EUROPEAN REFUGEE CRISIS: LEGAL FRAMEWORK AND EUROPEAN POLITICAL EFFECTS

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Abstract

The European refugee crisis that engulfs some of the European Union member states can be approached through a legal perspective: from the 14th article of the Universal Declaration of Human Rights and the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, to the jurisprudence of the European Court of Human Rights and article 78 of the Treaty on the Functioning of the European Union and to certain acts of the European Union, such as the Dublin Regulation. However, while facing the `refugee crisis`, this legal framework was considered inappropriate for dealing with the magnitude of the refugee phenomenon and the political stepped in to take matters into its own hands. The divergent political responses of the European Union member states and the turn towards a radical response after the November 13 Paris attacks accelerated a trend which was already in place in Europe – the rise of the right-wing extremism, which contests the very core of the European project. Analyzing this unsettling context, the article investigates some of the myths and rhetorical strategies that tend to monopolize the European public discourse and advocates for a return to law as a reference point.

Key words: refugee crisis; human rights discourse; Dublin Regulation; right-wing extremism; 1951 Geneva Convention

Law, "crisis" and *ad captandum vulgus* discourses

A trait of the contemporary Western world is the ever mediated relation one has with raw facts; reality itself seems to be nothing more but the background which all discourses in the foreground relate to and claim to represent – getting to reality itself in order to form a personal opinion, in order to perceive it in an unaltered manner and escape the web of narratives, seems to be the Sisyphean task of our days. It isn't a very appealing one to commit to, since most of the discourses indicate an undeniable craftsmanship in projecting such vivid images of reality that they may be easily be confused with the reality itself. For the purpose of this article, the notion of "discourse" is used in the most broad and general sense, referring to all forms of communication of parties, political figures, institutions, organizations and any relevant public actors, individuals or groups that shape the public opinion.

As Baudrillard pointed out, the discourses which can be still identified as representations of reality are harmless; the most harmful ones are the discourses which aim at something else: at the true artistry which implies that the discourse is to be taken as reality since there are no signs of craftsmanship whatsoever that can be identified (Baudrillard J., 1988). Law, the legal framework, gets inevitably tangled in all these conflicting discourses with the unsettling effect that what should be a reference point becomes blurred and contaminated with uncertainty. This bears a significant importance especially in times of what has been called "crisis" – from the "European economic crisis" to the most recent one, the "European refugee crisis".

If the massive refugee influx that hit the European shores at the end of 2015 deserves indeed to be qualified as a "crisis" is a matter of dispute. The controversy around the designation of a certain state of affairs as a "crisis" has, in this case just as in any other, political consequences. Language is not innocent, in the sense that it structures the way reality is perceived, and a certain diagnosis calls for a particular set of measures. Thus, an unwise and rash label such as "crisis" attached to states of affairs that may require a thorough examination inevitably suggest that measures that are to be adopted should be proportional and as radical as the diagnosis demands. However, as I argue in this article, regardless of the innocent ignorance or questionable intentions behind such a hasty diagnosis, it is beyond controversy that it is a rhetoric strategy in some discourses that effectively benefit some.

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Habermas tried to clarify the concept of "crisis" by placing it in its adequate context – the term is generally used in medicine to refer to a state in which it must be decided whether the organism's powers to heal are sufficient to overcome the disease. The disease which triggers these self-healing powers is an external, objective element and although it affects the patient as a subject, in the moment of crisis the patient has no control over the course of the events. (Habermas J., 1973) *Mutatis mutandis*, in the "European refugee crisis", the massive influx of refugees at the end of 2015 was presented and experienced by the public as an external event, over which national and supranational institutions had no control. A general feeling of helplessness and sometimes panic casted a dark shadow on otherwise clear institutions and legal rules. The mere act of labeling the refugee phenomenon as a "crisis" in the public discourse created a great amount of uncertainty, a lack of predictability generated by an unstable situation, and this was the environment in which, *ad captandum vulgus*, populist discourses proliferated.

The state of public confusion and the diffuse sense of fear are the ingredients needed for all radical discourses to flourish, discourses which call into question fundamental political elements that already have a strong legal ground – for example, multiculturalism, the constitutional order, the very foundations of the European Union etc. This is a neither new nor unexpected reaction to uncertainty. Modernity, through a continuous and fundamental undermining of all ancestral certainties, left people in an unbearable state of uncertainty regarding what used to be their rather safe symbolic order, with stable and prescribed identities, morals and ways of life. In this context, any quasi-prophetic movement that promised either a way back or a way forward by pointing to something certain seemed appealing (Donskis L., 2013). Such reactions to modernity encompass the 1797 "Mémoires pour servir à l'histoire du Jacobinisme", Barruel's conspiracy theory regarding the 1789 French Revolution, anti-Semitism, movements for monarchist restorations and the more recent 20th century fascism with its racist and xenophobic politics. Some of the discourses portraying the 2015 European refugee crisis have structures similar to any other anti-modern discourse – the idea that the massive refugee influx at the end of 2015 is an "orchestrated invasion" echoes Augustin Barruel's conspiracy theory; the claims that European Union has forgotten its Christian origins and that the refugees, since most of them are Muslims, are a threat to the very European Christian inheritance, echoe both the reaction of the Church after the French Revolution and also the everlasting European anti-Semitism; as well, the rise of the straight-forward right-wing Euroskeptic political forces with clear anti-immigrant, xenophobic, racist and nationalistic agendas are the contemporary political equivalents of the 20th century fascism.

Before returning to the *ad captandum vulgus* discourses with their questionable diagnosis and the dangerous myths they circulate in the public sphere, which only brings a new impetus to the European right-wing extremism, I shall examine the legal framework which establishes the rights and obligations of all the parties involved – the refugees on the one hand, the states on the other. The analysis will proceed gradually from the most broad international documents such as the Universal Declaration of Human Rights and the 1951 Geneva Convention relating to the status of the refugee only to focus on the more specific European legal documents and institutions regarding refugees, such as the European Convention of Human Rights (ECHR), the Charter of Fundamental Rights of the European Union, the Treaty of the European Union and the Treaty on the Functioning of the European Union.

The international legal status of the refugee: The Universal Declaration of Human Rights and The Geneva Convention of 28 July 1951 completed by the Protocol of 31 January 1967

The Universal Declaration of Human Rights (UDHR), a fundamental document in the development of human rights, was proclaimed by the United Nations General Assembly in Paris on 10 December 1948. For the first time human beings, for the mere fact of being human, were recognized certain fundamental rights in an international document. UDHR specifically recognizes the right to seek asylum in article 14: *1. Everyone has the right to seek and to enjoy in other countries asylum from persecution. 2. This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.*

Three years after the proclamation of UDHR, The 1951 Geneva Convention was adopted as the main legal instrument concerning the legal status of the refugees. As it is stated in the Preamble of the Convention and in the December 2010 introductory note of the Convention by the Office of the United Nations High Commissioner for Refugees (UNHCR), the Convention is grounded in article 14 of the UDHR. With this Convention adopted by the United Nations, which entered into force on 22 April

1954, matters regarding the definition of a refugee, their rights and the legal obligations of states were settled, by offering a unifying codification of previous legal instruments concerning particular groups of refugees. The 1967 Protocol removed geographical and temporal restrictions which were prior established in the text of the 1951 Geneva Convention, thereby giving it an universal coverage.

Chapter I of the Convention contains general dispositions in articles 1-11. Article 1 A (1) of the Convention defines the legal notion of "refugee" as any person who has been considered a refugee under the Arrangements of 12 May 1926 and 30 June 1928 or under the Conventions of 28 October 1933 and 10 February 1938, the Protocol of 14 September 1939 or the Constitution of the International Refugee Organization. Article 1 A (2) states that a refugee is any person who, 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.

The second article of the Convention refers to the general obligations of the refugee, which imply that she/he should comply to the laws and regulations as well as to the measures taken for the maintenance of public order in the state in which she/he finds her/himself.

Refugees are to be treated by states with respect of the non-discrimination principle provided in article 3 of the Convention, which specifies that race, religion or country of origin cannot constitute proper grounds for a differentiated application of the provisions of the Convention.

Chapter II of the Convention configures in articles 12-16 the legal status of the refugee, referring to the personal status of the refugee (Article 12), to the rights regarding acquisition and lease of movable and immovable property and other related contractual rights (article 13), to the artistic rights and industrial property (article 14), to the right of association (article 15) and to the access to courts (article 16). Chapter III contains provisions regarding the gainful employment, Chapter IV – provisions regarding the welfare of the refugee, Chapter V – provisions regarding administrative measures and Chapter VI – executory and transitory provisions.

Article 31 of the Convention refers to the delicate issue regarding the legal status of refugees unlawfully in the country of refugee and the obligations such states have regarding those refugees who find themselves in that specific condition. Article 31 (1) provides that states *should not impose penalties, on account of their illegal entry or presence, on those refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.* Article 31 (2) provides that the states *shall not apply to the movement of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country*. Article 32 regarding the expulsion refers only to the refugees who find themselves legally on the territory of a state. However, article 33 regarding the prohibition of expulsion or return ("refoulement") applies to all refugees, regardless of their lawfully or unlawfully entrance or presence on a territory. Article 33 (1) provides that *No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.* Article 33 (2) states that *The benefit of the present provision may not, however be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.*

Certain conclusions can be drawn from the interpretation of article 31 (1). First of all, states have, due to their sovereignty, a discretionary right to decide who and under which conditions persons may enter and stay on their territory (Balan M., 2015). In the light of article 31 (1) of the Convention, the disposition applies to those refugees who find themselves on the territory of the states in breach of the state's laws which regulate admission and presence on its territory. Under article 31 (1) of the Convention, states have the negative obligation not to penalize such refugees on the grounds of the violation of the national laws regarding the entry and presence of persons on their territory. The *penalties* the text of the article 31 (1) refers to encompass all criminal

procedures such as investigation and bringing in front of a court, and sanctions deriving from such procedures, such as detention or any other sanctions (Moldovan C., 2015).

There are two cumulative conditions that ought to be met by the refugees who enter or stay illegally in a state in order to benefit from the provision of article 31 (1) of the Convention – firstly, they have to come directly from a territory where their life or freedom was threatened in the sense of article 1 of the Convention, which refers to the danger of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; secondly, they must present themselves *without delay* to the authorities and justify their illegal entry or presence. In the absence of any of the two conditions, the penalties applied by the state are justified. Therefore, the provision refers to those refugees who enter or find themselves illegally in a state, who also come directly from the country of origin where they are in danger of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, and also seek asylum to the national authorities. As such, those refugees who enter or stay illegally in a state, but only in order to hide or continue their transit to other destinations are out of the scope of article 31 (1) of the Convention, and, thus, may be subjected to penal measures. Also, refugees who enter or stay illegally in a state, but without coming directly from the country where his life and freedom are threatened in the sense of article 1, may also be subjected to penal measures – such refugees are those who, coming directly from the country of origin, were denied asylum in a state and seek asylum in a different one.

Although article 31 (1) forbids the states to take any penal measures against those refugees who enter or find themselves illegally in that state but meet the conditions provided in article 31 (1) analyzed above, article 31 (2) allows the states to take certain measures that restrict the movement of those refugees. Such restrictions should meet two conditions: firstly, they have to be necessary, and secondly, they must only be applied until their status in the country is regularized or they obtain admission into another country.

A Brief Overview of the European protection of the refugees

The refugee legal status provided in the 1951 Geneva Convention and the 1967 Protocol was locally supplemented and improved as regional, subsidiary legal instruments were adopted in this sphere. As article 5 of the 1951 Geneva Convention states, *Nothing in this Convention shall be deemed to impair any rights and benefits granted by a Contracting State to refugees apart from this Convention*, thus, the protection offered by the Convention was meant only to impose a minimum to which the states may add their own regime offering a greater protection to the refugees through particular legal documents. In Europe, the particular regime of the refugees was customized through the adoption and enforcement of such legal documents as the European Convention of Human Rights (ECHR), the Charter of Fundamental Rights of the European Union, the Treaty of the European Union and the Treaty of the Functioning of the European Union.

Regarding the European Convention of Human Rights, the matters concerning refugees are rather exceptional, since there is no specific provision in the Convention that explicitly refers to refugees. However, through the application of other articles of the Convention, the European Court of Human Rights managed to compensate the lack of a specific provision regarding the protection of refugees or the right to asylum.

In 1989 *Soering v. United Kingdom,* the Court had to decide whether the decision of the national authorities of extradition and expulsion of a foreign person was violating the obligations the state had under the European Convention of Human Rights. According to article 1 of the Convention, *The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention*. Therefore, the foreign person who finds him/herself on the territory of a state that signed the ECHR enjoys the human rights provided in the ECHR. The term foreign person which benefits from the protection of the ECHR is not only the refugee, but also any other person who is a citizen of a different state who did not sign the European Convention of Human Rights or a stateless person. Although the foreign person enjoys the protection of his rights under ECHR, the Convention does not explicitly grant a right of entrance, presence or residence in the territory of a state, as the constant jurisprudence of the European Court of Human Rights points out in decisions such as the 1986 *Lukka v. United Kingdom* or the 1996 *Chahal v. United Kingdom*. Therefore, under the ECHR the states are recognized full sovereignty in matters regarding the entrance an presence on their territories.

In the 1989 *Soering v. United Kingdom* case, against Jens Soering, foreign person, the authorities of the United Kingdom took the decision of extradition to the United States of America, according to a 1972 bilateral agreement of extradition. The decision was taken in order for Soering to be tried for murder in the state of Virginia, offense which was sanctioned with the

death penalty. Soering claimed that the extradition decision was in violation of ECHR, which prohibits torture in article 3 – *No one shall be subjected to torture or to inhuman or degrading treatment or punishment*, since he would have been exposed to the "death row syndrome". In this case, although the British authorities did not themselves subject Soering to any of the situations prohibited in article 3 of ECHR, since the foreseeable effect of the extradition decision was unequivocally leading to a breach of ECHR, the European Court of Human Rights decided in favor of Soering. This line of reasoning of the European Court of Human Rights was restated in decisions such as the 1991 *Cruz-Varas v. Sweden*, the 1991 *Vilvarajah v. United Kingdom*, the 1996 *Chahal v. United Kingdom,* the 2007 *Salah Shekh v. Netherlands* or the 2008 *Saadi v. Italy*.

A particular decision regarding the application of the 1951 Geneva Convention relating to the status of the refugee was the 1996 *Amuur v. France*. In this case, the European Court of Human Rights clarified the conditions of the application of article 31 (2) of the 1951 Geneva Convention, which allows states to take certain measures that restrict the movement of those refugees who enter or stay illegally in a state, but who meet both conditions specified in article 31 (1) of the 1951 Geneva Convention – they come directly from the country in which they are exposed to the dangers specified in article 1, and they seek asylum. As it is stated in article 31 (2), the states may impose only those restrictions on the movement of such refugees that meet two conditions: firstly, they have to be necessary, and secondly, they must only be applied until the status of the refugees is regularized or they obtain admission into another country. In the 1996 *Amuur v. France* decision, the European Court of Human Rights admitted that the movement of those refugees may be restricted by detention in prisons, closed camps or restricted areas such as reception centers. However, these measures may not under any circumstance prevent the effective access of those persons to the procedure which regularizes their status.

Also, although the jurisprudence of the European Court of Human Rights does not impose any direct limitations on the sovereign right of the states to decide in matters of extradition or expulsion, article 4 of the 1963 Protocol of the ECHR forbids the collective expulsion of foreigners. In the 2002 *Conka v. Belgium* case, the European Court of Human Rights defined the "collective expulsion" as any measure that constrains the foreigners as a group to leave the country, excepting those situations in which such a measure is adopted after a reasonable and objective examination of the specific situation of each foreign person that forms the group.

Taking into account the rights proclaimed in the ECHR and the jurisprudence of the European Court of Human Rights, but also the jurisprudence of the Court of Justice of the European Union and the common constitutional traditions of the European Union member states, the Charter of Fundamental Rights of the European Union (CFREU) was signed and proclaimed in December 2000 without any binding effect, which was later recognized through the Lisbon Treaty in 2009. The CFREU is to be applied by the institutions and the bodies of the European Union (EU) and by the national authorities only when they are implementing EU law.

Article 18 of the CFREU explicitly recognizes the right to asylum – *The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union (hereinafter referred to as 'the Treaties')*. The text of article 18 of the CREU refers to the 1951 Geneva Convention which I have already analyzed, but also to the provisions regarding the right to asylum provided in the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU), international legal documents which, under article 18 of the CFREU, must be observed simultaneously. Therefore, the asylum policies of the EU must respect article 18 of the CRFEU.

The asylum policies of the EU are stipulated in the TEU and TFEU. TEU refers to asylum in article 3 (2) - *The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime*. Also, Protocol No 24 of the TEU refers to asylum for nationals of member states of the European Union, recognizing that *Given the level of protection of fundamental rights and freedoms by the Member States of the European Union, Member States shall be regarded as constituting safe countries of origin in respect of each other for all legal and practical purposes in relation to asylum matters.*

In Title V of the TFEU regarding the Area of freedom, security and justice, Chapter II refers to matters concerning the policies on border checks, asylum and immigration. Directly applying

to refugees are the provisions in article 78 (1) which states that *The Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement. This policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties.* The article offers a ground for the EU policies regarding asylum, which also makes reference to the 1951 Geneva Convention, especially to the article 33 of the Convention, which imposes the principle of non-refoulement.

In the development of the policy regarding asylum, article 78 (2) of the TFEU states that the EU institutions (European Parliament and the Council, acting in accordance with the ordinary legislative procedure) shall adopt measures for a common European asylum system referring to: a uniform status of asylum for nationals of third countries, valid throughout the Union; a uniform status of subsidiary protection for nationals of third countries who, without obtaining European asylum, are in need of international protection; a common system of temporary protection for displaced persons in the event of a massive inflow; common procedures for the granting and withdrawing of uniform asylum or subsidiary protection status; criteria and mechanisms for determining which EU member state is responsible for considering an application for asylum or subsidiary protection; standards concerning the conditions for the reception of applicants for asylum or subsidiary protection; partnership and cooperation with third countries for the purpose of managing inflows of people applying for asylum or subsidiary or temporary protection. Looking at the provisions of article 78 (2) of TFEU, there are sufficient legal grounds for EU and member states to adopt detailed and rigorous policies and measures regarding the refugees. Even "crisis" situations such as the one generated by the influx of refugees by the end of 2015 may fall within the scope of the law, since article 78 (3) of the TFEU explicitly refers to the event in which one or more EU member states are confronted with an emergency situation triggered by a sudden inflow of nationals of third countries. In such situations, article 78 (3) of the TFEU states that the Council, following a proposal from the Commission, may adopt provisional measures for the benefit of the member state(s) concerned. It shall act after consulting the European Parliament.

The EU asylum policies started with the Maastricht Treaty. Under the Maastricht Treaty signed in 1992 and in force since 1993, which introduced the novelty of the European Union that juxtaposed without substituting previous European Communities, a common European policy regarding asylum was taken into consideration. Under the Maastricht Treaty, the asylum policy was considered part of the "common interest", as it was stated in article K.1: *For the purpose of achieving the objectives of the Union, in particular the free movement of persons, and without prejudice to the powers of the European Community, Member States shall regard the following areas as matters of common interest: (a) asylum policy*.

The Maastricht Treaty created a European Union consisting of three pillars: the European Communities, Common Foreign and Security Policy (CFSP), and police and judicial cooperation in criminal matters (JHA). The first pillar, dominated by the Community method, consists in the European Community, the European Coal and Steel Community (ECSC) and EURATOM, and it encompasses the sphere in which the member states share their sovereignty with the institutions of the Community. The second pillar referring to the common foreign and security policy (CFSP) and the third pillar regarding the cooperation in the field of justice and home affairs (JHA) were dominated by the intergovernmental method. At first, the policy regarding asylum was a matter of intergovernmental cooperation, which implied that the member states were able to adopt and impose their particular legal rules regarding asylum and refugees. However, the Amsterdam Treaty signed in 1997 and in force since 1999 stated that one of the objectives of the EU was *to maintain and develop the Union as an area of freedom, security and justice, in which the free movement of persons is assured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime* and introduced Title IIIa regarding visas, asylum, immigration and other policies related to the free movement of persons, thereby transferring the policy regarding asylum to the first pillar. This transfer presupposed that the states lost their sovereignty regarding asylum policies and permitted for specific legally binding EU acts such as directives and regulation to be passed in the field of asylum, which before the Amsterdam Treaty was possible only in the field regarding visas (Peers, Guild, Tomkin, 2012)

The adoption of the Amsterdam Treaty in 1999 marked an important momentum regarding the asylum policies of the EU. The European Council

adopted in 15 and 16 October 1999 what was called the Tampere Programme, which proposed a Common EU Asylum and Migration Policy which encompassed aspects regarding partnerships with countries of origin, the creation of a Common European Asylum System (CEAS), fair treatment of third country nationals and management of migration flows. The Tampere Programme affirms in the section A II points 14 and 15 of the Presidency conclusions the need to create a Common European Asylum System (CEAS) through a two-phase process: *14. This System should include, in the short term, a clear and workable determination of the State responsible for the examination of an asylum application, common standards for a fair and efficient asylum procedure, common minimum conditions of reception of asylum seekers, and the approximation of rules on the recognition and content of the refugee status. It should also be completed with measures on subsidiary forms of protection offering an appropriate status to any person in need of such protection. (...). 15. In the longer term, Community rules should lead to a common asylum procedure and a uniform status for those who are granted asylum valid throughout the Union.(...)* The 2004 Hague Programme of the European Council reiterates the need for pursuing a Common European Asylum System. Both the Tampere and Hague Programmes focused on the creation and implementation of the CEAS, which was to be accomplished in two phases – the first one (1999-2005) was concerned with the legal harmonization of all the different laws of the EU states regarding asylum; the second one (2005-2010) was concerned with a common asylum procedure and a uniform status for those who are granted asylum or subsidiary protection, as it is stated in the Hague Programme: *The aims of the Common European Asylum System in its second phase will be the establishment of a common asylum procedure and a uniform status for those who are granted asylum or subsidiary protection. (...).*

In order to implement the CEAS, a series of EU acts were adopted. One of the most important EU acts is the Council Regulation (EC) No 343/2003 of 18 February 2003, also known as "Dublin Regulation", which establishes the criteria and mechanisms for determining the EU member state responsible for examining an asylum application lodged in one of the Member States by a third-country national. The objective of Dublin Regulation is to identify as quickly as possible the EU member state responsible for examining an asylum application, and to prevent abuse of asylum procedures. Dublin Regulation establishes the principle that only one EU member state is responsible for examining an asylum application so that asylum seekers will not be sent from one country to another. This regulation also prevents the submission of multiple applications for asylum by one person. The Dublin Regulation refers to the situation of the refugees who enter or stay illegally in a EU member state: *Where the asylum seeker has irregularly crossed the border into a Member State, that Member State will be responsible for examining the asylum application. This responsibility ceases 12 months after the date on which the border has been illegally crossed. When the asylum seeker has been living for a continuous period of at least five months in a Member State before lodging his/her asylum application, that Member State becomes responsible for examining the application. Where the applicant has been living for a period of time of at least five months in several Member States, the Member State where he/she lived most recently shall be responsible for examining the application.*

Considering the fact that the Tampere Conclusions provide that a CEAS should include, in the short term, common minimum conditions for the reception of asylum seekers, the Council Directive 2003/9/EC of 27 January 2003 was concerned with laying down such minimum standards as it is stated in article 1 of the Directive. Chapter II of the Directive contains general provisions regarding the reception conditions the states should meet. For example, article 5 related to the information obligation of the states stipulates that, within a reasonable time not exceeding 15 days after they have lodged their application for asylum with the competent authority, member states should inform the asylum seekers of at least any established benefits and of the obligations with which they must comply relating to reception conditions. Also, article 5 (1) stipulates the obligation of the member states to ensure that applicants are provided with information on organizations or groups of persons that provide specific legal assistance and organizations that might be able to help or inform them on issues regarding the available reception conditions, including health care. As stated in article 5 (2), such information must be addressed in writing and in a language that the applicants may reasonably be supposed to understand. Chapter III of the Directive refers to the reduction or withdrawal of reception conditions, Chapter IV contains provisions for persons with special needs, Chapter V contains conditions regarding appeal and Chapters VI and VII refer to actions to improve the efficiency of the reception system and final provisions. Regarding the movement of the asylum seekers, article 7, which refers to residence and freedom of movement, states that *1. Asylum*

seekers may move freely within the territory of the host Member State or within an area assigned to them by that Member State. The assigned area shall not affect the unalienable sphere of private life and shall allow sufficient scope for guaranteeing access to all benefits under this Directive. 2.Member States may decide on the residence of the asylum seeker for reasons of public interest, public order or, when necessary, for the swift processing and effective monitoring of his or her application. 3. When it proves necessary, for example for legal reasons or reasons of public order, Member States may confine an applicant to a particular place in accordance with their national law.

After the first phase was fully accomplished, the 2007 Green Paper on the Future of CEAS analyzed the further steps to be taken in this domain. A year later the European Commission adopted the Policy Plan on Asylum, which proposed an integrated approach to protection in the EU. The Policy Plan organized the future developments of CEAS on three pillars: the first was concerned with a more uniform asylum legislation in all EU member states, the second with the effective practical cooperation in this field, and the third with the increased solidarity and sense of responsibility among EU States, and between the EU and non-EU countries.

This led to a new and improved European legal framework in the field of asylum, through the revision of the Asylum Procedures Directive, of the Reception Conditions Directive regarding humane material reception conditions in EU member states and the respect of the fundamental rights of the asylum seekers (which also requires that measures such as detention are applied only in exceptional cases as a measure of last resort), through a revision of the Qualification Directive, which clarifies the grounds for obtaining international protection, and through the revision of the Dublin Regulation, which created a system to detect issues of the EU state's asylum or reception systems, and prevent these problems from growing into unmanageable troubles by addressing their root causes. Also, the EURODAC Regulation, which created a central EU asylum fingerprint database that contained the fingerprints of all the persons who applied for asylum in any of the EU member states, was improved through a revision In addition to these improvements, the European Parliament and the Council adopted in 19 May 2010 the Regulation (EU) No 439/2010 for establishing the European Asylum Support Office. As article 1 of the Regulation states, the creation of this institution was meant *to help to improve the implementation of the Common European Asylum System (the CEAS), to strengthen practical cooperation among Member States on asylum and to provide and/or coordinate the provision of operational support to Member States subject to particular pressure on their asylum and reception systems.* (Peers, S., Guild, E., Tomkin, J., 2012).

What and whose "crisis"?

After looking at the EU legal framework, policies and institutions that address the issues of refugees and other international legal documents with legal relevance to the EU states with respect to the asylum seekers, a couple of general conclusions can be drawn – under no circumstance is there a legal vacuum in matters regarding asylum in EU. Moreover, "crisis" situations were foreseen and the EU legal acts, institutions and policies have clear dispositions on how to anticipate, react and tackle tensed situations. If some of the public discourses that were so eager to announce the failure of the EU strategies regarding asylum were either triggered by the refugee influx or just given a boost, the framing of the events regarding the arrival of the refugees in the European states as a "crisis" has very obvious political effects. The rise of right-wing extremism is such an effect, while the voices which were once marginal in European politics are given more and more credibility. These voices advance a new political goal – instead of returning to the legal framework and focusing on improving the ways in which already existing and binding laws could be enforced, this fear-driven and at times inflammatory discourse turns the law into a resource and an object of debate.

It is still a debatable thing whether when referring to the "refugee crisis" the legal discourse and the public discourse mean the same thing. First of all, since the crisis situations were anticipated by the EU as it can easily be seen through the legal dispositions and institutions that address such situations, from a legal point of view, the "crisis" is nothing but a scenario which implies a different course also prescribed by the law. In the public discourse, however, the "refugee crisis" is supposed to mean a rather different thing – the fact that the situation is beyond any control and, as such, it cannot be dealt with within the given legal framework. The voices that articulate this point and those who are animated by it do not refer to the situation of the refugees as a "crisis", since it is their rights prescribed by international and EU legal documents that are constantly violated. On the contrary – the claim is that the EU is in crisis due to the refugee influx, particularly in those states which have had for some years now an increasingly vocal anti-immigrant, nationalist and

xenophobic attitude (Kenneth, R., 2015). The logic of the discourse seems to be reducible to a simple equation where EU is in crisis because the state is in crisis and the state is in crisis because of the *Other*: the Muslim immigrants, the Roma immigrants, the Eastern-European immigrants and, the most recent ones, the refugees. There is an undeniable connection between the disproportionately perceived magnitude of the refugee influx and the rampant anti-EU right-wing extremism; the distorted perception over immigration is the wind beneath the wings of Euroskeptic and nationalist political movements.

In matters regarding the 2015 European refugee influx, the public discourse, which is not plain xenophobic or racist, may be misleading in several ways. First of all, it is misleading in the sense that it sometimes points to false problems. Second of all, when it recognizes the existence of legally binding international documents regarding the rights of the refugees, it is misleading in the sense that it suggests the exceptional character of the European refugee 2015 influx, which is considered to be a sufficient reason for non-compliance to the international rules.

Regarding the elements of the public discourse that misguide the perspective on the refugee crisis, they consist primarily of false problems. Such false problems are issues which have already been addressed by the law, and, as such, were removed from the broad and cloudy sphere of *doxa* – for example, there is no point in asking today whether refugees have any rights in EU because there already are several legal instruments that specifically address the status of the refugees. Furthermore, as analyzed above, the EU itself passed specific acts in compliance with the 1951 Geneva Convention that recognize rights to refugees, and developed particular institutions and policies in order to address the matters regarding immigration and refugees. Therefore, the fact that the question of whether refugees have any rights at all has been risen is either an expression of ignorance or simply a manipulation the purpose of which is to suggest that, from a legal point of view, the matters concerning the refugees are not quite settled, that somehow there is a legal gap. This perspective is usually continued with the suggestion that the legal gap is to be filled, of course, with a "legitimate democratic" debate regarding the very existence of the rights and the legal status refugees should have. The mere fact of presenting an issue which is governed by law as a matter of public debate (even a most democratic one) is unsettling, because it aims to conceal and undermine the very existence of the legal rules in the field of refugees and to substitute the compliance with the law with the arbitrary process of creating the law from scratch in the light of current events.

A slightly different discourse accepts the fact that refugees have rights specified in certain binding acts that compel the states to respect them, but it considers this legal framework to be outdated and ineffective. Once again, due to the faulty application of the law, the issues addressed by public international law instruments should be brought "back to the people" and the existence of any rights of the refugees should be re-settled through a "democratic debate". The essential detail is that this debate should take place especially considering the massive influx of refugees during 2015. If there is an equivalent of the "efficient breach of contract" in the public law, this perspective certainly embodies it. The main point is that, although EU states have agreed to recognize and respect the rights of the refugees, this was done without any means of anticipating the impact and the effects the refugee phenomenon would have in 2015, which is a false hypothesis. This perspective translates the entire logic of the *pacta sunt servanda/ rebus sic stantibus* dispute regarding the performance of a contract in continental-European private law: yes, we concluded a contract and yes, I did not fulfill my obligations. However, this was due to the fact that I consented to enter in a contractual relationship only considering the fact that no radical changes would appear that would make the fulfillment of my obligations extremely onerous. Therefore, the breach of contract on my part through failure to fulfill my obligations is legitimate. This would fall within the legal scheme of *rebus sic stantibus,* which would also imply the fact that any further negotiations regarding the fulfilling of the obligations are to be conducted only in order to "save the deal", which indirectly admits a commitment to find a solution at the EU level and not the radical nationalist closing of the borders. However, somehow this whole objective, unexpected event that prevents states to observe the EU regulations is used not to reconsider a common solution at the EU level, but to denounce the EU and the legal framework altogether.

CONCLUSION

There is very little debate about the existing binding laws regarding the refugees. The public discourse is mostly focused on issues already presented in a distorted way and, once reality is perceived as such, it can only open up a space for radical solutions. Labeling the refugee influx as a "crisis" seems to be a double-edged sword – the word was used to refer both to empathize with the

extreme situation of the refugees, but it gradually shifted to referring to the inconveniences generated by the entrance of the refugee in EU member states. The already existing legal framework was considered to be, in the right-wing extremist discourse, responsible for the second meaning of the "refugee crisis" and, as such, the law started to be viewed as a stake instead of a point of reference. Just as Habermas once invited to "think with Heidegger against Heidegger", we should today, confronted with the unsettling rise of right-wing extremism and unnatural alliances between former antipathies, "mit Carl Schmitt gegen Carl Schmitt denken". The only way to remove the law as a resource in the right-wing discourse and restore the EU legal framework regarding refugees as a foundation for possible actions is to thoroughly criticize, *sine ira et studio*, the vertigo which melts together in one category the extremely diverse examples of *the Other* to which the right-wing extremists react. A strange tacit alliance as an effect of this undifferentiated rejection of *the Other* is the one between the radical populist, anti-immigrant political voices of the Western European states and the ones in Central and Eastern Europe. The former employed precisely the same strategies when it came to workers coming in their countries from the latter, but this fact seemed to be water under the bridge in the face of the "refugee crisis". This factitious solidarity between political forces that see their states as monads was possible only in the context of the refugee influx, which suddenly placed the former favorite targets of anti-immigrant discourses, the central and eastern Europeans, in the much admired league of the "true" Western European states. It is not necessarily that the EU cannot respond properly or that the EU legal framework is insufficient or faulty, since such a debate would have implied a break with "fear politics" and emotional political reactions and, most importantly, a commitment to finding a solution at the European level. The legal framework came into the public discourse only in a mystified way, to conceal recognized rights and to suggest that the only possible solutions can be adopted only by the states, although it was the EU legal framework and institutions that were created by the same states in order to deal commonly with issues regarding refugees and asylum, which the states themselves admitted that were beyond their power.

REFERENCES

Balan, M., 2015 - *Drept constituțional şi instituții politice. Vol I. Teoria generală a statului şi a constituției. Constituția română în context european*, Hamangiu, Bucureşti, pp. 45-47

Baudrillard, J., 1988 - *Simulacra and Simulations*, Jean Baudrillard, Selected Writings, ed. Mark Poster, Stanford University Press, Stanford, California, pp. 167-171

Donskis, L., 2013 - *Forme ale urii. Imaginația bântuită a filozofiei şi literaturii moderne,* Cetatea de scaun, Târgovişte, p. 31

Habermas, J., 1973 - *What does a crisis mean today? Legitimation problems in late capitalism*, Social Research, Vol. 40, No. 4 (WINTER 1973), New School, pp. 643-667

Kenneth, R., 2015 - *The Refugee Crisis That Isn't*, Human Rights Watch, 3 september 2015, https://www.hrw.org/news/2015/09/03/refugee-crisis-isnt

Moldovan, C., 2015 - *Considerații în legătură cu statutul juridic al refugiaților aflați ilegal în țara de primire*, (coord.) Tudorel Toader, Ioana Maria Costea, Conferința „160 de ani de învățământ juridic ieşean", Hamangiu, Bucureşti, pp. 305-309

Peers, S., Guild, E., Tomkin, J., 2012 - *EU Immigration and Asylum Law (Text and Commentary): Second Revised Edition: Volume 1: Visas and Border Controls*, Koninklijke Brill NV, Leiden, Netherlands, 104-105, 156-158