reports and testimonies at that time revealed that Hungarian authorities did not provide any information about how long asylum seekers had to wait to access the asylum procedure in the transit zone; additionally, any screening to identify and prioritize vulnerable people appeared haphazard.[782] If the asylum seeker is granted access to claim asylum, he/she will be detained throughout the asylum procedure,[783] and his/her asylum claim will most likely be denied because he/she came from Serbia, which is regarded as a 'safe third country' by Hungary. Second, undocumented asylum seekers generally had few chances to enter the country and claim asylum.[784] Asylum seekers, in this case, frequently used more hazardous routes or turned to smugglers to attempt to enter the country.[785]

[780] Transit zone is discussed in the next subchapter.
[781] The concept of 'third safe country' is discussed in the previous section.
[782] Gall, Lydia. "Dispatches: Asylum Seekers Stuck Outside Transit Zones in Hungary." Human Right Watch, 4 April 2016. Retrieved from https://www.hrw.org/node/288410/printable/print Accessed 2 February 2022; Human Right Watch. "Hungary: Failing to Protect Vulnerable Refugees."20 September 2016. Retrieved from https://www.hrw.org/node/294144/printable/print Accessed 2 February 2022; Tóth, Judit & Kilic, Tugce. "Country analysis of Hungary (2017) Civil Policy on Migration." CEVIPOL Project: Country Analysis of Hungary, 2017, pp.35-37.
[783] Detention is discussed in the next subchapter.
[784] Normally, the burden of proof lies with the asylum seeker who claims asylum. An asylum seeker should be given a reasonable opportunity to present evidence to support his/her claim, in addition to the general duty to tell the truth and cooperate with the decision-making authorities. As a result, an asylum seeker must make reasonable efforts to establish the veracity of his/ her allegations and the veracity of the facts upon which the claim is based. Source: UNHCR. "Note on Burden and Standard of Proof in Refugee Claims." 16 December 1998, paras.5-7. Retrieved from https://www.refworld.org/docid/3ae6b3338.html Accessed 22 February 2022.
[785] Oxfam Organization. "At Europe's borders, migrants and refugees are denied their basic human rights." Retrieved from https://www.oxfam.org/en/europes-borders-migrants-and-refugees-are-denied-their-basic-human-rights Accessed 22 February 2022.

If access to the 'transit zones' was difficult and required a long wait in the field on the Serbian side, being returned through the fence by force (there were only two gates along the fence, located some 50 km away from each other),[786] and without providing any legal defence against the action 'is the ultimate form of obstruction.'[787] In this context, UNHCR, for example, considered that the fence 'had the combined effect of restricting and deterring access to asylum in the country and shrinking the protection space for asylum seekers.'[788] It is important to note that the fence itself is not subject to legal criticism because it is defined as a means of protecting the EU's border in a crisis situation.[789]

The ECtHR ruled in Shahzad v. Hungary, which involved a Pakistani national's being forcibly removed by Hungarian police officials and denied access to an asylum procedure.[790] A group of twelve persons, including the applicant, had crossed the Hungarian border irregularly and were apprehended by the Hungarian police; after repeatedly asking for asylum, they were told that they could not claim it. They were driven to the border fence, brought to the other side, and told to return to Serbia.[791] In the present case, it is uncontested that the applicant's only options for legally entering Hungary were the two transit zones, *Tompa* and *Röszke*, which were approximately 40 km and 84 km from the location to which the applicant was returned.[792] The applicant was supposed to enter the transit zone and claim asylum in accordance with the Asylum Act procedure.[793] However, the applicant claimed that he had no realistic chance of entering the transit zones and requesting international protection. He stated that, while he could physically reach the area surrounding the transit zones, he could not access the asylum procedure due to the limited access to the transit zones caused by the daily application limit.[794]

The Court found that the applicant had been subjected to a 'collective' expulsion because the Hungarian authorities had not ascertained his individual situation, and they had not provided genuine and effective ways to enter Hungary, and his removal had not been a result of his conduct. According to the Court, this amounted to a violation of Article 4 of

[786] Push-back is discussed in the next section.
[787] *Op.cit.* Nagy, Boldizsár, 2016, p.1065.
[788] UNHCR. "Progress under the Global Strategy beyond Detention 2014-2019, Mid-2016." pp.1-4. Retrieved from https://www.unhcr.org/57b5832d7.pdf Accessed 3 February 2021.
[789] *Op.cit.* Czina, Veronika, 2021, p.27.
[790] *Shahzad v. Hungary*, Application no. (12625/17) Judgment of the (First Section) of 8 July 2021, ECtHR, para.12.
[791] *Ibid*. para.26
[792] *Ibid.* para.14
[793] *Ibid.* paras. 18-19.
[794] *Ibid*. para. 63.

Protocol No. 4 to the ECHR, which forbids collective expulsion.[795] Furthermore, it determined that the applicant lacked an adequate legal remedy, which constituted a violation of Article 13.[796]

The ruling is important in its own right, regarding the right to seek asylum and follows judgments by the *Ilias and Ahmed v. Hungary*, and the *Commission v. Hungary* issued by the CJEU.[797] In *Commission v. Hungary*, the CJEU found that restricting access to the asylum procedure to the two transit zones was incompatible with the Asylum Procedures Directive.[798] Since 2015, the European Commission has expressed its doubts to Hungary as to the compatibility of its asylum legislation with EU law.[799] Additional concerns were raised following the 2017 amendments.[800] Based on concerns about Hungary's compliance with EU law, the Commission initiated infringement proceedings against the country in December 2015, which resulted in the aforementioned judgment.

Among other things, the European Commission criticized Hungary in particular for restricting access to the international protection procedure, in violation of the substantive and procedural safeguards provided for in the Procedures and Reception Directives.[801] The Court holds that Hungary has failed to meet its obligation to ensure effective access to the procedure for granting international protection insofar as third-country nationals wishing to access that procedure from the Serbian-Hungarian border were in practice faced with the virtual impossibility of making their application.[802] The court determined that Hungary had failed to meet its obligations under Article 6 of the Asylum Procedures Directive.[803] Moreover, the Court rejected Hungary's argument that the refugee crisis justified derogating from certain rules in the Procedures and Reception Directives with a view to maintaining public order and protecting internal security in accordance with Article 72 TFEU.[804] Clearly, the CJEU accentuated the necessity for the domestic authorities to guarantee adequate access to procedures for international protection. It also addressed some issues related to the treatment and detention of asylum seekers in the transit zone in

[795] *Ibid.* para. 87.
[796] *Ibid.*
[797] *Op.cit. Commission v. Hungary*.
[798] *Ibid.* para. 317.
[799] *Ibid.* paras. 45-60.
[800] *Ibid.* paras. 48-56.
[801] *Ibid.* para. 317.
[802] *Ibid.* para. 241
[803] *Ibid.*
[804] *Ibid.* paras. 263-265.

the same judgment,[805] which will be discussed in the following subchapter and led to the closure of the transit zone.[806]

Following the closure of the transit zones, Hungary has created new bureaucratic barriers to asylum that extend far beyond its own borders. Based on Act VIII 2020 on Transitional Provisions related to the Termination of the State of Danger and on Medical Preparedness,[807] it is no longer possible to apply for asylum on the Hungarian territory, neither at the border crossing points.[808] Before being able to claim asylum in Hungary, asylum seekers must first make a declaration of intent affirming their wish to apply for asylum at Hungarian Embassies outside the EU and be issued with a special entry permit for that purpose. Thus, asylum seekers would first have to lodge a 'declaration of intent' at Hungary's embassies in either Belgrade, Serbia or Kiev, Ukraine.[809]

This measure was implemented in response to the epidemic in order to protect public safety. It was put in place within the scope of both the 'crisis situation' and readiness for pandemic-related mass movement, as well as the 'state of medical crisis.'[810] According to Bakondi, the prime minister of Hungary's national security adviser, Hungary has 'indefinitely suspended access to border transit sites for asylum seekers' due to the risks associated with the spread of COVID-19.[811]

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[805] *Ibid*. paras. 290-293.

[806] See also, *FMS and Others v Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Or-szágos Idegenrendészeti Főigazgatóság,* Joined Cases no. (C-924/19 PPU) and (C-925/19 PPU), Judgment (preliminary ruling) of the Court (Grand Chamber) of 14 May 2020, CJEU.

[807] Art. 267 and Art. 275 of the of Act LVIII of 18 June 2020 on the transitional rules and epidemiological preparedness related to the cessation of the state of danger.

[808] Except for three groups of people: those who already have subsidiary protection status in Hungary; those who are recognized as refugees or who have subsidiary protection for members of their family; and anyone who is subject to measures restricting their freedom unless it is determined that they entered the country illegally. Source: *Ibid.*

[809] Inotai, Edit & Ciobanu, Claudia "EU takes Hungary's asylum Policy to task again, but Budapest Shrugs." *Balkan Insight*, 3 November 2020.
Retrieved from https://balkaninsight.com/2020/11/03/eu-takes-hungarys-asylum-policy-to-task-again-but-budapest-shrugs/ Accessed 3 February 2022.

[810] Inotai, Edit. "Pandemic-Hit Hungary Harps on About 'Migrant Crisis.'" *Balkan Insight*. 19 March 2020.
Retrieved from https://balkaninsight.com/2020/03/19/pandemic-hit-hungary-harps-on-about-migrant-crisis/
Accessed 8 February 2022.

[811] "Breaking News: Migrant flood possibly infected with coronavirus is expected to arrive at the Hungarian border." About Hungary, 1 March 2020.
Retrieved from https://abouthungary.hu/news-in-brief/breaking-news-migrant-flood-possibly-infected-with-coronavirus-is-expected-to-arrive-at-the-hungarian-border
Accessed 8 February 2022.

Some argue, however, that this measure was simply an excuse to suspend the right to seek asylum in Hungary.[812] In this regard, the European Commission estimated that this law is an unlawful restriction to access to the asylum procedure that is contrary to the Asylum Procedures Directive, read in the light of CFR, as it restrains persons who are on Hungary's territory, including at the border, from applying for international protection there.[813] In the same vein, UNHCR considered that 'the requirement that asylum seekers arriving at the Hungarian border declare their intent to seek asylum at embassies outside the EU before being admitted to the territory and the asylum procedure violates Hungary's obligations under international refugee and human rights law, as well as EU law.'[814]

Reports have shown that asylum seekers in Poland have been 'blocked at the border' and denied access to the asylum procedure, mainly at the Polish Eastern border. [815] Since the refugee crisis of 2015-16, it was the restrictive implementation of the law, government policy, and unofficial practices that limited access to asylum in Poland, *e.g.*, second-line control at the border and the way of formulating questions by the Border Guard, urging asylum seekers to include in the application form only the principal reasons for applying for refugee status, without going into detail, *etc.* [816] Limited access to Polish territory and automatic refusal of entry of persons showing the intention to apply for asylum have been observed, especially at the Terespol border-crossing point on the border with Belarus, as well as Medyka on the border with Ukraine.[817] Additionally, there have been obstacles in submitting applications for international protection due to the difficulties of the asylum procedure itself.[818] Furthermore, the decisions issued in this regard, the large number of discontinuances, negative decisions, and appeals are noteworthy.[819]

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[812] Ghezelbash, Daniel, and Feith Tan, Nikolas . "The End of the Right to Seek Asylum? COVID-19 and the Future of Refugee Protection." Research Paper No. RSCAS 2020/55, Robert Schuman Centre for Advanced Studies, Fiesole, 2020, pp.7-9.
[813] European Commission. "Commission refers Hungary to the CJEU for unlawfully restricting access to the asylum procedure." Press release, 15 July 2021, pp.1-2.
[814] UNHCR. "Hungarian Act LVIII of 2020 on the Transitional Rules and Epidemiological Preparedness related to the Cessation of the State of Danger." June 2020, p.2.
Retrieved from https://www.refworld.org/docid/5ef5c0614.html Accessed 8 February 2022
[815] Human Rights Watch. "Poland: Asylum Seekers Blocked at Border." 1 March 2017, Retrieved from https://www.hrw.org/news/2017/03/01/poland-asylum-seekers-blocked-border
Accessed 8 February 2022 ; Amnesty International. "Poland: Digital investigation proves Poland violated refugees' rights." 30 September 2021 Retrieved from https://www.amnesty.org/en/latest/news/2021/09/poland-digital-investigation-proves-poland-violated-refugees-rights/ Accessed 20 August 2022.
[816] *Op. cit.* Pachocka, Marta & Sobczak Szelc, Karolina , 2020, p.9.
[817] Asylum Information Database. "Country Report Poland." (Updated 31 December 2017), 2018, pp. 14-16. Retrieved from https://bit.ly/2zqDYiY Accessed 23 February 2022.
[818] *Op. cit.* Pachocka, Marta *et al.* 2020, p.9.
[819] *Ibid.*

As there are several issues related to the implementation of the law, the role of the Border Guard and its implications for the process of receiving asylum applications have received special attention. Grave concerns about the interview process conducted by border guards were detected.[820] For example, in many cases, interview questions did not address the fear of persecution.[821] Several interviewees declared that 'some of the questions seemed unrelated to their fear of persecution in their home countries.'[822] Besides, the confidentiality of the asylum procedure was not fully guaranteed at the Polish border, which constitutes a violation of the principle of confidentiality of the asylum procedure.[823] Various interviewees described the interview process as 'rushed and lacking privacy.'[824]

In addition, allegations of arbitrary selection of asylum seekers have been noticed in Poland.[825] According to the Belarusian NGO Human Constanta, the Polish Border Guard arbitrarily denied admitting many persons asking for asylum in Poland, with only a couple of individuals per day being accepted to the asylum procedure. However, 'the logic behind the registration of asylum cases by the Polish Border Guard seemed unclear.' [826] Furthermore, those denied from entering were asked to board a return train to Belarus later the same day and received a decision where the Border Guard officers pointed out the cause of refusal: 'Lack of entry visa.'[827] In this sense, several complaints against the Border Guard were registered by national[828] and international courts.[829]

When it comes to cases of entry refusals before national courts, the Supreme Administrative Court of Poland, for example, ruled in a number of cases[830] that 'the official notes memos issued and signed by the Border Guard to substantiate refusal of entry decisions indicating 'economic purposes' as the reason behind a foreigner's intention to

[820] ECRE. "Country Report: Poland." 2019, p. 17-18. Retrieved from https://asylumineurope.org/wp-content/uploads/2020/04/report-download_aida_pl_2019update.pdf Accessed 9 February 2022.
[821] *Op.cit.* Human Rights Watch. "Poland: Asylum Seekers Blocked at Border." 1 March 2017.
[822] *Ibid.*
[823] Art.15 of Asylum Procedures Directive.
[824] *Op.cit.* Human Rights Watch. "Poland: Asylum Seekers Blocked at Border." 1 March 2017.
[825] Human Constanta. "Invisible Refugees on Belarus Poland border 2016-2017."10 January 2018. Retrieved from https://humanconstanta.by/en/invisible-refugees-on-the-belarusian-polish-border-2016-2017/ Accessed 24 February 2022.
[826] *Ibid.*
[827]Szczepanik, Marta. "Defending the right to seek asylum: a perspective from Poland. Legal dialogue organization." *legal dialogue*, 8 August 2018. Retrieved from https://legal-dialogue.org/defending-the-right-to-seek-asylum-a-perspective-from-poland Accessed 24 February 2022.
[828] Mainly, the Voivodeship Administrative Court and the Supreme Administrative Court.
[829] *E.g. M.K. and Others v Poland*, cases no. (40503/17), (42902/17), and (43643/17) Judgment of the Court (First Section) of 23 July 2020, ECtHR; *D.A. and Others v. Poland*, case no. (51246/17) Judgment of the Court (First Section) of 8 July 2021, ECtHR.
[830]The judgments of the Polish Supreme Administrative Court, case no.: (II OSK 2766/17) of 17 May 2018 and case no. (II OSK 345/18) of 20 September 2018.

enter Poland cannot be sufficient evidence on the basis of which the entry is rejected.'[831] Generally speaking, the Supreme Administrative Court of Poland renounced all entry-refusal decisions showing procedural omissions made by the Border Guard.[832] As the Supreme Administrative Court has issued several judgments favourable to asylum seekers, the Commissioner for Human Rights requested that the Ministry of Interior and Administration include in national law provisions that would implement the Supreme Administrative Court's case-law.[833] The Ministry retorted that the existing procedure would not be altered. The Ministry of Interior disagreed, considering that the case-law of the Supreme Administrative Court is not legally binding for cases other than those that were examined by the Court.[834]

At the international level, in the case referred to as *M.K. and Others v. Poland*, the ECtHR ruled that denying access to asylum procedures and the repeated refusal of Polish border authorities to examine applications for international protection violated several articles of the ECHR.[835] According to the Court judgment, the Polish authorities had failed to examine the applicants' requests for international protection in compliance with their procedural obligations, contrary to article 3 of the ECHR.[836]

The majority of the problems with access to asylum in Czechia have been identified in the transit zone of international airports, which are the country's only external borders with third countries.[837] In 2015 and 2016, the Organization for Aid to Refugees (hereafter 'OPU') recognized various complaints against the Aliens Police behaviour at the Prague Airport Transit Zone. The police denied several people who had expressed their intention,

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[831] European Database of Asylum Law. "Poland Supreme Administrative Court rules in cases of refusal of entry at the border." 18 September 2020.
Retrieved from https://www.asylumlawdatabase.eu/en/content/poland-%E2%80%93-supreme-administrative-court-rules-cases-refusal-entry-border Accessed 24 February 2022.

[832] European Asylum Support Office. "Input by civil society to the EASO Annual Report on the Situation of Asylum in the EU+ 2018." 28 February 2019, pp.1-11.
Retrieved from https://www.easo.europa.eu/sites/default/files/helsinki-foundation-for-human-rights-po-2018-web.pdf Accessed 24 February 2022.

[833] Commissioner for Human Rights, letter dd. 24 September 2018; *Op.cit.* Asylum Information Database. "Country Report Poland." 2018, p.15.
Retrieved from content/uploads/2019/03/report-download_aida_pl_2018update.pdf Accessed 25 February 2022.

[834] Ministry of Interior, Response from 29 October 2018, pp.1-4. Retrieved from http://bit.ly/2C0SJd7 Accessed 25 February 2022.

[835] *Op.cit. M.K. and Others v Poland.* para.152.

[836] *Ibid.* paras.138-139.

[837] Franková, Hana. "Czech Republic." *Addressing Security concerns in the Asylum Procedure*, edited by Katarzyna Przybysławska, Halina Nied Legal Aid Centre & Human Rights League & The Organization for Aid to Refugees & Subjective Values Foundation 2018, p.38.
Retrieved from https://www.pomocprawna.org/lib/i5r5fu/Addressing-Security-Concerns-in-Asylum-V4--report-2018-jo477sj4.pdf Accessed 25 February 2022.

of making asylum claims.[838] The failure to present a proper entry document led to obstacles to accessing the asylum procedure at the airport transit zone. In some cases, the police refuse to 'hear' the asylum demands and instead launch a criminal procedure for the crime of presenting a forged document.[839] Even people who arrived with valid visas could face obstacles when expressing their intention to seek asylum at the airport transit zone. Testimonies collected by OPU included a female asylum seeker from Azerbaijan with a valid visa, travelling with her two children in 2015; and a family of Iraqi Yezidi asylum seekers with valid visas, travelling with four children in 2016.[840] Although they declared their intention to claim asylum, the border police cancelled their visa and wanted to deport them.[841]

Compared to the other members of the V4 group, the number of asylum seekers was low in Slovakia.[842] Nonetheless, an alleged violation of the asylum procedure was identified.[843] In *Asady and others v. Slovakia*, the applicants alleged that the Slovak authorities had failed to carry out an individual assessment and examination of their case and had denied them access to the asylum procedure.[844] Also, the applicants complained that their removal to Ukraine was carried out without any type of assessment of their specific circumstances or effective remedy.[845] The ECtHR, having regard to the particular circumstances and the available evidence, was not persuaded that the applicants' expulsion was 'collective' within the meaning of Article 4 of Protocol No. 4 and that the applicants were prevented from claiming asylum.[846]

Several physical and legislative obstacles have made effective access to the territory of the V4 countries, which is an essential pre-condition to being able to exercise the right to seek asylum, challenging. It could be claimed that border rejection did not always imply a return to a country where the asylum seeker faces persecution, and hence did not always

[838] NGO information. "The Czech Republic Joint submission by OPU and Forum for Human Rights (FORUM) to the Universal Periodic Review of the Czech Republic on the 28th session of the UPR Working Group" October-November 2017, p.4.
[839] HHC "Pushed Back at the Door: Denial of Access to Asylum in Eastern EU Member States." 2017, p.8. Retrieved from http://www.ecre.org/poland-bulgaria-czech-republic-hungary-and-slovenia-pushed-back-at-the-door/Accessed 25 February 2022.
[840] *Op.cit.* "NGO information the Czech Republic." 2017, p.7.
[841] *Ibid.*
[842] *Op.cit.* Cuprik, Roman "Asylum seekers avoid Slovakia." 2017.
[843] *Asady and Others v. Slovakia*, (Application no. 24917/15), Judgment of the Court (third Section) of 24 March 2020, ECtHR.
[844] *Ibid.* para. 3-9.
[845] *Ibid.* para.14.
[846] *Ibid.* para.75.

imply *refoulement.* For example, Hungary considered that rejecting asylum seekers coming from Serbia would not result in *refoulement* as Serbia is a 'safe third country' where asylum seekers can claim asylum. However, how can it be guaranteed that the asylum seeker's rights would not be threatened or that he/she would not be tortured or exposed to cruel, inhuman, or degrading treatment if access to the asylum procedure in Hungary is denied and he/she is returned to Serbia? In the same vein, denial of entry to Polish territory to claim asylum and deportation to Belarus could amount to *refoulment*, given Belarus is not a secure place for asylum seekers. The authority of the four countries to regulate their borders and manage the mixed migratory flow is legitimate, but it should not be used to restrict the right to seek asylum. A case-by-case assessment is required to determine whether an asylum seeker's denial at the border automatically results in his deportation to a country where he faces persecution.

2.3. Criminalization of irregular entry of asylum seekers

The criminalization of asylum means that an asylum seeker's irregular entry or stay is punishable.[847] In some cases, states adopt a 'zero-tolerance policy' for irregular entry or stay of asylum seekers.[848]

In general, Article 31(1) CSR51 prohibits the penalization of asylum seekers coming 'directly from a territory where their life or freedom was threatened' for irregular entry or stay.[849] It recognizes the extraordinary circumstances that asylum seekers may face when fleeing a country where they face persecution.[850] It clearly envisions that asylum seekers may have no realistic choice but to enter a country in an irregular manner without a visa or passport, and requires states parties to the CSR51 to refrain from imposing penalties on such asylum seekers, [851] at least where certain conditions are met.[852] An asylum seeker

[847] Healey, Sharon A. "The Trend Toward the Criminalization and Detention of Asylum Seekers." *Human Rights Brief*, vol. 12, no. 1, 2004, pp.1-5; McDonnell, Thomas M. & Merton, Vanessa H. "Enter at Your Own Risk: Criminalizing Asylum-Seekers." *Columbia Human Rights Law Review*, vol. 51, no.1, 2019, pp. 1-3.

[848] Ghosh, Smita & Hoopes, Mary. "Learning to Detain Asylum Seekers and the Growth of Mass Immigration Detention in the United States." *Law & Social Inquiry*, vol. 46, no. 4, 2021, p.25.

[849] Art.31(1) CSR51.

[850] McAdam, Jane. "Inquiry into the provisions of the Migration Amendment (Designated Unauthorised Arrivals) Bill, 2006." Parliament of Australia, p.10. Retrieved from https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed_inquiries/2004-07/migration_unauthorised_arrivals/submissions/sublist Accessed 26 February 2022.

[851] UNHCR considers that 'the Convention is both a status and rights-based instrument and is underpinned by a number of fundamental principles, most notably non-discrimination, non-penalization and non-refoulement.' Source: UNHCR. "Introductory Note, 1951 UN Convention on Refugees and 1967 Protocol Relating to the Status of Refugees." 2010, p.3.

should not be penalized if he/she arrived directly, presented themselves 'without delay', or demonstrated 'good cause' for their irregular entry or presence.[853] In other words, no one who has entered or stayed illegally in the country where he/she seeks asylum may be detained, imprisoned, or punished as a result of his irregular entry. In this context, Goodwin-Gill has observed that the notion of punishment encompasses 'prosecution, fine, and imprisonment.'[854] According to the author, imposing penalties without taking into account the validity of a person's claim to be a refugee will probably also violate the state's commitment to guarantee and protect the human rights of everyone within its territory or subject to its jurisdiction.[855]

The question thus arises: is Article 31(1) only applicable to asylum seekers who have arrived 'directly from a territory where their life or freedom was threatened'? The expression 'directly from a territory where their life or freedom was threatened' can be interpreted in a variety of ways.[856] There are, in my opinion, two such ways.

The first type of interpretation is strict, literal, and narrow, which refers to a 'plain text reading' or the 'ordinary meaning' of the provision, in which the provision is interpreted based on its plain text meaning. Asylum seekers arriving from or transiting through a 'safe third country' are excluded from this provision, in countries that interpret the refugee definition narrowly.

Retrieved from https://www.unhcr.org/protection/basic/3b66c2aa10/convention-protocol-relating-status-refugees.html Accessed 26 February 2022.

[852] Art. 31(1) CSR51.

[853] *Ibid*.

[854] Goodwin-Gill, Guy S. "Article 31 of the 1951 Convention relating to the Status of Refugees: Non-penalization, Detention, and Protection." *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* edited by UNHCR, 2003, p. 194.

[855] According to Goodwin-Gill, those who argue that Art. 31(1)'s use of the word "penalty" should be interpreted more strictly frequently cite the French translation, which merely calls for '*sanctions penales*' (or 'criminal penalties') and case law. However, the English language version refers only to 'penalties.' As Goodwin-Gill notes: where the French and English texts of a convention disclose a different meaning which the applications of Art. 31 and 32 of the 1969 Vienna Convention do not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted. Source: *ibid.* pp.190-194.

[856] Textualist, Intentionalist, and Teleological are the three major schools of treaty interpretation.
Source: Morse, Oliver. Schools of Approach to the Interpretation of Treaties. Catholic University Law Review, vol.9, no.1, 1960, pp.36-51; Sinclair, I. M. "Vienna Conference on the Law of Treaties." The International and Comparative Law Quarterly, vol. 19, no. 1, 1970, pp. 47–69; Merrills, J. G. "Two Approaches to Treaty Interpretation." *The Australian Yearbook of International Law Online,* vol. 4, no.1, 1971, pp. 55-82; Ammann, Odile. (ed.) "Chapter 6 The Interpretative Methods of International Law: What Are They, and Why Use Them?" *Domestic Courts and the Interpretation of International Law*. Brill Nijhoff, 2020, pp.991-222.

The second type of interpretation is purposive and broad.[857] In this case, the expression 'directly from a territory where their life or freedom was threatened' includes asylum seekers who transited or stayed for a period of time in other countries where they did not or could not receive international protection in accordance with international standards, or where their safety or security could not be assured.[858] This reading is consistent with the humanitarian objectives of CSR51, which is to provide as much protection as possible to those in need. A purposive reading of the provision would imply that asylum seekers who did not 'come directly from a territory where their life or freedom was threatened' may also benefit from the protection provided by this provision.

VCLT may be used as an additional tool for interpretation where the CSR51's text is ambiguous. Article 32 VCLT provides the use of additional means of interpretation, including *travaux préparatoires*. This means that the latter could play a supporting role as the means of interpretation. The terms of treaties written in two or more languages are presumed to mean the same thing in each authentic text, according to Article 33(3) VCLT. However, Article 33(4) VCLT states that 'when a comparison of the authentic texts reveals a difference in meaning that the application of Articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.' This approach should be applied to interpreting Article 31 CSR51 because there are differences between some aspects of the English and French language versions of the provision. The Non-Penalization clause, according to the Vienna Convention, is intended to avoid the scenario where a claimant is obliged to flee their country of origin but is refused entry into another. The *travaux préparatoires* demonstrated that 'coming directly' and 'showing good cause' were not meant to deny protection to persons in analogous situations. The drafting history of Article 31(1), however, clearly demonstrates only a small shift from an 'open' immunity provision (benefiting the refugee who presents themselves without delay and demonstrates 'good cause') to one with a slightly more restricted scope, including references to refugees 'coming directly from a territory where their life or freedom was threatened.'[859]

In Article 31(1), the expression 'coming directly' refers to a circumstance in which a person enters the country where asylum is sought straight from his or her country of origin

[857] Costello, Cathryn. "Article 31 of the 1951 Convention Relating to the Status of Refugees." Legal and Protection Policy Research: division of international protection, Series, PPLA/2017/01, 2017, p.5.
[858] *Ibid.* pp.3-5.
[859] *Op.cit.* UNHCR. The Refugee Convention, 1951: The *Travaux préparatoires* analysed with a Commentary by Dr. Paul Weis, 1990, p. 201-220.

or from a different country where his or her protection, safety, or security cannot be guaranteed. It is recognized that this expression also refers to a person who transits through a third country for a short period of time without requesting or obtaining asylum there. The expression 'coming directly' is not subject to a precise time limit, and each case must be evaluated on its own merits.[860]

It is interesting to study how the V4 countries interpret the non-penalisation clause of CSR51 and how the four countries handle the irregular entry or presence of asylum seekers. To begin with, it is essential to understand the legal provisions governing irregular entry in general. Irregular border crossings from the fence side can amount to a crime in Hungary. [861] In Poland [862] and Czechia, irregular border crossing is punishable by imprisonment only if it is committed with the use or threat of violence.[863] In Slovakia, irregular border crossing is not a crime, but it is punishable by a range of administrative fines.[864]

Will asylum seekers be exempt from penalties for irregular entry if they present themselves 'without delay' to the authorities and demonstrate 'good cause for their irregular entry or presence'? When Article 31(1) CSR51 was found to be applicable, criminal proceedings were not suspended in the V4 countries. [865] Criminal and asylum procedures are applied simultaneously.[866] This means that the asylum seeker will most likely be detained or 'imprisoned' throughout the asylum process because he/ she entered in an irregular manner.[867]

Both Poland and Slovakia examine the conditions referred in Article 31(1) CSR51 when deciding whether or not to impose penalties for irregular entry or stay of asylum seekers.[868]

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[860] UNHCR. UNHCR's Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers, 26 February 1999, para. 4.
[861] In Hungary, irregular border crossings from the fence side can result in up to 8 years in prison, deportation, and a re-entry ban. (Art. 352 of Act C of 2012 on the Penal Code, as amended by Act CXL of 2015).
[862] In Poland, irregular border crossing can result in a fine, a restriction of liberty penalty, or a deprivation of liberty for up to two years. (Art.49(A) Act of 24 August 2001 on the Code of Practice for Petty Offences; Art. 264 Act of 6 June 1997 Penal Code)
[863] In Czechia, irregular border crossing is punishable by imprisonment for one to five years only if it is committed with the use or threat of violence (Art. 339 of the Penal Code of Czech Republic of 2009).
[864] In Slovakia irregular border crossing is not a crime, but it is punishable by a range of administrative fines (Art. 116 of Act No. 404/2011 Coll. of 21 October 2011 on the Stay of Foreigners and on the Changes and Amendments of Some Legal Acts regulates the entry and legal stay of foreigners).
[865] Costello, Cathryn, 2017, p.37.
[866] *Ibid.*
[867] Detention is discussed in the next subchapter.
[868] European Commission. "EMN Ad-Hoc Query on "Interaction between criminal proceedings and asylum procedure."" 9 February 2016, p.2.

In Poland, criminal procedure for the irregular entry of asylum seeker can be suspended, depending on the circumstances.[869] However, criminal proceedings continue in both Poland and Slovakia when an asylum seeker arrives from a transit country, 'not coming directly.'[870] In Czechia, asylum seekers are not prosecuted for irregular border crossing, but the act is punishable only when the state border is crossed with force.[871] Asylum procedure at the border excludes the criminal procedure because the asylum seeker does not cross the border, so he/she is a subject of refusal of entry.[872] At the end of the asylum procedure at the border, in case of refusal, he/she is returned to his/her country of origin or to another country where he/she can be readmitted.

Table No.2.: Legal provisions governing the irregular entry, including irregular entry of asylum seekers

Country	Legal provisions	Punishment	Applicability of Article 31(1) CSR51
Hungary	• Art. 204 (1)(2)(3) Act II of 2012 on petty offences. • Art. 352 of act C of 2012 on the Penal Code, as amended by Act CXL of 2015)	• **Fine:** from HUF 5,000 up to HUF 150,000 (€ 16 up to € 510) or • **Crime:** irregular border crossings from the fence side can result in up to eight years in prison, deportation, and a re-entry ban.	Criminal and asylum procedures are applied simultaneously.
Poland	• Art.49(a)Act of 24 August 2001 on the Code of Practice for Petty Offences • Art. 264 Act Of 6 June 1997 Penal Code • Provisions 2(A) (B) of the regulation of the Ministry of Interior and Administration of 13 March 2020 on	• **Fine:** from PLN 20 (€ 4.75) to PLN 5,000 (€ 1,188). or • **Crime:** restriction of liberty penalty, or prison for up to two years. • Irregular border crossing is punishable by deportation and re-	Criminal and asylum procedures are applied simultaneously.

[869] *Ibid.*
[870] *Ibid.*
[871] Art. 339 of the Penal Code of Czech Republic of 2009.
[872] *Op.cit.* European Commission. "EMN Ad-Hoc Query…" 2016, p.2.

	temporary suspension or restriction of border traffic at certain border crossing points.	entering ban for a period ranging from 'six months to three years'.	
Czech Republic	• Art. 156 Act No. 326/1999 Coll., of 1 January 2000 on the Residence of Foreign Nationals in the Territory of the Czech Republic. • Art. 339 of the Penal Code of Czech Republic of 2009).	• **Fine:** from CZK 3,000 (€ 120) to CZK 10,000 (€ 400) or • **Crime:** irregular border crossing is punishable by imprisonment for one to five years only if it is committed with the use or threat of violence.	Criminal and asylum procedures are applied simultaneously.
Slovakia	• Art. 116 of Act No. 404/2011 Coll. of 21 October 2011 on the Stay of Foreigners and on the Changes and Amendments of Some Legal Acts regulates the entry and legal stay of foreigners.	• **Fine**: up to € 800.	Criminal and asylum procedures are applied simultaneously.

Source: author's own creation

It is important to investigate whether irregular entry of asylum seekers in the aftermath of the 2015-16 refugee crisis amounts to a crime in the V4 countries. In Czechia, as previously stated, the OPU observed that between 2015 and 2017, asylum seekers were more likely to be imprisoned in regular prisons after arriving at Prague International Airport.[873] The imprisonment was a criminal sanction for presenting false documents. The Czech authorities did not consider the applicability of the non-penalization clause in Article 31(1) CSR51.[874] According to the statements of imprisoned asylum seekers, their requests to claim asylum at the airport transit zone were ignored or directly rejected.[875]

In Hungary, the applicability of Article 31(1) is highly debatable both before and after the 2015-16 refugee crisis.[876] Practice shows that the criminal procedure is not suspended if the defendant applies for asylum during the court hearing, which would have allowed the

[873] *Op.cit*. NGO information. "The Czech Republic Joint submission by OPU …" 2017, p.4.
[874] *Ibid.*
[875] *Ibid.*
[876] There is insufficient data on the applicability and interpretation of Article 31(1) CSR51 when asylum seekers arrive illegally and apply for asylum in Poland and Slovakia. The only available information is that criminal and asylum procedures are applied simultaneously in case of the irregular entry of asylum seekers.

court to consider a defence under article 31(1) CSR51.[877] Motions for suspension of criminal proceedings filed by the defendants' legal representatives were consistently denied by the court on the grounds that eligibility for international protection was not a relevant issue to criminal liability.[878] While the asylum claims have a suspensive effect, and a 'penitentiary judge' can prohibit the execution of a court sentence of expulsion where the individual concerned has been granted international protection, that prohibition does not abrogate the penal sentence, let alone the conviction. [879]

The question is whether the criminalization of irregular entry of asylum seekers in Hungary amounts to a violation of Article 31(1) CSR51. From the Hungarian perspective, there is no violation of Article 31(1) CSR51 because asylum seekers are not coming 'directly from a country of persecution.'[880] In general, asylum seekers arrive in Hungary through a 'safe third country' such as Serbia or another country, where they can claim asylum and be protected. To justify the criminalization of irregular entry of asylum seekers, Hungary relies on arguments related to the protection of national and EU security.[881]

Another point of view, primarily that of the Council of Europe[882] and UNHCR,[883] regarded the criminalization of asylum seekers for the sole reason of crossing the border fence or entering the country irregularly, as inconsistent with Article 31(1) CSR51. According to the Council of Europe 'lodging an asylum claim does not suspend the criminal procedure, placing Hungary in breach of Article 31(1) CSR51.'[884] In the same vein, UNHCR claimed that the prosecution of asylum seekers for irregular crossing of the

[877] Asylum Information Database. "Access to the Territory and Push Backs: Hungary." 2021. Retrieved from https://asylumineurope.org/reports/country/hungary/asylum-procedure/access-procedure-and-registration/access-territory-and-push-backs/ Accessed 26 February 2022.
[878] *Ibid.*
[879] Art. 301(6) of Act CCXL of 2013 on the implementation of criminal punishments and measures, and art. 51 and art. 52 of Act II of 2007 on the entry and residence of third-country nationals; Art. 59(2) of Act C of 2012 on the Penal Code which provides that: 'Persons granted asylum may not be expelled.'
[880] Generally, asylum seekers arrive in Hungary via two main routes. One is from Afghanistan Iran-Turkey-Bulgaria-Serbia (or, to a lesser extent, but also via Romania and Ukraine), and the other is by sea, from Turkey to Greece-Macedonia-Serbia. Source: *Op.cit.* Bernát, Anikó, et *al.* 2019, pp. 8-9.
[881] "Government Spokesperson: Hungary's border fence continues to protect the country against an influx of migrants." *Hungary Today*, 2 February 2018. Retrieved from https://abouthungary.hu/news-in-brief/government-spokesperson-hungarys-border-fence-continues-to-protect-the-country-against-an-influx-of-migrants Accessed 22 February 2022 ; "FM Szijjártó: Building Border Fences 'Only Effective Way' to Stop Migration." *Hungary Today*, 9 November 2021. Retrieved from https://hungarytoday.hu/foreign-minister-peter-szijjarto-building-border-fences-only-effective-way-to-stop-migration-orban-government/ Accessed 26 February 2022.
[882] Council of Europe Parliamentary Assembly. Doc. 14645, Reference 4414 of 21 January 2019, para. 49.
[883] UNHCR. "Hungary as a Country of Asylum. Observations on Restrictive Legal Measures and Subsequent Practice Implemented between July 2015 and March 2016." May 2016, paras.57- 62.
[884] *Op.cit.* Council of Europe, 2019, para.49.

border fence 'raises serious concerns regarding incompatibility with Article 31(1) CSR51.'[885]

As a result of these new provisions, thousands of asylum seekers were convicted of criminal charges related to the border fence between 2015 and 2016. Attempts to invoke Article 31(1) in these cases appear to have failed, owing in part to the fact that asylum seekers were not deemed to have 'come directly' to Hungary.[886] In this context, the UN Human Rights Commissioner, Zeid Ra'ad Al Hussein, stated that amendments to the Penal Code and the Asylum Act are incompatible with Hungary's binding human rights commitments. According to him, this is a completely unacceptable breach of the human rights of refugees. Both seeking asylum and entering a country irregularly are not crimes.[887]

Hungary interpreted Article 31(1) CSR51 restrictively even before the 2015-16 refugee crisis and the construction of fences.[888] In 2008, the HHC released a report on the protection of the rights of people who arrive in Hungary with false documents with the intention of seeking asylum.[889] According to the report, when the application of Article 31(1) arises, Hungarian authorities apply the provisions of the Penal Procedure Code, rather than the provisions of the CSR51, and do not take asylum seekers' special circumstances into account.[890] In 2008, both the UNHCR and the HHC requested the Chief Prosecutor's Office to determine its position concerning the applicability of Article 31(1) CSR51.[891] The Chief Prosecutor admitted that if the criteria contained in Article 31(1) are fully met 'they present themselves without delay to the authorities and show good cause for their illegal entry or presence', the criminal procedure should be suspended until a final decision is taken in the asylum procedure. Indeed, he claimed that the

[885] *Op.cit.* UNHCR. "Hungary as a Country of Asylum..." 2016, para. 59.
[886] *Ibid.* paras. 60-62.
[887] OHCHR. "Hungary violating international law in response to migration crisis: Zeid." 17 September 2015. Retrieved from https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=16449&LangID=E Accessed 26 February 2022.
[888] *E.g. Al-Tayyar Abdelhakim v Hungary,* application no. (13058/11), Judgment of the (Second Section) of 23 October 2012, ECtHR, para.37.
[889] HHC. "Asylum Seekers' Access to Territory and to the Asylum Procedure in the Republic of Hungary." 2008, pp.31-34. Retrieved from https://www.refworld.org/pdfid/4ecfd5d52.pdf Accessed 27 February 2022.
[890] According to the report, when Hungarian authorities discover that a foreigner is using a false travel document, they usually claim that they must apply the provisions of the Penal Procedure Code and are thus required to report the criminal act. As a result, an asylum seeker who enters Hungary with false or forged travel documents was subject to criminal sanctions. Source: *Ibid.*
[891] In 2008, UNHCR addressed a letter to the Chief Public Prosecutor on "The Application of Article 31 of the Geneva Convention Relating to the Status of Refugees in the Republic of Hungary".

nullification of culpability is linked to the final recognition as a refugee or as a beneficiary of subsidiary protection. In other words, in cases where persons are later admitted as refugees or beneficiaries of subsidiary protection, culpability should be excluded according to Article 22(i) of the Penal Code.[892] The application of Article 31(1) CSR51 has always been problematic in Hungary. It can be said that Hungarian authorities failed to properly apply Article 31(1) CSR51 in several cases, establishing the criminal liability of asylum seekers without regard to this specific provision of the CSR51.Hungarian law lacked legal guarantees to ensure compliance with Article 31(1) CSR51. The criminalization of irregular entry targeting asylum seeker through the exclusion of the application of Article 31(1) violates Hungary's international legal obligations.

I presume that the non-penalization clause in Article 31(1) CSR51, as well as the avoidance of prosecuting asylum seekers, must be considered when asylum seekers enter irregularly. The failure to establish clear rulings prohibiting or suspending criminal prosecution while the asylum claim is pending or determined could be a problem. In Hungary and Czechia, for example, criminalizing irregular entry is an additional barrier for asylum seekers. In recognizing that seeking asylum is not an unlawful act nor a criminal act, an asylum seeker shall not be criminalized solely for his/her irregular entry.

3. Asylum Seekers at risk of unlawful and arbitrary detention

In the asylum context, 'detention' can be defined as 'the deprivation of liberty or confinement in a closed place which an asylum seeker is not permitted to leave at will, including, though not limited to, prisons or purpose-built detention, closed reception or holding centres or facilities.' [893] The detention facility may be managed by public authorities or private contractors, and the confinement may be authorized by an administrative or judicial procedure.[894]

Article 31(2) CSR51 uses the expression 'restrictions on movements of refugees.' This means that restrictions on asylum seekers' movement may be imposed, only if necessary, until their status is regularized. It is worth noting that the right to liberty and security of person is guaranteed under Article 9 of the ICCPR. This applies to all kinds of deprivations

[892] Art. 22 of Act C of 2012 on the Penal Code.
[893] UNHCR. "Detention Guidelines: Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum Seekers and Alternatives to Detention." 2012, para.5.
[894] *Ibid.*

of liberty, including detention for migration control.[895] However, the states' right of derogation can be invoked only in a public emergency if it is 'strictly required by the exigencies of the situation', and 'provided such measures are not inconsistent with their other obligations under international law and do not involve discrimination …'[896]Accordingly, detention in the asylum context is neither prohibited under international law *per se*, nor is the right to liberty of an individual absolute.[897]

Asylum seekers may be detained during the 'pre-admission' stage or throughout the entire asylum procedure. If used, detention should be lawful rather than unlawful or arbitrary, and explicitly confirmed to be necessary, reasonable, proportional, and a measure of last resort. [898] It should be used only in specific cases and should address individual needs and vulnerabilities.

As will be detailed below, the detention of asylum seekers has been governed by specific provisions of EU asylum law, most notably in the Reception Conditions Directive, the Dublin III Regulation, and the Return Directive, which outline permissible grounds, procedural safeguards, and detention conditions, including those for vulnerable applicants. Detention conditions must strictly respect human dignity and international standards.

All of the V4 countries established grounds to justify the detention of asylum seekers.[899] Indeed, detention of asylum seekers is only legal in all four countries if it is used to verify identity, determine the elements on which the claim to asylum is based, or to preserve public order or national security. As a result, asylum seekers can be detained pending a

[895] HRC. "General Comment No. 8 on Article 9 (Right to liberty and security of person)." HRI/GEN/1/Rev.7, 1982, para. 1.
[896] Art. 4 ICCPR.
[897] *Op. cit.* UNHCR. "Detention Guidelines…" 2012, para.18.
[898] UNGA. "Report of the Working Group on Arbitrary Detention United Nations Basic Principles and Guidelines on remedies and procedures on the right of anyone deprived of their liberty to bring proceedings before a court." A/HRC/30/xx, 2015, paras. 1-14, 24, 54.
[899]**(1)** In Hungary, asylum detention found its basis in Art. 31/A the Act LXXX of 2007 of 1 January 2008 on Asylum. Based on Act XX of 2017 on the amendment of certain acts to tighten the procedures conducted on the border, Hungary expanded its detention regime by establishing automatic and indefinite detention for all asylum seekers for the duration of the asylum procedure, with the exception of unaccompanied children under the age of 14; **(2)**In Poland, asylum detention found its basis in both Art. 40 and Art. 89(1) of Act of 13 June 2003 on granting protection to aliens within the territory of the Republic of Poland, and Art. 398(A),410-427 of Act of 12 December 2013 on Foreigners; **(3)** In Czechia, asylum detention found its basis in Art.124(A) 124(B)(1) art.125(1)-(3) Art. 119(1)(A) and art. 119(1)(B)(6)-(7) of Act No. 326/1999 Coll., of 1 January 2000 on the Residence of Foreign Nationals in the Territory of the Czech Republic; Art. 124(1), Art. 129 of the Act no. 326/199 Coll. on the Residence of Foreign Nationals, and Art. 46(A)(5) of Act No. 325/1999 Coll. of 11 November 1999 on Asylum.; **(4)**In Slovakia, asylum detention found its basis in Art. 2 (T), Art. 61(a), Art. 77, Art.78 (A), Art. 88 of Act No. 404/2011 Coll. of 21 October 2011 on the Stay of Foreigners and on the Changes and Amendments of Some Legal Acts regulates the entry and legal stay of foreigners and Art. 3 (8) of Act. No. 480/2002 Coll. of 20 June 2002 on Asylum and on the Changes and Amendments of Some Legal Acts.

decision on their asylum claim or other requests to remain in the country; or pending their final removal when they are no longer allowed to stay in the country due to the rejection of their asylum application. As will be addressed further below, the maximum period of detention has been established by law, and special detention measures apply to 'vulnerable applicants.'

The unlawfulness of certain detentions of asylum seekers during and in the aftermath of the 2015-16 refugee crisis raises a number of inconsistencies with V4 countries' EU and international obligations. The first question that comes to mind is: what makes asylum detention unlawful? There are numerous reasons that call into question the lawfulness of asylum detention.

De jure, any asylum detention that is not based on one of the legal grounds specified in the V4 national legislation, in accordance with the administrative procedure within a strict time limit and violates the detainee's rights and guarantees is unlawful. The following are the main flaws in asylum detention: the total absence of individualized decision-making in determining the necessity and proportionality of detention, as well as the use of speculative, generalized arguments rather than individualized reasoning; the absence of well-considered alternatives to detention; and the inefficiency of judicial review of asylum detention. Additionally, the place of detention 'transit zone' itself challenged the lawfulness of detention.

3.1. Automatic detention and lack of individualized decision-making

What exactly is meant by 'automatic detention'? The term 'automatic detention' describes detention that is not based on an examination of the necessity of the detention in the specific case. One of the features of automatic asylum detention is the complete lack of individualized decision-making. This means that authorities automatically detain asylum seekers who intend to apply for asylum or whose asylum claim is pending, as well as asylum seekers subject to the return procedure.

Recent national legislative reforms in Hungary and Poland have increased the risk of systematic and arbitrary detention through the almost exclusive conduct of asylum procedures at the border. The 2017 amendments to Hungary's asylum law allowed for the automatic and indefinite detention of all asylum seekers, whose claims can now only be examined in the transit zones of *Röszke* and *Tompa*. The Polish government proposed a similar automatic detention regime at the border shortly after the Hungarian legislative

reform. Similarly, the aforementioned Draft Amendments, which were initiated in 2017 and will be implemented in Poland in 2021, impose mandatory detention of asylum seekers with no opportunity to challenge their detention.

In addition, automatic detention of asylum seekers has been observed in Czechia. Compared to other countries in the region, the Czech legal framework is distinguishable by setting an extensive ground, 'not narrowly defined', that can lead to automatic detention.[900] As the country was an important transit country for asylum seekers attempting to reach northern and western during the height of the 2015-16 refugee crisis, an amendment to the Asylum Act has extended the list of grounds defending the detention of asylum seekers.[901] The amendment was part of a complex asylum strategy, the first of its kind for Czechia.[902] Accordingly, the government significantly boosted the country's detention capacity and started systematically apprehending not only asylum seekers on trains arriving from Hungary [903] but also persons arriving at the Prague airport transit zone to claim asylum.[904]

In a similar vein, in *Komissarov v. Czech Republic*, the applicant, a Russian national, subject of several extradition requests lodged by Russia, complains under Article 5(1) ECHR that his detention by the Czech authorities was arbitrary and unreasonably prolonged as the time-limit prescribed under domestic law had not been respected, and no alternative measures to detention were examined.[905] To be more specific, the applicant lodged an application for asylum and the extradition proceedings were halted. However, he was held in detention during the duration of the asylum proceedings and, following their rejection, he was extradited on 15 November 2017.[906] In its analysis, the ECtHR noted that when extradition and asylum proceedings run concurrently, separate time limits are provided in domestic law, and in the present case, these limits have been greatly exceeded.[907] The Court reasoned that strict time limits for an asylum examination are important safeguards against arbitrariness and, that as a result, the domestic authorities are required to demonstrate the needed diligence under both domestic law and the

[900] HRC. "Concluding observations on the third periodic report of the Czech Republic." CCPR/C/CZE/CO/3, 22 August 2013, para. 17.
[901] Art. 2 of Act No. 314/2015 Coll.
[902] Global Detention Project. "The Czech Republic."
Retrieved from https://www.globaldetentionproject.org/countries/europe/czech-republic Accessed 9 February 2022.
[903] *Ibid.*
[904] *Ibid.*
[905] *Komissarov v. Czech Republic* case no. (20611/17) Judgment of the Court (Fifth Section) of 3 February 2022, ECtHR.
[906] *Ibid.* paras. 2-5.
[907] *Ibid.* para. 51-52.

Convention.[908] The court considered that the authorities failed to acknowledge or respond to the serious delays in the proceedings despite the applicant's complaints.[909] As a result, the Court found that the applicant's detention pending extradition for eighteen months violated domestic law.[910] In light of these considerations, the Court concluded that there had been a violation of Article 5(1)(f) ECHR.[911]

Deprivation of liberty is only permissible under the ECHR if it is used to achieve a specific goal defined in the exhaustive list of permissible grounds listed in Article 5(1) ECHR subparagraphs (a) to (f). Detention of persons subject to extradition, irregular migrants, and asylum seekers usually falls under subparagraph (f), which has 'two limbs': to prevent unauthorised entry or when action is being taken with the intention of deportation or extradition.[912] The legality of detaining asylum seekers in order to secure their deportation is not always clear.[913] The ECtHR initially stated that the pre-deportation limb of Article 5(1)(f) ECHR could not be applied to asylum seekers because Articles 31 and 33 CSR51 prohibit the expulsion of asylum seekers prior to a final decision on their application.[914] While ECtHR refers to CSR51 broadly in *S.D. v. Greece*, it specifically refers to Articles 31-33 CSR51 in *R.U. v. Greece*. The Court notes, in the latter, that it is clear from international law, [...] specifically Articles 31-33 CSR51[...], that the expulsion of a person who has submitted an asylum application is not permitted until a final decision on the asylum claim is issued.[915] However, in the recent case of *Nabil and others v. Hungary*, the Court took a different stance.[916] The case concerned three Somali nationals who entered Hungary through Serbia and were detained by Hungarian border police because they entered irregularly and lacked identity documents. The applicants were issued an expulsion order and detained in order to ensure their return. After a few days, they applied for asylum, claiming that they would face persecution from Al-Shabab if they

[908] *Ibid.* para. 51.
[909] *Ibid.*
[910] *Ibid.* para. 52.
[911] *Ibid.* para. 53.
[912] European Database of Asylum Law. "Detention of asylum-seekers under the scope of Article 5(1)(f) of ECHR - some thoughts based on recent ECHR and CJEU jurisprudence." 14 September 2016. Retrieved from https://www.asylumlawdatabase.eu/en/journal/detention-asylum-seekers-under-scope-article-51f-echr-some-thoughts-based-recent-echr-and Accessed 19 February 2022.
[913] *Ibid.*
[914] *S.D. v. Greece*, case no. (53541/07), Judgment of the Court (First Section) of 11 September 2009, ECtHR, paras. 15, 18, 31, 81; *R.U. v. Greece*, case no. (2237/08) Judgment of the Court (First section) 7 September 2011ECtHR.
[915] *Ibid. R.U. v. Greece*, para. 94.
[916] *Nabil and others v. Hungary*, case no. (62116/12), Judgment of the Court (Former Second Section) of 22 September 2015, ECtHR.

returned to Somalia.[917] They were detained until they were granted subsidiary protection. The Court reiterated that detention 'with a view to deportation' can only be justified if the deportation is already ongoing and there is a real prospect of carrying it out.[918] However, the pending asylum case does not imply that the detention was no longer 'with a view to deportation' because the eventual dismissal of the asylum applications could have opened the way for the deportation orders to be carried out. 'The detention nevertheless had to be in compliance with the national law and free of arbitrariness.'[919] The Court ruled that the applicants' detention prior to filing their asylum claim was justified by Article 5(1)(f) because they were being detained for the purpose of deportation.[920] Regarding their continued detention, this had been justified primarily on the basis of the initial decision to detain the applicants, without taking into account the criteria set forth in domestic law: whether the applicants were indeed frustrating their expulsion and constituted a flight risk; whether alternative, less restrictive measures were in place; and whether or not expulsion could eventually be enforced.[921] The court found that the detention of asylum seekers was unlawful because Hungary failed to conduct the necessary scrutiny while prolonging the applicants' detention, in violation of Article 5(1) ECHR.[922] However, the fact that deportation of asylum seekers is not permitted during the asylum procedure does not exempt such detention from the provisions of Article 5(1)(f). According ECtHR reasoning in this case, deportation of an asylum-seeker who has the right to remain on the territory of the Member State through the asylum procedure can be secured.

Automatic, mandatory, or collective detention could be viewed as a 'rational response' and a tool to better control the mixed migratory flow.[923] It could also be interpreted as a restrictive asylum measure or a 'deterrence strategy' designed to discourage the filing of false asylum claims and tackle 'secondary movements.'[924] Within this framework, detention is designed as a 'deterrent mechanism' to discourage 'bogus asylum seekers'

[917] *Ibid.* para. 9.
[918] *Ibid.* para. 38.
[919] *Ibid.* para. 38.
[920] *Ibid.* para. 38-39.
[921] *Ibid.* paras. 40-41.
[922] *Ibid.* para.52.
[923] Dušková, Šárka. "Migration Control and Detention of Migrants and Asylum Seekers – Motivations, Rationale, and Challenges." *Groningen Journal of International Law*, vol 5, no.1, 2017, p.23.
[924] Ryo, Emily, Detention as Deterrence. *Stanford Law Review*, vol. 71, 2019, p.237; Majcher, Izabella. "Creeping Crimmigration in Common European Asylum System Reform: Detention of Asylum-Seekers and Restrictions on Their Movement under EU Law." *Refugee Survey Quarterly*, vol. 40, no.1, 2021, pp. 82-83.

including irregular migrants, from entering and staying irregularly.[925] Governments, such as Hungary,[926] have attempted to strengthen their deterrence arguments by linking the mixed migratory flow to grave concerns for national security.[927] Automatic detention, for instance, is lawful in Hungary because it is based on national security grounds , as stipulated in Hungarian asylum legislation. [928] However, detention policies aimed at deterrence are generally unlawful under the EU and IHRL because they are not based on an individual assessment of the need to detain.[929]

The automatic recourse to detention as a general means of asylum control makes the current detention system of the V4 group problematic. On the one hand, under EU and international law, asylum seekers should only be detained in well-justified cases. Detention should be used only when it serves a legitimate purpose and is both necessary and proportionate in each individual case, and it should always be a last-resort measure. The HRC, for example, has expressed concerns about a Hungarian amendment to asylum law that allows for the automatic detention of all asylum applicants in transit zones for the duration of their asylum procedure.[930] Similarly in Poland, although there is no systematic detention, in practice, asylum seekers are placed in detention, and alternatives to detention are not viewed, correctly explained, and justified.[931] The legality of automatic asylum detention, on the other hand, necessitates a more nuanced interpretation given that it is implemented in the context of a mixed migratory flow that necessitates strict verification. The large-scale migratory flow and pressure on borders in the aftermath of the 2015-16 refugee crisis, particularly in Hungary and Poland, make case-by-case assessment of detention based on the individual's specific circumstances impossible. Due to the large

[925] Grant, Stefanie. "Immigration Detention: Some Issues of Inequality." *The Equal Rights Review*, vol. 7, 2011, p. 71.
[926] Bilefsky, Dan. "Hungary Approves Detention of Asylum Seekers in Guarded Camps." *The New York Times* 7 March 2017. Retrieved from https://www.nytimes.com/2017/03/07/world/europe/hungary-migrant-camps.html Accessed 19 February 2022.
[927] Léderer, András. "Deny, Deter, Deprive: the demolishment of the asylum system in Hungary." Heinrich-Böll-Stiftung, Berlin, 19 December 2019. Retrieved from https://cz.boell.org/en/2019/12/19/deny-deter-deprive-demolishment-asylum-system-hungary Accessed 19 February 2022.
[928] *Op.cit.* Law XX of 2017 on the amendment of certain acts to tighten the procedures conducted on the border.
[929] UNHCR. "Comments and Recommendations on the Draft Modification of Certain Migration-Related Legislative Acts for the Purpose of Legal Harmonisation." April 2013, p.9. Retrieved from https://bit.ly/3aiJvaP Accessed 19 February 2022.
[930] HRC. "Consideration of reports submitted by States parties under article 40 of the Covenant." CCPR/C/SR.3465, 23 March 2018, paras. 18, 28, 29, 30; HRC. "Concluding observations on the sixth periodic report of Hungary." CCPR/C/HUN/CO/6, 9 May 2018, paras. 45-46; Human Rights Committee. "Report on follow-up to the concluding observations of the Human Rights Committee." CCPR/C/133/3/Add.2, 17 December 2021, paras. 46- 47.
[931] ECRE. "Country Report: Poland." 2019, p. 71. Retrieved from https://asylumineurope.org/wp-content/uploads/2020/04/report-download_aida_pl_2019update.pdf Accessed 9 February 2022.

number of cases, authorities were unable to establish the facts and circumstances of each one individually. Thus, the 'mass people' detention could be viewed as a preventive measure.

In accordance with EU and international law, decisions to detain asylum seekers should be based on a detailed and individualized assessment of the need to detain, but this has not always been the case in the V4 group. With the exception of Slovakia, the V4 countries used automatic detention that lacked individualized decision-making in response to the 2015–16 refugee crisis. Recent national legislative reforms in Poland and Hungary have enhanced the potential for systematic and arbitrary detention by conducting asylum processes almost exclusively at the border and in transit zones. Similar to this, a Czech amendment to the asylum law established broad grounds for detention rather than narrow ones that might lead to the automatic detention of asylum seekers. While automatic detention may allow for more controlled management of the mixed migratory flow by distinguishing between 'genuine' and 'bogus' asylum seekers, it is still unlawful from an international perspective because it could impair the right to seek asylum. Automatically depriving all asylum seekers of their liberty is a clear violation of the V4 countries' obligations under EU and international law. An asylum seeker may only be detained when it seems necessary, based on an individual assessment of his case, and if other, less coercive, alternatives prove unsuccessful.

3.2. Purposes not justifying detention

Asylum detention that is not pursued for a legitimate reason would be arbitrary. Arbitrariness is not to be regarded as 'against the law' but should be interpreted broadly to incorporate elements of inappropriateness, injustice, lack of predictability, and due process of law.[932] As seeking asylum is not an unlawful act, according to Article 31(1) CSR51, it is assumed that the irregular entry or presence of asylum seekers does not automatically give the state the power to detain or otherwise restrict freedom of movement.[933] As a general principle, asylum seekers should not be held in detention.[934]According to international law, no one can be detained solely because they are seeking asylum. Mindful that asylum

[932] OHCHR. "About arbitrary."
Retrieved from https://www.ohchr.org/EN/Issues/Detention/Pages/AboutArbitraryDetention.aspx Accessed 9 February 2022.
[933] Goodwin-Gill, Guy S. "Article 31 of the 1951 Convention relating to the Status of Refugees: Non-penalization, Detention, and Protection." Cambridge University Press, 2003, pp.218-221.
[934]Art. 14 UHDR; Art. 31(1) CSR51.

seekers frequently have justifiable reasons for irregular entry, including traveling without identity documentation.[935]Detention for the purpose of discouraging future asylum seekers or discouraging those who have begun their claims from continuing to pursue them violates international norms. As Hathaway argues, the principle that refugees should be protected even if they enter without authorization is the 'most significant innovation' of modern refugee law.[936]

A similar approach is adopted by EU law, which views detention without purpose as unlawful. According to the Reception Conditions Directive, the detention of asylum seekers should be applied in line with the principle that a person shouldn't be detained solely because he or she is seeking international protection.[937] Applicants may be detained only under extremely specific, exceptional circumstances specified in this Directive and in accordance with the principles of necessity and proportionality with regard to both the means and the purpose of such detention.[938] In the same vein, according to Article 26 of the Asylum Procedures Directive, Member States may not detain a person solely because he or she applying for asylum, and in the case that they do, the reasons for the detention, the conditions of the detention, and the protections offered must be in accordance with the Reception Conditions Directive.

While EU law and most international bodies consider the criminalization of irregular entry to seek asylum to be disproportionate and recommend that it be considered an infringement, irregular entry to the V4 territories is criminalized and punishable.[939] Asylum detention is frequently an administrative measure, but in countries such as the V4, where irregular entry could amount to a criminal act, detention can be imposed under criminal law.

It is worth noting that the detention of asylum seekers can be justified in a variety of ways, even in the absence of deterrence reasoning. For example, an interpretation of Article 31(1) CSR51 allows asylum seekers to be punished for irregular entry, at least in limited circumstances. The words 'coming directly,' 'without delay,' and 'good cause' in

[935] *Op.cit.* UNHCR. "ExCom Conclusion No 58 (XL)." 1989, paras. (a) (b); "Summary Conclusions: Article 31 of the 1951 Convention Expert Roundtable organized by the United Nations High Commissioner for Refugees and the Graduate Institute of International Studies." Geneva, 8–9 November 2001. para.6.
[936] Hathaway, James C. *The Rights of Refugees under International Law*, Cambridge University Press, 2005, p.386.
[937] Recital 15 Reception Conditions Directive.
[938] *Ibid.*
[939] This point was discussed in the previous subchapter.

Article 31(1) of CSR51 are ambiguous, vague, and open to various interpretations, both broad and narrow.[940]

Also, in the same article, the term 'penalties' refers to 'administrative and judicial convictions' for irregular entry or stay in the country of refuge. According to Weis, the gap in Article 31 leaves wide discretion to contracting states.[941] The author argued that asylum seekers should not be imprisoned but rather detained in a detention centre for a short period of time during mass arrivals for the purposes of investigation.[942] Weis stated that the movement of asylum seekers should be restricted until their status is legalized or they are granted asylum. This is complicated because these procedures can last from a few days to several months, implying that refugees could be detained indefinitely.[943] In a similar vein, Noll contends that where asylum seekers' detention fails the necessity test of Article 31(2) CSR51, it may be punitive and thus prohibited by Article 31(1) CSR51.[944] To sum up, states that take an overly formal or restrictive approach to interpreting Article 31 CSR51 may find sufficient grounds to penalize an asylum seeker for irregular entry.[945]

As discussed in the previous subchapter, a narrow interpretation of the non-penalization clause in Article 31(1) of the CSR51 has been perceived in both Hungary and Czechia. This raises concerns about the punitive and deterrent effects of not only detaining but also imprisoning asylum seekers for irregular entry or coming with false documents.

I presume that asylum detention for irregular entry should be a 'preventive measure' rather than a 'punitive measure.' In the event of a sudden influx, such as the 2015-16 refugee crisis, it is understandable that authorities require more than a few days for investigation and verification of the irregular entry of an asylum seeker; additional detention would be required in cases involving security threats. Asylum seekers, for example, may be detained during the 'pre-admission' phase due to false documents or a

[940] UNHCR. The Refugee Convention, 1951: The *Travaux préparatoires* analysed with a Commentary by Dr. Paul Weis, 1990, pp.303-304; *Op.cit.* Goodwin-Gill, Guy S.2001; Case Law Summaries, *International Journal of Refugee Law*, vol.27, no. 1, 2015, pp. 141–153; Poon, Jenny. "A Purposive Reading of 'Non-Penalization' under Article 31(1) of the Refugee Convention." *Columbia SIPA Journal of International Affairs*, 19 April 2018. Retrieved from https://jia.sipa.columbia.edu/online-articles/purposive-reading-%E2%80%98non-penalization%E2%80%99-under-article-311-refugee-convention Accessed 20 February 2022.
[941] *Op.cit.* Weis, Paul. 1995, p.393.
[942] *Ibid.* pp.303-304.
[943] *Ibid.*
[944] Noll, Gregor. "*Réfugiés en situation irrégulière dans le pays d'accueil* (Refugees Lawfully in the Country of Refuge)." *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary*, edited by Andreas Zimmermann *et al.*, Oxford University Press, 2011, p.1243.
[945]The criminalization of irregular entry of asylum seeker is discussed in the previous subchapter.

lack of proper documentation, or they may be held in anticipation of deportation or transfer to a 'safe third country,' as defined by the Dublin III Regulation. However, after verification, detaining asylum seekers pending the review of their asylum application for the sole reason of their irregular entry should be considered as unlawful.

3.3. Transit zone detention

The detention of an asylum applicant in 'transit zone' challenged the lawfulness of asylum detention. It is crucial to specify that this is primarily a Hungarian matter, as it is related to the Röszke and *Tompa* transit zones on the Serbian border. The main concern is whether the stay of asylum seekers in the *Röszke* and *Tompa* transit zones amounts to detention.

Between 2015 and 2020, Hungary's 'detention' of asylum seekers in the transit zones of *Röszke* and *Tompa* raised concerns. It is necessary to consider the Hungarian government's position as well as the case law that has been developed regarding the possibility of arbitrary and unlawful detention in the transit zone.

The Hungarian government admitted that the transit zones of *Röszke* and *Tompa* are not detention centres, but rather reception facilities,[946] as 'the personal freedom of people staying in the transit zones is not restricted, and transit accommodation is open in the direction of Serbia.'[947] Transit zones are a component of Hungary's asylum policy and 'well-functioning elements of Hungarian border control.'[948]

Ilias and Ahmed v Hungary was the case before the ECtHR concerning the *Röszke* transit zone. The case was first assessed by the ECtHR's Fourth Section Court [949] before being referred to the ECtHR's Grand Chamber [950]. What is remarkable is that the Grand Chamber's judgment in this case was inconsistent with the judgment issued by the Court in the Fourth Section.

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[946] National Directorate-General for Aliens Policing Website. "Transit Zones of *Röszke* and *Tompa* Expanded." Retrieved from http://www.bmbah.hu/index.php?option=com_k2&view=item&id=1055:transit-zones-of-roszke-and-tompa-expanded&Itemid=1344&lang=en Accessed 18 February 2022.

[947] Website of the Hungarian Government. "Numbers of those illegally crossing the border, violent border-crossing attempts, and asylum-seekers have all increased." 31 May 2016. Retrieved from https://2015-2019.kormany.hu/en/ministry-of-interior/news/numbers-of-those-illegally-crossing-the-border-violent-border-crossing-attempts-and-asylum-seekers-have-all-increased Accessed 18 February 2022.

[948] Kovács, Zoltán. "Hungary begrudgingly shuts down transit zones, Orbán blames Soros." Index, 22 May 2020.
Retrieved from
https://index.hu/english/2020/05/22/hungary_transit_zone_roszke_european_court_of_justice/ Accessed 18 February 2022.

[949] *Ilias and Ahmed v. Hungary,* case no. (47287/15) (2017). Judgment of the (Fourth Section) of 14 March 2017, ECtHR.

[950] *Op.cit. Ilias and Ahmed v. Hungary,* (2019).

The Court in the Fourth Section of the ECtHR concluded that the situation of the applicants staying in the *Röszke* transit zone amounted to a deprivation of liberty as meant in Article 5 (1) ECHR.[951] As a result, the stay in the *Röszke* transit zone was classified as arbitrary detention by the Court in the Fourth Section of the ECtHR.[952] Unlike the Court in the Fourth Section, the Grand Chamber viewed the transit zone stay as a restriction rather than a deprivation of liberty and refused to recognize a violation of Article 5(1) ECHR.[953] The Grand Chamber ascertained that the stay in the *Röszke* transit zone was not an arbitrary detention.

A notable change in the ECtHR's transit zone-related jurisprudence can be seen after the *2019 Ilias and Ahmed* judgment, particularly in *R.R. and others v. Hungary*[954], *M.B.K and Others v. Hungary*[955], *H.M. and Others v. Hungary,* and finally[956] A.A.A. and Others v. Hungary.[957]

The first case, *R.R. and others v. Hungary*, concerns the detention of an Iranian Afghan family, including three minor children, in the *Röszke* transit zone at the border of Hungary and Serbia between 19 April and 15 August 2017.[958] The second *case, M.B.K and Others v. Hungary*, concerns the detention of an Afghan family who were held in the Röszke transit zone at the border of Hungary and Serbia between 30 March 2017 and 24 October 2017. The third case, *H.M. and Others v. Hungary*, dealt with the detention of a family from Iraq, including four children, between 3 April and 24 August 2017, in the *Tompa* transit zone at the border of Serbia and Hungary.[959] The fourth case, *A.A.A. and Others v. Hungary*, concerns a family of seven from Iraq, comprising a husband and wife and five children, one of whom is over the age of 18. The mother has critical health issues, and the father has been tortured.[960] The family was detained in the *Tompa* transit zone between 29 March 2017 and 11 August 2017.

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[951] *Op.cit. Ilias and Ahmed v Hungary*, (2017), para. 69.
[952] *Ibid.* para 68.
[953] *Op.cit. Ilias and Ahmed v Hungary*, (2019), paras. 246, 274 and 248.
[954] *R.R., and others v. Hungary*, case no. (36037/17), Judgment of the Court (Fourth Section) of 2 March 2021, ECtHR.
[955] *M.B.K and Others v. Hungary*, case no. (73860/17) Judgment of the Court (Fourth Section) of 24 February 2022, ECtHR.
[956] *H.M. and Others v. Hungary,* case no. (38967/17) Judgment of (the First Section) of 2 June 2022, ECtHR.
[957] A.A.A. and Others v. Hungary case no. (37327/17) judgment of (the First Section) of 9 June 2022, ECtHR.
[958] *Op.cit. R.R., and others v. Hungary*. para.1.
[959] *Op.cit. H.M. and Others v. Hungary,* para.1
[960] *Op.cit. , A.A.A. and Others v. Hungary* paras. *3-4.*

In the four cases, the applicants remained in the family area, specifically in a container in the transit zone's facilities, under the strict and constant supervision of border police to the extent that they were unable to leave on their own.[961] Along with other allegations, the applicants in the four cases claimed that their detention in the transit zone violated Article 5(1) and Article 4 of the ECHR.[962]

In *R.R. and others v. Hungary*, the ECtHR held that there had been a violation of Article 5(1) and Article 4 of the ECHR.[963] Similar violations of Articles 5 (1) and 4 of the EHCR were found by the Court in *M.B.K. and Others v. Hungary.*[964]Likewise, in *H.M. and Others v. Hungary*, the Court observed that the complaints raised under Articles 5 (1) and 4 of the ECHR are comparable to those considered in *R.R. and Others v. Hungary*, where the Court determined that the applicants' nearly four-month stay in the transit zone amounted to a *de facto* deprivation of liberty. [965] The court determined that the applicants' detention in the transit zone was unlawful. It was a de facto measure that was not supported by a decision that dealt with the issue of deprivation of liberty.[966] Similar findings were made in *A.A.A. and Others v. Hungary*, when the court found that detaining asylum seekers in the *Tompa* transit zone violated Articles 5(1) and 4 of the ECHR.

The jurisprudence of the ECtHR regarding transit zones after and prior to the 2019 *Ilias and Ahmed v Hungary* is different. It might be stated that the ECtHR's transit zone-related jurisprudence was evaluated favourably in terms of the protection of asylum seekers' rights and guarantees. It's important to keep in mind that the ECtHR refused to recognize a violation of Article 5(1) of the ECHR in *Ilias and Ahmed v. Hungary*, because the transit zone stay was viewed as a restriction rather than a deprivation of liberty. The ECtHR adopted an opposite approach in *R.R. and others v. Hungary*, *M.B.K. and Others v. Hungary*, *H.M. and Others v. Hungary*, and *A.A.A. and Others v. Hungary* concluding that depriving asylum seekers of their liberty while they were in a transit zone violated Articles 5(1) and 4 ECHR because there was no clearly defined legal basis for their detention and the Hungarian authorities had not made a formal decision outlining their reasons for detention. In other words, in both *H.M. and Others v. Hungary*, and *A.A.A. and Others v. Hungary* it was sufficient for the Court to recall *R.R. and Others v. Hungary* and *M.B.K.*

[961] *Op.cit. R.R., and others v. Hungary*. paras.10-11; *op.cit. case M.B.K and Others v. Hungary para.3; Op.cit. H.M. and Others v. Hungary,* para. 7; , *A.A.A. and Others v. Hungary* para.4.
[962] *Op.cit. R.R., and others v. Hungary*. para.70; *Op.cit. H.M. and Others v. Hungary,* para. 29.
[963] *Op.cit. R.R., and others v. Hungary*. para. 115.
[964] *Op.cit. M.B.K. and Others v. Hungary.* para. 17
[965] *Op.cit. H.M. and Others v. Hungary,* paras. 29- 41.
[966] *Ibid.* paras. 24-32.

and Others v. Hungary because at the time of their detention, neither domestic law nor a formal document detailing the reasons for their detention had been issued to the applicants, and they did not have access to an effective remedy to challenge the lawfulness of the custodial measure.

From the beginning, the CJEU concluded that detaining applicants in the *Röszke* transit zone without a formal decision and due process safeguards amounts to arbitrary detention.[967] The Court considered the obligation imposed on asylum applicants to remain permanently in the *Röszke* transit zone, which they cannot legally leave voluntarily, to be a deprivation of liberty characterized by 'arbitrary detention.' [968] Moreover, the Court contended that leaving the transit zones towards Serbia could only be done in violation of Serbian laws.[969]

It should be noted, however, that the CJEU's judgment sparked two conflicting reactions. On the one hand, the Hungarian government criticized the judgment, claiming that it was incompatible with the country's Fundamental Law.[970] On the other hand, the CJEU judgment has been observed as a 'landmark judgement'[971] and 'victory'[972] in terms of transit detention and procedural rights. Nagy considered the judgment significant for several reasons:

'It asserts that detaining asylum seekers in the transit zone at the external border constitutes detention and makes clear that such detention must be necessary and proportionate, ordered in a formal decision, involve judicial review, and not exceed the limits of the border procedure as defined by the Asylum Procedures Directive.'[973]

In general, the CJEU's judgment provided an opportunity to address asylum detention, both within the meaning of the Reception Conditions Directive and the Return Directive, as a coercive measure that restricts the applicant's freedom of movement and isolates him

[967] *Op.cit. FMS and Others v Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Or-szágos Idegenrendészeti Főigazgatóság*, 2020, para.294 (6).
[968] *Ibid*. para 231.
[969] *Ibid.* para. 229.
[970] "Gov't Won't Accept European Court Ruling on Transit Zone." *Hungary Today*, 19 May 2020. Retrieved from https://hungarytoday.hu/orban-govt-hungary-cjeu-transit-zone/ Accessed 18 February 2022.
[971] Asylum Information Database. "Country Report: Hungary." 2020, p.12. Retrieved from https://asylumineurope.org/wp-content/uploads/2021/04/AIDA-HU_2020update.pdf Accessed 18 February 2022.
[972] Nagy, Boldizsár. "A – pyrrhic? – victory concerning detention in transit zones and procedural rights: FMS & FMZ and the legislation adopted by Hungary in its wake." *EU Immigration and Asylum Law - Blog of the Odysseus Network*, 15 June 2020.
Retrieved from https://eumigrationlawblog.eu/a-pyrrhic-victory-concerning-detention-in-transit-zones-and-procedural-rights-fms-fmz-and-the-legislation-adopted-by-hungary-in-its-wake/ Accessed 18 February 2022.
[973] *Ibid.*

or her from the rest of the population by requiring him or her to remain permanently within a restricted and closed perimeter.'[974]

The Hungarian government implemented the CJEU's judgement and accordingly closed the transit zones on the Hungarian Serbian border, released approximately 300 asylum seekers, including families with minor children, and transferred them to open or semi-open refugee centres.[975] In terms of being specific, the Hungarian government 'begrudgingly complied with the judgment.' From the Hungarian perspective, the CJEU ruling is 'dangerous as it weakens border protection in Hungary, and therefore, in Europe as well.'[976]

I presume that during 2019 and 2020, the ECtHR and CJEU's approaches to the detention of asylum seekers in *Röszke* and *Tompa* transit zones were largely inconsistent. Unlike the CJEU in *FMS and Others v Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Or-szágos Idegenrendészeti Főigazgatóság*, the ECtHR in *Ilias and Ahmed v. Hungary* (2019) refused to accept a violation of Article 5(1) ECHR and found that the transit zone detention could not be regarded as arbitrary detention but rather a restriction of liberty. Two years later, the case of *H.M. and Others v. Hungary* marked a turning point in the ECtHR's transit zone jurisprudence because the court finally considered that keeping asylum seekers in transit zones while their applications were being processed without a clearly spelled-out legal justification for their detention constituted a violation of Article 5(1) and Article 4 ECHR and amounted to arbitrary detention. In the three subsequent judgments, *M.B.K. and Others v. Hungary*; *H.M. and Others v. Hungary*; and *A.A.A. and Others v. Hungary*, the Court's 'stance' has not changed.

One could argue that the CJEU's rulings on transit zones had an impact on the ECtHR. The prospect of consistent judging would create legal certainty and safeguard the protection of asylum seekers' rights across the EU.

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[974] *Op.cit. FMS and Others v Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Or-szágos Idegenrendészeti Főigazgatóság,* 2020, para.223.
[975] ECRE. "Hungary: Abolishment of Transit Zone Following CJEU Ruling." 22 May 2020. Retrieved from https://www.ecre.org/hungary-abolishment-of-transit-zone-following-cjeu-ruling/ Accessed 7 March 2021.
[976] Kovács, Zoltán. "Hungary begrudgingly shuts down transit zones, Orbán blames Soros." *Index*, 22 June 2020.
Retrieved from
https://index.hu/english/2020/05/22/hungary_transit_zone_roszke_european_court_of_justice/ Accessed 18 February 2022.

3.4. Detention of vulnerable applicants

To begin, vulnerability bears different meanings and dimensions in asylum systems.[977] Indeed, vulnerability is a broad term[978] because even asylum seekers fall into a special category that requires special protective measures due to their vulnerability. As a result of their status as an asylum seeker, the applicant for international protection is a member of a particularly disadvantaged and vulnerable group in need of special protection. [979]

For the purposes of this section, the term 'vulnerable applicant' refers to a 'applicant with special reception needs' or 'applicant in need of special procedural guarantees,' which includes, but is not limited to, unaccompanied asylum-seeking children, asylum-seeking families with children, pregnant women, elderly person, and person with mental and physical disability.[980]

The ECtHR broadened the concept of vulnerability in the context of asylum, recognizing an applicant as a vulnerable asylum seeker by virtue of his belonging to a sexual minority in his country of origin.[981] In *O.M. v. Hungary*, the court found the detention of a homosexual asylum seeker in Hungary was arbitrary, in violation of Article

[977] Asylum Information Database.
"The concept of vulnerability in European asylum procedures." (Last updated19 November 2020) , p.7. Retrieved from
https://asylumineurope.org/wp-content/uploads/2020/11/aida_vulnerability_in_asylum_procedures.pdf
Accessed 18 February 2022.

[978] Schroeder, Doris & Gefenas, Eugenijus. "Vulnerability: Too Vague and Too Broad?" *Cambridge Quarterly of Healthcare Ethics*, vol. 18, no. 2, 2009, pp. 113-121.

[979] *Op.cit. M.S.S. v Belgium and Greece* (2011) para. 251. It should be noted that in M.S.S, the ECtHR did not explicitly interpret vulnerability in the sense of the Reception Conditions Directive; *Khalifa and others v Italy*, case no. (16483/12), Judgment of the Court (Grand Chamber) of 15 December 2016, ECtHR, para. 215. In *Khlaifia and Others v. Italy* the ECtHR acknowledged that all asylum-seekers are vulnerable individuals.

[980] **(1)** Art. 2(k) of Act LXXX of 2007 of 1 January 2008 on Asylum identifies persons with special needs as including 'unaccompanied children or vulnerable persons, in particular, minor, elderly, disabled persons, pregnant women, single parents raising minor children or persons suffering from torture, rape or any other grave form of psychological, physical or sexual violence'; **(2)** Art. 68(1) of the Act of 13 June 2003 on granting protection to aliens on the territory of the Republic of Poland defines applicants who require special treatment as: Minors; Disabled people; Elderly people; Pregnant women; Single parents; Victims of human trafficking; Seriously ill; Mentally disordered people; Victims of torture; Victims of violence (psychological, psychological, including sexual); **(3)** Art. 2(i) of Act No. 325/1999 Coll. of 11 November 1999 on Asylum identifies vulnerable persons as including 'unaccompanied minors, parents or families with minor children or parents or families with minor children who have medical disabilities, people over 65, people with serious illnesses or disabilities, pregnant women, and victims of human trafficking'; **(4)** Art. 2(7) Act No. 404/2011 Coll. of 21 October 2011 on the Stay of Foreigners and on the Changes and Amendments of Some Legal Acts regulates the entry and legal stay of foreigners identifies persons with special needs as including ""those with disabilities, victims of trafficking, torture, rape, or other severe kinds of psychological or sexual assault, people over 65, people who are pregnant, and single parents with young children." Art. 88(8)) of Act No. 404/2011 Coll. of 21 October 2011 on the Stay of Foreigners and on the Changes and Amendments of Some Legal Acts regulates the entry and legal stay of foreigners prohibits asylum detention of unaccompanied children.

[981] *O.M. v. Hungary*, case no. (9912/15), Judgment of the Court (Fourth Section) of 5 July 2016, ECtHR.

5(1) ECHR.[982] The court decided that the authorities should take additional precautions and assess whether vulnerable applicants belonging to a sexual minority are safe or not in detention, especially that many of the detainees came from countries with a widespread cultural or religious bias against such persons.[983]

Unaccompanied asylum-seeking children are perceived to be the most vulnerable of all.[984] Guterres believes that protecting children is a top priority because they are the most 'vulnerable of the vulnerable', particularly those who are unaccompanied or have been separated from their families.[985]

Detention of a 'vulnerable applicant' is not prohibited, but it must be appropriate to their circumstances. For example, international law does not currently prohibit the detention of children in general, but all such decisions should be made with the 'best interest of the child' as a principal consideration, in accordance with Article 3 CRC.[986] In other words, the detention of asylum-seeking children could be an option in a few cases, but only if necessary safeguards. The principles of necessity and proportionality must always be respected and upheld.[987] Both Articles 3 and 37 CRC should be considered when detaining asylum-seeking children, whether accompanied or unaccompanied.

Specific protections for asylum seekers who are vulnerable were introduced under EU law. The Reception Conditions Directive mentions 'guarantees for the detention of vulnerable persons and applicants with special reception needs. According to Article 21(1) and Recital 14 of the Reception Conditions Directive, the situation of applicants with specific reception needs must be taken into account. These vulnerable applicants could be minors, unaccompanied minors, disabled people, elderly people, pregnant women, single

[982] *Ibid.* paras. 54-62.
[983] *Ibid.* para. 53.
[984] Halvorsen, Kate. "Separated children seeking asylum: the most vulnerable of all." *Forced Migration Review*, vol.12, 2002, pp.34-35; Radjenovic, Anja. "Vulnerability of unaccompanied and separated child migrants." European Parliamentary Research Service, 2021, p.2.
Retrieved from
https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/690575/EPRS_BRI(2021)690575_EN.pdf
Accessed 16 February 2022.
[985] Guterres, Antonio. "Opening remarks by António Guterres, United Nations High Commissioner for Refugees; Launch of UNHCR's report "Children on the Run.""delivered at the Launch of UNHCR's Report "Children on the Run," 12 March 2014.
Retrieved from https://www.unhcr.org/admin/hcspeeches/5321c5c39/opening-remarks-antonio-guterres-united-nations-high-commissioner-refugees.html Accessed 16 February 2022.
[986] *Krisztián Barnabás Tóth v. Hungary*, case no. (48494/06), Judgment of the Court (Second Section) of 12 February 2013, ECtHR.
[987] Vaghri, Ziba *et al.* "Refugee and Asylum-Seeking Children: Interrupted Child Development and Unfulfilled Child Rights" *Children*, vol. 6, no.11, 2019, pp. 120.

parents with minor children, human trafficking victims, people with serious illnesses, people with mental disorders, and people who have experienced torture, rape, or other severe forms of psychological, physical, or sexual violence, such as female genital mutilation victims.

Concerns were raised about the detention of unaccompanied asylum-seeking children, asylum-seeking families with children, and pregnant women in the V4 group. For instance, in Czechia, among the practices that have been widely criticized are the detention of families with children; the occasional use of non-custodial 'alternatives to detention;' and urging detainees to pay for their detention.[988] As mentioned throughout this section, international and EU law are quite clear that the detention of asylum seekers must be strictly a measure of last resort. And as for children, the UN Committee on the Rights of the Child has emphasized 'that detention of children on the sole basis of their migration status, or that of their parents, is a violation, is never in their best interests, and is not justifiable.' [989] In the same vein, Poland's practice of detaining asylum-seeking children has drawn significant international criticism.[990] In 2018, the ECtHR held in *Bistieva and others v Poland* that the country's practice of detaining families with children breached the ECHR.[991] The Court observed that Poland did not perceive the best interests of the child and failed to implement detention as a last resort, which is a violation of Article 8 ECHR.[992] Broadly, the main concern related to the detention of asylum seekers in Poland is that the country seems not to be trying to consider alternatives to detention and systematically detains families with children.[993] Besides, the lack of sufficient mechanisms to distinguish victims of torture or other forms of violence and the policy of asking

[988] Global Detention Project. "Country Report Immigration Detention in the Czech Republic: "we will not accept even one more refugee.""13 December 2018.
Retrieved from https://www.globaldetentionproject.org/immigration-detention-czech-republic-will-not-accept-even-one-refugee Accessed 9 February 2022.
[989] "UN human rights chief urges the Czech Republic to halt the detention of migrants and refugees."
Retrieved from https://news.un.org/en/story/2015/10/513332-un-human-rights-chief-urges-czech-republic-halt-detention-migrants-and-refugees Accessed 16 February 2022.
[990] Global Detention Project. "Country report immigration detention in Poland: Systematic family detention and lack of individualized assessment." 26 October 2018, pp. 8-10.
[991] *Bistieva and Others v. Poland*, case no. (75157/14), Judgment of the Court (Former Fourth Section) of 10 April 2018, ECtHR, para.78.
[992] *Ibid.* paras. 88 and 94.
[993] The European Union Agency for Fundamental Rights. "European Legal and Policy Framework on Immigration Detention of Children," 2017, p.13.
Retrieved from http://fra.europa.eu/en/publication/2017/child-migrant-detention Accessed 9 February 2022; *Op.cit.* Global Detention Project. "Country Report Immigration Detention in Poland…" 2018, p.12.

detainees to pay for their detention is a matter of concern.[994]Also, even though the law provides that asylum seekers should not be detained if detention presents a threat to their life or health, courts rarely recognize mental health when issuing detention orders.[995]

In Hungary, the amendment to the Asylum Act in 2017 removed the special procedural safeguards for vulnerable people and required all asylum seekers, with the exception of unaccompanied children under the age of 14, to go through the asylum procedure in transit zones. This means that unaccompanied asylum-seeking children are explicitly excluded from asylum detention by law.[996]

Despite the clear ban, reports show that unaccompanied asylum-seeking children have been detained.[997] It is within this context that, on 27 March 2017, the ECtHR, by means of interim measures, obliged Hungary to suspend the transfer of 8 unaccompanied asylum-seeking children and a traumatized pregnant woman from reception centres open to detention centres in the transit zones.[998] Furthermore, in its judgment in *R.R. and others v. Hungary*, the ECtHR ruled that the detention of an Iranian-Afghan family, including three minor children, in the *Röszke* transit zone constituted unlawful detention in violation of Article 5 ECHR.[999] Similarly, in *H.M v. Hungary*, the ECtHR examined the difficulties faced by a pregnant asylum seeker held in a transit area who had a high-risk pregnancy and experienced repeated complications.[1000] Despite the fact that she appears to have received the required medical care,[1001] the Court believed that the restrictions associated with detention to which she was subjected throughout her advanced stage of pregnancy must have caused her stress and psychological suffering, which, given her vulnerability, reached

[994] OHCHR."Office of the High Commissioner, Committee against Torture concludes its consideration of the report of Poland." 2019.
Retrieved from
https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=24847&LangID=E Accessed 9 February 2022.
[995] *Op.cit.* Global Detention Project. "Country Report Immigration Detention in Poland…" 2018, p.6.
[996] Art. 56 TCN Act; Art. 31 (B)(2) Act LXXX of 2007 of 1 January 2008 on Asylum.
[997] *E.g.* from 28 March 2017 until 21 May 2020, all unaccompanied children above the age of 14 were *de facto* detained in the transit zones for the whole duration of the asylum procedure. According to the statistics of the former IAO, there were 91 unaccompanied children detained in the transit zones in 2017. Source: *Op.cit.* Asylum Information Database. "Country Report: Hungary." 2020, p.97; Information provided by former IAO to HHC 12 February 2018.
[998] Request submitted by HHC on 26 May 2017 and granted on 30 May 2017. Source: HHC. "Interim measures granted by the European Court of Human Rights or the United Nations Human Rights Committee in applications against Hungary between January and May 2017." 30 May 2017, pp.1-2. Retrieved from https://helsinki.hu/wp-content/uploads/HHC-Info-Update-interim-measures-granted.pdf Accessed 9 February 2022.
[999] *Op.cit. R.R., and others v. Hungary*, para. 115.
[1000] *Op.cit. H.M v. Hungary*, para.18.
[1001] *Ibid.* para.7.

the threshold of severity required to engage Article 3 ECHR.[1002] Consequently, the court affirmed that Article 3 ECHR had been violated in respect of the vulnerable applicant.[1003] The court determined in the same judgment that holding children in the *Tompa* transit zone for more than four months was unlawful and amounted to a violation of Article 3 of the EHCR.[1004]

In Slovakia, when it comes to asylum-seeking children and their families, they may be detained only when absolutely necessary and for the shortest time possible.[1005] If a detained asylum seeker is recognized as a victim of trafficking in human beings, the decision on detention becomes invalid upon the victim's incorporation into the assistance programme and the protection of those who have been victims of human trafficking.[1006] Even though alternatives to detention are enshrined in Slovak law, it is therefore very rare for these alternatives to be applied in practice.[1007] The detention of asylum seekers, including unaccompanied children and families with children, for extensive periods of time has been observed.[1008] This practice has not been used as a measure of last resort, when strictly necessary and for the shortest possible time, especially since the 2015-16 refugee crisis.[1009]

Detention of the 'vulnerable applicant' is not a problem in and of itself because it is governed by specific provisions and is only used when absolutely necessary. Indeed, the automatic and arbitrary detention of this category poses a risk of breaching EU and international standards.

A first step toward reducing the risk of detention, particularly unlawful and arbitrary detention, of vulnerable asylum seekers is to improve their identification. The EU asylum acquis requires Member States to determine whether an applicant requires special procedural guarantees within a reasonable time after filing an application.[1010] Although

[1002] *Ibid.* para 18.
[1003] *Ibid.* para. 28-41.
[1004] *Ibid.* para.30
[1005] Art. 88(4) and (8) of Act No. 404/2011 Coll. of 21 October 2011 on the Stay of Foreigners and on the Changes and Amendments of Some Legal Acts regulates the entry and legal stay of foreigners.
[1006] European Commission "The use of detention and alternatives to detention in the context of immigration policies Synthesis Report for the EMN Focussed Study." 2014, p.21. Retrieved from https://www.refworld.org/pdfid/546dd6f24.pdf Accessed 10 February 2022.
[1007] *Op. cit.* Global Detention Project. "Country Report Immigration detention in Slovakia..." 2019, p.16.
[1008] "Submission by the UNHCR for the OHCHR' Compilation Report Universal Periodic Review: 3rd Cycle, 32nd Session Slovakia." December 2018. p.8. Retrieved from https://www.refworld.org/country,,,,SVK,,5c52c5e97,0.html Accessed 10 February 2022.
[1009] *Op.cit.* Global Detention Project. "Country Report Immigration detention in Slovakia..." 2019, p.16.
[1010] Art. 24(1) Asylum Procedures Directive.

neither the Asylum Procedures Directive nor the Reception Conditions Directive require a separate procedure for identifying special needs, a proper reading of the relevant provisions and general principles of fairness and effectiveness require the establishment of a dedicated identification mechanism in national law. It is the responsibility of the Member States to establish effective systems for identifying and assisting vulnerable asylum seekers, including age assessment. Therefore, the question arises: is there a specific identification mechanism in place in the V4 countries to systematically identify vulnerable asylum seekers?

In Hungary, there is no standardized systematic system for identifying vulnerable asylum seekers; vulnerability is assessed on a case-by-case basis. Authorities rather rely on the official in charge of the interview to notice vulnerabilities.[1011] Similarly, in Czechia, there is no mechanism in place to identify vulnerable asylum seekers at Prague Airport. The Supreme Administrative Court[1012] has expressed concern about the inadequacy of vulnerability identification for asylum seekers detained at the airport reception centre. In Slovakia, while there is no identification mechanism in place to identify vulnerable asylum seekers,[1013] there are legal mechanisms in place for the early identification of children among asylum seekers.[1014] In Poland, a specific identification mechanism is in place by law to systematically identify vulnerable asylum seekers at the beginning or during the asylum procedure. In practice, however, the existing identification mechanism is deemed insufficient and ineffective.[1015]

[1011] European Asylum support office. "Description of the Hungarian asylum system." 2015, p.14. Retrieved from https://euaa.europa.eu/sites/default/files/public/Description-of-the-Hungarian-asylum-system-18-May-final.pdf Accessed 16 February 2022; Projects such as: "Streamlining of identification of people with special needs in the procedure for granting the refugee status" (2014 – 2015).

[1012] *E.g.* Supreme Administrative Court of Czech Republic. Judgment of 4 September 2019, 9 *Azs* (193/2019). In 2019, a Belarussian asylum seeker was detained in the Prague airport transit zone. She had been beaten up, suffered a serious injury, and suffered from depression in her home country. During her detention, her psychological condition deteriorated to the point where she became suicidal. A psychologist at the centre confirmed she was in critical condition and required psychiatric care. Source: Forum for Human Rights & Organization for Aid to Refugees. "NGOs information to the United Nations Committee against Torture for consideration when compiling the List of Issues on the 70th session in respect of Czechia for the Seventh Periodic Report under the United Nations Convention Against Torture." 25 January 2021, p.6. Retrieved from https://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/CZE/INT_CAT_ICS_CZE_44396_E.pdf Accessed 16 February 2022

[1013] UNHCR. "Submission by the UNHCR for the OHCHR Compilation Report Universal Periodic Review: 3rd Cycle, 32nd Session, Slovakia." 2019, p. 1. Retrieved from https://www.refworld.org/pdfid/5c52c5e97.pdf Accessed 16 February 2022

[1014] *Ibid.* p.6.

[1015] *Op.cit.* UNHCR. "Submission by the UNHCR for the OHCHR…" 2019, p. 6.

Arbitrary and unlawful detention is one of the more visible consequences of the lack of a standardized, systematic system for identifying vulnerable asylum seekers. This is one of the reasons why vulnerable asylum seekers are not being identified and treated in accordance with the law, as well as EU and international standards.

Nonetheless, there are two other aspects of vulnerability to consider in the context of asylum. The first aspect is vulnerability and the risks of stereotyping asylum seekers.[1016] Vulnerability can be used to categorize asylum seekers, potentially leading to procedural fragmentation at the EU and national levels. And what are the consequences of being labelled as vulnerable for an asylum seeker? According to Crawley and Skleparis, the use of the concept of vulnerability is just one more aspect of the 'categorical fetishism' when dealing with asylum issues, in an attempt to split those who are 'good' asylum seekers worthy of support from those who are 'bad' asylum seekers who are thought to be abusing the system to gain protection that they do not deserve.[1017] The second aspect is the pretence of vulnerability. Asylum seekers can pretend to be vulnerable in order to gain access to additional protection.[1018]

To avoid the arbitrarily and unlawful detention of vulnerable applicants, the V4 group requires identification and assessment of vulnerability in situations where special authorities interact with the individual asylum seeker. Such a process necessitates appropriate mechanisms that draw on the capacities and skills of the various actors involved in the asylum procedure to ensure that vulnerabilities are identified in a timely and effective manner.

3.5. Indefinite detention is arbitrary

According to Article 9(1) of the Reception Conditions Directive, the length of detention shall be as short as possible, and the applicant for international protection shall be detained only for the duration of the grounds specified in Article 8(3). The CJEU emphasizes Article 9(1) of the Reception Conditions Directive as a provision but does not define what 'as short a period as possible' means.[1019] What is a reasonable period and what is as short

[1016] *Op.cit.* Asylum Information Database. "The concept of vulnerability..." 2020, p. 12.
[1017] Crawley, Heaven & Skleparis, Dimitris. "Refugees, migrants, neither both: categorical fetishism and the politics of bounding in Europe's 'migration crisis.'" *Journal of Ethnic and Migration Studies*, vol. 44, no.1, 2018, pp. 48-64.
[1018] Freedman, Jane. "The uses and abuses of "vulnerability" in EU asylum and refugee protection: Protecting women or reducing autonomy?" I*nternational Journal on Collective Identity Research*, no. 1, 2019, pp. 1-15.
[1019] *K. v Staatssecretaris van Veiligheid en Justitie*, case no. (c-18/16), Judgment of the Court (Fourth Chamber) of 14 September 2017, CJEU, para. 45.

as possible will depend on the specific circumstances of each case. Detention must be carried out in good faith, and the length of detention should not exceed the time reasonably required for the purpose pursued, as the duration of detention is strictly dependent on the grounds of Article 8(3) of the Reception Conditions Directive.

Maximum detention periods for asylum applicants are set in national legislation of the V4 group.[1020] Asylum seekers should not be detained for any longer than necessary, and if their justification is no longer valid, they should be released immediately.[1021] Vulnerable applicants, including unaccompanied asylum-seeking children and asylum-seeking families with children, may be detained in all four countries only when absolutely necessary, as previously discussed, and for the shortest possible period of time. Unaccompanied children seeking asylum should only be detained in special circumstances, that is, when all other options have been exhausted or when there are valid justifications such as those related to national security, health, or a very small number of other significant factors. For instance, in Hungary, there is a distinction between unaccompanied asylum-seeking children who are under 14 and those who are over 14. Unaccompanied asylum-seeking children under 14 cannot be held in detention.[1022]

Long periods of detention for both asylum seekers and rejected asylum seekers awaiting deportation have raised concerns in the V4 group. It is worth mentioning *Shiksaitov v. Slovakia,* which concerned detention 'with a view to extradition'.[1023] The case is more specifically about the detention of a Russian national by Slovak authorities in preparation for extradition to Russia. The applicant was granted refugee status in Sweden based on his political opinions, but an international arrest warrant was issued against him for acts of terrorism committed in Russia, and he was detained by Slovak authorities when he was apprehended at the border.[1024] The ECtHR ruled that, while the applicant's arrest and

[1020] **(1)** Art. 31(a) Act LXXX of 2007 of 1 January 2008 on Asylum sets the maximum period of detention for an applicant for international protection as 6 months, and 12 months for subsequent applicants, whose cases have no suspensive effect. Families with minors are not permitted to be detained for more than 30 days; **(2)** Art. 89 (1)-(5) of the Polish Act of 13 June 2003 on granting protection to aliens within the territory of the Republic of Poland sets the maximum period of detention for an applicant for international protection as 6 months; **(3)** Art. 46(a)(5) Act No. 325/1999 Coll. of 11 November 1999 on Asylum sets the maximum period of detention for an applicant for international protection as 4 months (120 days); **(4)** Art. 88(4) and (8) of Act No. 404/2011 Coll. of 21 October 2011 on the Stay of Foreigners and on the Changes and Amendments of Some Legal Acts regulates the entry and legal stay of foreigners sets the maximum period of detention for an applicant for international protection as 6 months, and 12 months if they pose a security risk.
[1021] HRC. "Communication no. 560/1993." 30 April 1997, paras. 9-4.
[1022] Art. 31/A (8) c of Act LXXX of 2007 of 1 January 2008 on Asylum.
[1023] *Shiksaitov v. Slovakia* , cases no. (56751/16 and 33762/17), Judgment of the Court (First Section) of 19 April 2021, ECtHR, para. 1.
[1024] *Ibid.* paras. 7-8.

detention orders were legal under Slovak law and the ECHR,[1025] his detention was excessively long and the reasons for his detention ceased to be valid, in violation of Article 5(1) ECHR.[1026]

Following the 2015–16 refugee crisis, concerns have been expressed about Czechia's lengthy detention of asylum applicants. In a case before the Supreme Administrative Court of the Czech Republic, it was pronounced that to ascertain or verify the identity of the asylum seeker applicant, detention is permissible only during the period in which the administrative authority takes concrete steps to justify this detention ground.[1027] The detention for 110 days has been perceived as unlawful in the case where the applicant for international protection met his commitment to give his identity or nationality by showing a declaration of his identity and it was not obvious whether further concrete steps for verification of his identity would be undertaken by the administrative authority.[1028]

In Hungary, the 2017 amendment to asylum law, which makes detention automatic, does not specify the maximum period of detention. Hence, without maximum periods, detention can become prolonged and in some cases, indefinite. In this sense, Commissioner for Human Rights of the Council of Europe, Mijatović declared that 'systematic detention of asylum seekers in the Hungarian transit zones without a time limit and sufficient legal basis brings up important problems about the arbitrary nature of the detention.'[1029]

When discussing the length of detention of an asylum applicant, the concept of 'due diligence' should be considered.[1030] This concept requires Member States to take concrete and meaningful steps to ensure that the time required to verify the grounds for detention is as short as possible and that there is a real prospect of such verification being carried out successfully in the shortest possible time, so that detention does not exceed the time reasonably required to complete the relevant procedures. In the absence of a time limit, detention should be ended as soon as it is no longer necessary or proportionate, with authorities exercising all due diligence.[1031]

[1025] *Ibid.* para. 67.
[1026] *Ibid.* paras. 92, 93, 94, 106.
[1027] Supreme Administrative Court of Czech Republic. *Judgment of 27 July 2017, AS v Ministry of Interior, 6 Azs (128/2016-44).*
[1028] *Ibid.*
[1029] "Report following the visit of Dunja Mijatović Commissioner for Human Rights of the Council of Europe to Hungary from 4 to 8 February 2019." 2 September 2019, CommDH(2019)24, p. 4.
[1030] Art.15(1) Return Directive; Recital 16 Reception Conditions Directive.
[1031] Art. 9(1) Reception Conditions Directive.

It has consistently argued that any period of indefinite detention of asylum seekers or rejected asylum seekers is unlawful. Nevertheless, there are two observations that should be made. First, while the maximum detention period for asylum seekers is set by national law in the V4 group, it is not set at the EU level. There is no provision in the Reception Conditions Directive establishing a maximum duration limit for the detention of asylum seekers. However, the failure to fix a maximum duration of the detention of an asylum seeker may violate Article 6 CFR,[1032] and Article 5(1) ECHR.[1033] The biggest risk is that, without maximum periods of detention, detention can become prolonged and, in some cases, indefinite.

3.6. The detention conditions and other detention-related guarantees

Asylum seekers should not face standards of treatment below those stipulated by international law while they are in detention. For example, states parties to the CAT should not take measures or adopt policies such as detention in poor conditions for indefinite periods of time, refusal to process asylum applications or their undue prolongation, reduction of funds intended for assistance programs for asylum seekers, which would oblige asylum seekers under Article 3 of the Convention to return to their country of origin despite the personal risk of being subjected to torture there and other cruel, inhuman or degrading treatment or punishment. The Body of Principles, which was established by General Assembly resolution 43/173 on 9 December 1988, lays out the rights of those who are arrested or detained, including access to legal counsel, medical care, and records of their detention, arrest, questioning, and medical care.[1034]

Under EU law, asylum seekers in detention should be treated with dignity, and their reception should be tailored to their specific needs.[1035] Detainees benefit from minimum standards for the reception of asylum seekers, which are usually sufficient to ensure a decent standard of living. Even if an asylum seeker is only staying for a short period of

[1032] *E.g. Op.cit. FMS and Others v Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Or-szágos Idegenrendészeti Főigazgatóság,* para.264.
[1033] Pinto Oliveira, Andreia Sofia. "Chapter 5 Aliens' Protection against Arbitrary Detention (Article 5 ECHR)." *Aliens before the European Court of Human Rights*, edited by David Moya & Georgios Milios, Brill Nijhoff, 2021, pp. 97–117.
[1034] UNGA. Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.A/RES/43/173, 9 December 1988.
[1035] Art. 6 CFR; Recital 18 Reception Conditions Directive.

time after filing an application for international protection or before being transferred to the responsible Member State, he/she is entitled to the minimum standards of reception.[1036]

Detention conditions must be humane and dignified, and asylum seekers must be treated with dignity and according to international standards.[1037] Also, there are numerous detention guarantees for asylum seekers, including but not limited to the right to a written detention order,[1038] the right to judicial review,[1039] the right to free legal assistance and representation,[1040] the right to an effective remedy,[1041] *etc*.

Minimum standards for detention conditions, rights, and guarantees for asylum seekers have been incorporated into the V4 group's legal provisions.[1042] During and after the 2015-16 refugee crisis, numerous reports revealed that the conditions of asylum detention in the V4 group were extremely problematic and humiliating.[1043] For example, it appears that the detention conditions set forth by EU and international law are incompatible with the conditions under which asylum seekers are held in the Czech Republic. In its concluding observations for the Czechia in 2018, the UN Committee against Torture expressed a number of concerns about the country's policies toward migrants and asylum seekers, including the detention of asylum seekers and the absence of alternative housing options for families with children; shortcomings in the physical conditions of facilities used to receive and detain asylum seekers; a lack of adequate legal assistance; and the absence of

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[1036] *Cimade and Groupe d'information et de soutien des immigrés (GISTI) v Ministre de l'Intérieur, de l'Outre-mer, des Collectivités territoriales et de l'Immigration*, case no. (C-179/11), Judgment of the Court (Fourth Chamber) of 27 September 2012, CJEU, para. 56.
[1037] *E.g.* Art. 7 UNCAT; Art. 10 and Art. 17 ICCPR.
[1038] Art.9(2) (4) Reception Conditions Directive; Art. 28(4) Dublin III regulation; Art. 5(2) ECHR.
[1039] Recital 16 and Art.9 (3) Reception Conditions Directive; Art.5(4) ECHR
[1040] Art.9(6) (7) (8) (9) and Art. 26(2) (3) Reception Conditions Directive; Art. 47 of the CFR.
[1041] Art.26(1) Reception Conditions Directive; Art. 47 CFR; Art.13 ECHR.
[1042] **(1)** Art. 31(f)(2) of the Act LXXX of 2007 of 1 January 2008 on Asylum and Art.36 (d) of the Hungarian Asylum Decree; **(2)** Art.410-427 of the Polish Act of 12 December 2013 on Foreigners; **(3)** Art. 79-83, 88 of Act No. 325/1999 Coll. of 11 November 1999 on Asylum; **(4)** Art.37- 41 of Act. No. 480/2002 Coll. of 20 June 2002 on Asylum and on the Changes and Amendments of Some Legal Acts.
[1043] Asylum Information Database. "Country Report: Conditions in detention facilities, Hungary." (Last updated: 15 April 2021). Retrieved from https://asylumineurope.org/reports/country/hungary/detention-asylum-seekers/detention-conditions/conditions-detention-facilities/ Accessed 17 February 2022; Asylum Information Database. Country Report: Conditions in detention facilities Poland. (Last updated: 16 April 2021).
Retrieved from https://asylumineurope.org/reports/country/poland/detention-asylum-seekers/detention conditions/conditions-detention-facilities/#_ftn1 Accessed 17 February 2022; ECRE. "Refugees being treated like criminals in Czech detention centres, by Martin Rozumek, Executive Director of Organization for Aid to Refugees.14 September 2015. Retrieved from https://ecre.org/refugees-being-treated-like-criminals-in-czech-detention-centres-by-martin-rozumek-executive-director-of-organization-for-aid-to-refugees-opu/ Accessed 17 February 2022; *Op.cit.* Global Detention Project. "Country Report Immigration detention in Slovakia..." 2019, p.16

standard operating procedures for identification and protection of vulnerable persons.[1044] As a result, the detention and reception facilities, as well as their compliance with EU and international standards, have been called into question. For instance, the ECtHR found in *R.R. and others v. Hungary* that the physical conditions of the container in the *Röszke* transit zone, in which the family stayed, as well as the unsuitable facilities for children and irregularities in the provision of medical services, amounted to a violation of Article 3 ECHR.[1045]

Besides, some guarantees that an asylum seeker or person subject to could benefit from while detained have been overlooked. For example, in the aforementioned *Shiksaitov v. Slovakia*, the ECtHR determined that the applicant lacked an enforceable right to compensation for the undue length of his detention, which violated Article 5(5) of the ECHR.[1046]

Following the 2015-16 refugee crisis, the V4 countries opted for the rather extended use of detention of asylum seekers. It can be said that the detention of asylum seekers in the V4 group is not new, but the scale of its use by the four countries to control borders and 'manage' mixed migratory flows is unprecedented. Therefore, the detention of asylum seekers has become common, and frequently unlawful and arbitrary in the V4 group. In other words, the securitization approach followed by the countries created risks of systematic and arbitrary detention through the almost exclusive conduct of asylum procedures at the border. Hence, alternatives to detention are rarely used in practice, and detainees lack knowledge of the available procedures to complain.[1047] Also, the detention of both accompanied and unaccompanied children is, in several cases, against the child's best interest and breaches human rights and EU law.

It is important to say that detention must not be unlawful or arbitrary, and any decision to detain must be based on an assessment of the asylum seeker's particular circumstances. Thus, detention has frequently been criticized as having harmful effects on the health and well-being of asylum seekers and migrants, causing psychological damage,

[1044] Committee against Torture. Concluding Observations on the sixth periodic report of Czechia, CAT/C/CZE/CO/6, 6 June 2018, paras. 20 & 23 & 26 & 27.
[1045] *Op.cit. R.R. and others v. Hungary*, paras. 60,62, 115.
[1046] *Op.cit. Shiksaitov v. Slovakia*, paras. 94, 97, 106.
[1047] UNHCR. "UNHCR deeply concerned by Hungary plans to detain all asylum seekers." 7 March 2017 Retrieved from https://www.unhcr.org/news/briefing/2017/3/58be80454/unhcr-deeply-concerned-hungary-plans-detain-asylum-seekers.html Accessed 19 July 2022; AIDA & ECRE. "Poland : Alternatives to Detention." 26 June 2022. Retrieved from https://asylumineurope.org/reports/country/poland/detention-asylum-seekers/legal-framework-detention/alternatives-detention/#_ftn4 Accessed 19 July 2022.

among other things.[1048] As it is different from 'criminal detention' or 'security detention' it is important to keep the administrative character of asylum detention. Any deprivation of liberty that is not in accordance with national law would be unlawful under EU and international law.

The unlawfulness and arbitrariness of certain detentions of asylum seekers during and in the aftermath of the 2015-16 refugee crisis raised a number of inconsistencies with V4 countries' EU and international obligations. As a result, there are particular tensions between international and EU law, and V4 practices in the area of asylum detention. This is due to domestic provisions, such as the amendment to the Hungarian Asylum Act that allows for automatic detention, as well as a high degree of discretion and broad detention powers granted to authorities.

4. Asylum seekers at risk of *refoulement* and summary deportation

As mentioned in the second chapter, the international law principle of *non-refoulment*, meaning 'forbidding to send back,' prohibits the return of an asylum seeker or refugee to a country where he/she is likely to face persecution or torture. This principle is a cornerstone of IRL and has further become more broadly appropriate to human rights law. *Refoulement* is prohibited under human rights law on several grounds.[1049] Thus, 'the development of the international protection of human rights broadened the scope of the application of *non-refoulement*, whereby the principle grew beyond the narrow framework of IRL.'[1050]

Indirectly, the principle of *non-refoulement* can be gathered from Article 3 UNCAT and Article 7 ICCPR which ban torture, through the extraterritorial interpretation of the prohibition of torture. Accordingly, most states are bound by treaty law to respect the principle of *non-refoulement*. [1051] This principle is also mirrored in the primary EU law, specifically in Articles 18 and 19 CFR and Article 78 TFEU. Secondary EU law relating to

[1048] Von Werthern, Martha *et al.*"The impact of immigration detention on mental health: a systematic review." *BMC Psychiatry* vol. 18, no. 382, 2018, p.19 ; EASO. "Input by civil society to the 2021 EASO Asylum Report." 2021, pp.8-9. Retrieved from https://euaa.europa.eu/sites/default/files/OPU-Forum-for-Human-Rights.pdf Accessed 19 July 2022.
[1049] Wouters, Cornelis Kees. "International refugee and human rights law: partners in ensuring international protection and asylum." *Routledge Handbook of International Human Rights Law,* edited by Scott Sheeran *et al.,* Routledge, 2013, pp. 231-244.
[1050] Molnár, Tamás. "The principle of *non-refoulement* under international law: Its inception and evolution in a nutshell." *Corvinus Journal of International Affairs* vol.1, no.1, 2016, p.53.
[1051] Lauterpacht, Sir Elihu & Bethlehem, Daniel. "The scope and content of the principle of *non-refoulement*: Opinion." *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection,* edited by Erika Feller *et al.* , Cambridge University Press, 2003, p.108.

borders, asylum, migration, and return prohibits *refoulement*.[1052] Besides, there are several other regional instruments and non-binding documents that incorporate the principle of *non-refoulment*.[1053] Although the principle is embodied in several treaties, many arguments have been advanced for the importance of preserving the principle of *non-refoulement* as a part of customary international law.[1054] First, the relevant practice is widespread and representative because nearly all the states of the United Nations are party to one or several treaties endorsing the principle of *non-refoulment*, whether the CSR51 or universal or regional Human Rights treaties.[1055] Second, the few states that have not ratified one of those instruments, none claims to possess an unconditional right to return a refugee to a country of persecution.[1056] Third, the customary nature of *non-refoulment* is asserted in a large amount a material, including national legislation, case law, and resolutions of international and regional organizations.[1057]

In addition to its customary nature, Allain considered that the principle of *non-refoulement* had gained the status of *jus cogens*, that is, a peremptory norm of international law from which no derogation is permitted.[1058] Consideration of the principle of *non-refoulement* in light of its *jus cogens* character has demonstrated that states are prohibited from violating its provisions individually or collectively.[1059] However, this approach must be nuanced. Given that there exist exceptions, the *non-refoulement* principle's recognition as a *jus cogens* norm does not apply in an absolute and unconditional manner. For instance, Article 33(2) of CSR51 specifies that a refugee may be sent back if he or she poses a threat

[1052] The European Union Agency for Fundamental Rights. *Handbook on European law relating to asylum, borders, and immigration*, 2020, p.104-107.
[1053] *E.g.* 1966 Art. 3(3) of Principles Concerning Treatment of Refugees, adopted by the Asian-African Legal Consultative Committee, 24 June 2001; Art. 3 of Declaration on Territorial Asylum adopted by the United Nations General Assembly (Res 2132 (XXII) 14 December 1967 ; Art. 2 (3) of Convention Governing the Specific Aspects of Refugee Problems in Africa 10 September 1969, 1001, UNTS 45; Art. 22 (8) of American Convention on Human Rights 22 November 1969 ; Art. 3(5) Cartegena Declaration 22 November 1984.
[1054] Von Sternberg, Mark R. "Reconfiguring the Law of *Non-Refoulement*: Procedural and Substantive Barriers for Those Seeking to Access Surrogate International Human Rights Protection." *Journal on Migration and Human Security*, vol.2, no. 4, 2014, pp.330; Greig, Donald Westlake. "The Protection of Refugees and Customary International Law." *Australian Yearbook of International Law*, 1980. p.134.
[1055] UNHCR. "Advisory Opinion on the Extraterritorial Application of *Non-Refoulement* Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol." 2007, paras. 14-16.
[1056] Rodenhäuser, Tilman. "The principle of *non-refoulement* in the migration context: 5 key points. Humanitarian Law and policy." *Blog ICRC*, 30 March 2018. Retrieved from https://blogs.icrc.org/law-and-policy/2018/03/30/principle-of-non-refoulement-migration-context-5-key-points/ Accessed 21 February 2022.
[1057] Chetail, Vincent. "Sources of International Migration Law." *Foundations of International Migration Law* edited by Opeskin, Brian *et al.*, Cambridge University Press, 2012, p.76.
[1058] Allain, Jean. "The *jus cogens* Nature of *non-refoulement*." *International Journal of Refugee Law*, vol. 13, no. 4, 2001, p.533.
[1059] *Ibid.* p.558.

to the host country's national security. The *jus cogens* nature of *non-refoulmement* principle is debatable and contested. Today, nearly all states are party to at least one international agreement that binds them to the principle of *non-refoulement*. However, a state is required to always respect, safeguard, and uphold the human rights of all people under its jurisdiction.

When discussing the principle of *non-refoulment*, it's worth noting that there's a link between this principle and the concept of a 'safe third country.' As discussed in the preceding subchapter, the concept of 'safe third country' holds that if an asylum seeker passes through a country where he/she could have, and should have, applied for protection, a state may return the asylum seeker to that country. However, before removing an asylum seeker to a 'safe third country', the host state must first determine whether the prospective receiving country is actually safe for the applicant; otherwise, failure to conduct a proper assessment could quickly result in a violation of the host state's *non-refoulement* obligations.

After briefly explaining the principle of *non-refoulement*, it's necessary to question whether the V4 countries are respecting or evading their responsibilities to apply and observe non *refoulement* under EU and international law. Allegations of push-back practice have been identified in the V4 group, primarily in Hungary and Poland. Though not a legal term, 'push-backs' can be interpreted as behaviour or practice infringing the general rule of *non-refoulement.*[1060] Broadly, the term 'push-back' refers to the informal cross-border expulsion (without due process) of individuals or groups to another country. It must be admitted that push-backs are occurring in different ways and taking place, in particular, at EU external land borders. Initially, the term was used to describe the unfolding situations along the EU borders of Hungary and Croatia with Serbia in 2016, after the closure of the Balkan route.[1061] It lies in contrast to the term 'deportation', which is conducted in a legal framework, and 'readmission' which is a formal procedure rooted in bilateral and multilateral agreements between states.[1062] In a report produced by the European Parliament's Directorate-General for External Affairs in 2015, push-back practices are defined as practices of 'national coast guards

[1060] Council of Europe, Parliamentary Assembly. Committee on Migration, Refugees and Displaced Persons. "Push-back policies and practice in Council of Europe Member States." Doc. 14645, Reference 4414, 2019.
[1061] ECRE. "Balkan route reversed: The return of asylum seekers to Croatia under the Dublin system." 2016, pp.29-30. Retrieved from https://asylumineurope.org/wpcontent/uploads/2020/11/balkan_route_reversed.pdf Accessed 10 February 2022.
[1062] Border Violence Monitoring Network. "Push-backs and Police Violence, Legal Framework." Retrieved from https://www.borderviolence.eu/legal-framework/ Accessed 21 February 2022.

trying to prevent migrant boats from reaching certain territorial waters by returning them to their points of departure.'[1063] Keady-Tabbal and Mann considered that the term 'push-back' has appeared from the discourse of refugee advocates. According to them, it is a 'non-technical term' for a breach of the fundamental principle of refugee law, which is non-refoulement: nobody shall be sent back to a place where they may experience well-founded fear of persecution or/and ill-treatment.[1064]

Accordingly, push-backs may breach a number of fundamental rights, such as the right to life, the prohibition on collective expulsions and refoulement, the ban on torture, and the prohibition on cruel or degrading treatment or punishment.[1065] These unlawful practices are generally referred to as 'deterrence' measures to safeguard borders. Border militarization and externalization policies, which prevent those in need of protection-often referred to as 'irregular' migrants-from accessing asylum and other protective procedures, are examples of how deterrence has been implemented.[1066]

In the context of the V4 group, 'push-back' can be defined as a set of state measures by which asylum seekers or rejected asylum seekers are forced back over a border, generally immediately after they cross it, without consideration of their individual circumstances and without any possibility to apply for asylum or to put forward arguments against the measures taken.[1067] The highest risk associated with push-backs is the risk of *refoulement*, which means that a person is sent back to a place where they may face persecution in the sense of CSR51 or inhuman or degrading treatment in the sense of ECHR.[1068] Thus, push-backs can result in direct persecution or inhuman or degrading treatment in the country to which they are returned or cannot flee. The push-back includes 'pressure' on neighbouring countries to accept rejected asylum seekers or to

[1063] The European Parliament's Directorate-General for External Affairs. "Migrants in the Mediterranean: Protecting human rights." 2015, p.31.
Retrieved from
https://www.europarl.europa.eu/RegData/etudes/STUD/2015/535005/EXPO_STU(2015)535005_EN.pdf
Accessed 21 February 2022.
[1064] Keady-Tabbal, Niamh & Mann, Itamar. ""Pushbacks" as Euphemism." EJIL: TALK, 14 April 2021. Retrieved from https://www.ejiltalk.org/pushbacks-as-euphemism/ Accessed 24 August 2022.
[1065] European Union Agency for Fundamental Rights. 'Fundamental Rights Report 2022.' 2022, p.141
[1066] Rodrik, Delphine. Rights Not Recognized: Applying the Right to Recognition as a Person before the Law to Pushbacks at International Borders, International Journal of Refugee Law, Vol.33, no. 4, 2021, p.541.
[1067]European Centre for Constitutional and Human Rights. "Push-Back." Retrieved from https://www.ecchr.eu/en/glossary/push-back/ Accessed 22 February 2022.
[1068] Council of Europe: Parliamentary Assembly. Resolution 2299 (2019) on Pushback policies and practice in the Council of Europe Members. 28 June 2019 Retrieved from https://pace.coe.int/en/files/28074 Accessed 10 February 2022.

force asylum seekers to leave the country.[1069] Thus, push-backs may occur based on bilateral agreements, which are frequently not readily available to the public, between 'push-back' and 'pull-back' countries.[1070] Frontline states conclude agreements with their neighbouring countries, which are paid and compensated to prevent persons, including asylum seekers, from leaving their territory.[1071] This is to say that, despite its illegitimacy and illegality, push-back can occur within a legal framework, as will be discussed further below.[1072]

These 'pull-backs' by neighbouring countries may hinder access to protection for asylum seekers stranded in that country if a sufficient protection system is lacking. In cases where there is a clear link between such bilateral cooperation, a lack of access to asylum, and other human rights violations, the Member State requesting the pull-back is also responsible for the violations.

The fundamental obligations of asylum and international law are intended to prevent this from occurring. Jurisprudence, expert opinions[1073] and CAT[1074] also confirm the view that the principle of *non-refoulement* prohibits states not only from directly transferring a person to a place of danger (a return decision enforced by the state) but also from taking, hidden or indirect, measures that produce circumstances leaving an individual with no real alternative other than returning to a place of danger.[1075]

[1069] Yilmaz-Elmas, Fatma. "EU's Global Actorness in Question: A Debate over the EU-Turkey Migration Deal." *Uluslararası İlişkiler / International Relations,* vol. 17, no. 68, 2020, p.161

[1070]Markard, Nora. "The Right to Leave by Sea: Legal Limits on EU Migration Control by Third Countries." *European Journal of International Law,* vol. 27, no. 3, 2016, p.613.

[1071] *Op.cit.* Council of Europe: Parliamentary Assembly. Resolution 2299 (2019).

[1072] It is in this context, as will be discussed further below, that bilateral agreements were concluded between Hungary and Serbia, on the one hand, and Poland and Belarus, on the other.

[1073] See the provisions of Draft Article 10 on the prohibition of disguised expulsion. "Draft articles on the expulsion of aliens, with commentaries." 2014, pp.15-18.

[1074] Para.14 "States parties should not adopt dissuasive measures or policies, such as detention in poor conditions for indefinite periods, refusing to process claims for asylum or unduly prolong them, or cutting funds for assistance programs to asylum seekers, which would compel persons in need of protection under Article 3 of the Convention to return to their country of origin in spite of their personal risk of being subjected there to torture and other cruel, inhuman or degrading treatment or punishment." Source: CAT. "General Comment No. 4 (2017) on the implementation of Article 3 of the Convention in the context of Article 22." 9 February 2018.

[1075] *Op.cit.* Rodenhäuser, Tilman, 2018.

4.1. Push backs at land borders

4.1.1. The interpretation of 'push-back' in light of the presence of the concept of 'safe third countries'

Push-backs have taken place on the Hungarian- Serbian border since the amendment to the law in July 2016.[1076] The starting point is whether the amendments and new regulations, affect directly or indirectly, the principle of *non-refoulement*? To answer this question, the principle must be read in the context of the newly implemented restrictions on the Hungarian asylum system.

At first glance, the amendments to the Hungarian Asylum Law do not raise issues related to the principle of *non-refoulment*. As mentioned in the previous subchapter, based on the amendments, all asylum seekers must submit their applications in transit zones at the Hungarian-Serbian border, where they will be detained for the duration of the asylum procedure. On 9 March 2016, as the 'crisis situation' was extended to the entire territory of Hungary, persons apprehended irregularly, even if they express their intention to claim asylum, will be removed from anywhere in the country through the gate of the facility at the border, where they can apply for asylum in the transit zones.[1077]

As a result of the amendment associated with the concept of the safe third country rule, which according to the government applies to Serbia, it is recognized that not only access to the asylum procedure but also the refugee status determination is a complex process in Hungary. The following were major changes: First, the time limit for asylum authorities to issue an asylum decision has been shortened. Accelerated procedures must be completed in fifteen calendar days rather than thirty, and an appeal must be submitted within three days. [1078] Second, denying the suspensive effect of any appeal in most accelerated procedures and with respect to ineligible applications, with the exception of the application of the safe third country rule, which means that, in a large number of cases, persons could be removed from the country before the first judicial review even begins.[1079] What happens if an asylum claim is rejected at the Hungarian- Serbian Border?

[1076] HHC. "The latest Amendments 'legalize' extrajudicial Push-Back of Asylum-seekers, in violation of EU and International Law." 5 July 2016. Retrieved from https://www.helsinki.hu/en/hungary-latest-amendments-legalise-extrajudicial-push-back-of-asylum-seekers-in-violation-of-eu-and-international-law/ Accessed 11 February 2022.

[1077] Art. 71(A) (1) of Act LXXX of 2007 of 1 January 2008 on Asylum and newly added Art. 5 of Act LXXXIX of 2007 on State Borders

[1078] *Op.cit.* Act CXXVII of 6 July 2015 on the Establishment of Temporary Border Security Closure and on Amending Acts related to Migration.

[1079] *Ibid.*

Before 2015, Serbia took back asylum seekers whose applications were rejected in a final decision in Hungary, based on the 'safe third country concept,'[1080] and under the EU-Serbia Readmission Agreement.[1081] However, this agreement was suspended by Serbia in September 2015, following the building of the fence by Hungary. In this context, Gil-Bazo observes that 'Given that the fence is built on Hungarian territory itself, the 'removal' across the fence would not be (in itself) an expulsion to a foreign state in the technical legal sense, but rather some form of 'internal relocation' within Hungarian territory and outside any procedural framework.' [1082] According to her, issues about expulsion (collective and otherwise), procedural safeguards applying in removal proceedings, as well as *non-refoulement* issues would not arise, precisely because the refugee thus 'removed' remains in Hungarian territory and subject to its jurisdiction.[1083] In other words, asylum seekers entering the 'transit zone' are under the jurisdiction of Hungary, as they are under the power and effective control of Hungarian authorities carrying out the asylum procedure.

Did Hungary expose both asylum seekers and rejected asylum seekers to the risk of *refoulement*?

Following Serbia's unilateral suspension of the EU-Serbia Readmission Agreement, the Hungarian government adopted the 'push-back' policy to return the rejected asylum seekers to the territory of Serbia. Likewise, asylum seekers who are apprehended within Hungary's borders, either the Serbian-Hungarian or Croatian-Hungarian borders, or who cross the fence at undesignated points, are automatically pushed back to Serbia by Hungarian authorities.[1084]

It has been admitted that amendments to the asylum legislation 'legalize' the 'push-back' practice.[1085] The military and police have been given explicit authority to push back both irregular asylum seekers apprehended within Hungary's borders and rejected asylum

[1080] *Op.cit.* Government Decree 191/2015 of 21 July 2015 on the National Designation of Safe Countries of Origin and Safe Third Countries.
[1081] 2007/819/EC: Council Decision of 8 November 2007 on the conclusion of the Agreement between the European Community and the Republic of Serbia on the readmission of persons residing without authorisation OJ L 334, 19 December 2007, p. 45.
[1082] Gil-Bazo, María-Teresa. "The End of the Right to Asylum in Hungary?" 3 May 2017, p. 2.
[1083] *Ibid.*
[1084] HHC. "Two Years After What's Left of Refugee Protection in Hungary." September 2017, p.5. Retrieved from https://www.helsinki.hu/wp-content/uploads/Two-years-after_2017.pdf Accessed 11 February 2022; Human Rights Watch. "Hungary: Migrants Abused at the Border." 13 July 2016. Retrieved from https://www.hrw.org/news/2016/07/13/hungary-migrants-abused-border Accessed 11 February 2022.
[1085] *See e.g.* Act XX of 2017 on the Amendment of Certain Acts Relating to Strengthening the Procedure Conducted in Border Surveillance Areas.

seekers.[1086] The push-back practice would seem to be incompatible with Hungary's legal obligations under EU and international law.[1087] It generally results in human rights violations such as forced returns without individual assessment.[1088] Yet, whether Hungary's push back policy amounts to a *non-refoulment* is debatable.

Hungary assumed that Serbia is a 'safe third country' that should process asylum claims of asylum seekers arriving in the EU via the Western Balkan route.[1089] As a result, the push-back policy does not violate the *non-refoulement* principle as defined in Article 33 CSR51. From the Hungarian perspective, push-backs 'are absolutely necessary to properly defend one's border', public order, and national security.[1090] Hence, 'no sovereign and independent nation state should allow itself to be handcuffed regarding its ability to defend its border. National security and self-preservation must come first.'[1091] In this context, Bakondi, the prime minister's chief domestic security advisor, stated that despite the numerous political attacks that Hungary has faced because of its actions in securing the border, the government has, in the interest of the nation and with the support of the Hungarian population, continuasly represented the migration policy it has followed since 2015.[1092]

However, as mentioned previously, the assumption that Serbia is a 'safe third country' has been challenged. In the aforementioned *Ilias and Ahmed v. Hungary*, the ECtHR found a violation of Article 3 ECHR in respect of the applicants' return to Serbia based on 'safe third country' grounds, due to the risk of chain *refoulement.*[1093] In its judgment, the Court found that the procedure applied by the Hungarian authorities was not suitable to provide the essential protection against a real risk of inhuman and degrading treatment.[1094] Thus,

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[1086] Freed, Rachel Gore *et al.* "A cautionary tale the United States follows Hungary' s dangerous path to dismantling asylum." Unitarian Universalist Service Committee, July 2018, pp. 3-4. Retrieved from https://www.uusc.org/wp-content/uploads/2018/07/Cautionary-Tale_DismantlingAsylum_Report_W.pdf Accessed 11 February 2022.
[1087] *Op.cit.* HHC. "Pushed Back at the Door…" 2017, p. 12.
[1088] OHCHR. "Report on means to address the human rights impact of push-backs of migrants on land and at sea." A/HRC/47/30, 12 May 2021.para. 38.
[1089] The reasons why Hungary considered Serbia a 'safe third country' have already been discussed in the section 'safe third country'
[1090] Kolos, Georgina Napja. "Should Really Hungary Be Sorry for Its Stance on Migration?" *Magyar Nemzet*, 2021.
Retrieved from https://magyarnemzet.hu/vpenglish/should-really-hungary-be-sorry-for-its-stance-on-migration-9376250/ Accessed 25 February 2022.
[1091] *Ibid.*
[1092] Pronczuk, Monika & Novak, Benjamin. "EU Border Agency Pulls Out of Hungary Over Rights Abuses." *The New York Times.* Retrieved from https://www.nytimes.com/2021/01/27/world/europe/frontex-hungary-eu-asylum.html Accessed 25 February 2022.
[1093] *Op.cit. Ilias and Ahmed v. Hungary* (2019) para. 69.
[1094] *Ibid.* para. 187.

the Hungarian authorities did not bear their share of the burden of proof and placed the applicants in a position where they were not able to rebut the presumption of safety, since the government's arguments remained confined to the 'schematic reference' to the inclusion of Serbia in the national list of safe countries.[1095] The Court stressed that relying on the Decree is not a sufficient reason to recognize a country as a 'safe third country' and that the ratification of the CSR51 is not an adequate condition to qualify a country as safe.[1096] Despite the Hungarian government's appeal, the Grand Chamber of the ECtHR confirmed the applicants' return to Serbia as a violation of Article 3 ECHR. The ECtHR's judgment showed that indirect *refoulement* is prohibited under international law. The principle of *non-refoulement* prohibits not only the direct forcible return of persons, but also indirect measures that have the same effect.[1097]

To determine whether the prohibition on refoulement is violated, the ECtHR employs a two-prong test. On the one hand, is there a real risk of exposing the asylum seeker to degrading or inhumane treatment, either directly in the destination country or indirectly in the case of chain *refoulement* to another country? One the other hand, if such a risk exists, is there an effective remedy available to the asylum seeker to avoid deportation? The only way to ensure protection is to evaluate each asylum seeker's application on a case-by-case basis. Yet, the ECtHR's approach to *non-refoulement* in *Ilias and Ahmed v. Hungary* will take another turn in *N.D. and N.T. v. Spain*. [1098]

The ECtHR reviewed in *N.D. and N.T.* v. *Spain* whether or not push-backs at European land borders fell within the scope of the prohibition of collective expulsion of aliens in the sense of Article 4 of Protocol No. 4. The case concerned the expulsion of two sub-Saharan Africans who entered Spain through Melilla's border fence. Spanish authorities apprehended the applicants and pushed them back to Morocco, without conducting any individual procedures or providing them the chance to apply for asylum.[1099] In a judgment of 3 October 2017, the third section of the Court, determined that Spain's 'push-backs' were unlawful and unanimously ascertained that there had been a violation of Article 4 of Protocol No. 4 due the lack of individualised assessment of the situation of each of the applicants, as well as a violation of Article 13 of the ECHR when combined with Article 4

[1095] *Ibid.* para. 115.
[1096] *Ibid.* para. 57.
[1097] *Ibid*. para. 112.
[1098] *N.D. and N.T. v. Spain*, Case nos. (8675/15) and (8697/15), Judgment of the Court (Grand Chamber) of 13 February 2020, ECtHR.
[1099] Ibid. paras. 15& 20.

of Protocol No. 4.[1100] In other words, the third section of the Court considered that the Spanish authorities violated Article 4 Protocol 4 of the Convention when they pushed back applicants who tried to enter Spanish territory without going through any sort of identification procedure or taking any administrative or judicial measure.

On 29 January 2018, this case was referred to the Grand Chamber of the ECtHR, which found that the immediate and forced return of aliens from a land border after they attempted to cross it in an unauthorized way and in large numbers is not a breach of the ECHR.[1101] Accordingly, there had been no violation of Article 13 taken in conjunction with Article 4 of Protocol No. 4, given that the applicants' own actions had led to the lack of an individualized removal procedure and that their initial complaint about the risks they might encounter in the destination country had been disregarded.[1102]

Although not related to the V4 group, the judgment was interpreted as 'a green light to push-backs at the border' [1103] and a step that offers 'enormous concessions' to states in the conduct of various forms of unlawful push backs at the border.[1104] The judgment could be seen as a concession by the Court in response to pressure from European states, the majority of which, during the 2015-16 refugee crisis, pursued a restrictive border control policy and implemented increasingly repressive types of push-backs at their land borders. *N.D. and N.T.v. Spain* may have been a historic and human rights-based corrective measure against the restrictive border regimes of some EU Member States, such as Spain, Hungary, and Poland, but regrettably, this was not the case. The court may have gone even farther by taking into account that insufficient safety in the country of origin or in the country of transit can explain a person's urgent need to enter the territory of the destination state using unlawful means. *N.D. & N.T.v. Spain* simply made a passing vague allusion to the potential existence of compelling justifications for not entering lawfully.[1105] The reasoning of the judgment raised questions about whether it might be used as a potential basis for summary returns and push-back of asylum seekers by EU Member States. One

[1100] *N.D. and N.T. v. Spain*, case nos. (8675/15) and (8697/15), Judgment of the Court (First Section) of 3 October 2017, ECtHR, paras. 96 & 97 and 127.
[1101] *Op.cit N.D. and N.T. v. Spain (2020) paras.* 206-220
[1102] *Ibid.* para.244.
[1103] Centre for Constitutional and Human Rights. 'Strasbourg shamelessly gives green light to push-backs at Europe's borders.'13 February 2020. Retrieved from https://www.ecchr.eu/en/press-release/strasbourg-shamelessly-gives-green-light-to-push-backs-at-europes-borders/ Accessed 24 August 2022.
[1104] Pichl, Maximilian & Schmalz, Dana. "Unlawful" may not mean rightless.: The shocking ECtHR Grand Chamber judgment in case N.D. and N.T.", *VerfBlog*, 14 February 2020. Retrieved from https://verfassungsblog.de/unlawful-may-not-mean-rightless/ Accessed 24 August 2022.
[1105] *Op.cit N.D. and N.T. v. Spain* (2020) paras. 201-220.

other thing to mention is that the *N.D. & N.T. v. Spain* outcome is also incompatible with the Spanish government's obligations under EU law and CFR (mainly Article 19), to protect human rights in border control and surveillance practices, as well as the fundamental right to asylum. A further incompatibility between the judgment and Article 52(3) on the relationship between the CFR and the ECHR is also worth mentioning.

At this level, it is necessary to review the CJEU's position on the push-back practice and its relationship to the concept of a safe third country. The CJEU has interpreted and analysed the application of the concept of 'safe third country' by Member States. In LH *v Bevándorlási és Menekültügyi Hivatal*, the CJEU found that a Member State may consider an application for asylum claim to be inadmissible, including cases where a non-EU State is considered a safe third country pursuant to Article 38 Asylum Procedures Directive, i.e., where there is, *inter alia*, no risk of persecution or refoulement.[1106] It stated, inter alia, that such a decision is subject to a requirement of a case-by-case analysis of the country's safety in general as well as for a given applicant.[1107] In its judgment, the court finds that the requirement under Article 38(1) Asylum Procedures Directive proved unsatisfactory, particularly during the 'migration crisis',[1108] because Hungarian government did not provide evidence of an adequate level of protection in the third country, Serbia.[1109] Furthermore, the fact that an applicant has transited through a third country does not imply that the country is safe, nor does it suffice to demonstrate a connecting link under Article 38(2) Asylum Procedures Directive, and thus does not constitute a ground for inadmissibility.[1110]

In *FMS and Others v Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Or-szágos Idegenrendészeti Főigazgatóság*, the CJEU held that the Hungarian legislation does not comply with the *non-refoulement* requirement, and there is no indication of the content of adequate protection in the 'safe third country'.[1111] Furthermore, the Court considered that the mere transit of an asylum seeker through a third

[1106] *LH v Bevándorlási és Menekültügyi Hivatal* (Request for a preliminary ruling from the Fővárosi Közigazgatási és Munkaügyi Bíróság (Budapest Administrative and Labour Court, Hungary)), Case no. (C-564/18), Judgment of the Court (First Chamber) of 19 March 2020, CJEU, para.37.
[1107] *Ibid*, paras. 38-48.
[1108] The term 'migration crisis' appears in the CJEU's Advocate General's opinion. Source: *LH v Bevándorlási és Menekültügyi Hivatal* (Request for a preliminary ruling from the Fővárosi Közigazgatási és Munkaügyi Bíróság (Budapest Administrative and Labour Court, Hungary)), Case no. (C-564/18), Opinion of Advocate General of 5 December 2019, CJEU, para.24.
[1109] *Op.cit. LH v Bevándorlási és Menekültügyi Hivatal* (2020) paras.67-68.
[1110] *Ibid.* paras. 49-50.
[1111] *Op.cit. FMS and Others v Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Or-szágos Idegenrendészeti Főigazgatóság,* (2020) paras. 153-155.

country cannot be considered a 'connection' under Article 38(2), and that the sole element of transit cannot satisfy national authorities' obligations to individually consider the safety of the third country and the significance of the connecting link under that same provision. [1112] In other words, transiting through county (a safe transit country) is insufficient to establish a link between an asylum seeker and the 'safe third country.'

In *Commission v. Hungary, the CJEU* found that 'the consistent and generalized practice' of the Hungarian authorities, consisting in severely restricting access to transit zones, making it 'completely illusory the possibility' for a third-country national who was being forcibly deported outside the border fence to reach one of those transit zones at short notice, violated EU law.[1113] Despite the CJEU's decision, reports showed that the police kept escorting all apprehended migrants back to the southern border's outer side of the fence (71,470 people by 2021's end).[1114] As a result of Hungary's failure to comply with the judgment, the European Commission referred the country back to the CJEU.[1115]

Similar to the ECtHR's reasoning *in Ilias and Ahmed v. Hungary*, the CJEU took a clear stance on the issue of pushing back asylum seekers, concluding that returning them to Serbia without first considering the merits of their claims and without making sure that the principle of *non-refoulement* could be respected amounted to *refoulement*. Therefore, the automatic rejection of an asylum application based on transit through a 'safe third country', as provided by Hungarian law, is a violation of EU law. Hungary's growing attempt to give legal cover to push-back policy is a cause of concern. It appears increasingly clear that the attempt to 'legalize' push-backs to Serbia is a breach of Hungary's EU and international obligations, posing serious security risks of *refoulment.* It is suggested that the concept of 'safe third country' shall be applied on a case-by-case basis in Hungary to avoid *refoulment* or other forms of cruel, inhuman, or degrading treatment or punishment that an asylum seeker may face if deported or pushed back.

[1112] *Ibid*. paras. 151-158.
[1113] *Op.cit. Commission v. Hungary* (C-808/18) (2020) para.259.
[1114] *Op.cit.* European Union Agency for Fundamental Rights. 'Fundamental Rights Report 2022.', based on The Hungarian police (2021), Statistics of illegal migration-By week (*Illegális migráció alakulása – heti bontásban*) p.141.
[1115] European Commission. "Migration: Commission refers HUNGARY to the Court of Justice of the European Union over its failure to comply with Court judgment." 12 November 2021. Retrieved from https://ec.europa.eu/commission/presscorner/detail/en/ip_21_5801 Accessed 24 August 2022.

4.1.2. The interpretation of 'push-back' in the absence of the concept of 'safe third countries'

As previously indicated, neither Poland, Czechia, nor Slovakia has a predetermined list of 'third safe countries' in their national legal framework. However, allegations of a push-back policy have been observed in both Poland and Slovakia, as will be examined below.

In Poland, as aforementioned in the preceding subchapter, large numbers of asylum seekers, primarily from the Russian Republic of Chechnya but also from Tajikistan and Georgia, have attempted to apply for asylum in the country at the border with Belarus since 2014.[1116] However, reports have shown that Polish authorities have been blocking entry to most asylum seekers at the Belarus-Poland border[1117] and neglecting their right to apply for asylum and instead summarily returning them to Belarus.[1118]

The policy of push-backs of asylum seekers introduced by Polish Border Guards has been criticized by international organizations ,[1119] which confirmed the existence of grave systemic irregularities at the border.[1120] For example, Gall, Balkans and Eastern Europe researcher at Human Rights Watch, stated that Poland is putting people in danger by denying them access to its asylum process and pushing them back to Belarus, where they can't get protection.'[1121]

[1116] *Op.cit.* Human Rights Watch. "Poland: Asylum Seekers Blocked at Border." 1 March 2017.
[1117] Terespol on the Belarusian border, which is a border-crossing point, has been the main entry point in Poland for asylum seekers, during 2012-2020, with a significant deterioration of the situation in 2016. Source: Asylum Information Database & ECRE. "Access to the territory and Push Backs Poland." (Last updated: 16 April 2021). Retrieved from https://asylumineurope.org/reports/country/poland/asylum-procedure/access-procedure-and-registration/access-territory-and-push-backs/ Accessed 11 February 2022.
[1118] *Ibid.*
[1119] *E.g.* Legal Intervention Association, Helsinki Foundation for Human Rights, Amnesty International, and Human Rights Watch. Source: Legal Intervention Association. "At the Border. Report on monitoring of access to the procedure for granting international protection at the border crossings in Terespol, Medyka, and Warszawa-Okecie airport." 2016, pp. 35-40. Retrieved from https://interwencjaprawna.pl/wp-content/uploads/2020/04/at-the-border.pdf Accessed 11 February 2022; Helsinki Foundation for Human Rights. "A Road to Nowhere: The account of the monitoring visit at the Brest-Terespol border crossing between Poland and Belarus." 2016, pp. 4-11. Retrieved from https://bit.ly/2ShztiG Accessed 11 February 2022; *Op.cit.* Human Rights Watch. "Poland: Asylum Seekers Blocked at Border." 1 March 2017; Helsinki Foundation for Human Rights. "Access to asylum procedure at Poland's external borders, Current situation and challenges for the future." April 2019, pp. 1-5 Retrieved from https://bit.ly/3955t0w Accessed 11 February 2022.
[1120] *Op cit*. HHC. "Pushed-Back at the Door: Denial of Access to Asylum in Eastern EU Member States." 2017, p 3.
[1121] *Op.cit.* Human Rights Watch. "Poland: Asylum Seekers Blocked at Border." 1 March 2017.

Poland's push-back policy, which prevents asylum seekers from entering the country and sends them back to Belarus, poses serious risks of *refoulment.*[1122] Several cases have been brought before the ECtHR. It is appropriate to cite, by way of example and without limitation, the cases of *M.K. and others v Poland*,[1123] and *D.A. and Others v Poland.*[1124]

M.K. and others v Poland concerns the repeated refusal of Polish border authorities to examine applications for international protection.[1125] The case concerned a number of applications submitted by Russian nationals, including minors, who made repeated attempts to cross the Terespol border between Poland and Belarus.[1126] The applicants, who were attempting to flee from Chechnya, asserted that they feared for their safety and that they intended to claim asylum in Poland.[1127] The case also concerns applicants who were pushed back to Belarus while their asylum application was still pending.[1128] The ECtHR found that the Polish authorities failed to receive asylum applications and that the applicants were summarily deported to a third country, where they would face *refoulement* and ill-treatment.[1129] The Court also considered that by refusing to allow the applicants to remain on Polish territory pending the examination of their asylum claim and sending them to Belarus, the Polish authorities intentionally exposed the applicants to a dangerous risk of chain-*refoulement* and treatment prohibited by Article 3 ECHR.[1130]

D.A. and Others v Poland. concerned alleged push-backs of the applicants, Syrian nationals, at the Polish-Belarusian border. The applicants alleged that the Polish authorities had repeatedly denied them the right to claim asylum.[1131] The ECtHR found that the applicants were deprived of an effective guarantee that would have protected them from exposure to a real risk of being subjected to inhuman or degrading treatment, as well as torture.[1132]

In both cases, the ECtHR held that if a state does not provide an effective means for asylum seekers to lodge their claims, it violates its duty under Article 3 and Article 4

[1122] Amnesty International. "Poland: EU Should Tackle Unsafe Returns to Belarus." 5 July 2017. Retrieved from https://www.amnesty.org/en/latest/news/2017/07/poland-eu-should-tackle-unsafe-returns-to-belarus/ Accessed 24 February 2022.
[1123] *Op.cit. M.K. and Others v Poland* (2020).
[1124] *Op.cit. D.A. and Others v Poland.* (2021)
[1125] *Op.cit. M.K. and Others v Poland.* para.4
[1126] *Ibid.* para. 26.
[1127] *Ibid.* para. 28-29.
[1128] *Ibid*. para. 21.
[1129] *Ibid*. para. 183-186.
[1130] *Ibid.* para. 235.
[1131] *Op.cit. D.A. and Others v Poland.* para.1.
[1132] *Ibid.* para. 74.

ECHR and also Protocol 4 ECHR to assess each case individually.[1133] As a result, even though asylum seekers on the Belarussian side of the border may not be subject to Article 1 ECHR jurisdiction due to a lack of a territorial or other direct link, they have the right to lodge their claims for protection with Polish border guards.[1134] According to the ECtHR, Poland's policy of sending asylum seekers back to Belarus amounts to both direct and indirect *refoulment*.

It was argued that Belarus lacks a functioning asylum system[1135], and there are real risks that asylum seekers from Chechnya or central Asian countries could be returned to their countries of origin, exposing them to the risk of torture or/and ill-treatment.[1136] Besides, it is essential to emphasize that Belarus is the only country in Europe to still use the death penalty and that its laws are extremely strict, making it impossible for many human rights groups to register their organizations.[1137]

Consequently, and based on the above, the Polish authorities' practice of renouncing access of people to the asylum procedure at the border and sending them back to Belarus not only violates the right to asylum under EU and international law but also creates a risk of *refoulement*. More specifically, Belarus is not a safe place for people in need of international protection.[1138] Thus, the country has an asylum law, but in practice, it 'does not offer meaningful protection.'[1139] By returning them summarily to Belarus, Poland is not giving asylum seekers a real chance to claim asylum.

Additionally, Belarus officials perceive Russia as a 'safe country of origin' in the case of those from Chechnya and a 'safe third country' in the case of those from Tajikistan, meaning that asylum seekers from either country have almost no chance of being granted

[1133] *Op.cit. D.A. and Others v Poland.* para.109; *op.cit. M.K. and Others v Poland.* para. 252.
[1134] *Ibid. D.A. and Others v Poland.* para.34; *ibid. M.K. and Others v Poland.* para. 109
[1135] *Op.cit.* Human Rights Watch, Poland: EU Should Tackle Unsafe Returns to Belarus, 5 July 2017.
[1136] ECRE. "Country Report: Poland." 2020, p.11. Retrieved from https://asylumineurope.org/wp-content/uploads/2021/04/AIDA-PL_2020update.pdf Accessed 24 August 2022.
[1137] "Death Penalty in Belarus: Murder on (Un)lawful grounds Joint FIDH – HRC 'Viasna' report." 2016, pp.1-4.
Retrieved from
https://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/BLR/INT_CAT_CSS_BLR_30786_E.pdf
Accessed 25 February 2022.
[1138] Gall, Lydia. "Poland Trapping Asylum Seekers in Unsafe Belarus." Human Right Watch. 16 May 2017. Retrieved from https://www.hrw.org/news/2017/05/16/poland-trapping-asylum-seekers-unsafe-belarus Accessed 12 February 2022; Auer, Marlene. "Poland continues arbitrary returns of asylum seekers to Belarus Practices at the EU external border undermine the right of people to international protection." *Borderline Europe*. 22 July 2019, p.1.
Retrieved from:
https://www.borderlineeurope.de/sites/default/files/readingtips/Poland%20Belarus%20final.pdf Accessed 12 February 2022.
[1139] *Op.cit.* Human Rights Watch. "Poland: Asylum Seekers Blocked at Border." 1 March 2017.

refugee status or subsidiary protection.[1140] Ironically, the EU has formally launched a Mobility Partnership with Belarus in the areas of migration, asylum and border management, the protection of refugees, combating irregular migration and human trafficking.[1141]

When it comes to the Polish–Ukrainian border, it must be stated that push-back does not exist. Polish authorities are more tolerant towards Ukrainian asylum seekers for various reasons, such as the armed conflict in the eastern part of the country with Russian involvement, and its unstable political and economic situation. [1142] Paradoxically, the number of Ukrainians who have been granted refugee status in Poland has been extremely low. The concept of 'internal flight or relocation alternative' served as the legal basis for the rejection of many asylum applications**.**[1143] The concept refers to a specific area of the country where there is no risk of a well-founded fear of persecution.[1144] While neither the CSR51 nor its 1967 Protocol expressly refers to this concept, it has over time been developed in state practice and legislation.[1145] It exists, for instance, in Article 8 of the EU Qualification Directive, which establishes the condition that the possibility of securing protection elsewhere within one's own country should serve as an element of the assessment of an asylum claim. Even among EU Member States, the practice in this area varies considerably. [1146] It is worth noting that the legal framework of Ukrainians' mobility between Ukraine and Poland is quite flexible. The Polish authorities established other mechanisms and programs for Ukrainians to regularize their stay in Poland,[1147] including residence permits,[1148]visas,[1149] work permits, and simplified access to

[1140] *Ibid*
[1141] European Commission. "EU launches Mobility Partnership with Belarus." *Press release*. 13 October 2016, pp.1-2. Retrieved from https://ec.europa.eu/commission/presscorner/detail/en/IP_16_3426 Accessed 12 February 2022.
[1142] UNHCR. "The Situation of Ukrainian Refugees in Poland" 2016, p.7
Retrieved from https://www.ecoi.net/en/file/local/1211563/1930_1475657937_57f3cfff4.pdf Accessed 12 February 2022.
[1143] Szczepanik, Marta & Tylec, Ewelina. "Ukrainian asylum seekers and a Polish immigration paradox." *Forced Migration Review*, vol. 51, 2016, p 71.
[1144] UNHCR. "Guidelines on International Protection No. 4: "Internal Flight or Relocation Alternative" Within the Context of Article 1A (2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees." 23 July 2003, HCR/GIP/03/04, para. 6.
[1145] *Op cit*. Szczepanik, Marta & Tylec, Ewelina. 2016, p. 71.
[1146] *Ibid.*
[1147] Szulecka, Monika. "Regulating Movement of the Very Mobile: Selected Legal and Policy Aspects of Ukrainian Migration to EU Countries." *Ukrainian Migration to the European Union,* edited by Olena Fedyuk & Marta Kindler, Springer, 2016, p 53.
[1148] *Op.cit.* of the Act of 12 December 2013 on Foreigners.
[1149] *Ukrinform.* "Poland issued almost 930,000 visas to Ukrainians in 2015." 4 January 2016. Retrieved from https://www.ukrinform.net/rubric-polytics/1940489-poland-issued-almost-930000-visas-to-ukrainians-in-2015.html Accessed 12 February 2022.

the labour market,[1150] studies,[1151] Pole's Card, *etc*.[1152] The mechanisms provided by Poland provide access to comparable rights and may lead to citizenship. However, it did not protect against *refoulement* if the permits were cancelled. The legal instruments used by Ukrainians in Poland do not provide adequate protection because of their temporary nature, as they do not protect against *refoulement*, and they do not provide comparable rights or lead to permanent solutions.[1153]

Despite receiving little attention, alleged push-back incidents have been reported on the Slovakia–Ukraine border. The organization, Human Rights League, which has been giving legal counselling in Slovakia for years, indicates that push-backs are ongoing.[1154] Asylum seekers who have expressed their intention to apply for asylum in Slovakia have been pushed back to Ukraine. Although the organization cannot determine the precise number of push-back that have occurred, it has continuously drawn attention to several push-back cases over the years through legal counselling sessions at detention centres close to the border.[1155] The push-backs are principally conducted under readmission agreements between Slovakia and Ukraine.[1156] However, Slovakia has denied using the agreements to conduct these summary return practices to Ukraine.[1157] There is evidence to claim that these readmissions are carried out under close cooperation between Slovakia and Ukraine and through joint patrols. Joint forces of this nature have received strong support from the EU.[1158]

In the aforementioned *Asady and Others v. Slovakia*, the collective expulsion was called into question. The applicants alleged that their expulsion from Slovakia to Ukraine was collective in nature and that they lacked an effective remedy.[1159] The ECtHR found that there was no violation of Article 13 ECHR because the applicants were not denied the

[1150] Act of 20 April 2004 on promotion of employment and labour market institutions; Lesińska, Magdalena. "Immigration of Ukrainians and Russians into Poland: Inflow, integration trends and policy impacts." INTERACT Research Report 2015/06, European University Institute, Fiesole, 2015, pp.12-14.
[1151] *Op.cit.* UNHCR. "The Situation of Ukrainian Refugees in Poland." 2016, p.9.
[1152] Act on Pole's Card of 7 September 2007.
[1153] *Op.cit.* UNHCR. "The Situation of Ukrainian Refugees in Poland." 2016, p.17.
[1154] "Push-backs and Rights Violations at Europe's Borders, the State of Play in 2020. Refugee Rights Europe and the End Push-backs Partnership." p. 53.
Retrieved from https://endpushbacks.com/wp-content/uploads/2020/11/pushbacks-and-rights-violations-at-europes-borders.pdf Accessed 12 February 2022.
[1155] *Ibid.*
[1156] Muetzelburg, Irina. "The EU's external asylum policy in Ukraine. 9th Pan-European Conference on International Relations: The Worlds of Violence, EISA, HAL ,Italy, 2015, pp. 8-9. Retrieved from https://halshs.archives-ouvertes.fr/halshs-01246246/document Accessed 12 February 2022.
[1157] *Ibid.*
[1158] *Ibid.*
[1159] *Op.cit. Asady and Others v. Slovakia* paras. 3-4.

opportunity to draw attention to the circumstances that would entitle them to remain in Slovakia.[1160] As a result, the expulsion did not amount to collective expulsion within the meaning of Article 4 Protocol 4 to ECHR. [1161]

In the same vein, the *case M.S. v. Ukraine and Slovakia* must be highlighted.[1162] The case concerned expulsion of a minor unaccompanied Afghani national from Slovakia to Ukraine. The applicant complains that the Slovakian authorities expelled him to Ukraine despite the risk that he would be subjected to degrading conditions of detention and the threat of indirect *refoulement* to Afghanistan, where, in turn, he faced a real risk of serious harm. He further complains of not having an effective remedy against his expulsion to Ukraine and in respect of the risk of indirect *refoulement* to Afghanistan.[1163] While the Court concluded that the complaints against Slovakia are inadmissible, it considered that Ukraine committed a procedural violation of Article 3 ECHR by failing to investigate the applicant's claims of fear of persecution in Afghanistan in a timely manner before returning him there.[1164]

I presume that in *Asady and others v. Slovakia,* the applicants could have raised Article 3 ECHR allegations but did not, and this affected their claims. In other words, the applicants failed to express clearly that their removal would expose them to the risks outlined in Article 3 ECHR. It was noted that the domestic expulsion decisions referred to an examination of Article 3 risks, but there was no record of applicants' risk-related statements.[1165] It is mostly the same issue in *M.S. v. Ukraine and Slovakia,* as the applicant failed to present any allegations of potential risks in Afghanistan to the Slovakian authorities.[1166] And the question that arises here is whether Slovak authorities conducted an objective examination of each individual case and whether applicants were given an effective opportunity to submit their arguments.

[1160] *Ibid.* para. 71
[1161] *Ibid.* para. 78.
[1162] *M.S. v. Ukraine and Slovakia* case no. (17189/11), Judgment of the Court (first section) of 11 June 2020, ECtHR.
[1163] *Ibid.* para.1-2
[1164] *Ibid.* para. 152.
[1165] *Op.cit. Asady and others v. Slovakia, para.67.*
[1166] *Op.cit. M.S. v. Ukraine and Slovakia, para. 127.*

4.2. Push backs at transit zone of air borders

In Czechia, the push-back policy has been observed, particularly at the Prague Airport Transit Zone.[1167] As previously discussed, instead, being enabled to access the asylum procedure, some asylum seekers were imprisoned for arriving with forged passports. Imprisonment is a step that precedes the expulsion of asylum seekers.[1168] Moreover, several asylum seekers were expelled directly from the transit zone, even though they arrived with a valid visa. In 2018 and 2019, OPU observed a regular practice of issuing administrative expulsion orders to all persons intending or applying for asylum directly upon landing at the Prague Airport transit zone.[1169] The administrative expulsion decision is automatically issued, regardless of the asylum seeker's circumstances. Generally, it can be done before registering the asylum application but also during the asylum proceedings.[1170]

Besides, the amendment to Act No. 326/1999 Coll., of 1 January 2000 on the Residence of Foreign Nationals in the Territory of the Czech Republic, which entered into force in July 2019, [1171] narrowed down possible obstacles to expulsion to only include breach of Article 3 ECHR. In this context, the cases of Yemenite asylum seekers at the Prague airport reception centre who arrived in September 2019 from the war zones of Yemen intending to claim asylum in Czechia are good examples to cite.[1172] In the administrative expulsion procedure, the police identified them as 'able to return', indicating the absence of a violation of Article 3 ECHR, and therefore no obstacle to return is present, since the expulsion to a war zone is not currently a reason to suspend deportation under the Aliens Act.[1173] However, it is unclear whether the Czech authorities' alleged policy of pushing back asylum seekers in the transit area of Prague Airport amounts to direct or indirect *refoulement.*

The prohibition of *refoulement* to a danger of persecution under IRL is applicable to any form of forcible removal, including, push back, deportation, expulsion, extradition,

[1167] *Op.cit.* HHC. "Pushed Back at the Door…" 2017, p. 8
[1168] *Ibid.*
[1169] OPU. "Czech Republic: OPU Submission to the HRC 127th session (14 October-8 November 2019)." 2019 p.11
[1170] *Ibid.*
[1171] Art.179 of Act no. 176/2019 Sb., amending Act No. 326/1999 Coll., of 1 January 2000 on the Residence of Foreign Nationals in the Territory of the Czech Republic.
[1172] *Op.cit.* "Czech Republic: OPU Submission to the HRC 127th session…" p.11.
[1173] *Ibid.*

informal transfer or 'renditions', and non-admission at the border.[1174] The push-back policy observed primarily in Hungary and Poland amounted to indirect *refoulement.* What is interesting is that, despite the fact that the ECHR does not explicitly mention the *non-refoulement* principle, the ECtHR has made it clear that the prohibitions on torture, inhuman or degrading treatment, or punishment included in Article 3 ECHR also apply to deportations, expulsions, or extraditions.

Concerning the concept of a 'safe third country,' the CJEU's main concern was whether effective guarantees exist to protect asylum seekers from *refoulement*, whether direct or indirect, to the country from which they fled. The concept itself is perplexing. There is uncertainty surrounding the debate over this concept, and the proposition that a shift in perspective, based on general rules of interpretation, would lead to a definitive conclusion on its legality. The fact that the CSR51 neither expressly authorizes nor prohibits reliance on protection elsewhere policies demonstrate this. However, the principle of international law's effectiveness requires the refusal of a construction that preserves a precarious position by prolonging uncertainty, as Lauterpacht observed it, 'the object of the law is order, not the perpetuation of disagreements.'[1175]

5. Challenges in the enjoyment of the right to an effective remedy

When their application for asylum is denied or they have another complaint alleging a violation of their human rights, asylum seekers must have access to a practical and effective remedy. In this respect, it is acknowledged by both international and EU law that adherence to procedural safeguards is necessary for an effective and prompt review of each particular case.

To begin with, it is debatable whether Articles 32 and 33 of CSR51 might be applied to deduct the right to an effective legal remedy for an asylum seeker.[1176] To be more accurate, these Articles of CSR51 dealt with expulsion and did not specifically address the right to an effective remedy. According to Article 33, states are required to adhere to the fundamental principle of *non-refoulement*. The only derogation allowed (debatable)relates to refugees who pose a threat to the host state's national security or who, having been

[1174] *Op.cit.* UNHCR. "Advisory Opinion on the Extraterritorial Application of *Non-Refoulement* …"2007, para. 7.
[1175]Lauterpacht, Hersch. *The Development of International Law by the International Court,* Stevens Publisher, 1958, pp. 233-234.
[1176] Boeles, Pieter. "Effective Legal Remedies for Asylum Seekers According to the Convention of Geneva 1951." *Netherlands International Law Review,* vol. 43, no. 3, 1996, pp. 291-319.

convicted by a final judgment of a particularly serious crime, represent a danger to the community of that state. Such a refugee may only be expulsed when a decision has been made in conformity with the law. The refugee has the right to provide evidence to defend themselves, to challenge the decision, and to be represented before the appropriate authorities. If the decision to expel the person is confirmed, they must be given a sufficient amount of time to seek legal admission into another country. The UNHCR addressed the question of effective remedies for asylum seekers. According to UNHCR guidance, an applicant for refugee status should be able to appeal the decision to an administrative or judicial body, have enough time to file the appeal, and be allowed to stay in the country while the appeal is pending.[1177]

International human rights instruments, including Article 2 (3) ICCPR, articles 3 and 14 of the CAT, and Article 13 ECHR, protect the right to an effective remedy against a denial of an asylum claim or any other complaint alleging a violation of human rights. More precisely, asylum-related matters fall under the provisions of Article 13 ECHR, which gives the right to an effective remedy before a national authority. Other ECHR rights, including Article 3, may be read in conjunction with Article 13. It is important to note that asylum cases are not covered by Article 6 of the ECHR, which protects the right to a fair trial. The right to an effective remedy is also mirrored in the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.[1178]

Under EU law, Article 47 CFR guarantees the 'right to an effective remedy and a fair trial.' The first paragraph of Article 47 CFR is based on Article 13 of the ECHR, which guarantees the right to an 'effective remedy before a national authority.' It should be noted that, in contrast to Article 13 ECHR, which only requests review before a national authority, the CFR provides that review must be conducted by a court.[1179] The second paragraph of Article 47 of the EU Charter is based on Article 6 of the ECHR, which guarantees the right to a fair trial but only when assessing civil rights or obligations or any criminal charge. Due to the fact that matters involving asylum do not include the

[1177] *Op.cit.* UNHCR Handbook, para. 192(vi) and (vii).
[1178] *Op.cit.* UNGA. Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, A/RES/60/147, 21 March 2006.
[1179] *Op.cit.* Explanations relating to the Charter of Fundamental Rights.

determination of a civil right or responsibility, Article 6 of the ECHR cannot be applied to them. [1180]There is no such distinction under Article 47 of the EU Charter. This right is also included in Article 46 of the Asylum Procedures Directive. The latter guarantees the right to an effective remedy against a decision rejecting international protection, a decision to refuse to reopen a previously discontinued application, and a decision to withdraw international protection. It has to cover a full and *ex nunc* examination of both facts and points of law. Time limits must not make filing an appeal impossible or prohibitively difficult. The right to an effective remedy is further guaranteed by Articles 14(3) of the Schengen Borders Code, Article 54 of the SIS Border Checks Regulation,[1181] and Articles 32(3) and 34(7) of the Visa Code, among other documents.

Before examining whether the V4 countries respect the right of an effective remedy of the asylum seeker when his or her application for asylum is denied or when he or she files another complaint alleging a violation of their human rights, it is important to look at the factors that make an asylum claim inadmissible.

The V4 countries established grounds for the inadmissibility of an asylum application in their national asylum laws.[1182] Generally in all the four countries, if a person is an EU citizen, has protection from another EU Member state, has refugee status in a third country and this country is willing to readmit the applicant, submits a subsequent application, and there are no new circumstances or facts, his application for asylum is deemed inadmissible.[1183]

Besides, inadmissibility could be due to national security reasons. This type of inadmissibility requires a careful examination because it is surrounded by uncertainty and it is difficult, if not impossible, to contest it. The asylum laws of the V4 countries refer explicitly to the 'Exclusion Clause,' which is specified in Article 1F of CSR51. In

[1180] *Maaouia v. France,* case no. (39652/98) 5 October 2000. Judgment of the Court (Grand Chamber) of 5 October 2000, ECtHR, paras. 38-39.
[1181] Regulation (EU) 2018/1861 of the European Parliament and of the Council of 28 November 2018 on the establishment, operation and use of the Schengen Information System (SIS) in the field of border checks, and amending the Convention implementing the Schengen Agreement, and amending and repealing Regulation (EC) No 1987/2006 PE/35/2018/REV/1 OJ L 312, 7.12.2018, p. 14–55.
[1182] Hungary: Art. 51 of Act LXXX of 2007 of 1 January 2008 on Asylum; Poland: Art. 38 Art. 5 of Act of 13 June 2003 on granting protection to foreigners within the territory of the Republic of Poland; Czechia: Art.10 of the Act No. 325/1999 Coll. of 11 November 1999 on Asylum; Art. 11 of Act. No. 480/2002 Coll. of 20 June 2002 on Asylum and on the Changes and Amendments of Some Legal Acts.
[1183] As previously discussed, Hungary also uses the 'concept of a safe third country' as ground for inadmissibility.

Hungary, for example, a person can be excluded from refugee status[1184] or subsidiary protection status[1185] based on national security grounds. These provisions state that a person cannot be recognized as a refugee or as a beneficiary of subsidiary protection if their residences endanger national security. The security agencies, specifically the Counter-Terrorism Office (*Terrorelhárítási Központ, TEK*) and the Constitutional Protection Office (*Alkotmányvédelmi Hivatal, AH*), have the authority to assess a national security risk.[1186] Security agencies' opinions on national security threats are binding for the asylum authorities in asylum procedures. There is no legal obligation for security agencies to provide reasons for their national security opinions in asylum procedures.[1187] While the asylum seeker in question may formally request access to classified information,[1188] such requests are always denied by security agencies.[1189]

In Poland, as in Hungary, a person can be denied refugee or subsidiary protection status on the basis of national security.[1190] The identity of an asylum seeker is verified in the context of security concerns, with the goal of determining whether their entry or stay will pose a threat to the state's defence, security, or public safety and order.[1191] Before issuing an asylum decision, the authority conducting the procedure requests information from the Police, Border Guard, Internal Security Agency, or Consul on whether the asylum seeker's entry or stay in Poland poses a threat to defence, national security, or public safety and order.[1192] According to the relevant provisions,[1193] an administrative authority issuing a decision based on the opinion of a threat to national security may refrain from drafting factual reasoning if security considerations require it. It should be noted that this is a

[1184] Art. 8(4) of Act LXXX of 2007 of 1 January 2008 on Asylum.
[1185] *Ibid.* Art. 15(B).
[1186] Art. 2(A) of the Decree no. 301/2007 (XI. 9.) on the execution of Act LXXX of 2007 of 1 January 2008 on Asylum.
[1187] According to Art. 57(6) of Act LXXX of 2007 of 1 January 2008 on Asylum. the opinion of expert authorities (which includes the opinion on a national security threat issued by the security agencies) only has to contain the name of the competent authority, data necessary to identify the case, the opinion of the competent authority, the legal basis on which its decision is based, and information on the remedy.
[1188] Art.3(9), 11(1) and 12(1) of the Act CLV of 2009 on the Protection of Classified Data.
[1189] According to information obtained through the Hungarian Helsinki Committee (hereafter 'HHC') Freedom of Information requests to the CTO and CPO on 8 October 2020 and 4-5 August 2021, none of the access requests submitted to the agencies in 2019, 2020, or the first half of 2021 were granted. Source: HHC. "National security grounds for exclusion from international protection as a carte blanche: Hungarian asylum provisions not compliant with EU law." 20 December 2021. Retrieved from https://helsinki.hu/en/wp-content/uploads/sites/2/2022/01/Info-Note_national-security_exclusion_FINAL.docx.pdf Accessed 6 March 2022.
[1190] Art. 19 of the Act of 13 June 2003 on granting protection to foreigners within the territory of the Republic of Poland.
[1191] *Ibid.* Art.86(f).
[1192] *Ibid.*
[1193] Art. 6 (1) of Act of 12 December 2013 on foreigners; Art. 5 of Act of 13 June 2003 on granting protection to foreigners within the territory of the Republic of Poland.

general rule that applies to all asylum-related proceedings. The opinion on a national security threat usually includes a summary of information about a specific asylum seeker gathered by the Security agency, which is not accessible to the affected asylum seeker.[1194] The law makes no formal requirements for forming an opinion on a national security threat. Such opinions are not binding on the authority presiding over the proceedings.[1195] One of the most well-known cases of asylum denial due to security concerns in Poland was the case of an Iraqi national who was denied refugee protection.[1196]

In Czechia, asylum claims may be denied due to security concerns.[1197] If the decision is based on classified information, the information is never described in the written decision, and the asylum seeker has no access to it.[1198] Similarly, in Slovakia, asylum is not granted if the applicant is reasonably regarded as a threat to the security of the Slovak Republic, or if the applicant has been convicted of a particularly serious crime and poses a threat to society.[1199] Furthermore, disagreement of the Slovak Information Service or Military Intelligence constitutes another reason for not granting asylum, if the asylum seeker poses a threat to the security of the Slovak Republic as well as a threat to society.[1200] If the decision is based on classified information, it is never included in the case file or described in the written decision. Such information is not available to the asylum seeker or his or her legal representative. On written request and with the consent of the Slovak Information Service, the classified information can be made available to the attorney of the asylum seeker.[1201] If the Migration Office issues a negative decision because the asylum seeker poses a threat to the security of the Slovak Republic, the reasoning of such a decision states only the fact that it is a security interest of the Slovak Republic. In the decision's reasoning, there is no further explanation or specification of this risk.[1202] The refusal,

[1194] *Ibid.*
[1195] HHC. "The right to know: Comparative Report on Access to Classified Data in National Security Immigration Cases in Cyprus, Hungary, and Poland." 2021, p.16.
[1196] Radio Poland. "Polish MPs to Probe Iraqi Suspected of Ties with Islamic Radicals: Report." 15 November 2016. Retrieved from http://archiwum.thenews.pl/1/10/Artykul/279991,Polish-MPs-to-probe-Iraqi-suspected-of-ties-with-Islamic-radicals-report Accessed 6 March 2022 ; For the description of the case see *Ibid,* p.7.
[1197] Art. 15 (1), Art.17 Act No. 325/1999 Coll. of 11 November 1999 on Asylum.
[1198] Act No. 412/2005 Coll. ACT of 21 September 2005 on the Protection of Classified Information and Security Eligibility.
[1199] Art.13 (5) (a)(b) of Act. No. 480/2002 Coll. of 20 June 2002 on Asylum and on the Changes and Amendments of Some Legal Acts.
[1200] Ibid. Art. 12 (2) (h); Art.13 (2) (d) (e).
[1201] Art. 35(3) of Act no. 215/2004 Coll. of 11 March 2004 on the Protection of classified information.
[1202] Art. 13(5) (A), 13 (2)(C) (D) of Act. No. 480/2002 Coll. of 20 June 2002 on Asylum and on the Changes and Amendments of Some Legal Acts.

withholding, or extension of asylum or subsidiary protection for security reasons can be challenged within 30 days by filing an administrative action with the Regional Court.[1203]

It is necessary to ascertain whether an asylum seeker applying for protection poses a security risk or has committed a serious crime. However, in order to defend his/her rights in accordance with the fair trial and effective remedy standards, the asylum seeker or their legal representative should be informed at least about the substance of the 'accusations' levelled against the applicant regarding alleged security threats. This is not possible in most cases especially because the rejection cannot be challenged (*e.g.* Hungary and Poland). Excessive use of the Exclusion Clause may endanger the right to seek asylum, particularly given the lack of reasoning for the exclusion decision and no access to the underlying information.[1204] In a related vein, Csatlós points out that all foreigners are subject to the general expulsion clause based on threats to national security, but that EU citizens and their families are afforded a broader range of protections against state discretion.[1205] When national security issues arise, ordinary third-country nationals, including asylum seekers are in a less favourable situation.[1206]

Although states have discretionary power to deny an asylum application based on public security concerns, this discretion must be used in a way that respects the concerned asylum seeker's human rights.[1207] This means that it must be used after examining the asylum seeker's personal circumstances and giving them the opportunity to object to the action taken by the relevant authority.[1208] It also means that it must be used by the competent

[1203] *Ibid.* Art. 13 (5), Art.15 (3), Art. 15b (1) (b).
[1204] *E.g.* HHC observed an increase in Hungary in the use of national security grounds as a reason for denying asylum claims. Source: HHC. "Flagrant breach of the right to defence in national security cases, systemic denial of the right to family life." 20 November 2020, pp.1-3. Retrieved from https://www.helsinki.hu/wp-content/uploads/National-Security-Risk.pdf Accessed 6 March 2022.
[1205] Csatlós, Erzsébet. "National Security and its Implication on Expulsion Decisions in Hungary during the Pandemic." *Recent Challenges of Public Administration 4.* Papers presented at the conference of '4th Contemporary Issues of Public Administration' on 10th December 2021, edited by Erzsébet Csatlós, Szeged, Hungary, Iurisperitus Kiadó, 2022. p.63.
[1206] See *e.g.* the case of the 14 Iranian university students who were expelled from Hungary for breaking quarantine laws related to the Covid-19 pandemic, on grounds of being a threat to public policy and public security. Source Csatlós, Erzsébet. "Remarks on the Reasoning: The Morals of a Hungarian Expulsion Decision in Times of Pandemic." *Central European Public Administration Review*, vol. 19, no. 1, 2021. pp. 181-197.
[1207] See. *e.g. Bolat v. Russia,* case no. (14139/03) Judgment of the Court (First Section) of 5 October 2006, ECtHR, para.81.
[1208] *Chahal v. the United Kingdom,* case no. (22414/93), Judgment of the Court (Grand Chamber) of 15 November 1996, ECtHR, para.142.

authority in accordance with e provisions of substantive law and with the relevant procedural rules.[1209]

It is acknowledged that it is difficult, if not impossible, to appeal an asylum rejection made for security reasons in the V4 countries. It is now interesting to examine how simple it is to access a practical and effective remedy if an asylum application was rejected on grounds other than security or if the applicant has another complaint alleging a violation of his human rights.

Following the 2015-16 refugee crisis, it appears that the V4 countries did not completely respect asylum seekers' rights to an effective remedy. It is necessary to review the Strasbourg and Luxemburg case law to determine if the V4 countries respected or disregarded the right to effective remedy.

In *Shahzad v. Hungary,* the applicant complained that he had no remedy at his disposal to efficiently access the process for analysing his personal circumstances due to the limited access to the transit zone.[1210] The ECtHR held that Article 13 taken in conjunction with Article 4 of Protocol No. 4 was breached due to the absence of an effective remedy for the applicant to complain about his removal.[1211] Similarly, in *M.K. and Others v. Poland*, the applicants emphasized that the decisions regarding the denial of admission were immediately enforceable and that an appeal would not have any suspensive effects.[1212] They complained that they were denied an appropriate legal remedy under Polish law to file their claim.[1213] As a result, they claimed a violation of Article 13 in conjunction with article 4 of Protocol No. 4 due to the lack of an effective remedy to contest the removal decisions. The Court held that the absence of a remedy with an automatic suspensive effect constituted a violation of Article 13 when read in conjunction with Article 3 of the Convention and Article 4 of Protocol No. 4.

In *M.B.K and Others v. Hungary*, the applicants complained that their detention in the *Röszke* transit zone had violated the rights guaranteed by Articles 3 and 8 of the Convention.[1214] They argued that there had been no effective way to complain about those under Article 13 and Article 3 of the Convention.[1215] Regrettably, the ECtHR decided that

[1209] *Op.cit, Bolat v. Russia,* para.81
[1210] *Op.cit. Shahzad v. Hungary*, para. 78.
[1211] *Ibid.* paras 79-87.
[1212] *Op.cit. M.K. and Others v. Poland,* paras. 4,139, 147.
[1213] *Ibid.* para.212.
[1214] *Op.cit. M.B.K and Others v. Hungary*. para. 2.
[1215] *Ibid.*

there was no need to consider the Article 3 complaint in light of the Article 13 complaint.[1216] Similarly, in *R.R. and Others v. Hungary* the applicants claimed that there was no effective remedy for them to complain about the living conditions in the transit zone, and they also asserted that no decision had been made about the first applicant's request for reception conditions, and there had been no remedies to contest the denial.[1217] However, the court determined that it is unnecessary to consider the complaint under Article 13 of ECHR.[1218]

In *Shiksaitov v. Slovakia*, the applicant argued that he was denied a remedy under domestic law that would have allowed him to seek compensation for his unlawful detention in accordance with Article 13 of the ECHR,[1219] but the court determined that there is no separate issue under that provision of the ECHR.[1220] Alike, in *Asady and Others v. Slovakia,* the applicants argued that their expulsion to Ukraine had been of a collective nature, had been immediately enforced , and that they had been denied an effective remedy because removal had eliminated the appeal's automatic suspensive effect.[1221] Ultimately, the court determined that the allegations made under Article 13 of the ECHR were obviously ill-founded.[1222]

In the context of V4 group, it appears that the ECtHR did not always consider complaints filed under article 13 of the Convention under consideration. The ECtHR has established broad guidelines for what constitutes an effective remedy in situations involving the expulsion of asylum seekers. Applicants should have remedy at national level cable to address the substance of any 'arguable complaint' under the ECHR and, if necessary, provide the necessary relief.[1223] A remedy must be effective both in theory and in practice, therefore the ECtHR may need to take into account, among other things, whether or not an asylum seeker was given enough time to file an appeal.[1224] The notion of an effective remedy under the Convention requires that the remedy be capable of

[1216] *Ibid.* para.17.
[1217] *Op.cit. R.R. and Others v. Hungary.* para.66
[1218] *Ibid.* para. 115
[1219] *Shiksaitov v. Slovakia* para.95.
[1220] *Ibid*. para.106.
[1221] *Op. cit. Asady and Others v. Slovakia* para. 72.
[1222] *Ibid.* para. 26.
[1223] See *e.g. M.S.S. v Belgium and Greece para. 288; Kudła v. Poland,* case no. (30210/96) Judgment of (the Grand Chamber) of 226 October 2000, ECtHR, para. 157.
[1224] *Abdolkhani and Karimnia v. Turkey,* case no. (30471/08) Judgment of the Court (Second Section) of 22 September 2009, ECtHR, paras. 111–117.

preventing the execution of measures that are contrary to the Convention and whose effects are potentially irreversible.

It is essential at this point to verify the CJEU case law regarding the right to an effective remedy in relation to the V4 group. As previously noted, Article 46(3) of the Asylum Procedures Directive reinforces the right to an effective remedy in asylum proceedings under EU law. This provision should be interpreted and applied in light of Article 47 of CFR. The CJEU examined the right to an effective remedy within the meaning of Article 47 of CFR in the case of *FMS and Others v. Országos Idegenrendészeti Figazgatóság Dél-alföldi Regionális Igazgatóság and Or-szágos Idegenrendészeti Figazgatóság.* The applicants received return decisions ordering them to return to Serbia after their asylum claims were rejected as inadmissible in accordance with Hungarian law. Serbia, however, refused to readmit them, claiming that they had not complied with the terms outlined in the readmission agreement between the EU and Serbia (the applicants entered Hungary legally after traveling through transit zones from Serbia).[1225] Following that, the Hungarian authorities changed the first return decisions' country of destination to reflect the respective countries of origin of the applicants.[1226] This is further complicated by the fact that the applicants have been detained without the right to an effective remedy during both the asylum procedure and after the decision of removal.

The court addressed the question of what constitutes an effective remedy relating to changing the destination country in a return decision. The Court ruled that Article 13 of the Return Directive[1227] and Article 47 of the Charter should be interpreted as precluding legislation of a member state that allows a decision to change the country of destination only upon return to be challenged by making an administrative authority appeal, without a guarantee that the authority's decision can be subject to judicial review. Therefore, the Court rejected Hungary's claim that the modification merely implemented a return decision and so did not constitute a decision on removal.[1228] It was firmly established that a change in the country of destination constitutes a new return decision, giving the applicant

[1225] *Op.cit. FMS and Others v Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Or-szágos Idegenrendészeti Főigazgatóság,* (2020) paras. 151-160.
[1226] *Ibid* para. 110.
[1227] Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals OJ L 348, 24.12.2008, p. 98–107.

[1228] *Ibid.* para. 120.

the right to an effective remedy and requiring a consideration of the *non-refoulement* principle.[1229]

The court examined the question of effective remedy with regard to detention during the asylum process and for removal purposes, as well. It made it clear that the right to effective judicial protection guaranteed by Article 47 of the CFR and the principle of primacy of EU law must be interpreted as requiring the national court, in the absence of a national provision providing for judicial review of the legality of an administrative decision ordering the detention of applicants for international protection or of asylum seekers whose applications for asylum have been denied, to declare that it has jurisdiction to decide on the legality of such detention and grant that court the right to release the individuals concerned immediately if it believes that such detention constitutes detention in violation of EU law.[1230]

I agree that anyone seeking asylum should have the right to fair procedures and effective remedies. This indicates that applicants for asylum must have the ability to file an appeal if their claim is denied and/or report any restrictions or abuses of their basic rights and freedoms. Following the 2015–16 refugee crisis, despite numerous allegations of violations of the right to an effective remedy, it appears that the ECtHR did not always take complaints made under article 13 of the Convention into consideration in the context of the V4 group (With the exception of *Shahzad v. Hungary* and *M.K. and Others v. Poland*). Comparatively, the CJEU made it clear in *FMS and Others v. Országos Idegenrendészeti Figazgatóság Dél-alföldi Regionális Igazgatóság and Or-szágos Idegenrendészeti Figazgatóság* that Member States are committed to the protection of asylum seekers and to fundamental rights, including the right to effective remedies.

6. Conclusion

It can be concluded that the restrictive asylum policies implemented by the V4 countries in response to the refugee crisis of 2015–16 have undermined the rights of asylum seekers to protection, either directly or indirectly. The four countries do not completely uphold the right to seek and enjoy asylum. The well-established case law of the ECtHR and CJEU demonstrates how asylum applicants have been denied access to asylum, unlawfully and arbitrary detained, criminalized, and pushed back without the right to an effective remedy.

[1229] *Ibid. para.* 116-119.
[1230] *Op.cit. FMS and Others v. Országos Idegenrendészeti Figazgatóság Dél-alföldi Regionális Igazgatóság and Or-szágos Idegenrendészeti Figazgatóság*, para. 302(8).

The three tables that follow present the 'big picture' of how the rights, safeguards, and fundamental freedoms enjoyed by asylum seekers have been breached in the wake of the refugee crisis.

Besides, it can be said that asylum policies of the V4 countries are satisfactory from the perspective of protecting public security and protection of cultural and religious identity, but they are not satisfactory from the perspective of asylum protection. Therefore, key fundamental rights concerns arise as a result of the less protective domestic V4 asylum policies. Undoubtedly, the legal and practical frameworks developed to pathologize the movement of asylum seekers are incompatible with the international and EU legal obligations of the V4 countries

Table No.3.: Noteworthy cases and judgments on asylum delivered by the ECtHR following the 2015-16 refugee crisis

Country	Cases and judgments of ECtHR
Hungary	***A.A.A. and Others v. Hungary (2022)*** Short description of the case The case concerned the detention of an Iraqi family, including vulnerable members, in the *Tompa* transit zone on Serbia's border between 29 March and 11 August 2017. Judgment • Violatin of Article 3 (prohibition of torture or inhuman or degrading treatment) as regards the applicant (children). • violation of Article 5 (1) (Right to liberty and security)and Article 4 (Prohibition slavery or servitude) with respect to all applicants. ***H.M. and Others v. Hungary*** Short description of the case The case concerned the detention of an Iraqi family, including four children, in the *Tompa* transit zone on the border of Serbia and Hungary, between 3 April and 24 August 2017. Judgment • Violation of Article 3 (prohibition of torture or inhuman or degrading treatment) . • Violation of Article 5 (1) (Right to liberty and security) and Article 4 (Prohibition slavery or servitude).

M.B.K and Others v. Hungary (2022)

Short description of the case
The case concerned the detention of an Iranian Afghan family, including three minor children, in the *Röszke* transit zone on the border of Hungary and Serbia between 19 April and 15 August 2017

Judgment

- Violation of Article 3 (prohibition of torture or inhuman or degrading treatment) as regards the applicant (children).
- Violation of Article 5 (1) (Right to liberty and security) and Article 4 (Prohibition slavery or servitude).

Shahzad v. Hungary (2021)

Short description of the case
The case concerned the applicant's entry from Serbia to Hungary as part of a group and his subsequent summary expulsion by the police.

Judgment
- Violation of Article 4 of Protocol No. 4. (Prohibition of collective expulsion of aliens).
- Violation of Article 13 (right to an effective remedy) taken in conjunction with Article 4 of Protocol No. 4.

R.R. and Others v. Hungary (2021)

Short description of the case
The case concerned the applicants' detention in the *Röszke* transit zone on the border with Serbia in April-August 2017.

Judgment
- Violation of Article 3.
- Violation of Article 5(1) (right to liberty and security).
- Violation of Article 5(4) (right to have lawfulness of detention decided speedily by a court)

Ilias and Ahmed v. Hungary (2019)

Short description of the case
The case concerned two asylum seekers from Bangladesh who spent 23 days in a Hungarian border transit zone before being removed to Serbia after their asylum applications were rejected.

Judgment
- Violation of Article 3 (prohibition of torture or inhuman or degrading treatment) owing to the applicants' removal to Serbia
- No violation of Article 3 as regards the conditions in the transit zone.
- The applicants' complaints under Article 5(1) and 4 (right to liberty and

	security) had to be rejected as inadmissible. ***O.M. v. Hungary (2016)*** Short description of the case The case concerned the detention of an Iranian LGBT asylum seeker while his application for asylum was being processed and before he was granted refugee status. Judgement • Violation of Article 5(1) ECHR (the applicant's detention was arbitrary and unjustified). ***Nabil and others v. Hungary (2015)*** Short description of the case Three Somali nationals who entered Hungary were detained for deportation and then sought asylum. The applicants claimed that their detention was arbitrary and that no appropriate judicial review was conducted. Judgement • Violation of Article 5(1) ECHR (the applicant's detention was arbitrary).
Poland	***D.A. and Others v. Poland (2021)*** Short description of the case The case concerns push-backs of the applicants – Syrian nationals – at the Polish-Belarusian border and, denied to the possibility of lodging applications for international protection, Judgment • Violation of Article 3 (prohibition of torture or inhuman or degrading treatment) on account of the applicants being denied access to the asylum procedure and exposed to a risk of inhuman and degrading treatment and torture in Syria. • No violation of Article 3 as a result of degrading treatment by Polish border authorities. • Violation of Article 4 of Protocol No. 4. (Prohibition of collective expulsion of aliens). • Violation of Article 13 taken in conjunction with Article 3 and Article 4 of Protocol No. 4. • Poland has failed to comply with its obligations under Article 34 (right to individual petition) ***M.K. and Others v Poland (2020)*** Short description of the case The case concerned the repeated refusal of Polish border guards on the border with Belarus to admit the applicants, who had come from Chechnya and had asked for international protection. Judgment • Violation of Article 3 because the applicants were denied access to the asylum procedure

	exposed to a risk of inhuman and degrading treatment and torture in country of origin (indirect *refoulement*). • No violation of Article 3 as a result of degrading treatment by Polish border authorities. • Violation of Article 4 of Protocol No. 4. (Prohibition of collective expulsion of aliens). • Violation of Article 13 taken in conjunction with Article 3 and Article 4 of Protocol No. 4. • Poland has failed to comply with its obligations under Article 34 (right to individual petition). ***Bistieva and Others v. Poland (2018)*** Short description of the case The case concerned the detention for almost six months of a Russian national and her three children at the *Kętrzyn* guarded centre for foreigners. Judgment • Violation of Article 8 (Protect against arbitrary action by public authorities). Poland did not perceive the best interests of the child and failed to implement detention as a last resort.
Czechia	***Komissarov v. Czech Republic 2022*** Short description of the case: The case concerned the arbitrary and excessively long detention of the applicant, a Russian national, awaiting extradition to Russia from Czechia. The applicant lodged an application for asylum and the extradition proceedings were halted, however, he remained in detention during the duration of the asylum proceedings and following their rejection he was extradited. Judgement: • Violation of Article 5(1)(f) ECHR (Lawful arrest or detention with a view to deportation or extradition).
Slovakia	***Shiksaitov v. Slovakia (2021)*** Short description of the case The case concerned the lawfulness of the detention of a Russian national by the Slovak authorities in view of extradition to Russia. Judgement • Violation of Article 5(1) (Right to liberty and security). • Violation of Article 5(5) (Right to seek compensation) • No separate issue arises under Article 13 (Right to an effective remedy) ***Asady and Others v. Slovakia (2020)*** Short description of the case The case concerned the removal of Afghan nationals from Slovakia to Ukraine and denial of access to asylum procedure.

	Judgement • No violation of Article 4 of Protocol No. 4. • No violation of Article 13 (Right to an effective remedy) ***M.S. v. Ukraine and Slovakia* (2020)** Short description of the case The case concerned the expulsion to Afghanistan and detention pending expulsion. Judgement • Declares the complaints against Slovakia inadmissible

Source: Author's own creation based on ECtHR's judgments

Table No.4.: Highlighting ECHR provisions violated by the Visegrád group based on ECtHR's judgments

Violation of Article 3 (prohibition of torture or inhuman or degrading treatment)	*A.A.A. and Others v. Hungary (2022)* *H.M. and Others v. Hungary (2022)* *M.B.K and Others v. Hungary (2022)* *D.A. and Others v. Poland (2021)* *M.K. and Others v Poland (2020)* *Ilias and Ahmed v. Hungary (2019)*
Violation of Article 5(1) (Right to liberty and security).	*A.A.A. and Others v. Hungary (2022)* *H.M. and Others v. Hungary (2022)* *M.B.K and Others v. Hungary (2022)* *Komissarov v. Czech Republic 2022* *R.R. and Others v. Hungary (2021)* *O.M. v. Hungary (2016)* *Nabil and others v. Hungary (2015)* *Shiksaitov v. Slovakia (2021)*
Violation of Article 8 (Protect against arbitrary action by public authorities).	*Bistieva and Others v. Poland (2018)*
Article 13 (Right to an effective remedy)	*Shahzad v. Hungary (2021)* *M.K. and Others v Poland (2020)*
Violation of Article 34 (the right to individual petition)	*M.K. and Others v Poland (2020)* *D.A. and Others v. Poland (2021)*
Violation of Article 4 of Protocol No. 4. (Prohibition of collective expulsion of aliens).	*M.K. and Others v Poland (2020)* *D.A. and Others v. Poland (2021)* *Shahzad v. Hungary (2021)*

Source: Author's own creation based on ECtHR's judgments

Table No.5.: Noteworthy cases and judgments on asylum delivered by CJEU following the 2015-16 refugee crisis

Case	Judgement of CJEU
Commission v. Hungary (C-808/18) 17 December 2020	Hungary failed to meet its obligations under • Articles 3 and 6 of the Asylum Procedures Directive by requiring asylum seekers arriving from Serbia to apply for international protection only in the transit zones of *Röszke* and *Tompa* while also systematically limiting the number of people who could enter the transit zones daily. • Articles 24(3) and Article 43 of the Asylum Procedures Directive by establishing a system of systematic detention of applicants for international protection in the transit zones of *Röszke* and *Tompa*, without observing the guarantees provided in the Directive. • Articles 8, 9, and 11 of Reception Conditions Directive.
Commission v. Hungary (C-821/19) 16 November 2021	Hungary failed to meet its obligations under • Article 33(2) of the Asylum Procedures Directive by allowing an application for international protection to be rejected as inadmissible on the ground that the applicant arrived on its territory via a State in which that person was not exposed to persecution or a risk of serious harm, or in which a sufficient degree of protection is guaranteed. • Articles 8(2) and 22(1) of Asylum Procedures Directive and Article 10(4) of Reception Conditions Directive by criminalising in its national law the actions of any person who, in connection with an organizing activity, provides assistance in respect of the making or lodging of an application for asylum in its territory, where it can be proved beyond all reasonable doubt that that person was aware that that application could not be accepted under that law. • Article 8(2), Article 12(1)(c) and Article 22(1) of Asylum Procedures Directive and Article 10(4) of Reception Conditions Directive by preventing any person who is suspected of having committed such an offence from the right to approach its external borders.
Commission v Poland, Hungary, and the Czech Republic, (C-715/17, C-718/17), and (C-719/17) 2 April 2020	Poland and Czechia have, failed to fulfil their obligations under • Article 5(2) of Council Decision (EU) 2015/1523 of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece, and Article 5(2) of Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece, and has consequently failed to fulfil its subsequent relocation obligations under Article 5(4) to (11) of each of those two decisions. Hungary has, failed to fulfil its obligations under

	• Article 5(2) of Decision 2015/1601 and has consequently failed to fulfil its subsequent relocation obligations under Article 5(4) to (11) of that decision.
Slovak Republic and Hungary v Council of the European Union, (C-643/15) and (C-647/15) 6 September 2017.	The Court dismisses the actions

Source: Author's own creation based on CJEU's judgments

VI. The Visegrád Group and the Global Compact on Refugees

1. Overview

Aware of the need to develop a long-term, comprehensive, and universal asylum, refugee, and migration approach, the UNGA convened a high-level Summit for Refugees and Migrants that was aimed at ameliorating the way in which the international community responds to large movements of asylum seekers and migrants.[1231] The UNGA summit resulted in the adoption of the so-called New York Declaration for Refugees and Migrants which expressed the political will of world leaders to share responsibility for migrants and refugees on a global scale. Also, the document invited for the negotiation of two new styles of legally non-binding agreements, a Compact on Safe, Orderly and Regular Migration (GCM) and one on Refugees.

While they have been used interchangeably in several references, the GCM and GCR are very different instruments. This is not to say that there is no connection between the two instruments. Both Compacts are non-binding and were developed over more than 18 months of extensive discussions and negotiations involving governments, UN agencies, civil society organizations, experts, the private sector, the philanthropic community, and refugees and migrants themselves. While the GCM was adopted on 10 December 2018 amid heightened political tension, the UNGA's adoption of the GCR went relatively unnoticed. The emphasis in this chapter will be on the GCR, but this does not negate the fact that an allusion to GCM will be made from time to time when it is relevant.

The GCR was a step toward more predictable and equitable responsibility-sharing, recognizing that a long-term solution to asylum and refugee issues requires international cooperation. It is a new international agreement to forge a stronger, fairer response to large refugee movements and protracted situations. As mentioned above, it arose from the historic New York Declaration for Refugees and Migrants of September 2016 and its comprehensive refugee response framework, followed by two years of intensive consultations with UN Member States, international organizations, experts, civil society, and refugees.

The chapter will demonstrate that the positions of the V4 countries on the GCR differ (2). It will also examine how and why the GCR's vote was yet perceived as another missed

[1231] UNGA, New York Declaration for Refugees and Migrants, A/RES/71/1, 3 October 2016.

opportunity for the EU to speak with one voice (3). Lastly, it will investigate whether the GCR has any legal or political implications (4).

2. The Visegrád Group's position on the GCR: A disunified one

For several reasons, unlike the GCM, the GCR has received widespread support from the international community thus far.[1232] First, there was an urgent need for a more equitable distribution of the burden and responsibility for hosting and supporting the world's refugees, taking into account existing contributions as well as differences in capacity and resources among states.[1233] This is deemed necessary because several countries that provide a global public good on behalf of the international community are disproportionately affected by related challenges and require additional assistance.[1234] The GCR is a manifestation of the urgent need to address asylum and refugee issues.

Second, the GCR 'envisions new and deeper working relationships' with states, national and local governments, international and regional organizations, international financial institutions, civil society, the private sector, academia, and – most importantly – refugees and host communities.[1235] These kinds of collaborations are important for achieving more equitable responsibility sharing. Thus, the GCR aims to relieve pressures on host countries by increasing the resilience of refugees and host communities, particularly through increased development cooperation. Besides, the GCR predicted several arrangements to facilitate implementation. In this sense, the Comprehensive Refugee Response Framework, which was already laid out in an annex to the New York Declaration, is at the heart of the Compact.[1236] Wherever possible, this framework supports responses that shift away from encampment and parallel systems for refugees. For example, it focuses on bolstering national and local infrastructures so that they can meet the needs of both refugees and host communities.[1237] It also promotes responsibility sharing with host countries by focusing on solutions, both in terms of expanding opportunities for resettlement and other solutions in

[1232] McAdam, Jane. "The Global Compacts on Refugees and Migration: A New Era for International Protection?" *International Journal of Refugee Law*, vol. 30, no. 4, 2018, pp. 571-574.
[1233] A/73/12 (Part II) Report of the United Nations High Commissioner for Refugees Part II Global Compact on refugees. United Nations New York, 2018. p.1.
[1234] Türk, Volker. "The Promise and Potential of the Global Compact on Refugees." *International Journal of Refugee Law*, vol 30, no 4, 2018, p. 577.
[1235] *Ibid*
[1236] UNHCR. "Comprehensive Refugee Response Framework Delivering more comprehensive and predictable responses for refugees." Retrieved from https://www.unhcr.org/new-york-declaration-for-refugees-and-migrants.html Accessed 28 April 2021.
[1237] *Op.cit.* Türk, Volker, 2018, p. 578.

third countries and facilitating the conditions necessary for refugees to return to their home countries in safety and dignity.[1238]

Third, the GCR builds on a solid foundation of law, policy, and operational practice developed since the UN's inception, and establishes a framework for greater responsibility sharing with countries that host the most people, often for the longest periods of time. For instance, the GCR is consistent with the spirit of the CSR51, in which states recognized 'that the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution to a problem of which the United Nations has acknowledged the international scope and nature cannot therefore be achieved without cooperation on a global scale.'[1239]

Normally, the GCR corresponds, at least in part, to the logic of the Visegrád group's asylum policy, particularly the externalisation of asylum policy, and cooperation with third countries in addressing the root causes of displacement and creating prospects. However, for the reasons that will be discussed below, Hungary and Poland voted against the GCR.

By consulting the V4 countries' joint statements between November 2016 and December 2018, one can notice the absence of a common position regarding the GCR;[1240] instead, each of the V4 countries announced its position and expressed its concerns separately. While the V4 group, with the exception of Slovakia, [1241] rejected the GCM as a whole, this was not the case for the GCR vote. The GCR vote revealed persistent differences between the four countries. While Hungary voted against the GCR and Poland did not participate, the Czech Republic and Slovakia voted in favour of it.[1242] This fragmented stance raises many questions, including, but not limited to, the extent of the V4 group's convergence of views on asylum policy. The four countries never had a unified asylum policy, but there were always common elements and a shared vision and position. Their common positions on asylum issues have been reflected in joint statements and communiqués since the 2015-16 refugee crisis. For example, when it comes to the

[1238] *Op.cit.* A/73/12.
[1239] Preamble of CSR51.
[1240] Visegrád Group. "Official Statements and Communiqués."
Retrieved from https://www.visegradgroup.eu/documents/official-statements Accessed 7 March 2022.
[1241] "General Assembly official records, 73rd session: 60th plenary meeting" A/73/PV, 19 December 2018; UNGA, Resolution adopted by the General Assembly on 19 December 2018, A/Res/73/195, 11 January 2019.
[1242] UNGA, Resolution adopted by the General Assembly on 17 December 2018, A/RES/73/151, 17 December 2019

provisional mechanism for the mandatory relocation of asylum seekers, they expressed their position in a joint statement, calling for 'preserving the voluntary nature of EU solidarity measures' and stating that 'any proposal leading to the introduction of mandatory and permanent quotas for solidarity measures would be unacceptable.'[1243]

Hungary rejects the GCR, considering that the objective of the Compact is to bring 'in through the back door whoever they can't bring in through the main gate with the migration Compact.' [1244] From the Hungarian perspective, the Compact is against Hungary's security interests and it 'is not necessary because international law adequately regulates asylum.'[1245]

Poland did not participate in the vote.[1246] It should be noted that Poland's position on the GCR was not as clear as it was on the GCM. Poland asserted before the UNGA that the GCM 'should not be treated as a point of reference for legal clarification in any court proceedings.'[1247] It 'objects to the possibility of any state practice of customary soft law established based on the GCM.' The country also adds that 'the Compact will have no impact on our obligations or competences within the EU.'[1248] The scope of its objections attempting to undermine any legal implications of the GCM that might be considered necessary for it under the principle of estoppel can be seen beyond doubt in these statements;[1249] by analogy, the same could be said about the GCR.

Unexpectedly, Slovakia and Czechia voted in favour of the GCR. For Slovakia, it is worth noting that Lajcák, as President of the UNGA, was a key architect of the Compacts.[1250] Even though the Slovak government has taken an anti-refugee stance in international fora, as evidenced by its leaders' refusal to attend the international migration

[1243] *Op.cit.* The Visegrád Group. "Joint Statement of the Heads of Government of the Visegrád Group Countries." 4 September 2015.
[1244] "Szijjarto: Hungary rejects the UN refugee Compact." *Magyar Hírlap*. 8 December 2018. Retrieved from: https://www.magyarhirlap.hu/english/Szijjarto_Hungary_rejects_the_UN_refugee_compact. Accessed 7 March 2022.
[1245] Kovács, Zoltán. "Hungary says no to UN Global Compact on Refugees." *Index*. 8 December 2018. Retrieved from https://index.hu/english/2018/12/08/szijjarto_no_refugee_compact_un_cards_asylum/ Accessed 7 March 2022.
[1246] Rush, Nayla. "Global Compact for Refugees Adopted Today Even without U.S. assent, it will likely shape global regulation." Centre for Immigration Studies, Washington 17 December 2018. Retrieved from https://cis.org/Rush/Global-Compact-Refugees-Adopted-Today Accessed 7 March 2022.
[1247] *Op.cit.* A/73/PV.60, p. 18.
[1248] *Ibid.* p.19.
[1249] Del Castillo, Teresa Fajardo. "The Global Compact for Safe, Orderly and Regular Migration: a Soft Law Instrument for Management of Migration Respecting Human Rights." *Paix et Securite Internationales*, vol. 8, no. 8, 2020, p. 70.
[1250] UNGA. "Final Intergovernmental Negotiations on The Global Compact For Safe, Orderly and regular migration." 13 July 2018. Retrieved from https://www.un.org/pga/72/2018/07/13/final-intergovernmental-negotiations-on-the-global-compact-for-safe-orderly-and-regular-migration/ Accessed 7 March 2022.

conference in Marrakech in December 2018 and their refusal to endorse the GCM, Slovakia adopted the GCR.[1251] In other words, Slovakia rejects the GCM and adopts the GCR.[1252] The questions are, why did Slovakia endorse the GCR, and what does the agreement entail for Slovakia? From a Slovak perspective, the GCR focuses on increasing government and private sector investments in infrastructure, as well as health and education, in countries where refugees have been forced to flee.[1253] Besides, the GCR's measures are voluntary, which means that nothing will change for Slovakia. Also, since the GCR is not a legally binding international treaty, the Slovak parliament did not need to approve it.[1254] Similarly, the Czech government rejected the GCM while endorsing the GCR.[1255] The reasons for the Czech government's support for the GCR are not explained in the available literature.

The rejection of the GCR by Hungary and Poland was seen as a contrast to appropriate Council decisions and Commission communications on EU priorities at the UN,[1256] which assert that the EU and its Member States will strive for strong, balanced global agreements and actively collaborate in the development of a common asylum and refugee approach at the EU and international levels. The EU Member States that did not vote in favour of the GCR have arguably acted within their competencies. However, one might expect EU Member States to approve the GCR or, at least, to disagree only with those aspects of the Compact that have not been discussed at the EU level. For example, creating more legal pathways to long-term solutions to asylum issues, which is the core goal of the GCR, appears to be a top priority shared by all EU institutions and Member States. Furthermore, given the EU's efforts in the area of asylum in the aftermath of the 2015-16 refugee crisis, it does not make much sense for some of its Member States, including Hungary and Poland, to stay away from such a global initiative.

[1251] "Slovakia endorses the UN's Refugee Pact." *The Slovak Spectator*, 20 December 2018. Retrieved from https://spectator.sme.sk/c/22011857/slovakia-endorses-the-uns-refugee-pact.html Accessed 7 March 2022.
[1252] *Ibid.*
[1253] *Ibid.*
[1254] *Ibid.*
[1255] *Op.cit.* UNGA vote, 19 December 2018; A/Res/73/195, 11 January 2019.
[1256] Council of the EU. EU priorities at the United Nations and the 73rd United Nations General Assembly (September 2018 – September 2019),10056/18, 25 June 2018, pp.1-9; European External Action Service (hereafter 'EEAS'). "the Diplomatic Service of the EU. EU adopts priorities at United Nations & 73rd United Nations General Assembly." 9 September 2018. Retrieved from https://www.eeas.europa.eu/node/47281_en Accessed 26 August 2022.

3. GCR vote: From unity to fragmentation

In the beginning, all the Member States, including the V4 group, maintained their support for the EU position throughout the first stages of the negotiation of the GCR. Later, the EU lacked a common position when some of its Member States left the GCR negotiations and approval process.

3.1. The GCR's negotiations

The GCR was negotiated in accordance with the New York Declaration on Refugees and Migrants, which was unanimously adopted in September 2016 by 193 UN Member States, laying the groundwork for the development of governance frameworks for migrants and refugees worldwide.[1257] In relation to refugees, the New York Declaration for Refugees and Migrants included two important steps. On the one hand, Member States adopted the comprehensive refugee response framework, which outlines a wide range of measures that the international community should take in response to a large-scale refugee crisis.[1258] On the other hand, Member States agreed to continue improving international responses by working toward the adoption of a 'GCR' in 2018. They requested that the UNHCR consult with Member States and a wide range of other stakeholders before proposing such a Compact.[1259]

In terms of negotiations, the GCR was developed through an extensive multilateral consultation process with Member States and other key stakeholders. The UNGA's Social, Humanitarian, and Cultural Committee unanimously approved the resolution affirming the GCR and forwarded the text to the UNGA plenary.[1260] This was the first time in Third Committee history that a resolution on UNHCR's work was put to a vote rather than being adopted by consensus.[1261] The fact that the resolution was put to a vote demonstrated how

[1257] *Op.cit.* A/RES/71/1, 19 September 2016.
[1258] UNHCR. "Comprehensive Refugee Response Framework (hereafter 'CRRF')." Retrieved from https://www.unhcr.org/comprehensive-refugee-response-framework-crrf.html Accessed 7 March 2022.
[1259] *Ibid.*
[1260] Third Committee of the General Assembly. "Report of the United Nations High Commissioner for Refugees, questions relating to refugees, returnees, and displaced persons, and humanitarian questions." 73rd Session Agenda Item 65, 31 October 2018.
Retrieved from https://www.unhcr.org/admin/hcspeeches/5bdb0a184/third-committee-general-assembly-73rd-session.html Accessed 7 March 2022.
[1261] On November 13, 2018, the United States of America called for a vote on the omnibus resolution in the UN General Assembly's Third Committee. There were 176 yes votes, one no vote (the United States), three abstentions (Eritrea, Liberia, and Libya), and 13 countries that did not vote.

seriously states took the Compact's responsibilities and the importance they placed on it, as well as how a non-binding text like the Compact can still influence state behaviour.[1262]

In terms of the EU institutions' position, it must be stated that the EU institutions were interested in 'influencing the architecture of the GCR.' [1263] In light of the recent 2015-16 refugee crisis and the ongoing fragmentation of EU asylum policy, several high-ranking EU officials attended the 2016 UN Summit in New York.[1264] As a result, as will be discussed later, it is not surprising that the GCR reproduces and reflects several elements of EU asylum policy, such as promoting securitization and voluntary solidarity, or 'flexible solidarity,' as advocated by the V4 group, which allows 'Member States to decide on specific forms of contribution, taking into account their experience and potential.'[1265]

To summarize, the EU institutions' position during the GCR negotiations and drafting was based on two visions: one based on human rights discourse and the other on voluntary humanitarian assistance. [1266] These two points of view frequently reflect divergences between Parliament and the EEAS. The EU Parliament opted for a strong human rights language in the GCR, which is linked to a call for Member States to share responsibility for protecting refugees, as evidenced by the resolution that was adopted:'[The EU Parliament] welcomes the draft Compact on Refugees and its human rights- and people-centred approach; … calls on all countries to make obligations to a more equitable sharing of responsibility for hosting and assisting refugees globally and urges the EU and its Member States to recognize and uphold their own share of responsibility; promotes a human rights-based strategy for the proposed Compact and asks for the creation of a global responsibility-sharing mechanism.'[1267]

However, the EEAS position differed from that of the EU Parliament, as indicated by its communications with the UNHCR, which presented a much weaker vision of solidarity towards refugees and states particularly impacted by recent inflows of refugees. The EEAS communicated its support for the process leading to the GCR in a statement at a UNHCR

[1262] *Op.cit.* Türk, Volker, 2018, p. 580.
[1263] Boucher, François & Gördemann, Johanna. "The European Union and the Global Compacts on Refugees and Migration: A Philosophical Critique." *International Journal of Postcolonial Studies*, vol. 23, no. 2, 2021, p.230.
[1264] European Commission. "EU attends UN Summit on refugees and migrants and 71st United Nations General Assembly Ministerial week." Press release, 16 September 2016. Retrieved from https://ec.europa.eu/commission/presscorner/detail/en/IP_16_3082 Accessed 3 March 2022.
[1265] *Op.cit.* Joint Statement of the Visegrád group on Migration. 15 February 2016.
[1266] Grandi, Filippo. "The Global Compact on Refugees: A Historic Achievement." *International Migration*, vol. 57, no. 6, 2019, pp. 23-26.
[1267] European Parliament. "European Parliament resolution of 18 April 2018 on progress on the UN Global Compacts for Safe, Orderly and Regular Migration and on Refugees, 2018 (2018/2642(RSP)).

briefing in New York but stressed that the document should be viewed in the context of humanitarian and voluntary action: 'As the New York Declaration, the Global Compact on Refugees is, and requires to be, grounded in a strong multilateral and political will to address collectively and globally refugee issues with a renewed commitment. The program of action itself is a non-legally binding document meant for humanitarian and non-partisan purposes: protecting and assisting refugees and their hosts … GCR is not about imposing additional standards or burdens.'[1268] In a similar spirit, the EESA called for support for states hosting large numbers of refugees. The EEAS noted as well that strong arguments, trustworthy data, and thorough analyses of refugee situations, including impacts on host communities, are essential in order to develop 'evidence-based and results-oriented policies.'[1269]

The final draft of the GCR finally came to represent the EEAS's approach, which was against strengthening current legal obligations to safeguard refugees. This demonstrates the European Parliament's limited impact on the EU's external action, which has been minimized whenever possible. The role of the European Parliament's role in EU external action and representation is fairly marginal.

It must be said that, while the EU was an active negotiator throughout the GCM negotiations, both with and on behalf of EU Member States, this was not the case during the GCR negotiations. The EU was less involved in the process leading to the GCR because there is already an existing legal framework of international refugee law and because the drafting of the GCR was mostly in the hands of the UNHCR, but it still had the opportunity to express its views on its content.[1270]

Regardless of the level of participation in the Compact's negotiations, the Union delegation statements, according to the European Commission, were 'EU coordinated statements' that comprised a 'unified EU approach.'[1271] As a result, the EU Member States, including the V4 group, aligned themselves with the EU's position on the procedure

[1268] EEAS. "European Union Remarks at UNHCR Briefing in New York on the Global Compact on Refugees."European External Action Service. 11 May 2018.
Retrieved from https://eeas.europa.eu/headquarters/headquarters-homepage/44572/eu-remarks-%E2%80%93-united-nations-unhcr-briefing-global-compact-refugees_en Accessed 7 March 2022.
[1269] EEAS. "Global Compact on Refugees - Second thematic session - EU Statement - Second panel: Supporting States receiving large numbers of refugees." 17 October 2017. Retrieved from https://www.eeas.europa.eu/node/34195_en Accessed 28 August 2022.
[1270] *Op.cit.* Boucher, François & Gördemann, Johanna. 2021, p. 230.
[1271] Proposal for a Council decision authorizing the Commission to approve, on behalf of the Union, the Global Compact for Safe, Orderly and Regular Migration in the field of development cooperation
ST 7400 2018 INIT - 2018/0079.

leading up to the elaboration of the GCR and its core elements.[1272] Nonetheless, during the final stages of the negotiations in 2018, some EU Member States, including Hungary, pulled out of the negotiations.[1273] That 'unified EU approach' needs, however, to be nuanced considering that, since March 2018, Hungary has suggested a very different approach than the one defended by the Union delegation.[1274] Since then, Hungary has pulled out of the EU coordinated statements. This is clearly shown in the Union delegation's statements themselves, which mention 'on behalf of 27 Member States.' In this sense, Molnár observes that 'a common EU position existed between 2017 and May 2018, but then Hungary openly dissociated from it for political reasons.'[1275] However, abandoning an international cooperation framework that took 18 months to negotiate and draft, particularly at a time when asylum and refugees are a contentious issue in European politics, 'hardly fits the bill.'[1276]

When it comes to the Visegrád Group as a whole, it can be said that the group expresses its concerns about the GCM rather than the GCR. In general, the GCR was not given the same level of attention as the GCM during negotiations. In this context, for example, Syria's representative stated that the GCR is the result of consultations rather than negotiations.[1277] Although they both stem from the New York Declaration and were developed concurrently, the UNGA was keen to emphasize from the start that the Compacts were 'separate, distinct, and independent,' a position that corresponds with the fact that they start from different places and aim to accomplish different things. As states focus more on the GCM, the GCR appears to have been kind of marginalized during negotiations and adoption. The question is: Why? Simply, the GCR follows the roadmap

[1272] The European External Action Service has spoken on behalf of the EU at a number of informal thematic sessions based on guidelines commonly agreed by both the UN Working Party and the High Level Working Party on Asylum and Migration. The formulation of a common EU approach began with the recurring item on the agenda of these two Council working parties throughout 2017 called 'Follow-up to the UN Summit on Addressing Large Movements of Refugees and Migrants of 19 September 2016.

[1273] "Hungary officially withdraws from the UN Global Compact for Migration Adoption Process on July 24, 2018. Hungary Pulls Out of U.N. Global Migration Agreement." *The New York Times.* 18 July 2018. Retrieved from: https://www.nytimes.com/2018/07/18/world/europe/hungary-migration-united-nations.html. Accessed 30 April 2021.

[1274] Permanent Mission of Hungary United Nations New York. "Participation of H.E. Mr. Péter Szijjártó, Minister of Foreign Affairs and Trade of Hungary at the Second Intergovernmental Negotiation of the UN on the Global Compact for Migration on 12 March 2018." Retrieved from: https://ensz-newyork.mfa.gov.hu/ Accessed 30 April 2021.

[1275] Molnár, Tamás. "The EU shaping the Global Compact for Safe, Orderly and Regular Migration: the glass half full or half-empty?" *International Journal of Law in Context*, vol.16, no. 3, 2020, p. 327.

[1276] Li, Monica. "Global Compact for Migration—A Missed Opportunity for Europe." *The Global Observatory.*19 December 2018. Retrieved from: https://theglobalobservatory.org/2018/12/global-compact-migration-missed-opportunity-europe/ Accessed 30 April 2021.

[1277] UNGA Endorses Landmark Global Compact on Refugees, adopting 53 Third Committee Resolutions, 6 Decisions Covering Range of Human Rights. GA/12107. 17 December 2018

outlined in the New York Declaration by presenting a Programme of Action to implement the already agreed-upon Comprehensive Refugee Response Framework.[1278] As a result, the GCR has been less politicized.[1279] In contrast, because there was no pre-existing comprehensive framework for multilateral action on migration, the GCM's mission was far more ambitious, optimistic, and far-reaching framework for multilateral action on migration that carefully balances the many diverse interests of states and other actors.[1280]

One could argue that significant internal EU coordination occurred during the GCR negotiations, as evidenced by official documents demonstrating the EU's and its Member States' common position. The latter will not be maintained, as Hungary will openly withdraw from the negotiations. This could be due to two reasons: on the one hand, internal divisions over asylum policies, as well as the diversity of national preferences on asylum policy, may explain, to a large extent, the inability of the EU and its Member States to maintain a common position. On the other hand, the EU's and its Member States' external competence and representation in the field of asylum and refugee policy is complicated by the still ambiguous provisions governing EU external action, as will be discussed below.

3.2. EU speaking with one voice internationally?

As a starting point, given that the GCR is a non-legally binding international instrument, the procedure enshrined in Article 218 TFEU for negotiating and concluding an international agreement was not applicable. In the case of the GCR negotiations, no Council Decision authorizing the start of the negotiations exists.[1281] The European Commission relies on two documents to justify its negotiating position on behalf of the Union: the October 2016 European Council Conclusions on Migration[1282] and the 2017 European Consensus on Development.[1283] While the two documents could be interpreted

[1278] Ferris, Elizabeth G. & Katharine M. Donato. *Migration and Global Governance: Negotiating the Global Compacts*, Routledge, 2020, p 232.
[1279] *Ibid.*
[1280] *Ibid.*
[1281] The EU took part in the GCR negotiations by delivering Union delegation statements. The Union delegation statements, according to the EC, were "EU coordinated statements" that comprised a "unified EU approach."
[1282] Council of the EU. European Council conclusions on migration. Press Release 602/16.20 October 2016. Retrieved from https://www.consilium.europa.eu/en/press/press-releases/2016/10/20/european-council-conclusions-migration/ Accessed 7 March 2022.
[1283] European Commission, Directorate-General for International Cooperation and Development, The new European consensus on development 'our World, our Dignity, our Future': joint statement by the Council

as an indication of the European Council's willingness to have a common position in the GCR negotiations, there is nothing in the documents that either identifies the European Commission as the negotiator on behalf of the Union and its Member States or indicates what the content of that common position would be.[1284]

In relation to the approval process, the European Commission has asked to sign on behalf of the Union. While the European Commission is required to sign the GCM on behalf of the EU Member States, it is unclear whether this includes the GCR as well.[1285] In any case, the Commission's request was denied,[1286] and the EU has failed to speak with one voice at the international level. It should be noted that when it comes to non-binding documents, the EU has no specific procedure that must be followed, namely whether the European Commission asked for authorization from the Council, and at what stage of the procedure. In any case, the withdrawal of Hungary from the two Compacts, as well as the lack of a unified voice, have weakened the EU's institutional position in international affairs. Several EU principles, including but not limited to the 'principle of solidarity', 'the principles of conferral and institutional balance', as well as the principle of 'sincere cooperation' in the EU's external action, have been challenged. Within this context, Melin observes that the fact that the GCR is 'a non-legally binding international instrument does not entail that the principles of conferral, institutional balance, or sincere cooperation should not be respected.'[1287]

For example, in legal terms, the principle of solidarity is rooted in the international refugee regime.[1288] Because of the international nature of the refugee problem, any solution

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and the representatives of the governments of the Member States meeting within the Council, the European Parliament, and the European Commission, Publications Office, 2018.
Retrieved from https://data.europa.eu/doi/10.2841/694595 Accessed 7 March 2022.

[1284] Melin, Pauline. "The Global Compact for Migration: cracks in the unity of EU representation." *EU Law Analysis Blog*, 2018.
Retrieved from http://eulawanalysis.blogspot.com/2018/12/the-global-compact-for-migration-cracks.html Accessed 7 March 2022.

[1285] *Op.cit.* Proposal for a Council decision authorizing the Commission to approve, on behalf of the Union, the Global Compact for Safe, Orderly and Regular Migration in the field of development cooperation; Attachment to the Proposal for a Council decision Proposal for a Council decision authorising the Commission to approve, on behalf of the Union, the Global Compact for Safe, Orderly and Regular Migration, in the area of immigration policy ST 7391 2018 ADD 1 - 2018/0078 (NLE).

[1286] "Withdrawal of Commission's Proposals." 2019/C 210/07, Official Journal of the European Union, C 210 of 21 June 2019, pp. 13-14.
Retrieved from https://eurlex.europa.eu/legalcontent/EN/TXT/PDF/?uri=OJ:C:2019:210:FULL&from=PT Accessed 7 March 2022.

[1287] *Op.cit.* Melin, Pauline, 2018.

[1288] UNGA, Refugees and stateless persons, 3 December 1949, A/RES/319. The resolution's preamble explicitly acknowledged that "the problem of refugees is international in scope and nature." Furthermore, the fourth sentence of the CSR51's preamble confirms the same principle.

would necessitate consultation and cooperation among states. However, depending on one's point of view, it is debatable whether the principle of solidarity as a guiding principle for European asylum and immigration policy stems from international law or from a concept intended to govern relations between EU Member States.[1289] Both Article 2 TEU and the preambles to the Treaty and the CFR refer to solidarity as a 'value' of EU law, while other, more specific Treaty Articles like Article 21 TEU and Article 80 TFEU refer to solidarity as a 'principle.' It's significant that the meaning and values of the solidarity principle vary throughout the range of policy areas.

Solidarity is referred to in Article 67 TFEU as a guiding principle for asylum and immigration policies, and it is expanded on in Article 80 TFEU, which is the final provision of the treaty section dedicated to border checks, asylum, and immigration policies. Indeed, solidarity is explicitly tied to burden-sharing in the area of asylum. This is a result of the fact that some Member States are more exposed to immigration and asylum applications than others. It's noteworthy that Article 80 TFEU makes reference to the use of financial tools to ensure solidarity, giving it a more specific meaning than other articles relating to solidarity.

In a few cases with very distinct backgrounds, the CJEU has referred to solidarity.[1290] The solidarity between EU Member States has been raised in connection to the V4 countries in both the *Commission v. Poland, Hungary,* and the *Czech Republic* and *Slovakia and Hungary v. Council* cases, both discussed above.

In *Slovakia and Hungary v. Council,* the binding nature of the principle of solidarity within the EU's asylum and migration policy was an important point in the Court's judgement.[1291] The significant importance accorded to solidarity under Article 80 TFEU was appropriately acknowledged by the CJEU in the judgment. The court claimed that the solidarity and fair sharing of responsibility principles required Hungary to receive refugee quotas in a manner similar to that of all other Member States.[1292] The Court also noted that the principle of solidarity did not ostensibly ensnare the Member States in the relocation

[1289] Balboni, Marco. "Subsidiarity Versus Solidarity? EU Asylum and Immigration Policy." *E-international Relations.* 29 March 2021, p.3. Retrieved from https://www.e-ir.info/2021/03/29/subsidiarity-versus-solidarity-eu-asylum-and-immigration-policy/ Accessed 7 Mach 2022.
[1290] See *e.g. Commission of the European Communities v. French Republic.* Joined cases nos. (6 and 11-69), Judgment of the Court of 10 December 1969, CJEU, ECLI:EU:C:1969:68; *Commission of the European Communities v. Italian Republic* (Premiums for slaughtering cows) Case no. 39-72, Judgment of the Court of 7 February 1973, CJEU, ECLI:EU:C:1973:13; *op.cit. Commission v Poland, Hungary, and the Czech Republic.*
[1291] *Op.cit Slovakia and Hungary v. Council,* para. 304.
[1292] *Ibid.* para. 293.

mechanism at all costs. Instead, as demonstrated by the exemptions given to Austria and Sweden, it was in line with the principle of allowing quota derogations if participating Member States themselves were confronted with an emergency situation.[1293]

Similarly, the court held in the *Commission v. Poland, Hungary, and the Czech Republic* that the spirit of solidarity and the binding nature of the Relocation Decisions do not permit Member States to derogate based solely on their own evaluations of the mechanism's efficacy without offering a solid legal basis.[1294] According to Advocate General Sharpston, solidarity is 'the lifeblood of the European enterprise,'[1295] and it is from solidarity that the concept of burden-sharing among the Member States emerges.

Even though the EU and its Members frequently refer to solidarity as one of their core values, the concept frequently fails to translate into concrete and collaborative action.[1296] When it comes to asylum and refugee issues in the EU, solidarity is an 'essentially contested concept.'[1297] The lack of a homogeneous stance on GCR reflects the lack of a common notion of solidarity in relation to asylum and refugee issues. In this regard, it is worth noting again that the 2015-16 refugee crisis demonstrated how the principle of solidarity is interpreted differently by different Member States.[1298] Some EU Member States defend 'mandatory' or 'compulsory' solidarity among EU Member States when it comes to distributing refugees across the Union,[1299] while others, primarily the V4 group, support 'flexible solidarity.' As a result, there is a *de facto* disagreement among EU Member States about the nature of solidarity itself. My claim is that solidarity should be understood as a 'contested concept' between EU Member States in terms of its notions, nature, and limits.

[1293] *Ibid.* para. 294-296.
[1294] *Op.cit. Commission v. Poland, Hungary, and the Czech Republic*, paras. 124, 164 and 182.
[1295] *Commission v. Poland, Hungary, and the Czech Republic*, Joined Cases no. (C-715/17, C-718/17), and (C-719/17), Opinion of Advocate General Sharpston delivered on 31 October 2019, CJEU, para. 164.
[1296] Grimmel, Andreas. ""Le Grand absent Européen": solidarity in the politics of European integration." *Acta Polit* vol. 56, 2021, pp. 242–260.
[1297] Gallie, Walter Bryce "Essentially Contested Concepts." *Proceedings of the Aristotelian Society*, vol. 56, 1955, pp. 167–198.
[1298] Takle, Marianne. "Is the Migration Crisis a Solidarity Crisis?" *The Crisis of the European Union*, edited by Andreas Grimmel, Routledge, 2018, pp.116-129.
[1299] Mainly Germany and France. Source: Conrad, Naomi. "In Berlin, renewed calls for European solidarity." *DW News*, 9 September 2015. Retrieved from https://www.dw.com/en/in-berlin-renewed-calls-for-european-solidarity/a-18703128 Accessed 7 Mach 2022; Noyan, Oliver. "EU states agree to 'mandatory solidarity' on migration." *EURACTIV.de*, 4 February 2022. Retrieved from https://www.euractiv.com/section/justice-home-affairs/news/eu-states-agree-to-mandatory-solidarity-on-migration/ Accessed 7 Mach 2022.

Moving on to the principle of 'sincere cooperation,' which is fundamental in the EU's external relations. One of the cornerstones of the EU constitutional edifice is the principle of 'sincere cooperation' and its implications for the national interests of EU Member States in the field of external relations. This principle is imposed by the EU treaty itself, which states in Article 4(3) TEU that the EU and its Member States have a mutual legal obligation 'to assist each other in carrying out the tasks which flow from the Treaties and to take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the treaties or stemming from the acts of the institutions of the Union.' In the context of the EU's international relations, this principle is becoming increasingly important. According to Advocate General Sharpston, the need to ensure the unity of the Union's external representation, as well as the principle of 'sincere cooperation' between the Union and the Member States, and especially among EU institutions, is valid even with political and non-binding agreements with third countries. [1300] Similarly, Van Elsuwege and Merket[1301] stated that the CJEU has consistently used the duty of 'sincere cooperation' to support close cooperation between the EU and the Member States in their international relations and that the duty of cooperation is 'a concept that gradually developed in the context of the Court's case-law on mixed agreements.'[1302] The respect for 'sincere cooperation' with the Union may appear obvious in theory. To ensure unity in the Union's international representation, Member States must adhere to this principle in all areas of EU competence, including the processes of negotiating international non-binding agreements.[1303] Nevertheless, in a delicate sector like asylum and migration, the effective implementation of the 'sincere cooperation' duty in the EU's external action is fraught with internal and external challenges. As a result, expecting the EU to 'speak with one voice' is challenging.

[1300] *Council of the European Union v European Commission* (Commission decision approving an addendum to a memorandum of understanding ('MoU') with a third State and authorising its signature-Articles 16 and 17 TEU-Respective powers of the Council of the European Union and the European Commission- Article 13(2) TEU- Principle of sincere cooperation-Article 263 TFEU-Admissibility) case no. (C-660/13), Opinion of Advocate General Sharpston of 26 November 2015, CJEU, para. 71.

[1301] Van Elsuwege, Peter & Hans Merket. "The role of the Court of Justice in ensuring the unity of the EU's external representation." *Principles and practices of EU external representation*, edited by Steven Blockmans & Ramses A. Wessel. CLEER Working Papers 2012/5, Centre for Law of EU External Relations, 2012, p. 38.

[1302] *E.g. Leclerc v. Syndicat des Libraires de Loire-Ocean (Demande de décision préjudicielle)* Case no. (299/83), judgment of the Court (Third Chamber) of 11 July 1985, Tribunal de Grande Instance de Nantes (France), para. 20; Klamert, Marcus. *The Principle of Loyalty in EU law*. Oxford University Press, 2014, p. 31.

[1303] De Baere, Geert. "EU External Action." *European Union Law*, edited by C. Catherine Barnard & Steve Peers, Oxford University Press, 2nd Ed., 2014, pp. 710-717.

Hampshire argued that there are few chances for the EU to speak on questions relating to asylum and immigration policies at the international level with a unified voice.[1304] The author investigated three internal factors that constrain the EU's ability to 'speak with one voice.' The three factors are 'the contrasting approaches of the Commission and Council to the external dimension; the diversity of Member States' interests in asylum and migration policy; and the various policy agendas of European agencies.'[1305] External factors stem from the refugee and migration process, which is a complex and ever-changing phenomenon.[1306]

However, when it comes to the negotiation and approval of the GCR, there is much more to discuss than the principle of 'sincere cooperation.' Both the distribution of external competence and the representation of the EU and its Member States in the international arena of asylum and refugee policy require careful consideration. The two questions are important because of the specificity of the combination of asylum and refugee policy and foreign affairs for the national sovereignty of EU Member States, and they are complicated by the still ambiguous provisions governing EU external action. The Union's external competence concerning asylum and refugee is not exclusive but shared between the EU and its Member States. Since the primary law only recognizes the express competence of the Union with regard to measures aimed to address the readmission of irregular migrants,[1307] resort to the CJEU doctrine of implied external powers, codified in Article 216(1) TFEU, becomes imperative.[1308] In other words, except for the conclusion of agreements on readmission, the opportunities of the Union to exercise that competence at an international level are restricted, as migration issues 'are covered by a framework for the worldwide exercise of external competencies.'[1309]

[1304] Hampshire, James. "Speaking with one voice? The European Union's global approach to migration and mobility and the limits of international migration cooperation." *Journal of Ethnic and Migration Studies*, vol.42, no. 4, 2016, p.571.
[1305] *Ibid.*
[1306] *Ibid.*
[1307] Art. 79(3) TFEU.
[1308] *E.g. Commission of the European Communities v Council of the European Communities* (AETR/ERTA), Case no. (22/70) Judgment of the Court of 31 March 1971, CJEU, para. 16 ; Opinion given pursuant to Article 228 (1) of the EEC Treaty. – 'Draft Agreement establishing a European laying-up fund for inland waterway vessels, Opinion 1/76 of the CJEU, of 26 April 1977, CJEU, para. 3. incorporated into the second scenario envisioned in Article 216(1) TFEU. The third and fourth scenarios of this provision rather codify the doctrine on ERTA exclusivity and thus should not have been incorporated into a clause referencing the existence of external competences (*e.g.* Art 3(2) TFEU).
[1309] Source: The European Parliament's Committee on Civil Liberties, Justice, and Home Affairs. 2012. Division of competences between the European Union and its Member States concerning immigration, European Parliament, Brussels. Under a broader interpretation, as the Union's competence in the area of freedom, security and justice is a shared competence, and in the absence of a specific reference in Article

When it comes to the external representation of the EU, the President of the European Council, the EU High Representative for Foreign Affairs and Security Policy,[1310] the President of the European Commission [1311] and the EU delegation can therefore deliver the positions of the EU and its Member States at the UN. According to Andrade, selecting who is in charge of representing the EU internationally in the fields of asylum and migration does not depend on the category of authorities at the level at which the discussion is taking place.[1312] It, accordingly, seems that the Commission should represent the Union in negotiations leading to an international agreement in this field. The Commission, as the EU's representative, has been an active negotiator with and on behalf of EU Member States, but without the right to vote. This does not imply the annihilation or limitation of the rights of EU Member States. On the contrary, each Member State retains full negotiating and voting rights within the United Nations.

Despite their explicit intention to speak with a single voice in foreign affairs and international relations, EU Member States are unable to do so on a consistent basis, particularly when it comes to complex issues such as asylum, refugee, and migration. Several types of research have been conducted on the analysis of EU Member States' voting behaviour in the UNGA. In this context, Jakobsson investigates whether the War on Terror and the fifth enlargement of the EU in 2004 have affected the EU Member States' voting cohesion in the UNGA. [1313] According to him, while the War on Terror, in particular the crisis over Iraq, led to a decrease in the voting cohesion, the fifth enlargement did not negatively affect the voting cohesion.[1314] Rasch examines the voting behaviour in the years 1988-2005 and includes all the present 27 EU Member States. The main findings are that the degree of voting cohesion is higher on Middle East and Human Rights issues than on international security and decolonization issues.[1315]

79(3) TFEU, its competence to conclude readmission agreements is also shared. This suggests that it is not impossible for the Member States to conclude readmission agreements.

[1310] Art. 15(6), penultimate paragraph, TEU.

[1311] Art. 17 TEU.

[1312] Andrade, Paula Garcia, "External Competence and Representation of the EU and its Member States in the Area of Migration and Asylum." *EU Immigration and Asylum Law - Blog of the Odysseus Network*, 17 January 2018. Retrieved from https://eumigrationlawblog.eu/external-competence-and-representation-of-the-eu-and-its-member-states-in-the-area-of-migration-and-asylum/. Accessed 7 March 2022.

[1313] Jakobsson, Ulf. "An International Actor Under Pressure: The Impact of the War on Terror and the Fifth Enlargement on EU Voting Cohesion at the UN General Assembly 2000-05." *Journal of Common Market Studies*, vol. 47, no. 3, 2009, pp.531-554

[1314] *Ibid.*

[1315] Rasch, Maximilian B., The European Union at the United Nations – The Functioning and Coherence of EU External Representation in a State-centric Environment, Martinus Nijhoff Publishers, 2008, pp. 203-217.

For many years, the EU has tried to speak with a unified voice on foreign policy issues.[1316] It was difficult for 27 Member States with disparate interests to reach an agreement, particularly on an issue involving asylum, refugees, and migration. To date, the EU and its Member States have been unable to reach an agreement on a balanced approach to dealing with 'regular', and 'irregular' migration. The same could be said about asylum policy. As previously stated, Europe's asylum policy suffers from a lack of coherence.

Unsurprisingly, the unity of the EU's voice in its external action has been challenged when some EU Member States, including Hungary and Poland, refused to endorse the GCR. From a legal point of view, there is no obligation on the part of EU Member States to serve the 'unity' of EU representation, especially given that the Union has no exclusive external competences. From the perspective of the EU, by rejecting the UN Compacts, each EU Member State acted within the scope of its competence. EU Member States can choose how they want to be represented in areas where they have exclusive power or concurrent competences that the EU does not yet have. As the Union has no exclusive external competence in this matter, every EU Member State has the right to have its own opinion and the full freedom to endorse or not the GCR. From the UN perspective, in order to be an international actor, the EU must act in harmony.[1317] If each Member State acts independently, the EU will find itself 'relegated to the role of mere spectator in the arena of major world events, with neither the capacity nor the power to influence their outcome.'[1318]

Moving on to the GCR's potential legal and political implications, the dominant view among EU institutions and Member States was that the GCR should remain entirely voluntary and should not result in new legally binding international obligations.[1319] Hungary also expressed concern about any attempt to explicitly refer to the Compact when developing EU projects and policies.[1320] At this point, the chapter shifts gears to discuss

[1316] Art. 24(3) TEU.
[1317] Javier Solana, Francisco. "European Foreign Policy and Its Challenges in the Current Context." *The Search for Europe Contrasting Approaches,* edited by Daron Acemoğlu, BBVA Publisher, Bilbao, 2016, p. 4
[1318] *Ibid.*
[1319] *Op.cit.* Boucher, François & Gördemann, Johanna. 2021, pp. 230-233.
[1320] The Permanent Representation of Hungary to the European Union. "There is proof that they want to make the UN Global Compact for Migration legally mandatory" Retrieved from https://eu-brusszel.mfa.gov.hu/eng/news/there-is-proof-that-they-want-to-make-the-un-global-compact-for-migration-legally-mandatory Accessed 7 March 2022; "Statement by H.E. Mr. Péter Szijjártó Minister of Foreign Affairs and Trade of Hungary at the General Debate of the74th Session of the United Nations General Assembly." 26 September 2019, p.3.

the potential legal implications of the GCR, if, any. Given that it is a voluntary, non-binding agreement, will it be merely a 'talking shop', or will it make a real difference, and if so, how?

4. The potential legal and political implications of the GCR

The fact that the GCR is of a soft law character brings with it the dilemma of determining its real legal effects. A logical starting point is to acknowledge that the GCR's soft law nature does not *per se* mean that its legal impact is minimal, if any.[1321] In this vein, the acute debate following the endorsement of the GCR is proof that EU Member States, particularly the Visegrád Group, led by Hungary and Poland, take soft law seriously. The reason behind their position is undoubtedly related, at least in part, to the fact that soft law may have an impact on both existing and emerging hard law. Initially, it must be admitted that it is a hard task to define both the nature and the scope of the GCR 's impacts. This hardiness results from the arduousness of determining and defining the soft law itself. Indeed, giving a precise definition of soft law is made tough by the heterogeneous legal instruments that can be included.[1322]Some legal scholars describe soft law as an 'umbrella concept' that includes a variety of ideas. It is generally used to refer to 'law-like' rules that are not essentially binding, not founded on a legal basis, and not identified with any particular institutional actor responsible for its adoption, but which may have practical and legal effects.[1323] Aust finds that there is no agreement about what 'soft law' means or indeed if it really exists.[1324] It argues that the subject of soft law has always been a recurrent issue for debate for international legal scholars. Under traditional approaches, scholars did not acknowledge soft law as law at all, in the narrower sense. In this respect, Professor Weil asserts, that these obligations 'are neither soft law nor hard law: they are simply not law at all.' [1325] Under more modern approaches, soft law is one of the notions that challenges classical hard law. Legal scholars would agree that soft law is politics too.

Retrieved from https://ensznewyork.mfa.gov.hu/asset/view/106445/GA%20besz%C3%A9d%202019%2009%2026.pdf Accessed 7 March 2022.

[1321] Bufalini, Alessandro. "The Global Compact for Safe, Orderly and Regular Migration: What is its contribution to International Migration Law?" *Questions of International Law journal, Zoom-in jo* 58, 2019 pp 5-24.

[1322] Korkea-aho, Emilia. "EU soft law in domestic legal systems: flexibility and diversity guaranteed?" *Maastricht Journal of European and Comparative Law*, vol. 16, no. 3, 2009, pp. 271-274.

[1323] *Ibid.*

[1324] Aust, Anthony. *Handbook of International Law.* Cambridge University Press, 2010, p. 11.

[1325] Prosper, Weil. "Towards Relative Normativity in International Law." *The American Journal of International Law,* vol. 77, no. 3, 1983, pp. 413-442.

For instance, language embodied in the UDHR, the Helsinki Final Act, the Basle Accord on Capital Adequacy, and decisions of the HRC are thought to affect states because of their quasi-legal character.[1326] Fitzmaurice argues that 'soft law is one of these phenomena of international law which confounds international lawyers and leave disagreement as to their legal character and their legal effects.'[1327]It is in this same spirit that Dupuy states that soft law 'is a trouble maker because it is either not yet or not only law.'[1328]

At first glance, the GCR appears to create neither obligations for states nor rights for individuals because it is not legally binding. However, the lack of binding effects does not necessarily imply that the GCR is ineffective. Soft law instruments may have normative or political effects under certain conditions.[1329] The wording of the text surely plays a notable role, but the legal weight of soft law instruments may depend on a variety of other factors and their combination. It is, for example, relevant to the fact that the GCR emerged from a comprehensive and multi-phased discussion involving a plurality of actors. Also, it incarnates the culmination of a project of an unprecedented review of evidence and data gathered during an open, transparent, and inclusive process'.[1330] Quite the opposite, it may have a weakening influence on the GCR's legal impact that consensus was not reached and ,further, that there was clear opposition from some states.

4.1. GCR as a tool of cooperation in the international protection system

The GCR paves the way for host-country pressures to be relieved and access to third-country solutions to be expanded.[1331] This is consistent with the overall goals of the EU's asylum policy.[1332]Thus, EU cooperation on asylum issues has played a significant role in the development of policy and legal instruments aimed at the 'containment' of asylum

[1326] Guzman, Andrew T. & Meyer, Timothy L. "International Soft Law." *The Journal of Legal Analysis*, vol. 2, no.1, 2010, pp.171–225.
[1327] Fitzmaurice, Malgosia. "International Protection of the Environment." *Collected Courses of the Hague Academy of International Law*, vol. 293, 2001, p.76.
[1328] Dupuy, Pierre-Marie. "Soft law and the international law of the environment." *Michigan Journal of International Law*, vol. 12, no. 2, 1991, pp. 420-435.
[1329] Barelli, Mauro. "The Role of Soft Law in the International Legal System: The Case of the United Nations Declaration on the Rights of Indigenous Peoples*." The International and Comparative Law Quarterly*, vol. 58, no. 4, 2009, pp. 957-98.
[1330] GCM (n.1) para. 10.
[1331] GCR (iii) Objectives, Para 7.
[1332] COM/2015/0240 final. "Communication from the Commission to the European Parliament, the Council, the European Economic, and Social Committee and the Committee of the Regions: a European Agenda on Migration."

seekers and refugees in their countries of origin or transit.[1333] Scholars have recently identified how, in the aftermath of the 2015-16 refugee crisis, EU cooperation with third countries on asylum and migration was re-prioritized, resulting in the adoption of several non-binding political arrangements.[1334] According to the literature, there has been a shift in EU policy, from one emphasizing formal cooperation through legal acts and international agreements to one emphasizing informal channels and political tools, or non-legally binding or technical arrangements of cooperation, often linked to emergency-driven EU financial tools.[1335] In reality, such agreements are part of the EU's externalization policy, which the V4 countries promote and defend, as previously discussed. Nowadays, international asylum and refugee management is marked by a continuous process of externalization. [1336] Through international asylum and migration treaties, soft law instruments have emerged as an important strategy for externalizing asylum management to third countries. The EU-Turkey agreement, for example, is a landmark soft law agreement between the EU and a third country in the field of asylum and refugees.[1337] The agreement has since become a blueprint for the EU's strategy of externalizing asylum management to its neighbours. The case of the memorandum of understanding between Libya and Italy is also an example of how soft law can be used to externalize asylum and migration management.[1338]

[1333] Boswell, Christina. "Burden-sharing in the New Age of Immigration." Migration Policy Institute, Washington, 1 November 2003. Retrieved from https://www.migrationpolicy.org/article/burden-sharing-new-age-immigration Accessed 7 March 2022.

[1334] *Op.cit.* Karolewski, Ireneusz Pawel & Benedikter, Roland. 2018, pp. 98-132; Slominski, Peter & Trauner, Florian. "Reforming me softly-how soft law has changed EU return policy since the migration crisis." *West European Politics*, vol. 44, no.1, 2021, pp. 93-113.

[1335] Carrera, Sergio. "On Policy Ghosts: Readmission Arrangements as Intersecting Policy Universes." *EU External Migration Policies in an Era of Global Mobilities: Intersecting Policy Universes,* edited by Sergio Carrera *et al*. Brill Nijhoff, 2018, pp. 21-59; *Op.cit.* Yilmaz-Elmas, Fatma, 2020, pp. 161-177.

[1336] Emiliani, Tommaso & Linck, Annika. "The External Dimension of EU Immigration Policies: Reacting to External Events?" *The European Union's Evolving External Engagement: Towards New Sectoral Diplomacies?* edited by Chad Damro *et al.* Routledge, 2018, pp. 126-150; Martins, Bruno Oliveira & Michael Strange. "Rethinking EU external migration policy: contestation and critique" *Global Affairs*, vol. 5, no. 3, 2019, pp. 195-202.

[1337] Fernández Arribas, Gloria. "Insight: The EU-Turkey Statement, the Treaty-Making Process and Competent Organs. Is the Statement an International Agreement?", *European Papers, European Forum,* vol. 2, no.1, 2017, pp. 303-309; Terry, Kyilah. "The EU-Turkey Deal, Five Years On: A Frayed and Controversial but Enduring Blueprint." Migration Policy Institute, Washington, 8 April 2018. Retrieved from https://www.migrationpolicy.org/article/eu-turkey-deal-five-years-on Accessed 7 March 2022.

[1338] Italy-Libya Memorandum of Understanding, 2017; Vari, Elisa. "Italy-Libya Memorandum of Understanding: Italy's International Obligations." *Hastings International and Comparative Law Review,* vol. 43, no.1, 2020, pp.104-134; Achour, Majd & Thomas Spijkerboer. "The Libyan litigation about the 2017 Memorandum of Understanding between Italy and Libya. EU Immigration and Asylum Law and Policy." *EU Immigration and Asylum Law - Blog of the Odysseus Network*, 2 June 2020. Retrieved from

Back to the GCR, it appears that this instrument has emerged to bolster soft law agreement in the management of asylum. Perhaps the GCR's key function will be to fill existing gaps in hard law in asylum governance by fostering cooperation and consolidating international obligations, standards, and stakeholders. In other words, it offers a promising tool for encouraging states to cooperate by incorporating legally binding principles into a non-binding document.

As discussed in previous chapters, this kind of soft law agreement is also consistent with the restrictive shift in Visegrád asylum policy, which prioritizes state controls over admissions and resettlement and highlights the existence of a containment or source-control bias aimed at removing the so-called 'root causes' of refugee mobility in countries of origin of refugee flows. In this regard, bilateral and multilateral soft law agreements could help to diminish the 'unwanted' migration flows in 'the sense that receiving countries would prefer to be without them.'[1339] Typically, these agreements include two types of provisions: first, provisions that foreshadow significant financial assistance; and second, provisions that provide training and equipment to the counterpart to carry out migration management activities.[1340]

While resorting to soft law agreements in the asylum area can be useful in situations in which states are resisting contractual arrangements they have agreed to, it risks watering down the mandatory character and normative nature of several principles. Furthermore, the agreements in the form of soft law instruments are problematic because they do not follow the normal legal process, making it difficult to assess their legal efficacy. This type of instrument has some critical characteristics, including fluidity and a hyper-simplified form of adoption.[1341] These features enable the creation of agreements capable of overcoming the normal checks and balances of democracy. The executive power uses this type of instrument to avoid the control of the parliament.[1342] In doing so, it is possible to observe a

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https://eumigrationlawblog.eu/the-libyan-litigation-about-the-2017-memorandum-of-understanding-between-italy-and-libya/ Accessed 7 March 2022.

[1339] Carling, Jørgen. "European Strategies for Reducing "Unwanted" Immigration." DIIS Brief, Danish Institute for International Studies, Copenhagen, 2007, p.1.

[1340] Richey, Mason. "The North African Revolutions: A Chance to Rethink European Externalization of the Handling of Non-EU Migrant Inflows." *Foreign Policy Analysis,* vol. 9, no. 4, 2013, pp. 409-413.

[1341] Reviglio, Martino. "Externalizing Migration Management through Soft Law: The Case of the Memorandum of Understanding between Libya and Italy." *Global Jurist*, vol. 20, no. 1, 2020, pp.1-7.

[1342] Hess, Sabine. "We are Facilitating States!' An Ethnographic Analysis of the ICMPD." *The Politics of International Migration Management,* edited by Martin Geiger & Antoine Pécoud, Palgrave Macmillan, 2010, pp. 96-118.

shift from government to governance in asylum and migration management.[1343] This shift is part of a broader scheme that considers soft law instruments, and 'thus governing by governance, more adaptable to the rapid changes of contemporary democracies.' [1344] Informal soft law agreements enable the EU to avoid and overcome legal deadlocks in the fields of asylum, which are currently stymied by the pursuit of national interests and the reaffirmation of state sovereignty.

Cooperation based on soft law agreements may result in strong commitment and compliance, but it may not. Because soft law regimes are becoming more prevalent in international law, their intuitive design attributes and characteristics raise new questions about regime effectiveness.[1345] Besides, in the field of asylum, these soft law agreements raise a slew of legal and material validity issues, particularly the protection of the human rights of asylum seekers and refugees. That is to say that asylum seekers may not be provided with the necessary guarantees regarding the proper protection of their rights. The EU-Turkey agreement, for example, has been criticized for creating a dangerous precedent by jeopardizing the right to seek asylum.[1346] While European Commission claims that the agreement 'showed that international cooperation can succeed' and that 'its elements can inspire cooperation with other key third countries,'[1347] reports show that the agreement has a human rights cost, including arbitrary detention, inhuman and degrading conditions, and violations of CSR51.[1348] These types of agreements leave some grey areas or 'twilight zones' concerning EU Member States' operations in third countries, particularly when they support or collaborate with them in their efforts to manage migration flows.[1349] Such involvement occurs in the 'background,' with no 'direct or simultaneous participation in

[1343] Van Riemsdijk, Micheline *et al*. "New actors and contested architectures in global migration governance: continuity and change." *Third World Quarterly*, vol. 42, no. 1, 2021, pp.1-15.
[1344] *Op.cit.* Reviglio, Martino, 2020, p.1.
[1345] Wanner, Maximilian S. T. "The effectiveness of soft law in international environmental regimes, participation and compliance in the Hyogo Framework for Action." *International Environmental Agreements: Politics, Law and Economics*, vol. 21, no. 1, 2021, pp. 113-132.
[1346] Human Rights Watch. "Q&A: Why the EU-Turkey Migration Deal is No Blueprint." 14 November 2016. Retrieved from https://www.hrw.org/news/2016/11/14/qa-why-eu-turkey-migration-deal-no-blueprint Accessed 7 March 2022.
[1347] COM (2016) 231 final. Communication from the Commission to the European Parliament, the European Council, and the Council first report on the progress made in the implementation of the EU-turkey statement. 20 April 2016.
[1348] Amnesty International. "A Blueprint for Despair: Human Rights Impact of the EU-Turkey Deal." 14 February 2017. Retrieved from https://www.amnesty.org/en/documents/eur25/5664/2017/en/ Accessed 7 March 2022.
[1349] Molnár, Tamás. "EU Member States' international responsibility when cooperating with third countries: grey zones of law" EU Immigration and Asylum Law - Blog of the Odysseus Network, 25 March 2022. Retrieved from https://eumigrationlawblog.eu/eu-member-states-international-responsibility-when-cooperating-with-third-countries-grey-zones-of-law/ Accessed 30 March 2022.

the commission of unlawful acts,' such as violations of asylum seekers' rights to leave any country, including their own.[1350]

4.2. GCR: a stepping-stone toward new legislation?

From a traditional standpoint, the provisions of the GCR cannot be subsumed under Article 38 of the ICJ Statute. It is highly debatable and a source of uncertainty whether or not the CGR will produce legal effect and result in the creation of new rights and obligations over time. There was and still is an 'open contrast' between the GCR's publicly expressed non-bindingness and widespread fear that it would 'either severely constrain national sovereignty in highly sensitive areas or dilute arduously achieved standards, particularly in refugee law.'[1351]

The GCR, as a special tool with symbolic significance, raised hopes that it could improve the global response to large refugee movements. For instance, the 2015-16 refugee crisis is seen as one impetus for reforming the entire refugee system to bring more transparency, equity, and consistency. When reforming asylum law, it is important to consider whether to create a single comprehensive law or to incorporate reforms through a series of amendments to existing law.[1352] Finding the right form was crucial to the successful implementation of these reforms. Because neither time nor political clout were sufficient for a 'hard law' reform, the GCR was used as a 'soft law' solution.[1353] The flexibility provided by soft law instruments such as the GCR may entice states that 'are traditionally more apprehensive about international law to participate.'[1354] States may be able to legislate on aspects of the GCR domestically without having to overcome concerns about compromising state sovereignty or issues with enforcement mechanisms associated with the ratification of binding international law.[1355]

Back to the obvious question of whether the GCR can have legal effect and thus create new rights and obligations. It is too early to answer this question, but it appears that the longer this debate goes on, the more the perception of its complexity increases. According

[1350] *Ibid.*
[1351] Hilpold, Peter. "Opening up a new chapter of law-making in international law: The Global Compacts on Migration and for Refugees of 2018." *European Law Journal,* vol. 26, no. 3 and 4, 2021, p.1.
[1352] *Op.cit.* Nicholson, Frances & Kumin, Judith. "A guide to international refugee protection and building State asylum systems." 2017, p.58.
[1353] *Op.cit.* Hilpold, Peter, 2021, p. 2.
[1354] Kinsky, Elisabeth. "The legal relevance of the Global Compact on Refugees: improving refugee rights in Lebanon and Jordan." Working paper, the Issam Fares Institute for Public Policy and International Affairs. 2020, p.7.
[1355] *Ibid.*

to Hilpold, 'they affirm that the GCR is non-binding, whereas this formula appears to be nothing more than constructive ambiguity.'[1356] Despite the fact that they were declared to be 'non-binding' in substance, their legal value was not defined. It became clear, in particular, that in order to assess their legal value, it was necessary to look beyond the traditional source catalogue specified in Article 38 of the ICJ Statute.

4.2.1. Political commitments, rather than legal commitments?

The GCR's ability to produce legal effects is dependent on the will of states as, 'what constitutes international law remains to a considerable extent a question of belief'.[1357] If the states that are members of the GCR take the Compact's objectives seriously, work systematically to achieve them, and cooperate more closely on asylum and refugee issues, it is possible to argue that the Compact contributed to the establishment of rights and obligations for the protection of asylum seekers and refugees.

Non-binding agreements lead to political commitments.[1358] In this context, Olivier argue:

"As in the case of non-binding agreements, there is none the less an expectation of, and reliance on, compliance by states. The potential of a resolution to create obligations on the political plane is determined by various factors, such as the circumstances that led to its adoption, the degree of agreement on which it is based, content of the document, and implementation procedures. … resolutions do shape international practice, and practice as in the case of usages, shapes law." [1359] As a result, resolution-based political responsibilities may eventually become legal obligations.

When it comes to soft law, it is important to note that distinguishing between the political and the legal in international law is somewhat erroneous, because the legal is completely permeated by the political.[1360] Indeed, it is evident that international law is formed through political processes such as political negotiations, state consensus,

[1356] *Op.cit.* Hilpold, Peter, 2021, p.2

[1357] Pauwelyn, Joost. "Is It International Law or Not, and Does It Even Matter?" *Informal International Lawmaking*, edited by Joost Pauwelyn *et al.*, Oxford University Press, 2021 p.139

[1358] Boyle, Alan E. "Some Reflections on the Relationship of Treaties and Soft Law." *The International and Comparative Law Quarterly*, vol. 48, no. 4, 1999, pp. 901–913; Chinkin, Christine "The Challenge of Soft Law: Development and Change in International Law." *The International and Comparative Law Quarterly*, vol. 38, no. 4, 1989, pp. 850–866; Schachter, Oscar. "The Twilight Existence of Nonbinding International Agreements." *The American Journal of International Law*, vol. 71, no. 2, 1977, pp. 296–304.

[1359] Olivier, Michele. "The relevance of 'soft law' as a source of international human rights." *Comparative and International Law Journal of Southern Africa*, vol. 35, no. 3, 2002, pp. 296–297.

[1360] Shelton, Dinah (ed.) "Law, Non-Law and the Problem of "Soft Law."" *Commitment and Compliance – The Role of Non-Binding Norms in the International Legal System*, Oxford University Press, 2009, p.11.

politically influenced court decisions, *etc.*[1361] In addition, some scholars distinguish between hard and soft law, claiming that a violation of the law results in legal consequences, whereas a violation of a political norm results in political consequences. Making this distinction is not always simple.[1362]

In any case, the GCR represents an unprecedented political commitment as well as a model for better international cooperation.[1363] It is of important political significance and can serve as a catalyst for various countries to assume greater responsibility for asylum and refugee issues. The fact that states are part of non-binding international instruments entails political and even ethical commitments. According to professor Blutman 'norms under soft law are essentially social norms-political, moral, technical and other non-legal requirements- that can carry out an extremely important function in the coordination of actions of states or other international actors.'[1364] Similarly, Gammeltoft-Hansen states that the Compact 'as a choice of instrument further tend to place emphasis on political and practical cooperation as opposed to legal commitments.'[1365] While not legally binding, the GCR could be a politically guiding framework, which sets out ground rules for the long term.

Although the GCR is seen as simply another soft law cooperation framework on international asylum and refugee system, it puts forward concrete commitments. The GCR's clear wording left no doubt that there is a clear political commitment that states must respect. The term 'political commitment' is explicitly mentioned in the GCR text.[1366] Through non-legally binding instruments, states engage themselves politically. In this sense, Hilpold observes that in the future, no state adhering to the Compact will be able to abstain from the discourse it has contributed to engendering or to take an openly contrarian

[1361] Byers, Michael. "Custom, Power, and the Power of Rules Customary International Law from an Interdisciplinary Perspective." *Michigan Journal of International Law*, vol.17, no.1, 1995, p. 113; Kelly, J. Patrick. "The Twilight of Customary International Law." *Virginia Journal of International Law,* vol.40, no.2, 2000, pp. 452-455.
[1362] *Op.cit.* Shelton, Dinah, 2009, p.11; Manton, Eric. "The OSCE Human Dimension and Customary International Law Formation." Yearbook on Organization for Security and Cooperation in Europe, 2005, pp.197–198.
[1363] *Op.cit.* McAdam, Jane, 2018, p.571; Federal Foreign Office of Germany. "Global Compact on Refugees-taking responsibility and sharing the burden." 24 June 2019. Retrieved from https://www.auswaertiges-amt.de/en/aussenpolitik/themen/migration/global-compact-on-refugees/2229394 Accessed 8 March 2022.
[1364] Blutman, László. "In the Trap of a legal Metaphor: international Soft Law." *The International and Comparative Law Quarterly*, vol. 59, no. 3, 2010, p. 623.
[1365] Gammeltoft-Hansen, Thomas. "The Normative Impact of the Global Compact on Refugees." *International Journal of Refugee Law, vol.* 30, no.4, 2019, pp. 605–610.
[1366] GCR, III. Programme of action, para. 23.

position without incurring 'heavy political costs.'[1367] States bear a fundamental political responsibility for the GCR's implementation progress especially that the GCR requires follow-up and review, which is carried out through the Global Refugee Forum, high-level official meetings, and annual reporting to the UNGA by the UNHCR.[1368] Even though the GCR is considered soft law and is not legally binding, it has political ramifications.[1369]

4.2.2. Evidencing existing law rather than creating new norms and rights?

As a non-binding instrument, the GCR serves the dual purpose of evidencing existing law, as demonstrated by its reference to CSR51, and introducing some longer-and shorter-term policy objectives to improve cooperation and responsibility sharing. At this level, it is important to understand how the GCR may relate to existing international asylum and refugee law, as well as what, if any, normative implications this new instrument are likely to have. Because the GCR is based on the existing international legal system for asylum and refugee protection, which includes the CSR51 and other international legal instruments on refugee, human rights, and humanitarian law, interaction between the Compact and other instruments is unavoidable. In this sense, Boyle contends that 'treaties, soft law, general principles, and custom interact and supplement one another.'[1370] According to the author, 'once soft law begins to interact with binding instruments' that 'its non-binding character may be lost or altered.'[1371] One example of interaction is the inclusion of the CRRF within the New York Declaration, which recognizes that refugees require specific protection and that host countries must develop country-specific assessments and plans of action for how they will provide refugees with rights.[1372] As a result, GCR's non-binding nature has not diminished states' legal commitments and duties to comply with and implement the CRRF.[1373]

From a human rights perspective, it is important to mention that GCR is more concerned with achieving cooperation among states and other stakeholders in the face of asylum seekers and refugee movements than with outlining refugee rights and states'

[1367] *Op.cit*. Hilpold, Peter, 2021, p.18.
[1368] GCR, IV. Follow-up and review, para. 101-107.
[1369] Wauters, E. Evelien & Jan Wouters. "The UN Global Compact for Safe, Orderly and Regular Migration: Some Reflections." Leuven Centre for Global Governance Studies, Leuven, 2019, p.749.
[1370] Boyle, Alan E. "Soft Law in International Law-Making." *International Law* edited by Malcolm Evans, Oxford University Press, 5th ed., 2018, p. 121.
[1371] *Ibid.*
[1372] Khan, Fatima & Sackeyfio, Cecile. "Situating the Global Compact on Refugees in Africa: Will it Make a Difference to the Lives of Refugees "Languishing in Camps"?" *Journal of African Law*, vol.65, no. 1, 2021, p.45.
[1373] *Ibid.* p.48.

associated obligations. As a result, GCR appears to be 'framed as a development tool rather than a legal human rights instrument.' The words 'humanitarian' and 'development' were used numerous times in the compact, but there are only a few mentions to international law, including refugee and human rights law. For instance, the GCR hardly makes reference to the CSR51 and its 1967 Protocol.[1374] Likewise, the principle of *non-refoulement* is mentioned only once.[1375] Despite the fact that GCR is directed by pertinent international human rights legislation, international humanitarian law, and other applicable international instruments,[1376] it appears that it makes no effort to advance the rights of refugees and asylum seekers. Therefore, rather than an instrument interested in promoting the rights and guarantees of asylum seekers and refugees, the GCR could be seen as a tool aimed at creating cooperation between governments and other stakeholders in the face of refugee movements.

In some areas of human rights law, soft law has come to fill in the gap in the absence of treaty law, exerting a significant amount of normative force despite its non-binding nature; however, this is not the case with GCR as its focus on asylum and refugee rights has been limited. First, human rights are seen as playing a preventive role in addressing the root causes of large-scale refugee movements 'all states and relevant stakeholders are urged to promote, respect, protect, and fulfil human rights and fundamental freedoms for all.'[1377] Second, human rights are mentioned in the context of two specific areas in need of assistance: safety and security[1378] and women and girls.[1379]As stated, the principle of *non-refoulement*, for example, is mentioned only once in the GCR, despite being the cornerstone of the refugee protection regime.[1380] Third, human rights are described as part of solutions, as 'the promotion and protection of human rights are essential to resolving protracted refugee situations and preventing new crises from emerging.'[1381]

Even though the GCR contains only a few direct references to international instruments and little open texture to international human rights law, it is undeniable that its language reflects a human rights perspective. This is noticeable in the GCR's references to 'safety

[1374] GCR, I.Introduction, A. Background, para. 2; GCR, I. Introduction, C. Guiding principles para 5.
[1375] GCR, I. Introduction, C. Guiding principles para 5
[1376] *Ibid.*
[1377] GCR, III. Programme of action, paras. 8-9.
[1378] GCR, III. Programme of action, para. 56.
[1379] GCR, III. Programme of action, para. 74.
[1380] GCR, III. Programme of action, para. 87.
[1381] GCR, III. Programme of action, para. 85.

and dignity,' [1382] 'non-discrimination,' [1383] and 'age, gender, and diversity considerations',[1384] *etc.*

In any case, the GCR linked refugee rights to state sovereignty, defining it as 'a sovereign decision and an option to be exercised by states guided by their treaty obligations and human rights principles.'[1385] It appears to incorporate some 'tokenistic references' to states' obligations under refugee and human rights law while highlighting state sovereignty, rather than explicitly remembering that states are bound by these obligations and urging them to respect them.[1386] It is evident that that despite the fact that the GCR is based on the international refugee protection regime, the references to international law remain relatively vague and soft. The GCR could have been framed more explicitly from a human rights perspective.

Another point to mention is that, while refugees receive more attention in the GCR, asylum seekers and their rights appear to be overlooked. The term 'asylum seeker' is not even mentioned in the Compact. While overlapping the terms 'asylum seekers' and 'refugees' are each requires a distinct approach.[1387] This begs the question of why the GCR did not separately reaffirm the rights of refugees and asylum seekers. The reasoning appears to be that refugees are protected by a specifically dedicated regime, refugee law, whereas human rights law protects all humans, including asylum seekers. Also, it is unclear why the GCR does not make more explicit reference to CSR51. Is it because CSR51 'falls short of its mission', whereas the GCR goes above and beyond, urging the international community to collaborate to improve refugees' self-reliance and the resilience of their host communities by transforming refugees from a humanitarian burden to a development and economic opportunity? [1388] However, unlike the CSR51, the Compact is not legally binding on the states that have endorsed it. This has sparked widespread

[1382] GCR, I. Introduction, C. Objectives, para 7; *Op.cit*. para. 87.
[1383] *Op.cit* para. 9; GCR, III. Programme of action, para. 13; GCR, III. Programme of action, para. 84.
[1384] *Op.*cit para. 13.
[1385] GCR, III. Programme of action, para. 97.
[1386] Pijnenburg, Annick. "The Global Compact on Refugees and International Law: A Missed Opportunity?" 5 February 2019. School of the Advanced Study University of London.
Retrieved from https://rli.blogs.sas.ac.uk/2019/02/05/the-gcr-and-international-law-a-missed-opportunity/ Accessed 8 Mach 2022.
[1387] UNHCR. "Interception of Asylum seekers and refugees: The International Framework and recommendations for a Comprehensive Approach." Retrieved from https://www.unhcr.org/4963237411.pdf Accessed 8 Mach 2022.
[1388] Kirişci, Kemal. "The 1951 Refugee Convention is falling short of its mission. Could the Global Compact on Refugees help?" *Brookings*, 26 July 2021. Retrieved from https://www.brookings.edu/blog/order-from-chaos/2021/07/26/the-1951-refugee-convention-is-falling-short-of-its-mission-could-the-global-compact-on-refugees-help/ Accessed 8 Mach 2022.

criticism, with experts claiming that the Compact amounted to a 'cop-out' from state commitments under the terms of the convention.[1389]

The GCR proposes concrete action plans and emphasizes the importance of traditional long-term solutions for achieving permanent protection for refugees in the context of a sustainable development approach, calling for increased 'access to third-country solutions' and 'support conditions in countries of origin for safe and dignified return.' However, it falls short of providing an adequate and clear alternative approach to asylum seekers and refugees' protection. This failure to strongly embed the GCR in the international legal framework can be seen as a missed opportunity to remind states of their commitments toward asylum seekers and refugees.[1390]

The GCR acknowledges the significance of international law, including human rights and refugee law, but makes no attempt to consolidate or improve it. It could have alluded to the need for refugee law development rather than focusing solely on responsibility-sharing. It could also have gone beyond the assistance-based approach to protection and implemented a human rights-based approach. This suggests that the GCR is far from producing new rights or obligations on the part of states in terms of the rights of asylum seekers and refugees.

4.2.3. GCR as a reference for upcoming legislation

Could the GCR, as a non-binding instrument, serve as a foundation and inspiration for binding legislation? In principle, states that have withdrawn from the GCR, such as Hungary and Poland, are not bound by the obligations stemming from the agreement. But what if the UN refers to the GCR when elaborating its resolutions and declarations? For instance, the UNGA has often addressed human rights in resolutions or declarations. But such resolutions and declarations are only recommendations. Although they have no legal value, since they often interpret customary law, they can serve as a basis for subsequent treaties having binding force over time.[1391] The legal nature of the UNGA resolutions and declarations is quite a complex and often confusing matter, that will not be addressed in

[1389] *Op.cit.* Hathaway, James C., 2018.
[1390] *Op*.cit. Pijnenburg, Annick, 2019.
[1391] Kerwin, Gregory J. "The Role of United Nations General Assembly Resolutions in Determining Principles of International Law in United States Courts." *Duke Law Journal*, vol. 32, no. 4,1983 pp. 876-899; Lande, Gabriella Rosner. "The Changing Effectiveness of General Assembly Resolutions." *Proceedings of the American Society of International Law at its Annual Meeting*, vol. 58, no. 1, 1964, pp. 162-173; Falk, Richard Anderson. "On the Quasi-Legislative Competence of the General Assembly." *The American Journal of International Law*, vol.60, no.4, 1966. pp. 782-791; Joyner, Christopher C. "U.N. General Assembly Resolutions and International Law: Rethinking the Contemporary Dynamics of Norm-Creation." *California Western International Law Journal*, vol. 11, no. 1, 1981, pp. 445-478.

this thesis. Within this framework, Hungary expressed concerns about the implication of UN Compacts on international law. The Hungarian Foreign Minister declared, in this sense, that the 'UN Migration Package should neither fully, nor partly become a reference or part of international law.'[1392] Despite the opposition of some states, the UN has drafted a series of resolutions that refer to the global migration and refugee packages and has made repeated attempts to incorporate them into international law as a basis of reference.[1393]

At the EU level, Hungary expressed concern about the legal implications of the GCR and whether it can have a decisive influence on the content of EU legislation on asylum and refugees. In this regard, The Hungarian Foreign Minister stated that European Commission is 'attempting to make the UN Global Compacts for compulsory.'[1394] The Hungarian Minister's announcement was made following a leaked internal note or 'secret document' issued by the European Commission.[1395] While the note is related to the GCM rather than the GCR, it is important to discuss because it demonstrates the logic followed by EU institutions.

The internal legal note from the European Commission's legal service, titled 'the legal effects of the UNGA's adoption of the Global Compact for Safe, Orderly, and Regular Migration,' explaining the duties arising from the EU Treaties, namely the EU's principle of loyal and sincere cooperation in development cooperation in international forums, became another major source of contention among EU Member States.[1396] In 53 points, the internal note enumerates the possibilities of how the UN's Global Compacts for Migration could become binding through international law for all EU Member States. Point 46 asserts that the GCM has legal effects as it are able to decisively influence the content of the legislation adopted by the EU legislature.

In this stance, European Commission was perceived as challenging the sovereign right of its Member States to decide how they formulate and deal with the issue of international

[1392] "Foreign Minister: UN Migration Package Should Not Become Basis of Reference." *Hungary Today*, 19 December 2019.
Retrieved from https://hungarytoday.hu/foreign-minister-un-migration-package-shouldnt-become-basis-of-reference/ Accessed 8 March 2022.
[1393] See *e.g.* UNGA, Resolution adopted by the General Assembly on 5 August 2020, A/75/292, paras. 2, 23, and 40; UNGA, Resolution adopted by the General Assembly on 16 December 2020, paras.18, 19, 20;
UNGA, Resolution adopted by the General Assembly on 27 December 2021, A/76/642, paras. 1, 2, 6, and 7.
[1394] *Op.cit.* The Permanent Representation of Hungary to the European Union.
[1395] *Ibid*
[1396] European Commission. "Opinion of the Legal Service on "Legal effects of the adoption of the Global Compact for Safe, Orderly and Regular Migration by the UN General Assembly."" Brussel, 1 February 2022.

refugee and migration. [1397] When referring to the Compacts, Article 208(2) TFEU is invoked. [1398] The latter stipulates that 'the Union and the Member States shall comply with the commitments and take account of the objectives they have approved in the context of the United Nations and other competent international organizations.'

While the GCR may be mentioned in certain EU documents, it does not appear that the Compact will have a significant impact on current and future EU and international legislation on asylum and refugees. There appears to be exaggeration in expressing concerns about the GCR and its potential as a reference for upcoming legislation, especially given that the GCR reflects much of the spirit of EU asylum and refugee policy.[1399] Prior to the GCR, the New York Declaration contained and mirrored elements of several restrictive EU asylum, refugee, and migration policies, such as efforts to prevent people from crossing EU borders irregularly [1400] or increasing migration securitization rather than creating safe and regular pathways for refugees. [1401] Besides, the EEAS's position, which was opposed to strengthening existing legal obligations to protect refugees, was eventually reflected in the GCR.[1402]

Furthermore, the emphasis on increased burden and responsibility sharing in the context of international protection has been enshrined in several EU texts, including but not limited to the European Commission's 2016 Communication 'Lives in Dignity', which recognizes the need for greater complementarity between the approaches of humanitarian, development, and peacebuilding actors to overcome displacement challenges and address, as well as to address root causes of displacement.[1403] This is, in fact, at the heart of the GCR spirit.

[1397] "Question for written answer E-001383/2019 to the Commission. Legal effects of the adoption of the Global Compact for Safe, Orderly, and Regular Migration." 18 March 2019. Retrieved from https://www.europarl.europa.eu/doceo/document/E-8-2019-001383_EN.pdf Accessed 8 March 2022; *Op.cit.* The Permanent Representation of Hungary to the European Union.

[1398] European Parliament legislative resolution of 13 March 2019 on the proposal for a regulation of the European Parliament and of the Council establishing the Asylum and Migration Fund (COM (2018)0471 – C8-0271/2018 – 2018/0248(COD)) TA/2019/0175, para. 4(a).

[1399] *Op.cit.* Boucher, François & Gördemann, Johanna 2021, pp.228-232.

[1400] The New York Declaration, paras. 27 and 70.

[1401] *Ibid*, para.36.

[1402] EEAS. "European Union Remarks at UNHCR Briefing in New York on the Global Compact on Refugees." Brussels: European External Action Service. 2018. Retrieved from https://eeas.europa.eu/headquarters/headquarters-homepage/44572/eu remarks%E2%80%93%E2%80%93united-nations-unhcr-briefing-global-compact-refugees_en. Accessed 8 March 2022.

[1403] COM/2016/0234 "Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee of the Regions Lives in Dignity: from Aid-dependence to Self-reliance Forced Displacement and Development."

The EU's New Pact on Migration and Asylum was a litmus test for whether the EU will use the GCR as a reference. As mentioned, while there is an allusion to the GCR, or more specifically the Global Refugee Forum, the New Pact does not appear to take the Compact as a reference.[1404] Despite the fact that the pact hardly makes any reference to the GCR, [1405] it appears that the Compact was a source of policy ideas because as it offers a number of innovative policy suggestions that the EU can consider when negotiating partnerships with countries hosting large numbers of refugees.[1406] The Pact intends to seek 'global solutions and responsibility-sharing' with international partners on asylum and refugees, as well as to create a 'Union Resettlement and Humanitarian Admission Framework Regulation [that] would provide a stable EU framework for the EU contribution to global resettlement efforts.' These, at the very least, reflect the GCR's spirit.[1407]

It appears that the European Commission intentionally avoids mentioning the GCR to reduce the tensions that exist at the EU level regarding asylum and refugee issues. Lately, it has been criticized 'for catering to the priorities of the more conservative Member States such as Hungary, Poland, and Slovakia.'[1408] The Pact is producing a new approach. On an operational level, the Pact endorses and reinforces the EU's externalization agenda and envisions a much more forceful role for Frontex, the EU's border control agency. At the same time, it gives Member States the authority to refuse asylum seekers entry based on arbitrary criteria. As a result, the Pact is 'full of worrying signs from the perspective of asylum seekers and refugees' rights.'[1409] The 'fight against irregular migration' appears to have become a key goal of the Common European Asylum System, overshadowing the

[1404]COM/2020/609 Final. "Communication From the Commission to The European Parliament, The Council, The European Economic and Social Committee And The Committee Of The Regions On A New Pact On Migration And Asylum."

[1405] Crisp, Jeff. "European Refugee Policy: What's Gone Wrong and How to Make It Better." Refugees International. 5 November 2020.
Retrieved from https://www.refugeesinternational.org/reports/2020/11/5/european-refugee-policy-whats-gone-wrong-and-how-to-make-it-better Accessed 8 March 2022.

[1406] Kirişci, Kemal *et al.* "The EU's "New Pact on Migration and Asylum" is missing a true foundation." *Brookings*, 6 November 2020.
Retrieved from https://www.brookings.edu/blog/order-from-chaos/2020/11/06/the-eus-new-pact-on-migration-and-asylum-is-missing-a-true-foundation/ Accessed 8 March 2022.

[1407] European Commission. "Speech by Vice-President Schinas on the New Pact on Migration and Asylum." 23 September 2020. Speech/20/1736.

[1408] *Op.cit.* Kirişci, Kemal *et al.*, 2020.

[1409] Turner, Lewis. "Internal Solidarity, External Migration Management: The EU Pact and Migration Policy Towards Jordan." *The EU Pact on Migration and Asylum in Light of the United Nations Global Compact on Refugees: International Experiences on Containment and Mobility and their Impacts on Trust and Rights*. edited by Andrew Geddes & Sergio Carrera, European University Institute, 2021, p.196.

international obligation of Member States to protect refugees.[1410] Prioritizing returns seem to garner more support among Member States than fulfilling the international obligation to protect refugees.[1411]

Building on this consensus, European Commission has made effective returns a key driving force behind the new Common European Asylum System reform proposed by the Asylum and Migration Pact. This approach differs from the European Commission's previous proposals to reform the EU's return system.[1412] Could this be regarded as a success of the V4 group, particularly Hungary, in shaping EU asylum policy?

5. Conclusion

It can be concluded that the GCR failed in narrowing the differences and bridging the gaps existing in the asylum approaches between the EU and its Member States, but it was successful in attracting attention to the V4 asylum policy. Indeed, the restrictive asylum policies supported by the Visegrád countries have a global reach. The GCR offered the 4 group, particularly Hungary, the chance to reaffirm that it will not participate in any instruments, even non-binding ones, that are incompatible with its asylum policy.

The lack of consistency and the proper implementation of the principle of solidarity on the part of the EU has had an effect on the external image of the Union to some extent, but we cannot reproach a Member State for acting within its competence, especially in delicate area like asylum policy.

[1410] European Commission. "Migration policy: Council agrees partial negotiating position on return directive." Retrieved from https://www.consilium.europa.eu/en/press/press-releases/2019/06/07/migration-policy-council-agrees-partial-negotiating-position-on-return-directive/ Accessed 8 March 2022.

[1411] European Commission. Remarks by Commissioner Avramopoulos following the Home Affairs Council. SPEECH/18/6706.

[1412] Moraru, Madalina. "The new design of the EU's return system under the Pact on Asylum and Migration.EU Immigration and Asylum Law and Policy." *EU Immigration and Asylum Law - Blog of the Odysseus Network,* 14 January 2021. Retrieved from https://eumigrationlawblog.eu/the-new-design-of-the-eus-return-system-under-the-pact-on-asylum-and-migration/ Accessed 8 March 2022.

VII. Conclusion and *de lege ferenda* proposals

This thesis examined the asylum policies of the V4 group during and in the aftermath of the 2015-16 refugee crisis. It is possible to conclude that neither the V4 asylum policy, the EU law, nor the IRL are total failures. Both have their own set of strengths and weaknesses, as well as their own list of accomplishments. Evaluating the inconsistencies between IRL, the existing EU asylum acquis, and national asylum laws and policies in the V4 group is important, but it is not enough. The thesis attempted not only to identify shortcomings in the V4 asylum policy that affect the right to seek asylum in specific cases but also to take a neutral stance and investigate the essence of the V4 group's restrictive asylum policies, which is seen as, in large part, contrary to the four countries' obligations under IRL and the existing EU asylum acquis.

It is absolutely essential to explain why these restrictions, in part, are not necessarily negative but rather contribute to the strengthening of security and combating the root causes of asylum seeking. This does not justify the V4 group's breach of some of its IRL and EU-derived obligations. The direct or indirect breach of an international obligation that affects the right to seek asylum should not be overlooked. Preventing such violations will be an important step toward improving the system of asylum seeker protection in the V4 group.

Part of the V4 group's asylum policy should be reconsidered and reassessed. A balance should be achieved between the need to protect the fundamental rights of asylum seekers and the states' interest in protecting their sovereignty to the greatest extent possible. Strategic rethinking about the future of international protection while respecting the state's choice to externalize asylum and capacity to regulate access to its territory is required. There is a lot more that should be achieved.

1. Rethinking the Visegrád Group's solutions

1.1. The essence of the Visegrád Group's asylum policies

The essence of the Visegrád group's asylum policies can be summed up in three short sentences: securitization of national territory; protection of cultural and religious identity; and externalization of asylum policy.

The security concerns that arose as a result of the 2015-16 refugee crisis were addressed through a sovereignty-based measures and practices. Security risk prevention measures and

practices were implemented in the national contexts of the V4 states, ranging from physical barriers to stricter border controls, as well as amendments or restrictive interpretations of existing asylum laws. The need to maintain the image of sovereignty and control of borders pushes the four countries to adopt more restrictive asylum policies. More specifically, the 2015-16 refugee crisis was perceived as a threat to existing public order and national security by the four countries, particularly Hungary, to the point where normal rules and procedures governing asylum had to be amended, restrictively interpreted, or suspended in order to maintain public order and national security.

Besides, the V4 countries opposed any supranational developments or solutions that limit state sovereignty, *e.g.* the provisional mechanism for the mandatory relocation of asylum seekers. Asylum policy is interpreted, therefore, as being somehow intrinsic to what it is to be a nation. A sovereign state, according to the conclusions of the V4 group, has the right to its own definition of solidarity and establishment of rules for the acceptance or rejection of asylum seekers. That is why, any solution to asylum issues at the EU level that does not place the sovereignty of the Member States at the centre of its debate and does not respect the states' rights to prioritize the safety and security of their own citizens will not be considered.

The four countries' asylum policy aim to preserve homogeneous cultural and religious identity. As a result, asylum policies cannot be developed in isolation from their cultural and religious context. It could be argued that the Visegrád group's asylum policies are more selective than restrictive. What exactly does this indicate? The V4 countries are not against asylum in general, but rather against specific types of asylum seekers. They are reluctant to accept asylum seekers from different cultural and religious backgrounds. Ultimately, this type of selective asylum policy is a political choice, but it also reflects the indigenous people's will to protect their national culture and identity. In this view, policymakers act as brokers who produce asylum policies based on the interests of their citizens.

The V4 group defends a 'Fortress Europe' and highlights the importance of concentrating on the 'external dimension' of EU asylum policy, as well as seeking alternatives outside of the EU. This approach is heavily reliant on strengthening EU external border protection and deploying cooperation or partnerships with origin and transit countries as a tool for addressing the root causes of displacement. In this context,

the four countries acknowledged that the asylum issues could not be resolved without cooperation with the countries along the Balkan migratory route. Throughout and after the refugee crisis, the group brought the Western Balkans agenda into the spotlight and maintained that more effort should be directed toward supporting their accession to the EU. This has the potential to reduce irregular migration and create safe asylum channels.

In addition, the group emphasizes the importance of implementing a more effective system for returning third-country nationals who do not have the legal right to remain in the EU Member States. Otherwise, there will be no credible EU asylum policy. Furthermore, the group works to develop the policy of 'claiming asylum from outside' through various external cooperation schemes. This policy suggests that processing of asylum seekers could take place outside of EU borders. From the V4 perspective, this policy or strategy is needed not only to protect the EU's security, national identity, and culture but also to reduce 'bogus asylum seekers.' The rationale behind this strategy is that during the 2015-16 refugee crisis, a large number of 'newcomers' to the EU were not genuine asylum seekers fleeing persecution but rather irregular migrants seeking a better life.

Moreover, the Visegrád group is still advocating the idea that the issue of asylum seekers and refugees should be debated by the European Council, which includes the leaders of all EU countries, and not the European Commission, which is the EU's executive arm. From the V4's perspective, the EU's asylum reform decisions should be taken at the level of the European Council so that governments have the right to veto. As long as the distribution of institutional and political competences for asylum and refugee policy in the EU remains fragmented, and as long as this policy is repeatedly modified in response to each new political climate, the mere idea of working on comprehensive reform as part of a coordinated migration policy is a sign of progress. So, all the Member States of the EU have to work more closely than ever before under the aegis of international conventions to overcome the 2015-16 refugee crisis and prepare for an expected new wave of asylum seekers.

1.2. 'Visegrádization' of the EU

The Visegrád group's asylum approach cannot be ignored. The regional coalition has responded to the 2015-16 refugee crisis with an unexpectedly consistent position. The group is increasingly cooperating on asylum issues and speaking as a bloc. However, when

studying the position of the V4 group in the context of the 2015-16 refugee crisis, it is therefore necessary to follow it on two levels. The first level is represented by individual V4 countries: Hungary, Poland, Czechia, and Slovakia. The second is the V4 group's policy as a regional coalition that compounds the interests of the four countries and reacts to EU asylum policy. While the four countries' asylum policies are not identical, there are common elements that allow the group to speak with a unified voice on asylum issues most of the time. The V4 countries identified their shared interests and goals at the beginning of the crisis that stemmed from their geographical and cultural proximity. State sovereignty, as well as cultural and often religious symbols, are heavily emphasized in all four countries.

Arguably, the V4 group' s involvement in discussions about the 2015-16 refugee crisis and reform of the Common European Asylum System contributed to the perception of the group as an alliance with many common interests. It is becoming increasingly clear that the V4 group in the EU is more than just a policy recipient; it is also a policy shaper. This regional cooperation contends it has the potential to influence the EU's current and future asylum policies. 'Without the Visegrád Group, Europe would be a lesser, weaker and more dangerous place.'[1413] On a global scale, the role of the V4 in the GCR negotiations and their eventual role in influencing the Compact's content have been notable.

Firstly, the 2015-16 refugee crisis, as well as the failure and inefficiency of the Common European Asylum System in dealing with the crisis, increased the weight of the group, which was persistent and united on this issue. The group made its voice heard clearly and loudly. It successfully advocated for the Central European position on asylum policy, and this gained acceptance among an increasing number of Member States. Following the path of the V4 group, EU Member States have adopted increasingly stringent asylum rules and are focusing on reducing irregular migration flows.[1414]

Secondly, the group promotes 'the art of disagreement' on issues of asylum, and its position has raised the bloc's profile in the EU and contributed to the perception that it is

[1413] Website of the Hungarian Government. "Without the Visegrád Group, Europe would be lesser, weaker, and more dangerous." 8 October 2020. Retrieved from https://2015-2019.kormany.hu/en/ministry-of-foreign-affairs-and-trade/news/without-the-visegrad-group-europe-would-be-lesser-weaker-and-more-dangerous Accessed 10 March 2022.

[1414] Dettmer, Jamie "Migrant Advocates Accuse EU of Flagrant Breaches of Geneva Convention." *Voa News.* 30 November 2021. Retrieved from https://www.voanews.com/a/migrant-advocates-accuse-eu-of-flagrant-breaches-of-geneva-convention/6333808.html Accessed 12 November 2021; Van Hootegem, Arno *et al.* "Attitudes Toward Asylum Policy in a Divided Europe: Diverging Contexts, Diverging Attitudes?" *Frontiere in Sociology*, 21 May 2020. Retrieved from https://www.frontiersin.org/articles/10.3389/fsoc.2020.00035/full Accessed 13 November 2021.

primarily a protest group. In other words, the crisis gave the group new impetus, attracting unprecedented attention at the European level and raising expectations about its performance both within the group and among partners.

Thirdly, instead of being merely complying executives, the V4 has evolved into an influential and constructive actor at the EU level, with the ability to significantly shape EU policy.[1415] It is within this context that the V4 group succeeded in promoting the term 'flexible solidarity.' This success can be seen in the inclusion of this concept in in the New Pact on Migration and Asylum proposal. The Pact allows Members to opt out of relocating asylum seekers and refugees within the EU in exchange for administrative and financial assistance from other Members. Additionally, the pact establishes 'return sponsorship,' which is presented as one of the pact's new instruments of solidarity. Based on it Member State could return irregularly staying third-country nationals by means of return sponsorship. In general, unlike previous attempts, the Pact is based on 'flexible solutions and mechanisms.' It does not include fixed relocation quotas, but rather a variety of forms of cooperation and responsibility sharing, including a voluntary sponsorship system.

Fourthly, in line with the V4's restrictive stance, the EU is developing concrete measures to protect Europe's security and strengthen the EU's external border control.[1416] In addition to the V4 group, eight Member States[1417] urged the Commission in a letter to strengthen the Schengen Borders Code, demanding that EU external borders be protected with a highest level of security, including the utilization of EU-funded physical infrastructure.[1418] The concept of erecting physical barriers as a means of protecting external borders and regulating the flow of asylum seekers and migrants by directing them through controlled checkpoints, rather than as a measure to prevent access to territory

[1415] Gallai, Sándor. "The Four Visegrád Countries: More Than It Seems." *Migrációkutató Intézet.* 2018. Retrieved from https://www.migraciokutato.hu/en/2018/04/16/the-four-visegrad-countries-more-than-it-seems/ Accessed 13 November 2021.

[1416]These include delivering on Frontex's enhanced mandate; upgrading the Schengen information system and the visa information system; implementing systematic checks against relevant databases on all persons crossing external borders; operationalizing the new entry/exit system for non-EU nationals; deploying the new European travel information and authorisation system; and establishing new rules to make EU databases more interoperable. Source: Council of the European Union. "Strengthening the EU's external borders." 10 December 2021.
Retrieved from https://www.consilium.europa.eu/en/policies/strengthening-external-borders/ Accessed 16 November 2021.

[1417]Austria, Bulgaria, Cyprus, Denmark, Greece, Estonia, Latvia, and Lithuania.

[1418] *Schengen visa info*. "Several EU Member States Call on the Commission to Finance Physical Barriers as Border Protection Measures." 9 October 2021.
Retrieved from https://www.schengenvisainfo.com/news/several-eu-member-states-call-on-the-commission-to-finance-physical-barriers-as-border-protection-measures/ Accessed 16 November 2021.

entirely, appears to be becoming more common in the EU. In the same vein, in the aftermath of the 2021 Afghan crisis, which put pressure on the EU's external borders, the European Commission proposed emergency measures that would allow the three EU countries bordering Belarus[1419] to deviate from EU asylum rules.[1420]

In light of the current context, which is characterized by growing crises at EU external borders, the rise in irregular migration to the EU, as well as intensifying European cleavages in perspectives on appropriate political responses, I presume that security and identity threats will result in higher support for restrictive asylum policies. It is unclear how this support will be translated into more restrictive asylum policies. V4 foreign policymakers will play a greater role in shaping a more restrictive asylum policy at the EU level in the coming years.

Moving towards a more restrictive asylum policy, however, is a double-edged sword. On the one hand, a restrictive asylum policy may promote national interests, cultural homogeneity, political stability, and contribute to the enforcement of various security and defence policies within the EU. This also boosts the efforts of other governments, particularly in North Africa, to become more cooperative and tasked with the responsibility of facilitating returns in their own territories on behalf of the EU. On the other hand, restrictive measures will either limit or deny the right to seek asylum.

2. Unbalanced approach: Too defensive less protective

I argue that several aspects of the V4 group's asylum policy, such as addressing the root causes of asylum and irregular migration, and the call for close cooperation with sending countries, are strong points if implemented properly. However, since border security has taken precedence over access to asylum, this asylum policy is, for the most part, overly defensive and under protective. Border restrictions continue to prevent some asylum seekers from claiming asylum. If they are admitted to the territories, they will face even longer waits for claims to be processed, as well as discriminatory restrictions and violations of certain rights, as discussed in previous chapters. Without a doubt, several new measures and laws adopted by the four countries have widened protection gaps and further restricted the already limited options for asylum seekers, forcing them into even more dangerous forms of irregular migration via human smugglers. Tightening access to asylum

[1419] Poland, Latvia, and Lithuania.
[1420] COM/2021/752 final, Proposal for a Council Decision on provisional emergency measures for the benefit of Latvia, Lithuania, and Poland. 1 December 2021.

seekers will have a negative impact. Indeed, externalizing national borders and lowering the quality of asylum processing may allow countries to avoid their legal obligation to provide protection.

The creation of physical distance, whether through exit control, disembarkation platforms, holding sites, or international reception camps, contributes, to some extent, to 'irresponsibility' through diffusion.[1421] It should be noted, also, that the pandemic has broadened protection gaps and further limited asylum seekers' already fewer options, forcing them into even more expensive and dangerous forms of irregular migration via human smugglers.[1422]

I argue that the current asylum policy advocated by the V4 group appears to be lacking in that it does not work out a well-balanced solution to help correctly identify the person in true need of international protection from other irregular migrants who abuse asylum and seek to enter in an irregular manner.

Indeed, national law and policies that externalize asylum responsibilities could endanger the efficient admissibility of asylum claims. Asylum seeking is a fundamental human right that must be respected by states; accordingly, any policy implemented to avoid this legal obligation is a violation of international law. The externalization of asylum policy while ignoring fundamental rights could reflect the state's attempt to avoid certain of its legal responsibilities. This serves to 'minimize or avoid responsibilities, obstructing rather than facilitating access to international protection.'

Partnership with sending countries does not exonerate states from their *non-refoulement* and related obligations, both under general customary law and in accordance with the relevant international treaties. It is within this context that the UNHCR stated that efforts to externalize asylum management are '...inconsistent with global solidarity and responsibility sharing,' [1423] and that 'imposing a blanket measure to prohibit the admission

[1421] McDonnell, Emilie. "Realising the Right to Leave during Externalised Migration Control." EJIL TALK. 27 September 2021. Retrieved from https://www.ejiltalk.org/realising-the-right-to-leave-during-externalised-migration-control/ Accessed 17 November 2021.
[1422] Horwood, Chris & Frouws, Bram (eds.) *Mixed Migration Review 2021.* Mixed Migration Centre, 2021. p. 14.
[1423] *Op.cit.* UNHCR. "UNHCR Note on the "Externalization" of International Protection." 28 May 2021, para.5.

of refugees or asylum-seekers without measures to protect against *refoulement* would not meet international standards, even in times of emergency.' [1424]

It is dangerous to 'normalize' the extreme features of policies that restrict asylum seeking, especially in countries guided by human rights principles. The abuses discussed in four countries were *de facto* border control methods that could not be presented, in most of the cases, as isolated incidents carried out by fringe elements. In any case, the asylum policy of the V4 countries should not be based on abuses of human rights or disregard for EU asylum standards. Restrictive asylum policies risk not only violating the EU and IRL but also undermining efforts to develop a comprehensive and coordinated approach to dealing with asylum seekers.

3. De *lege ferenda* proposals

The proposed de *lege ferenda* solutions fall into two categories: corrective and preventive measures and actions.

3.1. Corrective or 'remedial' strategy

3.1.1. Getting the balance right

Making a balance between asylum seekers' rights and national security interests is not an easy task. Generally, 'asylum policies are the result of a tug-of-war between international norms and morality loosening asylum on the one hand and national interests tightening it on the other.'[1425] Thus, asylum policy has always been at least one part state interest and at most one-part compassion. Appeals based simply upon compassion, solidarity, or rights are only rarely successful.'[1426] In an era of growing security concerns, the V4 countries are opting for stricter rules to protect borders and internal security that can affect the basic rights of asylum seekers. Increasingly, the four countries appear incapable of adhering to the stringent rules imposed by international standards and treaties when it comes to asylum seekers' rights.

The challenge is undoubtedly to strike a balance between protection and security. With good faith and creativity, the four countries can ensure both public security and asylum

[1424] UNHCR. "Key Legal Considerations on access to the territory for persons in need of international protection in the context of the COVID-19 response."16 March 2020, para. 6.
[1425] Steiner, Niklaus. "Arguing about asylum: the complexity of refugee debates in Europe." New Issues in Refugee Research Working Paper No. 48, 2001, p.4.
[1426] Shacknove, Andrew E. "American Duties to Refugees: Their Scope and Limits" *Open Borders? Closed Societies?* edited by Mark Gibney, Greenwood Press, 1988, p. 133.

seekers' rights to seek asylum. Of course, there are no quick fixes or easy solutions, but there are propositions for improving existing international protection standards in the four countries.

Based on the thesis findings, a set of proposed recommendations concerning both law and practice has been developed that are applicable to all V4 countries. Asylum seeking and national security should be regarded as complementary rather than conflicting. Both asylum protection and national security respond to the goal of human security, albeit from different perspectives and with different emphasis. Therefore, there is a need for more effective mechanisms that incorporate security procedures into protection procedures while respecting international human rights standards. In other words, it is necessary to strike a balance between protecting national security and maintaining public order on the one hand and preserving human rights and asylum principles on the other.

As a first step, I propose that the four countries reconsider revising some of the asylum provisions and practices enacted in the aftermath of the 2015-16 refugee crisis that are incompatible with IRL principles, EU acquis, and other applicable human rights standards. Any extraordinary measures taken during a crisis to address security concerns should not jeopardize the right to seek asylum. This primarily applies to asylum seekers who are already present on the territory or at the borders of the four countries. Besides, both air and land borders are not zones of exclusion or exception in terms of human rights obligations, and the V4 group's border jurisdiction must therefore be exercised in a manner consistent with its obligations to all persons, including asylum seekers. In the same vein, any attempt to provide legal cover for the push-back policy should be abandoned, as it undermines the individual right to have asylum claims fully and fairly processed and may result in individuals being deported to their country of origin in violation of the principle of *non-refoulement*.

The four countries have a responsibility to identify irregular migrants and prevent terrorist attacks to protect their national security and public order. They do, however, have a responsibility to protect asylum seekers fleeing persecution and violence. To this end, strategies that promote both security and asylum protection could be implemented. Additional steps that the V4 group could take to improve the balance of security and asylum policies during the pre-registration, registration, asylum claim processing, and decision phases.

Table No.6.: *De lege ferenda* proposals

Phase	'Win-win' security and protection
Security checks and pre-registration phase	• Investigate novel approaches to address upcoming challenges in order to avoid registration bottlenecks. For example, the digitalization of the 'pre-registration' stage of asylum procedures through the incorporation of remote, online, or IT elements into the pre-registration process to improve the overall efficiency and organization. • A security check should be performed before claiming asylum as part of the pre-registration phase. Allowing asylum seekers to enter a country without travel documents may be permissible while maintaining a high level of security surveillance. Asylum seekers may only be detained until the security check is completed if it is absolutely required and well justified. This should not, in any case, lead to automatic and prolonged detention during the screening phase.
Registration phase	• The establishment of reliable and efficient systems for registering and screening asylum seekers. Screening for people who may pose a security threat must be done in accordance with the principles of necessity, proportionality, and non-discrimination and must be subject to judicial oversight. • Evidence and credibility assessments are required at this stage.[1427] The authorities are tasked with assisting and directing asylum applicants while gathering background data on them to assess their credibility. • With its capabilities and resources, the EUAA can help the Visegrád countries build up their capacity for receiving asylum seekers and hosting them in accordance with EU and international standards. This agency seems to be playing a proactive role,

[1427] EASO. "Judicial analysis Evidence and credibility assessment in the context of the Common European Asylum System." 2018. Retrieved from https://euaa.europa.eu/sites/default/files/EASO%20Evidence%20and%20Credibility%20Assesment_JA_EN_0.pdf Accessed 28 August 2022; EUAA. "New EU Agency for Asylum starts work with reinforced mandate." Retrieved from https://euaa.europa.eu/news-events/new-eu-agency-asylum-starts-work-reinforced-mandate Accessed 28 August 2022.

	particularly with its new Monitoring Mechanism that will partially go into effect at the end of 2023 and track the operational and technical implementation of EU legislative commitments. This will ultimately help the EU asylum system become more uniform by assisting Member States, including the Visegrád, in constructively identifying any possible flaws in their asylum procedures. Frontex and Europol's operations should be strengthened in the Visegrád countries. The two agencies may be given 'extra space' so they can more effectively get involved in the registration stage of the identification and screening of irregular migrants and asylum seekers. • Detention of asylum seekers should only be used as a last resort, after all other options have been considered. Alternatives to detention should be taken into consideration. The Visegrád countries can use a variety of non-detention alternatives to reduce unnecessary detention and improve community-based management.[1428] Detention alternatives may include, but are not limited to, release on your own recognizance, release on conditions, Release on bail and provision of sureties by third parties, community-based supervised release or case management, placement in open facilities with caseworker support, electronic monitoring and/or tracking, and strict curfews.
Processing asylum's claim phase	• Establishing asylum mechanisms that allow for the fair and efficient adjudication of asylum claims, both from a protection and security standpoint. • Asylum claims should be evaluated on a case-by-case basis. A uniform application of asylum procedures based on non-

[1428] Council of Europe. "Alternatives to Immigration Detention: Fostering Effective Results." Council of Europe, 2019, pp. 18- 24. Retrieved from https://rm.coe.int/migration-practical-guide-alternatives-migration/1680990236 Accessed 28 August 2022; International Detention coalition. "There are alternatives: A handbook for preventing unnecessary immigration detention (revised edition)." 2015, p.73. Retrieved from https://idcoalition.org/wp-content/uploads/2015/10/There-Are-Alternatives-2015.pdf Accessed 28 August 2022; European Union Agency for Fundamental Rights. "Alternatives to detention for asylum seekers and people in return procedures." 2015, p. 2 Retrieved from https://fra.europa.eu/sites/default/files/fra_uploads/fra-2015-alternatives-to-detention-compilation-key-materials-2_en.pdf Accessed 28 August 2022.

	discrimination is preferred. • In the four countries, there is a lack of specific law, administrative provision, or policy guidance directing decision-makers on how to structure the credibility assessment in the V4 group. To evaluate the credibility of asylum applications, a variety of methods, procedures, and arrangements might be used. I propose that approaches to promoting credibility assessment of asylum seekers be developed rather than applying the principle of free evaluation of all evidence. Both the approaches developed by the Netherlands and the United Kingdom, which share common features, require special consideration.[1429] The credibility assessment in the Netherlands is based on three steps: step one: document evaluation; step two: determining the level of credibility to be applied; step three: credibility evaluation of the applicant's statements which include assessment of credibility of factual circumstances, and assessment of credibility of events and assumptions.[1430] The United Kingdom approach is divided into two steps: step one is to determine the material facts, and step two is to assess the credibility of the material facts.[1431] A good assessment of asylum seekers' credibility could aid in distinguishing between genuine asylum seekers and irregular migrants.
post-application phase	• If an asylum seeker is denied based on national security grounds, the asylum seeker and/or his/her legal representative should be informed of the 'accusations' levelled against the applicant so that he/she can defend his/her rights during the procedure. • Greater transparency is required in the four countries when it comes to the outcomes of asylum claims. I suggest that there should be more harmonization at the Visegrád level on the concrete (minimum) conditions under which an asylum seeker can be considered a security threat to a state, including the definitions of

[1429] UNHCR. "Beyond Proof Credibility Assessment in EU Asylum Systems." May 2013, p.222 Retrieved from https://www.unhcr.org/51a8a08a9.pdf Accessed 11 March 2022.
[1430] *Ibid.* p.222-224.
[1431] *Ibid.* p.225

	relevant terms.

Source: author's own creation

3.1.2. Rational political rhetoric

I propose that the V4 political leaders engage in more balanced political discourse in the media. The portrayal of asylum seekers from different cultures or religions as a security threat and/or a problem in the media has a significant impact on shaping negative public attitudes toward asylum seekers. It is also crucial to avoid stereotyping asylum seekers, as this can lead to discrimination, racism, xenophobia, and other forms of intolerance. Furthermore,, training for media professionals on asylum issues, as well as reporting in a multicultural environment, is to be encouraged. It is suggested that the terms 'asylum seekers' and 'irregular migrants' be used with greater caution. It is also important to avoid automatically 'labelling' African or Muslim asylum seekers as irregular migrant or 'bogus asylum seekers.'

3.2. Preventive strategy

The Visegrád group could play a more political and diplomatic role in resolving the world's numerous refugee-producing crises, such as the Syrian and Iraqi 'Mega- Crisis,' 'Africa's First World War,' the quarter-century of chaos and turmoil in Somalia, the civil war in South Sudan, and sectarian violence in the Central African Republic, the Ethiopian's Tigray conflict, the Taliban's takeover in Afghanistan, *etc*. You may be wondering how a small coalition such as the V4 group can contribute politically and diplomatically to long-term peace in several regions. I would say, 'when it comes to peace, no effort is too small.'

Also, voluntary and safe return, the V4 group's preferred option, cannot be scaled up as a long-term solution without systematically addressing asylum-generating conditions. Efforts to rebuild war-torn nations are also essential. The Visegrád group, for example, could contribute to innovative policies and practices that lead to tangible change in education in some African countries. Looking at education as a long-term and forward-thinking investment could aid nation-building in a variety of ways. Education has the potential to significantly reduce the emergence of conflicts and create conditions for peace. I believe it is the most powerful tool for transforming lives, building the world of tomorrow, and reducing the number of asylum seekers and irregular migrants.

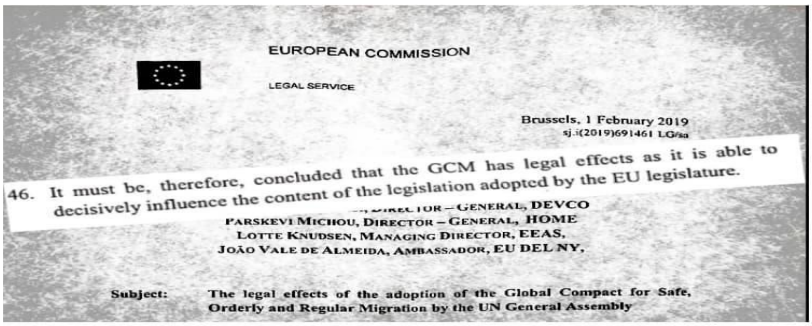
In relation to the Visegrád group's solution of 'claiming asylum from the outside,' I propose that the four countries become more involved in creating more effective platforms for closer cooperation with third-country stakeholders such as Tunisia and Morocco as origin and transit countries. For example, Tunisia is more than ever in the 'firing line' of the EU for enforcing its extraterritorial asylum and migration policies.[1432] The country, located on the southern shore of the Mediterranean Sea, represents a central player for the EU with its multiplying arsenal of tools for managing human mobility in the macro-region. Visegrád Group countries could make greater efforts to assist Tunisia in strengthening border controls. This contributes to European security because 'European security begins in North Africa.'[1433] Furthermore, as the Tunisian government asserts its sovereignty on asylum and migration issues by rejecting the 'hotspot' project on its territory, several types of cooperation remain in substance. I presume that more efforts should be made to assist the country in carrying out various tasks for managing asylum and migration issues, such as controls, capacity-building, fighting human and migrant trafficking, *etc*.

[1432] Rouland, Betty. "Redistributing EU 'burdens': the Tunisian perspective on the new Pact on Migration and Asylum." Asile Project, 8 January 2021. Retrieved from https://www.asileproject.eu/redistributing-eu-burdens-the-tunisian-perspective-on-the-new-pact-on-migration-and-asylum/ Accessed 11 March 2022.
[1433] Visegrád Group. "Szijjarto: V4 planning to support Tunisia border defence. 30 November 2018. Retrieved from https://www.visegradgroup.eu/news/szijjarto-v4-planning-to Accessed 11 March 2022.

List of Charts and tables

Annexes

Annex No. 1.: The first page of top-secret document of the European Commission
Source: De Laurentiis, Ulderico. "Exclusive: Global Compact: the EU secret document that makes it mandatory." *La Voce Del Patriota,* 27 March 2019
(Accessed 20 March 2022)



EUROPEAN COMMISSION

LEGAL SERVICE

Brussels, 1 February 2019

46. It must be, therefore, concluded that the GCM has legal effects as it is able to decisively influence the content of the legislation adopted by the EU legislature.

PARSKEVI MICHOU, DIRECTOR – GENERAL, HOME
LOTTE KNUDSEN, MANAGING DIRECTOR, EEAS,
JOÃO VALE DE ALMEIDA, AMBASSADOR, EU DEL NY,

Subject: **The legal effects of the adoption of the Global Compact for Safe, Orderly and Regular Migration by the UN General Assembly**

The first page of the top-secret document of the European Commission

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Adopted 13 December 2006 entered into force 3 May 2008, New York, 2515 UNTS 3, No. 44910.

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