



ARTICLES

THE EU'S SHIFTING BORDERS RECONSIDERED: EXTERNALISATION, CONSTITUTIONALISATION, AND ADMINISTRATIVE INTEGRATION

edited by Evangelia (Lilian) Tsourdi, Andrea Ott and Zvezda Vankova

THE EU'S SHIFTING BORDERS RECONSIDERED: EXTERNALISATION, CONSTITUTIONALISATION, AND ADMINISTRATIVE INTEGRATION

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ABSTRACT: Borders have gone far beyond their traditional static function of merely demarcating nation-states. Alongside physical border barriers, such as walls and barbwire fences, new technologies driven by sophisticated legal innovations have contributed to the multiplicity of border controls. These legal techniques have turned the border into an individualised moving barrier, conceptualized as a "shifting border" by Ayelet Shachar. Against this backdrop, this *Article* introduces, conceptually and thematically, the contributions to this *Special Section* which critically assess the paradigm of the shifting border

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This *Special Section* resulted from papers presented at the online workshop organised in December 2020 in the framework of the NOVA-EU project (Innovating and Transforming the European Union), NOVA-EU – Research – Maastricht University, which was financially supported by the Jean Monnet action of the European Commission. The editors would like to thank Emma Pessotto for her language revision.



in the EU and analyse its implications. We first map out intricate legal issues invoked by the rise of hybridity and informality in the EU's cooperation with third countries on migration and the resulting accountability deficit. Next, we scrutinize the physical and legal infrastructures of mobility regulation (and often deflection) that are currently employed at the EU's external territorial borders. We highlight the emergence of increasing horizontal (between the EU and national level) and vertical (across national levels) administrative integration as a prevailing mode of policy implementation at the EU's borders and reflect on the implications, including both challenges and opportunities, of this development. Finally, we scrutinise the Commission's proposals as part of a New Pact on Migration and Asylum with respect to the envisaged processes at the borders and the streamlining of external border control, asylum, and return in a seamless process finding that they create further risks for fundamental rights and procedural guarantees.

KEYWORDS: borders – EU migration policy – EU asylum policy – externalisation – constitutionalisation – EU migration agencies.

I. EU'S SHIFTING BORDERS: AN INTRODUCTION

Over the past two decades researchers from different disciplines have exhibited the complex and transformative nature of borders that have gone far beyond their traditional static “world-configuring function”¹ of merely demarcating nation-states.² Contemporary borders have become characterized by “polysemy” and “heterogeneity”,³ multifunctionality and elasticity,⁴ serving equally as “devices of inclusion that select and filter people” as well as exclusionary measures.⁵ Alongside physical border barriers, such as walls and barbed wire fences, new technologies and instruments driven by “sophisticated legal innovations”,⁶ have contributed to the “multiplication and multiplicity of border controls”.⁷ These legal techniques are characterised by what Inder refers to as “hyper-legalism”,⁸

¹ É Balibar, *Politics and the Other Scene* (Verso 2002) 79.

² See for instance S Sassen, ‘When National Territory is Home to the Global: Old Borders to Novel Borderings’ (2005) *New Political Economy* 523; D Bigo, ‘Globalized (in)Security: the Field and the Ban-Opticon’ in D Bigo and A Tsoukala (eds), *Terror, Insecurity and Liberty: Illiberal Practices of Liberal Regimes after 9/11* (Routledge 2008) 10; D Newman and A Paasi, ‘Fences and Neighbours in the Postmodern World: Boundary Narratives in Political Geography’ (1998) *Progress in Human Geography* 186.

³ É Balibar, *Politics and the Other Scene* cit. 76-79.

⁴ E Weizman, *Hollow Land: Israel's Architecture of Occupation* (Verso 2007) 6.

⁵ B Neilson and S Mezzadra, *Border as Method, or, the Multiplication of Labor* (Duke University Press 2013) 7.

⁶ A Shachar, *The Shifting Border: Legal Cartographies of Migration and Mobility. Ayelet Shachar in Dialogue* (Manchester University Press 2020) 7.

⁷ See further A Kraler, M Hindow and F Pastore, ‘Introduction: Multiplication and Multiplicity. Transformations of Border Control’ (2016) *Journal of Borderlands Studies* 145-149.

⁸ C Inder, ‘International Refugee Law, “Hyper-Legalism” and Migration Management: The Pacific Solution’ in M Geiger and A Pécoud (eds), *The Politics of International Migration Management. Migration, Minorities and Citizenship* (Palgrave Macmillan 2010) 220.

enabling states to “pay lip service to their international obligations”, while in practice subverting their purpose and substance to keep asylum seekers away.⁹ The “hyper-legalism” approach is essential ingredient of the “architecture of repulsion”¹⁰ and the “shifting border” paradigm, which have turned the border into an individual moving barrier.¹¹

The shifting border is rooted in migration control that is exercised to selectively restrict the unwanted and “spontaneous migrants” and at the same time to facilitate mobility for the wealthy and those with desired skills. As its name prompts, the location of this border is not fixed in time or place – it shifts inwards and outwards of the territory – while simultaneously exhibiting features of a static border transformed into “the last point of encounter, rather than the first”.¹² Through the use of “law’s admission gates”, this “everywhere-and-nowhere border” moves into the interior of the territory to create “constitution free zones”, referred also as “barbicans”,¹³ where the rights of those non-citizens without a proper legal status become suspended or severely limited. At the same time, relying on legal means of deterrence,¹⁴ the border also becomes externalized beyond the limits of its territory. Despite the flexibility of the shifting border while exercising migration control, when it comes to granting rights and protection, driven by “hyper-legalism”¹⁵ states shift back to the static notion of borders signifying a narrow and strict interpretation of spatiality which curbs their responsibility and liability.¹⁶

As Shachar demonstrates, the EU has been a “leading contributor” to the “shifting-border book”¹⁷ by establishing “one of the world’s most complex, inter-agency, multi-tiered visions of the shifting border, comprised of pre-entry controls at countries of origin and transit all the way through to removal of irregular migrants after they have reached EU territory”.¹⁸ This ongoing process had already been captured by other authors in the wake of the so-called “migration and refugee crisis”, from an EU as well as Member State perspective. For instance, Davitti refers to this phenomenon as the “EU’s liquid borders” which have partially lost their spatial and territorial significance, as well as their legal and political meaning.¹⁹ She distinguishes between two types of non-linear externalized and

⁹ D Ghezelbash, ‘Hyper-Legalism and Obfuscation: How States Evade Their International Obligations Towards Refugees’ (2020) *AmJCompL* 479.

¹⁰ D FitzGerald, *Refuge beyond Reach: How Rich Democracies Repel Asylum Seekers* (Oxford University Press 2019) 6.

¹¹ A Shachar, *The Shifting Border* cit.

¹² *Ibid.* 5.

¹³ D S FitzGerald, *Refuge beyond Reach* cit. 9.

¹⁴ See further J Hathaway and T Gammeltoft-Hansen, ‘Non-Refoulement in a World of Cooperative Deterrence’ (2015) *ColumJTransnatlL* 235, 235–284.

¹⁵ C Inder, ‘International Refugee Law, “Hyper-Legalism” and Migration Management’ cit.

¹⁶ A Shachar, *The Shifting Border* cit. 8.

¹⁷ *Ibid.* 15.

¹⁸ *Ibid.* 55.

¹⁹ D Davitti, ‘Biopolitical Borders and the State of Exception in the European Migration “Crisis”’ (2018) *EJIL* 1178.

outsourced enforcement infrastructures of the liquid borders: “physical infrastructures”, as corridors and spaces of confinement for managing refugees on the one hand, and “borderline legal apparatus” – such as “safe third country” concepts and readmission agreements – whose main objective is to avoid international obligations, on the other.²⁰ Taking a Member States’ perspective, Godenau and López-Salab conceptualize the dynamic nature of the “shifting border” in the context of Spain’s “comprehensive multi-layered deterrence strategy”.²¹ They capture two processes: the “gradual geographical extension and elasticity of borders” displayed by “the novel multi-sited and multiple character of migration control”, and at the same time the introduction of “creative forms of manipulating” the location and the physical demarcation of the border “as evolving through mobile and retractable limits”.²²

Drawing on this literature, this *Article* aims to further exemplify the nature of the shifting border in the EU and to critically analyse its implications. While we employ the shifting-border paradigm, our analysis goes beyond its inward-outward binary and focuses on what Davitti frames as “liquid borders of the EU”.²³ On one hand, we examine the “legal apparatus”, denoting the EU’s “contactless control” and externalisation policies. The concept of “contactless control” signifies a shift in the “deterrence paradigm” from the mere prevention of spontaneous arrivals and deflection of flows to other destinations, to the hindering exit of “risky” migrants.²⁴ These policies are part of “the new toolbox of consensual containment” which is exercised by the EU and its Member States through the outsourcing of pre-emptive migration control beyond the EU’s physical borders.²⁵ They are implemented by securing the strategic partnership of key transit and origin countries which are persuaded to contain, as well as readmit, potential asylum seekers in exchange of political and financial gains, such as promises for funding, visa facilitation or accession negotiations.²⁶

On the other hand, we focus on “physical infrastructures” of mobility regulation currently employed at the EU’s external territorial borders, such as hotspots, physical walls and other means of fortification and deflection of “risky” migrants, as well as the emergence of

²⁰ *Ibid.* 1176-1177.

²¹ D Godenau and A López-Sala, ‘Multi-layered Migration Deterrence and Technology in Spanish Maritime Border Management’ (2016) *Journal of Borderlands Studies* 151, 153.

²² *Ibid.* 153-154.

²³ D Davitti, ‘Biopolitical Borders and the State of Exception in the European Migration “Crisis”’ cit. 1176-1177.

²⁴ M Giuffré and V Moreno-Lax, ‘The Rise of Consensual Containment: From “Contactless Control” to “Contactless Responsibility” for Migratory Flows’ in S Juss (ed.), *Research Handbook on International Refugee Law* (Edward Elgar Publishing 2019) 84. On contactless control see further V Moreno-Lax, ‘The Architecture of Functional Jurisdiction: Unpacking Contactless Control – On Public Powers, S.S. and Others v. Italy, and the “Operational Model”’ (2020) *German Law Journal* 385, 385-416.

²⁵ M Giuffré and V Moreno-Lax, ‘The Rise of Consensual Containment’ cit. 97.

²⁶ *Ibid.* 84.

administrative integration as a prevailing mode of policy implementation at the EU's shifting borders. From our understanding, the legal apparatus and the physical infrastructures are not only "liquified"²⁷ beyond territorial borders areas *stricto sensu*, but at times are also overlapping, with the hotspots approach presenting a notable example further discussed in this issue. Finally, we analyse the EU's vision for the future when it comes to its legal apparatus and physical infrastructures at the borders as envisaged in the proposals forming part of the New Pact on Migration and Asylum: are we going to witness a new chapter being added to the "shifting-border book" or is the "fresh start" an illusion?²⁸

II. PROTECTING BORDERS AND RESPECTING HUMAN RIGHTS

Protecting its territory and borders is every state's sovereign right.²⁹ However, the setting of borders is restricted by international human rights and refugee rights under international conventions. Modern constitutions (and especially the European ones) have translated rights of refugees in the form of a right to seek asylum and have recognised the principle of *non-refoulement*.³⁰ The EU's area of freedom, security of justice also reflects these two aspects in arts 77 and 78 TFEU for the European Union. While ensuring internally frictionless travel and the absence of any controls on the internal border, the external border of the Union is to be protected and regulated. At the same time, the status of third country nationals in need of international protection and in line with the *non-refoulement* principle, must be respected; these rights are further underlined by the EU Charter of Fundamental Rights. The EU's constitutional system and the Member States' national constitutional systems have the constitutional mandate to reconcile these conflicting aims and find solutions without undermining either objective.³¹ This constitutional balancing has become a gargantuan exercise for a Union in perpetual "crisis mode". Shifting or liquid borders lead to a new toolbox of containment described above. Two of the main legal and constitutional challenges arising from shifting or liquid borders are

²⁷ D Davitti, 'Biopolitical Borders and the State of Exception in the European Migration "Crisis"' cit. 1176 drawing from the work of Z Bauman, *Liquid Modernity* (Polity 2000); Z Bauman, *Liquid Times: Living in an Age of Uncertainty* (Polity 2006).

²⁸ See analysis in D Thym, 'European Realpolitik: Legislative Uncertainties and Operational Pitfalls of the "New" Pact on Migration and Asylum' (28 September 2020) EU Immigration and Asylum Law and Policy eumigrationlawblog.eu.

²⁹ S Besson, 'Sovereignty' (April 2011) Max Planck Encyclopedia of International Law opil.ouplaw.com.

³⁰ A Farahat and N Markard, 'Forced Migration Governance: In Search of Sovereignty' (2016) German Law Journal 923. See for a statistical overview: L Kowalczyk and M Versteeg, 'The Political Economy of the Constitutional Right of Asylum' (2017) Cornell Law Review 1219, 1262.

³¹ This can be understood as achieving practical concordance as promoted by German constitutional lawyer Konrad Hesse, see on this D P Kommers, 'German Constitutionalism: A Prolegomenon' (1991) Emory Law Journal 837.

the hybridity of actions and actors and the informality of the tools employed when externalizing the borders and their management. This section explores the evolution and implications of hybridity and informality, as well as the resultant deficit of accountability.

II.1. HOW TO RECONCILE DIVERGING CONSTITUTIONAL OBJECTIVES IN LIGHT OF HYBRIDITY AND INFORMALITY?

Hybridity and informality raise intricate issues for the determination of the proper constitutional framework for limiting or guiding EU and Member States actions. Firstly, the practice of shifting responsibilities between actors (EU Member States, EU institutions and agencies) implementing EU border controls in the integrated European administrative space,³² and with the cooperation of third countries externally, raises questions as to who is accountable under EU and international law for human rights breaches and whether the extraterritorial application of the EU Charter of Fundamental Rights should be considered.³³

Secondly, the informal legal instruments employed to externalize border and migration management demand constant reflection on its constitutional limits and constraints, as Catarina Molinari emphasizes in her *Article* in this *Special Section*.³⁴ More specifically, the same rules and principles framing binding international action and agreements also apply to the informal tools employed variably by EU institutions, Member States or third country actors in complicity with the EU and Member State actors. Hybridity and informality are the consequences of what Vladislava Stoyanova explained as follows: “[s]trategic human rights litigation laying bare the gaps is countered by more inventive and adapted measures by states and EU to evade achieving control over the physical border: preventing asylum seekers, migrants to reach and cross EU border and deport non-recognised asylum seekers”.³⁵

Thus, lawyers and civil society ask the right questions concerning the legality of tools invented by governments and administration, but cannot provide immediate answers – either the state actors escape with their action into the twilight of legality, or further scrutiny is avoided by more inventive or clandestine follow-up measures. The disputed and dubious 18 March 2016 EU-Turkey Statement has become the most famous example of

³² See further E Tsourdi, ‘Beyond the “Migration Crisis”: the Evolving Role of EU Agencies in the Administrative Governance of the Asylum and External Border Control Policies’ in J Pollak and P Slominski (eds), *The Role of EU Agencies in the Eurozone and Migration Crisis: Impact and Future Challenges* (Palgrave Macmillan, 2021) 175 and below section III.

³³ V Moreno-Lax and C Costello, ‘The Extraterritorial Application of the EU Charter of Fundamental Rights: From Territoriality to Facticity, the Effectiveness Model’ in S Peers, T Hervey and J Kenner (eds), *The EU Charter of Fundamental Rights: A Commentary* (Hart/Beck 2014) 657.

³⁴ See in this *Special Section*, C Molinari, ‘The EU Readmission Policy to the Test of Subsidiarity and Institutional Balance: Framing the Exercise of a Peculiar Shared Competence’ (2022) *European Papers* www.europeanpapers.eu 151.

³⁵ V Stoyanova, ‘The Right to Life Under the EU Charter and Cooperation with Third States to Combat Human Smuggling’ (2020) *German Law Journal* 436.

this hybridity and informality.³⁶ The text of this deal, published as a press release on the website of the European Council and of the Council of the European Union, conceals its legal nature, its authorship,³⁷ and entangles financial, political, and legal objectives of the EU and its Member States in their relations with Turkey.³⁸ It combines readmission objectives with financial commitments, expresses promises of Turkish visa liberalization and accession talks, and is embedded in other actions and instruments such as the EU-Turkey Joint Action Plan and the Statement of the EU heads of 7 March 2016.³⁹ Finally, it also reinforced parallel Member State informal and formal arrangements.⁴⁰

It is difficult to envisage greater legal hybridity than embodied by the EU-Turkey Statement and doubts are cast over its authorship, categorisation and legality. Often seen as a blueprint for future deals with third countries of Northern Africa,⁴¹ doubts remain over its role model character when referring to the special circumstances under which it was negotiated and the EU's and its Member States' byzantine and layered relations with Turkey.⁴² At the end, its notoriety led both sides to withdraw from the negotiations of its renewal outside the public eye. The Statement is part and parcel of the ongoing informalization by the EU and Member States to externalize EU border management and control.

It was not or could not be legally challenged by the European Parliament or individuals.⁴³ As it is undetermined who authored this document, the inter-institutional relationship can be only assessed when an assumption is made that the Member States concluded a non-binding arrangement or binding agreement⁴⁴ or that the European Council has acted. In both situations, further legal issues arise. In the former situation, Member States action

³⁶ See M Gatti and A Ott, 'The EU-Turkey Statement: Legal Nature and Compatibility with EU Institutional law' in S Carrera, J Santos Vara and T Strik (eds), *Constitutionalizing the External Dimension of EU Migration Policies in Times of Crisis: Legality, Rule of Law and Fundamental Rights Reconsidered* (Edward Elgar 2019) 179.

³⁷ See also E Kassoti and A Carrozzini, 'One Instrument in Search of an Author: Revisiting the Authorship and Legal Nature of the EU-Turkey Statement' in E Kassoti and N Idriz (eds), *The informalization of the EU's external action in the field of migration and asylum* (TMC Asser Press 2022) 433.

³⁸ A Ott, 'EU-Turkey Cooperation in Migration Matters: a Game-Changer in a Multi-Layered Relationship?' in F Ippolito, G Borzoni and F Casolari (eds), *Bilateral relations in the Mediterranean* (Edward Elgar Publishing 2020) 185.

³⁹ See on the background and analysed in light of informal institutional governance: S Smeets and D Beach, 'When Success is an Orphan: Informal Institutional Governance and the EU-Turkey deal' (2020) *West European Politics* 129.

⁴⁰ See, for instance, F L Gatta, 'Migration and the Rule of (Human Rights) Law: Two "Crises" Looking in the Same Mirror' (2019) *Croatian Yearbook of European Law and Policy* 99, 108-109.

⁴¹ R Lehner, 'The EU-Turkey Deal: Legal Challenges and Pitfalls' (2019) *International Migration* 176.

⁴² S Smeets and D Beach, 'When Success is an Orphan' cit. 147; A Ott, 'EU-Turkey Cooperation in Migration Matters' cit.

⁴³ Case T-192/16 *NF v European Council* ECLI:EU:T:2017:128; case T-193/16 *NG v European Council* ECLI:EU:T:2017:129 and case T-257/16 *NM v European Council* ECLI:EU:T:2017:130; joined cases C-208/17 P to C-210/17 P *NF and others v European Council* ECLI:EU:C:2018:705.

⁴⁴ This assessment is provided by the General Court *NF v the European Council* cit., *NG v the European Council* cit. and *NM v European Council* cit.

outside the procedural rule of EU treaty-making is not *per se* illegal⁴⁵ but, for instance, a hybrid EU/Member States international agreement would be illegal and would breach art. 218 TFEU.⁴⁶ If Member States chose to employ a non-binding instrument, then they would still have to respect the competence divide and not interfere with EU exclusive competence⁴⁷ and EU law supremacy.⁴⁸ If considered a European Council action, it could not be adopted as an international agreement because this would breach art. 15 TEU and the principle of institutional balance (art. 13(2) TEU). However, when adopted as non-binding instrument, there is no breach of art. 218 TFEU but questions nonetheless arise regarding the prerogative of the EP. The last option is less likely to raise constitutional compatibility issues, but the EU fundamental rights protection remains a major concern.

Leaving aside whether the EU Charter has extraterritorial effect, the EU institutions and its Member States are bound by the principle of *non-refoulement*. The Statement's content, as argued by the majority of commentators, is in breach of this principle⁴⁹ because it allows for collective expulsion, denies asylum-seekers access to procedural protection, and declares Turkey a safe country.⁵⁰ To understand the questions on accountability arising from its implementation on the ground, we need to assess the emerging European integrated administration of hotspots and interagency collaboration assisted by national administrations and addressed in detail in section III of this *Article*.

II.2. WHICH WAY FORWARD WITH ACCOUNTABILITY?

Hybridity and informality raise novel legal questions, among them whether they can be tackled with existing accountability tools (political, financial, and legal), or a better coordination of existing tools, or more innovative accountability mechanisms as social accountability (see below section III.1). We adopt the understanding of accountability developed by Bovens, Goodin, and Schillemans, according to whom accountability may be

⁴⁵ Joined cases C-181/01 and C-248/91 *Parliament v Council (Bangladesh Aid)* ECLI:EU:1993:271.

⁴⁶ Case C-28/12 *Commission v Council (hybrid act)* ECLI:EU:C:2015:282 para. 54.

⁴⁷ And the disputable claim is made that the Statement breaches EU exclusive competences, see S Carrera, L den Hertog and M Stefan, 'It Wasn't Me, The Luxembourg Court Orders on the EU-Turkey Refugee Deal' (2017) CEPS Policy Insights 8.

⁴⁸ A Ott, 'Informalization of EU Bilateral Instruments: Categorization, Contestation, and Challenges' (2021) *Yearbook of European Law* 569.

⁴⁹ See, however N Oudejans, C Rijken and A Pijnenburg, 'Protecting the EU External Border and the Prohibition of Refoulement' (2018) *Melbourne Journal of International Law* 1, 7 addressing which international law questions arise with the externalisation of border controls.

⁵⁰ M Gatti, 'The EU-Turkey Statement: A Treaty that Violates Democracy' (2016) EJIL: Talk! www.ejiltalk.org; J Poon, 'EU-Turkey Deal: Violation of, or, Consistency with, International Law?' *European Papers* (European Forum Insight 22 December 2016) www.europeanpapers.eu 1195.

conceptualized as “an institutional relation or arrangement in which an agent can be held to account by another agent or institution”.⁵¹ It consists of three elements or stages:

i) The actor should be obliged to inform the forum about his or her conduct, by providing various sorts of information about the performance of tasks, about outcomes, or about procedures;

ii) there needs to be a possibility for the forum to interrogate the actor and to question the adequacy of the explanation or the legitimacy of the conduct; and finally,

iii) the forum may pass judgment on the conduct of the actor.⁵² The mention of a “judgment” in this context should not be equated with a legally binding final pronouncement by a court or tribunal. Rather, what is meant is the possibility of concrete consequences following the information provision and debate stages.

Political accountability in the context of hybridity and informality entails that the EU's executive, its main EU external actors, including the Member States, have to justify their action towards the European Parliament and the national parliaments.⁵³ In the case of soft law measures such as the EU-Turkey Statement it can be observed that national parliaments and the EP have regularly assessed this instrument and its related financial tools.⁵⁴ In addition, the Statement and its tools have come regularly and critically to the fore in the reports of the Court of Auditors.⁵⁵

Concerned individuals will not be able to challenge such informal instruments. In the case of the EU-Turkey Statement before the General Court and European Court of Justice, this option was disabled by the Statement's hybridity which excluded that it could be considered an action associated to the Union. It also becomes clear that legal review mechanisms are inaccessible not only due to strict standing conditions in the annulment procedure and Union liability claims but also due to the hybridity of actions and actors. Other venues for legal accountability are national courts and the European Court of Human Rights by not challenging the Statement directly but national measures implementing the Statement. For the latter court, the case *JR and Others* addressed in 2018 the human rights implications of the Statement in the Greek without finding concretely a violation or addressing

⁵¹ See M Bovens, T Schillemans and R E Goodin, ‘Public Accountability’ in M Bovens, T Schillemans and R E Goodin (eds), *The Oxford Handbook of Public Accountability* (Oxford University Press 2014) 1, 9, building on the previous works of Bovens and notably on M Bovens, ‘New Forms of Accountability and EU-Governance’ (2007) *Comparative European Politics* 104.

⁵² *Ibid.*

⁵³ See for instance: C Harlow, *Accountability of the European Union* (Oxford University Press 2002).

⁵⁴ See for the German Bundestag of 15 March 2017 18/11568 *Drucksache*; German Bundestag of 27 February 2019 19/8028 *Drucksache*; German Bundestag of 27 March 2020 19/19340 *Drucksache*.

⁵⁵ For example: European Court of Auditors, ‘Special report 24/2019: Asylum, relocation and return of migrants: Time to step up action to address disparities between objectives and results’ (2019); European Court of Auditors, ‘Special report No 27/2018: The Facility for refugees in Turkey: helpful support, but improvement needed to deliver more value for money’ www.eca.europa.eu.

the nature of this Statement.⁵⁶ Also Greek national courts have not ruled on the matter. While a lower Greek court in Lesbos found that Turkey is an unsafe third country, the Greek Council of State ruled in 2017 that the return of Syrian refugee was in line with EU law and the judges decided against submitting a request to the ECJ for a preliminary ruling.⁵⁷ Here, the discussion could be enriched by the research and findings involving the shared responsibility for wrongful acts under international law.⁵⁸ Overall, EU liability in the current format and under its current strict procedural conditions, does not provide a suitable tool to remedy breaches of fundamental human rights in the externalisation process.⁵⁹

In addition, the EP has avoided challenging these informal instruments in court for political reasons. Finally, as Paula García Andrade highlights in her *Article* to this *Special Section*, the ECJ evaded ruling on the substance which is in stark contrast to the more active role taken in the assessment of legal migration from partner countries.⁶⁰ In a politically sensitive field with many different players involved, the ECJ applies the well-known reservations, may they be specified as a restriction to manifest errors of assessment or a misuse of power, or lack of competence and falling outside the scope of EU law.⁶¹ This chimes in with the general trend to carve out the Court's jurisdiction in the Common Foreign and Security Policy (CFSP), stressing that the rule of law and effective judicial protection are worth pointing out.⁶² While García Andrade argues for a more accentuated role of the external relations' structural principles to fulfil gap-filling tasks, scrutiny mechanisms to address shifting borders include also the European Court of Human Rights⁶³ and national courts. The contribution by Galina Cornelisse and Madalina Moraru in this *Special Section* emphasizes in the case of the European Return Directive that the "vertical, horizontal and transnational judicial interaction between domestic courts, ECJ and the ECtHR" can take away hard edges and place limits to states attempts to shift their borders".⁶⁴ Overall, it becomes clear that only the careful recalibration and coordination of

⁵⁶ ECtHR *JR and Others v Greece* App n. 22696/16 [25 January 2018].

⁵⁷ Greece Council of State of 22 September 2017 decision n. 2347/2017.

⁵⁸ A Nollkaemper and others, 'Guiding Principles on Shared Responsibility in International Law' (2020) EJIL 15.

⁵⁹ See further: C Ziebritzki, 'Refugee Camps at EU External Borders, the Question of the Union's Responsibility, and the Potential of EU Public Liability Law' (05 February 2020) *Verfassungsblog* verfassungsblog.de.

⁶⁰ See in this *Special Section*, P García Andrade, 'The External Dimension of the EU Immigration and Asylum Policies before the Court of Justice' (2022) *European Papers* www.europeanpapers.eu 109.

⁶¹ Case C-162/96, *Racke v Hauptzollamt Mainz* ECLI:EU:C:1998:293. And see further case law examples in P García Andrade's, 'The External Dimension of the EU Immigration and Asylum Policies before the ECJ' cit.

⁶² Case C-134/19 P *Bank Refah Kargaran v Council* ECLI:EU:C:2020:793 paras 35-36.

⁶³ ECtHR *O.S.A and others v. Greece* App n. 39065/16 [21 March 2019]; ECtHR *J.R. and others* App n. 22696/16 [25 January 2018]; ECtHR *Ilias and Ahmed v Hungary* App n. 47287/15 [14 March 2017].

⁶⁴ See in this *Special Section* G Cornelisse and M Moraru, 'Judicial Interactions on the European Return Directive: Shifting Borders and the Constitutionalisation of Irregular Migration Governance' (2022) *European Papers* www.europeanpapers.eu 127.

accountability mechanisms can address and frame evolving and inventive tools to shift borders and their management.

III. EU'S EXTERNAL BORDERS: OF ADMINISTRATIVE INTEGRATION AND PHYSICAL AND LEGAL INFRASTRUCTURES OF DEFLECTION

The (immediately) preceding section focused on the hybridity and informalisation which is increasingly employed in the EU's cooperation with third countries on migration. In this section, the focus shifts on the legal and policy developments at the EU's territorial external borders, as "the last points of encounter" of EU's shifting borders.⁶⁵ We critically analyse their "liquidity", as Davitti puts it,⁶⁶ referring here to the physical and legal infrastructures of mobility regulation (and often deflection) that are currently employed at the EU's external territorial borders. Moreover, this section highlights the emergence of increasing horizontal (across national levels) and vertical (between the EU and national level) administrative integration as a prevailing mode of policy implementation at the EU's borders and reflects on the implications, including both challenges and opportunities, of this development. Finally, we scrutinise the Commission's proposals as part of a New Pact on Migration and Asylum in what concerns the envisaged processes at the borders and the streamlining of external border control, asylum, and return in a seamless process.

III.1. HOTSPOTS AS INCUBATORS OF LIMINALITY AND OF AN EMERGING EUROPEAN INTEGRATED ADMINISTRATION

The "hotspot approach to migration management"⁶⁷ is part of the EU level responses to the 2015–16 spike in arrivals of third country nationals and stateless persons at the EU's external borders, many of them with international protection needs, for example, fleeing persecution or generalized violence. It essentially concerns interagency collaboration, where deployed national experts under the coordination of a specific agency – the European Asylum Support Office (EASO), Frontex, Europol, and Eurojust – operationally assist national administrations in "hotspots" for migrant arrivals. It comprises a variety of administrative tasks, including registration and identification of migrants, and channelling of migrants into further procedures, for example, return or assessment of an international protection claim.⁶⁸ This approach, first rolled out in Italy and Greece, was novel:

⁶⁵ A Shachar, *The Shifting Border* cit. 5.

⁶⁶ D Davitti, 'Biopolitical Borders and the State of Exception in the European Migration "Crisis"' cit. 1176

⁶⁷ For its first conceptualisation see Commission Communication COM(2015) 490 final of 25 September 2015 on managing the refugee crisis: immediate operational, budgetary and legal measures under the European agenda on migration, Annex II.

⁶⁸ See K Luyten and A Orav, 'Hotspots at EU External Borders: State of Play' (2020) European Parliament www.europarl.europa.eu.

although the respective agency regulations foresaw deployments, the element of inter-agency collaboration in what in essence would be a single operational framework, had never been so clearly articulated. Although five years have passed since the roll out of this approach, the regulatory framework of EU hotspots continues to be characterised by informality and complexity and the pertinent legal framework still consists of a fragmented patchwork of EU and national (soft law) and legislation.⁶⁹

Critical migration studies have engaged with the realities associated with the functioning of the hotspots. Papoutsi *et al.* conceptualise hotspots as an incubator of “liminal EU territory”, understood as “a sorting space that filters through the ‘deserving few’ and detains or removes the ‘undeserving’ and the ‘rightless’”.⁷⁰ Drawing from Foucault’s “political technology” concept,⁷¹ Tazzioli analyses hotspots as a “a generalised strategy of containment through mobility”,⁷² where migration movements are not only obstructed in their autonomy by generating immobility but also “through administrative, political and legal measures that use (forced) mobility as a technique of government”.⁷³ One could conceptualise the functioning of relevant legal processes implemented in the hotspots, such as the EU’s Dublin Regulation for responsibility allocation,⁷⁴ the emergency relocation decisions (establishing intra-EU transfers of asylum seekers for the benefit of Italy and Greece as a temporary exception to the Dublin system),⁷⁵ and returns to Turkey under safe country provisions,⁷⁶ as such strategies of “containment through mobility” since they completely fail to take into account the agency of migrants. Finally, Davitti, drawing

⁶⁹ K Ziebritzki, ‘The Integrated EU Hotspot Administration and the Question of the EU’s Liability’ in M Kotzur, D Moya, U S Sözen and A Romano (eds), *The External Dimension of EU Migration and Asylum Policies* (Nomos 2020) 253, 261-264.

⁷⁰ A Papoutsi and others, ‘The EC Hotspot Approach in Greece: Creating Liminal EU Territory’ (2019) JEMS 2200, 2201.

⁷¹ M Foucault, ‘The Political Technology of Individuals’ in J D Faubion (ed.), *Power: Essential Works of Foucault 1954–1984* (The New Press 2000) 403.

⁷² M Tazzioli, ‘Containment through Mobility: Migrants’ Spatial Disobediences and the Reshaping of Control Through the Hotspot System’ (2019) JEMS 2764, 2765.

⁷³ *Ibid.*

⁷⁴ Regulation (EU) 604/2013 of the Council and the European Parliament of 26 June 2013 on 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) (Dublin III Regulation).

⁷⁵ 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 (1st Emergency Relocation Decision); Decision 2015/1601/EU of the Council of 22 September 2015 on establishing Provisional Measures in the Area of International Protection for the Benefit of Italy and Greece (2nd Emergency Relocation Decision) and for analysis of the content and functioning of the schemes see B De Witte and E Tsourdi, ‘Confrontation on Relocation. The Court of Justice Endorses the Emergency Scheme for Compulsory Relocation of Asylum Seekers within the European Union: Slovak Republic and Hungary v Council’ (2018) CMLRev 1457, 1459–67.

⁷⁶ 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 (Procedures Directive), art. 38.

on Agamben's writings on "willed exception",⁷⁷ understands the application of safe country concepts in hotspots as a clear manifestation of a "willed biopolitical technique of government" which aims at deflection while being couched in humanitarian terms.⁷⁸

From a doctrinal legal perspective, the current implementation of the EU hotspot approach has led to fundamental rights violations, including the risk of *refoulement* due to return to a non-safe country,⁷⁹ disproportionate restrictions to the freedom of movement of asylum seekers,⁸⁰ and violations of the principle of human dignity and of the prohibition of inhuman or degrading treatment.⁸¹ From a combined interdisciplinary perspective of EU administrative law and administrative governance, the functioning of the hotspots points to an increasingly integrated administration,⁸² with EU agencies engaging in joint implementation with national authorities.⁸³ For example, based on Greek national law, EASO experts conduct interviews and issue non-binding opinions on the admissibility of claims and at the merits stage.⁸⁴ While the final decision formally remains with the Greek Asylum Service, EASO evidently has a significant, if not decisive, impact on the outcome of applications, rendering this in essence a *de facto* mixed or composite administrative proceeding.⁸⁵ The exercise of executive powers and discretion by EU agency (deployed) staff has direct impact on the fundamental rights of migrants and asylum seekers.

⁷⁷ G Agamben, *Homo Sacer: Sovereign Power and Bare Life* (Stanford University Press 1998).

⁷⁸ D Davitti, 'Biopolitical Borders and the State of Exception in the European Migration "Crisis"' cit. 1188-1192.

⁷⁹ M Gkliati, 'The EU-Turkey Deal and the Safe Third Country Concept Before Greek Asylum Appeals Committees' (2017) *Movements, Journal for Critical Migration and Border Regime Studies* 213; and E Tsourdi, 'Regional Refugee Regimes – Europe' in C Costello, M Foster and J McAdam (eds), *Oxford Handbook of International Refugee Law* (Oxford University Press, 2021) 352, 365-367.

⁸⁰ M Mouzourakis, 'All but Last Resort: The Last Reform of Detention of Asylum Seekers in Greece' (18 November 2019) EU Immigration and Asylum Law and Policy eumigrationlawblog.eu.

⁸¹ E Tsourdi, 'COVID-19, Asylum in the EU, and the Great Expectations of Solidarity' (2020) *IJRL* 374.

⁸² E Tsourdi, 'The Emerging Architecture of EU Asylum Policy: Insights into the Administrative Governance of the Common European Asylum System' in F Bignami (ed.), *EU Law in Populist Times: Crises and Prospects* (Cambridge University Press 2020) 191.

⁸³ For a conceptual framework on joint processing, see E Tsourdi, 'Holding the European Asylum Support Office Accountable for its Role in Asylum Decision-Making: Mission Impossible?' (2020) *GLJ* 506, 513-516. For an understanding on Frontex's role in joint implementation see E Tsourdi, 'Beyond the Migration Crisis: The Evolving Role of EU Agencies in the Administrative Governance of the Asylum and External Border Control Policies' in J Pollak and P Slominski (eds), *The Role of EU Agencies in the Eurozone and Migration Crisis: Impact and Future Challenges* (Palgrave Macmillan 2021) 171, 180-181.

⁸⁴ See Law 4346/2019 of 1 November 2019 published on the Official Gazette of the Greek Government, Series A, Issue 169, 4827 ff., arts 76(1) (re: admissibility) 76(2) (re: merits) and 90 (re: border procedures).

⁸⁵ On mixed or composite administrative proceedings in EU law more broadly see characteristically: G Della Cananea, 'The European Union's Mixed Administrative Proceedings' (2014) *Law&ContempProbs* 197; MP Chiti, 'Forms of European Administrative Action' (2014) *Law&ContempProbs* 37 (2014); H Hofmann, 'Composite Decision-Making Procedures in EU Administrative Law' in H Hoffmann and A Türk (eds), *Legal Challenges in EU Administrative Law: Towards an Integrated Administration* (Edward Elgar 2009) 136.

These developments stir the challenges of effective monitoring, explored in this *Special Section* by the *Article* of Sarah Tas,⁸⁶ and of accountability⁸⁷ for fundamental rights violations. Regarding the latter, one line of literature has explored the limitations and possibilities of judicial accountability, including the mobilisation of less traditional avenues such as EU public liability by Fink.⁸⁸ Other authors have focused on less explored accountability avenues such as Tsourdi's critical analysis of extra-judicial accountability, and namely the EU Ombudsman's treatment of individual complaints relating to EASO involvement in asylum processing at hotspots,⁸⁹ or in this *Special Section* the analysis of Loschi and Slominski of Frontex's Consultative Forum as a novel mechanism of social accountability.⁹⁰ However, administrative integration should not be considered as inherently negative due to the failings of the current application of the hotspots approach. It also presents significant opportunities, such as the potential to harmonise practices "bottom-up",⁹¹ and to enhance intra-EU solidarity through EU agencies and their resources. However, in order for it to evolve beyond the *status quo*, administrative cooperation should be appropriately framed, including through binding legislation, appropriately resourced, including through significant resources from the EU level, and released from the underlying impetus of externalisation.

III.2. BEYOND HOTSPOTS: SECURITISATION AND DEFLECTION OF "RISKY" MIGRANTS

The operationalisation of the hotspot approach to migration management is not the sole development at the EU's external borders. Member States have adopted a number of national level responses, some at the fringes of legality, such as the increased use of criminal law to pre-empt and manage migration, some beyond, such as illegal pushbacks at the borders. These developments are inscribed in Member States' increasing espousal

⁸⁶ See in this *Special Section* S Tas, 'Fundamental Rights Violations in the Hotspots: Who Is Watching Over Them?' (2022) European Papers www.europeanpapers.eu 215.

⁸⁷ We are referring here to a broad interdisciplinary understanding of the concept of accountability, thus not equating it to legal responsibility. See, e.g., M Bovens, T Schillemans and R E Goodin, 'Public Accountability' cit. 1, 9, building on the previous works of Bovens and notably on M Bovens, 'New Forms of Accountability and EU-Governance' (2007) *Comparative European Politics* 104.

⁸⁸ M Fink, *Frontex and Human Rights: Responsibility in "Multi-Actor Situations" under the ECHR and EU Public Liability Law* (Oxford University Press 2018).

⁸⁹ E Tsourdi, 'Holding the European Asylum Support Office Accountable for its Role in Asylum Decision-Making: Mission Impossible?' cit. 526-530.

⁹⁰ See in this *Special Section*, C Loschi and P Slominski, 'Frontex's Consultative Forum and Fundamental Rights Protection: Enhancing Accountability Through Dialogue' (2022) European Papers www.europeanpapers.eu 195.

⁹¹ On the evolution of practical cooperation in the EU asylum policy see E Tsourdi and C Costello, 'The Evolution of EU Law on Refugees and Asylum' in P Craig and G de Búrca (eds), *The Evolution of EU Law: Third Edition* (Oxford University Press 2021) 793, 813-814.

of a security-oriented approach to migration, whereby refugees and migrants are perceived as a security threat to state sovereignty.⁹² Similar trends of securitisation at territorial borders can be observed in further states of the Global North, such as the US and Australia, whereby states try to control global mobility.⁹³ In a “culture of control”, as Garland has eloquently put it, there is growing societal motivation for the identification, segregation and incapacitation of certain classes of people perceived as “the dangerous other”,⁹⁴ with migrants and refugees falling within this realm of “risky” individuals. Jesse analysed how “othering” is a discursive group process wherein the in-group has the power to ascribe negative attributes to an out-group.⁹⁵ Central to the construction of “otherness” is the “asymmetry in power relations” wherein the dominant group devalues the particularity of others (their otherness) while imposing corresponding discriminatory measures.⁹⁶ Cultural and ethnic identity increasingly define othering,⁹⁷ and thus underpin the characterisation of migrants and refugees as “the risky other”. The illegal and borderline legal unilateral deflection practices at the EU’s territorial borders, outlined by following paragraphs, and the securitisation approach that underpins them, bear links with racism, empire, and colonialism.⁹⁸

Criminalisation of migration – or, as commonly referred to, “crimmigration”⁹⁹ – broadly encompasses the entire arsenal of coercive measures currently available in the context of immigration enforcement at the national level, whose origins can be traced back to the criminal justice system. This continuum of measures includes deprivation of liberty, preventive policing, and the creation of criminal offences for non-compliance with

⁹² For example, see D Bigo, ‘Security and Immigration: Toward a Critique of the Governmentality of Unease’ (2002) *Alternatives* 63.

⁹³ See A Shacknove, ‘From Asylum to Containment’ (1993) *International Journal of Refugee Law* 516; B S Chimni, ‘The Geopolitics of Refugee Studies: A View from the South’ (1998) *Journal of Refugee Studies* 350, and more recently, D S FitzGerald, *Refuge beyond Reach* cit.; D Ghezelbash, V Moreno-Lax and others, ‘Securitization of Search and Rescue at Sea: The Response to Boat Migration in the Mediterranean and Offshore Australia’ (2018) *ICLQ* 315.

⁹⁴ D Garland, *Culture of Control* (Chicago University Press 2001).

⁹⁵ M Jesse, ‘The Immigrant as the “Other”’ in M Jesse (ed.), *European Societies, Migration, and the Law: the “Others” amongst “Us”* (Cambridge University Press 2021) 19, 20-22.

⁹⁶ J F Staszak, ‘Other/otherness’ in R Kitchin and N Thrift (eds), *Encyclopedia of Human Geography* (Elsevier 2009) 43, 43.

⁹⁷ A Rea, S Bonjour, and D Jacobs, ‘Introduction’ in S Bonjour, D Jacobs and S Bonjour (eds), *The Others in Europe* (Éditions de l’Université libre de Bruxelles 2009) 9.

⁹⁸ See, e.g., N El-Enany, *Bordering Britain: Law, Race, And Empire* (Manchester University Press 2020) and L Mayblin and J Turner, *Migration Studies and Colonialism* (Polity 2020).

⁹⁹ This term was coined by Juliet Stumpf. See Juliet Stumpf, ‘The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power’ (2006) *AmULRev* 367. For the notion of “populist fuelled crimmigration” see V Passalacqua, ‘El Dridi Upside down: A Case of Legal Mobilization for Undocumented Migrants’ Rights in Italy’ (2016) *Tijdschrift voor bestuurswetenschappen en publiekrecht* 215.

administrative – immigration – legislation.¹⁰⁰ For example, as Galina Cornelisse and Madalina Moraru explore in this *Special Section*, with the entry into force of the Return Directive,¹⁰¹ certain Member States turned to protean and complex crimmigration policies based on an ill-conceived understanding of the *legal* and *temporal* borders between domestic criminal law and the Return Directive, including concerning illegal entry.¹⁰² As the authors analyse, the ECJ has greatly curtailed such recourse to national criminal legislation based on the principles of effectiveness and proportionality.¹⁰³ In addition, the trend of (over)criminalising migration has more recently extended to the criminalisation and prosecution of human smuggling in a rather sweeping manner, including where no financial gain is pursued and humanitarian assistance to irregular entry is provided by individuals or civil society actors.¹⁰⁴

Another set of practices includes the erection of physical barriers at external territorial borders and the establishment of transit zones. Hungary is a case at point. Since 2015, the Hungarian government has dismantled refugee protection through a series of legislative amendments. A detailed analysis goes beyond the remit of this *Article*;¹⁰⁵ the measures touched every aspect of the national asylum system. Among other things, the measures introduced a fully informal removal mechanism, first within an eight-kilometre distance of the fence with Serbia, and later throughout the whole territory; criminalised the crossing of the 175-kilometre fence; and established that a “crisis situation” permits the deprivation of liberty of asylum seekers in transit zones throughout the entire refugee status determination procedure.¹⁰⁶

As Nagy has explained, this signified that during a “crisis situation caused by mass immigration” (which the Hungarian government immediately instated and has repeatedly renewed without objective indicators to justify it), all asylum seekers are obliged to submit themselves to a forced (and escorted) removal from within Hungarian territory to the

¹⁰⁰ Valsamis Mitsilegas, *The Criminalisation of Migration in Europe: Challenges for Human Rights and the Rule of Law* (Springer 2015).

¹⁰¹ Directive 2008/115/EC of the European Parliament and the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals.

¹⁰² See in this *Special Section* G Cornelisse and M Moraru, ‘Judicial Interactions on the European Return Directive’ cit.

¹⁰³ *Ibid.*

¹⁰⁴ For example, S Carrera and others, *Policing Humanitarianism – EU Policies Against Human Smuggling and their Impact on Civil Society* (Hart 2019).

¹⁰⁵ See instead B Nagy, ‘From Reluctance to Total Denial: Asylum Policy in Hungary 2015-2018’ in V Stoyanova and E Karageorgiou (eds), *The New Asylum and Transit Countries in Europe During and in the Aftermath of the 2015/2016 Crisis* (Brill 2019) 17; K Juhász, ‘Assessing Hungary’s Stance on Migration and Asylum in Light of the European and Hungarian Migration Strategies’ (2017) *Politics in Central Europe* 35; Hungarian Helsinki Committee, ‘Two Years After: What’s Left of Refugee Protection in Hungary?’ (September 2017) helsinki.hu.

¹⁰⁶ Nagy, ‘From Reluctance to Total Denial’ cit.

Serbian side of the fence, depriving them of immediate access to the procedure.¹⁰⁷ The official narrative is that removed persons could then walk along the fence to reach the Hungarian transit zone and wait for admission, with no water, sanitation or shelter provided.¹⁰⁸ Admissions to the transit zone were extremely limited, benefiting just one person per day in January 2018.¹⁰⁹ Within the transit zone, asylum seekers were deprived of a number of procedural rights and reception conditions, and of their liberty.¹¹⁰

These amendments led to systemic violations of asylum seekers' fundamental rights. This became apparent through a host of references for preliminary rulings by Hungarian courts. The *FMS* judgment allowed the ECJ to scrutinise conditions within the transit zones, and to find multiple violations of the substantive asylum and return *acquis* on detention standards (*i.e.* arbitrary deprivation of liberty), alongside related procedural standards (*i.e.* no possibility of judicial review of detention).¹¹¹ It was an infringement action initiated by the Commission that allowed the ECJ to holistically examine the dismantling of the national asylum and return systems.¹¹² The Court found that the "automatic removals" of asylum seekers from Hungarian territory, the drastic limitation of the number of applicants allowed to enter the transit zones, and the system of detention in transit zones, breached a number of the EU's asylum and return *acquis* provisions and the fundamental rights under the Charter (notably arts 6, 18 and 47). Despite the Court's rulings, pushbacks at the Hungarian-Serbian border consisting of illegal *refoulement* persist. The involvement of Frontex in these settings creates intricate legal issues of responsibility for fundamental rights violations in a multi-actor setting that Mariana Gkliati explores in this *Special Section*.¹¹³

A final example of unilateral deflection actions at national level takes place at the EU's external sea borders. Namely, the absence of an EU-coordinated response to disembarkation of asylum seekers and migrants arriving by sea has seen Member States such as Italy and Malta unilaterally declaring a "closed port" policy combined with non-disembarkation practices. This has led to intense human suffering with boats remaining adrift at

¹⁰⁷ *Ibid.* 38. Only three exceptional categories of individuals were granted access to a regular procedure: those in detention, those who regularly stayed in Hungary and those under 14 years of age; see Hungarian Asylum Act, art. 80(j).

¹⁰⁸ Nagy, 'From Reluctance to Total Denial' cit. 38.

¹⁰⁹ United Nations High Commissioner for Refugees, *Hungary: UNHCR dismayed over further border restrictions and draft law targeting NGOs working with asylum-seekers and refugees* www.unhcr.org.

¹¹⁰ Joined cases C-924/19 and C-925-19 *FMS and Others v Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság* ECLI:EU:C:2020:367.

¹¹¹ *Ibid.*

¹¹² Case C-808/18 *Commission v Hungary* ECLI:EU:C:2020:1029.

¹¹³ See in this *Special Section*, M Gkliati, 'The Next Phase of the European Border and Coast Guard: Responsibility for Returns and Push-backs in Hungary and Greece' (2022) European Papers www.europeanpapers.eu 171.

sea for lengthy periods.¹¹⁴ When disembarkation and relocation takes place, it is organised in an *ad hoc* manner, “ship-by-ship”. Solidarity *à-la-carte* has been found to downgrade the consistency of the EU asylum *acquis*, failing to adequately protect individuals’ fundamental rights.¹¹⁵

III.3. SCREENING, BORDER ASYLUM PROCEDURES AND STREAMLINED RETURNS: WHAT’S “NEW” IN THE NEW PACT ON MIGRATION AND ASYLUM?

The New Pact on Migration and Asylum,¹¹⁶ the latest policy framework and the series of legislative proposals that accompany it¹¹⁷ endorse “a comprehensive approach, bringing together policy in the areas of migration, asylum, integration and border management”, seeking to establish “seamless migration processes and stronger governance”.¹¹⁸ At the borders, this translates in practice to subjecting all non-EU citizens who do not fulfil entry requirements, first, to a *screening procedure* where identification (identity, health and security check), and referral to either an asylum procedure or a return procedure will take place, or will end in refusal of entry.¹¹⁹ Rather than constituting a novelty, this procedure mainly consolidates the processes which already take place under different instruments (e.g. Schengen Border Code, asylum *acquis*).¹²⁰

Those channelled to an asylum procedure may be subjected to either a *normal* asylum procedure or possibly a *border procedure* (such referral to a border procedure is mandatory in cases of misleading the authorities; constituting a danger to national security and public order; or holding a nationality with an EU-wide “recognition rate” of 20 per cent or lower).¹²¹ This border procedure, applicable for a maximum of 12 weeks, is in essence an accelerated asylum determination procedure, and can also be coupled with

¹¹⁴ One such highly mediated case was that of the Aquarius ship. See M Fink and K Gombeer, ‘The Aquarius Incident: Navigating the Turbulent Waters of International Law’ (14 June 2018) EJIL Talk www.ejiltalk.org.

¹¹⁵ S Carrera and R Cortinovis, ‘Search and Rescue, Disembarkation and Relocation Arrangements in the Mediterranean: Sailing Away from Responsibility?’ (CEPS Paper 10-2019).

¹¹⁶ Communication COM(2020) 609 final from the Commission of 23 September 2020 on a New Pact on Migration and Asylum.

¹¹⁷ The most relevant to our analysis are the: Commission Proposal for a Regulation COM(2020) 612 final introducing a screening of third country nationals at the external borders; Amended Commission Proposal for a Regulation COM(2020) 611 final establishing a common procedure for international protection in the Union; Commission Proposal for a Regulation COM(2020) 610 final on asylum and migration management; and, finally, Commission Proposal for a Regulation COM(2020) 613 final addressing situations of crisis and force majeure in the field of migration and asylum.

¹¹⁸ Communication COM(2020) 609 final cit.

¹¹⁹ Communication COM(2020) 612 final recital 40 Screening Regulation Proposal cit.

¹²⁰ See analysis in D Thym, ‘European Realpolitik’ cit.

¹²¹ COM(2020) 611 final art. 41(3) read together with art. 40(1) Amended Commission Proposal for a Procedures Regulation cit.

the deprivation of liberty of asylum seekers.¹²² The border procedure is not unknown to national asylum systems. However, it is currently not obligatory, neither is it regulated in such detail by EU law. Rather, the possibility exists under EU law for Member States to introduce such a procedure through national law. If the application is rejected at the end of the border procedure, the now failed asylum seeker is subjected to a novel *return border procedure*.¹²³ Therein lies the “seamless link” between asylum and return at the borders that aims to “quickly assess abusive asylum requests or asylum requests made at the external border by applicants coming from third countries with a low recognition rate in order to swiftly return those without a right to stay in the Union”.¹²⁴

The UNHCR had voiced the need for swift identification at the external borders, differentiation between categories of persons making up mixed flows, and referral to an appropriate procedure, as early as 2007 (and updated ten years later) through its so-called 10-Point Plan.¹²⁵ In addition, Member States’ international and EU law human rights obligations concerning asylum seekers, victims of trafficking in human beings, children, and victims of torture, entail, to varying degrees, positive obligations of identification. Hence, the establishment of a structured screening stage is not inherently negative.

What is problematic is the deflection logic which imbues the operationalisation of the screening procedure. First, protection needs are reduced to international protection needs and referral to an asylum procedure, whereas they should include broader forms of vulnerability, *e.g.* survivors of torture or victims of human trafficking and referral to appropriate care structures. Next, it has been observed, that while emphasis is placed on ill-founded asylum claims and the weeding out of “abusers”, no efforts are made for the prioritisation of manifestly well-founded claims.¹²⁶ The “means aspect” (*e.g.* facilities, personnel) for effectively running such a process is not appropriately accounted for, risking a repetition of the solidarity deficit conundrum and widely defective conditions currently facing applicants at hotspot areas, such as in the islands of Eastern Aegean in Greece.¹²⁷ Processing at border areas, for those subjected to an accelerated border procedure, risks undermining their procedural rights due to circumstances and logistic constraints (*e.g.*

¹²² COM(2020) 611 final art. 41(11) read together with art. 40(f) Amended Commission Proposal for a Procedures Regulation *cit.*, and analysis in G Cornelisse, ‘The Pact and Detention: An Empty Promise of “certainty, clarity and decent conditions”’ (6 January 2021) EU Immigration and Asylum Law and Policy eumigrationlawblog.eu.

¹²³ COM(2020) 611 final art. 41(a) Amended Proposal for a Procedures Regulation *cit.*

¹²⁴ COM(2020) 611 final Explanatory Memorandum Amended Proposal for a Procedures Regulation *cit.* 4.

¹²⁵ United Nations High Commissioner for Refugees, *The 10-Point Plan in Action* www.unhcr.org.

¹²⁶ An argument raised in L Jakulevičienė, ‘Re-decoration of Existing Practices? Proposed Screening Procedures at the EU External Borders’ (27 October 2020) EU Immigration and Asylum Law and Policy eumigrationlawblog.eu.

¹²⁷ E Tsourdi, ‘COVID-19, Asylum in the EU, and the Great Expectations of Solidarity’ *cit.*

access to information, access to counsel) while facing tight deadlines.¹²⁸ In addition, in all three stages of border procedures (*i.e.* screening, asylum and return) the instruments blur the lines between deprivation of liberty and restrictions to the freedom of movement, and could lead to the propagation of widespread *de facto* detention.¹²⁹ The Pact instruments on the border return procedure, however, contain guarantees for a fairer procedure compared to the European Commission's 2018 proposal to recast the Return Directive, for example in what concerns the justification of decisions and judicial review.¹³⁰

The Pact consolidates and enhances deflection strategies at the EU's external territorial borders. In addition, it adopts an ambivalent approach to administrative integration, not appropriately framing the involvement of EU agencies in these envisaged processes.¹³¹ Neither has financial support for the implementation of these procedures been significantly enhanced. Overall then, the Pact instruments risk further entrenching the EU's external territorial borders as "liminal EU territory",¹³² or "anomalous zones",¹³³ where certain fundamental rights and procedural guarantees could be *de facto* suspended.

IV. OVERVIEW OF CONTRIBUTIONS

This collective study brings together legal and social sciences scholars to reflect on themes that have the potential to both challenge or further reinvigorate the EU's shifting borders. The first *Article* in this *Special Section*, that of Paula García Andrade, assesses the role of courts in the EU: whether contributing to a reinvention of the EU's shifting border or to an expansion of human rights responsibilities beyond borders as a counterbalance to the "spatial and operational aggrandizement of regulatory power".¹³⁴ García Andrade dives into a scoping exercise to analyse whether a rationale in the case law can be detected in

¹²⁸ See analysis in J Vedsted-Hansen, 'Border Procedure: Efficient Examination or Restricted Access to Protection?' (18 December 2020) EU Immigration and Asylum Law and Policy eumigrationlawblog.eu.

¹²⁹ See analysis in Cornelisse, 'The Pact and Detention' cit.

¹³⁰ As elaborated by M Moraru, 'The New Design of the EU's Return System under the Pact on Asylum and Migration' (14 January 2021) EU Immigration and Asylum Law and Policy eumigrationlawblog.eu juxtaposing COM(2020) 611 final art. 41(a) Amended Proposal for a Procedures Regulation cit. with the provisions of COM(2018) 634 final chapter V Commission Proposal for a Directive on common standards and procedures in Member States for returning illegally staying third-country nationals.

¹³¹ See analysis in E Tsourdi, 'The New Pact and EU Agencies: A Tale of Two Tracks of Administrative Integration and Unsatisfactory Embedding' in D Thym and Odysseus Academic Network (eds), *Reforming the Common European Asylum System. Opportunities, Pitfalls, and Downsides of the Commission Proposals for a New 'Pact' on Migration and Asylum* (Nomos 2022) 113.

¹³² See analysis in A Papoutsis and others, 'The EC Hotspot Approach in Greece' cit. and above sub-section III.3.

¹³³ G Campesi, 'The EU Pact on Migration and Asylum and the Dangerous Multiplication of "anomalous zones" for Migration Management' (27 November 2020) Asile Forum on the New Pact on Migration and Asylum www.asileproject.eu, referring to the writings of Neuman on Guantanamo Bay; see G L Neuman, 'Anomalous Zones' (1996) *Stanford Law Review* 1197.

¹³⁴ A Shachar, 'The Shifting Border' cit. 19.

the external dimension of the EU immigration and asylum policies. She explains that a limited number of cases reach the court in this field, either because no infringement procedures against the Member States have been initiated, or due to the limited standing of individuals in the annulment procedure. Other factors are the CJEU's limited jurisdiction in the Common Foreign and Security Policy and the debated legal accountability of Frontex or EU Member States operations in third countries. Where the Court did assess this field, García Andrade detects judicial passivism which undermines the legitimacy of externalisation instruments. This, however, could be explained by the Court's unease with the deficiencies of the constitutional framework of the external dimension. The author further argues that such uncertainties could be overcome by the Court employing the structural principles of EU external relations law to fill gaps and address the shortcomings.

In the second *Article* of this *Special Section*, Galina Cornelisse and Madalina Moraru grapple with the multilevel application of migration law, in particular by courts. They argue that the role of law in migration management is more complex than merely enabling the state to regulate mobility and transform its borders. Migration legislation, in fact, holds a promise of opening more space for legal claims for migrant justice, especially if it is applied by judges across different legal orders. Cornelisse and Moraru substantiate this claim through a critical and thorough study of judicial interactions by European and domestic courts on the Return Directive, and, notably, the areas of merging of criminal justice and immigration policing; detention as immigration enforcement; and the legal and social exclusion of irregular migrants. They conclude that EU legislation on return has set into motion a process of incremental constitutionalisation of irregular migration in Europe in two ways. Firstly, by extending judicial review over a legal field which has traditionally been considered an exceptional branch of law under the purview of executive control, and, secondly, by enabling irregularly staying migrants to have their *interests* translated into *rights* that can be litigated and enforced.

The third *Article*, that of Caterina Molinari, examines the impact of constitutional principles in this field, where agreements and arrangements can create and reinforce borders, preventing individuals from accessing not only physical territories, but also legal systems endowing them with rights and safeguards. More specifically, the *Article* of Caterina Molinari delves into two structural principles, namely subsidiarity and institutional balance, and how far these principles frame the shared competences exercised in this field. She explains, firstly, that the role of the subsidiarity principle in EU external relations law has been underdeveloped but should be strengthened and could have an added value to limit Union's action in the readmission policy. She argues that the application by the Court of the principle of institutional balance can fill the gap of procedural rules for informal readmission instruments to allow institutions – and especially the European Parliament – to fully exercise their prerogatives without impinging upon each other's functions. She then evaluates the instruments employed in the readmission policy and concludes that certain types of *ad hoc* readmission deals will require a stricter application of

procedures, namely employing similar procedures as for international agreements they intend to replace.

The next two *Articles* centre around the physical infrastructures of the shifting border by examining the European Border and Coast Guard Agency's potential responsibility for human rights violations (Mariana Gkliati), as well as the impact of this agency's Consultative Forum on Fundamental Rights in increasing its fundamental rights accountability (Chiara Loschi and Peter Slominski).

Focusing on the role of Frontex in surveillance and return operations in Greece and Hungary, Mariana Gkliati traces the potential implications for the responsibility of the agency for human rights violations. In her thorough study, she scrutinises both the indirect responsibility of the agency through assisting the host state in the commission of a violation and into its direct responsibility due to exercising a degree of effective control over seconded agents. Gkliati's study illustrates a shift from complicity, as the main form of responsibility for Frontex, to direct responsibility, brought about by the agency's expansion of powers, means, and competences. These developments bring to sharp relief the necessity of a robust system of judicial and administrative accountability.

Chiara Loschi and Peter Slominski engage in a theoretical assessment of the Consultative Forum's interaction with the various fora in charge of holding Frontex accountable. In so doing, they combine Bovens' concept of accountability¹³⁵ with the notion of dialogues¹³⁶ to argue that the status of the Consultative Forum and its possibility to engage with key stakeholders on a regular basis provide an opportunity to strengthen dialogues with and between Frontex's accountability fora. Even though the authors reach the conclusion that these accountability dialogues have had a modest impact so far, they highlight their normative potential to enhance the agency's accountability and thus challenge EU's shifting borders.

To complement the role of agency action in the shifting border context and the arising accountability challenges, Sarah Tas studies hotspots as means to push the border "deep into the interior" of the EU. Tas observes the limited nature of judicial and administrative control over EU agencies and national authorities in the hotspots. She thus focuses on an under-researched area, notably monitoring for fundamental rights violations, as a means to fill this gap. Her detailed study includes five European monitoring mechanisms, being the European Commission, the European Parliament, the European Ombudsman, the Fundamental Rights Agency, and the agencies' internal monitoring mechanisms. After thorough scrutiny of the powers, means, and operationalisation of the monitoring mandate of each of these mechanisms, Tas concludes that, in their current state of development, they are insufficient to monitor the complex environment of the hotspots.

¹³⁵ M Bovens, 'Analysing and Assessing Accountability: A Conceptual Framework' (2007) ELJ 447.

¹³⁶ J Bohman, *Public Deliberation. Pluralism, Complexity, and Democracy* (MIT Press 1996); NC Roberts, 'Keeping Public Officials Accountable through Dialogue: Resolving the accountability Paradox' (2002) Public Administration Review 658; M Gkliati and H Rosenfeldt, 'Accountability of the European Border and Coast Guard Agency: Recent Developments, Legal Standards and Existing Mechanisms' (RLI Working Papers 30/2016).