

## 2 LEGISLATION AS A CATALYST OF IRREGULAR MIGRATION

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### 2.1 INTRODUCTION, HYPOTHESIS, METHODOLOGICAL BASIS

European history has been the story of emigration up until the middle of the 20th century – at least from a migrative point of view. However, this tendency was reversed in the middle of the last century, and migration affects the European continent much more as a target, instead of a source region.<sup>1</sup> This tendency was mounted by an irregular migration movement, which had been accelerating from 2010, but did not reach the territory of Europe in a spectacular way until the last two years, when it far exceeded the usual level of the previous years.<sup>2</sup> Irregular migration as a social phenomenon has created heretofore unseen challenges for the European Union and its Member States.<sup>3</sup> At the same time, we

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1 WETZEL, Tamás: *A bevándorlás kérdése Magyarországon (The Issue of Immigration in Hungary)*. PhD dissertation, Doctoral School of the Pázmány Péter Catholic University, Faculty of Law and Political Science, 2009. p. 2. <<https://jak.ppke.hu/uploads/articles/12332/file/Wetzel%20Tam%C3%A1s%20PhD.pdf>> (downloaded: September 5, 2016).

2 According to Eurostat data, the yearly number of asylum applicants stayed under 300,000 following the 2004 enlargement of the European Union, until 2013, when this number went up to 431,000. In 2014, it was up to 627,000, and in 2015, to 1,300,000. Eurostat: Asylum statistics. <[http://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum\\_statistics](http://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum_statistics)> (downloaded: September 5, 2016).

3 In this paper, we use the term irregular migration for cases when an alien stays in the territory of a country without a valid legal status, or has arrived to the territory of a country in a non-legal way, but tries to legalize it afterwards. This legalization effort is most often the submission of an asylum application. After being recognized as a refugee or granted international protection (but also per se when the application is submitted), the stay becomes legal, and the denial of the application is often followed by an overstay without a legal status. Looking at the same phenomenon from another perspective, irregular migration has two parts: forced migration (which is escaping or seeking refuge), and illegal migration (which is the aliens' illegal border crossing and stay). (See and compare with HAUTZINGER, Zoltán ed.: *A migráció elmélete [The Theory of Migration]*. Nemzeti Közszolgálati Egyetem Kiadó, Budapest 2014, pp. 17-18, and GYENEY, Laura: *A legális bevándorlás az Európai Unióba, különös tekintettel a családi élet tiszteltetésének jogára [Legal Migration to the European Union with special regard to the right to respect family life]*. PhD

are witnessing the formation of a worldwide tendency that projects an exponential growth in the number of people involved in regular and irregular migration for now and the future.<sup>4</sup> The causes of forced migration have substantially grown and escalated in number and in gravity, both in Africa, and in the Middle Eastern and the Central Asian region.<sup>5</sup> Consequently, while these areas are very different in terms of geography, culture, society, politics and history, they now have a common feature: they can be considered to belong to the same region of instability, from where a large and constant outflow is to be expected in all likelihood. In order to maintain political stability in the potential receiving regions, it is essential to understand the causes and their drivers.<sup>6</sup> However, the present international discourse on migration is more like a yo-yo game, where the institutional and state interests of those who consider the waves of migration a threat of stability stand in sharp contrast with individual interests and desires regarding migration.<sup>7</sup>

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dissertation, Doctoral School of the Pázmány Péter Catholic University, Faculty of Law and Political Science Budapest 2011, p. 13).

- 4 The United Nations (hereinafter referred to as UN) High Commissioner for Refugees (hereinafter together referred to as UNHCR) esteems the number of people needing international protection close to 55,000,000. UNHCR: Populations of concern to UNHCR. <[www.unhcr.org/564da0e3b.html](http://www.unhcr.org/564da0e3b.html)> (downloaded: September 5, 2016). According to data from the Organisation for Economic Co-operation and Development (hereinafter referred to as OECD), 117,000,000 people involved in international migration lived in the OECD countries (the foreign born population) in 2013, which is a 35,000,000, or 40% rise compared to data recorded in 2000. OECD: *International Migration Outlook 2015*. OECD Publishing, Paris 2015. <[www.keepeek.com/Digital-Asset-Management/oecd/social-issues-migration-health/international-migration-outlook-2015\\_migr\\_outlook-2015-en#page14](http://www.keepeek.com/Digital-Asset-Management/oecd/social-issues-migration-health/international-migration-outlook-2015_migr_outlook-2015-en#page14)> (downloaded: September 5, 2016).
- 5 For example, see sections of the paper entitled *Az Európa irányuló és 2015-től felgyorsult migrációs tényezők, irányai és kilátásai* (The factors, directions and perspectives of migration towards Europe accelerating in 2015) concerning the source countries. Magyar Tudományos Akadémia Migrációs Munkacsoport: *Az Európa irányuló és 2015-től felgyorsult migráció tényezők, irányai és kilátásai*. (Eds.: Csuka Gyöngyi, Török Ádám). <[http://mta.hu/data/cikkek/106/1060/cikk-106072/\\_europabairanyulo.pdf](http://mta.hu/data/cikkek/106/1060/cikk-106072/_europabairanyulo.pdf)> (downloaded: September 5, 2016).
- 6 Uncontrolled mass migration can also destabilize the target countries in a geopolitical sense. One study identified over 70 cases from international politics when a migration movement had this effect. (See: Kelly M. GREENHILL: *Weapons of Mass Migration: Forced Displacement as an Instrument of Coercion*. *Strategic Insights*, Vol. 9 (1) Spring/Summer 2010.) On further geopolitical implications of the migration crisis reaching the European Union, see Roderick PARKES: *European Union and the Geopolitics of Migration*. Swedish Institute of International Affairs UIpaper 2015/1. <[www.ui.se/eng/upl/files/111585.pdf](http://www.ui.se/eng/upl/files/111585.pdf)> (downloaded: September 5, 2016).
- 7 Franck DÜVELL: *Globalization of Migration Control: A Tug-of-War between Restrictionists and Human Agency?* Holger Henke (ed.): *Crossing Over – Comparing Recent Migration in the United States and Europe*. Lexington Books, Lanham 2005, p. 26.

## 2 LEGISLATION AS A CATALYST OF IRREGULAR MIGRATION

Therefore, in this paper, we attempt to examine whether or not:

- the International Refugee Law,<sup>8</sup>
- the policies of the European Union on border control, asylum, and immigration,<sup>9</sup> covering much of the so-called shared competence of the region in relation to freedom, security and justice, or
- the Fundamental Law and the legislative environment in Hungary<sup>10</sup> affect the above motions, and if they do, how.<sup>11</sup>

Therefore, we seek to find out the practical impact of legislation, and see how it affects certain migration movements. The most appropriate method seems to be the one used in behavioral law and economics,<sup>12</sup> which deals with the impact assessment of legislation. The basic methodological assumption of behavioral law and economics is that people affected by legislation are not rational, self-interest-oriented actors who have accumulated an optimal amount of information, and make supply and demand based decisions as prescribed by neoclassic economics, but individuals with limited rationality, who can be influenced, listen to subjective considerations, and have only a limited amount of information. For our present research, this methodological assumption is appropriate because it is capable of assessing the effects of legislation on individuals, inasmuch as it does not disregard subjective or beyond the law factors. These aspects are all essential to understand the causes and drivers of the migration movements, and their assessment would be less effective with other methodologies.

Our first claim is that it is very hard to arrive to the territory of the European Union in regular migration channels. Those who still manage to do that, do not have a real chance to acquire a permit for longer term residence and settlement. Generally, the present migration regularization does not reward, but in some cases markedly punishes the use of regular migration channels.

Our second claim is that in consequence of the above, these people move towards the channels of irregular migration. In practice, this involves the use of primarily international, as well as the European Union's and the Member States' refugee law systems, most

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8 In UNCHR terms, the international refugee law seeks to protect “people who seek asylum from persecution, and those who have been recognized as refugees. It comprises several international legal instruments... as well as customary law. ... [It] is also considered part of customary international law and therefore binding on all states. ... [It] overlaps to some extent with international human rights law. A series of international and regional human rights treaties and instruments have been enacted since 1945.” UNHCR: International Refugee Law. Tools for the protection of the displaced. <[www.unhcr-centraleurope.org/en/resources/legal-documents/international-refugee-law.html](http://www.unhcr-centraleurope.org/en/resources/legal-documents/international-refugee-law.html)> (downloaded: September 5, 2016).

9 Articles 77-80 of The Treaty on the Functioning of the European Union.

10 Especially paras. (2) and (3) of Article XIV in the Fundamental Law of Hungary, and the academic debate on the right to migration as a fundamental human right.

11 We shall refer to Sections a), b) and c) as the overall migration regularization hereinafter in the present paper.

12 For the most comprehensive summary of the method, see Cass R. SUNSTEIN (ed.): *Behavioral Law & Economics*. Cambridge University Press, New York 2000.

BALÁZS ANDRÁS ORBÁN

assuredly from the place where these people first come in contact with the authorities. The customary model is that these people try to legalize their irregular migration movement afterwards in the target country by becoming persons granted international protection, and thus eliminate the disadvantages of the virtually closed migration venues we referred to in our first claim. We also believe that this ‘status legalization’ step is only available for these people after entering the target country, which substantially reduces their willingness to cooperate with the authorities of the transit countries along their migration route. Contrasting our second observation with the claim we made on regular migration channels, we could also say that the migration regularization with regards to people arriving in the present wave of migration – to put it boldly – markedly rewards the use of irregular channels.

Our overall hypothesis is that the migration regularization that makes it difficult to use regular migration channels, and rewards the use of irregular channels, does not relieve, but specifically catalyzes the migration pressure on the European Union right now. In assessing this effect, and considering it in parallel with estimates on the high number of potential migration movements in the future, we may suppose that the present migration regularization does not have to be modified, but pragmatically changed in order to terminate this catalyzing effect.

In accordance with the behavioral law and economics method, we seek to verify the above hypothesis in a complex way. First, we identify the main cornerstones of migration regularization relating to regular and irregular ways that are able to affect human behavior. Then we use statistical data and empirical research findings to assess the range of regular migration channels available for nationals of the most common source countries. We suppose that the quantitative and the qualitative research findings will confirm that the regular migration channels are virtually closed for nationals of the given countries. Finally, we examine the possibilities in connection with irregular migration channels and the use of the asylum system, also by the use of quantitative statistical data and qualitative empirical research findings. We suppose that the result of this will make it clear that the only chance of status legalization for the people concerned is by arriving to the target country, and using the asylum system, and this has a pull effect in substantially enhancing the number of arrivals to the territory of the European Union in an irregular way.

## 2.2 THE MAIN CORNERSTONES OF REGULARIZATION IN THE EUROPEAN UNION RELATING TO MIGRATION

### 2.2.1 *The Rules of Regular Migration in the European Union*

The rules on regular migration movements to the territory of the European Union fall within the so-called shared competences, where both the European Union and the Mem-

## 2 LEGISLATION AS A CATALYST OF IRREGULAR MIGRATION

ber States can enact and adapt legally binding acts. The countries of the union can exercise their competences only in cases where the Union does not exercise or decides to cease to exercise them.<sup>13</sup> In immigration policy – which includes regular migration in our terminology –, the European Union is empowered to adopt legal acts to regulate the following areas (with restrictions not specified in this paper, such as the principles of proportionality and subsidiarity).

The European Parliament and the Council can, acting in accordance with the ordinary legislative procedure, adopt measures concerning common policies on visas and other short-stay residence permits, the checks to which persons crossing external borders are subject to, and the conditions under which nationals of third countries shall have the freedom to travel within the Union for a short period.<sup>14</sup> In addition, the European Union – with the aim of forming a common immigration policy – has the right to adopt legislative acts that include the conditions of entry and residence, and standards on the issue by Member States of long-term visas and residence permits, including those for the purpose of family reunification. This, however, does not affect the right of the Member States to determine volumes of admission of third-country nationals coming from third countries to their territory in order to seek work, whether employed or self-employed.<sup>15</sup>

In accordance with these authorizations in the founding treaties of the Union, the regulatory acts aiming for a common immigration policy came out in several regulations and directives,<sup>16</sup> as there seemed to be no intention for unified rules, and the common minimum regulation regarding legal migration for different purposes was easier to divide.<sup>17</sup>

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13 The Treaty on the Functioning of the European Union (hereinafter TFEU), Article 2(2), and Article 4(2)(j).

14 TFEU Article 77(2)(a)–(c).

15 TFEU Article 79(2)(b) and (5).

16 In view of the fact that the most typical type of irregular migration is the case of overstay following entrance within regular frames, in this paper we shall also examine the rules on short-term stays in the territory of the European Union, not just the rules on longer stays that are more closely related to immigration policy in a narrow sense. The overstay issue was one of the hardest cases of the Union's migration policy before the present wave of irregular migration (e.g. see Christal MOREHOUSE – Michael BLOMFIELD: *Irregular Migration in Europe*. Migration Policy Institute. Washington 2011, p. 12. and Pia M. ORRENIUS – Madeline ZAVODNY: *Irregular Immigration in the European Union*. Swedish Institute for European Policy Studies, European Policy Analysis 2016. pp. 4-5. <[www.sieps.se/sites/default/files/2016\\_2\\_epa%20eng.pdf](http://www.sieps.se/sites/default/files/2016_2_epa%20eng.pdf)> (downloaded: September 5, 2016).

17 The most important regulations and directions of the Union are the following:

- Regulation (EC) No 81/2009 of the European Parliament and of the Council, amending Regulation (EC) No 562/2006 as regards the use of the Visa Information System (VIS) under the Schengen Borders Code
- Regulation (EC) No 296/2008 of the European Parliament and of the Council of 11 March 2008 amending Regulation (EC) No 562/2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), as regards the implementing powers conferred on the Commission
- Regulation (EU) No 265/2010 of the European Parliament and of the Council of 25 March 2010 amending the Convention Implementing the Schengen Agreement and Regulation (EC) No 562/2006 as regards movement of persons with a long-stay visa
- Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing

BALÁZS ANDRÁS ORBÁN

The applicants must meet conditions proven in advance that are hard to meet in certain respects for all entrance permits, regardless of their purpose or the length of the time period they cover. Let us look at a few examples, based on the legal acts of the EU:

“All Member States, and all types of admissions require a travel document that authorizes border crossing, or a document and – if the visa regulations make it necessary – a valid visa; justification for the purpose and conditions of the intended stay; proof of sufficient means of subsistence for the duration of the intended stay, and the return to the country of origin, or to a third country en route, where admission is surely granted. The person seeking admission cannot have an issued alert in the information system for the purpose of refusing entry, and cannot pose a threat to the public policy, internal security, public health or internal relations of the Member States.”

In addition, the basic conditions of entry for third-country nationals arriving for educational purposes include: the individual must have been accepted by a higher education institution; must have the resources necessary to cover the costs of living, study, and return; must have a sufficient knowledge of the language of the study course to be followed; and must have paid the admission fees charged by the given educational institution.

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a Community Code on Visas (Visa Code)

- Regulation (EU) No 610/2013 of the European Parliament and of the Council of 26 June 2013 amending Regulation (EC) No 562/2006 of the European Parliament and of the Council establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), the Convention implementing the Schengen Agreement, Council Regulations (EC) No 1683/95 and (EC) No 539/2001 and Regulations (EC) No 767/2008 and (EC) No 810/2009 of the European Parliament and of the Council
- Directive (EU) 2016/801 of the European Parliament and of the Council of 11 May 2016 on the conditions of entry and residence of third-country nationals for the purposes of research, studies, training, voluntary service, pupil exchange schemes or educational projects and au pairing
- Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification
- Directive 2009/50/EC on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment is the “EU Blue Card”, on the basis of which higher skill employees can receive residence and work permits under more favorable conditions.
- Directive 2014/36/EU on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers regulates employment as a seasonal worker for up to nine months for those who carry out an activity dependent on the passing of the seasons, while retaining their principal place of residence in a third country.
- Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents, and Directive 2011/98/EU on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State, which define the conditions of permanent residence, establish a common, simplified procedure for those who apply for residence and work permits in a Member State.

## 2 LEGISLATION AS A CATALYST OF IRREGULAR MIGRATION

Applicants for the so-called blue card have to present the following documents: a valid work contract for at least one year in the hosting state of the Union, or a binding job offer, where the salary exceeds by at least 1.5 times the average gross annual salary; a document that proves that the applicant is possessing the necessary qualifications; and the applicant must also prove to have medical insurance.

Finally, for a prolonged stay for the purpose of work, the following additional conditions have to be met: stable and regular resources which are sufficient to maintain themselves and the members of their family, without recourse to the social assistance system of the Member State concerned; health insurance in respect of all risks normally covered for its own nationals in the Member State concerned; and Member States can require third-country nationals to comply with integration conditions, in accordance with national law.

In principle, applications for shorter and longer stay permits have to be submitted at a consulate of the target country (in certain cases, it is possible to submit an application at the aliens policing authority of the Member State directly, or at the external border of the EU Member State).<sup>18</sup>

It is clear to see from the above, that applicants arriving to the territory of the European Union and staying there for a shorter or longer period in regular migration channels have to meet serious substantive legal conditions – somewhat different in each of the Member States –, and have to successfully ‘fight through’ a procedural system built on bringing credible evidence on meeting the substantive legal conditions, while the channels that facilitate application submission and communication with the authorities have only limited availability. For applicants that are used to a different way of legal thinking and state operation, the procedures are most often unclear and incomprehensible. This statement is in full accordance with the position of academic literature, according to

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18 In this study, we have touched upon the EU legislation level only, when identifying the nodes of regulation in relation to regular migration channels, since presenting this one alone seems sufficient for the subject of our investigation. In this domain, the level of international law is not significant. “Migration is by far not fully and particularly regulated on a global, international level. General international law does not have detailed rules on the entry, stay, and legal status of aliens: there are many gaps in the regulation thus far realized on an international level. (...) Asylum is regulated more in international right, and it is an area aiming for a pretension of actual universality (about 150 states are parties to the Geneva Convention).” (BERTA Krisztina – MOLNÁR Tamás – TÖTTÖS Ágnes: *A migráció nemzetközi és európai uniós jogi szabályozása: a laza univerzális keretektől az átfogó, egységes EU-szakpolitikáig (International and EU legal regulation of migration: from loose universal frames to comprehensive, single EU policies)*. Migráció és Társadalom 2012/2. <<http://rendeszet.hu/folyoirat/2012/2/migr%C3%A1ci%C3%B3-nemzetk%C3%B6zi-%C3%A9s-eur%C3%B3pai-uni%C3%B3s-jogi-szab%C3%A1lyoz%C3%A1sa-laza-univerz%C3%A1lis-keretekt%C5%91l-az>> (downloaded: September 5, 2016) In addition, the most basic substantive and procedural rules can be systematically revealed without an evaluation of legal regularization differences between Member States within the European Union. In connection with this topic, see also: MOLNÁR Tamás: *A külföldiek kiutastásának általános nemzetközi jogi feltételrendszere és tilalomfái* (The general set of conditions and prohibitions in international law on expulsion). In: HAUTZINGER Zoltán (ed.): *Migráció és rendészet (Migration and policing)*. Magyar Rendészetudományi Társaság Migrációs Tagozat, Budapest 2015. pp. 121-122.

BALÁZS ANDRÁS ORBÁN

which regular migration to the territory of the European Union can be best characterized with “lack of opportunities”, especially with regards to certain countries of origin.<sup>19</sup>

### 2.2.2 *Rules on the Right to Asylum*

The international, modern history of the right to asylum goes back to almost a century. That’s when the first legislative and institutionalizing steps were taken in the League of Nations framework. Even though the first legal documents of the communist Soviet Union also dealt with people escaping for political reasons, the issue of refugees came to be the target of large-scale politics only after World War II, when the establishment of a new organization under the UN umbrella was supported by merely 18 governments of the 54 UN member states. Subsequently, in 1951, UNHCR was established, and its most important task was to act as a guardian of the agreement entered into on July 28, 1951 (hereinafter the Geneva Convention), and the protocol relating to the status of refugees, signed on January 31, 1967 (hereinafter the Protocol).<sup>20</sup> Article 1 of the Geneva Convention states that

“the term refugee shall apply to any person who: ...owing to well-founded fear of persecution 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.”

Originally, only those arriving from Europe fell under the scope of the Geneva Convention. The perceptions of the time approached eligibility to being granted international protection from an angle much different from our present concepts and knowledge. Theirs was the perspective of the cold war situation, and it was the Protocol that brought a universal effect.

The most important cornerstones of the Geneva Convention and international refugee law regulation can be best outlined as follows: (1) Obligations set out in the Geneva Conventions are limited to the target country, and (2) enter into force only when the

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19 Russell KING – Aija LULLE: *Research on Migration: Facing Realities and Maximising Opportunities – A Policy Review*. European Commission Directorate-General for Research and Innovation 2016, p. 26. <[https://ec.europa.eu/research/social-sciences/pdf/policy\\_reviews/ki-04-15-841\\_en\\_n.pdf](https://ec.europa.eu/research/social-sciences/pdf/policy_reviews/ki-04-15-841_en_n.pdf)> (downloaded: September 5, 2016).

20 Guy S. GOODWIN-GILL: *The International Law of Refugee Protection*. In: Elena Fiddian Qasimiyeh – Gil Loescher – Nando Sigona (eds.): *The Oxford Handbook of Refugee and Forced Migration Studies*. Oxford University Press, New York 2014. pp. 37-38.

## 2 LEGISLATION AS A CATALYST OF IRREGULAR MIGRATION

asylum applicant has entered the territory of that country, and has already requested asylum. (3) The most important cornerstone of the system, an unbreakable obligation is the principle of non-refoulement. The last important regulation cornerstone from the perspective of our topic is that (4) the asylum applicant cannot be punished for illegal border crossing and stay.<sup>21</sup> Although this does not follow from the Geneva Convention, the participant states – under UNHCR guidance – have established common refugee definition systems in practice, where the substantive and procedural rules of the states concerned remained different, but the central elements of these systems are the same after all. Asylum applications are examined individually, on the basis of the likelihood of persecution in case of refoulement. Decisions are based on the credibility of ‘stories’ told by the applicants, and on country information provided by certain organizations. For understandable reasons, the burden of proof with regards to the ‘stories’ is light in the proceedings, and the fear of refoulement and persecution in consequence of a possibly wrong decision in the proceeding tips the scale in favor of the applicant.<sup>22</sup>

In essence, all people involved in any irregular migration become visible for the legal systems only after crossing the border, when submitting an asylum application, except for people staying in an illegal migration status, and the authorities carry out an aliens policing procedure. In reality, the Geneva Convention does not grant the right to asylum, but the right to an asylum application, for the founding principle is not the grant of international protection for everyone, but non-refoulement. This requires, first of all, the movement, border crossing, and arrival of the individual to the territory of the target country – this is a *differentia specifica* in the Geneva Convention. It is interesting to note that other, regional refugee law agreements (e.g. the Cartagena Declaration<sup>23</sup> and the Convention of the Organisation of African Unity<sup>24</sup>) – although they use a much more inclusive refugee definition than the Geneva Convention – try to minimize such movements and the systems built on their subsequent management.<sup>25</sup>

21 For comprehensive comments on the relevant part of the Geneva Convention, see Andreas ZIMMERMANN – Felix MACHTS (Assistant) – Jonas DÖRSCHNER (Assistant) (ed.): *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary*. Oxford Commentaries of International Law 2011.

22 See for example Adrienne MILLBANK: *The Problem with the 1951 Refugee Convention*. Parliament of Australia Research Paper Series 2000-01/5, p. 4. <[www.aph.gov.au/binaries/library/pubs/rp/2000-01/01rp05.pdf](http://www.aph.gov.au/binaries/library/pubs/rp/2000-01/01rp05.pdf)> (downloaded: September 5, 2016) and Peter GATRELL: *The Making of Modern Refugee*. Oxford University Press, New York 2013, pp. 284-285, 294-295.

23 UNHCR: Cartagena declaration on refugees. <[www.unhcr-centraleurope.org/pdf/resources/legal-documents/international-refugee-law/1984-cartagena-declaration-on-refugees.html](http://www.unhcr-centraleurope.org/pdf/resources/legal-documents/international-refugee-law/1984-cartagena-declaration-on-refugees.html)> (downloaded: September 5, 2016).

24 UNHCR: Convention governing the specific aspects of refugee problems in Africa. <[www.unhcr-centraleurope.org/pdf/resources/legal-documents/international-refugee-law/1969-organization-of-african-unity-convention-governing-the-specific-aspects-of-refugee-problems-in-africa.html](http://www.unhcr-centraleurope.org/pdf/resources/legal-documents/international-refugee-law/1969-organization-of-african-unity-convention-governing-the-specific-aspects-of-refugee-problems-in-africa.html)> (downloaded: September 5, 2016).

25 Randall HANSEN: *State Controls: Borders, Refugees, and Citizenship*. In: Elena Fiddian Qasmiyeh – Gil Loescher – Nando Sigona *ibid.*, pp. 257-258.

The asylum definition of the Geneva Convention, and the right to protection in international law in general and on the level of case law have undergone substantial changes during the last decade. In several aspects – especially as formed by international customary law –, the range of people entitled to protection, and the definition itself was greatly expanded in comparison with the strict text of the Geneva Convention and the way of thinking at the time of its framing.<sup>26</sup> Naturally, one cannot object to this practice according to the law, as it is in harmony with Articles 31–33 of the Vienna Convention on the Law of Treaties, signed on May 23, 1969. However, the Geneva Convention system is still built on the logic outlined above, regardless of all that has been said.

After examining the cornerstones of the most important international legal regularizations effective in the territory of the European Union, let us see how the EU law ties in with all of this. The best place to pick up the process of how the EU refugee law was formed is the Amsterdam Treaty of 1999, which placed the asylum issue under the supervision of the “community”, and the so-called Tampere meeting of the European Council decided to establish a Common European Asylum System, based on the full and inclusive application of the Geneva Convention and the Protocol.<sup>27</sup> This is still an ongoing process, since the plans and processes that place asylum issues on a supranational level are still resulting different member state asylum systems on the level of law implementation and practice.<sup>28</sup> Several regulations and directives govern the EU rules on the international protection of refugees.<sup>29</sup> Moreover, we should make note of the Strasbourg case

26 William Thomas WORSTE: *The Evolving Definition of the Refugee In Contemporary International Law*. Berkeley Journal of Law 2012/1. pp. 94-95.

27 MOLNÁR Tamás: *Mily színes e táj! Az Európai Unió menekültügyi acquis-jának kialakulása és fejlődése a kezdetektől napjainkig (How colorful the scene! The formation and development of EU asylum acquis from the beginnings until now)*. Fundamentum 2013/2. pp. 55-56.

28 Jan-Paul BREKKE – Grete BROCHMANN: *Stuck in Transit: Secondary Migration of Asylum Seekers in Europe, National Differences, and the Dublin Regulation*. Journal of Refugee Studies 2014. <<http://jrs.oxfordjournals.org/content/28/2/145.full>> (downloaded: September 5, 2016).

29 The most important ones are:

- Regulation (EU) No 604/2013 (Dublin III) 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;
- Regulation (EC) No 2725/2000 concerning the establishment of Eurodac for the comparison of fingerprints for the effective application of the Dublin Convention (Eurodac regulation), 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;
- Directive 2011/95/EU 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 (qualification directive);
- Directive 2013/32/EU on common procedures for granting and withdrawing international protection

## 2 LEGISLATION AS A CATALYST OF IRREGULAR MIGRATION

law, which makes substantial contributions to forming the EU asylum practice<sup>30</sup> – and the fact that the Charter of Fundamental Rights of the European Union, Article 18 lays down in particular the right to asylum, and Article 19 the principle of non-refoulement.

In reality, however – as Article 78 of TFEU specifically lays down –, the entire EU refugee law is based on the regulatory logic of the Geneva Convention and the Protocol. Therefore, the Union law does not in essence modify the operational model outlined above. According to a handbook of the European Union Agency for Fundamental Rights, the asylum seekers are primarily nationals of countries from where a visa is required to enter the territory of the European Union. “As these individuals often do not qualify for an ordinary visa, they may have to cross the border in an irregular manner.” In principle, the directive works in practice, according to which – after illegal border crossing and submitting an application – the countries where the application for international protection was first submitted examine and consider it, as laid out in the Dublin III Regulation. The EU asylum *acquis* – just like the international law system based on the Geneva Convention – “only applies from the moment an individual has arrived at the border, including territorial waters and transit zones”.<sup>31</sup>

At the Tampere meeting, the Heads of State and Government of the EU Member States provided direction in other important issues relevant to our topic as well. It was decided that to complement the deficiencies of the Geneva Convention mentioned above, a system of subsidiary protection should be established on the level of the Union. This is because many are convinced that the Geneva Convention (still) does not provide assistance for all potential candidates who could be entitled to receive international protection, and serious “breaches of protection” can be detected.<sup>32</sup> These breaches can be sufficiently filled by the system of subsidiary protection, which is not a radical innovation in essence. Upon examination of the qualification directive, we see that this protection structure already existed on a member state level, though it was fragmented, and needed some fitting.<sup>33</sup> The Treaty of

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(procedures directive);

- Directive 2013/33/EU laying down standards for the reception of applicants for international protection (reception directive);
- Directive 2008/115/EC on common standards and procedures in Member States for returning illegally staying third-country nationals (returning directive);
- Directive 2001/55/EC 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 (temporary protection directive).

30 Katharina EISELE: *The External Dimension of the EU's Migration Policy*. Brill-Nijhoff, Leiden 2013, p. 187.

31 European Union Agency For Fundamental Rights: *Handbook on European law relating to asylum, borders and immigration*. Council of Europe, 2014, pp. 35-37. <[http://fra.europa.eu/sites/default/files/handbook-law-asylum-migration-borders-2nded\\_en.pdf](http://fra.europa.eu/sites/default/files/handbook-law-asylum-migration-borders-2nded_en.pdf)> (downloaded: September 5, 2016).

32 Volker TÜRK – Rebecca DOWD: *Protection Gaps*. Elena Fiddian-Qasmiyeh – Gil Loescher – Katy Long – Nando Sigona (ed.): *ibid.*, pp. 278-279.

33 SZÉP Árpád: *A kiegészítő védelem okainak rendszere (The system of causes for subsidiary protection)*. Iustum Aequum Salutem 2015/1, pp. 219-220.

BALÁZS ANDRÁS ORBÁN

Lisbon – in addition to making further steps towards establishing a Common European Asylum System – laid down the new types of international protection on the TFEU level, including the refugee status according to the Geneva Convention (conventional refugee), the subsidiary protection not classified as refugee status, and the temporary protection applicable in mass influx.<sup>34</sup> All these are relevant to our topic because in addition to the system based on the regulatory logic of the Geneva Convention, the circle of individuals entitled to some level of international protection – the number of potentially successful asylum applicants – has been substantially expanded, due to a category that now appears on the basic regulation level of the Union.<sup>35</sup>

This paper has a specific focus on the international legal aspects of the right to asylum. Meanwhile, we cannot overlook the constitutional aspects of the right to asylum, since the standards visible on the constitutional level decisively determine the structure and the operation of a legal institution. On the other hand, we can observe a legal institution determined by international law in case of the right to asylum. The constitutions of several European countries ascertain the institution of the right to asylum – including the German, the French, and the Italian constitutions among the major ones in Europe. In addition, the various national asylum institutions have a long history of development and national character in the West European constitutions, though the international legal obligations and the legislation acts of the European Union – according to academic literature – have rendered these ineffective by now. In this regard, the dominance of international law cannot be called into question.<sup>36</sup> Therefore, we should not handle the issue off asylum right on the constitutional level separately for the purpose of our study, investigating international law does not leave any gaps.<sup>37</sup> The most important documents of the international asylum system have only been recently ‘revitalized’ by human rights dogmatism.<sup>38</sup>

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34 MOLNÁR: *ibid.*, p. 57.

35 About the most up to date correlations between international law and asylum in the Union, see MOHAY Ágoston: *Nemzetközi jogi standardok az uniós menekültügyben (International legal standards in asylum in the Union)*, Scriptura (2016).

36 Hélène LAMBERT – Francesco MESSINEO – Paul TIEDEMANN: *Comparative Perspectives of Constitutional Asylum in France, Italy and Germany: Requiescat in Pace?* Refugee Survey Quarterly 2008/3. pp. 16, 17.

37 An interesting side of this issue is the lively international discussion on the right to migration, instead of the right to asylum. For the most exciting summary of the debate, see Sarah FINE – Lea YPI (ed.): *Migration in Political Theory – The Ethics of Movement and Membership*. Oxford University Press, New York 2016.

38 Vincent CHETAIL: *Are Refugee Rights Human Rights? An Unorthodox Questioning of the Relations between Refugee Law and Human Rights Law*. In: Ruth Rubio-Marín (ed.): *Human Rights and Immigration*. Oxford Scholarship Online 2014, p. 70.

### 2.3 A STATISTICS-BASED SURVEY OF CORRELATIONS BETWEEN REGULAR MIGRATION CHANNELS AND THE RIGHT TO ASYLUM

In accordance with the methodological basis outlined in Section 2.1, now we attempt to examine the use of regular and irregular migration channels on a statistical base, and seek to confirm or confute the hypothesis. To this effect, we take the following steps:

First, we identify five countries, the nationals of which composed the largest number of asylum applicants in the European Union in 2015. Henceforth, we use these five countries as markers. Then we identify the number of visas and residence permits issued in these countries between 2010 and 2015, along with the refusal rate of visa and residence permit applications.<sup>39</sup> In parallel, we monitor the correlations between the absolute number of applications submitted and the refusal rate figures. The number of short term visas are just as – if not more – relevant in this comparison than residence permits affording longer stays, more similar to granting international protection, because almost all experts agree that the most common form of irregular migration is the case of overstay (see footnote 18). Thus, we can reasonably conclude that people planning a longer term stay in the territory of the European Union, consider a visa providing for a short term legal stay a real legal chance for entrance (the ‘just get in, and then see’ factor).

The five countries of origin of the largest number of asylum applicants<sup>40</sup> in 2015 – based on absolute numbers and the percentage of total first time applications – were as follows. Syrian asylum seekers submitted 363 thousand applications in the territory of the EU in 2015, which was 29 percent of the total first time applications. They are followed by the Afghan and Iraqi asylum seekers, with 14 percent (175 thousand applications), and 10 percent (125 thousand applications) of the total first time applications. Kosovo and Albania both provided 62–62 thousands of asylum seekers in 2015, which was each 5 percent of the total first time applications. Therefore, we will look at the data on Syria, Afghanistan, Iraq, Kosovo and Albania, as the five most important source countries of asylum applicants.

In 2010, in the Schengen member states,<sup>41</sup> 12.6 million visa applications<sup>42</sup> were submitted, and the average refusal rate was 5.8 percent.

39 From a methodological point of view, it is more secure to look at this data not just from one year, but several, as that provides a better filter for possible sways – and then misleading conclusions – in the data.

40 A total of 1,321,600 asylum applications were submitted in the EU member states in 2015, 1,255,685 of these were first time applications, while 65,296 were subsequent applications. In this regard – in line with the methodology of Eurostat statistics –, we take first time applications for reference values. Eurostat: Asylum statistics <[http://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum\\_statistics](http://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum_statistics)> (downloaded: August 20, 2016).

41 The account includes the visas issued by Schengen member states only, and excludes visas issued by member states of the Union not yet in the Schengen area (Romania, Bulgaria, Croatia).

42 Only A, B and C types of visa applications. The number of limited territorial validity visas (LTV) and D category national visas allowing for longer term stays was insignificant compared to the total number of visa applications, they are not important for the final conclusions, and their refusal rate figures are not available, so we will not mention these. European Commission: Visa policy. <[http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/visa-policy/index\\_en.htm](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/visa-policy/index_en.htm)> (downloaded: August 20, 2016).

*BALÁZS ANDRÁS ORBÁN***2010**

<b>Country</b>	<b>Number of Schengen consulates</b>	<b>Number of total applications</b>	<b>The application refusal rate of the country</b>	<b>Difference in comparison to the average refusal rate of all countries</b>
Afghanistan	8	5,477	10.7%	+4.9%
Albania	17	90,323	23.5%	+17.7%
Iraq	8	9,719	10.8%	+5%
Kosovo	9	39,784	36.9%	+31.1%
Syria	17	42,883	23.8%	+18%

In 2011, in the Schengen member states, 13.5 million visa applications were submitted, and the average refusal rate was 5.5 percent.

**2011**

<b>Country</b>	<b>Number of Schengen consulates</b>	<b>Number of total applications</b>	<b>The application refusal rate of the country</b>	<b>Difference in comparison to the average refusal rate of all countries</b>
Afghanistan	8	5,884	10.6%	+5.1%
Albania	13	3,325	19.6%	+14.1%
Iraq	9	15,145	9.9%	+4.45%
Kosovo	9	26,538	55.4%	+49.9%
Syria	17	33,826	30.5%	+25%

In 2012, in the Schengen member states, 15.1 million visa applications were submitted, and the average refusal rate was 4.8 percent.

**2012**

<b>Country</b>	<b>Number of Schengen consulates</b>	<b>Number of total applications</b>	<b>The application refusal rate of the country</b>	<b>Difference in comparison to the average refusal rate of all countries</b>
Afghanistan	8	5,765	16.6%	+11.8%
Albania	12	1,965	20.2%	+15.4%
Iraq	10	13,792	11.8%	+7%

2 *LEGISLATION AS A CATALYST OF IRREGULAR MIGRATION***2012**

<b>Country</b>	<b>Number of Schengen consulates</b>	<b>Number of total applications</b>	<b>The application refusal rate of the country</b>	<b>Difference in comparison to the average refusal rate of all countries</b>
Kosovo	9	21,506	45%	+40.2%
Syria	16	5,306	41.7%	+36.9%

In 2013, in the Schengen member states, 17.2 million visa applications were submitted, and the average refusal rate was 4.8 percent.

**2013**

<b>Country</b>	<b>Number of Schengen consulates</b>	<b>Number of total applications</b>	<b>The application refusal rate of the country</b>	<b>Difference in comparison to the average refusal rate of all countries</b>
Afghanistan	8	6,512	29.8%	+25%
Albania	12	1,498	4.4%	-0.4%
Iraq	9	30,117	6.8%	+2%
Kosovo	9	81,217	21%	+16.2%
Syria	3	400	41.2%	+36.4%

In 2014, in the Schengen member states, 16.7 million visa applications were submitted, and the average refusal rate was 5.1 percent.

**2014**

<b>Country</b>	<b>Number of Schengen consulates</b>	<b>Number of total applications</b>	<b>The application refusal rate of the country</b>	<b>Difference in comparison to the average refusal rate of all countries</b>
Afghanistan	7	6,291	27.4%	+22.3%
Albania	12	1,392	8%	+2.9%
Iraq	10	36,294	17.8%	+12.7%
Kosovo	10	74,286	28.3%	+23.2%
Syria	3	360	32.7%	+27.6%

*BALÁZS ANDRÁS ORBÁN*

In 2015, in the Schengen member states, 15.4 million visa applications were submitted, and the average refusal rate was 6.2 percent.

**2015**

Country	Number of Schengen consulates	Number of total applications	The application refusal rate of the country	Difference in comparison to the average refusal rate of all countries
Afghanistan	8	6,930	32.5%	+26.3%
Albania	10	1,305	14.8%	+8.6%
Iraq	10	38,480	17.8%	+11.6%
Kosovo	11	80,175	17.4%	+11.2%
Syria	3	565	16.7%	+9.9%

In relation to the five most productive source countries of asylum applicants, therefore, it is clear to see that the refusal rate of short term visa applications is significantly – 15–25 percent – higher than the average refusal rate. From this we can conclude that it is rather hard to process a successful visa application in these countries. Let us see if this relatively high inefficacy rate is also there in the number of visa applications:

**2010**

Country	Number of visa applications	Difference between the total number of visas issued that year (12.6 million) and the average per country (74,348 applications)
Afghanistan	5,744	-92.2%
Albania	90,323	+18%
Iraq	9,719	-87%
Kosovo	39,784	-47%
Syria	42,883	-42%

**2011**

Country	Number of visa applications	Difference between the total number of visas issued that year (13.5 million) and the average per country (79,849 applications)
Afghanistan	5,884	-92.7%

2 *LEGISLATION AS A CATALYST OF IRREGULAR MIGRATION***2011**

<b>Country</b>	<b>Number of visa applications</b>	<b>Difference between the total number of visas issued that year (13.5 million) and the average per country (79,849 applications)</b>
Albania	3,325	-95.9%
Iraq	15,145	-81.1%
Kosovo	26,538	-66.8%
Syria	33,826	-57.7%

**2012**

<b>Country</b>	<b>Number of visa applications</b>	<b>Difference between the total number of visas issued that year (15.1 million) and the average per country (87,460 applications)</b>
Afghanistan	5,765	-93.4%
Albania	1,965	-97.8%
Iraq	13,792	-84.2%
Kosovo	21,506	-75.4%
Syria	5,306	-94%

**2013**

<b>Country</b>	<b>Number of visa applications</b>	<b>Difference between the total number of visas issued that year (17.2 million) and the average per country (98,408 applications)</b>
Afghanistan	6,512	-93.4%
Albania	1,498	-98.5%
Iraq	30,117	-69%
Kosovo	81,217	-17.5%
Syria	400	-99.6%

*BALÁZS ANDRÁS ORBÁN***2014**

<b>Country</b>	<b>Number of visa applications</b>	<b>Difference between the total number of visas issued that year (16.7 million) and the average per country (97,302 applications)</b>
Afghanistan	6,291	-93.5%
Albania	1,392	-98.6%
Iraq	36,294	-62.7%
Kosovo	74,286	-23.7%
Syria	360	-99.6%

**2015**

<b>Country</b>	<b>Number of visa applications</b>	<b>Difference between the total number of visas issued that year (15.4 million) and the average per country (90,379 applications)</b>
Afghanistan	6,930	-92.3%
Albania	1,305	-98.6%
Iraq	38,480	-57.4%
Kosovo	80,175	-11.3%
Syria	565	-99.4%

From the above data, it is easy to observe that the countries surveyed are lagging behind by well over an average 50 percent in terms of the average number of visa applications per country.

Therefore, the overall observation – in view of the absolute number of visa applications and their refusal rate in connection with the five origin countries of the largest number of asylum seekers – is that we have a typically low number of visa applications from nationals of countries providing the largest number of asylum seekers, and the refusal rate of visas allowing for a short term legal stay is much higher than in the case of nationals of other countries.

Subsequently, let us take a look at the number of residence permits issued in member states of the European Union during the same period. Looking at the absolute numbers, we see that there were 2.5 million residence permits issued in 2010, 2.2 million in 2011,

## 2 LEGISLATION AS A CATALYST OF IRREGULAR MIGRATION

2.1 million in 2012, 2.3 million in 2013, and 2.3 and 2.4 in 2014 and in 2015.<sup>43</sup> In comparison, the number of residence permits issued for nationals of countries providing the largest number of asylum seekers – just like the number of visas – is very low, but we should treat the two Balkan countries – due to their special role in migration to the territory of the European Union – separate from the three Asian ones.<sup>44</sup>

Country	Number of resident permits issued					
	2010	2011	2012	2013	2014	2015
Afghanistan	14,392	18,689	18,990	20,874	22,432	15,713
Albania	75,215	40,807	32,146	31,262	33,950	48,650
Iraq	19,633	18,293	17,610	17,205	17,329	14,181
Kosovo	16,866	15,099	16,232	17,525	18,059	10,873
Syria	7,968	9,003	24,020	41,567	85,882	77,733

The absolute numbers are not very informative, but a little comparison reveals that the number of residence permits issued by the Member States of the European Union for nationals of those five countries (2010: 12427; 2011: 10939; 2012: 10535; 2013: 11841; 2014: 11683; 2015: 12089) exceeded the average number of permits per country each year.<sup>45</sup>

Year	Average permits per country
2010	12,427
2011	10,939
2012	10,535
2013	11,841
2014	11,683
2015	12,089

43 Aggregated data of residence permits issued for family reasons, employment, education, and other reasons. Figures on the proportion of refused applications is not available on the Eurostat database. Eurostat: First permits by reason, length of validity and citizenship. <[http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=migr\\_resfirst&lang=en](http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=migr_resfirst&lang=en)> (downloaded: August 21, 2016).

44 On the special situation of the South Slavic countries, see for example ERDEI Nikolett – TUKA Ágnes: *Az Európai Unió migrációs politikája napjainkban (The migration policy of the European Union in our days)*. In: Tarrósy István – Glied Viktor – Keseru Dávid (eds.): *Új népvándorlás – Migráció a 21. században Afrika és Európa között*. IDResearch Kft./Publikon Kiadó Pécs, 2011. 244.; an analysis of the migration strategies of Balkan countries from the German Federal Ministry for Economic Cooperation and Development. <<https://www.giz.de/fachexpertise/downloads/giz2012-en-analysis-migration-strategies.pdf>> (downloaded: September 5, 2016); Corrado BONIFAZI – Marija MAMOLO: *Past and Current Trends of Balkan Migrations*. Espace populations société 2004/3.

45 Eurostat: First permits by reason, length of validity and citizenship. <[http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=migr\\_resfirst&lang=en](http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=migr_resfirst&lang=en)> (downloaded: August 21, 2016).

BALÁZS ANDRÁS ORBÁN

If we look at the number of permits per 1000 inhabitants, we detect the following: In Afghanistan, the visas issued per 1000 inhabitants is 0.12, while the number of residence permits issued is 0.48. In Albania, the visas issued per 1000 inhabitants is 0.42, while the number of residence permits issued is 16.7. In Iraq, the visas issued per 1000 inhabitants is 0.84, while the number of residence permits issued is 0.37. In Kosovo, the visas issued per 1000 inhabitants<sup>46</sup> is 33.94, while the number of residence permits issued is 5.72. Finally, in Syria, the visas issued per 1000 inhabitants<sup>47</sup> is 0.02, while the number of residence permits issued is 4.2.<sup>48</sup>

In the data about residence permits, it is easy to observe the already mentioned gap between the data of the two Balkan countries and the data of the Middle Eastern and Central Asian countries (the difference is also there in the data about visa applications, only less marked). This is mainly due to the unique role of the Balkan countries in the life of the European Union regarding migration in the past few decades. There have been very lively migration movements towards the European Union through – at least to some extent – regular migration channels. Consequently, it is good to look at a few more countries in the row behind the five that provided the largest number of asylum seekers, to filter out the distorting effects in the data set. This additional survey reveals the following results: In Pakistan, the visas issued per 1000 inhabitants is 0.24, while the number of residence permits issued is 0.21. In Eritrea, the visas issued per 1000 inhabitants is 0.22, while the number of residence permits issued is 3.8. In Nigeria, the visas issued per 1000 inhabitants is 0.3, while the number of residence permits issued is 0.15. In Iran, the visas issued per 1000 inhabitants is 2.04, while the number of residence permits issued is 0.19.

Therefore, we can come to the general conclusion that for the countries providing the highest number of asylum seekers, the regular migration channels – taking the two Balkan countries for an exception in certain respects – are much more narrow than for other countries. The low number of applications submitted shows that a substantial part of the population in these countries does not have a real chance to reach the territory of the European Union through regular migration channels.

#### 2.4 AN EMPIRICAL SURVEY ON THE CORRELATIONS BETWEEN REGULAR AND IRREGULAR MIGRATION

A large number of various surveys, based on empirical data collection, research those arriving to the territory of the European Union through migration channels. However,

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46 Countrymeters: Kosovo Population clock. <<http://countrymeters.info/en/Kosovo>> (downloaded: August 21, 2016).

47 The data of a 18.5 million population is certainly based on measures before the civil war broke out, but we take it as a reference value nevertheless.

48 Population.city: The population of countries and cities worldwide. <<http://nepesseg.population.city/>> (downloaded: August 21, 2016), except for Kosovo.

## 2 LEGISLATION AS A CATALYST OF IRREGULAR MIGRATION

the research methods are not fully suited to disclose all correlations, since it is very hard to receive exact data from the people concerned. Nevertheless, from several important surveys and the studies summarizing them – along with our own data collection for this study – we can come to some conclusions for reflection.

Researchers of the Maastricht University made a summary of other empirical results available in academic literature, and surveyed the motivations, drivers, and choices of people involved in migration in their study.<sup>49</sup> From the results we can detect consensus in academic literature about the fact that there are complex factors behind the decisions of people participating in irregular and regular migration, and these factors are not without economic, social and political considerations. For this reason, a similar study, ordered by the Australian Government, brings up the issue that the legal distinction between a refugee and an economic migrant has become outdated to the extent that it does not help us understand the motivations behind today's migration movements and handle the situation at all.<sup>50</sup> Several people draw attention to the fact that the following factors also pay an important role in the perceptions and decisions of people who use various migration channels: the relationship between the country of origin and the receiving country, geographical features, asylum regulations, and online communication.<sup>51</sup> The authors of the study that summarizes the result of several well-known research also draw attention to the deficiency of surveying the role of people-trafficking networks that have a serious impact on the decisions made by those who choose irregular migration channels.<sup>52</sup>

The researchers have also found out that migration policy – using the generic term – also influences the use of irregular and regular channels. Border control, the quality and depth of police action, and the strictness or permissiveness of the asylum regularization all play a role in this regard. Upon comparing several kinds of research, the present study has concluded that the empirical data is diversified: some say that the people arriving have no information on migration policy whatsoever, while others have found that the interviewees arrive with the armor of detailed accounts on former experiences. All in all, it has been concluded that migration policy assuredly influences at least whether or not the arrivals to the European Union stay in a given country.<sup>53</sup> Another, British research takes a detailed look at the advance awareness of arrivals on migration policy. In that

49 Katie KUSCHMINDER – Julia de BRESSER – Melissa SIEGEL: *Irregular Migration Routes to Europe and Factors Influencing Migrants' Destination Choices*. Maastricht Graduate School of Governance 2015. <<http://migration.unu.edu/publications/reports/irregular-migration-routes-to-europe-and-factors-influencing-migrants-destination-choices.html>> (downloaded: September 5, 2016).

50 Seeking the Views of Irregular Migrants: Decision Making, Drivers and Migration Journeys. Australian Government Department of Immigration and Border Protection, Irregular Migration Research Program Occasional Paper Series 2013/5, p. 9. <<https://www.border.gov.au/ReportsandPublications/Documents/research/views-irregular-migrant-decision-drivers-journey.pdf>> (downloaded: September 5, 2016).

51 See also Rianne DEKKER – Godfried ENGBERSEN: *How Social Media Transform Migrant Networks and Facilitate Migration*. University of Oxford International Migration Institute Working Papers 2012/64.

52 Katie KUSCHMINDER – Julia de BRESSER – Melissa SIEGEL: *ibid.*, 13.

53 Katie KUSCHMINDER – Julia de BRESSER – Melissa SIEGEL: *ibid.*, pp. 61-62.

context, it has been discovered that the respondents had a general perception on the relative openness of certain countries towards them, but the pieces of information they had were rather imperfect and inaccurate. Nevertheless, they clearly influenced their decisions. While referring to results of other studies, they also suggest that there is a correlation between the recognition rate of asylum applications and the number of arrivals to that country. The more people a country provides protection for, the more will seek to go there, relatively.<sup>54</sup>

Upon a more detailed analysis on the surveys known to the authors of the above mentioned study, we can discover further correlations between decisions on the migration channels to use, and the significance of legislation. A research surveying migration data and the changes in the conditions of acquiring a visa in 38 countries between 1973 and 2012 has confirmed that restrictions in visa policy reduce or avert migration towards that country. At the same time, the research has also concluded that the restriction not only reduced the number of immigrants, but also had a negative effect on the number of emigrants. Therefore, restricting the visa policy reduces the number of new arrivals to a given country, while it is accompanied by the overstay of those already present, so it reduces the migration circulation.<sup>55</sup> To that we add that in reality, the emigration reducing effect of a more strict visa policy can prevail only in places where there is a substantial community of immigrants already at the time of the restriction. Another, similar research, conducted in 29 countries revealed that the restriction of visa policy – whether on the level of legislation or on the level of administration – clearly pushed immigrants toward asylum application, and strengthened the irregular migration channels in the long run.<sup>56</sup> Finally, another study is worth to mention, which makes note of the phenomenon of countries narrowing their entrance points for the sake of defending their borders (for example, restricting document control in air traffic). Typically, the asylum regulation of individual countries get restricted because actual refugees and people who use the asylum system because no other migration channel is available to them put pressure on the system, and push the regulation and the administration in the direction of restrictions.<sup>57</sup>

In conclusion, the empirical studies reveal that the motivations of people arriving to the territory of the European Union in an irregular way are complex, and the issue of

54 Heaven CRAWLEY: *Chance or choice? Understanding why asylum seekers come to the UK*. Refugee Council 2010. 16. <[www.refugeecouncil.org.uk/assets/0001/5702/rcchance.pdf](http://www.refugeecouncil.org.uk/assets/0001/5702/rcchance.pdf)> (downloaded: September 5, 2016).

55 Mathias CZAİKA – Hein de HAAS: *The Effect of Visa Policies on International Migration Dynamics*. University of Oxford, International Migration Institute. Working Papers 2014/89. <<https://www.imi.ox.ac.uk/pdfs/wp/wp-89-14.pdf>> (downloaded: September 5, 2016).

56 Mathias CZAİKA – Mogens HOBOLT: *Deflection into irregularity? The (un)intended Effects of Restrictive Asylum and Visa Policies*. University of Oxford, International Migration Institute Working Papers 2014/84. <<https://www.imi.ox.ac.uk/pdfs/wp/wp-84-14.pdf>> (downloaded: September 5, 2016).

57 Randall HANSEN: *State Controls: Borders, Refugees, and Citizens*. In: Elena Fiddian Qasmiyeh – Gil Loescher – Nando Sigona (ed.) *ibid.*, pp. 260-262.

human migration is hard to interpret solely along certain theories.<sup>58</sup> Experience is diversified with regards to the level of preparedness and legal awareness among the people arriving to the continent through irregular migration channels, but we can conclude awareness of the migration regularization (which we can call legal awareness), and communications reaching their target clearly influence their decisions.

In addition to processing the research available, this study was supported by its own data collection, which in some respects reconfirmed, in other respects supplemented the above observations. In May of 2016, researchers of the Migration Research Institute conducted an empirical study, based on in-depth interviews with third-country nationals granted international protection, residing in the Bicske Reception Centre. The aim of the in-depth interviews was to examine the motivations behind leaving the country of origin, and the general level of legal awareness.<sup>59</sup>

In the case of interviewees from the Middle East and Africa, the main motivations behind leaving were civil war in the source country, conflicts of interest with the government in power; persecution due to religious or sexual orientations, and the complete lack of vision for the future. In addition, it is worth to note that apart from the above motivations – at least partially protected by the Geneva Convention –, the researchers have ran into several statements, which gave similar emphasis to claims for “a better life, work and study”. This indicates that the target group often views the above mentioned motivations of mixed perception in a consolidated system, and does not separate them from one another. The typical viewpoint of interviewees from the Middle East and Africa was this: all people had the right to better their living conditions, and it is natural that

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58 See Hein de HAAS: *Migration Theory – Quo Vadis?* University of Oxford International Migration Institute. Working Papers Series 2014/100. <<https://www.imi.ox.ac.uk/pdfs/wp/wp-100-14.pdf>> (downloaded: September 5, 2016).

59 Altogether, 19 single individuals and two families participated in the two day surveying, from 12 countries or autonomous territories (Syria: 3 persons; Pakistan, Iraq, Iran, Gaza Strip, Libya, Republic of Congo, Democratic Republic of the Congo, Mali and Cameroon: 1 persons each; Somalia: 2 persons; Afghanistan: 9 persons). The surveyed target group was subsequently divided into two regional categories: the Middle East and Africa (11 people), and Central Asia (10 people), in order to better illustrate the results. (Note: specific reference is made where findings from the first region pertain to only one subgroup or the other.) In all cases, interviews were conducted in the native language of the interviewee, or in a familiar language (English, Arabic, French, Pashto). All respondents volunteered for the interview, though a small incentive (food voucher) went a long way. However, as it is clear from the content summary, there was a substantial difference between the level of willingness to cooperate among interviewees from the Middle East, and those arriving from other regions. The interviews were 20–75 minutes long, depending on the expansiveness of the interviewees. The structured questions covered the following areas of investigation: individual and broader motivations; general awareness; the nature and source of assistance received; the intensity of cooperation with the authorities; general legal awareness; the evaluation of possibilities offered by legal channels; individual evaluation of experiences, and the target group’s vision of the future. On the hardships and methodological challenges of empirical data collection in the migration research, see KOVÁTS András – VÁRHALMI Zoltán ed.: *A válaszhányok kezelésétől a résztvevo megfigyeléséig – Módszertani problémák a migrációkutatásban (From handling non-response to monitoring the participant – Methodological problems in migration research)*. Nemzetközi Összehasonlító Kutatásokat Támogató Alapítvány Kiadó, Budapest 2014.

BALÁZS ANDRÁS ORBÁN

they seek to find the best circumstances for that. They viewed Europe as “a place where both the freedom rights and the religious ideas are respected”. The educated were more conscious about this, while others were convinced only by what they heard. People from Syria and Iraq are explicitly offended and angry, because they feel that their human rights are violated by the hindrance. “Everyone wants the best for himself and his children, and has the opportunity to act accordingly, we are the only ones stripped of that.” In their opinion, immigration automatically becomes a fundamental human right inasmuch as any other element of the human rights is violated in their country.

Regarding legal awareness, the research has revealed that people arriving from countries in the Middle East or Africa were not – with a few exceptions – previously aware of the details of the asylum procedure. One good example is this: prior to arriving to Greece or Bulgaria, none of the interviewees had information on the importance of taking fingerprints regarding the later procedures, and they gained information about this only as a part of some procedure, not from the peers or the people smugglers. The case of the Pakistani interviewee is especially noteworthy, since his immediate relative told him to profess himself a 16-year-old, regardless of the time span of the journey (awareness of the legal consequences of being a minor).

Therefore, the preliminary awareness of the target group surveyed, and the reliability of information thus gained seems to be very low. They gained most information they had on the journey from oral accounts, and they also specified the Internet and international news channels as the main sources of preliminary information. Typically, they set out on their journey without doubt, encouraged by the success stories of acquaintances and relatives: “Everyone receives an apartment and plenty of aid in Germany”, “one can get there fast”, “children can go to school there”. For the most part, travel arrangements were made through people smugglers – contacted with the mediation of relatives – (“such a journey is impossible without people smugglers”, “they are well organized, especially near the Hungarian fence”, “they pass you from hand to hand all through the journey”). Still, as an Afghan interviewee indicated: “It is not in the interest of people smugglers to be totally honest, because then the business would not go that well.” They had no preliminary information on prospective constraints and measures regulating movement en route, everyone believed the way to be open, and expected rapid arrival. People from Syria and Iraq feel that the experiences of their journey have been very humiliating. In view of their experiences, several stated that they would not wish that for their enemy, either.

Regarding the use of regular migration channels, the research had the reoccurring answer that if they had had an opportunity to enter with a visa, they would not have ventured on such a dangerous and uncertain journey. About the possibility for a visa issued at a consulate, most people indicated that it was exceedingly expensive (“only the rich can buy it”, or “those who have good relationships”), and had a great deal of conditions. It is impossible for a common man, and there are places where the embassies do not work, either, or even getting a passport runs into difficulties. An interviewee, who was

## 2 LEGISLATION AS A CATALYST OF IRREGULAR MIGRATION

a police officer in Iran, reported that because of his profession, he could not have received a passport until five years after retirement, and even then, it would have been one with limited territorial validity. And as an Afghan interviewee put it: “If you have to flee right away, there is no time to use such channels.” There were only two people among the respondents, who used a regular migration channel – to some extent – during the journey (a Palestinian from Gaza, and a citizen of Congo). These interviewees also consciously moved towards the least resistance, and choose a consulate (Ukrainian and Russian), where a personal interview was not mandatory, and “it was easy to get a visa”. Afterwards, they proceeded with false documents or the intervention of people smugglers. Finally, it is worth to note that some of the interviewees of African origin (a Libyan, a Cameroonian, a Malian, and a Kongo) arrived to Europe through Turkey, due to the fact that the Turkish National Airline – defying the line of complaints on its economic policy, which endorses irregular migration – operates direct airlines to several African countries, and visa acquisition is possible in Turkey, as the stories of the Somalian and Libyan interviewees attest.<sup>60</sup>

## 2.5 CONCLUSIONS

Based on the hypothesis and the methodology laid down in the introduction, we proceeded as follows. In Section 2.2, we reviewed the central elements of the regularization concerning regular and irregular migration channels towards the European Union. On this basis, there emerged on the one hand a regular migration channel established on a preliminary application before starting on a journey, still outside the target country, and meeting a complex set of conditions, hard to fulfill for many. On the other hand, there is an irregular migration channel, based on an application after the journey, in the target country, and a set of conditions relatively “easy to meet”, supported by an asylum regularization.

In Section 2.3, we sought to analyze – with the method of classical law and economics – the possible correlations between the use of irregular and regular migration channels, based on statistical data. The data reveals that the nationals of countries providing the highest number of asylum applicants do use the regular migration channels as well, but in significantly and demonstrably lower numbers, and with definitely below average performance indicators. Therefore, we cannot per se conclude that the nationals of countries providing the highest number of asylum applicants would not have a chance to arrive to the European Union through regular channels. However, we can conclude that the number of people using these channels are well below the average, and both the width and the functioning of these channels are not as favorable as for the nationals of other countries.

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<sup>60</sup> The findings of this study are confirmed in relation to Turkey by Joris SCHAPENDONK: *Turbulent Trajectories: African Migrants on Their Way to the European Union*. Societies 2012/2, p. 37.

BALÁZS ANDRÁS ORBÁN

Therefore, the method of classical law and economics has already revealed correlations that confirm the hypothesis, but further empirical investigations are needed to understand why the individuals surveyed choose irregular channels instead of regular ones.

In Section 2.4, based on the results of empirical research conducted by others, and our own research in connection with this study, we sought to find out – with the behavioral law and economics method – whether or not the present asylum regularization specifically catalyzes irregular migration, as this could not be unequivocally confirmed with only statistical methods. The surveys clearly reveal that the arrivals have complex motivations, the consideration of entitlement to international protection is exceptionally difficult, and the verifiability of fear from personal persecution is always highly questionable.<sup>61</sup> The results of the empirical research clearly confirm that the people concerned believe the use of regular migration channels is practically impossible, while the use of irregular migration channels and receiving international protection appears to them as a human right of some sort.

In addition, the legal awareness level of the interviewees surveyed is rather low, but they are fully aware that they get a chance to start a new life on the continent only after arriving to the territory of the European Union. Furthermore, all information amounting to some level of legal awareness is geared towards helping them ‘legalize’ their status through the asylum system past their use of the irregular migration channels (emphasizing protected characteristics, the overvalue of being a minor, the importance of the fingerprinting procedure). Finally, it is important to underline that the results of other empirical studies confirmed the influence of the layout, operation and strictness of the migration regularization on migration.

In our study, we sought to find out why millions of people from the developing regions of conflict – surrounding Europe – arrive the way they do. Our basic assumption was that this type of uncontrolled irregular migration is not good for either the countries of origin, the transit countries, or the receiving countries, and actually, it is not good for the people in the migration movement.<sup>62</sup> We did not examine who is entitled to asylum and who is not, who depends on it in reality and who does not – we just wanted to see how the migration regularization affects this mode of migration. Here, it is important to make it clear that in our opinion, sooner or later we have to acknowledge that distinguishing between a refugee and an immigrant – and the individualized grant of international protection in general – will not be appropriate in handling the forced migration movements of the 21st century. As of now, there are not many references to this in the academic literature, the issue arises only in terms of the need to grant international pro-

61 Instead of personal persecution, their flight is – understandably for all humans – prompted by armed conflict, uncertainty, or natural effects in their country in general. See RITECZ György – SALLAI János: *A migráció trendjei, okai és kezelésének lehetősége (Migration trends, causes, and an option to address it)*. Hanns Seidel Alapítvány 2015, p. 19).

62 Paul COLLIER: *Exodus: How Migration is Changing Our World*. Oxford University Press, 2013. pp. 251-255, 270.

## 2 LEGISLATION AS A CATALYST OF IRREGULAR MIGRATION

tection for more people, while this is not the only way to approach the issue. At the same time, it is still a sustainable conclusion – based on the numbers – that the majority of asylum applicants are not entitled to international protection. The recognition rates typically remained under 50% in the European Union – not just in terms of conventional refugees, but for all people granted international protection.<sup>63</sup> Thus, we can say that there is a substantial number of people who seek to legalize their irregular migration movement afterwards by using the right to asylum. It is essential to understand the motivations of these people, so that we can reduce the negative consequences of the waves of migration generated by them (as well) in the receiving countries. In order to understand what is happening and why, we turned to the method of behavioral law and economics, which is a research method also used to assess the effects of legislation.

As we have seen, the assumptions of the hypothesis outlined in the introduction have been confirmed, inasmuch as: people now arriving do not have a real chance (or at least that is what they think) to arrive to (and permanently stay in) the European Union through regular migration channels, and asylum right in the Union, built on international migration regularization, along with the regulations of the various member states, distinctively push the individuals concerned towards irregular migration movements, and force them to move. In addition, while the legal awareness of people arriving is exceedingly low, the minimal information regarding the regularization catalyze these processes even further, while information possibly slowing down the movement are gathered only along the way (e.g. negative experiences on the dangers of the travel, hardships experienced in the receiving countries).

Examining the phenomena mentioned in this study from the behavioral law and economics point of view, a very noteworthy picture takes shape in front of us, based on empirical research. Before starting on the journey, when people conduct a cost-benefit analysis to see whether they should leave or stay, and decide on what kinds of migration channels they should use, apparently they estimate the cost of regular channels exceedingly high: “expensive”, “practically impossible” – these are the most often repeated perceptions, which raise the usage cost of regular migration channels to a very high level. On the level of perceptions, the costs attached to the use of these regular channels are so high, that even though in reality it is not impossible for the nationals of these countries to enter the territory of the European Union and stay there legally, the chance for this – as supported by the statistics – appears to be zero in practice. It is also clear to see that in parallel to this, people irrationally underestimate the costs of irregular migration, both

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63 Randall HANSEN – Demetrios G. PAPADEMETRIOU: *Securing Borders: The Intended Unintended, and Perverse Consequences*. In: Randall Hansen – Demetrios G. Papademetriou (ed.): *Managing Borders in an Increasingly Borderless World*. Migration Policy Institute Washington DC. 2013, p. 9. For the difference between recognition rates and its background, see A. LEERKES: *How (un)restrictive are we? – ‘Adjusted’ and ‘expected’ asylum recognition rates in Europe*. Cahier 2015/10. <<https://www.rijksoverheid.nl/documenten/rapporten/2016/02/02/tk-bijlage-wodc-rapport-how-unrestrictive-are-we-adjusted-and-expected-asylum-recognition-rates-in-europe>> (downloaded: September 5, 2016).

BALÁZS ANDRÁS ORBÁN

regarding the dangers and expenses of the way, and the prospective hardships in the transit countries and in the receiving countries.

Our overall observation is that people who consider starting on the journey do not or cannot conduct a rational cost-benefit analysis while they contemplate between staying or leaving, and using regular or irregular migration channels, but they rely on so-called rules of thumb, and on rumor. During this contemplation, which we may call intuitive, they typically estimate the costs of leaving much lower than the costs of staying, while the usage cost of irregular migration channels is already underestimated in comparison with chances offered by regular channels. In relation to benefits, we see that the chance to start a new life overshadow the sometimes extraordinary costs of starting on the journey (direct or indirect risks to life, extended costs along the way, uncertainty, criminal groups). The legal system of the receiving area specifically promotes this irrational cost-benefit analysis, which often turns out false afterwards, and the – sometimes false, distorted or incomplete – information available on the legislation and on the use of different migration channels also have a decisive influence in an unfavorable direction.<sup>64</sup>

Unquestionably, legislation affects migration. And the present regulation – regarding regular and irregular migration channels – specifically promotes the mode of migration which has become prevalent in public discourse over the past two years. The overall conclusion of our study is that while there is no pragmatic change in the migration regularization, and information campaigns presenting the migration regularization do not get organized to lower the number of people involved in the irregular migration movement, we cannot expect a decrease in the number of irregular migrants and asylum applicants from a legislative point of view. And if the objective is to reduce the number of people arriving to the European Union – regardless of the channel used by them –, then we need to entirely change the logic of the international and EU legislation now enhancing irregular movement.

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64 More and more people indicate that the nature of migration has changed fundamentally in our day, and in the light of present events, the migration generated by former, ideology-based distinctions is only worth to investigate to the extent that will help us understand how different the current processes are from the former ones. The motivations of individuals involved in migration are unpredictable, and the decisions of one greatly influence the decisions of others. Today's migrants are exceedingly risk-taking young men for the most part, who move around in the world without state support, intensively cooperating and sharing informations with one another. (See Roderick PARKES: *People on The Move: The New Global (Dis)Order*. European Union Institute for Security Studies Chaillot Papers 2016/138. <[www.iss.europa.eu/uploads/media/Chaillot\\_Paper\\_138.pdf](http://www.iss.europa.eu/uploads/media/Chaillot_Paper_138.pdf)> (downloaded: September 5, 2016)