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The Creative Role of the European Council in the Area of Managing Asylum Migration and Return of Third-Country Nationals to Their Country of Origin in the Times of the Migration Crisis. Research on the Content of the EC's Conclusions 2011–2017[1]

Abstract: *The article analyses the conclusions of the European Council in the years 2011–2017 from the perspective of the implementation of the so-called principle of migration security priority in the area of EU's return and asylum policy. In accordance with the theses of the current article, there exists an overarching principle of migration security priority, which is applicable at the level of the shaping of EU's migration policy, whereas the European Council has a real influence on the shape and directions of the development of EU's migration policy. In actual fact, the European Council performs the function of the creator within the sphere of asylum and return policy – develops programme guidelines, provides solutions to problems and proposes possible changes in the instruments of the law. The article presents the results of an in-depth analysis of the conclusions of the European Council with regard to the management of migration processes in the era of the migration crisis, which escalated in April 2015.*

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1. Introduction

The aim of this article is to analyse the role of the European Council (EC) in the area of creating migration policy with regard to the asylum and return migration, on the basis of the content of the conclusions of the EC from the period 2011–2017. It should also be emphasised at this point that the article does not aim to provide an overall assessment of the migration policy implemented by the EU. Rather, it primarily attempts to provide an analysis of the activities and initiatives of the EC in the Area of Freedom, Security and Justice.

The ongoing development of European migration policy could be observed already in the years after 1999, that is after the Treaty of Amsterdam came into force and after the creation of the Area of Freedom, Security and Justice. However, the crucial stages marking an increase in the dynamics of the development of migration policies include the Arab Spring of 2011 and the outbreak of the migration crisis in 2015.[2] Those dates are related to armed conflicts which occurred first in north African states and then in Syria, resulting in an intensified influx of people seeking international protection in the EU, as well as a heightened threat of irregular migration.

As is stated in the first thesis of the current article, there exists an overarching principle of migration security priority, which is applicable at the level of the shaping of EU's migration policy. The aim of the article is to analyse the evolution of the application of the principle of migration security priority in the context of creating asylum and return policy by the European Council after 2011. The definition of the principle in question, adopted for the purpose of the research, will be presented in the further part of the article on the escalation of the migration crisis.

With reference to the second thesis adopted for the purpose of the current study, the European Council has a real impact on the shape and directions of the development of EU's migration policy through the proposals formulated in the adopted conclusions. In fact, the European Council performs the function of the creator within the sphere of asylum and return policy. The meaning of the concept of the creative role of the EC will be defined in the following sections of the article.

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[2] On the subject of the Arab Spring see: B. Przybylska-Maszner (ed.), *The Arab Spring*, Poznań 2011. See also: M. Pacek, *European Europe – The Migration Crisis of European Integration*, "Yearbook of Polish European Studies", Vol. 19/2016, p. 90.

2. The role of the European Council in the development of the Area of Freedom, Security and Justice and the adopted methodology

The European Council played a significant role in the development of co-operation in the area of justice and internal co-operation already in the 1980s.[3] Moreover, the process of strengthening the protection of migrants' rights within the EU system had its roots at the EC's summits.[4] An additional proof of the EC's interest in the issues of asylum and return migration was the adoption of the multiannual programmes, such as the Tampere Programme, the Hague Programme and the Stockholm Programme.[5]

In accordance with the provisions of the Treaty on European Union: '*The European Council shall provide the Union with the necessary impetus for its development and shall define the general political directions and priorities thereof. It shall not exercise legislative functions*'.[6] The fact that the character of the EC's activities is defined in such a way has a direct impact on EU policy-making in the area of migration. This role may be defined as the 'Policy-making Process'.[7] As K. Witkowska-Chrzczonowicz observes,

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[3] P. Wawrzyk, *Bezpieczeństwo wewnętrzne Unii Europejskiej (Internal Security of the European Union)*, Warszawa 2014, p. 142; I. Wróbel, *Status obywatela państwa trzeciego w Unii Europejskiej (Status of the Third-Country National in the European Union)*, Warszawa 2007, p. 18.

[4] J. Balicki, *Imigranci i uchodźcy w Unii Europejskiej. Humanizacja polityki imigracyjnej i azylowej (Immigrants and Refugees in the European Union. Humanisation of migration and asylum policy)*, Warszawa 2012, p. 42 et seq. It is worth mentioning here the EC's summits in Nice (2000), Laeken (2001) and Seville (2002).

[5] See: J. Balicki, op.cit., pp. 44–54.

[6] Art. 15 TEU, Treaty on the European Union, consolidated version, OJ C 202, 7 June 2016, pp. 13–46. On the subject of the changes in the functioning of the EC after the Treaty of Lisbon see: A. Szczerba-Zawada, *Funkcje Rady Europejskiej w sferze unijnej władzy ustawodawczej (The Functions of the European Council in the Sphere of EU Legislature)*, "Przegląd Sejmowy", No. 1/2013, p. 57; A. Szczerba, *Rola i znaczenie Rady Europejskiej w procesie ratyfikacji Traktatu z Lizbony (The Role and Significance of the European Council in the Process of Ratifying the Lisbon Treaty)* in: *Stosunki międzynarodowe we współczesnym świecie: regiony i problemy (International Relations in the Contemporary World. Regions and Problems)*, M. Grabowski (ed.), Kraków 2011, p. 149 et seq. What is more, the EC does not fall within the jurisdiction of the CJEU and does not directly answer to any institution – See: A. Wierzchowska, *Rada Unii Europejskiej i Rada Europejska a model odpowiedzialności Unii Europejskiej (The Council of the European Union and the European Council and a Model of Responsibility of the EU)* in: *Odpowiedzialność w Unii Europejskiej. Rzeczywistość czy iluzja? (Responsibility in the EU. Reality or Illusion?)*, A. Sroka (ed.), Warszawa 2011, pp. 66–71.

[7] U. Puetter, *The European Council and the Council. New Intergovernmentalism and Institutional Change*, Oxford 2014, p. 69.

the EC '*assumes the role of a collective political leader who analyses the situation of the EU as that of an international organisation and then defines its political priorities*'.[8] Even though the EC does not exercise legislative functions, it still has a strong impact on the development of the EU's migration *acquis*, within the so-called 'policy dialogue'.[9] Hence, the function of the EC is often described as a strategic and political one,[10] whereas '*the development of numerous policies is marked by subsequent summits of the European Council*'.[11]

On the other hand, as A. Szczerba-Zawada points out, the scope of the EC's actions laid down in Art. 15 TEU is not limited with regard to its substance, which facilitates deeper European integration in new areas.[12] What is crucial, however, is the fact that '*the competences of the EC for the shaping of the EU's initiatives in certain areas also include the EC's authority to establish strategic guidelines for operational and legislative planning within the Area of Freedom, Security and Justice*'[13] under Art. 68 TFEU.[14] Apart from that, in accordance with Art. 26 TEU, the EC defines general guidelines for the common foreign and security policy. Additionally, the EC plays the control function and systematically assesses the threats facing the Union with regard to terrorism, natural and man-made disasters.[15]

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[8] K. Witkowska-Chrzczonowicz, *Dynamika rozwoju Rady Europejskiej w systemie Instytucjonalnym Unii Europejskiej. Studium prawno-ustrojowe (The Dynamics of the Development of the EU's Institutional System. The Legal-Systemic Study)*, Toruń 2014, p. 281. As the author observes, the EC has a real driving force, even though its decisions are of a political nature. However, one cannot but agree with the statement that while concentrating on the "high level politics" the EC defines the strategy for the EU. See: K.Witkowska-Chrzczonowicz, op.cit., p. 286. On the other hand, R. Grzeszczak defines the EC as the political top of the executive power. See: R. Grzeszczak, *Władza wykonawcza w systemie Unii Europejskiej (The Executive in the System of the European Union)*, Warszawa 2011, p. 186.

[9] U. Puetter, op.cit., p. 73.

[10] M. Rewizorski, B. Przybylska-Maszner, *System instytucjonalny Unii Europejskiej po traktacie z Lizbony. Aspekty polityczne i prawne (The Institutional System of the European Union after the Lisbon Treaty. Political and Legal aspects)*, Warszawa 2012, p. 187. As J. Maliszewska-Nienartowicz observes, the EC 'guarantees coherence in all areas of EU activities.' See: J. Maliszewska-Nienartowicz, *System instytucjonalny i prawny Unii Europejskiej (The Institutional and Legal System of the European Union)*, Toruń 2010, p. 74.

[11] M. Rewizorski, B. Przybylska-Maszner, op.cit., p. 188.

[12] A. Szczerba-Zawada, *Pozycja ustrojowa Rady Europejskiej w systemie instytucjonalnym Unii Europejskiej (Systemic Position of the EC in the Institutional System of the EU)*, Warszawa 2013, p. 142.

[13] Ibidem, p. 147.

[14] Treaty on the Functioning of the European Union, consolidated version, OJ C 326, 26 October 2012, p. 47.

[15] Ibidem, Art. 222, Item 4. See: A.Szczerba-Zawada, *Pozycja ustrojowa Rady Europejskiej...*, op.cit., p. 162.

In accordance with Art. 15, Item 3 TEU, the European Council meets twice every six months, but when a special need arises, there is a possibility for the President to convene a special meeting.[16] Such extraordinary meetings may be organised in the face of migration challenges, and they will be discussed in greater detail in the further section of the article.[17] At this stage, it is worth pointing out that with regard to the number of meetings of the EC, it was the year 2011 (that is, the time of the Arab Spring) that was exceptional, as the EC convened 11 times.[18]

The subject matter of the analysis in the current article includes the conclusions of the EC and their content with regard to the problem of migration. In accordance with Art. 15, Item 4 TEU, decisions of the European Council, as a rule, are taken by consensus.[19] The very Art. 15 does not list the acts issued by the EC, as the meetings result in adopting the so-called conclusions. Witkowska-Chrzczonowicz divides the acts adopted by the EC into the binding ones (having the form of a decision) and non-binding ones (conclusions, recommendations, provisions).[20] Szczerba-Zawada enumerates four types of the conclusions of the EC: the so-called programming statements (indicating the new areas for integration processes or recommending directions for further development of integration), guidelines for objectives and rules of integration, declarations of intent and substantive decisions.[21] Even though the EC's conclusions are considered to be the so-called 'soft law', they nevertheless have a real impact on the shape of the EU's policy-making and legislature.[22]

Despite the fact that conclusions are political documents and not sources of law, they may be considered as part of *acquis communautaire*, that is the whole body of EU achievement (so called *acquis*), which, regardless of the lack of the legal definition, is described in the doctrine as *'the accumulated legislation of the EU (including that which was adopted within the European Communities, of which the Union is a successor), EU policies, the*

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[16] J. Sozański, *Lizbońska reforma Rady Europejskiej i jej skutki dla Unii (The Lisbon Reform of the European Council and its Effects for the Union)*, "Ius Novum", No. 4/2012, p. 110.

[17] K.Witkowska-Chrzczonowicz, op.cit., p. 74.

[18] U. Puetter, op.cit., pp. 105–106, 109. In 2011 there were also four informal meetings of the EC. See also: Art. 1 Rules of Procedure of the European Council, www.consilium. europa.eu (last visited 22.11.2017).

[19] See also: Art. 6 Rules of Procedure of the European Council.

[20] K. Witkowska-Chrzczonowicz, op.cit., p. 268.

[21] A. Szczerba-Zawada, *Pozycja ustrojowa Rady Europejskiej...*, op.cit., p. 126.

[22] Ibidem, p. 127. As J. Sozański observes, *'the European Council often expressed its stance with regard to significant events on the international stage. Such was the character of the conclusions adopted in Cannes in June 1995. The participants of the meeting presented their stance on the situation in the former Yugoslavia'*, J. Sozański, op.cit., p. 106.

dynamically developing case-law of the CJEU, and also the customs and values lying at the foundation of the functioning of the EU'.[23]

As a result, being part of the whole body of EU law, conclusions of the EC also constitute a part of migration *acquis* insofar as they concern the directions of development of the Area of Freedom, Security and Justice. As has been mentioned above, following the entry into force of the Treaty of Amsterdam, the EC adopted multiannual programmes, setting out the priorities for the development of the Area of Freedom, Security and Justice. After the termination of the Stockholm programme, the EC no longer adopted multiannual programmes, but only strategic guidelines.

However, as political documents, conclusions are of key importance for the shaping of the legal framework of the AFSJ, whereas in the doctrine it is assumed that conclusions constitute a form of an indirect legislative initiative.[24]

The term adopted for the purpose of formulating the research theses for the current study, that is the 'creative role of the European Council' should be understood as the creation of specific directions for actions and specific directions of development of EU policy – in this case migration policy – which then might be implemented within the actions undertaken by other EU institutions in the area of law-making and practical implementation. The European Council is thus perceived as a creator of the idea of developing EU migration policy.[25]

The methodology adopted for the purpose of the current study entailed an analysis of the conclusions of the European Council. Due to the fact that the conclusions are part of the EU *acquis*, the methodology used is typical of legal sciences. What was analysed in the first place was the content of the documents adopted by the EC and the impact of the con-

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[23] M. Cesarz, *Porządek prawny Unii Europejskiej (Legal Order of the European Union)* in: *Procesy integracyjne i dezintegracyjne w Europie (Integration and Disintegration Processes in Europe)*, A. Pacześniak, M. Klimowicz (eds.), Wrocław 2014, p. 185.

[24] A. Parol, *Agencje zdecentralizowane w Przestrzeni wolności, bezpieczeństwa i sprawiedliwości Unii Europejskiej (Decentralised Agencies in the Area of Freedom, Security and Justice in the European Union)*, Lublin 2016, PhD dissertation – manuscript, p. 60. See also: A. Łazowski, *Instytucjonalne aspekty funkcjonowania III filara Unii Europejskiej – stan obecny i perspektywy zmian (Institutional Aspects of the Functioning of the 3rd Pillar of the European Union – the Current State and Perspectives for Change)* in: *Prawo Wspólnot Europejskich a prawo polskie. Dokumenty karne (The European Communities Law and Polish Law. Documents for the Criminal Proceedings)*, Vol. II, E. Zielińska (ed.), Warszawa 2005, pp. 27–50.

[25] In literature the creative competences of the EC are described as *'the empowerment to establish bodies, shape their inner organisation and personnel policy'* – See for instance: A. Szczerba-Zawada, op. cit., p. 163. For the purpose of the current article, the adjective 'creative' has been used in a different meaning.

clusion guidelines on the legislative initiatives undertaken by other EU institutions. The research was to primarily determine the extent of the EC's involvement in the implementation of migration policies, despite the fact that no multiannual programmes have been started recently.

For the purposes of the current study, the analysed material includes the conclusions adopted at the meetings of the European Council which were held in the years 2011–2017. It has been assumed by the author of the current article that the year 2011 marks the beginning of the EC's deeper concern with the migration issues with regard to the outbreak of the Arab Spring and the beginning of democratic transition processes in the countries of north Africa.[26] Since that moment, the importance of the EU's migration policy with regard to the asylum and irregular migration has been steadily increasing.

The conclusions were analysed from the perspective of eight criteria: the order of the discussed issues and the ampleness of conclusions with regard to migration (1), the issues regarding co-operation with third countries (2), the occurrence of special events with regard to an increase in migration flows (3). Apart from that, the analysis of the conclusions intended to demonstrate what type of migration (regular, irregular, asylum migration) the document referred to (4), whether it raised the issues of the protection of migrants' fundamental rights (5), whether the conclusions included the issues regarding security (including migration security) (6), whether the documents contained concrete legislative proposals (7) and whether the EC's proposals have been eventually implemented (8).

The aim of the substantive analysis of the EC's conclusions was to prove the thesis adopted in the current article, according to which there exists an overarching principle of migration security priority, which finds its application at the level of creating EU migration policies, whereas the EC has a real influence on the shape and directions of the development of legislature and policy-making with regard to migration.

3. Migration crisis and the principle of migration security priority

The escalation of the migration crisis occurred in 2015, whereas the accident off the coast of Lampedusa of 19 April might be considered as its symbolic beginning. In that tragic event, a boat carrying migrants cap-

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[26] See: W.J. Janik, E.J. Jaremczuk, *Artykuł wprowadzający. Niekontrolowana migracja jako zagrożenie dla Europy – polski strach przed uchodźcami (Introductory Article. Uncontrolled Migration as a Threat to Europe – Polish Fear of Refugees)* in: *Migracje i kryzys uchodźczy w Europie. Rzeczywistość i wyzwania (Migrations and the Refugee Crisis in Europe. Reality and Challenges)*, E.J. Jaremczuk (ed.), Poznań 2017, pp. 15–17.

sized and as a result around 700 people died.[27] It is estimated that in 2015 alone more than 1 million persons seeking international protection arrived in the EU.[28] According to the data gathered by the European Asylum Support Office (EASO), in 2015, over 1.4 million persons applied for asylum in the EU and in 2016 it was almost 1.3 million.[29] In 2016, over 700 000 persons were granted protection – which is three times more than the number of people who received international protection in Australia, Canada and the US.[30]

The problem of irregular migration, which is so difficult to show in the statistics, is also an extremely topical issue in the current situation. As stated by R. F. Barsky, on the basis of the data presented by the International Organisation for Migration (IOM), there are about 20–30 million persons in an irregular situation around the world.[31] According to the data gathered by the Frontex Agency, almost 492 thousand persons were identified as having irregular status in 2016 (the year before, in 2015, it was almost 700 thousand). Subsequently, over 206 thousand of refusals of entry were issued, as well as 305 thousand of return decisions, out of which over 176 thousand were implemented.[32] Even a brief comparison of the last two items of data suggests that on the territory of the EU there is a large number of people, escaping precise estimates, that remains in the so-called 'legal limbo.' In 2008, the researchers involved in the Clandestino project determined that there were most probably between 1.9 and 3.8 million of undocumented migrants in Europe at that time.[33]

The journey undertaken by the people who choose the sea route (especially the Central Mediterranean route, which starts at the coasts of

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[27] https://www.theguardian.com/world/2015/apr/19/700-migrants-feared-dead-mediterranean-shipwreck-worst-yet (last visited 22.11.2017). There were numerous incidents like that off the coast of Lampedusa. Still, it is worth remembering about the most tragic ones of April 2011 and October 2013.

[28] Fundamental Rights Report 2016, European Union Agency for Fundamental Rights, p. 7; www.fra.europa.eu (last visited 22.11.2017).

[29] EASO, Key findings of EASO's Annual Report on the Situation of Asylum in the EU 2016, p. 2. Figures available on the website: www.easo.europa.eu (last visited 22.11.2017).

[30] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, on the Delivery of the European Agenda on Migration, Brussels, 27.9.2017, COM(2017) 558 final, p. 2.

[31] R.F. Barsky, *Undocumented Immigrants in an Era of Arbitrary Law. The Flight and the Plight of People Deemed "Illegal"*, London 2016, p. 173.

[32] Frontex Risk Analysis for 2017, European Border and Coast Guard Agency, p. 16.

[33] Size and Development of Irregular Migration to the EU. Clandestino Research Project Counting the Uncountable: Data and Trends across Europe, Comparative Policy Brief-Size of Irregular Migration, October 2009, p. 4.

Libya),[34] carries with itself a high risk of death – in 2015 alone the death toll on the Mediterranean Sea reached over 3500 persons.[35] The data on the missing migrants have been collected by the IOM as part of the project 'Missing migrants.' The latest report figures show that only in the 1st half of 2017, as many as 2259 persons died on the Mediterranean Sea.[36] A huge risk is also undertaken by migrants attempting to get from African countries to the coasts of Libya, where, as a result many of them die during the crossing of the desert.[37] Hence, it seems necessary to undertake actions, also in migrants' countries of origin, with a view to stabilising the levels of security.[38] Taking into account the collective statistical data with regard to the death of migrants during the course of their journey (60 000 persons who have died since 1996 around the world),[39] it is hard not to agree with the argument that the principle of migration security priority is of such significance that it should be implemented at the level of planning, policy-making and implementation of EU's migration policy.

In recent years the legal doctrine has witnessed a discussion of the proponents and opponents of securitisation of migration, which is deemed to be a factor in limiting migration. In the discourse of the opponents of securitisation there appears an argument that migration does not pose a threat to security and it is merely conveyed as such to the public.[40] As a consequence, it is argued, securitisation brings about re-

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[34] See: http://frontex.europa.eu/trends-and-routes/central-mediterranean-route/ (last visited 22.11.2017).

[35] Fundamental Rights Report 2016, p. 10. On the subject see also: S. Grant, *Recording and Identifying European Frontier Deaths*, "European Journal of Migration and Law", Vol. 13, No. 2/2011, pp. 135–156.

[36] Fatal journeys. Volume 3, part 1. Improving data on missing migrants, IOM 2017, p. 2. See also: Fatal journeys. Tracking lives lost during migration, IOM 2014. The publications are available on the website: www.iom.int (last visited 22.11.2017).

[37] Fatal journeys, Volume 3, part 1, p. 10. See also: P. Kingsley, *Nowa odyseja. Opowieść o kryzysie uchodźczym w Europie (New Odyssey. A Story of Migration Crisis in Europe)*, Warszawa 2017, p. 57 et seq.

[38] As it transpires from the Communication on the delivery of the European Agenda on Migration, within the so-called EU Trust Fund for Africa, €3.1 billion was allocated to help 26 African countries. See: Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, on the Delivery of the European Agenda on Migration, p. 6.

[39] A. Singleton, F. Laczko, J. Black, *Measuring unsafe migration: The challenge of collecting accurate data on migrant fatalities*, "Migration Policy Practice", Vol. VII, No. 2, April–September 2017, p. 4.

[40] G. Karyotis, *The Fallacy of Securitizing Migration: Elite Rationality and Unintended Consequences* in: *Security, Insecurity and Migration in Europe*, G. Lazaridis (ed.), London 2016, p. 14.

strictions to the freedoms and rights of migrants.[41] It seems that such one-sided opinions (oscillating around the concepts such as Fortress Europe and Borderless Europe[42]) do not serve the purpose of managing migration for the common good.[43] In my view, the principle of migration security priority also entails that the very migrants should be provided security and safety due to the fact that, as it transpires from the above-mentioned statistical data, the level of security at the stage of their journey to Europe is very low. To ensure safety also means that one should be responsible for others and such an argument can hardly be viewed in a negative light.[44]

Securitisation of migration has been present in policy-making of specific states as well as, later, at the level of the European Union since the 1920s.[45] However, it is worth emphasising that it is not migrants themselves *en masse* that pose a threat, but the ill-managed migration processes, which might give rise to serious risks for the very migrating persons. Due to the fact that the Europeanisation of migration policies has already become a fact,[46] the European migration policy should be created and implemented in accordance with the obligation of managing migration, in full respect for the law and the principle of equity.[47] As such, it would

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[41] Ibidem, p. 16.

[42] B. Togral, *Convergence of Securitization of Migration and 'New Racism' in Europe: Rise of Culturalism and Disappearance of Politics* in: *Security, Insecurity and Migration in Europe*, G. Lazaridis (ed.), London 2016, s. 219.

[43] As it is rightly observed by F. Gemenne: *'Migrations are neither an opportunity nor a threat. They are the reality of the 21ˢᵗ century, a social fact inherently connected to the existence of the world marked by deep inequalities.'* F. Gemenne, *Migracje – szansa czy zagrożenie? (Migrations – Opportunity or Threat)* in: *Migranci, migracje. O czym warto wiedzieć, by wyrobić sobie własne zdanie (Migrants, migrations. What is Worth Knowing so as to Make Up One's Own Mind)*, H. Thiollet (ed.), Kraków 2017, p. 182.

[44] See: G. Karyotis, op.cit., p. 17. On the other hand, D. Kostakopoulou observes that the necessity of the liberal migration policy should transpire from a certain political morality. However, while accepting the arguments presented by the author, it is still hard to accept the concept of migration policy which does not guarantee security both for the receiving society, as well as the migrants themselves. See: D. Kostakopoulou, *The Area of Freedom, Security and Justice and the Political Morality of Migration and Integration* in: *A Right to Inclusion and Exclusion? Normative Fault Lines of the EU's Area of Freedom Security and Justice. Essays in European Law*, H. Lindahl (ed.), Oxford 2009, p. 186.

[45] A. Tsoukala, *Turning Immigrants into Security Threats: A Multi-Faceted Process* in: *Security, Insecurity and Migration in Europe*, G. Lazaridis (ed.), London 2016, p. 180.

[46] A. Geddes, *Migration Research and European Integration: The Construction and Institutionalization of Problems of Europe* in: *International Migration Research*, M. Bommes, E. Morawska (eds.), London and New York 2016, p. 273.

[47] C. Grey, *Justice and Authority in Immigration Law*, Oxford and Portland, Oregon 2017, p. 77.

thus benefit all participants of the migration process – both the receiving society as well as migrants themselves.

For the purpose of the current study, the principle of migration security priority should be understood as a recognition of – at the level of both defining political strategies and even more so at the level of law making – the priority of guaranteeing the highest possible level of security to all participants of the migration process, that is migrants, as well as the receiving society. The scope of application of the principle of migration security priority should be aligned with the scope of EU competences under Art. 4 TFEU. A specific field of the Area of Freedom, Security and Justice where the principle of migration security priority finds its application is EU law and asylum and return policy.

4. The involvement of the European Council in the execution of the principle of migration security priority in the face of migration challenges – an analysis of the content of the EC's conclusions

After a detailed analysis of the documents containing the conclusions of the EC from the years 2011–2017, the following assumptions can be formulated:

Firstly, a significant difference in the EC's interest in migration issues in the years 2011–2014 and 2015–2017 can be observed. In the period 2011–2014 the issues regarding the management of migrations had been present since the beginning of 2011, due to the outbreak of the Arab Spring. However, at that time the Union concentrated primarily on the fight against the economic crisis, energy and climate policies and institutional problems.

Migration issues are raised most often in the context of co-operation with third-world countries and support for the countries of north Africa (Libya, Egypt, Tunis) in their democratic transitions.[48] The EC has also expressed its concern on multiple occasions with regard to the situation in migrants' countries of origin, such as Iran, Afghanistan, Syria since 2012, and most recently Ukraine since 2014.[49]

As regards conclusions containing precise guidelines for migration policy and management of migration security, such documents are very scarce (as a rule, conclusions and recommendations with regard to the broadly-understood migration policy are to be found in the middle or final sections of the document) and one should mention primarily the

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[48] See e.g. Conclusions of the European Council of 7–8 February 2013.
[49] See e.g. Conclusions of the European Council of 24 October 2014.

conclusions of the European Council from the summit of June 2014.[50] In the document, the European Council '*defined the strategic guidelines for legislative and operational planning for the coming years within the area of freedom, security and justice*'.[51] The document also contains guidelines for the sphere of tackling irregular migration and managing the Schengen area.

An interest in migration issues in the actions of the European Council has increased significantly after 19 April 2015, when another ship sank off the coast of Lampedusa resulting in the death of several hundred people.[52] As a result of this tragic event, a special meeting of the European Council was convened on 23 April 2015. Since that time, the subject of migration might be considered to be the major concern of the EC – the subject of migration was present as the first issue in the conclusions of 10 documents,[53] apart from the above-mentioned summit of 23 April 2015, and it occupied considerable parts of the documents. The conclusions also include extensive guidelines in the area of practical actions and legislative initiatives addressed at other institutions of the EU, which will be discussed further below. On the basis of the content of the conclusions from the years 2015–2017, it might be said that the subject of managing migrations has dominated the policy of the EU.

The second conclusion which transpires from the content of the analysed documents is that the European Council reacts dynamically to the possibility of the escalation of the migration crisis and potential threats to security due to increased migration flows. The EC's reactions are of a two-fold character.

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[50] Conclusions of the European Council of 26–27 June 2014. All the analysed documents are available on the website: http://www.consilium.europa.eu/en/european-council/conclusions/ (last visited 22.11.2017).

[51] See: Preamble to the conclusions of the European Council of 26–27 June 2014. In the conclusions it is also stressed that '*the Union needs an efficient and well-managed migration, asylum and borders policy, guided by the Treaty principles of solidarity and fair sharing of responsibility, in accordance with Article 80 TFEU and its effective implementation. A comprehensive approach is required, optimising the benefits of legal migration and offering protection to those in need while tackling irregular migration resolutely and managing the EU's external borders efficiently,*' pt. 5.

[52] It is worth noting that during the EC summit in March in 2015, which took place before the outbreak of the migration crisis, migration issues were generally not raised. In the conclusions from the meeting of 19–20 March, the EC merely emphasises in the 16, penultimate point of the conclusions that '*the European Council deplores the continuing loss of migrants' lives at sea, greatly increased by organised people smugglers and human traffickers.*' Conclusions of the European Council of 19–20 March 2015.

[53] As at 31 December 2017. Conclusions of the European Council of 25–26 June 2015, 16 October 2015, 17–18 December 2015, 17–18 March 2016, 28 June 2016, 16 September 2016, 21 October 2016, 15 December 2016, 3 February 2017, 19 October 2017.

The first line of policy is that the EC remains alert to and monitors the situation on an ongoing basis in the potential countries of origin of migrants. It is obvious that in the case when a third country experiences an internal crisis (whether due to events of a political or economic nature, natural disasters or climatic changes), a country like that becomes a potential country of origin of migrants, who attempt to get into the territory of the European Union. In the conclusions of the years 2011–2017, there are statements containing an assessment of the situation in countries such as Libya, Tunis, Egypt (since 2011), Iran (since 2011), Afghanistan (2011), Syria (generally since 2011) or Ukraine (since 2014).[54]

Secondly, as it transpires from the analysed documents, in situations of crisis, the EC immediately convened special meetings devoted to specific issues. The key meetings of the EC were held in 2015, when on 23 April the European Council discussed the consequences of the tragic events at Lampedusa and proposed further actions by the Union in order to protect people at sea[55] or in February 2017 with regard to the migration via the Central Mediterranean route.[56] Also in 2011, after the outbreak of the Arab Spring, an extraordinary meeting of the EC was convened, and its conclusions included statements on the priorities of EU future policies in that region.[57]

The third conclusion in the current article concerns the role of the European Council as a specific creator in the area of co-operation of the Union with migrants' countries of origin and transit countries. On the basis of the analysed documents there is no doubt that the EC plays such a role through providing general guidelines and priorities for the EU in the area of co-operation with third countries where migrants originally come from. An analysis of the EC's actions in the area of co-operation with migrants' countries of origin allows for identifying the EU's priorities in this sphere. While formulating conclusions concerning said co-operation, the European Council has focused generally on two key issues.

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[54] On the subject of the Ukrainian crisis see: T. Stępniewski, *Ukraine Crisis: Political Transformation vs. Security and Migration*, "Yearbook of Polish European Studies", Vol. 19/2016, p. 237 et seq.

[55] Conclusions of the European Council of 23 April 2015. Additionally, a special meeting of heads of states was held on 23 September 2015. See: http://www.consilium.europa.eu/en/press/press-releases/2015/09/23/statement-informal-meeting/ (last visited 22.11.2017).

[56] Malta Declaration by the members of the European Council on the external aspects of migration: addressing the Central Mediterranean route, 3.02.2017, http://www.consilium.europa.eu/en/press/press-releases/2017/02/03/malta-declaration/ (last visited 22.11.2017).

[57] Extraordinary European Council Conclusions of 11 March 2011.

First of all, the EU prefers to initiate co-operation with the countries of origin along the lines of the so-called '3Rs', that is, return, readmission,[58] reintegration.[59] Irregular migration is perceived in the EU's policy *en masse,* and in the conclusions presented by the EC, as a specific type of threat – for both the very migrants who risk their lives and are deprived of social care, and the receiving society as well. On this subject the EC issued a statement already in December 2013 pointing out that '*increased engagement with third countries in order to avoid that migrants embark on hazardous journeys towards the European Union should be a priority. Information campaigns, regional protection programmes, mobility partnerships and an effective return policy are important components of this comprehensive approach*'.[60] Also in the conclusions of June 2014, which provided guidelines for the EU in the Area of Freedom, Security and Justice after the termination of the Stockholm Programme, the EC emphasised that the necessary actions include the following: '*establishing an effective common return policy and enforcing readmission obligations in agreements with third countries*'.[61]

In fact, this stance has been upheld throughout the migration crisis. Already at the summit of 25–26 June 2015 the adopted conclusions included statements (at the beginning of the document) relating to this sphere, entitled 'Return, readmission, reintegration',[62] which was reiterated in the subsequent conclusions adopted at the summits of the EC.[63]

Secondly, after analysing the conclusions of the EC and after examining the development of EU migration policy, one can draw a conclusion that the Union has been making continuous attempts to apply preventive measures in the face of migration challenges. It seems that the priority is to halt migration processes in the regions where they originate and to solve the problems

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[58] See e.g. Conclusions of the European Council of 28 June 2016, conclusions of the European Council of 15 December 2016.

[59] Which is largely confirmed by the communication from the Commission on the Delivery of the European Agenda on Migration.

[60] Conclusions of the European Council of 19–20 December 2013. Those conclusions were adopted as a result of another accident of a boat carrying migrants off the coast of Lampedusa in October 2013.

[61] Conclusions of the European Council of 26–27 June 2014.

[62] Conclusions of the European Council of 25–26 June 2015. In accordance with pt. 5 of the conclusion, '*Effective return, readmission and reintegration policies for those not qualifying for protection are an essential part of combating illegal migration and will help discourage people from risking their lives. All tools shall be mobilised to promote readmission of irregular migrants to countries of origin and transit.*'

[63] See e.g. Conclusions of the European Council of 15 October 2015, conclusions of the European Council of 28 June 2016, conclusions of the European Council of 19 October 2017.

which cause migration in the first place *in situ*.[64] This preventive policy finds its confirmation in a paraphrase of B. Franklin's saying '*an ounce of prevention is worth a ton of intervention*'[65] quoted by A. Dziewulska and A.M. Ostrowska. The intention of the EC is therefore to create such migration policy which would assume directing humanitarian aid to the regions affected by the crisis, which would thus result in increasing security and the well-being of societies in the countries of origin and, as a consequence, in decreasing migration flows. Such humanitarian aid was directed to Libya[66] at the time of the Arab Spring, then to Ukraine,[67] or to Syria.[68] The EC also postulated co-operation within the framework of humanitarian aid with the UNHCR and IOM as international organisations whose mandate obligates them to conduct such activities in the countries affected by the crisis.[69]

As an undeniable success of the EC's activities in the area of co-operation with the countries of origin one should mention its support for the organisation of the summit in Valletta in November 2015 devoted to the partnership with African countries.[70] The EC also postulated the adoption of

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[64] Conclusions of the European Council of 26–27 June 2014, pt. 8: '*Addressing the root causes of irregular migration flows is an essential part of EU migration policy. This, together with the prevention and tackling of irregular migration, will help avoid the loss of lives of migrants undertaking hazardous journeys. A sustainable solution can only be found by intensifying cooperation with countries of origin and transit, including through assistance to strengthen their migration and border management capacity. Migration policies must become a much stronger integral part of the Union's external and development policies, applying the "more for more" principle and building on the Global Approach to Migration and Mobility.*'

[65] A. Dziewulska, A.M. Ostrowska, *The Crooked Logic of Migration Policies and Their Malthusian Roots*, "Yearbook of Polish European Studies", Vol. 19/2016, p. 71.

[66] Conclusions of the extraordinary meeting of the European Council of 11 March 2011, conclusions of the European Council of 24–25 March 2011, pts. 25–26.

[67] Conclusions of the European Council of 24 October 2014.

[68] Conclusions of the European Council of 18–19 February 2016.

[69] Conclusions of the European Council of 24–25 October 2013, pt. 47; conclusions of the European Council of 26–27 June 2014, pt. 8; conclusions of the European Council of 15 October 2015; conclusions of the European Council of 18–19 March 2016; conclusions of the European Council of 3 February 2017; conclusions of the European Council of 19 October 2017.

[70] The announcement of the intention to organise a summit in Valletta was already to be found in the conclusions of the EC summit of 25–26 June 2015. See also: conclusions of the European Council of 18–19 February 2016 after adopting the final documents of the summit in Valletta. Also after the summit in Valletta the EC postulated further activation of a range of aid activities (including also those financed under the European Regional Development Fund (ERDF)) and adoption of concrete legal instruments which would facilitate its implementation. See: conclusions of the European Council of 15 December 2016, pt. 3. See also: A. Kosińska, *Polityka Unii Europejskiej wobec migracji nieregularnej z Afryki a postanowienia Kongresu wiedeńskiego w sprawie zniesienia handlu niewolnikami (EU*

a widely-commented agreement on co-operation with Turkey in the area of migration, as an instrument halting migration flows, a process which ended in the signing of the agreement.[71] The content of the agreement raised a wave of criticism with regard to a potential violation of the fundamental rights of migrants, which will be discussed further in the article.

It might thus be claimed that co-operation with third countries is an integral part of EU activity, with an aim to increase migration security both for the countries of the Union (by decreasing migration), and migrants' countries of origin as well, by ensuring migration security for third-country nationals.

The fourth conclusion of the current article is key to the present discussion in that the EC in its conclusions defines the conditions for implementing the principle of migration security priority in the area of legislature and in the practical aspect of implementing migration policies within the framework of EU institutions. The concept of the migration security priority has been defined above and it includes an adoption of – at the level of both defining political strategies and even more so at the level of law making – the priority of guaranteeing the highest possible level of security to all participants of the migration process, that is migrants, as well as the receiving society.

On the basis of the conclusions of the EC, among the priority activities intended to implement the principle of migration security priority, one can identify primarily the issue of the fight against migrant smuggling and trafficking in human beings. The EC had expressed its concern over the aforementioned problem before the actual escalation of the migration crisis.[72] The postulate of the necessity of undertaking activities in order

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Policy with regard to Irregular Migration from Africa and the Regulations of the Congress of Vienna on the Abolition of the Slave Trade) in: *Idee, normy i instytucje Kongresu wiedeńskiego – 200 lat później – perspektywa prawnomiędzynarodowa (Ideas, Norms and Institutions of the Congress of Vienna – 200 Year Later – Legal and International Perspective)*, J. Menkes, E. Cała-Wacinkiewicz, J. Nowakowska-Małusecka, W. Pęksa, W.Sz. Staszewski (eds.), Warszawa 2016, p. 526. The summit in Valletta ended with the adoption of the action plan and political declaration http://www.consilium.europa.eu/en/press/press-releases/2015/11/12/valletta-final-docs/ (last visited 22.11.2017).

[71] Conclusions of the European Council of 17–18 March 2016. The agreement with Turkey was signed on 18 March 2016. See also: conclusion of the European Council of 16 October 2015. Extensively on the subject of implementing their co-operation with Turkey, the EC presented their stance in their conclusions of 18–19 February 2016. See also: A. Adamczyk, G. Ilik, *Greek–Turkish Relations, UE and Migration Problem*, "Yearbook of Polish European Studies", Vol. 19/2016, p. 198.

[72] See: Conclusions of the European Council of 26–27 June 2014, conclusions of the European Council of 23 April 2015; conclusions of the European Council of 16 October

to fight against the aforesaid activity also appeared in the conclusions of the extraordinary summit of the EC of 23 April 2015. It was at that time that the EC decided on the necessity of fighting against smugglers, preventing irregular migration and strengthening inner solidarity and responsibility.[73] The EC has upheld its intention to fight against networks of smugglers in the conclusions from subsequent summits of October and December 2015,[74] as well as in 2016.[75]

In the area of implementing migration security, the EC, as well as other EU institutions, also had to face the problem of terrorism and the necessity of undertaking concrete action in order to combat such activities.[76] Already in the conclusions of 20 December 2013 the EC has issued a call for '*increased synergies between CSDP and Freedom/Security/Justice actors to tackle horizontal issues such as illegal migration, organised crime and terrorism*'.[77] Unfortunately, the course of events in the EU in subsequent years has proven that the EC was right in showing interest in this matter in conjunction with the issues of migration and security.[78]

Secondly, the attention of the EC was to a large extent focused on the effects of 'smuggling' and irregular migration, which have entailed (and still do) considerable threats to the life of migrants trying to illegally cross sea borders and get to the EU.[79] The solutions proposed by the EC in 2013 which would increase safety at sea included '*increased engagement with third countries in order to avoid that migrants embark on hazardous journeys towards the European Union,*' as well as information campaigns, regional protection programmes and effective return policy.[80] An important solution postulated by the EC was to reinforce maritime safety.[81]

2015; conclusions of the European Council of 17–18 December 2015; Conclusions of the European Council of 17–18 March 2016.

[73] Conclusions of the European Council of 23 April 2015, pt. 2.

[74] Conclusions of the European Council of 15 October 2015, Conclusions of the European Council of 17–18 December 2015.

[75] Conclusions of the European Council of 18 March 2016.

[76] See e.g. Conclusions of the European Council of 23 June 2017.

[77] Conclusions of the European Council of 20 December 2013, pt. 9; the part of conclusions entitled *Common Security and Defence Policy*. See also: Conclusions of the European Council of 19–20 March 2015, pt. 15; Conclusions of the European Council of 17–18 March 2016, pt. 9 on the support for Libya in combatting terrorism.

[78] See: Conclusions of the European Council of 22–23 June 2017.

[79] See: Conclusions of the European Council of 25 October 2013 after the tragic accident off the coast of Lampedusa.

[80] Conclusions of the European Council of 19–20 December 2013.

[81] Conclusions of the European Council of 19–20 March 2015, Conclusions of the European Council of 23 April 2015. Apart from that, the EC postulated to enhance support for the Libyan coastguard. See: Conclusions of the European Council of 15 December 2016.

Thirdly, the principle of migration security priority is being implemented in EU migration policy in the area of managing borders. The EC has focused on this aspect of ensuring security to both the receiving society and migrants in the course of their journey very frequently. Among the issues raised in the conclusions, one should mention primarily the governance of the Schengen area in the face of increased migration influxes,[82] the strengthening of EU external borders[83] – including the implementation of the 'smart border package' and the operational management of large-scale IT systems by the eu-LISA agency.[84] Migration security entails, as it transpires from the EC's conclusions, to a large extent an effective control of the borders.[85]

In the area of issues relating to the implementation of the principle of migration security priority, the EC also plays an extremely important function of an informal initiator of legislative work by calling upon EU institutions to prepare drafts of legal acts. The EC has postulated, amongst other things, the establishment of a mechanism facilitating a return to temporary checks at the internal borders of the Schengen area[86] and monitored work on the second phase of the implementation of the CEAS.[87] The EC demonstrated a significant amount of activity after the escalation of the crisis in 2015, especially with regard to its preparation of the decision[88] on the resettlement and relocation operations (the decision was adopted on 22 September 2015),[89] but also in drawing up a list of safe countries of origin[90] and in its support for the reform of the CEAS.[91]

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[82] Conclusions of the European Council of 23–24 June 2014, conclusions of the European Council of 25–26 June 2015, conclusions of the European Council of 16 September 2016.

[83] Conclusions of the European Council of 16 October 2015, conclusions of the European Council of 17–18 December 2015, conclusions of the European Council of 16 September 2016.

[84] Conclusions of the European Council of 27 June 2013.

[85] Malta Declaration by the members of the European Council on the external aspects of migration: addressing the Central Mediterranean route, 3 February 2017.

[86] Conclusions of the European Council of 23–24 June 2011, pt. 22.

[87] Conclusions of the European Council of 29 June 2012.

[88] Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece, OJ L 248, 24.09.2015, pp. 80–94.

[89] Conclusions of the European Council of 25–26 June 2015.

[90] Conclusions of the European Council of 25–26 June 2015, Conclusions of the European Council of 17–18 December 2015, conclusions of the European Council of 25–26 June 2015.

[91] Conclusions of the European Council of 21 October 2016.

At present, new qualification and procedure regulations are being processed, as well as a new reception directive, which constitute the next stage in the development of the CEAS.[92]

In 2015, the EC also noticed the necessity for strengthening the mandate of the Frontex Agency,[93] upholding its stance over subsequent summits in 2016. As a result of such activities the European Parliament and the Council adopted a regulation of the European Parliament and of the Council establishing the European Border and Coast Guard.[94] Migration security is thus guaranteed also through the up-to-date character and dynamic adjustments of legal instruments to the actual needs resulting from migration flows.

Among the general conclusions, one reflection that is particularly worth mentioning is that the issue of protecting migrants' fundamental rights is not directly present in most of the 'migration conclusions' of the EC. These issues do appear though, but as a consequence of the discussed events and problems, such as the necessity of providing humanitarian aid[95] or saving migrants at sea,[96] creating reception facilities in the regions affected by the

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[92] See: Proposal of 13.07.2016 for a Regulation of the European Parliament and of the Council 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 and amending Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, COM/2016/0466 final – 2016/0223 (COD); Proposal of 13.07.2016 for a Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU, COM/2016/0467 final – 2016/0224 (COD); Proposal of 13.07.2016 for a Directive of the European Parliament and of the Council laying down standards for the reception of applicants for international protection (recast) COM(2016) 465 final 2016/0222(COD).

[93] Conclusions of the European Council of 16 October 2015, conclusions of the European Council of 17–18 December 2015.

[94] Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC, OJ L 251, 16.09.2016, pp. 1–76.

[95] See e.g. Conclusions of the European Council of 11 March 2011 on humanitarian aid for Libya; Conclusions of the European Council of 24 October 2014 relating to the help for Ukraine; Conclusions of the European Council of 16 October 2015 relating to the support for the EU–Africa Trust Fund; Conclusions of the European Council of 18–19 February 2016 with regard to the aid for Syria.

[96] See e.g. Conclusions of the European Council of 23 April 2015, Conclusions of the European Council of 28 June 2016. See: T. Scovazzi, *Human Rights and Immigration at Sea* in: *Human Rights and Immigration*, R. Rubio-Marin (ed.), Oxford 2014, p. 258.

crisis[97] and co-operation with the UNHCR.[98] However, this does not mean that the protection of fundamental rights of third-country nationals is marginalised in the EC's approach to immigration policy. Fundamental rights of persons seeking international protection are safeguarded by the EU system under the provisions of the Charter of Fundamental Rights (Art. 18), which also provides protection against removal (Art. 19). In the so-called *Malta Declaration by the members of the European Council on the external aspects of migration: addressing the Central Mediterranean route* (document of 3 February 2017), the members of the EC confirmed their determination to act with full respect for fundamental rights, international law and European values, as well as in co-operation with the UNHCR and IOM.[99] Therefore, the guarantees of the protection of migrants' fundamental rights prove to be an integral part of the principle of migration security priority. It is even more true in light of the fact that both the activities aimed to combat the smuggling of and trafficking in persons, as well as the activities focused on providing aid to the 'boat people' are directly related to the issues of the protection of migrants' health and life.

In spite of the considerable involvement of the European Council in the shaping of the political framework of the AFSJ and a high degree of reception of the solutions proposed by the EC into the area of law, some proposals expressed in the EC conclusions should be assessed critically.

It should be remembered that on the basis of the norms under Art. 15 TEU, despite often contradictory opinions of different Member States, the EC adopts conclusions which are to serve the development of the Area of Freedom, Security and Justice, that is, they should encompass the whole territory of the Union in their implementation. The experience of individual Member States in managing migration might be entirely different, which also refers to their needs and the attitude to the issue of migration. Hence the conclusions, as political documents of a non-binding nature, are an effect of hard-wrought compromises and constitute only general declarations.[100]

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[97] Conclusions of the European Council of 16 October 2015.

[98] See e.g. Conclusions of the European Council of 18–19 February 2016.

[99] Malta Declaration by the members of the European Council on the external aspects of migration: addressing the Central Mediterranean route, 3 February 2017.

[100] On the various experience of Member States in managing migration flows see: T. Dokos, *Both a Transit and Host Country* in: *Escaping the Escape. Toward Solutions for the Humanitarian Migration Crisis*, B. Stiftung (ed.), Gütersloh 2017, p. 37; further, on the subject of the German stance and the so-called 'culture of welcoming' see: A. de Geus, *Preface* in: *Escaping the Escape. Toward Solutions for the Humanitarian Migration Crisis*, B. Stiftung (ed.), Gütersloh 2017, p. 9.

On the other hand, as a result of the divergent approaches to the question of migration, the recognition rate of the applications for international protection filed by foreign nationals in different Member States also varies. It is an alarming situation from the perspective of the guarantees of human rights and the right to seek international protection. As E. Guild suggests, a potential solution to the problem might be to establish a European agency responsible for the issues relating to the granting of international protection.[101] Without a doubt, this problem will partially be solved by the adoption of the regulations, quoted above, unifying the qualification process and the procedures for applying for international protection.

An agreement between the Union and Turkey of April 2016 was met with especially severe criticism, as it entailed the risk of a violation of fundamental rights. The signing of the agreement is an illustration of the effectiveness of the activities undertaken by the Union. However, it also raises questions concerning the rightness of such solutions in the light of the guarantees of human rights. M.J. Alpes, S. Tunaboylu, O. Ulusoy and S. Hassan have expressed their criticism with regard to the implementation of the agreement, pointing out to the problematic use of the safe third-country concept and the existence, in the case of returning migrants to Turkey, of the risk of inhuman treatment.[102] What is more, the agreement in question prioritised return over the guarantees of the right to seek asylum.[103]

The policy of the so-called '3Rs', promoted by the EC, is also perceived as problematic in the doctrine of human rights. As D. De Bono emphasises, the strengthening of returns will not solve the problem of the presence of irregular migrants on the territory of the Union.[104] An accepted form of return is the voluntary return, as the least interfering with the sphere of fundamental rights. Nonetheless, the constant problem with regard to undocumented migration concerns the persons remaining in the so-called 'legal limbo' (e.g. third-country nationals who cannot be returned because

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[101] E. Guild, *Does the EU Need a European Migration and Protection Agency?*, "International Journal of Refugee Law", Vol. 28, No. 4/2016, pp. 585–600.

[102] M.J. Alpes., S. Tunaboylu, O. Ulusoy, S. Hassan, *Post-deportation risks under the EU–Turkey Statement: What happens after readmission to Turkey?*, Migration Policy Centre Robert Schuman Centre for Advanced Studies, "Policy Brief Issue", No. 30/2017, p. 7 et seq.

[103] M.J. Alpes, S. Tunaboylu, I. van Liempt, *Human Rights Violations by Design: EU–Turkey Statement Prioritises Returns from Greece Over Access to Asylum*, Policy Brief Issue 2017/29, Migration Policy Centre Robert Schuman Centre for Advanced Studies, p. 2 et seq.

[104] D. De Bono, *Returning and Deporting Irregular Migrants: Not a Solution to the 'Refugee Crisis'*, "Human Geography", No. 9(2), p. 105 et seq.

their countries of origin have not confirmed their identity) and for whom the Union has not proposed any procedural solutions.

It is also problematic from the perspective of creating migrants' image to create a link between the issues of terrorism and organised crime with the so-called illegal migration. The very use of the adjective 'illegal' instead of 'undocumented' or 'irregular' poses the risk of creating a connotation that migration is definitely a negative phenomenon and migrants violating the residence rules might be treated as criminals.[105]

Thus, on the one hand, irregular migrants are exposed to a forced return to their countries of origin;[106] on the other hand, they face social exclusion.[107] The policy of '3Rs', promoted by the EC, is not able to effectively solve all the problems concerning undocumented migration.

As has been emphasised in the introductory remarks, the aim of the current article was not to make an assessment of the EU migration policy *en masse*, but merely to provide an analysis of the undertaken actions and initiatives of the EC in the Area of Freedom, Security and Justice. The conducted analysis of the content of the EC's conclusions from the years 2011–2017 has made it possible to identify both the strong points and weaker aspects of its activities the area of creating migration policy. While summing up the critical part of the study, it should be pointed out that there is a noticeable tendency in the EC for preventive activities aiming, albeit indirectly, to reduce migration of undocumented and forced character to the European Union. The consequences of the EC's decisions expressed in the conclusions may sometimes elude unambiguous moral assessment, as for instance the above-mentioned agreement with Turkey.

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[105] On the subject of the creation of negative stereotypes as an effect of the use of the adjective 'illegal' with regard to migrants see: P.C. Cernadas, *Language as a Migration Policy Tool. Critical remarks on the concept of "economic migrant" and how it leads to human rights violations*, "Sur International Journal on Human Rights", Vol. 13, No. 23/2016, p. 106, http://sur.conectas.org/en/ (last visited 12.03.2018). On the subject of the social reception of the migration crisis see: W. Wciseł, *Fala emocji, Reakcje internautów na kryzys migracyjny w 2015 r. (The Wave of Emotions. Reactions of Internet Users to the Migration Crisis in 2015)* in: *W obliczu kryzysu. Przyszłość polityki azylowej i migracyjnej Unii Europejskiej (In the Face of the Crisis. The Future of the EU Asylum and Migration Policy)*, A. Kosińska (ed.), Lublin 2017, pp. 191–213.

[106] On this topic see: D. De Bono, *Burning without fire' in Sweden: The paradox of the state's attempt to safeguard deportees' psychosocial wellbeing* in: *Return Migration and Psychosocial Wellbeing: Discourses, Policy-Making and Outcomes for Migrants and their Families*, Z. Vathi, R. King (eds.), London 2017, pp. 129–147.

[107] A. Błuś, *Beyond the wall of paper. Undocumented migrants, the border and human Rights*, „European Journal of Migration and Law", Vol. 15, No. 4/2013, p. 423.

While assessing the degree of implementation of the principle of migration security priority, understood as a priority of guaranteeing the highest possible security to all participants of the migrations process, that is migrants as well as the receiving society both at the level of defining political strategies and especially at the level of creating new law, it is hard to resist the impression that in some areas it is of a two-fold character. The EC safeguards the principle of migration security priority with regard to EU citizens, whereas in the case of third-country nationals, the EC undertakes the 'indispensable minimum' and preventive measures in order to reduce asylum and irregular migration.

Conclusions

The examination of the content of the EC's conclusions in the current article generally confirms the validity of the adopted thesis. The principle of migration security priority functions at the level of creating EU migration policy and the security issues with regard to this area are continually raised in the conclusions of the EC. In the current migration situation, the European Council plays the role of an actual creator of EU migration policy priorities. The principle of migration security priority is being implemented by the EC in the spirit of solidarity and responsibility, both at the level of the EU, as well as at the global level, which does not mean, however, that the migrants' countries of origin should be absolved of their responsibility in solving the problems.

Migrations are commonly perceived as both an opportunity and a threat,[108] whereas the principle of migration security priority facilitates the exercising of, at least, partial control over migration flows. In the era of crisis of the idea of solidarity, the EC also plays an important role in reinforcing this value in the context of initiating activities strengthening the sense of migration security in Member States.[109]

On the other hand, the activities of the EC should also serve the purpose of providing security to migrants themselves, due to the fact that people decide to migrate, as is rightly observed by M. Ślęzak, 'in search

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[108] Wł. Fehler, K. Cebul, R. Podgórzańska, *Migracje jako wyzwanie dla Unii Europejskiej i wybranych państw członkowskich (Migrations as a Challenge for the European Union and Several Member States)*, Warszawa 2017, p. 58. See: J.L. Bazan, *A Refugee Crisis in Europe? Questioning perceptions in the current migration debate* in: *Kryzys migracyjny w Europie. Wyzwania etyczne, społeczno kulturowe i etniczne (Migration Crisis in Europe. Questions in Ethics, Society, Culture and Ethnicity)*, J. Balicki, W. Necel (eds.), Warszawa 2017, p. 32.

[109] T.G. Grosse, J. Hetnarowicz, *The Discourse of Solidarity and the European Migrant Crisis*, "Yearbook of Polish European Studies", Vol. 19/2016, p. 44.

of security'.[110] Nevertheless, this is not always the case, as transpires from the critical remarks on the activities of the EC from the perspective of migration policy-making in the area of asylum and irregular migration, as presented in the last part of the study.

The principle of migration security priority, in accordance with the definition adopted for the purpose of the study, must apply equally to citizens of EU Member States, as we as to third-country nationals. As G. Oberleitner and S. Salomon observe, '[…] *human security does not catergorically prioritize the interest of citizens over interest of non-citizens*'.[111]

The full implementation of the principle of migration security priority should facilitate in the future the creation of policies to manage migrations for the benefit of all participants of migration processes, with full respect for fundamental rights.

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