Capítulo II

The Legislative Trends of the Common European Asylum System

Salvatore Fabio Nicolosi*
Senior Assistant Professor, Utrecht University
Researcher at Utrecht Centre for Regulation and Enforcement in European (RENFORCE)
Adjunct Professor of International and European Migration and Asylum Law
Vrije Universiteit Brussel (VUB)

SUMARIO: I. INTRODUCTION AND CONTEXT. II. THE LEGISLATIVE MODEL OF THE COMMON EUROPEAN ASYLUM SYSTEM. 2.1. *Stating the Paradigm: The Harmonization of Functional Humanitarianism*. 2.2. *Contesting the Paradigm: The Judicial Incursions*. III. REFORMING THE COMMON EUROPEAN ASYLUM SYSTEM: A PARADIGM SHIFT? 3.1. *The Emergency-Focused Approach*. 3.2. *Agencification and Enhanced Harmonization*. 3.3. *Externalization*. IV. CONCLUDING REMARKS: FIXING POLICY OBJECTIVES IN THE COMMON EUROPEAN ASYLUM SYSTEM. V. BIBLIOGRAPHY.

I. INTRODUCTION AND CONTEXT

Since the 1990s, one of the EU's main goals has been the establishment of a Common European Asylum System (CEAS).[1] The primary objective of the CEAS is to offer "an appropriate status to any third-country national requiring

* This chapter was elaborated in the framework of the *Proyecto de I+D+i del Programa Operativo FEDER Andalucía: "Políticas de Integración de los Inmigrantes y Refugiados en Perspectiva Nacional, Autonómica y Europea", 2021-2023, B-SEJ-442-UGR20*.

1. The Common European Asylum System (CEAS) includes the following core binding acts: Regulation 604/2013 [2013] OJ L180/31 (Dublin III Regulation); Regulation 603/2013 [2013] OJ L180/1 (Eurodac Regulation); Directive 2011/95 [2011] OJ L337/9 (Qualification Directive); Directive 2013/33 [2013] OJ L180/96 (Reception Directive); Directive 2013/32 [2013] OJ L180/249 (Procedures Directive); Directive 2001/55/EC [2001] OJ L212/12 (Temporary Protection Directive). For an updated commentary on the CEAS toolbox, see especially Thym, D., and Hailbronner, K. (eds), *EU Immigration and Asylum Law. Commentary*, 3rd edn, Hart Publishing/Nomos, 2022.

international protection"[2] by achieving uniform and effective asylum procedures, joint guarantees for protection, and access to safe and uniform regimes across all Member States. However, the EU's competence in asylum matters is a clear example of the persistent tensions between the need for European regulation and the protection of national interests and has been one of the most delicate and challenging areas to regulate.

Twenty years after the European Council of Tampere that in 1999 set out the political roadmap to establish a CEAS,[3] and two phases of legislative harmonization (1999-2004 and 2005-2013 respectively),[4] the EU asylum policy is subject to another stage of reform aimed at tackling the structural shortcomings particularly exacerbated by the ongoing migratory flows to the EU.[5] Such inadequacies are especially related to the dysfunctional Dublin mechanism on the State responsible for an asylum application. This has been always regarded as the backbone of the whole CEAS, as confirmed by the European Court of Justice (ECJ).[6] Additionally, the migratory pressure of 2015 has highlighted the normative loopholes in the EU legislative framework as well as a poor level of implementation and compliance at the national level.[7]

Three structural problems arose as distinct features of the CEAS. Firstly, the system is not well-equipped to tackle emergency situations. On the contrary, it tends to perpetuate a situation of emergency, because, as Advocate General Sharpston stated in her Opinion in *Cimade and GISTI*, "the whole system of providing protection for asylum seekers and refugees is predicated on the burden lying where it falls."[8] Secondly, the CEAS's focus on harmonized minimum standards for the reception, protection, and recognition of refugees stopped a long way short of creating a level playing field for refugees in the EU.[9] Thirdly,

2. Consolidated version of the Treaty on the Functioning of the European Union (TFEU), [2016] OJ C202/1, Art. 78 (1).
3. European Council, Presidency Conclusions, Tampere, 15-16 October 1999, 16 October 1999.
4. For more extensive references on the two phases of harmonization see, *inter alia*, Tsourdi, E. and Costello, C., "The Evolution of EU Law on Refugees and Asylum", in P. Craig and G. de Búrca (eds), *The Evolution of EU Law,* 3rd ed, Oxford University Press, 2021, pp. 793-823.
5. Commission, "On a New Pact on Migration and Asylum" (Communication) COM(2020) 609 final. For a critical discussion, see Thym, D., and Odysseus Academic Network (eds), *Reforming the Common European Asylum System. Opportunities, Pitfalls, and Downsides of the Commission Proposals for a New Pact on Migration and Asylum,* Nomos, 2022.
6. Case C-638/16 PPU, *X and X v. État belge*, 7 March 2017, para. 48.
7. Commission, "Proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the member state responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast)", COM (2016) 270 final, 4.
8. Case C-179/11, *CIMADE et Groupe d'information et de soutien des immigrés (GISTI) v. Ministre de l'intérieur, de l'outre-mer, des collectivités territoriales et de l'immigration*, Opinion of Advocate General Sharpston, 15 May 2012, para 83.
9. Den Heijer, M., Rijpma, J., and Spijkerboer, T., "Coercion, Prohibition, and Great Expectations: The Continuing Failure of the Common European Asylum System", *Common Market Law Review,* 2016, pp. 607-642; Allard, S., "Casualties of Disharmony:

the system is inaccessible due to the lack of safe channels of arrival, as confirmed by Advocate General Mengozzi in his Opinion on the case of humanitarian visas in *X and X* v. *Belgium*.[10]

In light of these structural deficiencies, this chapter emphasizes that the ongoing reform constitutes a crucial step for the future regulation of the CEAS because a solid asylum system is even more urgently needed to tackle the many challenges triggered by such problems. In this connection, moving from Majone's assumption of the EU as a "regulatory state,"[11] this chapter pursues a twofold objective. First, it explains the evolution of the CEAS from the perspective of legislative choices, highlighting the relevance of specific regulatory frameworks as mechanisms for realizing the policy objectives of the EU. From this perspective, the chapter argues that the normative effectiveness of the CEAS very much depends on the extent the legislative frameworks realize the objectives of the specific policy area. Good law-making requires, in fact, a direct relationship between the measure adopted and the objective to be achieved. Second, while investigating the emerging legislative trends, the chapter eventually concludes that the current reform should not miss the opportunity to advance appropriate normative corrections that can ensure a genuine pursuit of the policy objectives of the CEAS. In particular, it is argued that such a teleological approach is necessary and functional to contrast the hazardous distortions of the CEAS and elaborate an effective and value-proof legislative framework.

It is, nonetheless, worth noting that, despite its relevance to fixing the policy objectives of the CEAS, a new legislative framework may not be sufficient. Taking into consideration the inherent operational vocation of all policies on asylum, migration, and border checks, efforts are also necessary at the level of law enforcement.

II. THE LEGISLATIVE MODEL OF THE COMMON EUROPEAN ASYLUM SYSTEM

The flaws underpinning the CEAS are not to be seen as exclusively linked with a mass influx of migrants and the diversity of their individual situations (mixed flows).[12] These problems are to a large extent due to the legal design and the

---

The Exclusion of Asylum Seekers Under the Auspices of the Common European Asylum System", *Emory International Law Review,* 24, 2010, pp. 295-330.

10. *X and X* v. *Belgium*, Opinion of Advocate General Mengozzi, para. 175.
11. Majone, G., "The rise of the regulatory state in Europe", *West European Politics,* 17, 1994, pp. 77-101.
12. Perruchoud, R., and Redpath-Cross, J. (eds.), *Glossary on Migration,* 2nd ed, International Organization for Migration, 2011, p. 63, define "mixed flows" as: 'complex migratory population movements that include refugees, asylum-seekers, economic migrants and other migrants, as opposed to migratory population movements that consist entirely of one category of migrants.' For references see García Andrade, P., "Initiatives of EU Member States in Managing Mixed Flows in the Mediterranean and the EU Distribution of Competences", in Matera, C., and Taylor, A. (eds), *The Common European Asylum System and Human Rights: Enhancing Protection in Times of Emergencies,* Asser Press, 2014, pp. 51-63.

rationales beyond the legislative frameworks adopted for the CEAS, which are in direct connection with the management of the whole Schengen area.[13]

The CEAS constitutes a common good for the Schengen area, which, as is known, was created to ensure free movement as an essential component of the internal market, therefore to the benefit of European citizens. Because of the Schengen regime,[14] border control has been replaced by the development of European police cooperation and the strengthening of EU external border monitoring. This confirms that Schengen is fully relevant for third country nationals and that a solid asylum system is necessary and functional to ensure the effectiveness of the whole area. Accordingly, the legislative framework of the CEAS and its reform are inherently influenced by those political dynamics essentially aiming at monitoring and managing the crossings at the Schengen borders.

There is a lot of scholarly debate about the conceptualization of regulation.[15] It has been traditionally defined from the State perspective as "the sustained and focused control exercised by a public authority over activities valued by the community,"[16] but, despite some commonalities across different social science disciplines,[17] the definition of regulation is far from being set.

Looking at the EU as a regulatory authority,[18] regulation will be especially understood as the process by which "norms are established, the behaviour of those subject to the norms monitored or fed-back into the regime, and for which there are mechanisms for holding the behaviour of regulated actors within the acceptable limits of the regime."[19] This definition can capture the complex essence of regulation in EU law, in which multilevel dynamics as well as a wide array of legal and political factors and actors influence the whole process. While contributing to explaining the dynamics of regulation, such a conceptualization cannot confirm the quality of a regulatory framework. For the purpose of this chapter, it is suggested

13. In this regard see in particular Carr, B., "Refugees without Borders: Legal Implications of the Refugee Crisis in the Schengen Zone", *Michigan Journal of International Law,* 38, 2016, pp. 137-160.
14. Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, Schengen Agreement, 14 June 1985, and Convention Implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic, on the Gradual Abolition of Checks at their Common Borders (Schengen Implementation Agreement), 19 June 1990.
15. For a broader overview, see in particular Lodge, M., Baldwin, R., and Cave, M., *Understanding Regulation*, 2nd ed., Oxford University Press, 2012.
16. Selznick, P., "Focusing Organisational Research on Regulation", in R. Noll (ed), *Regulatory Policy and the Social Sciences,* University of California Press, 1985, 363, 383.
17. Koop, C., and Lodge, M., "What is regulation? An interdisciplinary concept analysis", *Regulation and Governance,* 11, 2015, pp. 95-108, available at <http://eprints.lse.ac.uk/62135/>.
18. Majone, G., "The agency model: The growth of regulation and regulatory institutions in the European Union", *EIPASCOPE Working Paper,* n. 3, 1997, pp. 1-6.
19. Scott, C., "Analyzing Regulatory Space: Fragmented resources and institutional design", *Public Law*, n. 45, 2001, pp. 283, 284.

that an effective legislative framework must be able to realize the objectives of a specific policy. Such a teleological understanding of the effectiveness of a legislative framework contributes to shedding light on the problematic disconnection between policy goals and regulatory models characteristic of the CEAS.

A closer but concise look at the regulatory models of the CEAS explains the ongoing reform in the context of a normative continuum that over the years has progressively shifted from humanitarianism to securitization.[20] Such a shift reached its peak with the migratory pressure of 2015, when, beyond the emergency focus of the crisis regulation, it became clear that migratory movements and refugees from constituting a complex political problem were seen as a "risk" for the security of the EU polity. This risk is mostly due to the difficulties of a regulatory framework to effectively manage the phenomenon of mixed flows of migrants with different motivations and different protection needs who travel together along the same migration routes, using the same means of transport.

As a consequence, the whole migratory phenomenon has been captured through the paradigm of securitization. This resulted in conflating the policy objective of the CEAS, which is to offer "appropriate status to any third-country national requiring international protection", comprising measures such as "a uniform status of asylum for nationals of third countries, valid throughout the Union," with the objective of controlling migration in order to preserve the security of the EU.

2.1. STATING THE PARADIGM: THE HARMONIZATION OF FUNCTIONAL HUMANITARIANISM

Literature has abundantly delved into the nexus of migration-security[21] contributing to the conceptual exemplification of "Fortress Europe."[22] In particular, Huysmans considered the establishment of the Schengen area and the adoption of the Dublin system to determine the State responsible for an asylum application lodged within such an area as part of the "social construction of migration into a security question."[23]

While the policy attitude to frame migration as a risk for security within the EU has been predominant in most academic debates, less attention has been paid to how such a policy attitude translated into the legislative framework. Following the Tampere Conclusions in 1999 and the introduction through the treaty of Amsterdam of competence for the EU in the field of asylum,[24] the EU legislature adopted measures of minimum harmonization. Admittedly, a model of minimum harmonization is

20. Moreno-Lax, V., "The EU Humanitarian Border and the Securitization of Human Rights: The 'Rescue-Through-Interdiction/Rescue-Without-Protection' Paradigm", *Journal of Common Market Studies,* n. 56, 2018, 119, 121.
21. For further references see Bermejo, R., "Migration and Security in the EU: Back to Fortress Europe?", *Journal of Contemporary European Research,* n. 5, 2009, pp. 207-224.
22. Cfr. Geddes, A., *Immigration and European Integration. Towards fortress Europe?,* Manchester University Press, 2000.
23. Huysmans, J., "The European Union and the Securitization of Migration", *Journal of Common Market Studies,* n. 38, 200, 751, 753.
24. Treaty establishing the European Community (Amsterdam consolidated version), [1997] OJ C340/173, Art 63.

frequently adopted in those areas, including asylum or immigration, in which the realization of EU policy objectives is fraught with national interests.[25] Pursuing such a model, a set of three directives on the reception conditions, the asylum procedures, and the qualification of the protection complemented the Dublin regulation on the State responsible for an asylum application. In an attempt to realize a more integrated policy with a common asylum procedure on the basis of uniform protection status, this set of minimum standards was subject to revision meant to limit the margins of discretions left to the Member States.

The early phase of harmonization aimed to set up the development of the CEAS in line with international standards, in particular international refugee law. The adoption of instruments such as the Temporary Protection Directive and the harmonization of subsidiary protection as a complementary status to refugee status[26] are illustrative of such a paradigm of humanitarianism.

While it is beyond doubt that this model of harmonization has contributed to improving protection standards across the EU, more caution is needed as regards the doctrinal view that "there have not been any significant securitization dynamics at work in the EU asylum policy venue."[27] A systematic analysis of the more mature CEAS legal toolbox reveals how the attempt to harmonize those humanitarian principles, which are a distinct feature of the international protection regime, is watered down by an unfair balance between security and humanitarian guarantees. If, on the one hand, the regulatory framework of the CEAS has expanded the international protection regime, the technique of harmonization has, on the other hand, translated national practices and domestic rules into European norms,[28] with the consequence that national security interests have been turned into EU policy objectives. Instead of contributing to the further development and enforcement in Europe of the right to asylum,[29] the EU harmonization process resulted in "loophole techniques" aimed at preserving "a substantial amount of discretion and not to be too constrained, revealing an attempt to re-nationalize the whole asylum question."[30] The regulatory model of humanitarianism that has been pursued by the EU legislatures becomes therefore functional to a different aim which is in fact to reduce immigration pressure, enhance border control, and more broadly securitize the EU[31] instead of promoting a fully-fledged international protection policy.

---

25. For further references see Dougan, M., "Minimum Harmonisation and the Internal Market", *Common Market Law Review,* n. 37, 2000, 853, 856.
26. See Qualification Directive, Art 15.
27. Léonard, S., and Kaunert, Ch., *Refugees, Security and the European Union*, Routledge, 2019, 89.
28. For further references see Slot, P. J., and Bulterman, M., "Harmonization of Legislation on Migrating EU Citizens and Third Country Nationals: Towards a Uniform Evaluation Framework", *Fordham International Law,* 747.
29. UNHCR, 'Setting the European Asylum Agenda: UNHCR recommendations to the Tampere Summit (October 1999)', in *UNHCR Tool Boxes on EU Asylum Matters: Tool Box 2: The Instruments*, 2003, 45, 29, available at: <http://www.unhr.org>.
30. Teitgen-Colly, C., "The European Union and Asylum: an Illusion of Protection", *Common Market Law Review,* 2006, n. 43, 1503, 1512-1513.
31. See in this regard Juss, S., "The Decline and Decay of European Refugee Policy", *Oxford Journal of Legal Studies*, 25, 2005, 749 and more broadly Moreno-Lax, V., *Accessing*

This tendency has evolved and resulted in the adoption of even more restrictive asylum policies at the national level, due to the wide discretion left to the Member States by the existing harmonized framework. This impairs the correct implementation of the international principles and obligations of international refugee law on which the whole EU policy is assumed to be predicated. Elements of the securitization paradigm are especially embedded in multiple sets of provisions within the CEAS legal toolbox. These include the broad formulation of the clauses of exclusion and revocation of international protection in the Qualification Directive,[32] the detention clauses, and the withdrawal of material reception conditions in the Reception Directive[33] or the general scheme of the Asylum Procedures Directive. This overlap between humanitarianism and securitization is clear in official political documents, such as the Stockholm Programme which refers to legally safe and efficient asylum procedures and at the same time the need 'to combat illegal migration.'[34]

Ultimately, the recent European Agenda on Migration of 2015 as well as the New Pact on Migration and Asylum of 2020 constitute the political platforms of a number of initiatives aimed at reducing the number of arrivals in the EU,[35] such as the EU-Turkey Statement,[36] and prioritizing security disguised as humanitarianism.[37]

2.2. CONTESTING THE PARADIGM: THE JUDICIAL INCURSIONS

The paradigm of functional humanitarianism that resulted in further securitization has distorted the natural objective of the EU asylum policy proving ineffective to protect adequately asylum seekers. Before outlining the emerging legislative trends that contribute to disconnecting the CEAS from its natural policy objectives, it is worth highlighting how the two European supranational courts, namely the European Court of Human Rights (ECtHR) and the Court of Justice of the EU (CJEU)[38] have on many occasions reiterated a humanitarian reading of the CEAS legislative framework. This has partly influenced the legislative reforms, because, on the other hand, as will be explained in Section III, some proposals under the new Pact on Migration and Asylum seem to contrast with this case law.

Asylum in Europe. Extraterritorial Border Controls and Refugee Rights under EU Law, Oxford University Press, 2017. *Contra*, see Léonard and Kaunert (n 27) 95.

32. Qualification Directive, see e.g. Art 17 (1) d.
33. Reception Directive, see e.g. Arts 8-10 and Art 20.
34. Commission, "Delivering an area of freedom, security and justice for Europe's citizens: action plan implementing the Stockholm Programme" (Communication) COM (2010) 171 final.
35. Carrera, S., et al., "The EU's Response to the Refugee Crisis: Taking Stock and Setting Policy Priorities", *CEPS Essay*, n. 20, 16 December 2015, available at: <http://aei.pitt.edu/70408/1/EU_Response_to_the_2015_Refugee_Crisis.pdf>.
36. See European Council, EU-Turkey Statement, Press release, 144/16, 18 March 2016.
37. See in this regard Campesi, G., "Frontex, the Euro-Mediterranean border and the paradoxes of humanitarian rhetoric", *South East European Journal of Political Science,* n. 2, 2014, pp. 126-134.
38. See in this connection Ippolito, F., and Velluti, S., "The relationship between the CJEU and the ECtHR: the case of asylum", in Dzehtsiarou, K., et al. (eds), *Human Rights Law in Europe: The Influence, Overlaps and Contradictions of the EU and the ECHR*, Routledge, 2014, 156 ff.

The substantial amount of case law that the two courts have been developing has significantly delved into the standards of protection of asylum seekers and the coordination with the Refugee Convention.[39] The Dublin Regulation and its system of transfers of asylum seekers constitute the core of this body of case law that has been contributing to unearthing the risks beyond the CEAS. On different occasions, the judicial dialogue between the Strasbourg Court and its Luxembourg counterpart raised concerns about the fundamental rights implications of the Dublin transfers. A solid stream of case law has dismantled the false assumption of an equal level of protection available in all Member States, due to compliance with fundamental rights standards. This was illustrated by the ECtHR in *M.S.S.*, a case concerning the transfer of an Afghan applicant from Belgium to Greece, in which the Strasbourg Court emphasized that a system of automatic transfers to the State responsible for an asylum application is incompatible with international human rights standards.[40] On this point, the ECtHR was echoed by the CJEU in *N.S. and M.E.*[41]

While refining this line of reasoning more recently in *Jawo*,[42] the CJEU more specifically elaborated on the standards of protection of asylum seekers. On that occasion, the Court provided helpful elements to qualify a situation of extreme material poverty amounting to inhuman or degrading treatment within the meaning of Article 4 of the Charter. [43] It is worth recalling that the CEAS by means of the Reception Directive establishes minimum standards of treatment for asylum seekers. In *Cimade*, the Court stated that the obligation of the Member State to ensure minimum reception conditions concerns not only asylum seekers present in the territory of the responsible Member State but also those who remain pending the determination of the responsible Member State, a procedure which can last for a number of months.[44] Later, in *Saciri* the Court made clear that no derogation from the minimum standards set out in the Reception Directive can be justified on the basis of the saturation of the reception networks.[45]

Moreover, when addressing reception conditions, the Court of Justice has paid particular attention to the value of human dignity as enshrined in Article 1 of the Charter of Fundamental Rights of the EU.[46] The argument developed by the Court emphasizes that the CEAS in general is not only devised to offer an appropriate status of protection to third country nationals but also to guarantee adequate living standards and the enjoyment of fundamental rights.[47] The reasoning in *Jawo* by which the Court has provided helpful elements to qualify a situation of extreme

39. Convention Relating to the Status of Refugees, 28 July 1951, United Nations Treaty Series, vol. 189, 137.
40. *M.S.S. v Belgium and Greece*, App no 30696/09 (ECtHR, 21 January 2011), para 359.
41. *N.S. and M.E.*, C-411/10 and C-493/10, (CJEU, 21 December 2011), para 86.
42. *Jawo*, C-163/17, (CJEU, 19 March 2019), para 89.
43. Charter of Fundamental Rights of the European Union [2012] OJ C 326/391–407.
44. *Cimade, Groupe d'information et de soutien des immigrés (GISTI)*, C-179/11, (CJEU, 27 September 2012), para 43.
45. *Saciri*, Case C-79/13, (CJEU, 24 February 2014), para 35.
46. Charter of Fundamental Rights of the European Union [2012] OJ C 326/391–407.
47. For a broader analysis, see also Jones, J., "Human dignity in the EU Charter of Fundamental Rights and its Interpretation Before the European Court of Justice", *Liverpool Law Review,* n. 33, 2012, pp. 281-300.

material poverty amounting to inhuman or degrading treatment within the meaning of Article 4 of the Charter, thus confirms the need to construe the CEAS as a system that must be predicated on the protection of fundamental rights.

Lastly, the CJEU on many occasions had the chance to clarify the compatibility of the CEAS legal toolbox, especially the Qualification Directive, with the Refugee Convention. Such a treaty, as stated clearly by the Court 'constitutes the cornerstone of the international legal regime for the protection of refugees and… the provisions of the Directive for determining who qualifies for refugee status and the content thereof were adopted to guide the competent authorities of the Member States in the application of that convention…'[48].

In *Bolbol*, the Court adopted an interpretation of Article 12(1)(a) of the Qualification Directive which reproduced Article 1D of the 1951 Geneva Convention, excluding, therefore, from the scope of the Qualification Directive persons receiving protection or assistance from bodies or agencies of the United Nations.[49] On the basis of this interpretation, the applicant, who was a stateless person of Palestinian origin from the Gaza Strip who sought asylum in Hungary and who did not avail herself of protection or assistance from the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) prior to her asylum claim, was able to have her case examined under the Qualification Directive.

The compatibility of the Qualification Directive's provisions, especially those concerning the exclusion clauses, with the Refugee Convention has been more recently interpreted by the CJEU. In particular, in the joined cases of *M.* and *X.X.*, the Court was asked whether Article 14(4), (5) and (6) of the Qualification Directive create new grounds for refusal [Article 14(5)] and withdrawal [Article 14(4)] of refugee status due to danger to the security of the Member State or previous conviction for a serious crime, which are not explicitly laid down in the 1951 Refugee Convention and, thus, whether they are invalid under Article 18 of the Charter and Article 78(1) TFEU.[50] The case echoes the former rulings in *H.T.* and *Lounani*, concerning respectively the withdrawal of a residence permit for a refugee and the affiliation with a terrorist group as a ground to deny refugee status.[51]

In *M.* and *X.X.* the Court clarified that the provisions in Article 14(4) and (5) correspond to the conditions established in Article 21 (2) of the Qualification Directive and Article 33 (2) of the Refugee Convention on the principle of non-refoulement. Nonetheless, the Court emphasized that under EU asylum law the spectrum of protection is wider than the Refugee Convention, because, in line with the Charter's provision, no derogation of the absolute obligation of non-refoulement is possible.[52]

In sum, in an attempt to ensure high standards of protection for fundamental rights, the Court has been contributing to providing a humanitarian reading of the

48. *Abdulla*, Case C-175/08, (CJEU, 2 March 2010), para 52.
49. *Bolbol*, Case C-31/09, (CJEU, 17 June 2010).
50. *M v Ministerstvo vnitra*, Joined Cases C-391/16, C-77/17, C-78/17, (CJEU, 14 May 2019).
51. *H.T.*, Case C-373/13, (CJEU, 24 June 2015) and *Lounani*, Case C-573/14, (CJEU, 31 January 2017).
52. *M*, paras 95-96.

CEAS by setting yardsticks that have been partly integrated into the second phase of harmonization of the EU asylum rules. The CJEU has, for example, succeeded in reconciling the Qualification Directive with the Refugee Convention. However, as will be explained in Section III, the constant surfacing of the paradigm of securitization at each phase of legislative reform undermines the consolidation of the benchmarks set out by the case law.

III. REFORMING THE COMMON EUROPEAN ASYLUM SYSTEM: A PARADIGM SHIFT?

The migratory pressure put the CEAS to a test, confirming the shortcomings that over the years have destabilized European cooperation within the Schengen zone. In an attempt to tackle the volume and concentration of asylum seekers' arrivals and the enduring differing treatment of refugees across the Member States, based on the long-term priorities identified in the European Agenda for Migration of 2015,[53] the European Commission submitted a roadmap "towards a more humane, fair and efficient European asylum policy."[54] Due to the stalemate in the negotiations,[55] the Commission revamped the process of reform with a new Pact on Migration and Asylum underpinning a new set of legislative measures to commit the EU and its Member States "to build a system that manages and normalizes migration for the long term".[56]

Fierce criticism has been already raised by scholars[57] and civil society,[58] claiming that this political platform is all but new and definitely unfit for the "fresh start" sought by the Commission. While building on the progress achieved in the negotiation of some of the 2016 proposals, the Commission adds new legislative items for a comprehensive package that complements the core building blocks of the CEAS with new specific measures. As to the core building blocks, the major elements of novelty connect with the difficulties in finding a compromise on the reform of the Dublin Regulation and its model of solidarity as well as the need "to close the gaps between external border controls and asylum and return procedures." For the first time, the Commission repeals, or rather renames, the

53. Commission, 'A European Agenda on Migration' (Communication), COM(2015) 240 final.
54. Commission, 'Towards a Reform of the Common European Asylum System and Enhancing Legal Avenues to Europe'(Communication) COM (2016) 197 final.
55. Nicolosi, S., "The Reform of the Common European Asylum System: Between Recast and New Regulation", *RENFORCE Blog*, 12 June 2019, at: <http://blog.renforce.eu/index.php/nl/2019/06/12/the-reform-of-the-common-european-asylum-system-between-recast-and-new-regulation/>.
56. Commission, 'On a New Pact on Migration and Asylum' (Communication) COM(2020) 609 final.
57. See Thym and Odysseus Network, n 5.
58. See European Council on Refugees and Exiles (ECRE), "Joint Statement: The Pact on Migration and Asylum: to provide a fresh start and avoid past mistakes, risky elements need to be addressed and positive aspects need to be expanded", 6 October 2020, at: **https://ecre.org/the-pact-on-migration-and-asylum-to-provide-a-fresh-start-and-avoid-past-mistakes-risky-elements-need-to-be-addressed-and-positive-aspects-need-to-be-expanded/**.

Dublin Regulation, as the Regulation on asylum and migration management, which designs a mix of flexible mandatory solidarity schemes.[59] Moreover, the focus on procedures and enforcement is expanded by a new proposal for a Regulation introducing a screening of third country nationals at the external borders is added,[60] complementing the amended proposal for the Common Procedures Regulation[61] and the amended proposal for the Return Directive.[62]

With reference to solidarity, the Pact departs from the axiological view expressed by Advocate General Sharpston, who emphasized that through their participation in the EU integration project, "Member States and their nationals have obligations as well as benefits, duties as well as rights." This "requires one to shoulder collective responsibilities and… burdens to further the common good."[63] Instead, the Pact pursues a pragmatic approach. Member States can choose either to relocate asylum seekers, to sponsor returns to help another Member State repatriate irregular migrants, or to provide other types of support including external cooperation for migration management in countries of origin or transit. Such a model of solidarity can produce adverse effects, as it discourages the Member States from prioritizing the relocation of asylum seekers. Finally, this new framework, instead of acting as a catalyst for a consensus, seems to rather contribute to further fragmentation, neglecting that "the enjoyment of equal rights and benefits stemming from membership in the EU carries equal responsibilities."[64]

As for enforcement, the new legal design misses the opportunity to properly embed the role of the EU agencies that, according to the Pact, should be involved in implementing the screening and border procedures. Despite creating the expectations of fully fledged agencies, the proposals underpinning the Pact, in fact, do not properly fix the conundrum of the legal mandate of these agencies and their

59. Commission, Proposal for a Regulation of the European Parliament and of the Council on asylum and migration management and amending Council Directive (EC) 2003/109 and the proposed Regulation (EU) XXX/XXX [Asylum and Migration Fund] (Communication) COM(2020) 610 final.
60. Commission, Proposal for a Regulation of the European Parliament and of the Council introducing a screening of third country nationals at the external borders and amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817 (Communication) COM(2020) 612 final.
61. Commission, Amended proposal 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 (Communication) COM(2020) 611 final.
62. Commission, Proposal for a Directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals (recast) A contribution from the European Commission to the Leaders' meeting in Salzburg on 19-20 September 2018 (Communication) COM(2018) 634 final.
63. *European Commission v Poland, Hungary, Czech Republic*, Joined Cases C-715/17, C-718/17, C-719/17, (Opinion of Advocate General Sharpston, 31 October 2019), para 253.
64. Carrera, S., "Whose Pact? The Cognitive Dimensions of the New EU Pact on Migration and Asylum", *CEPS Policy Insights*, 22, September 2020, at: <https://www.ceps.eu/download/publication/?id=30350&pdf=PI2020-22-New-EU-Pact-on-Migration-and-Asylum.pdf>, 9.

executive powers that have been *de facto* expanding in the most recent years. This architecture, therefore, remains precarious in terms of procedural guarantees for migrants and coordination with the state authorities leaving accountability gaps open.[65]

Ultimately, new legislative measures include a mix of fully harmonizing instruments as well as soft law measures, aiming at addressing situations of crisis, including those caused by search and rescue operations at sea. These encompass the proposal for a Regulation addressing situations of crisis and force majeure[66] which repeals the Temporary Protection Directive,[67] and two Recommendations respectively on the Migration Preparedness and Crisis Blueprint,[68] and on cooperation among the Member States concerning operations carried out by vessels owned or operated by private entities for the purpose of search and rescue activities.[69]

This new legal design raises doubts about the overall political direction of the CEAS. In this connection, an overly articulated set of more than ten proposals certainly complicates the negotiations and may affect once again the effectiveness of the reform. This can be still impaired by the lack of policy coherence, because, in view of offering a pragmatic platform to accommodate the diverging positions of the Member States, the new legal design misses the opportunity to operate a fundamental paradigm shift.

Overall, three emerging trends, which will be shortly addressed in the following sub-sections, are distinct features of the proposed legislative framework, namely: an emphasis on emergency, further harmonization at the level of implementation through a stronger mandate for EU migration agencies, and externalization and cooperation with third countries. These are three predominant aspects in which the focus on securitization rather than humanitarianism is more visible.

---

65. In this regard see, inter alia, Nicolosi, S., and D. Fernández-Rojo, D., "Out of control? The case of the European Asylum Support Office", in Scholten, M. and Brenninkmeijer, A. (eds), *Controlling EU Agencies. The Rule of Law in a Multi-jurisdictional Legal Order*, Edward Elgar, 2020, pp. 177-195; Tsourdi, E., "Holding the European Asylum Support Office Accountable for its role in Asylum Decision-Making: Mission Impossible?", *German Law Journal*, 21, 2020, pp. 506-531.
66. Commission, Proposal for a Regulation of the European Parliament and of the Council addressing situations of crisis and force majeure in the field of migration and asylum (Communication), COM(2020) 613 final.
67. The Temporary Protection Directive was recently triggered for the benefit of those fleeing the armed conflict in Ukraine, see Council Implementing Decision (EU) 2022/382 of 4 March 2022 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection, ST/6846/2022/INIT, [2022] OJ L 71/1–6.
68. Commission, Recommendation (EU) 2020/1366 of 23 September 2020 on an EU mechanism for preparedness and management of crises related to migration, C/2020/6469, [2020] OJ L 317/26–38.
69. Commission, Recommendation (EU) 2020/1365 of 23 September 2020 on cooperation among Member States concerning operations carried out by vessels owned or operated by private entities for the purpose of search and rescue activities C/2020/6468, [2020] OJ L 317/23–25.

3.1. THE EMERGENCY-FOCUSED APPROACH

The New Pact on Migration and Asylum reflects a legislative model to address emergency situations, which draws on the experience with the adoption of *ad hoc* emergency measures to face the migratory pressure in 2015, including the two Relocation Decisions,[70] adopted using for the first time the legal basis of Article 78 (3) TFEU, and the former and now abandoned Dublin IV proposal.[71] The Commission has fine-tuned its emergency-focused approach to EU asylum law with a more sophisticated framework.[72]

The core of the crisis management machinery is the proposed Regulation addressing situations of crisis and *force majeure* in the field of migration and asylum.[73] This instrument establishes an in-built crisis management tool to avoid *ad hoc* solutions as those that have been recently designed for example for disembarkations, following search and rescue operations.[74] A relevant institutional novelty is that the new Regulation provides the European Commission instead of the Council with the competence to trigger the mechanism by adopting an implementing act. Unless the situation of crisis is extremely serious, the Commission needs to act with the assistance of committees of representatives from EU countries.[75] This is a significant novelty since situations of crisis might determine the adoption of emergency executive powers, thereby remedying a lacuna in EU law, which was formerly, in the context of the Temporary Protection Directive, relying on the Council's discretion. The attribution of such a specific competence to the European Commission, as the executive branch of the EU, contributes to better systematizing the exceptional nature of this emergency legislation compared to the ordinary one. The new Regulation will thus provide a temporary framework derogating from the ordinary rules on border asylum procedures, border return procedures, or the time limit to register asylum applicants by especially extending the time limits.

'The proposal gives discretion to the European Commission to qualify a situation as a crisis on the basis of substantiated information, gathered on the basis of the EU

70. Council Decision (EU) 2015/1523 of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece, 2015 OJ L 239/146; and Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece, 2015 OJ L 248/80. For a detailed analysis see Nicolosi, S., "*Emerging challenges* of the temporary relocation measures under EU asylum law", *European Law Review,* 41, 2016, 338-361.
71. Commission, Proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) (Communication), COM(2016) 270 final.
72. For more extensive analysis see Nicolosi, S., "Addressing a Crisis through Law: EU Emergency Legislation and its Limits in the Field of Asylum", *Utrecht Law Review,* 17, 2021, 17-30.
73. COM(2020) 613.
74. See critically, Moreno-Lax, V., "The EU Humanitarian Border and the Securitization of Human Rights: The 'Rescue-through-Interdiction / Rescue-without-Protection' Paradigm", *Journal of Common Market Studies,* 2018, 119-140.
75. COM(2020) 613, Art 5.

mechanism for Preparedness and Management of Crises related to Migration. In this connection, Article 1(2)(a) of the Proposal defines crises as exceptional situations of mass influx of third-country nationals or stateless persons arriving irregularly in a Member State or disembarked on its territory following search and rescue operations, being of such a scale, in proportion to the population and GDP of the Member State concerned, and nature, that it renders the Member State's asylum, reception or return system non-functional, or an imminent risk of such exceptional situations of mass influx.

This definition confirms that "such situations are covered by the proposal only if it is demonstrated that they would have serious consequences for the functioning of the Common European Asylum System or the Common Framework as set out in the proposed Regulation on Asylum and Migration Management." It is also relevant to clarify that such a definition should be read in conjunction with the concept of "migratory pressure" codified in the proposal for the AMMR. This limits itself to refer to "a large number of arrivals of third country nationals or stateless persons… that place a burden even on well-prepared asylum and reception systems and requires immediate action."[76]

The legislative machinery to address situations of crisis formalizes the emergency-focused paradigm which has become predominant in the EU institutions. As the Court of Justice clarified as regards the 2015 Decisions on the relocation of asylum seekers, this was "composed of a series of provisional measures, including a temporary relocation mechanism which derogates from the acquis relating to the common asylum system only on certain specific points which are expressly listed."[77] The pitfall of this paradigm is, however, twofold: on the one hand, it procrastinates the design of a solid asylum system that can be effective, in terms of sustainability beyond emergency-driven reactions, and fair to both refugees and the Member States. On the other hand, the effectiveness of such a regulatory model will be dependent on several elements which are political in nature, including the definition of a situation of emergency itself as well as the voluntary participation in the temporary solidarity mechanism. All these elements contribute to qualifying migration in terms of a security matter that requires exceptional legislative measures.

Finally, the emergency-focused approach can at best provide for a quick fix to cope with exceptional situations of migratory pressure, while instead there is an urgent need for a CEAS which is based on strong legislation that allows for equitable burden-sharing and is able to routinely function. As will be explained in the next section, further harmonization at the enforcement level through a more robust support from EU migration agencies might be a step in the right direction.

3.2. AGENCIFICATION AND ENHANCED HARMONIZATION

In view of fostering further harmonization, the reform of the CEAS aims to turn into regulations two core legislative instruments of the CEAS, namely the Qualification Directive and Procedure Directive. This revamped approach to harmonization is undertaken at a twofold level. Apart from recasting the existing legislation, the new Pact displays new attention to harmonization at the level of implementation by strengthening

76. COM(2020) 610 final, Art 2 (w).

77. *Slovak Republic and Hungary v Council of the European Union*, C-643-15, (CJEU, 6 September 2017), para 323.

the role of EU migration agencies, like the European Border and Coast Guard Agency (FRONTEX)[78] and the new EU Agency for Asylum (EUAA)[79] that has since January 2022 replaced the European Asylum Support Office (EASO).[80] Despite their potential to ensure more convergence of relevant EU rules, these agencies have been progressively tasked with powers in the area of border management that especially serve security objectives.

At the level of law-making, regulations compared to directives have the advantage of direct applicability, thereby providing for enhanced harmonization in the field. As is known, harmonization seeks to "effect an approximation or coordination of different legal provisions or systems by eliminating major differences and creating minimum requirements or standards."[81] To this end, the Commission approach aims to contribute to further convergence and ensure more coherence within the CEAS by reducing, on the one hand, "the differences in recognition rates and in the level of rights in the national asylum systems attached to the protection status,"[82] and by removing, on the other hand, "elements of discretion as well as simplifying, streamlining and consolidating procedural arrangements."[83]

Regrettably, despite such a formal change, the proposals for a Qualification Regulation and an Asylum Procedure Regulation offer at best a mere window dressing of the existing directives. As has been emphasized, "the overall direction is not ambitious, in that the reform reveals the reluctance of member states to move away from certain limits."[84] These limits are especially linked to the tensions of these proposals with the Refugee Convention and European Court of Human Rights case law, which create the risk of distortions in the application and interpretation of refugee law principles. In particular, the existing compromise for a Qualification Regulation text discloses unresolved controversial issues, especially as regards compliance with international human rights standards.[85] These include the new obligation to examine

78. Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624, PE/33/2019/REV/1 [2019] OJ L 295/1–131.
79. Regulation (EU) 2021/2303 of the European Parliament and of the Council of 15 December 2021 on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010, PE/61/2021/REV/1 [2021] OJ L 468/1–54.
80. Regulation (EU) No 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office [2010] OJ L 132/11–28.
81. Kamba, W.J., "Comparative Law - A Theoretical Framework", *International and Comparative Law Quarterly,* 23, 1974, 485, 501.
82. COM (2016) 466 final.
83. COM (2016) 467 final.
84. Thym, D., "Pitfalls of the Law, Politics and Administrative Practices in the Reform of the Common European Asylum System", *EU Immigration and Asylum Law and Policy Blog*, 9 February 2017, at: https://eumigrationlawblog.eu/pitfalls-of-the-law-politics-and-administrative-practices-in-the-reform-of-the-common-european-asylum-system/.
85. For a broader understanding of the compatibility between the CEAS and international refugee law see McDonough, P. and Tubakovic, T., "International refugee law and EU asylum law: accordance and influence", in E. Tsourdi and Ph. De Bruycker (eds), *Research Handbook on EU Migration and Asylum Law,* Edward Elgar, 2022, 141-167. See also Guild, E., "Seeking Asylum: Storm Clouds between International Commitments and EU Legislative Measures", *European Law Review* 2004, 29, 198–218.

whether an internal flight alternative within the country of origin is a possible option for an asylum seeker.[86] Particular attention should be given to the case law of the ECtHR that in *Salah Sheek* confirmed that, in order to consider such an alternative of protection "the person… must be able to travel to the area concerned, gain admittance and settle there…".[87]

At the level of implementation, EU legislative choices can be crucial to facilitate effective enforcement: legislation based on regulations can certainly ensure stricter enforcement by the Member States, which have, for instance, less discretion, namely a more limited power to make legislative decisions or a more limited latitude of choice within certain legal boundaries.[88] However, "a regulation may be directly applicable, but its effectiveness continues to be dependent on administrative capacities and practices on the ground."[89] The Dublin Regulation is a clear example of a Regulation with very detailed normative prescriptions but a very low level of enforcement.[90]

The practice following the two phases of harmonization of the CEAS has shown the lack of a common approach to the implementation of the CEAS legislative toolbox, owing to significant delays in the transposition of the legislative instruments which has impaired harmonization. In this connection, the current reform of the CEAS strengthens the complementing role of EU migration agencies in facilitating the correct implementation of EU rules and ensuring harmonization at the level of enforcement.[91] Due to a perceived increase of security issues, especially following the migratory pressure of 2015, the mandate of the relevant EU migration agencies has been expanded to also fulfil security objectives. Over the past years, these agencies were not only given more powers, but also powers which have vested these agencies with more authority.[92]

This is especially visible in the mandate of FRONTEX that "through its expertise, its coordination activities and its funding capacities, has facilitated EU Member States' involvement in securitizing practices," namely "activities that, in themselves, convey the idea that asylum-seekers and migrants are a security threat to the EU."[93]

---

86. See art. 8 of the Proposed Regulation [COM (2016) 466 final].
87. European Court of Human Rights (ECtHR), *Salah Sheekh v. The Netherlands*, Application No. 1948/04, 11 January 2007, para. 141. For a broader analysis of the internal flight alternative see J. Schultz, *The Internal Protection Alternative in Refugee Law* (Brill, 2018).
88. See van den Brink, T., "Refining the Division of Competences in the EU: National Discretion in EU Legislation", in Garben, S. and Govaere, I. (eds), *The Division of Competences between the EU and the Member States. Reflections on the Past, the Present and the Future*, Hart Publishing, 2018, 251-275.
89. Thym (n 84).
90. F. Maiani, "The Reform of the Dublin system and the dystopia of 'sharing people'", *Maastricht Journal of European and Comparative Law,* 24, 2017, 624 ff.
91. On EU migration agencies, see more extensively Fernández-Rojo, D., *EU Migration Agencies: The Operation and Cooperation of FRONTEX, EASO and EUROPOL,* Edward Elgar, 2021.
92. See Scipioni, M., "De Novo Bodies and EU Integration: What Is the Story behind EU Agencies' Expansion?", *Journal of Common Market Studies*, 56, 2018, 768, 771.
93. Léonard, S., "EU border security and migration into the European Union: FRONTEX and securitisation through practices", *European Security,* 19, 2010, 231, 237.

Originally established in 2004 with the aim of coordinating operational cooperation amongst the Member States to strengthen security at the external borders of the EU Member States, over the years FRONTEX has become a key security actor. This is reflected in the new 2019 Regulation that assigns specific tasks with reference to "the fight against cross-border crime and terrorism," and confirmed by the recent Report by the European Anti-Fraud Office (OLAF).[94] Additionally, FRONTEX is expected to play a significant role in the return sponsorship envisaged under the proposal for Asylum and Migration Management Regulation.

While being less studied than FRONTEX, EASO and the new EUAA have been involved in securitizing practices too. This is well illustrated by EASO's progressive involvement in the joint processing of asylum claims in the Greek hotspots, including autonomously conducting interviews with asylum seekers.[95] Such involvement is likely to be continued by the new EUAA, whose Regulation was adopted on 9 December 2021, and is the first and still the only legislative proposal accompanying the new Pact to be adopted.[96] The mandate of the new agency offers the potential to steer harmonization and convergence by allowing for the deployment of Asylum Support Teams with regard to the implementation of the obligations under the CEAS (EUAA Regulation, Art. 16(1) a). These Asylum Support Teams play a major role in hotspots in cooperation with teams from other agencies and Member States' officers. In particular, in asylum border procedures, security issues become crucial for these teams to determine which migrants can be considered genuine asylum seekers and thus channeled to the specific procedure and which ones should be placed in the return procedures. Despite being established to support the Member States in upholding the humanitarian nature of the right to asylum, articulated in the CEAS legislative framework, the agency is slowly transforming into another actor that integrates security considerations in its activities at the borders of the EU.

3.3. EXTERNALIZATION

A third legislative trend that is gaining momentum and confirms the conflation between humanitarian and security policy objectives has to do with the increasing externalization and outsourcing of international protection responsibilities.[97] This phenomenon includes "the range of processes whereby European actors and Member States complement policies to control migration across their territorial boundaries with initiatives that realize such control extra-territorially and through other countries and organs rather than their own."[98]

---

94. European Anti-Fraud Office (OLAF), Case No OC/2021/0451/A1, Final Report, Olaf.03(2021)21088.
95. Tsourdi (n 65) 516 ff.
96. Regulation (EU) 2021/2303 of the European Parliament and of the Council of 15 December 2021 on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010, PE/61/2021/REV/1 [2021] OJ L 468/1–54.
97. See European Council Conclusions, EUCO 9/18, 28 June 2018, available at: <www.consilium.europa.eu/en/press/press-releases/2018/06/29/20180628-euco-conclusions-final/>.
98. Moreno-Lax, V. and Lemberg-Pedersen, M., "Border-induced displacement: The ethical and legal implications of distance-creation through externalization", *Questions of International Law,* 56, 2019, 5.

Starting from the 2016 EU-Turkey Statement,[99] these initiatives have multiplied and are identified in the New Pact on Migration and Asylum as "Migration Partnerships" with third countries. These are non-legally binding instruments, as they cannot be regarded as international agreements,[100] and, as has been emphasized, they serve security-related policy objectives such as expulsions, border management, countering human smuggling, readmissions and returns.[101] The emphasis on readmission is especially confirmed by the Proposal for a new Asylum and Migration Management Regulation[102] and is linked with the 2016 proposal on a Union Resettlement Framework.[103] The humanitarian imprint of this instrument has been diluted by the inclusion of cooperation on readmission among the factors for prioritizing third counties countries for resettlement.

Because of the non-legally binding nature, Muller and Slominski refer to the externalization of borders by the EU as "breaking the legal link but not the law."[104] If the counterpart violates the rules set out in a deal, the EU cannot be held accountable as they are not formally attributable to the EU in legal terms,[105] as stated by the General Court, ruling it had no jurisdiction to review the deal on the ground that it was not an act of Union institutions, but that of Member States.[106] As has been emphasized, it seems that legal duties are dispersed by "blurring the lines of causation and making attribution of wrongful conduct a difficult task."[107]

---

99. 'EU-Turkey statement' (Council Press Release, 18 March 2016) 144/16, <www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/pdf>. For references see especially Carrera, S., den Hertog, L., Stefan, M., "The EU-Turkey statement: reversing 'lisbonisation' in EU migration and asylum policies' in S. Carrera, J. Santos Vara and T. Strik (eds), *Constitutionalising the external dimensions of EU migration policies in times of crisis,* Edward Elgar, 2019, 155-174.
100. See more extensively García Andrade, P., "The external dimension of the EU migration policy: the legal framing of building partnerships with third countries" in Tsourdi and De Bruycker (n 85) 366-390.
101. Carrera (n 64) 9.
102. COM(2020) 610, Art 7.
103. Commission, Proposal for a Regulation of the European Parliament and of the Council establishing a Union Resettlement Framework and amending Regulation (EU) No 516/2014 of the European Parliament and the Council (Communication), COM(2016) 468 final.
104. Muller, P. and Slominski, P., "Breaking the Legal Link but Not the Law? the Externalization of EU Migration Control through Orchestration in the Central Mediterranean", *Journal of European Public Policy* 28, 2020, 801-820.
105. Grappi, G. and Lucarelli, S. "Bordering power Europe? The mobility-bordering nexus in and by the European Union", *Journal of Contemporary European Studies,* 30, 2022, 207, 211; see also Fassi, E. and S. Lucarelli, S., "EU Foreign Policy and Migration: A Political and Normative Assessment", in M. Ceccorulli and E. Fassi (eds), *EU's External Governance of Migration: Perspectives of Justice*, Routledge, 2021, 259–277.
106. *NF v European Council*, T-192-1; *NG v European Council*, T-193/16; *NM v European Council*, T-257/16 (Order of the General Court, 28 February 2017). For a comment see Idriz, N., "Taking the EU-Turkey Deal to Court?", *VerfBlog*, 20 December 2017) at: https://verfassungsblog.de/taking-the-eu-turkey-deal-to-court/.
107. Moreno-Lax and Lemberg-Pedersen (n 98).

Scholars have aptly underscored how the approach to cooperation with third countries has changed over the various stages of legislative reform of the CEAS.[108] While the 1999 Tampere Programme assigned a humanitarian and development goal to partnerships with third countries, aimed at addressing the root causes of migration, in more recent years "the political framework of EU migration cooperation experienced a securitization phase, especially acute after the 9/11 terrorist attacks, in which EU efforts concentrated almost exclusively on obtaining third countries' cooperation on return and readmission, on border controls and on the fight against irregular immigration."[109] From this perspective, the emphasis on securitization from an internal priority has been translated to the external dimension, determining what the doctrine has recently labeled as "the security continuum."[110]

The focus on externalization has the twofold consequence of forcing migrants to select more dangerous migratory routes in search of safety, while creating precarious conditions of marginalization at the borders of the EU, where a great deal of the new migration institutional design finds application. Naturally, the normative focus of externalization is presented in pseudo-humanitarian terms.[111] In June 2018, for example, EU ministers proposed "controlled centres" and "regional disembarkation platforms," where migrants could be deported, but framed this as an innovative idea allowing the Member States both to "stem illegal migration" and simultaneously save vulnerable migrants by breaking the "business model" of smugglers and traffickers ostensibly in accordance with human rights and the rule of law.[112]

In reality, initiatives on border externalization have worsened migrants' living conditions and reinforced the coercive capacities of third countries, especially in North Africa, that use repression against migrants.[113] The EU positions itself as a purported 'champion of human rights'[114] but, in the meantime, builds a normative framework aimed at outsourcing legal and political responsibilities arguably contrasts with the objective of Article 78 TFEU and the obligation to develop a common policy with a view to offering appropriate status to any third-country national requiring international protection. This approach to externalization, therefore, results in a

108. García Andrade (n 100) 366.

109. *Ibid*.

110. Shepherd, A.J.K., *The EU Security Continuum. Blurring Internal and External Security,* Routledge, 2022.

111. See Moreno-Lax, V., "The EU Humanitarian Border and the Securitization of Human Rights: The 'Rescue-through- Interdiction/Rescue-without-Protection' Paradigm", *Journal of Common Market Studies,* 56, 2018, 119.

112. European Council, Conclusions, 28 June 2018, Press Release 421/18; See also Commission, *Migration: Regional Disembarkation Arrangements* (24 July 2018) <ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/20180724_factsheet-regional-disembarkation-arrangements_en.pdf>.

113. Buehler, M., Fabbe, K. and Kyrkopoulou, E., "Thy Neighbor's Gendarme? How Citizens of Buffer States in North Africa View EU Border Security Externalization", *Journal of Immigrant & Refugee Studies,* 2022, 1, 10.

114. Manners, I., "Normative power Europe: A contradiction in terms?", *Journal of Common Market Studies,* 40, 2022, 235–258.

system that is based on security instead of on humanitarian values despite the EU normative power discourse.[115]

IV. CONCLUDING REMARKS: FIXING POLICY OBJECTIVES IN THE COMMON EUROPEAN ASYLUM SYSTEM

The normative effectiveness of the CEAS regulatory framework is undermined by the obsession with securitization which has become a distinct feature in the area of migration and asylum through an osmotic process that equalizes the approaches to this policy domain in the EU and its Member States.[116] Such a tendency is detrimental to the attainment of the policy objectives of the CEAS, which is aimed to offer an "appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement."

The emerging legislative trends show how the CEAS normative framework has progressively departed from its humanitarian vocation to pursue instead security goals. Different phases of harmonization have accompanied the development of the CEAS. However, its development shows a flagrant disconnection from the ideals outlined more than twenty years ago in the Tampere Conclusions. On that occasion, it was clear the inherent interconnection between the Schengen Area and the CEAS and a system in which free movement could be ensured for third country nationals was envisaged, as "it would be in contradiction with Europe's traditions to deny such freedom to those whose circumstances lead them justifiably to seek access to our territory."[117]

Unfortunately, by formally boosting a legislative package of proposals serving security objectives, the current reform of the CEAS seems to follow the overall direction of maintaining the fundamentals of a system that over the years has proved ineffective. In a phase of constitutional reflection about the reform and the future sustainability of the CEAS, it is crucial to fix the ungluing between the CEAS policy objectives and its emerging regulatory framework. This would require addressing migration as a human phenomenon that requires structural and future-proof reforms instead of emergency-focused initiatives. Additionally, further harmonization is necessary at the level of implementation. In this regard, EU migration agencies offer a great potential to generate convergence in the application of relevant EU rules, but their operational mandate should be guided by the humanitarian imprint which is a distinct feature of the CEAS. Finally, cooperation with third countries is essential to contribute to international solidarity in the global governance of migration. Such cooperation should be based upon full respect for fundamental rights and compliance with international norms.

A change of paradigm is, therefore, recommended, foreseeing a system that is accessible, fundamental right-based, and apt to live up to the axiological dimension of EU law. An effective and future-proof CEAS is, in fact, the strongest

115. Arana, A. G. and McArdle, S., "The EU and the migration crisis: reinforcing a security-based approach to migration?", in Carrera, Santos Vara and Strik (eds) (n 99) 275.

116. Velluti, S., "The securitisation of asylum and immigration in European discourse and practice: the case of Italy", *Refugee Law Initiative Blog*, 19 November 2019, available at: <https://rli.blogs.sas.ac.uk/2019/11/19/the-securitisation-of-asylum-and-immigration-in-european-discourse-and-practice-the-case-of-italy/>.

117. European Council of Tampere, Presidency Conclusions, para 3.

guarantee of security both for those travelling to the EU and for those living within the Schengen area.

V. BIBLIOGRAPHY

Allard, S., "Casualties of Disharmony: The Exclusion of Asylum Seekers Under the Auspices of the Common European Asylum System", *Emory International Law Review,* 24, 2010, pp. 295-330.

Arana, A. G. and McArdle, S., "The EU and the migration crisis: reinforcing a security-based approach to migration?", in S. Carrera, J. Santos Vara and T. Strik (eds), *Constitutionalising the external dimensions of EU migration policies in times of crisis,* Edward Elgar, 2019.

Bermejo, R., "Migration and Security in the EU: Back to Fortress Europe?", *Journal of Contemporary European Research,* n. 5, 2009, pp. 207-224.

Buehler, M., Fabbe, K. and Kyrkopoulou, E., "Thy Neighbor's Gendarme? How Citizens of Buffer States in North Africa View EU Border Security Externalization", *Journal of Immigrant & Refugee Studies,* 2022, 1, 10.

Campesi, G., "Frontex, the Euro-Mediterranean border and the paradoxes of humanitarian rhetoric", *South East European Journal of Political Science,* n. 2, 2014, pp. 126-134.

Carr, B., "Refugees without Borders: Legal Implications of the Refugee Crisis in the Schengen Zone", *Michigan Journal of International Law,* 38, 2016, pp. 137-160.

Carrera, S., et al., "The EU's Response to the Refugee Crisis: Taking Stock and Setting Policy Priorities", *CEPS Essay*, n. 20, 16 December 2015, available at: <http://aei.pitt.edu/70408/1/EU_Response_to_the_2015_Refugee_Crisis.pdf>.

Carrera, S., den Hertog, L., Stefan, M., "The EU-Turkey statement: reversing 'lisbonisation' in EU migration and asylum policies' in S. Carrera, J. Santos Vara and T. Strik (eds), *Constitutionalising the external dimensions of EU migration policies in times of crisis,* Edward Elgar, 2019, 155-174.

Carrera, S., "Whose Pact? The Cognitive Dimensions of the New EU Pact on Migration and Asylum", *CEPS Policy Insights,* 22, September 2020, at: https://www.ceps.eu/download/publication/?id=30350&pdf=PI2020-22-New-EU-Pact-on-Migration-and-Asylum.pdf.

Commission, "Delivering an area of freedom, security and justice for Europe's citizens: action plan implementing the Stockholm Programme" (Communication) COM (2010) 171 final.

Commission, 'A European Agenda on Migration' (Communication), COM(2015) 240 final.

Commission, 'Towards a Reform of the Common European Asylum System and Enhancing Legal Avenues to Europe'(Communication) COM (2016) 197 final.

Commission, 'On a New Pact on Migration and Asylum' (Communication) COM(2020) 609 final.

Den Heijer, M., Rijpma, J., and Spijkerboer, T., "Coercion, Prohibition, and Great Expectations: The Continuing Failure of the Common European Asylum System", *Common Market Law Review,* 2016, pp. 607-642.

Dougan, M., "Minimum Harmonisation and the Internal Market", *Common Market Law Review,* n. 37, 2000, 853, 856.

European Council, Conclusions, 28 June 2018, Press Release 421/18; See also Commission, *Migration: Regional Disembarkation Arrangements* (24 July 2018) <ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/20180724_factsheet-regional-disembarkation-arrangements_en.pdf>.

European Council on Refugees and Exiles (ECRE), "Joint Statement: The Pact on Migration and Asylum: to provide a fresh start and avoid past mistakes, risky elements need to be addressed and positive aspects need to be expanded", 6 October 2020, at: https://ecre.org/the-pact-on-migration-and-asylum-to-provide-a-fresh-start-and-avoid-past-mistakes-risky-elements-need-to-be-addressed-and-positive-aspects-need-to-be-expanded/.

Fassi, E. and S. Lucarelli, S., "EU Foreign Policy and Migration: A Political and Normative Assessment", in M. Ceccorulli and E. Fassi (eds), *EU's External Governance of Migration: Perspectives of Justice*, Routledge, 2021, 259-277.

Fernández-Rojo, D., *EU Migration Agencies: The Operation and Cooperation of FRONTEX, EASO and EUROPOL,* Edward Elgar, 2021.

García Andrade, P., "The external dimension of the EU migration policy: the legal framing of building partnerships with third countries", in E. Tsourdi and Ph. De Bruycker (eds), *Research Handbook on EU Migration and Asylum Law,* Edward Elgar, 2022.

García Andrade, P., "Initiatives of EU Member States in Managing Mixed Flows in the Mediterranean and the EU Distribution of Competences", in Matera, C., and Taylor, A. (eds), *The Common European Asylum System and Human Rights: Enhancing Protection in Times of Emergencies,* Asser Press, 2014, pp. 51-63.

Geddes, A., *Immigration and European Integration. Towards fortress Europe?,* Manchester University Press, 2000.

Grappi, G. and Lucarelli, S. "Bordering power Europe? The mobility-bordering nexus in and by the European Union", *Journal of Contemporary European Studies,* 30, 2022, 207.

Guild, E., "Seeking Asylum: Storm Clouds between International Commitments and EU Legislative Measures", *European Law Review* 2004, 29, 198–218.

Huysmans, J., "The European Union and the Securitization of Migration", *Journal of Common Market Studies,* n. 38, 200, 751, 753.

Idriz, N., "Taking the EU-Turkey Deal to Court?", *VerfBlog*, 20 December 2017) at: <https://verfassungsblog.de/taking-the-eu-turkey-deal-to-court/> COM(2020) 610, Art 7.

Ippolito, F., and Velluti, S., "The relationship between the CJEU and the ECtHR: the case of asylum", in Dzehtsiarou, K., et al. (eds), *Human Rights Law in Europe: The Influence, Overlaps and Contradictions of the EU and the ECHR*, Routledge, 2014, 156 ff.

Jones, J., "Human dignity in the EU Charter of Fundamental Rights and its Interpretation Before the European Court of Justice", *Liverpool Law Review,* n. 33, 2012, pp. 281-300.

Juss, S., "The Decline and Decay of European Refugee Policy", *Oxford Journal of Legal Studies*, 25, 2005, 749.

Kamba, W.J., "Comparative Law - A Theoretical Framework", *International and Comparative Law Quarterly,* 23, 1974, 485, 501. Nicolosi, S., "*Emerging challenges* of the temporary relocation measures under EU asylum law", *European Law Review,* 41, 2016, 338-361.

Koop, C., and Lodge, M., "What is regulation? An interdisciplinary concept analysis", *Regulation and Governance,* 11, 2015, pp. 95-108, available at <http://eprints.lse.ac.uk/62135/>.

Léonard, S., "EU border security and migration into the European Union: FRONTEX and securitisation through practices", *European Security,* 19, 2010, 231, 237.

Léonard, S., and Kaunert, Ch., *Refugees, Security and the European Union*, Routledge, 2019, 89.

Lodge, M., Baldwin, R., and Cave, M., *Understanding Regulation*, 2nd ed., Oxford University Press, 2012.

Majone, G., "The rise of the regulatory state in Europe", *West European Politics,* 17, 1994, pp. 77-101.

Majone, G., "The agency model: The growth of regulation and regulatory institutions in the European Union", *EIPASCOPE Working Paper,* n. 3, 1997, pp. 1-6.

Maiani, F. "The Reform of the Dublin system and the dystopia of 'sharing people'", *Maastricht Journal of European and Comparative Law,* 24, 2017, 624 ff.

Manners, I., "Normative power Europe: A contradiction in terms?", *Journal of Common Market Studies,* 40, 2022, 235-258.

McDonough, P. and Tubakovic, T., "International refugee law and EU asylum law: accordance and influence", in E. Tsourdi and Ph. De Bruycker (eds), *Research Handbook on EU Migration and Asylum Law,* Edward Elgar, 2022, 141-167.

Muller, P. and Slominski, P., "Breaking the Legal Link but Not the Law? the Externalization of EU Migration Control through Orchestration in the Central Mediterranean", *Journal of European Public Policy* 28, 2020, 801-820.

Moreno-Lax, V., *Accessing Asylum in Europe. Extraterritorial Border Controls and Refugee Rights under EU Law*, Oxford University Press, 2017.

Moreno-Lax, V., "The EU Humanitarian Border and the Securitization of Human Rights: The 'Rescue-through- Interdiction/Rescue-without-Protection' Paradigm", *Journal of Common Market Studies,* 56, 2018, 119-140.

Moreno-Lax, V. and Lemberg-Pedersen, M., "Border-induced displacement: The ethical and legal implications of distance-creation through externalization", *Questions of International Law,* 56, 2019, 5.

Nicolosi, S., "The Reform of the Common European Asylum System: Between Recast and New Regulation", *RENFORCE Blog*, 12 June 2019, at: <http://blog.renforce.

eu/index.php/nl/2019/06/12/the-reform-of-the-common-european-asylum-system-between-recast-and-new-regulation/>.

Nicolosi, S., and D. Fernández-Rojo, D., "Out of control? The case of the European Asylum Support Office", in Scholten, M. and Brenninkmeijer, A. (eds), *Controlling EU Agencies. The Rule of Law in a Multi-jurisdictional Legal Order*, Edward Elgar, 2020, pp. 177-195.

Nicolosi, S., "Addressing a Crisis through Law: EU Emergency Legislation and its Limits in the Field of Asylum", *Utrecht Law Review,* 17, 2021, 17-30.

Perruchoud, R., and Redpath-Cross, J. (eds.), *Glossary on Migration,* 2nd ed, International Organization for Migration, 2011.

Scott, C., "Analyzing Regulatory Space: Fragmented resources and institutional design", *Public Law*, n. 45, 2001, pp. 283, 284.

Selznick, P., "Focusing Organisational Research on Regulation", in R. Noll (ed), *Regulatory Policy and the Social Sciences,* University of California Press, 1985, 363, 383.

Shepherd, A.J.K., *The EU Security Continuum. Blurring Internal and External Security,* Routledge, 2022.

Slot, P. J., and Bulterman, M., "Harmonization of Legislation on Migrating EU Citizens and Third Country Nationals: Towards a Uniform Evaluation Framework", *Fordham International Law,* 747.

Teitgen-Colly, C., "The European Union and Asylum: an Illusion of Protection", *Common Market Law Review,* 2006, n. 43, 1503, 1512-1513.

Thym, D., "Pitfalls of the Law, Politics and Administrative Practices in the Reform of the Common European Asylum System", *EU Immigration and Asylum Law and Policy Blog*, 9 February 2017, at: https://eumigrationlawblog.eu/pitfalls-of-the-law-politics-and-administrative-practices-in-the-reform-of-the-common-european-asylum-system/.

Tsourdi, E., "Holding the European Asylum Support Office Accountable for its role in Asylum Decision-Making: Mission Impossible?", *German Law Journal,* 21, 2020, pp. 506-531.

Tsourdi, E. and Costello, C., "The Evolution of EU Law on Refugees and Asylum", in P. Craig and G. de Búrca (eds), *The Evolution of EU Law,* 3rd ed, Oxford University Press, 2021, pp. 793-823.

UNHCR, 'Setting the European Asylum Agenda: UNHCR recommendations to the Tampere Summit (October 1999)', in *UNHCR Tool Boxes on EU Asylum Matters: Tool Box 2: The Instruments*, 2003, 45, 29, available at: <http://www.unhr.org>.

Van den Brink, T., "Refining the Division of Competences in the EU: National Discretion in EU Legislation", in Garben, S. and Govaere, I. (eds), *The Division of Competences between the EU and the Member States. Reflections on the Past, the Present and the Future*, Hart Publishing, 2018, 251-275.

Velluti, S., "The securitisation of asylum and immigration in European discourse and practice: the case of Italy", *Refugee Law Initiative Blog,* 19 November 2019, available at: <https://rli.blogs.sas.ac.uk/2019/11/19/the-securitisation-of-asylum-and-immigration-in-european-discourse-and-practice-the-case-of-italy/>.