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THE RIGHT TO ASYLUM AND READMISSION IN THE EUROPEAN UNION LAW*

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Having in mind current significance of the issue of irregular migration in Europe, the author of the paper analyses international documents relevant to the creation of common minimum standards in the area of the right to asylum in the European Union (hereinafter: EU), as well as to the arrangement of the rights and obligations of the states in the cases of readmission. In that sense, the documents adopted by the United Nations, Council of Europe and EU relevant to the questions of asylum and readmission are presented in the paper with special focus on the Directives of the EU in this field. Since the Republic of Serbia is one of the countries that are facing the issue of migrants, asylum seekers and returnees upon the Readmission Agreement, certain amount of attention is also given to its international obligation regarding this matter. Finally, the author of the paper presents recommendations and suggestions for the improvement of current state in this area with the purpose to ensure the protection of the right to asylum as one of fundamental human rights on the one hand, as well as the fulfilment of international obligations derived from the Readmission Agreement on the other.

KEYWORDS: asylum / readmission / European Union / human rights / acquis

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1. INTRODUCTION – THE RIGHT TO ASYLUM

As Boed noticed in 1994, “*despite its long history and worldwide practice, the term "asylum" still awaits a universally accepted definition*“ (Boed, 1994: 3). More than two decades later, the situation seems to be similar, which triggers debates among legal experts and causes long-term consequences that affect both – asylum seekers as well as the states they are asking protection from. In spite of different interpretations of this right, there are some specific manifestations of state conduct that are commonly related to the right of asylum: 1) to admit a person to its territory; 2) to allow the person to sojourn there; 3) to refrain from expelling the person; 4) to refrain from extraditing the person; and 5) to refrain from prosecuting, punishing, or otherwise restricting the person's liberty (Clark, 1992:190). The right to asylum has three aspects. The first refers to the right of a state to grant asylum, which is well established in international law. It is derived from the principle that every sovereign state has an exclusive control over its territory and over persons present in its territory (Boed, 1994: 3). The second includes the right of an individual to seek asylum. It is an individual right that an asylum-seeker has *vis-à-vis* his state of origin. Essentially, it is the right of an individual to leave his country of residence in pursuit of asylum. (Boed, 1994: 6). The third aspect refers to a still rather disputable right of an individual to be granted asylum. Although there are some standpoints according to which an individual has the right to be granted an asylum (followed by corresponding duty of the state to grant him/her asylum), legal instruments dealing with human rights, asylum, and refugees suggest that an individual has no right to asylum enforceable in the state of refuge (Boed, 1994: 6).

2. THE RIGHT TO ASYLUM IN THE DOCUMENTS ADOPTED BY THE UNITED NATIONS

In its Article 14, the Universal Declaration of Human Rights adopted in 1948¹ recognizes the right of persons to seek asylum from persecution in other countries. However, the most important international document regulating this issue of universal scope of application is the Convention relating to the Status of Refugees, adopted in 1951². The former Yugoslavia had signed and ratified the Convention on 28 July 1951 and 15 December 1959³, whereas the Republic of

¹ Universal Declaration of Human Rights, adopted by General Assembly Resolution 217 A(III) of 10 December 1948, available at: <http://www.refworld.org/docid/3ae6b3712c.html>, accessed 24.08.2018.

² Convention Relating to the Status of Refugees, Geneva, 28 July 1951 United Nations Treaty Series, vol. 189, p.137, 22 April 1954, No. 2545, available at: <http://treaties.un.org/doc/Publication/UNTS/Volume%20189/v189.pdf>, accessed 24.08.2018.

³ Regulation on the Ratification of the Convention Relating to the Status of Refugees with the Final Act of the Conference of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Official Gazette of FNRJ – International Treaties and Other Agreements, No. 7/60.

Serbia became the party to the Convention as one of its successors on 12 March 2001⁴.

According to Article 1(A)(2) of the 1951 Convention, the term “refugee” applies to any person who ... as a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; 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 envisages a temporal and a geographic limitation – one being recognised as a refugee only in relation to events occurred in Europe and before 1 January 1951 (Madureira, 2016). As a post-Second World War instrument, the Convention was limited to persons fleeing the events that took place before 1 January 1951 in Europe (UNHCR, 2010: 2). Such limitations were removed with the adoption of the 1967 Protocol Relating to the Status of Refugees⁵. Apart from expanding the definition of a refugee, the Protocol obliges the States to act in accordance with the provisions of the 1951 Convention and to apply them to all persons covered by the refugee definition from Article 1, without limitation of date (UNHCR, 2010: 4).

The emphasis of the definition of “refugee” is on the protection from political or other forms of persecution (UNHCR, 2010: 3). But the term “persecution” is not defined in the 1951 Convention. Articles 31 and 33 refer to the persons whose life or freedom “was” or “would be” threatened, which implies that it includes the threat of death, torture, or cruel, inhuman or degrading treatment or punishment (Goodwin-Gill, 2008). Nonetheless, a refugee, according to the Convention, is also someone who is unable or unwilling to return to their country of origin due to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion (UNHCR, 2010: 3). The persecuted clearly do not enjoy the protection of their country of origin, while the evidence of the lack of protection on either the internal or external level may create a presumption as to the likelihood of persecution (Goodwin-Gill, 2008).

The 1951 Convention is based upon several fundamental principles, the most significant of which are: non-discrimination, non-penalization and non-refoulement (UNHCR, 2010: 3). The principle of non-refoulement provides that no one shall expel or return a refugee against his or her will, in any manner whatsoever, to a territory where he/she fears threats to life or freedom (UNHCR, 2010: 3). The Convention sets basic minimum standards for the treatment of

⁴ Convention relating to the Status of Refugees, Geneva, 28 July, 1951, status as at : 23-08-2018 05:00:31 EDT, available at: https://treaties.un.org/pages/ViewDetailsII.aspx?src=TREATY&mtdsg_no=V-2&chapter=5&Temp=mtdsg2&clang=_en#2, accessed 24.08.2018.

⁵ Protocol Relating to the Status of Refugees, United Nations Treaty Series, vol. 606, p. 267, available at: <http://www.refworld.org/docid/3ae6b3ae4.html>, accessed: 24.08.2018.

refugees, but the states are free to grant them a more favourable treatment. These rights include: access to the courts, to primary education, to work, and the provision for documentation, including a refugee travel document (UNHCR, 2010: 3)

3. THE RIGHT TO ASYLUM IN DOCUMENTS ADOPTED BY THE COUNCIL OF EUROPE

The Convention for the Protection of Human Rights and Fundamental Freedoms, (also known as the European Convention on Human Rights)⁶ (hereinafter: ECHR), adopted in 1950 and in force since 1953, contains provisions relevant to the status of refugees and asylum seekers. Article 1 of the ECHR requires the states to “secure” the Convention rights to “everyone within their jurisdiction”. Under Article 1 of the ECHR, a state party to the ECHR is responsible for all acts and omissions of its organs regardless of whether the act or omission in question was a consequence of domestic law or of the necessity to comply with international legal obligations (European Union Agency for Fundamental Rights, 2014: 16).

The European Social Charter (adopted in 1961⁷ and revised in 1996⁸), (hereinafter: ESC) supplements the ECHR and represents a key reference for European human rights law in the area of economic and social rights. The Charter proclaims fundamental rights and freedoms and institutes a supervisory mechanism based on a reporting procedure and a collective complaints procedure, guaranteeing the respect of ESC rights by state parties. The ESC encompasses a corpus of rights that include housing, health, education, employment, social protection, the free movement of individuals and non-discrimination. Although the ESC’s protection for migrants is not based on the principle of reciprocity, its provisions apply at the outset only to nationals of Member States that have ratified the ESC and who are migrants in other Member States that have also ratified the ESC.

4. THE RIGHT TO ASYLUM IN THE EU – COMMON EUROPEAN ASYLUM SYSTEM

The EU has been working on the establishment of a Common European Asylum System (hereinafter: CEAS) and improving the legislative framework dedicated

⁶ European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, adopted by the Council of Europe on 4 November 1950, ETS 5, available at: <http://www.refworld.org/docid/3ae6b3b04.html>, accessed: 24.08.2018.

⁷ European Social Charter, Council of Europe, COETS 1 (18 October 1961), available at: <http://www.worldlii.org/int/other/COETS/1961/1.html>, accessed 25.08.2018.

⁸ European Social Charter (revised), Council of Europe, 3 May 1996, ETS 163, available at: <https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/090000168007cf93>, accessed 25.08.2018.

to that issue since special meeting in Tampere in 1999,⁹ when the leaders of the EU produced a list of over sixty points, giving special attention to asylum and migration. It was agreed that a common EU policy in that field would be based on: 1) partnership with countries of origin, 2) CEAS, 3) fair treatment of third country nationals and 4) management of migration flows.¹⁰ Accordingly, a series of legislative acts have been adopted with the aim to harmonise common minimum standards for asylum. The financial solidarity in this area was strengthened through founding of the European Refugee Fund that co-finances: 1) improvements of reception, accommodation, infrastructures or services, structures and training to ensure access to asylum procedures, 2) legal and social assistance for asylum seekers and refugees, 3) measures to support the empowerment of and acquisition of skills by refugees, including language training, resettlement or relocation operations, etc.¹¹

*The Temporary Protection Directive*¹², adopted in 2001 allowed for a common EU response to a mass influx of displaced persons unable to return to their country of origin¹³. Its aim is to establish minimum standards for giving temporary protection in the event of a mass influx of displaced persons from third countries who are unable to return to their country of origin and to promote a balance of effort between Member States in receiving and bearing the consequences of receiving such persons (Article 1). For the purposes of the Directive the term “temporary protection” refers to a procedure of exceptional character to provide, in the event of a mass influx or imminent mass influx of displaced persons from third countries who are unable to return to their country of origin, immediate and temporary protection to such persons (Article 2).

According to the Directive, the term “displaced persons” includes third-country nationals or stateless persons who have had to leave their country or region of origin, or have been evacuated, in particular in response to an appeal by international organisations, and are unable to return in safe and durable conditions because of the situation prevailing in that country, who may fall within the scope of Article 1A of the Geneva Convention or other international or national instruments giving international protection, in particular: 1) persons who have fled areas of armed conflict or endemic violence; 2) persons at serious risk of, or who have been the victims of, systematic or generalised violations of

⁹ European Parliament, Tampere European Council 15 and 16 October 1999, Presidency Conclusions, available at: http://www.europarl.europa.eu/summits/tam_en.htm, accessed 27.08.2018.

¹⁰ A Common EU Asylum and Migration Policy, available at:

http://www.europarl.europa.eu/summits/tam_en.htm#a, accessed 27.08.2018.

¹¹ European Commission, Refugee Fund, available at: https://ec.europa.eu/home-affairs/financing/fundings/migration-asylum-borders/refugee-fund_en, accessed 25.08.2018.

¹² Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, Official Journal of the European Communities, L 212/12, 07.8.2001, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:212:0012:0023:EN:PDF>, accessed 25.08.2018.

¹³ European Commission, Temporary Protection, available at: <https://ec.europa.eu/home-affairs/what-we-do/policies/asylum/temporary-protection>, accessed 25.08.2018.

their human rights. Moreover, the term “refugees” comprises third-country nationals or stateless persons within the meaning of Article 1A of the Geneva Convention (Article 2); The Directive defines the decision-making procedure needed to trigger, extend or end temporary protection. It prescribes harmonised rights for the persons who are given temporary protection, including a residence permit for the entire duration of the protection (which can last from one year to three years) (Article 4), appropriate information on temporary protection, access to residence permit (Article 8), employment (Article 12), accommodation or housing, social welfare or means of subsistence, access to medical treatment (Article 13), education for minors (Article 14), opportunities for families to reunite in certain circumstances (Article 15), and guarantees for access to the normal asylum procedure (Articles 17-19). The Directive contains provisions for the return of displaced persons to their country of origin (Articles 20-23) and for excluding individuals who have committed serious crimes or who pose a threat to security from the benefit of temporary protection (Article 28). Special provisions regulate the rights of unaccompanied minors (Article 16) and for those having undergone particularly traumatic experiences (Article 13, Paragraph 4). Solidarity (Articles 24-26) and administrative cooperation (Article 27) among the Member States receiving refugees are also promoted in the Directive.

*The Family Reunification Directive*¹⁴, adopted in 2003 determines the conditions for the exercise of the right to family reunification by third country nationals residing lawfully in the territory of the Member States (Article 1). It also refers to refugees¹⁵, which it defines in accordance with the Geneva Convention and its additional Protocol and, as such, is relevant for these issues. The term “sponsor” is used for a third country national residing lawfully in a Member State and applying or whose family members apply for family reunification to be joined with him/her (Article 2). “Family reunification” means the entry into and residence in a Member State by family members of a third country national residing lawfully in that Member State in order to preserve the family unit, whether the family relationship arose before or after the resident’s entry. The Directive sets minimal standards, but the Member States are free to apply more favourable provisions (Article 3). It also regulates the process of submission and examination of the application (Chapter 3), the requirements for the exercise of the right to family reunification (Chapter 4), the procedure of family reunification (Chapter 5) and entry and residence of family members (Chapter 6), whereas withdrawal or refusal of residence permit as well as penalties for the persons who abuse the rights prescribed by the Directive are regulated in a separate chapter (Chapter 7).

¹⁴ Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, Official Journal L 251, 03.10.2003., available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32003L0086&from=en>, accessed 26.08.2018.

¹⁵ European Commission, Family Reunification, available at: https://ec.europa.eu/home-affairs/what-we-do/policies/legal-migration/family-reunification_en, accessed: 26.08.2018.

*The Hague Programme: Strengthening Freedom, Security and Justice in the EU*¹⁶ was adopted in 2004. It is aimed at improving the ability of the EU to guarantee fundamental rights, minimum procedural protection and access to justice, to provide protection in accordance with the Geneva Convention on Refugees and other international treaties to persons in need, to manage migration flows and to control the external borders of the Union, to fight against the international organized crime and to repress the threat of terrorism, to fully use the potential of Europol and Eurojust, to improve the mutual recognition of judicial decisions and certificates in civil and criminal matters, as well as to eliminate obstacles in litigation in civil and family matters with cross-border implication.

*Green Paper on the future CEAS*¹⁷, adopted in 2007 emphasised the pressing need for increased solidarity in the area of asylum, so as to ensure that responsibility for processing asylum applications and granting protection in the EU is shared equitably. It prescribes several legal instruments relevant to this issue, including: 1) processing of asylum applications, 2) reception conditions for asylum seekers, 3) granting of protection and 4) cross cutting issues such as: appropriate response to situations of vulnerability, integration and ensuring second stage instruments are comprehensive. The Paper introduces a set of measures, such as enlarging the circle of stakeholders involved in the exchange of good practices, capacity-building and training activities and the development of guidelines and to engaging the whole range of stakeholders etc. The Paper insists on the distribution of responsibility and financial solidarity between the Member States.

*Commission's Policy Plan on Asylum*¹⁸, presented in 2008 provides the road-map for completing the second phase of the CEAS. It is based on a three-pronged strategy that focuses on the harmonisation of protection standards, practical cooperation and solidarity. According to the Plan, three pillars underpin the development of the CEAS: 1) bringing more harmonisation to standards of protection by further aligning the EU States' asylum legislation; 2) effective and well-supported practical cooperation; 3) increased solidarity and sense of responsibility among EU States, and between the EU and non-EU countries.

¹⁶ The Hague Programme: Strengthening Freedom, Security and Justice in the European Union, Council of

the European Union, Brussels, 13 December 2004, 16054/04, JAI 559, available at: <http://www.mvcr.cz/mvcren/file/the-hague-programme.aspx>, accessed 27.08.2018.

¹⁷ Green Paper on the future Common European Asylum System, COM (2007) 301 final, 6 June 2007, available at: <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2007:0301:FIN:EN:HTML>, accessed 27.08.2018.

¹⁸ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 17 June 2008 – Policy Plan on Asylum: An integrated approach to protection across the EU [COM(2008) 360 final, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=LEGISSUM:jlo002&from=GA>, accessed 27.08.2018.

Current *acquis* relevant to the issues of asylum and migration set out common high standards and stronger co-operation to ensure that asylum seekers are treated equally in an open and fair system¹⁹. It includes the revised: 1) Asylum Procedures Directive²⁰, 2) Reception Conditions Directive²¹, 3) Qualification Directive²², 4) Dublin Regulation²³ and 5) EURODAC Regulation²⁴

The revised Asylum Procedures Directive, adopted in 2013, was supposed to be transposed into Member States' national legislations by July 2015. It repealed Council Directive 2005/85/CE on minimum standards on procedures in Member States for granting and withdrawing refugee status²⁵. This Directive establishes a comprehensible system the aim of which is to guarantee that decisions on applications for international protection are taken more efficiently and more fairly. These goals are to be achieved by: 1) setting clear rules for lodging applications, 2) making sure that every person who wants to ask for international protection can do so quickly and effectively, 3) setting a time-limit

¹⁹ European Commission, Migration and Home Affairs, Common European Asylum System, available at: https://ec.europa.eu/home-affairs/what-we-do/policies/asylum_en, accessed 27.08.2018.

²⁰ 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 (recast), Official Journal of the European Union L 180/60, 29.06.2013., available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013L0032&from=en>, accessed 27.08.2018.

²¹ 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, Official Journal of the European Union, L 180/96, 29.06.2013., available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32013L0033&from=EN>, accessed 27.08.2018.

²² 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, Official Journal of the European Union, L 337/9, 20.12.2011., available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32011L0095&from=EN>, accessed 27.08.2018.

²³ 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, Official Journal of the European Union L 180, 29.6.2013, available at: <https://eur-lex.europa.eu/legal-content/EN/ALL/?jsessionid=jHNlTp3HLjqw8mqGbQSpZh1VWpjCyVQq14Hgcztw4pbfSQZffnrn!557467765?uri=CELEX:32013R0604>, accessed 28.08.2018.

²⁴ 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, Official Journal of the European Union, L 180, 29.6.2013., available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32013R0603&from=en>, accessed 28.08.2018.

²⁵ Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, Official Journal of the European Union L 326/13, 13.12.2005, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32005L0085&from=EN>, accessed 27.08.2018.

for the examination of applications (around six months at the administrative stage), while allowing the acceleration of the procedure in the cases of applications that are likely to be unfounded, 4) training decision makers and ensuring access to legal assistance; 5) providing adequate support to the persons in need of special guarantees because of their age, disability, illness etc. and 6) providing for clearer rules on appeals in front of courts or tribunals.²⁶ The Directive is designed to contribute to a fairer, quicker and better quality procedure on making asylum decisions. In the context of human rights protection, it is particularly worth emphasising that the Directive allows the asylum seekers with special needs to receive the necessary support to explain their claim and provides greater protection of unaccompanied minors and victims of torture²⁷

The revised Reception Conditions Directive, adopted in 2013, replaced Council Directive 2003/9/CE on minimum standards for the reception of asylum seekers²⁸ and deadline for its transposition into national law was 20 July 2015. The purpose of the Directive is to guarantee better and more harmonized standards of reception conditions in the Union. It also ensures that applicants are given the access to: housing, food, clothing, health care, education for minors and access to employment under certain conditions. Moreover, the Directive takes into consideration the specific needs of vulnerable persons such as unaccompanied minors and the victims of torture. Therefore, Member States are obliged to estimate, in each individual case whether there are special reception needs of vulnerable persons and to enable the vulnerable asylum seekers to have the access to medical and psychological support. It also contains the rules that regulate the detention of asylum seekers, making sure that their human rights are completely respected²⁹.

The revised Qualification Directive, adopted in 2011, amends Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted³⁰. It establishes criteria for applicants to qualify for refugee status or subsidiary protection and defines the rights given to beneficiaries of these

²⁶ European Commission, Asylum Procedures, available at: https://ec.europa.eu/home-affairs/what-we-do/policies/asylum/common-procedures_en, accessed 27.08.2018.

²⁷ A Common EU Asylum and Migration Policy, available at: http://www.europarl.europa.eu/summits/tam_en.htm#a, accessed 27.08.2018.

²⁸ Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers Official Journal L 031 , 06.02.2003., available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32003L0009&from=EN>, accessed 27.08.2018.

²⁹ European Commission, Migration and Home Affairs, Reception conditions, available at: https://ec.europa.eu/home-affairs/what-we-do/policies/asylum/reception-conditions_en, 27.08.2018.

³⁰ Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, Official Journal of the European Union, L 304/12, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32004L0083&from=en>, accessed 27.08.2018.

statuses. It also contains the provisions on: the protection from refoulement, residence permits, travel documents, access to employment, access to education, social welfare, healthcare, access to accommodation, access to integration facilities and the provisions relevant to children and vulnerable persons. The standards set out in the Directive represent minimum standards, but the Member States are free to adopt or maintain more favourable ones. The key purpose of the Directive is to make sure that the persons escaping from persecution, armed conflicts and torture are treated fairly, in a uniform manner throughout the EU. In order to achieve these goals, the Directive obliges Member States to apply the following measures: 1) clarifying the grounds for granting and withdrawing international protection, 2) regulating exclusion and cessation grounds, 3) improving the access of beneficiaries of international protection to rights and integration measures, 4) considering specific practical difficulties that the beneficiaries of international protection are faced with, 5) ensuring that the best interest of the child and other gender-related aspects are taken into account in the assessment of asylum applications and in the implementation of the rules on the content of international protection³¹.

The revised Dublin Regulation establishes the Member State responsible for the examination of the asylum application. The criteria for establishing responsibility include (in hierarchical order) the circumstances that vary from family considerations, to recent possession of visa or residence permit in a Member State, to whether the applicant has entered EU irregularly, or regularly. The Dublin III Directive, which is currently in force, entered into force in July 2013 and it contains comprehensive procedures for the protection of asylum applicants. It improves the system's efficiency through: 1) an early warning, readiness and crisis management mechanism, designed to address the key reasons of problems emerging in national asylum systems or due to particular pressures; 2) protecting the applicants by prescribing a compulsory personal interview, guarantees for minors and extended possibilities of reunifying them with relatives; 3) the possibility for appeals to suspend the execution of the transfer for the period when the appeal is judged, together with the guarantee of the right for a person to remain on the territory pending the decision of a court; 4) the obligation to provide for free legal assistance upon request; 5) a single ground for detention if there is the risk of escaping and strict limitation of detention's duration; 6) the possibility for asylum seekers that could in some cases be considered irregular migrants and returned under the Return Directive, to be treated under the Dublin procedure which gives these persons more protection than the Return Directive; 7) the obligation to guarantee the right to appeal against transfer decision; 8) clearer procedures between Member States. The procedure conducted under the Dublin Directive cannot last longer than 11

³¹ European Commission, Migration and Home Affairs, Who qualifies for international protection, available at: https://ec.europa.eu/home-affairs/what-we-do/policies/asylum/refugee-status_en, accessed 27.08.2018.

months to take charge of a person, or 9 months to take him/her back (apart from the cases of escaping or imprisonment).³²

The revised EURODAC³³ Regulation replaced the Council Regulation (EC) No 2725/2000 of 11 December 2000 concerning the establishment of “Eurodac” for the comparison of fingerprints for the effective application of the Dublin Convention³⁴ and the Council Regulation (EC) No 407/2002 of 28 February 2002 laying down certain rules to implement Regulation (EC) No 2725/2000 concerning the establishment of “Eurodac” for the comparison of fingerprints for the effective application of the Dublin Convention³⁵. The directive allows the access to the EU database of the fingerprints of asylum seekers under strictly limited circumstances in order to prevent, detect or investigate the most serious crimes, such as murder, and terrorism.

5. EUROPEAN UNION READMISSION AGREEMENTS

It has been estimated that between 400.000 and 500.000 foreign nationals per year are ordered to leave the EU due to the fact that they have entered or are staying there irregularly. But, around 40% of them are returned to their home country or to the country from which they have come to the EU.³⁶ The aforementioned confirms the necessity of a prompt and adequate response to challenges related to these issues, especially when it comes to human rights protection of the returnees. That is the reason why the EU adopted the common rules on return also known as the Return Directive³⁷ in 2008. This Directive which, came into force in 2010, establishes common rules for return and

³² European Commission, Migration and Home Affairs, Country responsible for asylum application (Dublin), available at: https://ec.europa.eu/home-affairs/what-we-do/policies/asylum/examination-of-applicants_en, accessed 28.07.2018.

³³ EUODAC is a biometric database in which Member States are required to enter the fingerprint data of asylum-seekers in order to identify where they entered the EU. Established in 2000 and reviewed in 2013, its main purpose is to facilitate the application of the Dublin Regulation (Orav, 2017).

³⁴ Council Regulation (EC) No 2725/2000 of 11 December 2000 concerning the establishment of “Eurodac” for the comparison of fingerprints for the effective application of the Dublin Convention, Official Journal of the European Communities, L 316, 15.12.2000., available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2000.316.01.0001.01.ENG&toc=OJ:L:2000:316:TOC, accessed 28.08.2018.

³⁵ Council Regulation (EC) No 407/2002 of 28 February 2002 laying down certain rules to implement Regulation (EC) No 2725/2000 concerning the establishment of “Eurodac” for the comparison of fingerprints for the effective application of the Dublin Convention, Official Journal of the European Communities, L 62, 05.03.2002, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32002R0407&from=EN>, accessed 28.08.2018.

³⁶ European Commission, Migration and Home Affairs, Return and Readmission, available at: https://ec.europa.eu/home-affairs/what-we-do/policies/irregular-migration-return-policy/return-readmission_en, accessed 28.08.2018.

³⁷ 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, Official Journal of the European Union L 348/98, 24.12.2008., available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:348:0098:0107:EN:PDF>, accessed 28.08.2018.

removal of the irregularly staying migrants, the use of coercive measures, detention and re-entry, while fully respecting the human rights and fundamental freedoms. The Directive has been transposed into national law by all States bound by it (all EU States except UK and Ireland; plus: Switzerland, Norway, Iceland and Liechtenstein)³⁸. It requires a fair and transparent procedure for decisions on the return of irregular migrants and obliges the Member States either to return irregular migrants or to grant them legal status. It promotes the principle of voluntary departure by prescribing that a "period for voluntary departure" should normally be granted. The Directive also provides a minimum set of basic rights to persons residing irregularly and waiting for the removal, including health care and children's education. It sets a limit on the use of coercive measures in the situations such as the removal of persons and ensures that these measures, if applied, are not excessive or disproportionate. This document also insists on providing for an entry ban that would be valid throughout the EU for migrants returned by an EU State. Finally, it limits the use of detention, binding it to the principle of proportionality and establishing minimum safeguards for detainees, which is of particular importance in the context of human rights protection.³⁹

In order to resolve the issues of readmission, The Council has adopted 21 negotiating directives on the conclusion of readmission agreements between the EU and partner countries and 17 EU readmission agreements have already entered into force (Lilienkamp, Saliba, 2015: 4). The competence to conclude EURAs on the level of the EU is integrated in Article 79 (3) of the Treaty on the Functioning of the EU⁴⁰ (Wild, 2016: 1). The Council authorises the Commission to open negotiations on these agreements with partner countries. Once negotiations are completed, the EURA must receive the European Parliament's consent before it can be concluded. Once in force, the EURA is monitored by a Joint Readmission Committee (JRC) comprising experts and representatives from the EU Member States and the partner country, and co-chaired by the Commission and the partner country (Lilienkamp, Saliba, 2015: 3). The partner countries are usually granted visa facilitation and other incentives such as financial support for implementing the agreement or special trade conditions in exchange for readmitting people irregularly residing in the EU (Lilienkamp, Saliba, 2015: 1).

EURAs are considered key instruments establishing cooperation between the EU and third countries for expelling irregular third-country nationals (Carreara, 2016: 1). They are based on reciprocal obligations and are concluded between the EU and non-EU countries to facilitate the return of people residing irregularly in

³⁸ European Commission, Migration and Home Affairs, Return and Readmission, available at: https://ec.europa.eu/home-affairs/what-we-do/policies/irregular-migration-return-policy/return-readmission_en, accessed 28.08.2018.

³⁹ *Ibid.*

⁴⁰ Consolidated version of the Treaty on the Functioning of the European Union, Official Journal C 326, 26.10.2012., available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12012E/TXT&from=EN>, accessed 28.08.2018.

one country to the country of their origin or to a country of transit. These agreements are applied together with and take precedence over bilateral readmission agreements between individual EU Member States and non-EU countries (Lilienkamp, Saliba, 2015: 3). Namely, there are significant differences between Member States when it comes to cooperating in on readmission, probably due to the variety of types of flows affecting their respective national territories (Cassarino, 2010: 24). However recommended by the European Commission, a majority of Member States do not apply readmission agreements on the European level for all their returns but adapt national agreements and administrative procedures. Alongside with official readmission agreements, some Member States fell back on a broader framework of *non-official* or *non-standard* agreements and cooperation on a bilateral basis (such as: police agreements or economic partnerships including a readmission phrase), providing a flexible response to various challenges and can be easily renegotiated (Wild, 2016: 2).

6. THE OBLIGATIONS OF THE REPUBLIC OF SERBIA ACCORDING TO READMISSION AGREEMENTS

The agreement on readmission between Serbia and the EU⁴¹, which foresees the return of Serbian citizens from European countries to their home country, was signed on 18 September 2007, the National Assembly ratified it in November 2007⁴² and it came into force on 1 January 2008 (EUR-Lex 2007b). In February 2009 the Government of the Republic of Serbia adopted Strategy of Reintegration of the Returnees based on the Readmission Agreement, which defined the institutional framework, measures, activities and stakeholders for the sustainable reintegration of returnees⁴³. Under the terms of the readmission agreement, Serbia accepted the obligations relating to the return of its citizens, third country nationals and stateless persons. The signing of this agreement, as a condition for Serbia's further progress in the EU accession process and respect for European standards protecting migrants' rights, accelerated the return process of the persons who enjoyed temporary protection (Vuković 2009: 569).

In accordance with the Readmission Agreement, Serbia accepted to readmit any person who does not, or who no longer, fulfils the conditions in force for entry to, presence in, or residence on, the territory of the Requesting Member State provided that it is proved, or may be validly assumed on the basis of *prima facie*

⁴¹ Agreement between the European Community and the Republic of Serbia on the Readmission of Persons Residing Without Authorization, Official Journal of the European Union L334, 19.12.2007., available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32007D0819&from=EN>, accessed 28.08.2108.

⁴² Law on Ratification on the Agreement between the European Community and the Republic of Serbia on the Readmission of Persons Residing without Authorization, Official Gazette of RS – International Agreements, No. 103/2007.

⁴³ Strategy of Reintegration of the Returnees based on the Readmission Agreement, Official Gazette of RS No. 15/2009.

evidence furnished, that such a person is a national of Serbia (Article 2, Paragraph 1). Serbia also agreed to readmit minor or unmarried children of these persons regardless of their place of birth or their nationality, unless they have an independent right of residence in the Requesting Member State, spouses, holding another nationality, of the persons mentioned in paragraph 1, provided they have the right to enter and stay or receive the right to enter and stay in the territory of Serbia, unless they have an independent right of residence in the Requesting Member State (Article 2, Paragraph 2). Also, Serbia is obliged to readmit persons who have renounced the nationality of Serbia since entering the territory of a Member State, unless such persons have at least been promised naturalisation by that Member State.

When it comes to the readmission of third-country nationals and stateless persons, Serbia has the obligation to readmit: all third-country nationals or stateless persons who do not, or who no longer, fulfil the legal conditions in force for entry to, presence in, or residence on, the territory of the Requesting Member State provided that it is proved, or may be validly assumed on the basis of prima facie evidence furnished, that such persons: 1) hold, or at the time of entry held, a valid visa or residence permit issued by Serbia; or 2) illegally and directly entered the territory of the Member States after having stayed on, or transited through, the territory of Serbia (Article 3, Paragraph 1)⁴⁴ and former nationals of the Socialist Federal Republic of Yugoslavia who have acquired no other nationality and whose place of birth and place of permanent residence on 27 April 1992, was in the territory of Serbia (Article 3, Paragraph 3).

It appears that the readmission process was accompanied by extensive rejections of asylum applications submitted by the citizens of Serbia. Moreover, it has been frequently conducted under very difficult circumstances, in the form of “voluntary” return or deportation including the application of measures which in some cases represented human rights violations (Vujadinović *et al.*, 2013: 61).

CONCLUSION

Massive and uncontrolled arrival of migrants and asylum seekers has raised doubts over the efficiency of many EU Member States’ asylum systems and shaken the credibility of the CEAS. The number and frequency of arrivals has revealed the weaknesses of the Dublin System, which establishes the Member State responsible for examining an asylum application based primarily on the

⁴⁴ The readmission obligation in paragraph is not applied if: 1) the third country national or stateless person has only been in airside transit via an International Airport of Serbia; or 2) the Requesting Member State has issued to the third country national or stateless person a visa or residence permit before or after entering its territory unless: that person is in possession of a visa or residence permit, issued by Serbia, which expires later, or the visa or residence permit issued by the Requesting Member State has been obtained by using forged or falsified documents, or by making false statements, and the person concerned has stayed on, or transited through, the territory of Serbia, or that person fails to observe any condition attached to the visa and that person has stayed on, or transited through, the territory of Serbia (Article 2, Paragraph 2).

first point of irregular entry. That is the reason why the revision and replacement of current asylum instruments is proposed by the Commission in order to facilitate the management of migration flows and offer adequate human rights protection in accordance with the principles of the European Agenda for Migration⁴⁵. The Commission's proposal from 2016 was based on the relocation of refugees throughout the different countries of the Union, breaking with the Dublin III model. The European Parliament has been even more ambitious by establishing solidarity between states as the cornerstone of the new procedure.⁴⁶

The European Agenda on Migration⁴⁷, adopted by the European Commission in May 2015, suggests that EU expulsions system seems to be “ineffective” in view of the rates of successful returns of third-country nationals given a removal order. In order to respond to this problems, the Agenda emphasised that third countries should complete their international obligation to take back their own nationals residing irregularly in Europe, especially in the context of readmission instruments (Carrera, 2016: 7). However, it should be noted that an effective and humane return policy represents a necessary part of a comprehensive migration policy and does not contradict a more open migration policy.

Moreover, it seems that ensuring the return of irregular migrants actually is essential in order to enhance the credibility of policies in the field of international protection and legal migration.⁴⁸ However, it should be noted that the European Parliament (EP) has raised concerns that EURAs do not provide sufficient human-rights safeguards to ensure the protection of returnees at all times. (Lilienkamp, Saliba, 2015: 1). Namely, practice shows that there are no clear mechanisms to ensure that the human rights of returnees are fully respected at all times. For example, in December 2014, a study published by the Swiss Federal Commission on Migration raised concerns that even with partnership support, the protection capacity of countries of origin and their respect for human rights might not be sufficiently well grounded to safeguard the rights of returning migrants (Zetter, 2014: 65). That is the reason why premature returns should be avoided. To conclude, in the cases of forced migration (return), it is essential to provide good governance and full respect for human rights. To meet the challenges of contemporary humanitarian crisis, it is

⁴⁵ Towards a reform of the CEAS: Dublin IV Regulation Proposal, available at: https://ec.europa.eu/home-affairs/what-we-do/policies/asylum/examination-of-applicants_en, accessed 28.08.2018.

⁴⁶ European Commission - Press release Towards a sustainable and fair Common European Asylum System Brussels, 4 May 2016, available at: http://europa.eu/rapid/press-release_IP-16-1620_en.htm, accessed 28.08.2018.

⁴⁷ 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, Brussels, 13.05.2015. COM(2015) 240 final, available at: https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/background-information/docs/communication_on_the_european_agenda_on_migration_en.pdf, accessed 28.08.2018.

⁴⁸ European Commission, Migration and Home Affairs, Return and Readmission, available at: https://ec.europa.eu/home-affairs/what-we-do/policies/irregular-migration-return-policy/return-readmission_en, accessed 28.08.2018.

necessary to reinforce but also to transcend current legislative frameworks of protection and reframe present perception of the concepts of forced migration and protection by addressing these issues within a wider policy framework (Zetter, 2015: 24).

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PRAVO NA AZIL I READMISIJA U PRAVU EVROPSKE UNIJE

Imajući u vidu trenutni značaj problematike iregularnih migracija u Evropi, autor u radu analizira međunarodne dokumente relevantne za formiranje zajedničkih minimalnih standarda u oblasti prava na azil u Evropskoj uniji, kao i za uređenje prava i obaveza država u slučajevima readmisije. U tom smislu, u radu su predstavljeni dokumenti usvojeni od strane Ujedinjenih nacija, Saveta Evrope i Evropske unije relevantni za pitanje azila i readmisije, sa posebnim fokusom na direktive Evropske unije u toj oblasti. Budući da je Republika Srbija jedna od zemalja koja se suočava sa problemom migranata, odnosno azilanata i povratnika po osnovu Sporazuma o readmisiji, određena pažnja posvećena je njenim međunarodnim obavezama u toj sferi. Konačno, u radu su iznete preporuke i sugestije za unapređenje postojećeg stanja u toj oblasti u cilju obezbeđenja zaštite prava na azil kao jednog od osnovnih ljudskih prava sa jedne strane i ispunjenja međunarodnih obaveza po osnovu Sporazuma o readmisiji sa druge.

KLJUČNE REČI: azil / readmisija / Evropska unija / ljudska prava