

# EU Challenges in the area of Migration and Refugees

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## 1. Introduction

Good Morning, my name is Vladimir Ortakovski, and I am a Full Professor of Public International Law at the Faculty of Security, University »Sts. Cyril and Methodius«, Bitola, Macedonia. In this lecture I am going to talk to you about EU challenges in the area of migration and refugees. I emphasize on the distinction between migrants and refugees. While countries treat **migrants** according to their immigration laws, **refugees** fall under relevant refugee protection and asylum provisions, which can be found in both international law and in national legislations. In this lecture I consider in greater detail the mechanisms of the European Union (EU) law which are relevant for the EU response to the European refugee crisis. I outline the EU legal framework relating to irregular migration; as well as the issue of human rights of irregular migrants. I provide an answer to the question whether the new legal framework of EU adequately addresses the issue of human rights of refugees and irregular migrants. At the end, I will emphasize conclusions arising from the lecture.

## 2. The Refugee Crisis in Europe

The phrases “European refugee crisis” and “European migrant crisis” have come into frequent use from April 2015 and onwards, when five vessels (small ships and boats) transporting around 2,000 refugees/migrants capsized due to overcapacity, killing more than 1,200 people. There were high numbers of people arriving in the Europe, overseas from across the Mediterranean Sea or overland through Southeast Europe. In March 2019 the European Commission declared the migrant crisis to be at an end, although displaced people continued to arrive.

Refugees and irregular migrants come from countries where armed conflicts were waged or are still on-going: from the Middle East (Syria, Iraq), from Africa (Eritrea, Nigeria, Somalia, Sudan, Gambia), from Southern Asia (Afghanistan, Pakistan, Bangladesh). According to data by UNHCR, the top three nationalities among over one million refugees arriving from the Mediterranean Sea were Syrian (46,7%), Afghan (20,9%) and Iraqi (9,4%). By 2019 the number of displaced arrivals in the Mediterranean had dropped to 129.663 people.

There are several routes used by refugees and irregular migrants on their way to seeking asylum in any of the EU countries. Via the **Western Mediterranean** route, irregular migrants and refugees

cross the Mediterranean Sea from Morocco and Algeria to Spain. The **Central Mediterranean** route covers the passage from Libya and Tunisia across the Mediterranean Sea to Italy. The **Eastern Mediterranean (Western Balkan)** route is used by the refugees and irregular migrants who cross Turkey and the Aegean Sea in order to reach the Greek islands, and then, from Greece, they take the land route across Macedonia, Serbia, and Hungary, and from the moment Hungary prohibited the irregular entry to its territory, from Serbia across Croatia and Slovenia, to Austria, but most of all, to Germany.

Armed conflicts in Middle Eastern countries have increased the number of forcefully **displaced persons** on a global scale, and by the end of 2014 this number reached 59.5 million, which is the highest number ever since WWII. Refugees from Syria constituted the largest refugee group in 2014 (3.9 million – 1.55 million more than the year before), exceeding the number of refugees from Afghanistan (2.6 million), who had made the largest share of refugees over the last three decades.

### 3. Definition of Refugees and Migrants

A **refugee** is “a person who crossed the international border due to a well-founded fear of persecution”. The **1951 Convention relating to the Status of Refugees** defines a refugee as persons 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, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it”.

This definition was made in the aftermath of WWII and it referred to all people who had fled their homes during the war. Over time, the nature of refugees changed, and instead of their movement from East to West, they started to move predominantly from South to North. The international law reacted to this by adopting the **1967 Protocol relating to the Status of Refugees**, which surpassed the temporal and geographical restrictions of the definition provided in the Convention.

These two international agreements became the cornerstones of the refugee protection and gave rise to the development of other international agreements. This includes the regional instruments: for Africa – the **1969 OAU Convention on Refugees**; for Latin America – the **1984 Cartagena Declaration**; for the European Union – the **Common European Asylum System**.

The definition provided in 1969 by the **Organisation for African Unity** includes additional reasons for a refugee status, such as external aggression, occupation, foreign domination or events seriously disturbing public order.

Protection of a refugee includes the certainty from not being returned into perilous circumstances from which the refugee had fled; access to a fair and efficient asylum procedure; measures ensuring the respect of fundamental human rights, which will allow the refugees to live in dignity and safely, all the while being assisted in seeking a long-term solution. States have the primary responsibility to ensure the protection.

Majority of refugees worldwide would only cross to a neighbouring country, wait for the situation to normalise in their country of origin, and then move back to their homes.

Unlike refugees, **migrants** leave their homes and go to another country for a prolonged period of time, for various reasons. In particular, economic migrants arrive to other countries not because there was a life-threatening armed conflict in their own country, rather, to improve their living standard, to find a job, or, in certain cases, to get educated, to reunify with someone from the family, or for other reasons. This means that migrants can return to their own homes, and if this happens, they will continue to receive protection from their own governments.

**Migrants are fundamentally distinct from refugees and the international law treats them differently.**

However, migrants and refugees would frequently use the same pathways and means of transport to reach their destinations overseas. Such travels are frequently irregular, because they lack the necessary documentation, they cross the borders outside the border-crossings, or become part of the so-called trafficking in human beings. In practice, countries are often faced with simultaneous irregular entry of both refugees and migrants.

#### **4. EU Response to the 2015 Refugee Crisis**

How did the EU react to the 2015 European refugee crisis? EU struggled to manage the crisis, by increasing the funds necessary for financing the border controls in the Mediterranean Sea, by developing plans to fight the trafficking in migrants, and by proposing a new quota system in order to redistribute the asylum seekers among EU Member States, thus facilitating the burden borne by the countries at the external borders of the EU. Discord emerged among EU Member States, as some countries were willing to admit asylum seekers, while other refused to do so.

The Chancellor of Germany, Angela Merkel, encouraged the refugees from Syria that, in case they succeed to arrive in Germany, they will be provided with a temporary stay and an opportunity to apply for asylum. She was driven by the needs of the powerful German economy for new professional workforce. However, in doing so, she suspended the EU rule stemming from the Dublin Regulation according to which the first EU country where the asylum seeker arrives becomes in charge of processing the asylum claims.

According to EUROSTAT, EU Member States received 626,000 asylum claims in 2014, which is the highest number ever since 1992, when it received 672,000 claims. The asylum was granted to more than 185,000 asylum seekers. In this, around two-thirds of the asylum claims were addressed to Germany, Sweden, Italy and France, who then granted the asylum to almost two-thirds of the claims. In the first half of 2015, additional 395,000 asylum claims were addressed to the EU Member States.

On 18 March 2016, EU and Turkey reached an agreement to return back to Turkey those migrants who had illegally entered the Greek territory. This EU-Turkey Statement stipulates:

- Turkey will take “any necessary measures to prevent new sea or land routes for illegal migration opening from Turkey to the EU” and will receive back “all new irregular migrants crossing from Turkey into Greek islands as from 20 March 2016”;

- for every Syrian being returned to Turkey from Greek islands, another Syrian will be resettled from Turkey to the an EU Member State (up to a total of 72,000 Syrian refugees), taking into account the UN Vulnerability Criteria;
- as of April 2016, EU will open a new Negotiating Chapter with Turkey (Chapter 33);
- the three billion euro of financial assistance promised to Turkey for dealing with the Syrian refugees on its territory will be disbursed by the summer of 2016, with yet another three billion euro by the end of 2018;
- visa liberalisation for Turkish nationals travelling to EU will come into effect in June 2016, if Turkey meets the necessary conditions.

This agreement should prevent the irregular entry of migrants into EU and deter them from their risky travels to Europe, at the same time encouraging them to travel to the Old Continent regularly, with a possibility of settling there at least a part of around 3 million refugees currently in Turkey. However, observed from the perspective of humanity and human rights, this agreement fails to provide a solution, and even worsens the conditions of Syrian refugees in Turkey, as well as of those sheltered in tents in Greece.

#### **4.1. EU Response - Political disagreements**

Individual member states of the EU – particularly Italy and Greece, the two countries most affected – can not overcome the long-term challenges posed by large-scale migration on their own. But many member states reject a common European effort, a stance that threatens to accelerate the erosion of solidarity within the EU.

Eastern European states like Hungary, Poland, Slovakia, and the Czech Republic have all expressed a strong preference for non-Muslim migrants. In August 2015, Slovakia announced that it would only accept Christian refugees from Syria. Poland has similarly focused on granting Syrian Christians asylum, and the head of the country's immigration office admitted to the *Financial Times* that, "[applicants'] religious background will have [an] impact on their refugee status applications." And in Hungary, Prime Minister Viktor Orban has explained his anti-migrant policies in explicitly anti-Muslim language. While selecting migrants based on religion is in clear violation of the EU's non-discrimination laws, these leaders have defended their policies by pointing to their own constituencies' discomfort with growing Muslim communities.

By contrast, Germany and Sweden have unveiled some of the most generous asylum policies in the EU. In September 2015, Berlin pledged 6 billion euros to support the 800.000 migrants - about quadruple the number from 2014 - it was expecting to receive by the end of 2015. German officials signaled that the country was prepared to take "500.000 asylum seekers a year" for several years. Similarly, Sweden granted refuge to the largest share of EU applicants (317.8 per 100,000) in 2014. Stockholm had previously announced that it would offer permanent residency to all Syrian applicants in 2013.

#### **4.2. EU Response – Critical assessment of different migration policies**

The conflicting responses of the EU's national governments to the crisis are symptoms of long-term difficulties with migration policies. As a result of disagreements at the national level over the past years and decades, common EU institutions in the areas of immigration and asylum are weak. In addition, the EU's migration, foreign, development and trade policies are not well coordinated. The existing asylum policies have not been properly implemented at the national level or enforced by the Commission. The situation is not going to improve without a much closer cooperation between the EU states. More generally, EU institutions and the member states should restart work on implementing the Lisbon Treaty provisions on common immigration and asylum policies. A number of specific policies can address the current crisis. The EU's dysfunctional asylum system, which is based on 28 national systems, needs to be reformed, including by allowing asylum applications from the countries of origin. Member states, assisted by EU-level institutions, need to return more failed asylum seekers to the countries of origin. Member states also need to continue supplying Frontex, the EU's external border agency, with personnel and equipment.

Abroad, measures should be aimed at stabilising the situation in the Middle East and North Africa in general and improving the situation of refugees and potential migrants in particular. In this regard, Turkey is the main partner in the Middle East. Member state funding for UN aid programmes in Lebanon and Jordan, and in Africa needs to be increased; this would have short-term effects in decreasing the propensity to move to Europe. The EU also needs a new deal between host countries and newcomers on the refugees' integration into European societies. This deal should be based on respect for constitutions of the member states and the Charter of Fundamental Rights of the EU.

It should be underlined that refugee crisis highlights larger – structural problem in Europe: **demography**. As European populations age and shrink, the continent urgently needs immigration. Yet many in Europe strongly oppose immigration, because it also means social change. In the long run, European countries cannot have economic prosperity, a high level of social security, and a population in which pensioners place a growing burden on the economically active. Europe's labor force must grow, which is reason why Europeans should stop treating migrants as a threat and start viewing them as an opportunity.

Next factors for migration into Europe are: political chaos in the Middle East and, more importantly, the extraordinarily huge income gaps between Europe and Africa. With globalization, the knowledge of these gaps as well as the practical means to bridge them by migrating to a rich country are more known and affordable than ever.

The situation with migration increases the influence the right-wing, often xenophobic, parties in Europe. Even when they do not participate in government their ideas and agenda are taken over by the center-right or centrist parties, as has happened in France, the Netherlands, Denmark and Sweden. Gradually, the entire political spectrum gets “infected”: anti-immigrant policies become mainstream.

The EU has no solution to migration crisis so far. The only approach that might begin to produce something that resembles a solution would be multilateral, not solely amongst EU members, but in including also the emitting countries from Africa.

## 5. Problem of Irregular Migrants

There are three fundamental problems which relate to the EU legal provisions on irregular migrants.

First, **there is no coherency in the EU migration policies in general**. Even when reviewing the individual legal provisions and policies related to the irregular migration, no clear strategic objectives can be identified. The logic behind the EU immigration policies is a contradictory one, especially the ones referring to criminal justice, labour market, foreign policies and development, gender equality.

The second problem arising from the legal framework relating to irregular migration is the continued **criminalisation of migration and migrants**. There are such provisions where migrants have been stigmatised as criminals, which only intensifies the distrust between the EU Member States and the migrants. This, in particular, refers to the “adoption of measures which stigmatise migrants, in the absence of a more thorough approach based on detailed guarantees of human rights”.

Hence the third, and fundamental weakness of the legal framework: **absence of human rights considerations** in the law and the policies in this area. Human rights protection has been placed second-ranking.

This means, there is no comprehensive migration policy in the EU. Instead, EU legal provision focus on specific issues related to migration and fail to perceive the migrants as human beings to whom human rights apply. Contradictions inherent to these policies and legal provisions hamper the regulation of migration and burden the protection of migrants’ interests, and those of third countries and EU Member States.

EU and its Member States “perceive migration as inherently undesired and, in many circumstance, threatening”. Many official documents of EU de facto criminalise migration. They use such terms as “illegal”, instead of “irregular” migration and they fail to clarify that irregular migrants are not criminals just because they have not regulated their status within an EU Member States.

Any person who has failed to enter a country in a regular way and who has not been subjected to an adequate verification at the border control has indeed entered the country illegally, but this does not make him a criminal.

Criminalisation and stigmatisation of migrants are evident in the human trafficking provisions. The language itself that has been used – “combating illegal migration”; “fighting of illegal migrants” – suggests the perception of migrants as criminals, not as human beings. Those wishing to avoid the negative connotation use such terms as “undocumented” or “irregular” migrants.

## 5.1. EU Legal Framework which relate to Irregular Migration

What is the EU legal framework relating to the irregular migrants coming from third countries into EU?

Despite voluminous EU-level legislation, the **Lisbon Treaty of 2009** clauses on common immigration and asylum policies (articles on 78, 79 and 80) remain largely aspirational (‘the European Union shall develop a common policy on asylum... and immigration’).

There is no common list of safe countries from which asylum applications are not accepted. As a separate issue, legal channels of coming to the EU are limited. The EU does not offer the possibility to apply for asylum in the country of origin, thus inviting asylum seekers to undertake dangerous journeys to, and through Europe with the aid of commercially operating human traffickers.

In order to reduce the irregular migration, to strengthen the border control and to manage the migration processes, pieces of EU regulation try to impact the factors which trigger the migrants to leave the countries of their origin.

The **Schengen Agreement** established an area where border controls between Member States were lifted. Border checks are carried out at the external Schengen borders, and countries lying along the external borders of the Schengen Area are obliged to implement these checks.

In regard to the external borders, EU supports its Member States in managing the border control and in providing a high and uniform level of control of persons and surveillance, as a precondition for the establishment of an area of freedom, security and justice. To this end, the **European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union “FRONTEX”** was established (**Regulation 2007/2004**). This regulation applies to any person crossing any border of the Member States.

In 2009, EU established the **Visa Code (Regulation 810/2009)**, which regulates the conditions and procedures for issuing visas for short stays and transit through Member States and associated members through the application of the Schengen Acquis. This code requires the third-country nationals to hold visas when crossing the external borders of EU, and nationals of some other countries to hold airport transit visas in order to pass through international areas of airports in Member States.

The **European Border Surveillance System “EUROSUR”** was established in 2011 and was commissioned on 02 December 2013. This system should reduce the number of irregular migrants entering EU, and should facilitate the Member States in responding swiftly to incidents caused by migrants without papers and to cross-border crimes. The system has introduced “National Coordination Centres” which require the competent authorities for border surveillance to coordinate their activities.

The **Dublin Rules (Dublin Regulation, No. 604/2013)**, in force since 19 July 2013, provide that EU Member States are responsible for the processing of asylum claims within EU, thereby preventing the “asylum shopping”, when an application is addressed to more than one EU Member State, or “asylum orbiting”, when none of the EU Member States wants to assume the responsibility for the processing of a particular asylum claim. The rule says that the responsibility lies with the first

Member State where the asylum seeker has entered the EU and where his fingerprints have been taken. If the asylum seeker claims an asylum in another EU Member State, he will be returned to the Member State where he first entered the EU. In regard to asylum seekers, the Dublin Rules impose great responsibility of Member States over the external borders of EU (such as Italy, Spain, Greece, Malta, etc.).

## 5.2. The Rights of Irregular Migrants during Return, including Detention

The issue of human rights seems to have been left aside in the political debates in EU, in a situation when there is no coherency, and criminalisation of migrants continues. EU human rights instruments consider the migrants to be of secondary importance, in a number of ways.

“A human being with his or her interests is central to the EU, and the Member States have a responsibility to protect the human rights of all those within their territory and jurisdiction. There is an individual and collective duty of EU states to protect persons moving across borders and it is incumbent on them to act and co-operate to achieve this purpose.” In practice, EU fails to implement such a protection of irregular migrants.

The “**Return Directive**” (Directive 2008/115/EC), in Article 13, provides that a third-country national may get his return decision suspended in due court proceedings, as a possibility, not necessarily as an automatic effect from the right to appeal. This means that an immigrant who had appealed the decision for his expulsion from an EU Member State could be doing it in vain because, once his expulsion is enforced, a possible court decision in his favour would produce no effect.

The lack of human rights protection also becomes evident in the constant support, in many aspects, of national jurisdictions, thus preventing the EU from having its own legislation and strictly its own rules. The general principles of EU, in many cases, are applied differently in the Member States, as they are granted the right of discretion to decide on such issues. As a result, in reality, several Member States refuse to provide protection for immigrants, especially for irregular immigrants, who are considered to be illegal in the sense that they may spell trouble.

**Detention** of migrants occurs as a consequence of both immigration and emigration and reflects the use of detention in both occurrences. Within the migration context, detention is ordered by either administrative or judicial authorities, for reason such as to establish identity, pending the processing of an immigration or asylum claim or for the purpose of enforcing an expulsion order. In some instances, detention is applied without any formal order.

Detention must not be arbitrary or unlawful, must have a legal basis in national law and must be used only when strictly necessary. Many rights groups contend that a number of migrant detention centers in Europe violate Article III of the European Convention on Human Rights, which prohibits inhuman or degrading treatment.

In recent years, the lines between criminal enforcement and immigration control have blurred in law and public discourse. For decades, courts and observers have documented and analyzed a wide



range of detention-related concerns, including mandatory and presumed custody, coercion and other due process violations, inadequate access to counsel, prolonged and indefinite custody, inadequate conditions of confinement, and violations of international law obligations. These concerns have rapidly proliferated - to the point where some commentators resist the very term “detention” in this context as sanitized and misleading, masking quasi-punitive circumstances that approximate “imprisonment.” There are a number of explicitly cases that detainees are - systematically and unnecessarily - held under circumstances inappropriate for immigration detention’s noncriminal purposes.

## 6. Fundamental Rights of Refugees

**Refugees** are persons who have left their country because of an armed conflict and a direct threat to their lives and property. Their situation has become unbearable and they move across the borders of their own country, they become internationally recognised as “refugees”, and they become eligible for assistance from other states, UNHCR and other international organisations.

Refugees are granted the fundamental rights that constitute an individual’s integrity and dignity, which are contained in the **Universal Declaration of Human Rights**. This refers to the following rights:

- freedom from torture or cruel, inhuman or degrading treatment or punishment;
- freedom from slavery;
- recognition as an individual in the law;
- freedom of opinion, conviction and religion;
- freedom from arbitrary arrest and detention;
- freedom from arbitrary interference with privacy, home and family life.

According to the **1951 Convention**, states must provide the following fundamental rights to refugees:

- non-refoulement;
- access to a fair and efficient asylum procedure;
- issuance of travel documents, etc.;
- prompt assistance or protection measures, if necessary;
- measures that will ensure the enforcement of their fundamental human rights, which will enable them to live a life in dignity and safety;
- facilitation in identifying a permanent solution (voluntary repatriation, local integration or a transfer to another country).

States have the primary responsibility to ensure the protection. Most important of all is the application of the non-refoulement principle, meaning that a refugee cannot be returned to the country of his origin. If refugees or asylum seekers are returned back to their countries of origin, their lives may be endangered.

The longer the refugees stay in the host country, the more of other rights they become entitled to. This refers to the following rights:

- not to be expelled, unless under well-established, strictly defined conditions (Article 32);
- not to be punished for their illegal entry into the territory of the Contracting State (Article 31);
- right to work (Article 17 and 19);
- right to housing (Article 21);
- right to education (Article 22);
- right to public relief and assistance (Article 23);
- freedom of religion (Article 4);
- right to access to courts (Article 16);
- freedom of movement within its territory (Article 26);
- right to be issued identity papers and travel documents (Article 27 and 28).

Refugees are required to respect the laws and regulations valid in the country of their asylum, and to adhere to the measures that have been taken for the preservation of the public order.

However, certain categories of persons are excluded from the right to be protected as refugees. This refers to persons who have been suspected of: a) committing crime against peace, war crimes, crimes against humanity; or b) have been found guilty for committing acts against the principles and aims of the United Nations.

It bears mentioning, however, that refugee protection under the 1951 Convention is not a permanent one. The refugee status is revoked once the refugee has been voluntarily repatriated to the country of his origin, or, has become integrated or naturalised in the host country of his current stay.

## **7. Misuse of Certain Institutes such as “Safe Third Country” Concept**

A State is not obliged to give refuge to a person even if he has established his refugee status. But, in addition to not returning him to his own State, he must not be sent to a third State if his life or freedom would there be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion (Article 33(1)). This is known as the principle of nonrefoulement. It applies even before a claim to refugee status has been verified, provided there is a

prima facie claim. The test is whether his life or freedom 'would' be threatened, and is thus an objective test, the refugee's perception not being so relevant. In the case of a political refugee, it may be necessary to determine whether the third State would be able to protect him from abduction or attack by agents of his own State.

This concept of »Safe Third Country« is used in the asylum procedure to transfer responsibility for the examination of an asylum request from the host country to another country considered to be »safe«, i.e. to be able to provide protection to asylum seekers and refugees. Such transfer of responsibility is subject to certain requirements following from international law (notably from the principle of non-refoulement).

A mass influx of refugees into a State can cause considerable problems, particularly as such movements tend to be into small or developing countries with limited resources. The 1967 UN General Assembly Declaration on Territorial Asylum provides that in order to safeguard the local population such refugees may be refused entry or, if already in the State, returned even if they may be persecuted. But the Declaration is not legally binding and an attempt to convert it into a treaty was unsuccessful. Yet, the Convention was written with mass movements in mind (Second World War refugees) and its limited exceptions to the prohibition on refoulement do not include situations of mass influx.

### **8.1. Application for refugee status**

The proposition that a refugee should make his claim in the first country at which he arrives is controversial and not supported by the Convention or other legal instruments. But the determination of refugee status should be made by the first State in whose territory the claim to refugee status is made. Every State is obliged to admit refugee claimants, this duty of admission flowing from the principle of non-refoulement, and is a key part of refugee law. The claim is often made at immigration control at an airport or seaport. The practice of a State declaring a 'migration zone' within its territory (only within which a person can apply for refuge), but leaving outlying areas of its territory outside the zone in an attempt to avoid the Convention applying in the zone, is not compatible with Convention obligations. However, it may be compatible with its obligations if the State makes provision for applications to be properly processed outside the zone, either in its territory or in a third State, and, if they are successful, admits the refugees into the zone. Once the claim has been made, the State should not require the claimant to leave while his application is pending.

A passport is prima facie proof of the nationality of the claimant, but is not conclusive. It is not necessary for a person claiming refugee status to have lawfully entered the State where he makes the claim (Article 31(1)). Used correctly, the term »irregular« immigrants means only that the persons have entered another State without the necessary advance permission, such as a visa. Many economic migrants fall into this category. Most refugees are quite unable to obtain a visa or other permission before entering the State of refuge. Embassies and consulates may refuse a visa or be inaccessible, and the Convention does not require States to process refugee applications abroad, although there is a growing trend to do this.

## 8.2. Fear of persecution

An applicant's fear of persecution will be well founded (i.e. real) if he establishes to a reasonable degree that if he were to return to his State it is likely that he would be persecuted. Fear being largely subjective, the applicant's perception will be important, but it must still be reasonable. So there must be some basis in fact that he, or other persons in his State who are in a like position, have been or are likely to be persecuted.

The persecution must be for reasons of race, religion, nationality, membership of a particular social group or political opinion, although a rigid line cannot be drawn between these categories, since often they overlap. The Convention does not define persecution, although it must amount to some significant form of ill-treatment, usually involving human rights abuses. The ill-treatment does not have to be physical. Discrimination in matters such as education or healthcare, if particularly severe and cumulative, may amount to persecution, but the threshold is high. The person would have to show that, because of his political opinions etc., the real purpose of a prosecution would be to persecute him or that, for the same reason, he would not get a fair trial or the sentence might be excessive.

Persecution for reasons of 'nationality' includes persecution of ethnic or linguistic groups. Being of a different political opinion to that of the government will, in itself, not be enough; the person would have to show that because of his opinions he has a real fear of persecution.

Persecution can also be done by a dominant minority, but States vary on whether fear of persecution by private persons is sufficient. This includes organisations as well as individuals who are not formally linked to the State, for example rebel armed forces and paramilitary groups. Some States regard private persecution as insufficient, and others only if the persecution is known to the authorities and they were unwilling or unable to provide protection.

## 8.3. Exceptions to refugee status

Article 1, Sections C to F, of the Convention list four cases where a person coming within the definition of refugee is nevertheless excluded from the protection of the Convention: he no longer needs protection (Section C); he is receiving protection and assistance from UN organs or agencies other than the UNHCR, for example the UN Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) (Section D); although not a national of his new State of residence, its authorities treat him as if he were one (Section E). Section F is rather different in that it lists, in the words of the UNHCR Handbook, 'persons not to be deserving of international protection'. A State is required not to treat a person as a refugee if there are 'serious reasons for considering' that:

(a) he has committed a crime against peace (aggression), a war crime or a crime against humanity;

(b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;

(c) he has been guilty of acts contrary to the purposes and principles of the United Nations.

To make it clear that persons involved in terrorism are not entitled to refugee status, in 1996 the UN General Assembly reaffirmed that terrorism, including knowingly financing, planning and inciting terrorist acts, is ‘contrary to the purposes and principles of the United Nations’, and that before recognising refugee status, States should ensure that the person has not participated in terrorist acts.

## 9. Does the new legal framework of EU adequately address the issue of human rights of refugees and irregular migrants?

The Common European Asylum System, which consists of several pieces of legislation, has a major weakness in the Dublin Regulation which determines the member state responsible for considering an application for asylum. The first member state in which an asylum seeker’s fingerprints are taken and stored is responsible for that person’s asylum claim. According to the Commission’s European Agenda on Migration from May 2015, the purpose of the common asylum package is ensure that all asylum applicants are treated ‘equally in an open and fair system’. The situation in which asylum seekers avoid registration in the first EU country they enter (Greece, or Italy, for example) and aim for a handful of EU countries out of the 28, shows that such a fair and open system does not exist in reality.

Yet, there are **some improvements** as to the ways in which EU addresses the issue of a greater and effective protection of human rights of irregular migrants.

In the **Return Directive (Directive 2008/115/EC)** some of the provision refer to human rights protection: the right of migrants to receive free legal assistance (at the request of the migrant, who should be informed of this opportunity, in a language he understands); the returning decision must include clarification of the reasons, both factual and legal; the prohibition to keep a migrant detained during the on-going procedure.

Another positive measure – the European Parliament has adopted a Regulation on surveillance rules within FRONTEX through joint coordinated operations. On 20 February 2014, the **European Parliament Committee on Civil Liberties, Justice and Home Affairs (LIBE)** adopted a provision laying down that units participating in FRONTEX operations should provide safety and dignity for the persons they are rescuing or preventing from reaching the desired destination. There is also an obligation to identify the vulnerable persons, such as victims of human trafficking or migrant children separated from their parents, who should be provided with adequate care.

**Directive 2011/36/EU on Preventing and Combating Trafficking in Human Beings and Protecting its Victims**, in force since 15 April 2011, mandatory to be transposed into national legislations of EU Member States by 06 April 2013 – is focused more on the protection of victims, as part of their human rights. It makes an explicit reference to the European and international human rights instruments. It has a more comprehensive approach, and in addition to combating the organised

crime, it also emphasises the protection of victims. Article 2(2) of this Directive includes an explicit provision for “position of vulnerability” and for non-criminalisation of persons who are subjected to human trafficking. In line with this is the provision that a judge may seize or confiscate a property in order to secure the financial resources for victims’ assistance and protection. This Directive promoted the civil society organisations, including NGOs, stating that Member States must work closely with them (in relation to their initiatives, information campaigns), on research, education and training, and monitoring and evaluation of the impact of these measures on combating the human trafficking.

However, some of these provisions are hard to implement in practice, considering that victims are placed in a vulnerable position, and the human traffickers in the position of having a real power over the victims. And because of lack of funds for NGOs and other organisations that should provide the assistance, the right to compensation, in practice, is reduced to a symbolic one.

Although it is undeniable that sanctions are imposed against human traffickers, it has to be made sure that the sanctions will not reflect negatively on the victims of the human trafficking. Moreover, it is important to monitor how this Directive is implemented by individual EU Member States, as not all of them have shown readiness to cooperate on this issue.

## 10. Conclusions

The following key conclusions can be drawn from what was presented in this lecture:

- States treat migrants according to their own immigration rules and procedures, while the refugees are treated in accordance with norms for refugee and asylum seeker protection as defined in both international law and in their national legislation. Refusal to admit a refugee or a migrant may inflict grave consequences on their lives and safety.
- In a situation of enormous number of refugees and migrants coming into EU countries, it is necessary to give priority to refugees coming from armed conflict zones, such as Syria and Iraq, rather than to economic migrants coming from a number of other countries. The Dublin Regulation should be adapted to newly arising conditions, in that it will require the Member States to register everyone arriving in their territory, along with the requirement to register the migrants/asylum seekers.
- There is no consistent framework for the current EU law and policies relating to irregular migration. There exists a form of criminalisation of irregular migrants, who are left behind, without an adequate human rights-based protection.
- The amendments that have been made to the EU legal framework over the past years have made some changes for the better, in acknowledging the fundamental human rights of migrants, especially in relation to migrant trafficking.
- The refugee crises in Europe imposes the need for EU to re-examine its asylum system in relation to irregular migration and in spirit of the Schengen Agreement. This becomes all the

more important in light of the terrorist attacks in France in November 2015, in Belgium in March 2016, etc.

- From a long-term perspective, EU should develop mechanism for integration of refugees, especially in the labour market, and seek ways to use the great inflow of refugees for the reduction of demographic crisis that has been experienced by EU countries.
- We believe that human rights should take a central position in the European migration policy. EU should build a coherent migration framework on all levels and in all context, without putting certain migrant groups in a privileged position. If human rights were underlying such a policy, Member States would be encouraged to treat all migrants, irregular ones included, with more respect, and this would make sure that the processes of border regulation and the enforcement of such a regulation are carried out in a way that protects the human dignity. However, such approach prerequisites a clearer and systemic European legal framework on migration in general, which is yet to be achieved. Thank you very much.