Human Rights and Legitimacy in the Implementation of EU Asylum and Migration Law*

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I. Introduction

This chapter will discuss the current crisis regarding the mass inflow of refugees into Europe caused by turmoil in Africa and in the Middle East.[1] It will suggest that the existing and newly adopted EU migration and asylum measures and policies may not only jeopardize asylum seekers' rights, but also destabilize the EU regime of fundamental rights and lead to a changed paradigm of EU law.

The chapter will be structured in five sections. Following the introductory section, the second section will discuss the deterioration of human rights standards in the EU political discourse. It will be argued that the European Union political discourse related to refugees has been dominated by discriminatory and xenophobic statements which have seriously challenged the core EU values and principles of "human dignity, freedom, democracy, equality, the rule of law and respect for human rights" proclaimed by Article 2 of the Treaty on the European Union (TEU). The anti-refugee political narrative has, at the same time, set the political and social climate in Europe and inspired the adoption and application of stringent national and EU migration and asylum legislation.

The third section will try to suggest that refugee influx has led to a partial dismantling of EU asylum rules.[2] It will concentrate on the discussion of human rights standards

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[1] For a detailed account of the refugee influx into Europe along the Western Balkans route and of the legal consequence of the creation of the route, see Iris Goldner Lang, Croatia and EU Asylum Law: Playing on the Sidelines of at the Centre of Events?, in THE NEW ASYLUM AND TRANSIT COUNTRIES IN EUROPE DURING AND IN THE AFTERMATH OF THE 2015/2016 CRISIS (Vladislava Stoyanova and Eleni Karageorgiou eds.), Brill, forthcoming in 2018.

[2] For a detailed overview of EU asylum law *see* STEVE PEERS, EU JUSTICE AND HOME AFFAIRS LAW (2016); 3 EU IMMIGRATION AND ASYLUM LAW (TEXT AND COMMENTARY) (Steve Peers et al. eds., 2d rev ed. 2015); KAY HAILBRONNER, EU IMMIGRATION AND ASYLUM LAW: COMMENTARY ON EU REGULATIONS AND DIRECTIVES (2016).

in the context of the adoption and (non-)application of EU and national asylum and migration law. It will first discuss the Dublin Regulation and the many instances of suspension of Dublin transfers for the purpose of protecting asylum seekers' fundamental rights. Then it will offer examples of national legislation and practices in several EU Member States which violate EU-based human rights obligations and standards. It will also provide statistical data to show the discrepancies of the recognition rates of asylum seekers in different EU Member States and discuss potential explanations for the divergence.

The fourth section will discuss the EU response to the refugee influx. It will concentrate on the two Relocation Decisions of September 2015 and the EU-Turkey Statement of March 2016, as the three crucial measures in this category, and examine them from the perspective of their legitimacy and compliance with human rights. This section will be followed by concluding remarks, summarizing the most important legal consequences of the refugee inflows and suggesting that the current EU asylum law first, proved inadequate to respond to mass refugee inflows and, second, turned out to be based on incorrect assumptions, leading to human rights violations in practice. By putting the current refugee-related developments in the wider EU context, it will be suggested that we are witnessing a change of paradigm of EU law illustrated by three developments: by the process of retrenchment or Member States' withdrawal from certain EU policies (as opposed to further European integration based on "spillover" effect into more policy areas), by changing the focus from protection of individuals to protection of states and from progressive to regressive integration.

II. Human Rights in the Refugee-Related EU Political Narrative

The refugee-related political narrative dominating the European territory in the past several years has been abundant in controversial and sometimes xenophobic statements. These statements are indicative both in terms of palpating the political and social climate in Europe, and in terms of influencing national and EU migration and asylum legislation. This section will display several most revealing statements originating from three EU Member States and discuss them from the perspective of their legitimacy and compliance with human rights.

The first two are statements by the Slovak Prime Minister Robert Fico. In the first statement, given at a press conference on July 21, 2015, Robert Fico declared that "Slovakia will receive only 100 refugees – Syrian Christian families that it will itself select."[3] According to Euractiv, a European online platform publishing articles on the European Union, Prime Minister Fico later on said that "the number of immigrants his country would take would be 200, but repeated that all of them should be Christians."[4]

These statements - which indicate that Slovakia would accept only Christian refugees – is problematic in a number of respects. First and foremost, it goes contrary to EU values and the principle of non-discrimination, contained in Article 2 TEU and Article 21 of the Charter of Fundamental Rights of the European Union.

Second, Fico's statements, that Slovakia will select only those refugees it likes (based on their religion) and that it will admit only 100 or 200 refugees, violates Slovak EU law obligations stemming from EU secondary law. It goes contrary to the two binding Relocation Decisions adopted by the Council of Ministers on September 14 and 22, 2015.[5] Both Relocation Decisions will be discussed in more detail in Section IV. At this point, it should be observed that both acts embody the principle of solidarity among EU Member States by providing that, in total, 160,000 refugees, who arrived to Greece and Italy, should be relocated to other EU Member States within two years from the coming into force of the Relocation Decisions. The quotas in the 2nd Relocation Decision – which are legally binding for all EU Member States, including Slovakia, despite the fact that Slovakia voted against the Decision in the Council of Ministers – provide that Slovakia would be obliged to relocate 190 refugees from Italy and 612 refugees from Greece. These numbers are much higher than the 100 or 200 asserted in Fico's statements. Therefore, in his statements, the Slovak Prime

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[3] Georgi Gotev, *Commission frowns on 'Christian only' solidarity with migrants*, EURACTIV (Aug. 19, 2015), http://www.euractiv.com/section/languages-culture/news/commission-frowns-on-christian-only-solidarity-with-migrants.

[4] *Id.*

[5] Council Decision 2015/1523, 2015 O.J. (L 239/146) 146–56 (EU) (establishing provisional measures in the area of international protection for the benefit of Italy and of Greece); Council Decision 2015/1601, 2015 O.J. (L 248) 80–94 (EU) (establishing provisional measures in the area of international protection for the benefit of Italy and Greece).

Minister directly and publicly expressed his determination not to respect Slovak obligations stemming from the soon-to-be-adopted Relocation Decisions and its obligations stemming from the principle of solidarity stipulated by Art. 80 TFEU..[6] This is also confirmed by Fico's later statement from September 2015 in which he affirmed that as long as he is prime minister "mandatory quotas won't be implemented on Slovak territory."[7]

Further, both Relocation Decisions provide that the relocation procedure, including the identification of individuals who will be relocated to each Member State, will be run by Greece and Italy, and not by the host Member State.[8] This means that Slovakia is not allowed to select whom it wants to admit, as the selection has to be done by Greece and Italy, while taking into consideration specific characteristics of the applicants, such as their language skills as well as their family, cultural and social ties.[9] Member States can only exceptionally refuse to relocate an applicant, exclusively on grounds of national security, public order; or where there are serious reasons for considering that he/she has committed a crime against peace, a war crime, a crime against humanity, or a serious non-political crime; or that he/she has been guilty of acts contrary to the purposes and principles of the United Nations.[10]

In a similar vein, in its non-binding resolution adopted on April 1, 2016, the Polish parliament stated that, when accepting refugees, it favors "lone women, children, families with many children and religious minorities". It also expressed "its considered objection to any attempt to create permanent EU mechanisms for allocating refugees".[11] Again, these statements stand in stark contrast to the principles of equality, the rule of law and human rights. They also go contrary to the principle of

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[6] Fico's statement was given on July 21, 2015 whereas the Relocation Decisions were adopted in September 2015. However, the 1st Relocation Decision was discussed already at the June 2015 European Council, whereas on July 20, 2015 a Resolution of the representatives of the Governments of the Member States meeting within the Council on relocating from Greece and Italy 40000 persons in clear need of international protection was adopted by consensus.

[7] Nikolaj Nielsen & Eszter Zalan, *EU forces 'voluntary' migrant relocation on eastern states*, EUOBSERVER (Sep. 22, 2015, 9:28 PM), https://euobserver.com/migration/130374.

[8] Arts. 5(3) and 5(4) of Council Decision 2015/1523, *supra* note 4, and arts. 5(3) and 5(4) of Council Decision 2015/1601, *supra* note 4.

[9] Indent 28 of the Preamble of Council Decision 2015/1523, *supra* note 4; and indent 34 of the Preamble of Council Decision 2015/1601, *supra* note 4.

[10] Art. 5(7) of Council Decision 2015/1523, *supra* note 4; and art. 5(7) of Council Decision 2015/1601, *supra* note 4.

[11] Andrew Rettman, *Poland: Middle East migrants cause EU* 'tensions', EUOBSERVER (Apr. 1, 2016, 6:04 PM), https://euobserver.com/migration/132881.

solidarity, contained in Article 80 of the Treaty on the Functioning of the European Union (TFEU) and Poland's EU law obligations.

The final two statements were made by the Hungarian Prime Minister Victor Orban. On November 24, 2015, several days after the Paris terrorist attacks of November 13, Prime Minister Orban asserted that "all the terrorists are basically migrants".[12] This statement is troubling, not only because it differs from the reality, but also because it sends a strong xenophobic message across Europe.

At the congress of the center-right European Popular Party (EPP) in Madrid on October 22, 2015, Victor Orban stated that "the right to dignity and security are basic rights", but that "neither the German nor the Hungarian way of life is a basic right of all people on the Earth".[13] This statement reflects the Prime Minister's anti-refugee policy, visible also in the newly-adopted Hungarian legislation, and his controversial position that those who arrive at the European borders should be sent back and that the majority of them are economic migrants.[14]

One should make clear that, in parallel with the above statements, some EU politicians have put forward completely opposite statements, such as the one by the German Chancellor Angela Merkel who stated that Europe should "help and find a home [for] those who have a right to stay as refugees".[15] Nevertheless, such human-rights sensitive statements seem to have been outtalked by the anti-immigration voices. The dominating political rhetoric in Europe showed a clear turn from the basic European values and principles, as proclaimed in the Founding Treaties, and inspired the new national and EU migration and asylum legislation, as will be discussed in Section III.

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[12] Matthew Kaminski, *'All the terrorists are migrants' Viktor Orbán on how to protect Europe from terror, save Schengen, and get along with Putin's Russia*, POLITICO (Nov. 23, 2015, 5:30 AM), http://www.politico.eu/article/viktor-orban-interview-terrorists-migrants-eu-russia-putin-borders-schengen/.

[13] Viktor Orbán, Prime Minister of Hungary, Speech at the EPP Congress (Oct. 22, 2015), http://www.kormany.hu/en/the-prime-minister/the-prime-minister-s-speeches/speech-of-viktor-orban-at-the-epp-congress20151024.

[14] For the discussion of the newly adopted Hungarian legislation, which might potentially violate its EU law obligations, see Section III.

[15] Eric Maurice, *Centre-right leaders close ranks on migration*, EUOBSERVER (Oct. 22, 2015, 10:31 PM), https://euobserver.com/political/130804.

III. Human Rights and Legitimacy in the Implementation of EU Asylum and Migration Law

The past several years of EU asylum and migration law were marked by a visible departure from the black letter law in practice, by unharmonized practices and diverging recognition rates of asylum applications across the EU and by newly adopted Member States' national rules and practices, in breach of EU law and human rights standards. The aim of this section is to discuss the above-mentioned deviations, thus suggesting that EU asylum and migration law is not adequate to respond to mass refugee influx and that it is sometimes based on incorrect assumptions, which can impair its legitimacy and lead to human rights violations in practice.

A. The Dublin State-of-First-Entry Rule and Why It Is Inappropriate

The Dublin Regulation establishes the Member State responsible for the examination of the asylum application.[16] The objective of the Regulation is the examination of the asylum claim by one EU Member State and the avoidance of asylum shopping and of "refugees in orbit" – asylum seekers who are shunted from one EU Member State to another, as none of them is willing to process the asylum claim. The Dublin rules, therefore, ensure there is a Member State responsible to determine the case and they prevent any parallel or subsequent decisions.

The criteria for establishing the responsible Member State range, in hierarchical order, from family considerations, to possession of a valid residence document or a visa, to the Member State of first irregular entry into the EU. In other words, in case the applicant has a family member already present in a Member State different from the state of his/her first entry into the EU, the Member State where the family member is present will be in charge of processing the applicant's claim. Equally, in case the applicant has a valid residence permit or a visa issued by a Member State different from the state of his/her first entry into the EU, the Member State of issuance will again be in charge of processing the asylum claim. Otherwise, the Member State in

[16] Regulation 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 O.J. (L 180/31) 31–59 (EU).

charge of determining an asylum claim will be state of the applicant's first entry into the Union.

In reality, the Dublin state-of-first-entry rule dominates and underpins the Dublin Regulation, as it applies to the majority of asylum cases. It is the weakest link of the Dublin Regulation for three principal reasons. First, it puts the most pressure on the geographically most exposed Member States which create the external borders of the EU, primarily Greece and Italy, as these are usually the Member States of the applicant's first irregular entry into the EU. For this reason, the state-of-first-entry rule goes contrary to the principle of solidarity, which stipulates that EU policies on border checks, asylum and immigration "shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States".[17]

In terms of its compliance with human rights standards, the state-of-first entry rule functions properly only in case of equal and appropriate human rights standards across the EU. Such an assumption underpins the Dublin Regulation, as under the logic of the state-of-first-entry rule it should not matter which Member State is processing the asylum claim. However, the rule does not suffice in case some Member States' national rules or practice do not satisfy procedural guarantees in in the asylum proceedings,[18] the standards of reception of asylum applicants[19] or the standards for the qualification of a third-country national for refugee status.[20] In fact, the past several years of high refugee inflows have revealed serious deficiencies in asylum systems of some EU Member States and their incapability or incapacity to

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[17] Consolidated Version of the Treaty on the Functioning of the European Union, art. 80, 2008 O.J. C 115/47 [hereinafter TFEU]. On solidarity in EU asylum law, *see* Iris Goldner Lang, *The EU Financial and Migration Crises: Two Crises—Many Facets of Solidarity*, *in* SOLIDARITY IN EU LAW: LEGAL PRINCIPLE IN THE MAKING (Andrea Biondi, Egle Dagilyte & Esin Küçük eds., forthcoming); Madeline Garlick, Solidarity under Strain: Solidarity and Fair Sharing of Responsibility in Law and Practice for the International Protection of Refugees in the European Union (Sep. 19, 2016) (unpublished Ph.D. Dissertation, Radboud University). The principle of solidarity will be discussed in more detail later, in relation to Relocation Decisions.

[18] 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, 2013 O.J. (L 180) 60–95 (EU).

[19] Directive 2013/33, of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection, 2013 O.J. (L 180) 96–116 (EU).

[20] Directive 2011/95, 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 eligible for subsidiary protection, and for the content of the protection granted, 2011 O.J. (L 337) 9–26 (EU).

process the asylum claims and treat asylum applicants in a human-rights compliant manner. For this reason, the underlying assumption of the Dublin state-of-first-entry rule – that all EU Member States satisfy adequate human rights standards for all asylum seekers on their territories – proved incorrect.

Third, the Dublin state-of-first-entry rule is based on the principle of mutual trust among EU Member States.[21] This principle implies that the Dublin criteria and the mechanism for determining the Member State responsible for examining an asylum application are based not only on the assumption of the establishment of equal, human-rights compliant standards in all Member States, but also on the trust of the transferring Member State that the receiving Member State, which is responsible for examining the asylum application, will treat the asylum seeker, in each individual case, in accordance with EU and international legal rules and human rights standards.[22] Mutual trust in the context of asylum is based on the premise that all Member States respect the principle of *non-refoulement* and are safe countries for third-country nationals.[23]

The only exception to the principle of mutual trust in the Dublin II Regulation was the sovereignty clause (also known as the "discretionary clause"), now contained in Article 17(1) of the Dublin III Regulation.[24] This clause enables each Member State to examine an asylum application even if such examination is not its responsibility

[21] Inter-state mutual trust is the underlying idea for the functioning of the area of freedom, security and justice in general, as the abolishment of internal borders starts from the premise of mutual trust. *See e.g.*, Brussels European Council, The Hague Program: Strengthening Freedom, Security and Justice in the European Union, Conclusions of the Presidency, Annex I, O.J. C 2004/C 53/01; European Council, The Stockholm Program—an open and secure Europe serving and protecting citizens 5, O.J. 2010/C 115/01; and the most recent strategic guidelines of the European Council meeting on 26/27 June 2014, *see* European Council, Conclusions, EUCO 79/14.

[22] According to Battjes, mutual trust in the Dublin system is "the assumption that each Member State will treat asylum-seekers and examine their claims in accordance with the relevant rules of national, European and International Law." *See* Hemme Battjes, *Mutual trust in asylum matters: the Dublin system*, *in* THE PRINCIPLE OF MUTUAL TRUST IN EUROPEAN ASYLUM, MIGRATION AND CRIMINAL LAW 9 (Hemme Battjes et al., 2011).

[23] *See* Regulation 604/2013, of the European Parliament and of the Council of 26 June 2013, Recital 3, 2013 O.J. (L 180/31) (EU) [hereinafter the Dublin III Regulation].

[24] The sovereignty clause stands together in the Dublin III Regulation with the humanitarian clause (art. 17(2)), which enables the determining or responsible Member State to request another Member State, other than the one otherwise responsible based on the Dublin rules, to take charge of an applicant "in order to bring together any family relation, on humanitarian grounds based in particular on family or cultural considerations."

according to the criteria contained in the Regulation.[25] However, despite the existence of such an "emergency exit", prior to the two groundbreaking judgments of the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU) - *MSS* and the *NS* judgments - Member States chose not to use the sovereignty clause with regard to Greece.

The underlying problems of the Dublin logic came to the surface first with the ECtHR Grand Chamber ruling in *MSS*[26] on January 21 2011, followed by the judgment of the CJEU in *NS*[27] on December 12 2011. These judgments revealed the inaccuracy of the premise that all EU Member States provide an adequate level of quality and efficiency and ensure a satisfactory level of protection of asylum seekers' fundamental rights. In *MSS*, the ECtHR concluded that both Greece, as the state of the asylum seeker's first entry into the EU, and Belgium, as the transferring state, violated Article 3 ECHR (which prohibits torture, inhuman or degrading treatment or punishment) and also Article 13 ECHR (which proclaims the right to an effective remedy). On the other hand, in *NS* the CJEU relied on the EU Charter of Fundamental Rights and held that the presumption that Member States are observing the fundamental rights enshrined in the Charter is rebutted when there are systemic deficiencies in asylum procedures and in reception conditions of asylum seekers. The Court of Justice, however, emphasized that not every violation of fundamental rights would suffice to rebut the presumption, but rather the systemic deficiencies need to amount to a real risk of inhuman or degrading treatment of asylum-seekers in the sense of Article 4 of the Charter.

Both *MSS* and *NS* testified to serious deficiencies of the system, which Member States previously chose to ignore by continuing transfers to Greece, and emphasized that asylum seekers must not be transferred to a Member State whose asylum system manifests systemic deficiencies. The judgments showed that the rules of the Common European Asylum System did not respond to reality by sufficiently taking into consideration inadequate conditions in certain Member States and their current financial and other limitations. *MSS* and *NS* demonstrated that the Dublin mechanism could not properly function in the event of an unfair or incomplete examination of

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[25] Art. 17 of the Dublin III Regulation, *supra* note 22, provides that "each Member State may decide to examine an application for international protection lodged with it by a third-country national or a stateless person, even if such examination is not its responsibility."

[26] M.S.S. v. Belgium and Greece, App. No. 30696/09, 2011 Eur. Ct. H.R. 108.

[27] Joined Cases C-411/10 and C-493/10, N.S. v. Sec'y of State for Home Dep't and M.E. v. Refugee Applications Comm'r, 2011 E.C.R I-13991.

asylum applications in some Member States, inadequate access to legal remedies and legal representation, and inappropriate detention conditions.

The judgments in *MSS* and *NS* were followed by further judgments in *Abdullahi*,[28] *Tarakhel*[29] and *C. K. v Slovenia*.[30] In its judgment in *Abdullahi* on December 10, 2013, the Court of Justice stated that "the Common European Asylum System was conceived in a context making it possible to assume that all the participating States … observe fundamental rights, including the rights based on the Geneva Convention and the 1967 Protocol, and on the ECHR, and that the Member States can have confidence in each other".[31] The Court repeated its criterion of systemic deficiencies in the asylum procedure and in the conditions for the reception of asylum applicants, as the condition for rebutting the presumption that Member States are observing the fundamental rights enshrined in the Charter. [32]

On the other hand, the ECtHR's judgment in *Tarakhel* on November 4, 2014 sets a higher threshold for the Member States than the one contained in *MSS*, *NS* and *Abdullahi*. It requires the national authorities to ascertain the applicant's individual situation in the light of the overall circumstances prevailing in the Member State of reception at the relevant time in order to determine whether the applicant would be at risk of treatment contrary to Article 3 ECHR. In other words, it is possible to challenge a Dublin transfer not only in case of systemic deficiencies in the Member State of reception, but also in case the individual transfer would create a risk of torture, inhuman or degrading treatment or punishment.

The CJEU's judgment in *C.K. v Slovenia* is the most recent decision related to Dublin transfers. In this judgment, dated February 16, 2017, the Court of Justice aligned its case-law with that of the Strasbourg court, by stating that "even where there are no substantial grounds for believing that there are systemic flaws" in the Member State responsible for examining the asylum application, the transfer can take place only if it would not result in "a real and proven risk of the person concerned suffering inhuman

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[28] Case C-394/12 Shamso Abdullahi v. Bundesasylamt, ECLI:EU:C:2013:813 (2013).
[29] Tarakhel v. Switzerland, App. No. 29217/12, 2014 Eur. Ct. H.R. 1185.
[30] Case C-578/16 P.P.U. C.K. v. Slovenia, ECLI:EU:C:2017:127 (2017).
[31] *Abdullahi*, *supra* note 27, at para. 52.
[32] *Id.* at para. 62.

or degrading treatment", as prohibited by Article 4 of the Charter.[33] In such situations the transferring Member State has to apply the sovereignty clause contained in Article 17(1) of the Dublin Regulation.[34]

One can view both the ECtHR's judgment in *Tarakhel* and the CJEU's judgment in *C.K. v Slovenia* as giving more legitimacy to the Dublin system and as qualifying mutual trust, which underpins the Dublin Regulation.[35] By stating that a Dublin transfer should not take place, not only in case of systemic flaws in the asylum system of the Member State responsible for examining an asylum claim, but also in case the transfer might result in a real risk of inhuman or degrading treatment, the two Courts seem to offer a corrective mechanism to the twin weak points of the Dublin Regulation: overreliance on the principle of mutual trust and the assumption that all EU Member States set and apply adequate human rights standards in their asylum systems.

The *MSS* and *NS* judgments had a strong resonance across the EU, as they led to the suspension of all asylum transfers to Greece since 2011. The European Commission is regularly issuing its recommendations on the resumption of Dublin transfers to Greece. The latest, fourth Recommendation was issued on December 8, 2016.[36] In this Recommendation the Commission noted that significant progress has been achieved by Greece, particularly by increasing its overall reception capacity for both irregular migrants and applicants for international protection. At the same time, the Commission noted a number of challenges in the Greek asylum system and, for this reasons, recommended only a gradual resumption of Dublin transfers. According to the Recommendation, the resumption of transfers should not be applied retroactively and should only concern asylum applicants who have entered Greece irregularly from March 15, 2017 onwards, or for whom Greece is responsible from March 15 under the Dublin criteria. Most importantly, the Recommendation suggested that asylum applicants should only be transferred to Greece if Greek authorities give individual

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[33] *C.K. v Slovenia*, *supra* note 29, at para. 96.
[34] *Id.*
[35] Cecilia Rizcallah, *The Dublin system: the ECJ Squares the Circle Between Mutual Trust and Human Rights Protection*, EU LAW ANALYSIS (Feb. 20, 2017), http://eulawanalysis.blogspot.hr/2017/02/the-dublin-system-ecj-squares-circle.html.
[36] Commission Recommendation 2016/8525 of Dec. 18, 2016, addressed to the Member States on the resumption of transfers to Greece under Regulation (EU) No. 604/2013.

assurance in each case that the asylum applicant will be hosted in appropriate reception centers and treated in accordance with EU law standards. The Commission recommended that vulnerable migrants (especially unaccompanied minors) should not be transferred at all.

However, the non-binding character of Commission recommendations makes the reality different from its content. For this reason, there is no guarantee that individual Member States will follow the Recommendation in individual cases. The number of Dublin requests to Greece best illustrates this statement: in 2016 the Greek Dublin Unit received 4,415 incoming requests, most of them coming from Hungary.[37] Out of that number, 97% requests were based on the state-of-first-entry criterion. Despite the fact that in 2016 only three Dublin transfers to Greece actually took place, the number of requests coming from Hungary clearly shows the Hungarian position that Dublin transfers to Greece need to be reinstated.[38]

The CJEU's judgment *NS* was also embraced in the process of amending the Dublin II Regulation into the currently operative Dublin III Regulation. Article 3(2) of the Dublin III Regulation, thus, explicitly states that the transfer cannot be made in case of systemic flaws in the asylum procedure or in the reception conditions of the Member State responsible for processing the asylum claim, resulting in a risk of inhuman or degrading treatment. In such a case the determining Member States has to establish whether another Member State can be designated as responsible, based on the criteria set by the Dublin Regulation. In case no other Member State can be designated as responsible, the determining Member State shall become responsible for processing the asylum claim. The transformation of the Court's case-law into EU secondary legislation in the case of the Dublin Regulation is one of many instances of the EU legislator's recognition of the importance of the judgments of the Court of Justice and their inclusion into newly adopted EU legal acts.

The effects of the MSS and NS judgments on the Dublin transfers to Greece, as well as the subsequent ECtHR and CJEU judgments in *Abdullahi*, *Tarakhel* and *C.K. v*

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[37] Press Release, Asylum Service, Ministry of Migration Policy of the Hellenic Republic, The Work of the Asylum Service in 2016, *available at* http://asylo.gov.gr/en/wp-content/uploads/2017/01/Press-Release-17.1.2017.pdf.

[38] *Id*.

Slovenia are not the only instances of deviation from the Dublin state-of-first-entry rule. Germany serves as yet another example of avoidance of Dublin transfers, visible at four levels. First, apart from suspending all Dublin transfers to Greece,[39] Germany decided to use the sovereignty clause to suspend Dublin transfers of Syrians. The suspension was in force from August 21, 2015 until October 21, 2015, when Dublin transfers were again reintroduced for Syrian asylum seekers.[40] The suspension decision was taken as internal instructions by the Germany's Federal Office for Migration and Refugees (BAMF) entitled "Instructions on the suspension of the Dublin procedure for Syrian nationals".[41] It should be understood in the context of a number of developments taking place in Germany in 2015 and the political reactions to these developments (including the Chancellor Merkel's dramatic statement "We can do it.").[42] Following this period, Syrians in Germany are now treated similarly to other nationalities in the context of the Dublin Regulation. In 2016, 500 Syrians were transferred from Germany to other EU Member States.[43]

Second, according to the available information, in 2016, in 39,663 cases either the use of the sovereignty clause or "*de facto* impediments to transfers" resulted in the asylum procedure being carried out in Germany.[44] This figure represents a significant increase in comparison to 2,882 cases for the first half of 2015 and 2,225 cases for the whole 2014. Third, Germany applies the sovereignty clause to particularly vulnerable persons. Such practice has been applied to Dublin transfers to Malta since 2009.[45]

[39] In 2016, in all the 31, 488 cases in which Greece was found to be responsible for processing the asylum claim, Germany suspended the Dublin transfer either based on the sovereignty clause or for other reasons. In December 2016, the Federal Minister of the Interior stated that the Dublin transfers to Greece could be reintroduced in the course of 2017 "subject to strict conditions". *See* Asylum Information Database [hereinafter AIDA], Dublin statistics for Germany 2016, *available at* http://www.asylumineurope.org/reports/country/germany/asylum-procedure/procedures/dublin [hereinafter Germany statistics 2016].

[40] *Deutschland will Syrer wieder in andere EU-Länder zurückschicken*, SPIEGEL ONLINE (Nov. 10, 2015, 6:29 PM), http://www.spiegel.de/politik/deutschland/fluechtlingskrise-deutschland-wendet-dublin-verfahren-an-a-1062156.html.

[41] GERMAN FEDERAL OFFICE FOR MIGRATION & REFUGEES, INSTRUCTIONS ON THE SUSPENSION OF THE DUBLIN PROCEDURE FOR SYRIAN NATIONALS (2015), *available at* http://www.asylumineurope.org/sites/default/files/resources/bamf_instructions_on_syrian_dublin_cases_august_2015.pdf.

[42] For a short overview of these developments, *see In the eye of the storm*, ZEIT ONLINE (May 7, 2015), http://www.zeit.de/politik/deutschland/2015-09/angela-merkel-refugees-crisis-chancellor/seite-4.

[43] *See* Germany statistics 2016, *supra* note 38.

[44] *Id.* According to the A.I.D.A. statistics, it is not clear whether the "*de facto* impediments to transfers" also includes cases in which the humanitarian clause (art. 17(2) of the Dublin III Regulation) was used.

[45] *See* Germany statistics 2016, *supra* note 38.

Finally, apart from the above political decisions, which affected certain categories of asylum seekers and covered major groups of applicants, German courts ruled on the suspension of Dublin transfers to Bulgaria, Hungary and Italy in several hundred individual cases in 2016, by issuing interim measures.[46]

Germany is only one – though probably the most prominent- example of the non-application of the Dublin state-of-first-entry rule due to its deficiencies and the dysfunction of the Dublin system. The 2016 statistics across the EU reveal three crucial deficiencies of the Dublin system. First, a generally low number of Dublin transfers actually take place, when compared to the number of Dublin requests.[47] Such a contrast between the number of Dublin requests and transfers leads to the wasting of Member States' resources and creating delays in asylum procedures. Second, there is a structural inconsistency between the Dublin transfers and the relocation scheme.[48] The relocation scheme has its logic in the principle of solidarity, as it aims to shift the burden of processing significant numbers of asylum claims from Greece and Italy - as the Member States of first entry due to their geographical position at the external borders of the European Union - to those Member States that are not so exposed to asylum waves. However, the Dublin state-of-first-entry rule can neutralize the positive effects of the relocation mechanism, as the transfers sometimes outnumber the relocation numbers. The situation in the first eleven months of 2016 in Italy illustrates this statement, as Italy transferred 1,864 asylum applicants to other EU Member States under the Dublin and relocation schemes, but received 2,086 people from other EU Member States under Dublin.[49]

Third, the underlying logic of the state-of-first-entry rule runs counter to human rights standards. Reality has shown that the safeguard clauses contained in the Dublin Regulation (Article 3(2) and Article 17) do not suffice to ensure the protection of asylum seekers' rights. Unfortunately, at least some Member States might decide to

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[46] *Id.*
[47] In 2016, Italy had the lowest rate of 0.4% Dublin transfers in comparison to the number of Dublin request, Germany, the as the main operator of the system had the rate of 7.1%. A number of other Member States, such as Hungary (3.8%) and Bulgaria (12%) also had a very low rate. *See* AIDA, THE DUBLIN SYSTEM IN 2016: KEY FIGURES FROM SELECTED EUROPEAN COUNTRIES 4 (2017) [hereinafter 2016 KEY FIGURES].
[48] The relocation scheme will be discussed in more detail in Section IV.
[49] 2016 KEY FIGURES, *supra* note 46, at 5.

initiate Dublin transfers even in case of systemic flaws in the asylum system of the reception Member State, or they might choose to ignore the individual situation of the asylum seeker, which might result in a real risk of inhuman or degrading treatment. The statement by Austria, Belgium and Germany, indicating that they intend to restart Dublin transfers to Greece in the course of 2017, illustrates this point.[50]

Due to all the above-mentioned deficiencies, the Dublin Regulation – as it now stands – remains ill-suited to respond to the challenge of high refugee inflows in a human-rights compliant, politically fair and practically efficient manner. This is also well illustrated by the situation on the "Western Balkans route" in 2015, where hundreds of thousands of migrants moved without being registered, fingerprinted and processes in accordance with the Dublin rules in the EU Member State of first entry.[51] Fingerprinting of all asylum seekers and irregular migrants is mandatory, based on the Eurodac Regulation.[52] According to Articles 9 and 17 of the Regulation, each EU Member State is obliged to take fingerprints of every asylum seeker and third-country national who crosses its border irregularly if they are at least 14 years old. Fingerprinting has to be done as soon as possible and no later than 72 hours after the lodging of the asylum application. Effective fingerprinting is a precondition for the functioning of the Dublin system. Unless Member States take fingerprints of third-country nationals who cross their borders - no matter whether they apply for asylum or not – there are no data showing which was the state of first entry of the asylum

[50] AIDA, COUNTRY REPORT AUSTRIA, 2016 UPDATE 39 (2017), *available at* www.asylumineurope.org/reports/country/austria; AIDA COUNTRY REPORT BELGIUM, 2016 UPDATE 14 (2017), *available at* www.asylumineurope.org/reports/country/belgium; AIDA COUNTRY REPORT GERMANY, 2016 UPDATE (2017), *available at* www.asylumineurope.org/reports/country/germany.

[51] Almost 880,000 people crossed from Turkey to Greece in 2015 and most of them continued travelling from Greece along the "Western Balkans route": via the Former Yugoslav Republic of Macedonia, Serbia into Hungary or Croatia and further to Slovenia and Austria, into Germany. As regards no fingerprinting *see, e.g.*, Press Release, European Commission, Implementing the European Agenda on Migration: Commission reports on progress in Greece, Italy and the Western Balkans (Feb. 10, 2016), *available at* http://europa.eu/rapid/press-release_IP-16-269_en.htm; Shadia Nasralla, *On the border, Austria takes migrant fingerprints, then discards them*, REUTERS (Feb. 22, 2016, 11:51 AM), http://uk.reuters.com/article/uk-europe-migrants-fingerprints-idUKKCN0VV1AX.

[52] Regulation 603/2013, of the European Parliament and 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 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 O.J. (L 180) 1–30 (EU).

seeker. However, a major number of third-country nationals travelling along the Western Balkans route in 2015 were not fingerprinted and processed in accordance with the Dublin rules when crossing the borders of several EU Member States.[53] Instead, their transportation from the border of one state to the next on the Western Balkans route was well-organized by authorities of the respective states, which ignored their Dublin obligations and enabled the migrants to reach their desired state of destination, in most cases being Germany.[54]

Whereas the present of the Dublin Regulation looks weak and inoperative, its future remains uncertain. This fact has been recognized by a number of EU leaders including the President of the European Council, Donald Tusk, who acknowledged, on October 13, 2015, in his invitation letter to the heads of state, that EU Member States "should consider the future of the Dublin system … and whether to keep it as it is or to look for alternatives".[55]

In May 2016 the European Commission put forward its proposal of the Dublin amendments (the Dublin IV Proposal).[56] Unfortunately, the Dublin IV Proposal retains the Dublin III logic and reinforces it, as the Member States of first entry retain

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[53] As a response to such violation of Member States' EU law obligations stemming from the Eurodac Regulation, the European Commission started infringement proceedings against Croatia, Greece and Italy on December 10, 2015. For a more detailed discussion on infringement proceedings, see Section III(B).

[54] After the submission of this paper for publication, the Grand Chamber of the Court of Justice issued two important rulings on the same day concerning the consequences of the non-application of the Dublin state-of-first-entry rule across the 2015/2016 Western Balkans route. The first decision was Joined Cases C-490/16 and C-646/16 A.S. v. Slovenian Republic, ECLI:EU:C:2017:585 (2017) and C-646/16 Jafari, ECLI:EU:C:2017:586 (2017), in which the Court of Justice ruled that Croatia was responsible for examining applications for international protection by persons who crossed its border during the 2015/2016 migration wave. However, in its second decision, Case C-670/16 Tsegezab Mengesteab v. Bundesrepublik Deutschland, ECLI:EU:C:2017:587 (2017), the Court limited the temporal effects of its judgment in *Jafari* by declaring that a Dublin transfer cannot take place upon the expiry of the three-month period after the application for international protection has been lodged. According to the Court, that period starts to run before a formal asylum application has been lodged, if a written document confirming the request for international protection has been received by the competent authority. In practical terms this means that the three-month period has expired for all the migrants who crossed the Western Balkans route in 2015/2016 and that, consequently, Dublin transfers to Croatia are not possible in case of several hundred thousand migrants, who passed through Croatia on their way to Western European states, where they eventually applied for asylum.

[55] Invitation letter by President Donald Tusk to the members of the European Council (Oct. 13, 2017), *available at* http://www.consilium.europa.eu/en/press/press-releases/2015/10/13-tusk-invitation-letter-european-council.

[56] *Commission Proposal for a Regulation of the European Parliament and 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 (May 4, 2016) [hereinafter Dublin IV Proposal].

the existing responsibilities contained in Dublin III and generate additional responsibilities - of filtering out persons coming from a "first country of asylum", a "safe third country" and a "safe country of origin" - in the pre-Dublin admissibility stage.[57]

Equally important, the Dublin IV Proposal could further violate the asylum applicant's human rights, as it contains a number of new, strict rules, which could affect the applicant's rights. First, the Proposal contains a rule on the use of the accelerated procedure as a sanction in case of the applicant's secondary movement from the Member State responsible for processing the asylum claim to another Member State.[58] Second, the applicant is not entitled to reception rights in any Member State apart from the one in which he is required to be present, the only exception being emergency health care situations.[59] Finally, in case of a "take back" Dublin procedure – where an application has been rejected and the applicant then made an application in another Member State than the Member State responsible under the Proposal or where the applicant is on the territory of another Member State without a residence document - the applicant would no longer have a right to an effective remedy against a denial of protection.[60]

All these rules aim at punishing the applicant who has made a secondary movement from the Member State responsible for processing the asylum claim to another EU Member State. Punishing asylum seekers who move to another state in search of better conditions does not seem fair or just.[61] Such a sanction-based approach to asylum seekers is unlikely to improve either the Member States' or the asylum seekers' trust in the Dublin system and to contribute to its legitimacy and fairness. The unwillingness to explore new mechanisms in the Dublin IV Proposal - which

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[57] For the critique of the Dublin IV Proposal, *see European Council on Refugees & Exiles, Comments on the Commission Proposal for a Dublin IV Regulation*, COM (2016) 270 (2016), *available at* http://www.ecre.org/wp-content/uploads/2016/10/ECRE-Comments-Dublin-IV.pdf [hereinafter COMMENTS ON DUBLIN IV]; EUROPEAN PARLIAMENT LIBE COMMITTEE STUDY, IMPLEMENTATION OF THE 2015 COUNCIL DECISIONS ESTABLISHING PROVISIONAL MEASURES IN THE AREA OF INTERNATIONAL PROTECTION FOR THE BENEFIT OF ITALY AND OF GREECE (2017), *available at* http://www.europarl.europa.eu/RegData/etudes/STUD/2017/583132/IPOL_STU(2017)583132_EN.pdf.

[58] Dublin IV Proposal, *supra* note 55, arts. 5(1) & 20(3).

[59] *Id.* art. 5(3).

[60] *Id.* art. 20(5).

[61] COMMENTS ON DUBLIN IV, *supra* note 56.

could promote asylum seekers' rights and enhance mutual trust and fairness, through burden-sharing and different joint activities such as joint processing - is the result of a lack of confidence and of fear of the negative impact of a mass refugee influx.

B. A Glimpse into National Asylum Legislations and Recognition Rates

The functioning of EU asylum and migration law relies on its proper implementation and application by national legislators, administration and judiciary. However, in the past several years, a number of EU Member States have adopted national legislation and conducted practices in clear breach of their EU asylum law obligations. The most prominent examples are the ones of Hungary, Austria and Greece. This subheading will first examine the human-rights noncompliant legislation in these three states and then address the (in)adequacy of the EU's institutional response to such practices. The second part of the subheading will discuss the diverging recognition rates of asylum applications among Member States and their potential reasons.

In 2015 Hungary built a barbed wire fence towards Serbia (a third-country,) and Croatia (an EU Member State, but not yet a Schengen state).[62] In September 2015, Hungary adopted national laws which enable fast-tracking of asylum seekers who arrive on its territory via Serbia. The existing practice has shown that a decision dismissing the asylum application can be made within one hour, with a ban on entering for a year.[63] The asylum seekers are often not interviewed by the authorities, they are not given proper information free of charge, they have difficulties in accessing free legal assistance and interpretation and they are not told why they are detained and how they can appeal against detention.[64] Applications are systematically declared inadmissible due to the fact that applicants have reached Hungary via Serbia and they have no means to challenge the proposition that Serbia is a safe country.[65]

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[62] The Schengen Area is an area without internal border controls. It started in 1985 by the signing of the Schengen Agreement by five states, which was supplemented by the Schengen Convention in 1990. The implementation of the Schengen agreements originally involved seven EU states. These agreements first functioned as international law treaties binding their signatories, but as of 1999 the Schengen rules have become integrated into the EU law framework. Today, the Schengen Area encompasses 26 states (22 EU Member States plus Switzerland, Norway, Iceland and Lichtenstein).
[63] Eszter Zalan, *EU Commission concerned by Hungary's migration laws*, EUOBSERVER (Oct. 13, 2015, 9:07 AM), https://euobserver.com/migration/130656.
[64] *Id.*
[65] *Id.*

On top of that, the new law criminalizes both the refugees who break through the razor wire (up to 3 years of imprisonment) and anyone who helps them cross the border (1-5 years of imprisonment).[66]

Austria, on the other hand, instituted a daily cap of 80 asylum applications at its border in February 2016. In April 2016, the National Council of the Austrian parliament adopted a national law which allows the government, with the approval of the Main Committee of the parliament, to declare "special measures for the maintenance of public order and the safeguarding of internal security" in the event of significant arrivals of migrants and asylum seekers at Austria's borders.[67] Similar to the Hungarian package, the Austrian law enables fast-tracking of asylum seekers, as it urges the Austrian police officers to examine applications exclusively for determining whether the asylum seeker can be returned to the neighboring country from which he/she came. The law allows formal application for asylum only to those whose nuclear family members are already in Austria, or who argue successfully that their lives would be in danger in the neighboring country, or that they would face a real risk of torture or inhuman or degrading treatment there.[68] On top of that, Austria built a fence along its Spielfeld border crossing with Slovenia, and it plans to build a fence on its border with Italy at the Brenner Pass, as well as fences at two border crossings with Hungary.[69]

Finally, Greece is an isolated case due to its geographical position and its incapacity to process and accommodate such a significant number of asylum seekers that reached its territory, particularly in 2015.[70] As a consequence, the Greek asylum system has not functioned in a human-rights compliant manner, thus violating not only the Dublin Regulation, but also the three crucial EU asylum law acts that provide for asylum seekers' rights: the Asylum Procedures Directive, the Reception Conditions Directive and the Qualification Directive.

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[66] Amnesty International, *Hungary: Refugees blocked by forces, criminalized by laws* (Sep. 15, 2015), www.refworld.org/docid/55f90e7b4.html.
[67] Human Rights Watch, *Austria: Drastic, Unjustified Measures against Asylum Seekers*, (Apr. 27, 2016), www.refworld.org/docid/5721cccd118.html.
[68] *Id.*
[69] Tim Hume & Atika Shubert, *Austria passes tough new asylum laws as attitudes to migrants harden*, CNN (Apr. 28, 2016, 4:10 PM), http://edition.cnn.com/2016/04/28/europe/austria-tough-migrant-laws.
[70] *See, e.g.*, EUR. PARL. ASS. RES. 2109 (Apr. 20, 2016) (On the situation of refugees and migrants under the EU–Turkey Agreement of 18 March 2016).

The EU institutional reaction to the Hungarian, Austrian, Greek and other Member States' violations of their human-rights-based EU obligations has been conducted through infringement proceedings.[71] Infringement proceedings are a mechanism initiated by the European Commission against a Member State that fails to fulfill its EU law obligations. They can result in a decision of the Court of Justice to impose financial sanctions on the respective Member State.[72] On September 23, 2015, the European Commission instituted forty infringement proceedings against nineteen Member States due to their potential infringement of EU asylum legislation.[73] These decisions were followed by the opening of a further eight infringement proceedings against five Member States on December 10, 2015.[74] This number adds to the already pending 34 proceedings in the area of EU asylum law. The number of infringement proceedings illustrates both the inadequacy of the current EU asylum rules and the incapacity or unwillingness of EU Member States to implement the standards set thereby.

However, the institution of infringement proceedings need not have any effect on the potentially failing Member State. Infringement proceedings take years to complete and during that time the respective Member State can continue its human-rights non-compliant practices without any consequences. For that reason, infringement proceedings, though being a powerful tool, do not in themselves suffice to prevent or alter Member States' violations of refugees' human rights.[75]

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[71] Art. 258 TFEU.
[72] Art. 260 TFEU.
[73] Press Release, European Commission, More Responsibility in Managing the Refugee Crisis: European Commission adopts 40 infringement decisions to make European Asylum System work (Sep. 23, 2015).
[74] Press Release, European Commission, Implementing the Common European Asylum System: Commission escalates 8 infringement proceedings (Dec. 10, 2015).
[75] Consolidated Version of the Treaty on European Union, art. 7, 2010 O.J. C 83/01 [hereinafter TEU] provides another tool for sanctioning Member States' violations of EU foundational values of human dignity, freedom, democracy, equality, the rule of law and human rights enumerated in art. 2 TEU. There are two different mechanisms envisaged by art. 7 TEU: the preventive mechanism (art. 7(1)), which can be activated only in case of a "clear risk of a serious breach", and the sanctioning mechanism (art. 7(2)), which can be activated only in case of a "serious and persistent breach by a Member State" of the art. 2 values. The preventive mechanism allows the Council to issue a warning to the Member State concerned before a "serious breach" has materialized. The sanctioning mechanism allows the Council to suspend certain Member State's rights, including the voting rights in the Council. However, art. 7 has never been used, despite the repeated calls for its activation against Poland and some other E.U. Member States. *See* Leonard F. M. Besselink, *The Bite, the Bark and the Howl: Article 7 TEU and the Rule of Law Initiatives*, *in* THE ENFORCEMENT OF EU LAW AND VALUES:

Incorrect implementation and application of EU asylum law as well as unharmonized practices lead to divergent recognition rates of asylum applications in different EU Member States. The figures in Table 1 illustrate such divergences with regard to first instance decisions on asylum applications lodged by Syrian, Eritrean and Iraqi nationals. The figures in the AIDA Annual Report for 2014/15 further show that even where the overall recognition rate for a particular nationality, such as for Syrians and Eritreans, is high across Europe, there are significant differences in the type of protection status (refugee status or subsidiary protection) applicants receive across the EU.[76]

One could partly explain and justify the differences in recognition rates by the fact that different Member States have to process significantly different numbers of asylum applications and the numbers might not always be equally representative of the situation. Also, in some cases asylum seekers do not stay to wait for the first instance decision, but they continue moving to another Member State. In such cases of secondary movement, the negative first instance decisions are the result of the fact that the asylum seeker is no longer present in the Member State where the asylum claim is being processed. However, these reasons explain only partly the considerable variations of recognition rates among EU Member States. The figures on recognition rates for Iraqi nationals illustrate this point. For example the 2014 first instance recognition rate for Iraqis was 87% in Germany, 91% in Italy and 60% in Italy, considering the three EU Member States that issued over half of the Union's first instance decisions for Iraqi nationals. As a contrast, the Greek recognition rate for Iraqi nationals was only 14% and this percentage was in absolute numbers represented by 80 negative decisions out of 575 overall decisions for Iraqi nationals.[77] Such considerable differences indicate that national practices significantly deviate not

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ENSURING MEMBER STATES' COMPLIANCE 128 (András Jakab & Dimitry Kochenov eds., 2017); Wojciech Sadurski, *Adding Bite to a Bark: The Story of Article 7, EU Enlargement, and Jörg Haider*, 16 COLUM. J. EUR. L. 385 (2010). *See also* Ginger Hervey & Emmet Livingstone, *What is Article 7?*, POLITICO (Jan. 13, 2016, 10:55 AM), http://www.politico.eu/article/hungary-eu-news-article-7-vote-poland-rule-of-law/.

[76] AIDA ANNUAL REPORT, COMMON ASYLUM SYSTEM AT A TURNING POINT: REFUGEES CAUGHT IN EUROPE'S SOLIDARITY CRISIS 18 (2015), http://www.asylumineurope.org/sites/default/files/shadow-reports/aida_annualreport_2014-2015_0.pdf.

[77] *Id.* at 22.

only among themselves, but also from the Member States' EU asylum law obligations in general.

Table 1: 1st Instance Recognition Rates (2014)

Syrians	Sweden: 100%	Estonia: 50%	Slovakia: 43%
Eritreans	Sweden: 100%	Greece: 48%	France: 26 %
Iraqis	Italy: 91%	Greece: 14%	Denmark: 13%

Source: AIDA Annual Report 2014/2015: *Common Asylum System at a Turning Point: Refugees Caught in Europe's Solidarity Crisis*, 2015, available at: http://www.asylumineurope.org/sites/default/files/shadow-reports/aida_annualreport_2014-2015_0.pdf (last accessed on April 10, 2017)

IV. EU Response to the Refugee Influx – Is It Right and Legitimate?

The European Union instituted a number of measures as a response to the mass refugee influx. The measures can be divided into three broad categories. The first category comprises measures that enhance cooperation with third countries and aim partly at preventing individuals from reaching European soil and partly at returning some of the newly arrived back outside the EU borders. The EU-Turkey Statement stands out as the most prominent measure in this category.[78] The second category are measures aimed at the improvement of EU solidarity, more efficient processing of asylum claims and better management of the asylum flows in general. In this category, the proposal of a new Common European Asylum System (CEAS) package and two Relocation Decisions, adopted in 2015, deserve special attention. The final category are measures aimed at strengthening the EU's external borders, such as the creation of the European Border and Coast Guard Agency.[79] The following paragraphs will discuss the two Relocation Decisions and the EU-Turkey deal in more detail, as the three measures that best reflect the EU dynamics triggered by the refugee inflows and problematize the EU response in the context of its alignment with human rights standards and legitimacy.

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[78] Press Release, Council of Europe, EU-Turkey Statement (Mar. 18, 2016), http://www.consilium.europa.eu/press-releases-pdf/2016/3/40802210113_en.pdf.

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

A. The Failure of the Relocation Decisions

In 2015, the EU Member States adopted two relocation acts and one resettlement act. The first Relocation Decision and the Resettlement Conclusions[80] were adopted as part of the First Implementation Package on May 27, 2015.[81] The second Relocation Decision was adopted as part of the Second Implementation Package on September 9, 2015.[82] The semantic difference between resettlement and relocation is based on the geographic distinction between the two schemes.Resettlement implies the transfer of a person from a third country into the territory of the European Union, while relocation applies to the transfer of a person from one EU Member State to another. Relocation is therefore based on the idea of EU solidarity, as its underlying premise is to relieve the burden from Greece and Italy - as the two geographically most exposed EU Member States of first entry of asylum seekers - and to distribute the asylum seekers evenly across the EU.

The two Relocation Decisions could thus be viewed as the expression of Member States' mutual trust and fairness, which are two important elements of solidarity.[83] The migration and asylum solidarity clause, contained in Article 80 TFUE, explicitly mentions "fairness" by stating that EU policies on border checks, asylum and immigration "shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States". Fair responsibility-sharing and burden-sharing would imply assistance by Member States exposed to a lower number of asylum seekers to the Member States exposed to higher asylum pressures, primarily as the result of their geographical position of the external Union borders and the Dublin state-of-first-entry rule.

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[80] Conclusions of the Representatives of the Governments of the Member States meeting within the Council on resettling through multilateral and national schemes 20,000 persons in clear need of international protection, 11130/15 (July 22, 2015), http://data.consilium.europa.eu/doc/document/ST-11130-2015-INIT/en/pdf. The Resettlement Conclusions provided for the resettlement, in the period of two years, of 22,504 people in need of international protection from the Middle East, Horn of Africa and Northern Africa.

[81] For the list of acts contained in the First Implementation Package, *see* https://ec.europa.eu/home-affairs/what-we-do/policies/european-agenda-migration/proposal-implementation-package_en.

[82] For the list of acts contained in the Second Implementation Package, *see* https://ec.europa.eu/home-affairs/what-we-do/policies/european-agenda-migration/proposal-implementation-package_en.

[83] *See* Goldner Lang, *supra* note 16.

However, despite their positive premise, the Relocation Decisions were adopted to apply only to a time-limited emergency situation of Greece' and Italy's exposure to a disproportionate number of asylum seekers exceeding their capacities.[84] For this reason - despite the fact that the Relocation Decisions can be considered an exception to the Dublin state-of-first-entry rule and thus an improvement – they do not amend the rule itself, but only enable its partial non-application in an emergency situation. Also, the relocation schemes would not have been triggered automatically without the political will of the EU Member States to adopt the Decisions in the Council of Ministers. They are therefore limited in scope and based on a political, voluntary decision of EU Member States.

The dependence of the Relocation Decisions on the political will of Member States had two significant consequences. First, the process of their adoption in the Council of Ministers revealed the Member States' disagreement and division as to the right approach to the refugee inflows. Four Member States – the Czech Republic, Hungary, Romania and Slovakia – voted against the Second Relocation Decision. However, the passing of the Decision required a qualified majority vote in the Council and the four Member States did not have enough votes to block its adoption.[85] Consequently, all the EU Member States, including the ones that voted against the Second Relocation Decision, became legally bound by the relocation quotas contained therein.

In December 2015 Slovakia and Hungary started annulment actions against the Second Relocation Decision before the Court of Justice of the European Union.[86] In both actions, the two Member States contested the procedure applied in the adoption of the Decision, the appropriateness of Article 78(3) TFEU as its legal basis and its compliance with the principle of proportionality. At the time of writing this chapter, the Court of Justice has not yet decided on the two annulment actions. However, the

[84] The Relocation Decisions explicitly state they would apply for two years since their entry into force.
[85] The qualified majority vote requires 55% of Member States, representing at least 65% of the total EU population, to vote in favor of the act. The blocking minority requires at least four Member States representing more than 35% of the EU population. The blocking minority was not achieved in the process of the adoption of the Second Relocation Decision.
[86] Case C-643/15, Slovak Republic v. Council of the European Union, ECLI:EU:C:2017:631 (2017); Case C-647/15, Hungary v. Council of the European Union, ECLI:EU:C:2017:618 (2017). On September 6, 2017—after this chapter was submitted for publication—the Grand Chamber of the Court of Justice decided to dismiss the actions brought by Slovakia and Hungary, declaring that the relocation mechanism had been adopted in accordance with E.U. law, that it actually contributed to enabling Greece and Italy to deal with the 2015 migration wave and that it was proportionate.

pending cases do not suspend the Relocation Decisions, which are thus currently fully in force. Moreover, a number of experts have expressed the view that the legal arguments raised by Slovakia and Hungary are weak.[87]

The second consequence of the dependence of the Relocation Decisions on the political will of EU Member States is their poor and reluctant enforcement in practice. Initially, EU Member States committed to relocate 40,000 asylum seekers, based on the First Relocation Decision, and 120,000 asylum seekers, based on the Second Relocation Decision. The two Decisions, thus, commit EU Member States to the total of 160,000 relocations by September 2017. However, in reality, Member States have committed to relocate "only" 98,255 persons (34,953 from Italy and 63,302 from Greece). This is so because 7,745 slots from the First Relocation Decisions still need to be allocated and because 54,000 were initially not allocated,[88] and it was subsequently decided, as the result of the EU-Turkey Statement, to use them for the resettlement of Syrians from Turkey into the EU, rather than for relocations.[89] Despite such a significant reduction of Member States' commitment, by April 10, 2017 only 17% of relocations actually took place: 5,001 persons were relocated from Italy and 11,339 persons from Greece.[90] As a consequence of the Czech Republic, Hungary and Poland's disregard of their relocation obligations, on June 14, 2017 the European Commission decided to launch infringement procedures against these three EU Member States for non-compliance the 2015 Council Decisions on relocation.[91]

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[87] Kees Groenendijk & Boldizsar Nagy, *Hungary's appeal against relocation to the CJEU: upfront attack or rear guard battle?*, E.U. IMMIGR. & ASYLUM L. & POL'Y (Dec. 16, 2015), http://eumigrationlawblog.eu/hungarys-appeal-against-relocation-to-the-cjeu-upfront-attack-or-rear-guard-battle; Steve Peers, *Relocation of Asylum-Seekers in the EU: Law and Policy*, E.U. LAW ANALYSIS (Sep. 24, 2015), http://eulawanalysis.blogspot.hr/2015/09/relocation-of-asylum-seekers-in-eu-law.html.

[88] This number was initially meant for relocations from Hungary. However, as Hungary refused to be the beneficiary state as it did not want to be seen as a frontline state and it did not want to host a registration and distribution center for thousands of refugees. *See* Duncan Robinson, *Why Hungary wanted out of EU's refugee scheme*, FINANCIAL TIMES (Sep. 22, 2015), https://www.ft.com/content/080fb765-5e93-35f7-9a3c-2e83b26c4b8c.

[89] Council Decision 2016/1754, of 29 September 2016 amending Decision 2015/1601 (EU) establishing provisional measures in the area of international protection for the benefit of Italy and Greece, 2016 O.J. (L 268) 82–84 (EU).

[90] *Eleventh Report from the Commission to the European Parliament, the European Council and the Council on Relocation and Resettlement*, Annex 3, COM (2017) 212 final (Apr. 12, 2017), https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/20170412_eleventh_report_on_relocation_and_resettlement_annex_3_en.pdf.

[91] Press Release, European Commission, Relocation: Commission launches infringement procedures against the Czech Republic, Hungary and Poland, http://europa.eu/rapid/press-release_IP-17-1607_en.htm (June 14, 2017).

Such a low number of relocations is the consequence of several factors. First and foremost, as has been shown in subheading 2, several Member States lack the political will to take over a part of the asylum seekers who are arriving to Greece and Italy. The resistance is best illustrated by Slovak Prime Minister Fico's statements and the Polish parliamentary resolution, cited in subheading 2, which go against not only the Slovak and Polish EU law commitments, but also the principle of non-discrimination proclaimed by Article 2 TEU and Article 21 of the Charter of Fundamental Rights of the European Union. Another reason for a low implementation of the Relocation Decisions in some Member States is a lack of reception and processing capacities, particularly for vulnerable asylum seekers, which may be due to the mismanagement of their asylum systems, leading to the shortage of reception places.[92] However, it is also possible that Member States just claim to lack places, although this might not be substantiated by the facts, as there is no EU mechanism to check the availability of reception spaces.[93] Finally, there have been a number of instances where relocations have been rejected on national security grounds.[94] Whereas, Member States have the right to refuse to relocate on security grounds, it appears that in many cases Member States use the security justification without any individual explanation, which is contrary to Article 5 in both Relocation Decisions and the obligation of the administration to give reasons for its decision, contained in Article 41 of the Charter.[95]

To conclude, the two Relocation Decisions can be viewed, first, as a pragmatic tool to improve the EU asylum system, by moving away from the Dublin state-of-first-entry rule and by improving its efficiency and compliance with human rights, by relieving Greece and Italy from a mass number of asylum seekers exceeding their capacities. Second, the Relocation Decisions can be understood as a solidarity mechanism that would demonstrate - both internally, to its Member States, and externally, to the

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[92] EUROPEAN PARLIAMENT LIBE COMMITTEE STUDY, IMPLEMENTATION OF THE 2015 COUNCIL DECISIONS ESTABLISHING PROVISIONAL MEASURES IN THE AREA OF INTERNATIONAL PROTECTION FOR THE BENEFIT OF ITALY AND OF GREECE 34 (2017), *available at* http://www.europarl.europa.eu/RegData/etudes/STUD/2017/583132/IPOL_STU(2017)583132_EN.pdf.

[93] *Id.* at 32.

[94] *Ninth report on relocation and resettlement*, at 6, COM (2017) 74 (Feb. 8, 2017).

[95] *See* EUROPEAN PARLIAMENT LIBE COMMITTEE STUDY, *supra* note 91, at 22.

outside world - the Member States' commitment to their union and their joint strength to the outside world. In other words, by means of the two Relocation Decisions, the Union had an opportunity to strengthen the legitimacy of its asylum system and of their union itself. For this reason, the fiasco of the Relocation Decisions is at the same time the failure of the EU's attempt to improve its problematic asylum system and the failure of EU solidarity and legitimacy.

The Commission's proposal of the Dublin IV regulation, with its permanent relocation scheme (entitled the "corrective allocation mechanism") and the Member States' right not to participate in the scheme by paying financial contributions, is unlikely to improve the legitimacy of the EU asylum system for two reasons. First, it is unlikely to relieve the pressure on Greece and Italy, as –before the relocation can take place – the state of first entry has to determine the admissibility of the asylum application, according to the "safe third country" and "first country or asylum" criteria of the Asylum Procedures Directive, and to run a security check.[96] Applications declared inadmissible or subject to a security check will not be subject to relocation,[97] leading to an actual negligible relief of the most pressured Member States.[98] Second, Member States will be entitled to choose not to participate in the relocation scheme by paying the financial contribution of EUR 250,000 per applicant for a 12-month period.[99] Such a "pay not to play" clause[100] is both ethically problematic and inefficient, as it cannot effectively improve the reception and processing capacities of the most pressured Member States.[101]

B. The EU-Turkey Statement

The EU-Turkey Statement (the EU-Turkey deal)[102] of March 18, 2016 marks the culminating point in the EU's efforts to curb down the number of refugees and

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[96] Dublin IV Proposal, *supra* note 55, art. 3(3).
[97] *Id.* art. 36(3).
[98] *See* EUROPEAN PARLIAMENT LIBE COMMITTEE STUDY, *supra* note 91, at 64.
[99] Dublin IV Proposal, *supra* note 55, art. 37.
[100] Francesco Maiani, *The Reform of the Dublin III Regulation*, EUR. PARL. COMM. CIVIL LIB., JUS. & HOME AFF. STUDY PE 571.360 34 (2016).
[101] *See* EUROPEAN PARLIAMENT LIBE COMMITTEE STUDY, *supra* note 91, at 64.
[102] Press Release, Council of the European Union, EU-Turkey Statement (Mar. 18, 2016), *available at* http://www.consilium.europa.eu/press-releases-pdf/2016/3/40802210113_en.pdf [hereinafter E.U.

migrants entering the Union territory through Greece. The deal aims to return "all new irregular migrants" – thus including asylum-seekers – "crossing from Turkey into Greek islands as from 20 March 2016".[103] In return, the EU Member States agreed to resettle one Syrian refugee from Turkey for every Syrian being returned to Turkey from Greek islands.[104] Such an arrangement of returning asylum seekers to Turkey is problematic for a number of reasons. Most importantly, it is based on the, often challenged, assumption that Turkey is a "safe third country", meaning it can provide a human-rights compliant procedure and protection to the readmitted person.[105]

The Greek authorities' rejection of the presumption that Turkey is a safe country has been reflected in the decisions of the "Backlog" Appeal Committees. According to the Amnesty International report, «these committees have overturned the vast majority of the appealed first instance inadmissibility decisions of the Greek Asylum Service».[106] Consequently, as of January 31, 2017 «no asylum seeker had been formally returned to Turkey on the basis that Turkey is a safe third country».[107] The lastest figures from April 20, 2017 show that by that date 1,074 people have been returned from Greece to Turkey, whereas there have been 4,939 resettlements of Syrian refugees from Turkey in the period between April 4, 2016 and April 20, 2017.[108] The low number of returns

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Turkey Statement]. Officially, the document is entitled the "EU-Turkey Statement". However, as it is most often referred as a "deal", the term "deal" will be used further in text.

[103] *Id.* Recital 1.

[104] *Id.* Recital 2. Apart from that, the EU agreed to disburse 6 billion euros to Turkey and accelerate the visa liberalization process with a view of lifting the visa requirements for Turkish citizens.

[105] Based on art. 38 of the Asylum Procedures Directive, a "safe third country" is a country where a third country national is treating in accordance with the following principles: a) life and liberty are not threatened on account of race, religion, nationality, membership of a particular social group or political opinion; b) there is no risk of serious harm as defined in Directive 2011/95/EC; c) the principle of non-refoulement in accordance with the Geneva Convention is respected; d) the prohibition of removal, in violation of the right to freedom from torture and cruel inhuman or degrading treatment, as laid out in international law, is respected and; e) the possibility exists to request refugee status and, if found to be a refugee, to receive protection in accordance with the Geneva Convention.

[106] AMNESTY INT'L, A BLUEPRINT FOR DESPAIR: HUMAN RIGHTS IMPACT OF THE EU-TURKEY DEAL 17 2017, *available at* http://www.amnesty.eu/content/assets/Reports/EU-Turkey_Deal_Briefing_Formatted_Final_P4840-3.pdf. The Report further observes that "of the 393 decisions these Backlog Appeal Committees issued, only three upheld the first instance inadmissibility decision of the Greek Asylum Service," *id.* at 14. The decisions of the "Backlog" Appeals Committees stand in contrast with the first instance decisions of the Greek Asylum Service. According to the Report, "of the 1,701 decisions on admissibility issued by the Asylum Service on the islands between 20 March 2016 and 1 January 2017, 1,317 involved negative decisions of admissibility on the premise that Turkey is a safe third country for the asylum-seeker concerned," *id.* at 13.

[107] *Id.* at 17.

[108] *See* Operational implementation of the EU-Turkey Statement, *available at* https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/press-material/docs/state_of_play_-_eu-turkey_en.pdf.

contrasts with 29,671, the number of arrivals to Greece in the period from the coming into force of the EU-Turkey deal until March 17, 2017.[109]

A number of different reports have cautioned that Turkey is not a "safe third country“ due to the lack of effective international protection and the evidence of human rights violations against refugees.[110] The deal, therefore, violates both EU and international law obligations and represents a threat to human rights and EU legitimacy. The fact that the EU is aware of the situation in Turkey makes the deal not only legally, but also ethically problematic.

On February 28, 2017, the General Court[111] decided that it lacks jurisdiction in three annulment actions challenging the legality of the EU-Turkey deal. The actions were brought in April 2016 by two Pakistani nationals and an Afghan national.[112] They travelled from Turkey to Greece, where they applied for asylum, claiming that they risked persecution if they returned to their respective countries of origin. Fearing that they might be returned to Turkey if their asylum applications were rejected, they decided to challenge the legality of the EU-Turkey deal before the Court of Justice of the European Union. In their submission they claimed that the EU-Turkey deal is incompatible with EU fundamental rights, that Turkey is not a safe third country, that the Temporary Protection Directive should have been used in the existing situation,[113] that the EU-Turkey deal is actually an international agreement which fails to comply with the relevant Treaty articles, and that the prohibition of collective expulsion is being breached by the deal. The Court, however, decided not to go into the substance

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[109] Joint Agency Brief Note, The Reality of the EU-Turkey Statement (Mar. 17, 2017), *available at* https://data2.unhcr.org/en/documents/download/54850.

[110] Emanuela Roman, Theodore Baird & Talia Radcliffe, *Why Turkey is not a Safe Third Country*, STATEWATCH ANALYSIS (Feb. 2016), http://www.statewatch.org/analyses/no-283-why-turkey-is-not-a-safe-country.pdf; EUR. COUNCIL REFUGEES & EXILES, THE DCR/ECRE DESK RESEARCH ON APPLICATION OF A SAFE THIRD COUNTRY AND A FIRST COUNTRY OF ASYLUM CONCEPTS TO TURKEY (2016), *available at* http://www.asylumlawdatabase.eu/sites/www.asylumlawdatabase.eu/files/aldfiles/turkeynote%20final%20edited%20DCR%20ECRE.pdf; AMNESTY INT'L, NO SAFE REFUGE: ASYLUM-SEEKERS AND REFUGEES DENIED EFFECTIVE PROTECTION IN TURKEY (2016).

[111] The General Court is the lower instance court within the Court of Justice of the European Union.

[112] Orders of the General Court in Cases T-192/16, T-193/16 and T-257/16 N.F., N.G. & N.M. v. European Council, ECLI:EU:T:2017:128, ECLI:EU:T:2017:129 and ECLI:EU:T:2017:130.

[113] Council Directive 2001/55/EC, 2001 O.J. (L 212) 12–23 (EC) (on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof).

of the case. Instead, it concentrated on the procedural aspects of the EU-Turkey deal and stated that the deal was in reality adopted by the Member States and not by the EU. Therefore, the Court concluded that the deal was not an EU act and that, consequently, it lacked jurisdiction to review the deal. One wonders whether the Court deliberetly chose to avoid discussing the substance of the actions. In the meantime, the applicants appealed and the case is now before the Court of Justice, as the CJEU's higher instance, which will have to respond to the pleas in the following months.

V. Concluding Remarks

The preceding discussion aimed to show three serious effects of refugee inflows on the functioning of the EU asylum system. First, they have led to the dysfunction of certain elements of EU asylum law in practice. Second, they have given rise to instances where the newly adopted national asylum rules go against the human rights standards and violate both the EU and international law obligations of the respective EU Member State. Finally, they have resulted in new EU measures which arguably violate human rights standards and infringe EU primary law and international law.

Overall, the current EU asylum law has proved inadequate to respond to mass refugee inflows. The only exception is the Temporary Protection Directive, which was adopted as a response to the war in ex-Yugoslavia, but, for political reasons, has never been used. The European Commission proposed its application for Libyan refugees in 2011 during the Arab Spring, but Member States refused to employ it, fearing it would create a pull factor for even higher volumes of refugee arrivals.

Further, EU asylum law has in some instances been based on incorrect assumptions, leading to human rights violations in practice. The dysfunction of the Dublin Regulation and its state-of-first-entry rule, as well as the highly criticized EU-Turkey deal, are clear examples of how such incorrect assumptions can result in violations of both EU and international law in practice.

Finally, the refugee influx has led to a change of paradigm in EU law in general, and EU asylum law in particular. This change can be best illustrated by three

developments. First is the shift of focus from protecting individuals to protecting states. The EU-Turkey deal and the proposal of the new Common European Asylum System (CEAS) package illustrate such a shift and an ever stronger emphasis on protecting states.

Another development marking the change of paradigm of EU law is a retrenchment process, whereby EU Member States choose to withdraw from certain measures and policies (as contrasted to further European integration based on "spillover" effect into more policy areas). The spillback in EU asylum law has been illustrated by the discussion of many instances of non-application of the Dublin state-of-first-entry rule, by the analysis of national asylum laws and practices that violate EU law obligations and by diverging recognition rates of asylum applications across the EU. All these examples can be described as a spillback or, in other words, as the Member States' withdrawal from the commonly adopted EU asylum policy.

The change of paradigm of EU law is also marked by the beginning of "regressive integration" - a new phase of EU integration, partly triggered by the refugee influx. The first sixty years of European integration have been marked by "progressive integration" or, in other words, the conferral of ever more and stronger individual rights and free movement, as well as by "an ever closer union among the peoples of Europe".[114] As opposed to "progressive integration", the past several years have been marked by a different type of a "backward" or "regressive" integration - integration which tends to restrict individual rights and free movement, but an integration nevertheless. Even though the fears that the EU might disintegrate have, at least so far, proved wrong, the process of "regressive integration" seems to spread and change the face of the EU from what one has become used to.

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[114] Art. 1 TEU.