Securitising Asylum Flows

Deflection, Criminalisation and Challenges for Human Rights

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CHAPTER 10

The EU Refugee Crisis and the 'Third-Phase' Asylum Legislation – The End of the Harmonisation Approach or Its Revival?

Giulia Vicini

1 Introduction

The harmonisation objective lost much of its relevance in the context of the EU response to the refugee crisis. In fact, there is little trace of it in the April 2015 Migration Agenda.[1] On the basis of these findings, this article questions the future role of harmonisation in the EU asylum regime. Acknowledging the failures of the current asylum policy, which the European Commission (Commission) imputes to the fragmentation of the asylum system, the Agenda puts forward both a short-term and a long-term strategy. In the short term, the Commission recommends the enforcement of monitoring and cooperation mechanisms in order to ensure Member States' compliance with the existing legislation and introduces some exceptional measures in order to give a prompt response to the crisis.[2] The long-term strategy aims at the completion of the Common European Asylum System (CEAS). The Commission project to complete the CEAS seems to put aside the harmonisation approach. Instead, is foresees a more 'centralised' action for the future. According to the Agenda,

> [t]he Commission will launch a broad debate on the next steps in the development of Common European Asylum System, including issues like a common Asylum Code and the mutual recognition of asylum decisions. A longer term reflection towards establishing a single asylum decision process will also be part of the debate, aiming to guarantee equal treatment of asylum seekers throughout Europe.

The development of a single asylum procedure, the operation of which would be entrusted to an EU agency, and the mutual recognition of positive asylum

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

2 Particularly through the implementation of the hotspot approach and the adoption of a relocation scheme pursuant to Article 78(3) TFEU.

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decisions have often been identified as workable and effective alternatives to the CEAS as it has been conceived so far; a still ongoing harmonisation process combined with a responsibility sharing mechanism that implies the mutual recognition of negative asylum decisions.[3] However, if the EU Migration Agenda seems to overcome the project of harmonising national regimes and to acknowledge 'centralisation' as a valid alternative, with the recent set of Commission proposals for reforming the CEAS,[4] the harmonisation approach experiences a true renaissance.

Against this backdrop, the second section of this article shows how the Commission attributes some of the shortcomings of the current EU asylum policy, *inter alia*, to the excessively high protection standards. According to the Commission, the high level of protection granted to asylum seekers makes the EU over-attractive for third-country nationals. This has led to a permanent influx of asylum seekers and, in Commission's own words, the collapse of the EU asylum regime itself.[5] On this basis, the proposal to reform the CEAS foresees a significant impoverishment of the protection standards. The rationale of these proposals is assessed in the third section.

3 For recent contributions see Guy S. Goodwin-Gill, 'Regulating "Irregular" Migration: International Obligations and International Responsibilities' (Keynote Address to the International Workshop, National and Kapodistrian University of Athens, Faculty of Law, 20 March 2015). The author promotes the idea that the EU needs an institution with specific responsibility to undertake Member States' obligations with regards to refugees and migrants. See also Valsamis Mitsilegas, 'Humanizing Solidarity in European Refugee Law: The Promise of Mutual Recognition' 24 (2017) 5 *Maastricht Journal of European and Comparative Law* 721. Mitsilegas proposes an alternative paradigm for the development of a common EU asylum policy based on the principle of mutual recognition in the field of positive asylum decisions, accompanied by full equality and access to the labour market for refugees across the European Union. Also see ECRE, 'Discussion Paper on Mutual recognition of positive asylum decisions and the transfer of international protection status within the EU' (November 2014).

4 This is the 'third-phase' legislation, touching upon procedural standards, reception conditions, and qualification, reforming the Dublin and Eurodac systems and strengthening the role of the European Asylum Support Office, whose name will change into 'EU Asylum Agency'.

5 According to the Commission, '[t]he EU has one of the most protective and generous asylum system in the world and the granting of international protection status in EU member State has in practice almost invariably led to permanent settlement in the EU while protection is supposed to be temporary'. Commission, 'Towards a Reform of the Common European Asylum System and Enhancing Legal Avenues to Europe' (Communication) COM(2016) 197final, 5.

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2 Acknowledging the Failure of the Harmonisation Approach

A preventive inquiry into the rationale underlying the EU common asylum policy is essential in order to assess the 'health' of the harmonisation process and to predict its future. This section attempts to identify the real objectives behind the harmonisation of national asylum legislations. In particular, it seeks to answer the question of whether harmonisation is implemented in the interest of individuals or is aimed, instead, at promoting European integration and protecting the internal market. It is argued that the second hypothesis better accounts for both the origin and the ongoing development of the CEAS, *a fortiori* in the light of the 'third-phase' legislation proposals. The chapter then assesses the shortcomings of the CEAS in connection with its rationale, as identified above.

2.1 *Historical Outline of the CEAS: From Minimum Standards to Common Policies, the Harmonisation Process Unachieved*

In the EU integration process, harmonisation and mutual recognition have traditionally been conceived as alternative means to guarantee the free movement freedoms through the removal (or the irrelevance) of technical and legislative divergences among Member States.[6] The first concrete step towards the development of a common European asylum policy was informed by the notion of mutual recognition, as elaborated by the Court of Justice of the European Union (CJEU) in its case law concerning the free movement of goods.[7]

Significantly, the interest of those Member States that signed the 1990 Schengen Convention[8] in taking common action in the field of asylum was driven by the need to establish rules to determine that only one Member State would be responsible for the assessment of an asylum claim. The approach on State's responsibility towards asylum seekers adopted by the Schengen Convention was then transposed in the so-called 'Dublin system', which is still in

6 This is certainly true with regard to the development of a common market (see among others Jacques Pelkmans, 'Mutual Recognition: Economic and Regulatory Logic in Goods and Services' *Bruges European Economic Research Papers* (24/2012)), but also in the field of procedural law (Torbjorn Andersson, 'Harmonisation and Mutual Recognition: How to Handle Mutual Distrust' (2006) 17 *European Business Law Review* 748).

7 The principle of mutual recognition was first elaborated by the EU Court of Justice in the well-known case Cassis de Dijon; Case 120/78 *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein* ECLI:EU:C:1979:42.

8 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, 19 June 1990 [2000] OJ L239/19.

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force today with its main features left untouched despite the consecutive reforms taken place since then.[9] Originally introduced with the 1990 Dublin Convention, entered into force in 1997,[10] the Dublin criteria and mechanisms were then 'communitarised'[11] through the adoption of Regulation 343/2003 (Dublin II).[12] This Regulation was replaced by Regulation 604/2013 (Dublin III)[13] and a 'Dublin IV' recast proposal is currently negotiated.[14] However, the aforementioned reforms have left untouched the premises and main features of the Dublin system. The criteria and mechanisms set forth lie on the presumption that all Member States' asylum regimes offer equal protection and comply fully with the protection of fundamental rights. Testament of this presumption is the adoption of a Protocol on Asylum for Nationals of Member States.[15] This Protocol binds Member States to consider asylum claims made by nationals of another Member State unfounded – except in particular circumstances – on account that

9 On the substantial identity of the Dublin rules and mechanisms before and after their communitarisation see Segolène Barbou des Places, 'Le Dispositif Dublin 2 ou les Tribulations de la Politique Communautaire d'Asile' (2004/06) *European University Institute Working Paper*; Adelina Adinolfi, 'Riconoscimento dello Status di Rifugiato e della Protezione Sussidiaria: Verso un Sistema Comune Europeo?' (2009) *Rivista di Diritto Internazionale* 672.

10 Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities [2000] OJ C 254/1.

11 As is well known, the asylum policy attracted within the EU third pillar by the 1992 Maastricht Treaty, was then included within the EU Community competence, and hence subjected to the first pillar procedures and mechanisms, by the Amsterdam Treaty signed in 1997.

12 Council Regulation 343/2003 [2004] OJ L50/1 (Dublin II Regulation).

13 Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) [2013] OJ L180/31 (Dublin III Regulation). The Dublin regime is complemented by a Regulation establishing the Eurodac system for the comparison of fingerprints in order to ensure its effective implementation. Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 (recast) [2013] OJ L 180/30.

14 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) 270final (Proposal for Dublin IV Regulation).

15 Originally annexed to the Amsterdam Treaty, the Protocol is still in force as Protocol n 24 of the Treaty on the Functioning of the European Union.

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> [g]iven the level of protection of fundamental rights and freedoms by the Member States of the European Union, Member States shall be regarded as constituting safe countries of origin in respect of each other for all legal and practical purposes in relation to asylum matters.

As noted, the implementation of the Dublin system is based on the so-called 'one-chance rule', pursuant to which an asylum seeker cannot lodge a second application in a different Member State when their claim is rejected by the competent State. Its functioning therefore, implies a system of mutual recognition of negative decisions.[16]

Concrete steps to harmonise national asylum legislations were first taken in 1999, when the European Council in its Conclusions following the Tampere meeting put forward an action plan in order to implement a common policy on asylum[17] as part of a broader strategy to develop and EU 'area of freedom, security and justice'.[18] The harmonisation project consisted of two distinct stages with short-term and long-term goals. In that respect, between 2001 and 2005 the EU legislator adopted the 'first-phase' legal instruments (Directives), with a view to setting minimum standards for the reception of asylum seekers (Reception Conditions Directive),[19] the procedures for obtaining international protection (Asylum Procedures Directive)[20] and the conditions and the

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16 As put forward by Elspeth Guild in 2004: 'The Convention is based the two principles: first that the Member States are entitled to pool their responsibility for asylum seekers; secondly, even though each Member State is separately a signatory to the Geneva Convention a decision on an asylum application by one of them absolves all the others of any duty to consider an asylum application by the same individual. This is a negative mutual recognition duty only. Positive decisions by Member States on recognition of individuals as refugees does not trigger the mutual recognition requirement'. See Elspeth Guild, 'Seeking Asylum: Storm Clouds between International Commitments and Legislative Measures' (2004) 29 *European Law Review* 198.

17 Council of the European Union, Presidency Conclusions, Tampere European Council, 15–16 October 1999. Although the harmonisation process was initiated in 2001, Member States acknowledged the need of harmonising national asylum legislations already since the 1970s; See Vincent Chetail, 'The Common European Asylum System: Bric-à-brac or System?' in Vincent Chetail, Philippe De Bruycker and Francesco Maiani (eds), *Reforming the Common European Asylum System: The New European Refugee Law* (Brill 2016) 5.

18 The legal basis for the adoption of harmonising asylum legislation was Article 63 of the (then) Treaty of the European Community.

19 Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers [2003] OJ L31/18.

20 Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status [2005] OJ L326/13.

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content of this protection (Qualification Directive).[21] A set of rules concerning temporary protection complements the asylum legislation.[22] In all these cases, legislative interventions took the form of a Directive, contrary to the instruments related to the Dublin system, which took the form of Regulations (Dublin[23] and Eurodac).[24] The paradoxical consequence of that choice is that, whereas the criteria and mechanisms for identifying the Member State responsible for a protection seeker, grounded on the presumption of mutual recognition, are directly binding upon Member States, the implementation of EU rules aimed at harmonising national asylum legislations – and hence giving substance to such presumption – falls within the discretion of national legislators, which are only bound to ensure minimum protection standards.[25]

The second-phase legislation, which is in force to date, was adopted between 2011 and 2013 with the aim of further approximating national asylum regimes. The legal basis has been Article 78 TFEU, which prescribes the development of a common policy on asylum comprising uniform status of asylum and of subsidiary protection,[26] common procedures for the granting and

21 Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted [2004]OJ L304/12.

22 Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof [2001] OJ L212/12. For an analysis see Nuria Arenas, 'The Concept of Mass Influx of Displaced Persons in the European Directive Establishing the Temporary' (2005) 7 *European Journal of Migration and Law* 447.

23 See n 12–13.

24 Regulation (EU) No 604/2013 (n 13) and Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice [2013] OJ L180/1.

25 According to Vincent Chetail, the EU preference for directives in the first and second phase of the CEAS has represented a major obstacle to the harmonization process. See Chetail (n 17) 25.

26 Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons

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withdrawing of such status[27] and common standards concerning the reception conditions of asylum seekers.[28] The third round of reform, which involves all legislative instruments[29] is currently negotiated within the EU institutions. Most of the third-phase legislative instruments will take the form of regulations.[30] Leaving to the third paragraph of this section the assessment of whether or not harmonisation has been achieved through the first and second generation of EU asylum legislation, the analysis will focus on the rationale of the Common asylum policy and the harmonisation project.

2.1.1 The Underlying Rationale of the Harmonisation Project

The historical development of the EU asylum policy, as outlined above demonstrates that the EU expected from the harmonisation of national asylum policies to be an effective tool to prevent secondary movement within the EU. However, since the genesis of the EU common asylum policy, a number of scholars have been questioning the 'human rights-based' reading of its development, warning about the risk that its implementation would instead negatively impact upon the protection of individuals.[31] Significantly, the interest of the EU in the asylum field began with the implementation of the Schengen Agreement and hence of an area without internal borders. As the wording of the Schengen Convention clearly shows[32] and as suggested by numerous

eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L337/9.

27 Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) [2013] OJ L180/60.

28 Directive 2013/33/EU of the European Parliament and the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) [2013] OJ L180/96. Two Regulations were also adopted to reform the Dublin and the recast Eurodac Regulation (n 24). With the exception of the Temporary Protection Directive (n 22), all legislative instruments were reformed.

29 No proposal for amending the Temporary Protection Directive has been presented so far.

30 Reception conditions of asylum seekers will continue to be regulated through a Directive.

31 For a far-sighted contribution see François Julien-Laferrière, 'La Compatibilité de la Politique d'Asile de l'Union Européenne avec la Convention de Genève du 28 juillet 195 Relative au Statut des Réfugiés' in Jean-François Flauss and Vincent Chetail (eds), *La Convention de Genève Relative au Status des Réfugiés – 50 Ans Après : Bilan et Perspectives* (Bruylant 2000) 257. Julien-Laferrière warned that the respect of the 1951 Refugee Convention and the protection of fundamental rights formally enshrined in the Treaties and in the policy papers driving the harmonisation process, was likely to be a mere distraction designed to overshadow the Member States' obligations stemming from the Geneva Convention.

32 The Preamble of the 1990 Schengen Convention stated that the gradual abolition of checks at Member States common borders required a 'series of appropriate measures and

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scholars,[33] the adoption of common asylum policies was meant to compensate the abolition of internal borders within the EU. When the freedom of movement was established, the States' interest to control and manage migration influx shifted from the internal to the external borders. In return to their willingness to abolish controls at the national borders, Member States wanted to have insurances on how the influx of third country nationals was managed by the other State Parties to the Agreement. To that end, given that the development of a common visa policy was not sufficient, the States parties also had to handle the influx of persons in seek of protection, towards whom all of them have obligations under International Law. The need to prevent freedom of movement to become an incentive for the secondary movement of asylum seekers and refugees accounts for the EU primary focus on the establishment of rules identifying the only Member State responsible for protection seeker.[34] This approach led to the adoption of the 1990 Dublin Convention, which still constitutes the cornerstone of the common asylum regime.[35] It thus becomes clear that the main objective underlying the development of the CEAS was to preserve the EU internal market. As outlined above, the Dublin criteria were fully operational long before the harmonisation process was initiated and completed. Member States rather opted for transposing into the asylum policy the principle of mutual recognition assuming that, in the absence of harmonisation, the protection of the freedom of movement between Member States could well justify the mutual recognition of negative decisions concerning asylum applications. Nevertheless, Member States soon realised that the principle could not work in practice without internal harmonisation. Furthermore, it was acknowledged that

close cooperation between the Contracting Parties'. This set of measures, meant to be compensatory to the creation of an area without internal borders, encompassed external border control and visa policies. Asylum seekers were explicitly excluded from the freedom of movement (Articles 30–38).

33 See among others Chetail (n 17) 5–7 and Gregor Noll, *Negotiating Asylum: The EU Acquis, Extraterritorial Protection and the Common Market of Deflection* (Martinus Nijhoff 2000) 123.

34 According to Elspeth Guild, the 'approach to State responsibility towards people seeking international protection in an area without internal border controls on persons was based on the principle that borders were still effective vis à vis asylum seekers, and that States had an entitlement to pool responsibility for them as those States themselves determined'. See Elspeth Guild, 'Does the EU Need a European Migration and Protection Agency?' 28 (2016) 4 *International Journal of Refugee Law* 588.

35 In the Stockholm Programme it was stated that '[t]he Dublin System remains a cornerstone in building the CEAS, as it clearly allocates responsibility for the examination of asylum application'. Also see Recital 7 of the Dublin III Regulation.

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> (t)he progressive creation of an area without internal frontiers in which free movement of persons is guaranteed in accordance with the TFEU and the establishment of Union policies regarding the conditions of entry and stay of third-country nationals, including common efforts towards the management of external borders, makes it necessary to strike a balance between responsibility criteria in a spirit of solidarity.[36]

Harmonisation and solidarity are thus perceived as preconditions for the CEAS to be fully and effectively implemented. Indeed, as the next paragraph puts forward, it is their insufficiency in the first and second phase legislation that accounts for the failure of CEAS.

The formulation of the Dublin criteria for determining the Member State responsible for assessing an application for international protection, coupled with the 'one-chance' rule, leave asylum seekers bereft of any choice concerning the country where they want to seek asylum. The system, which pursued the objective of preventing secondary movement, has proved to be inefficient. Indeed, given the lack of uniform standards of protection within Member States, third-country nationals in search of international protection understandably try to escape the Dublin criteria and mechanisms in order to settle in those Member States that offer better reception conditions or higher chances to be granted protection.[37] As Maiani eloquently notes, asylum seekers make efforts to resist to the application of Dublin criteria through different means including self-harm, the destruction of evidence, avoidance of identification, absconding and clandestine return (or onward travel) to the desired destination after the transfer.[38]

The strong resistance by asylum seekers to the implementation of the Dublin criteria shows that the lack of harmonised protection systems represents a dangerous incentive to secondary movement and, thus, a serious threat for the internal market. Nonetheless, EU institutions and Member States started perceiving harmonisation of national asylum legislations as a necessary component for the Dublin system only after a few years since its establishment. Moreover, the objective of harmonising national legislations is perceived by the EU institutions as secondary as opposed to the determination of which Member State is responsible for considering an application for asylum submitted by

36 Recital 25 of the Dublin III Regulation (n 13) corresponding to Recital 8 of the Dublin II Regulation (n 12).

37 Recognition rates are significantly divergent among Member States, substantially contributing to the phenomenon of secondary movement. See Guild (n 34) 590–591.

38 Franscesco Maiani, 'The Reform of the Dublin III Regulation' (Study for the LIBE Committee, European Parliament, 2016) 20–22.

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a third-country national in one of the Member States.[39] Against this background, one may reasonably question whether the driving force behind the harmonisation project really was, and is, the protection of asylum seekers and refugees in accordance with international law, despite what the Tampere Conclusions seemed to suggest.[40]

Arguably, the real aim of harmonisation is instead to exclude asylum seekers from internal free movement.[41] The endorsement of the principle of mutual recognition in the 1990 Dublin Convention only concerned negative decisions on asylum applications. Furthermore, whilst national policies are considered sufficiently harmonised to justify mutual recognition of negative decisions, more harmonisation is needed in order to set forth a mechanism for the recognition of positive decisions and the transfer of protection.[42] This presents an interesting paradox, accentuated by the fact that despite its evident inefficiencies, every attempt to substantially reconsider the responsibility-sharing rules criteria in the Dublin regime has been summarily abandoned before the formulation of a concrete proposal.[43]

The CJEU has contributed to informing the view that the CEAS is a system that essentially serves the functioning of an area without internal borders

39 Since Article 73k of the Treaty of Amsterdam, the establishment of criteria and mechanisms for determining the Member State responsible has been always listed as the first objective of developing a common policy on asylum.

40 On the non-compliance of the CEAS with international refugee and human rights law see, among many others Geoff Gilbert, 'Is Europe Living Up to Its Obligations to Refugees?' (2004) 15 *European Journal of International Law* 963; the chapters by Helène Lambert ('Introduction: European Refugee and Transnational Emulation') and Jean Francois Durieux ('The Vanishing Refugee: How EU Asylum Law Blurs the Specificity of Refugee Protection') in Hélène Lambert, Jane McAdam and Maryellen Fullerton (eds), *The Global Reach of European Refugee Law* (Cambridge University Press 2013).

41 Chetail (n 17) 11. He states that '[t]he driving force of the CEAS must however be found in a factor external to refugee protection and intrinsically linked to the political construction of the EU: the will of excluding asylum seekers from internal free movement'.

42 From the Tampere Conclusions to the EU Migration Agenda, the mutual recognition of positive asylum decisions has made its appearances more as a political announcement than as a concrete and feasible project. The EU institutions, fully aware of the lack of Member States' consent regarding its implementation, conceive the mutual recognition of positive decisions as a future and eventual objective of the CEAS to achieve once the harmonisation process is completed.

43 Steve Peers stated that '[f]or over twenty-five years now, the EU and its Member States have been attempting to get the Dublin system to work. The continued abject failures of those attempts to get this pig to fly never seem to deter the next attempt to launch its aviation career'. See Steve Peers, 'The Orbanisation of EU Asylum Law: The Latest EU Asylum Proposals' (*EU Law Analysis*, 6 May 2016) <http://eulawanalysis.blogspot.com/2016/05/the-orbanisation-of-eu-asylum-law.html> accessed 15 September 2018.

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where the protection of individual rights may be sacrificed in order to protect internal free movement. The Dublin rules rest on the presumption of mutual trust, according to which all Member States respect fundamental rights. This presumption has raised serious concerns[44] and has been scrutinised by both the European Court of Human Rights (ECtHR)[45] and the EU Court of Justice (CJEU).[46] While the principle of mutual trust may work for the internal market, as it does not directly affect individual rights, its implementation in the asylum policy area in the absence of sufficient harmonisation may result in a conflict with the norms concerning the protection of fundamental rights.[47] Nevertheless, in Opinion 2/13 the CJEU made clear that, when such conflict occurs, mutual trust, as a founding principle of the EU, is to prevail on the protection of fundamental individual rights. According to the Court, the fundamental importance of the mutual trust under EU law, which allows for the creation and the maintenance of an area without internal borders, excludes the possibility for Member States to ‘check whether [another] Member State has actually, in a specific case, observed the fundamental rights guaranteed by the EU’.[48] Against this background, the CJEU initially put forward a criterion for assessing the legality of a Dublin transfer that seemed to be incompatible to the one adopted by the ECtHR. Article 4 of the European Charter of Fundamental Rights (EUCFR) prohibits torture and other inhuman and degrading treatment and hence corresponds to Article 3 of the European Convention on Human Rights (ECHR).[49] Nevertheless, in the Luxembourg jurisprudence, Article 4 EUCFR seems to have a narrower meaning and scope than Article 3 ECHR. In *N.S.*, the CJEU noted that Article 4 EUCFR is to be interpreted as meaning that Member States may not transfer an asylum seeker if ‘they cannot

44 See among others, Evelien Brouwer, ‘Mutual Trust and the Dublin Regulation: Protection of Fundamental Rights in the EU and the Burden of Proof’ (2013) 9 *Utrecht Law Review* 135.

45 ECtHR, *M.S.S. v Belgium and Greece*, Judgment of 21 January 2011 (App. No. 30696/09); *Tarakhel v Switzerland*, Judgment of 4 November 2014 (App. No. 29217/12).

46 Joined Cases C-411/10 and 493/10 *N.S. v Secretary of State for the Home Department and M.E. and others v. Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform* ECLI:EU:C:2011:865; Case C-394/12 *Abdullahi v. Bundesasylamt* ECLI:EU:C:2013:813.

47 Brouwer argues that, in cases in which the mutual trust principle is not in the interest of the individuals, a ‘(higher level of the) harmonisation of law is necessary’. See Brouwer (n 44) 136–137. This assumption might apply, for instance, to the Dublin System and the European Arrest Warrant, both implying a risk of violation of Article 3 ECHR.

48 Opinion 2/2013 on the Accession of European Union to the European Convention for the protection of Human Rights and Fundamental Freedoms of 18 December 2014 ECLI:EU:C:2014:2454 para 192.

49 In accordance with Article 52(3) of the EUCFR, the CJEU has interpreted this provision as implicitly stating the principle of non-refoulement.

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be unaware of the systemic deficiencies in the protection system of the State responsible'.[50] In light of this statement, in order to assess whether the transfer of an asylum seeker is incompatible with the principle of non-refoulement what matters is the *general situation* in the receiving Member State. Conversely, according to the ECtHR, the individual circumstances of the applicants must be duly considered in assessing a potential violation of Article 3.[51] The individual situation of the applicant may be disregarded only if there is a generalised risk determined by widespread and systemic violations. As the Strasbourg Court has stated in *M.S.S.*,[52] in such exceptional circumstances, it is implicitly proved that the applicant would be individually affected by a large-scale risk of inhuman and degrading treatment. An interpretation in accordance with Article 52(3) EUCFR would consider the 'systemic failures' criterion'[53] adopted by the CJEU not as a threshold under which there is no potential violation of Article 4, but rather as a condition that might exempt the asylum seeker from proving their individual risk. Nonetheless, the CJEU has initially taken a different approach. Indeed, in *Abdullahi,* the Court stated that an asylum seeker can challenge the identification of the Member State competent, resulting from the criteria set forth by the Regulation, only 'by pleading systemic deficiencies in the asylum procedure and in the conditions for the reception of applicants for asylum in that Member State'.[54] More recently, the CJEU has realigned its interpretation with the one of the ECtHR: in *CK*, the Court stated that Article 4 EUCFR must be interpreted as meaning that

> even where there are no substantial grounds for believing that there are systemic flaws in the Member State responsible for examining the application for asylum, the transfer of the asylum seeker within the framework of the Dublin Regulation can take place only in conditions which exclude

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50 *N.S.* (n 46) para 94.

51 *M.S.S.* (n 45) para 219. The principles set forth in this judgment were confirmed and further elaborated by the ECtHR in *Tarakhel* (n 45) concerning the Italian standards of accommodation which though not qualifying as systemic failures were nonetheless poor. Although recognizing that the Italian reception system was not suffering from systemic failures, the Court considered the individual circumstances of the applicants and their condition of vulnerability.

52 *M.S.S.* (n 44) para 359.

53 For an analysis of the genesis and the rationale of this criterion, the scope of which extends beyond the implementation of the Dublin system, vis-à-vis the mutual trust principle, see Armin Von Bogdandy and John Ioannidis, 'Systemic Deficiency in the Rule of Law: What It Is, What Has Been Done, What Can Be Done' (2014) 51 *Common Market Law Review* 59.

54 *Abdullahi* (n 46) para 62.

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> the possibility that that transfer might result in a real and proven risk of the person concerned suffering inhuman or degrading treatment, within the meaning of that article.[55]

In the context of the intense judicial dialogue between the two European Courts, the CJEU decision to finally acknowledge the interpretative approach taken by the ECtHR in the field of application of the Dublin Regulation has also contributed to ease the tensions raised by Opinion 2/2013.[56]

The imperative goal of protecting the principle of free movement clearly drives the rationale of the Dublin Regulation; the main criterion of the Dublin system to allocate responsibility to the first country of entry is key in this respect. The rationale behind that criterion is a strong indication of how the CEAS is conceived. Reliance on this criterion is interpreted as a punishment for a Member State's failure to protect its external borders.[57] As such, the content of this punishment corresponds to the obligation on behalf of the Member State to take charge or take back the asylum seeker for whom it is responsible pursuant to the Dublin criteria. Interestingly, the proposal for amending the Dublin III Regulation introduces a punitive measure for asylum seekers who leave the territory of the Member State designated as responsible. In particular, the proposal introduces a new obligation

> that foresees that an applicant must apply in the Member State either of first irregular entry or, in case of legal stay, in that Member State. [...] In case of non-compliance with this new obligation by an applicant, the Member State must examine the application in an accelerated procedure.

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55 Case C-578/3026 *C.K.,* H.F. *and A.S v Republic of Slovenia* ECLI:EU:C:2017:127 para 98.

56 On the extent to which *CK* represents a *revirement* in its jurisprudence see Koen Lenaerts, 'La Vie après l'Avis: Exploring the Principle of Mutual (yet not Blind) Trust' (2017) 54 *Common Market Law Review* 28. According to Lenaerts, the CJEU approach was neither different nor incompatible with the one taken by the ECtHR: 'in *N.S.*, the ECJ was *not* confronted with questions similar to those addressed. [...] The *N.S.* judgment neither confirms nor undermines the rationale underpinning *Tarakhel*. Those two cases are simply not appropriate for 'case pairing'. Instead, one should read *N.S.* as a sign of deference towards the ruling of the ECtHR in *M.S.S*, since the ECJ limited itself to holding that, where a Member State's asylum system suffers from systemic deficiencies, an asylum seeker may not be transferred to that Member State'.

57 According to the Commission, this criterion is based on the assumption that 'a linkage should be made between the allocation of responsibility in the field of asylum and the respect by Member States of their obligations in terms of protection of external borders'. See Commission 'Towards a Reform of the Common European Asylum System' (n 5) 4. The interconnection between the asylum policy and the Schengen *acquis* and the serving role of the former for the efficient functioning of the latter could hardly be clearer.

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> In addition, an applicant will only be entitled to material reception rights where he or she is required to be present.[58]

According to the Commission, such obligation would discourage abuses and prevent secondary movement within the EU.[59] The prevention of secondary movement represents the *leitmotiv* of the third phase proposals, being explicitly listed by the Commission among the five priorities that must drive the strategy to address the structural shortcoming of the CEAS.[60] At the time of writing the negotiations are still ongoing. However, the LIBE Committee report[61] endorsed by the EU Parliament with a broad majority[62] proposes significant changes in the approach taken by the Commission and leaves aside the punitive measures set forth in the proposal.

58 See Commission, 'Proposal for Dublin IV Regulation' (n 14) 15. This provision would be in breach of the CJEU ruling in Case C-179/11 *Cimade and 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* ECLI:EU:C:2012:594. In this judgment, the Court, basing on the EU Charter of Fundamental Rights, settled the obligation of all Member States to ensure human reception conditions to asylum-seekers even in the pending of the 'Dublin' procedure for identifying the Member State responsible and eventually returning the claimant to it. Nonetheless, one can reasonably wonder whether the CJEU will maintain its protective approach in this time of crisis or whether instead it will be tempted to adjust the balance between the protection of individual rights and the preservation of the internal market freedoms, as its most recent judgments seem to suggest.

59 In the Proposal for Dublin IV Regulation, the Commission indicated among the main objectives of the proposal to 'discourage abuses and prevent secondary movements of the applicants within the EU, in particular by including clear obligations for applicants to apply in the Member State of first entry and remain in the Member State determined as responsible. This also requires proportionate procedural and material consequences in case of noncompliance with their obligations'; See Commission, 'Proposal for Dublin IV Regulation' (n 14) 4. Indeed, as noted by Maiani, the Commission imputed the failure of the Dublin system to asylum shopping and disregard from Member States; see Francesco Maiani, 'The Reform of the Dublin System and the Dystopia of "Sharing People"' (2017) 24 *Maastricht Journal of European and Comparative Law* 625.

60 Commission, 'Towards a Reform of the Common European Asylum System' (n 5) 6.

61 LIBE Committee, 'Report on the 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)' (A8-0345/2017).

62 390 votes in favour to 175 votes against, with 44 abstentions. See Draft European Parliament Legislative Resolution on the 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)0270 – C8-0173/2016 – 2016/0133(COD)) Ordinary legislative procedure – recast.

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2.1.2 Formal and Substantial Reasons for Its Failure

Having determined the objective behind the development of the CEAS as protecting free movement, the next step is to assess the extent to which it has failed. As a response to the influx of refugees and migrants, Member States have adopted national strategies openly undermining the EU integration objectives. Numerous examples can be inferred in that respect; for instance, Italy and Greece have engaged in the unlawful practice of not registering and fingerprinting migrants crossing their territories in order to escape their obligations under the Dublin III Regulation;[63] and a number of Member States reintroduced border controls, some even building physical barriers at the borders.[64] Such practices pose a serious threat to the enforcement of the Schengen *acquis*, resulting in the Commission proposing the reintroduction of temporary internal border control for up to two years.[65] The development of a common asylum policy, meant to serve the interest of an area without internal borders, has largely proven its inability to preserve the integrity of this area in time of crisis.[66] Nonetheless, as the Commission acknowledges, the shortcomings of the CEAS do not entirely depend on the increased migratory pressure,[67] as the

63 In December 2015, the Commission initiated a procedure against Greece, Croatia, and Italy, which have failed to correctly implement the Eurodac regulation in relation to the fingerprinting of asylum seekers. See Commission, 'Implementing the Common European Asylum System: Commission escalates 8 infringement proceedings' (Press release, 10 December 2015).

64 Hungary erected a fence along parts of its borders with Serbia and Croatia to stop migrants entering its territory, and border controls were reintroduced by a number of Member States, for instance Austria, Germany, Denmark and Sweden.

65 Commission, 'Proposal for a Council Implementing Decision setting out a recommendation for temporary internal border control in exceptional circumstances putting the overall functioning of the Schengen area at risk' COM(2016) 275final.

66 For an exhaustive account of Member States' unilateral strategies in reaction to the crisis see Opinion of Advocate General Sharpston delivered on 8 June 2017 in Case C-490/16 *C.K., H.F. and A.S. v Republic of Slovenia* (n 55) and Case C-646/16 *Jafari* ECLI:EU:C:2017:443.

67 Indeed, according to the Commission, '[n]otwithstanding the significant progress that has been made in the development of the Common European Asylum System, there are still notable differences between the Member States in the types of procedures used, the reception conditions provided to applicants, the recognition rates and the type of protection granted to beneficiaries of international protection. These divergences contribute to secondary movements and asylum shopping, create pull factors and ultimately lead to an uneven distribution among the Member States of the responsibility to offer protection to those in need'. See Commission, 'Proposal 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

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system has manifested its malfunctioning even before the perceived 'crisis'.[68] The EU asylum rules are indeed frequently disregarded by both Member States and asylum seekers.[69] These shortcomings are mainly due to the non-achievement of a fully harmonised asylum policy among Member States and to the limits of solidarity measures.[70]

First, the failure of the harmonisation project can be imputed to the technique used by the EU legislator, which proved to be unable to ensure Member States' compliance with common asylum standards. Among the shortcomings of this technique is the use of Directives instead of Regulations, the imposition of minimum standards in the first phase,[71] the lack of clarity of certain Directive provisions and the large margin of discretion left on Member States. A significant step forward towards an increasing level harmonisation of national policies was made through the second-phase legislative instruments, which aimed at establishing common procedures, common standards and a uniform status pursuant to Article 78 TFEU. The innovative scope of that provision is clear; the aim of the second phase was to trigger further approximation between Member States' asylum systems through the creation of a common policy, while the first phase aimed at the adoption of minimum standards.[72]

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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) 466final, 2.

68 According to the European Asylum Support Office (EASO), 'during the five-year period from 2009 to 2013, on average some 55 000 outgoing Dublin requests were made annually. 73% of the outgoing requests were accepted, but only some 26 % of the outgoing requests resulted in the physical transfer of a person from one EU+ country to another (on average, about 14 000 persons annually). The proportion of outgoing requests corresponded on average to about 15% of the number of registered asylum applicants. The proportion of physical Dublin transfers to the number of applicants for international protection in the EU+ was about 4%'. See EASO 'Annual Report on the Situation of Asylum in the European Union 2014' (2015) 34.

69 Maiani (n 59) 626–627.

70 Significantly, in presenting the 'third-phase' reform package, the First Vice-President of the Commission Timmermans stated that '[t]he EU needs an asylum system which is both effective and protective, based on common rules, solidarity and a fair sharing of responsibilities'.

71 As far as the first-phase asylum legislation is concerned, the vast amount of optional derogations from the common standards can be explained 'as a logical consequence of the unanimity requirement'. In this sense Jen Vedsted-Hansen, 'Common EU Standards on Asylum – Optional Harmonisation and Exclusive Procedures?' 2005 (7) *European Journal of Migration and Law* 370.

72 Rudolf Geiger, Daniel-Erasmus Khan, Marus Kotzur (eds), *European Union Treaties – Treaty on European Union – Treaty on the Functioning of the European Union* (Hart 2015). On commenting Article 78 TFEU, the authors observes that 'the integration dynamics of Article 78 TFEU reflect the new self-understanding of the asylum and refugee policy.

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The long negotiations that characterised the second phase of CEAS led to the adoption of more protective standards for asylum seekers and recipeints of international protection. The improvements include, among others, the treatment of vulnerable persons, the quality of the procedures for assessing international protection applications, the effectiveness of the right to appeal against negative decisions, and the reception conditions of asylum seekers.[73] However, under the second phase legislative framework, Member States retain a wide margin of appreciation that compromises in practice the substance of the improved guarantees. This is particularly true in the case of reception conditions, with Member States benefiting from high discretion concerning the definition of the material conditions of reception, the minimum level to be granted to any asylum seeker, access to the labour market.[74] Because of this important margin of appreciation left to the Member States, the second generation of the CEAS legislation proved its inadequacy to achieve the harmonisation process.

Second, although the principle of solidarity is a recurring *leitmotif* in EU asylum legislation instruments, the very few provisions that trigger its concrete application are conceived as extraordinary measures to be applied only in time of crisis or high pressure.[75] However, pursuant to Article 80 TFEU, the EU policies

Open internal borders require an effective but also coherent protection of the external borders of the Union. This requires the policy making to be transferred from Member States to the Union level, as already stipulated in the Tampere Programme of 15 and 16 October 1999'.

73 For an analysis of the second-phase legislation, see Vincent Chetail, Philippe De Bruycker and Francesco Maiani (eds), *Reforming the Common European Asylum System: The New European Refugee Law* (Brill 2016); Céline Bauloz, Meltem Ineli-Ciger, Sarah Singer and Vladislava Stoyanova (eds), *Seeking Asylum in the European Union. Selected Protection Issues Raised by the Second Phase of the Common European Asylum System* (Brill 2015); Marie Laure Basilien – Gainche, 'Regard Critique sur le Régime d'Asile Européen Commun – La persistance d'une Conception Restrictive de la Protection' 24 (2014) 2 *Europe: Actualités du Droit de l'Union Européenne* 6–10; Samantha Velluti, *Reforming the Common European Asylum System – Legislative Developments and Judicial Activism of the European Courts* (Springer 2014); Steve Peers, 'The Second Phase of the Common European Asylum System – A Brave New World or Lipstick on a Pig?' (Statewatch Analysis No. 220, 2013).

74 As stated by Guild, the Reception Conditions Directive 'has proved to be the Achilles heel of the system, with many Member States failing to live up to their obligations'. See Guild, 'Does the EU Need a European Migration and Protection Agency?' (n 34) 592–593.

75 According to De Bruycker and Tsourdi, '[t]he Stockholm Programme also emphasises the importance of this principle stating that the CEAS should be ultimately "a common area of protection and solidarity"'. However, rather than calling for the establishment of a mechanism that could permanently allocate responsibility in an equitable manner on the basis of objective criteria, it endorsed an approach of 'effective solidarity with the Member States facing particular pressures'. See Philippe De Bruycker and Evangelia Tsourdi,

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> shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States. Whenever necessary, the acts of the Union adopted pursuant to this Chapter shall contain appropriate measures to give effect to this principle.

As stated above, the Dublin III Regulation acknowledges that the progressive creation of an area without internal borders makes it necessary to strike a balance between responsibility criteria in a spirit of solidarity.[76] Nonetheless, it is hardly arguable that the criteria laid down therein succeed in striking that balance. Instead, these criteria strongly penalise Member States at the EU external borders. A concrete application of the principle of solidarity has been enshrined in Article 33 of the Regulation by way of response to the collapse of the Greek asylum system:

> Where, on the basis of, in particular, the information gathered by EASO pursuant to Regulation (EU) No 439/2010, the Commission establishes that the application of this Regulation may be jeopardised due either to a substantiated risk of particular pressure being placed on a Member State's asylum system and/or to problems in the functioning of the asylum system of a Member State, it shall, in cooperation with EASO, make recommendations to that Member State, inviting it to draw up a preventive action plan.

The adoption of Article 33 was clearly influenced by the case law of the European Courts, declaring the Dublin transfer towards Greece in violation of the principle of non-refoulement and is aimed at preventing that the excessive pressure on a Member State leads to the collapse of its reception system and hence to a dysfunction of the Dublin regime. Nevertheless, the mechanism for early warning, preparedness and crisis management set forth by that provision

'Building the Common European Asylum System beyond Legislative Harmonisation: Practical Cooperation, Solidarity and External Dimension' in Vincent Chetail, Philippe De Bruycker and Francesco Maiani (eds), *Reforming the Common European Asylum System: The New European Refugee Law* (Brill 2016) 483. This is nonetheless less surprising if one considers the UN Declaration of Territorial Asylum (14 December 1967) that recommended solidarity measures for extraordinary situations: '[w]here a State finds itself in difficult in granting or continuing to grant asylum, states individually or jointly through the UN shall consider, in a spirit of international solidarity, appropriate measures to lighten the burden on that State'.

76 Recital 25 of the Dublin III Regulation.

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has never been activated to date.[77] The 2015 EU Agenda on Migration[78] raised the need to reinforce internal solidarity to respond to the ongoing crisis and proposed to trigger the emergency response system envisaged under Article 78(3) TFEU by implementing a temporary distribution scheme for persons in clear need of international protection to ensure a fair and balanced participation of all Member States to this common effort. Decisions 2015/1523[79] and 2015/1601[80] were subsequently adopted by the EU Council in order to implement the relocation of 160.000 asylum seekers from Greece and Italy to other Member States basing on the basis of a quotas system. However, the application of those decisions encountered a major obstacle in the resistance of other Member States, many of which pledged very limited relocation places or refused to participate.[81] It follows that solidarity is not conceived as a principle that concretely applies in times of crisis only. Furthermore, its concrete application through extraordinary measures has proven to be highly problematic even in cases of influx or high pressure on Member States' asylum systems. It could thus be argued that the obstacles to the application of solidarity measures are as such partially imputable to the lack of internal harmonisation. Indeed, if the aforementioned solidarity measures were enacted as additional means to address the implementation gaps and inconsistencies of the first phase of the CEAS, the existing divergences and gaps – resulting from the failure of the first and second generation of asylum legislation in achieving internal harmonisation – trigger a general sentiment of mistrust, ultimately making Member States unwilling to engage in responsibility sharing.[82]

77 As put forward by De Bruycker and Evangelia Tsourdi (n 74, 482), the implementation of the European Asylum Support Office can also be listed among the measures aimed at granting concrete application to solidarity principle, being the Office tasked with the support of Member States under particular pressure.

78 Commission, 'EU Migration Agenda' (n 1).

79 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 [201] OJ L239/146.

80 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 [2015] OJ L248/80.

81 Slovakia and Hungary called for annulment of decision 2015/1601 by the CJEU in December 2015. The action was dismissed by the CJEU (*Cases C-643/15 and C-647/15 Slovak Republic and Hungary v Council of the European Union* ECLI:EU:C:2017:631). In June 2017, the Commission has launched infringement procedures against the Czech Republic, Hungary and Poland for non-compliance with their obligations under the 2015 Council Decisions on relocation.

82 Suffice it to note the high recognition rate in Italy, which is often put forward by other Member States as a reason not to engage in solidarity measures such as relocation.

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Interestingly, besides the lack of harmonisation and solidarity, the Commission has identified another reason for the failure of the CEAS in its first two phases. As argued above, if the preservation of internal free movement represents the driving rationale of the harmonisation process, the rise of national protection standards is not a priority for the EU institutions in pursuing the development of a common asylum policy. Nevertheless, it is undeniable that the harmonisation of internal asylum legislations has meaningfully contributed to the improvement of national protection regimes.[83] It could be reasonably excluded that, as suggested by the Commission, the increase of protection standards triggered by the harmonisation process makes the CEAS 'one of the most protective and generous asylum systems in the world'.[84] Nonetheless, the Commission identifies this improvement as a substantial reason for migratory pressures, in other words as a 'pull factor' for refugees and migrants. In particular it is argued that 'the granting of international protection status in EU Member State has in practice almost invariably led to permanent settlement in the EU while protection is supposed to be temporary'.[85] One may well wonder if the underlying meaning of these words is that the EU institutions have interpreted the recent trends in national immigration policies as a signal that Member States' political will to comply with higher protection standards, thus fulfilling their international obligations, is coming to an end. Regrettably, the proposals for amending the Common Asylum System strongly corroborate this reading.

3 Reconceiving Harmonisation: The EU Third-Phase Asylum Legislation

The proposals under negotiation show the willingness of the EU institutions to address the aforementioned structural shortcomings of the CEAS by replacing

Significantly, the need to ensure uniform recognition rates is strongly stressed in the reform package proposals.

83 An example of some of the positive improvements introduced by the CEAS, before an EU asylum legislation was adopted, some Member States refused to recognize the refugee status to the victims of persecutory acts perpetrated by non-State actors. Such interpretative approach cannot be endorsed after the entry into force of the first Qualification Directive. The introduction of a complementary form of protection and of a number of procedural safeties for asylum-seekers represent a further significant improvement. Nevertheless, the new Commission Proposals for amending the Dublin Regulation and the Procedure Directive seriously undermine asylum seekers' rights during the procedures for determining the Member State responsible and for assessing their claims.

84 EU Migration Agenda (n 1) 5.

85 Ibid.

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the instruments with Regulations, which are directly applicable. Regulations will ensure a stricter and more effective enforcement by Member States, without discretion with regard to their implementation. Indeed, after having announced its proposals for amending the Dublin[86] and Eurodac[87] Regulations in May 2016, on 13 July 2016 the Commission presented its second package to reform the CEAS, containing proposals for a recast Qualification Regulation,[88] a recast Asylum Procedures Regulation[89] and a recast Reception Directive.[90] In order to ensure further harmonisation trough an effective enforcement of the EU legal instruments, the CEAS reforming package also includes a proposal for an enhancement of the powers and the competencies of the European Asylum Support Office (EASO) whilst, imposing on Member States the obligation to cooperate with the agency and to comply with its guidelines.[91]

The prevention of secondary movement is not the only goal driving the CEAS reform; arguably, the core of the rules proposed corresponds to an underlying objective of dissuading migrants in search for international protection from reaching the EU in the first place. Firstly, the CEAS package aims at discouraging the pursuit of illegal and dangerous journeys to the EU by making access to protection more difficult. Certain provisions, the implementation of which has been optional for Member States are turned into obligations. For example, the proposal for a recast Qualification Regulation foresees that when examining an application for international protection, Member States will be

86 Commission, ‘Proposal for Dublin IV Regulation’ (n 14).

87 Commission, ‘Proposal for a Regulation of the European Parliament and of the Council on the establishment of ‘Eurodac’ for the comparison of fingerprints for the effective application of [Regulation (EU) No 604/2013], for identifying an illegally staying third-country national or stateless person and on requests for the comparison with Eurodac data by Member States’ law enforcement authorities and Europol for law enforcement purposes (recast)’ COM(2016) 272final.

88 Commission, ‘Proposal 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) 466final.

89 Commission, ‘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’ COM(2016) 467final.

90 Commission, ‘Proposal for a Directive European Parliament and of the Council laying down standards for the reception of applicants for international protection (recast)’ COM(2016) 465final.

91 Commission, ‘Proposal for a Regulation European Parliament and of the Council on the European Union Agency for Asylum and repealing Regulation (EU) No 439/201’ COM(2016) 271final.

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bound to assess whether the claimant can have access to internal protection alternatives in their country of origin.[92] These provisions, combined with an external policy aimed at strengthening cooperation with third (transit) countries in order to prevent arrivals and to enhance effective readmission mechanisms, make access to the EU potentially difficult.[93] Furthermore, the proposals envisage the introduction of an obligation for Member States to apply the controversial notions of 'safe third country', 'first country of asylum' and 'safe country of origin' in order to treat asylum applications as inadmissible.[94] For granting the full harmonisation of national asylum policies in this field, the Commission proposes to replace national safe country lists with European lists or designations at Union level within five years from the entry into force of the Regulation.[95] The EU Qualification Regulation also introduces an obligation to systematically and regularly review the protection status.[96]

Moreover, access to the EU territory is also discouraged by sanctioning persons who have irregularly entered, irregularly stayed in, or attempted to irregularly enter into the territory of the Member States during the last five years with the exclusion from the benefit to access resettlement programmes. Indeed, the Commission has released its proposal for a Regulation establishing a Union Resettlement Framework, which includes, among the grounds for exclusion from the Qualification Directive the additional ground of previous illegal entry in order to prevent a refugee from benefiting from a resettlement

92 Commission, 'Proposal for a Qualification Regulation' (n 87) 4 and 5. This proposal is likely to significantly water down the level of protection granted by some Member States, which did not transpose the provision of the EU Qualification Directive allowing Member States to exclude an asylum seeker from protection on the ground that internal protection alternatives are available in his/her country of origin. In Italy, for instance, this ground for exclusion cannot be applied according to the settle case law of the Supreme Court.

93 Following to the implementation of the so-called EU Turkey Deal (EU Council Statement of 18 March 2016), the number of migrants arriving in Greece has consistently decreased. In February 2017, a memorandum of understanding was concluded between the Italian and internationally recognised Libyan government to manage migration influxes from the Libyan territory. Italy agreed to help the Government of National Accord police in its own waters and to train and equip its coastguards. The EU endorsed the Memorandum and €90 million package was also adopted under EU Trust Fund for Africa in April to provide for socio-economic stabilisation at the municipality level, particularly for communities hosting migrants and displaced populations. See Commission, 'Partnership Framework on Migration: Commission reports on results and lessons learnt one year on' (13 June 2017).

94 Proposal for an Asylum Procedures Regulation (n 89) 8.

95 Article 48 of the proposal for an Asylum Procedures Regulation (n 89).

96 Articles 15 and 21 of the proposal for a Qualification Regulation (n 88).

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programme.[97] Another trend underpinning the proposed reforms seems to aim at making asylum seekers' life at the national level more difficult. Besides some improvements in the reception standards introduced by the proposal for a recast Reception Conditions Directive,[98] the reform includes additional grounds for detaining asylum seekers.[99]

In addition, according to the Commission, the key goal of preventing secondary movement will be achieved by establishing stricter rules on the responsibility of Member States pursuant to the Dublin criteria and by making the efficient implementation of Dublin mechanism an obligation the implementation of which is supported by sanctions affecting both Member States and asylum seekers.[100] Indeed, in order to address secondary movements, the reform package clarifies the obligations of an asylum seeker to stay in the Member State responsible for assessing their application and of a refugee to stay in the one that has already granted international protection. Additional disincentives are foreseen, among which is the application of accelerated procedures and the lack of possibility to access national reception facilities. Furthermore, the proposal for a recast Qualification Regulation triggers a modification of the Long-term Resident Directive aimed at sanctioning refugees who leave the Member States from whom they have being granted protection with the restarting of the time-period for being eligible for a long-term residence status. The report by the LIBE Committee,[101] leaves aside this 'deterring' approach taken by the Commission and proposes alternative means to ensure that all Member States accept their share of responsibility towards asylum seekers. The 'first-entry criterion' is abandoned and specific attention is given to the existence of a 'genuine link' with a Member State.[102] Asylum seekers that do not have a genuine link with a particular Member State will automatically be assigned to another Member State which will take responsibility for them

97 Commission, 'Proposal for a Regulation of the European Parliament and the Council establishing a Union Resettlement Framework and amending Regulation (EU) No 516/2014 of the European Parliament and the Council' COM(2016) 468final, 11.

98 For instance, the grant of quicker and more effective access to the labour market.

99 The proposal states: 'In order to tackle secondary movements and absconding of applicants, an additional detention ground has been added. In case an applicant has been assigned a specific place of residence but has not complied with this obligation, and where there is a continued risk that the applicant may abscond, the applicant may be detained in order to ensure the fulfilment of the obligation to reside in a specific place (Article 8(3)(c))'. See Commission, 'Proposal for a Reception Conditions Directive' (n 90) 15.

100 Commission, 'Proposal for Dublin IV Regulation' (n 14) 4.

101 European Parliament (n 61).

102 Such links would be defined as having family members present in that country, as well as prior residence or studies in a particular EU country.

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according to a distribution 'key' that reflects the 'reference key' elaborated in the Commission's proposal for the corrective allocation mechanism.[103]

In the light of the Commission's proposals, it could be argued that the objective recalled by the Commission in the 2015 Agenda to achieve the mutual recognition of asylum decisions has been temporarily left aside, along with the 'centralisation approach' that seemed to drive the Commission's strategy. Finally, the security rationale driving the reform of the CEAS merits some attention; the proposal for a recast Qualification Regulation foresees a provision which envisages among the grounds for withdrawing the refugee or the subsidiary protection status the case in which the beneficiary of international protection represents a danger to the security of the Member State or has been convicted of a particularly serious crime. Furthermore, security concerns certainly underpin the proposal for amending the Eurodac Regulation. The latter enlarges the category of data that can be collected, the category of persons whose data is collected and further processed and the category of persons who can proceed to the collection. The Commission proposal also extends further the possibility for law enforcement authorities to access to this database.[104] By way of conclusion, it should be highlighted that most of the provisions introduced by the aforementioned proposals triggers serious human rights concerns with their implementation being potentially in breach of the EU Charter of Fundamental Rights[105] and certainly weakening international protection standards.[106]

4 Conclusion

Having acknowledged the shortcomings of the harmonisation approach, the Commission strategy to react to the perceived 'crisis' seems to have turned toward a centralisation approach. The 2015 Agenda on Migration, recalling the Tampere objectives, brought again onto the scene ambitious projects such as the adoption of a Common European Asylum Code, the mutual recognition of asylum decisions and a single asylum decision process.[107] This raised high

103 See Articles 34 and 35.

104 For a comment of the Commission Proposal for reforming the Eurodac Regulation see Meijers Committee, 'Note on the proposed reforms of the Dublin Regulation, the Eurodac recast proposal, and the proposal for an EU Asylum Agency' (2016) 6–7.

105 See *Gisti* case (n 58).

106 See among others Vincent Chetail, 'Looking beyond the Rhetoric of the Refugee Crisis: The Failed Reform of the Common European Asylum System' (2016) *European Journal of Human Rights* 598–201.

107 Commission (n 1) 17.

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hopes, however, in the proposals for a third-generation asylum instruments, the Commission has openly re-endorsed the harmonisation approach, continuing to perceive the principle of solidarity as an extraordinary measure to be triggered only in case of failure of the system. As outlined in this contribution, the core of the proposed recast instruments, driven by the imperative need of preventing secondary movement, significantly water down the protection standards provided so far by the CEAS. This raises the question of whether the Commission strategy is based on the assumption that Member States' compliance with EU asylum policies is more easily ensured by lowering their obligations towards asylum seekers and refugees rather than by centralising asylum procedures. Has the Commission come to the conclusion that 'harmonising to the bottom' is a far more effective tool than 'centralising to the top' in order to protect the EU integration and internal free movement? Will the implementation of such restrictive policies, combined with the progressive externalisation of EU Member States' obligations towards asylum seekers and refugees, represent the last bricks to finally complete the realisation of a 'Fortress Europe' or a 'Security Union', where security concerns entirely drive migration and asylum policies?

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