ARTICLES

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CRISIS AS (ASYLUM) GOVERNANCE: THE EVOLVING NORMALISATION OF NON-ACCESS TO PROTECTION IN THE EU

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ABSTRACT: This *Article* problematises the role of crisis in the governance of asylum in Europe. It unveils its nature, predominance, and implications as a structural component of EU law and policy in this domain. The main point I intend to convey is that crisis, in and by itself, constitutes a system of governance producing very problematic effects. The association between (unwanted) migration and refugee flows with crisis in the European context has allowed for the exceptionalisation of rights and legal safeguards, with the pre-emption of unauthorised arrivals becoming the main concern. The danger, instability, and abnormality connected with crisis pervades law and policy, justifying mechanisms that contravene minimal rule of law standards, including due process guarantees and effective judicial protection. The incremental normalisation of exceptions has led to a position where the suspension of (rule of law-based) governance has become a form of governance. The prorogation of "normal" (rule of law-compliant) arrangements has given way to "exceptional" means of managing asylum, starting with the 2015 "refugee crisis" and the relocation-plus-hotspots scheme, which have

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now been streamlined as part of the New Pact on Migration and Asylum reforms. The resulting generalisation of derogations, the proliferation of legal fictions and rights negations that the envisaged amendments involve, is progressively normalising a situation of non-access to international protection in the EU, with deleterious consequences not only for asylum seekers, but for the integrity of the EU legal order and fundamental rights at large.

KEYWORDS: crisification – asylum governance – New Pact on Migration and Asylum – access to international protection – exceptionalisation – rule of law.

I. INTRODUCTION: STRUCTURALISING CRISIS

This *Article* problematises the role of crisis in the governance of asylum in Europe. It unveils its nature, predominance, and implications as a structural component of EU law and policy in this domain. The main point I intend to convey is that crisis, in and by itself, constitutes a system of governance producing very problematic effects.[1] The association between (unwanted) migration and refugee flows with crisis in the European context has allowed for the exceptionalisation of rights and legal safeguards, with the pre-emption of unauthorised arrivals becoming the main concern. The danger, instability, and abnormality connected with crisis pervades law and policy, justifying mechanisms that contravene minimal rule of law standards,[2] including due process guarantees and effective judicial protection.[3] The incremental normalisation of exceptions has led to a position, especially in the aftermath of the 2015 "refugee crisis", where the suspension of (rule of law-based) governance has become a form of governance. The prorogation of "normal" (rule of law-compliant) arrangements has given way to "exceptional" means of managing asylum that have now been consolidated as part of the *New Pact on Migration and Asylum* reforms.[4] The resulting generalisation of derogations, the proliferation of legal fictions and rights negations that the envisaged amendments involve, is progressively normalising a situation of non-access to international protection in the EU, with deleterious consequences not only for asylum seekers, but for the integrity of the legal order and fundamental rights at large. The move can be inscribed in the "trend to legitimise pushback[s] through the introduction of legislation…as a means to whitewash unlawful practices" the UN Special

[1] For the full-length argument, V Moreno Lax, 'The "Crisification" of Migration Law: Insights from the EU External Border', in K Cope, S Burch Elias and J Goldenizel (eds), *The Oxford Handbook of Comparative Immigration Law* (Oxford University Press, forthcoming) papers.ssrn.com.

[2] Art. 2 TEU and case C-64/16 *Associação Sindical dos Juízes Portugueses* ECLI:EU:C:2018:117 para. 36; case C-156/21 *Hungary v Parliament and Council* ECLI:EU:C:2022:97 para. 232; and C-157/21 *Poland v Parliament and Council* ECLI:EU:C:2022:98 para. 264..

[3] Arts 41 and 47 of the Charter of Fundamental Rights of the European Union [2012]. For analysis, V Moreno-Lax, *Accessing Asylum in Europe* (Oxford University Press 2017) ch.10.

[4] Communication COM(2020) 609 final from the Commission of 23 September 2020 on a New Pact on Migration and Asylum. See also the Migration and Asylum Package accompanying the document: commission.europa.eu.

Rapporteur on the human rights of migrants has denounced, regarding developments in several Member States and the European Union as a whole.[5]

In reality, asylum policy has long been permeated by migration control preoccupations in the EU, to the point that both policies have been "gradually merging".[6] Considerations of border management and the fight against unauthorised movement have infiltrated the Common European Asylum System (CEAS) on a systemic basis, defining the object and purpose of the regime. The CEAS has been framed not only as a common European scheme of international protection, but first and foremost as a "flaking measure" of the EU's Area of Freedom, Security and Justice (AFSJ),[7] facilitating "the free movement of persons" within the Single Market and "the absence of internal border controls" as the core element of the Schengen cooperation.[8] Instead of a sole (or even predominant) focus on refugee protection, the administration (if not containment) of refugee flows and the prevention of abuse have been the main goals from the early stages of inception.[9] It has long been considered that "effective asylum…systems" are those which are "capable of identifying refugees expeditiously and accurately thereby *balancing refugee protection with immigration control*".[10] This has rendered the CEAS a factor of migration management, with more of a control task than a protective function.[11] A key element has enabled this transformation: the consideration of refugee claimants as potentially bogus, ungenuine, as irregular migrants in disguise. In consequence, the supposed recipients of international protection have also become the target of "the fight against illegal immigration".[12] The assimilation of "claimed" refugees (or "asylum seekers" yet to demonstrate the genuineness of their status) to the wider group of irregular (and unwanted) migrants[13] is what has allowed for the conversion of asylum policy into yet another means to counter clandestine entry.

[5] United Nations Special Rapporteur on the human rights of migrants, Report of Human rights violations at international borders: trends, prevention and accountability, A/HRC/50/31(2022), para. 27.

[6] G Noll and J Vedsted-Hansen, 'Non-Communitarians: Refugee and Asylum Policies', in Philip Alston (ed.), *The European Union and Human Rights* (Oxford University Press 1999) 359, 368.

[7] Art. 61(a) TEC (Amsterdam).

[8] Art. 3(2) TEU and art. 67(1) and (2) TFEU.

[9] Communication COM(2000) 755 final from the Commission to the Council and the European Parliament of 22 November 2000 towards a common asylum procedure and a uniform status 7.

[10] Communication COM(2000) 757 final from the Commission to the Council and the European Parliament of 22 November 2000 on a Community immigration policy 14 (emphasis added).

[11] For the full argument, see V Moreno-Lax, 'Life after Lisbon: EU Asylum Policy as a Factor of Migration Control', in D Acosta and C Murphy (eds), *EU Justice and Security Law* (Hart 2014) 146.

[12] European Parliament, *The fight against illegal immigration and people smuggling in the Mediterranean (topical debate)*, www.europarl.europa.eu.

[13] For an approximation to the notion of "unwanted migration", see V Moreno-Lax and N Vavoula, 'The (Many) Rules and Roles of Law in the Regulation of "Unwanted Migration"' (2022) ICLR 285.

The next step has been the consideration of irregular migration (including by refugees) as unruly, undesirable, and ultimately dangerous, thus warranting a security response.[14] From framings of "invasion",[15] a "jungle" that may overtake the "garden" of Europe,[16] to flood "water against a dam" metaphors,[17] irregular migration has been routinely portrayed as an indomitable power that may shake the "very foundation" of the integration project.[18] Recently, EU High Representative Josep Borrell has warned that it may constitute "a dissolving force for the European Union".[19] This negative perception of unwanted migration is due to its association with crime, terrorism, and other (existential) threats to public order and internal security. Irregular migrants challenge EU and State power to control territory and population. Their deterrence therefore requires a "continuum of…measures"[20] capable of repelling and controlling their advance at "all stages",[21] from the beginning of their journeys up to their destination, so as to produce an "optimal level of protection [of the Union]"[22] and an "as high as possible level of security for the public".[23]

The resulting securitisation of migration (and refugee) flows has helped to tie the rise in asylum applications to a perceived generalised misuse of the asylum system, with little regard for underlying realities – specially the fact that there are no legal channels to access the EU from abroad to seek protection.[24] The widespread, if unproven, conviction that the asylum system is being exploited to circumvent migration restrictions emerged in the 1990s,[25] when refugee flows started to become more voluminous and more complex, due to the dissolution

[14] J Huysmans, 'The European Union and the Securitisation of Migration' (2000) JComMarSt 751.

[15] S Walker 'Hungarian leader says Europe is now "under invasion" by migrants' (15 March 2018) The Guardian www.theguardian.com.

[16] EEAS, European Diplomatic Academy: Opening remarks by High Representative Josep Borrell at the inauguration of the pilot programme (13 October 2022) www.eeas.europa.eu.

[17] European Commission, Speech by European Commission President Jean-Claude Juncker at the 20th anniversary of the European Policy Centre, 'The road to Rome: from crisis management to governing the EU' 13 October 2016 ec.europa.eu.

[18] *Ibid*.

[19] P Wintour, 'Migration could be "dissolving force for EU", says bloc's top diplomat' (22 September 2023) The Guardian www.theguardian.com.

[20] Communication 2005/C 53/01 from the Council of the European Union of 3 March on The Hague Programme: strengthening freedom, security and justice in the European Union (hereinafter "Hague Programme") 7.

[21] Art. 79(1) TFEU; and European Council Conclusions of 15-16 October 1999 para. 22.

[22] Hague Programme cit. p. 2.

[23] Action Plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice - Text adopted by the Justice and Home Affairs Council of 3 December 1998 paras 25 and 32.

[24] See further V Moreno-Lax, *Annex I: Legal Aspects,* in *European Added Value Assessment accompanying the European Parliament's legislative own-initiative report (Rapp. Lopez Aguilar) on Humanitarian Visas* (European Parliamentary Research Service 2018) www.europarl.europa.eu 23-124.

[25] See, *e.g.*, Communication SEC(91) 1857 final from the Commission to the Council and the European Parliament of 11 October 1991 on the right of asylum.

of the USSR and the process of decolonisation.[26] Since then, refugee flows (towards the EU) have been approached with caution and apprehension, as fundamental challenges to the project of EU integration. The identification of refugees/(irregular) migration with "crisis" situations (capable of dismantling the Schengen system) has increasingly become more potent.

"Crisis thinking" in relation to migration and asylum is, actually, structural in the EU; the main force driving initial harmonisation and subsequent reforms.[27] A political choice: the illegalisation of protection seekers' travel to the EU based on their assimilation to the general class of irregular/unwanted migrants,[28] has, from the start, determined the limits of the policy, contributing to the very "crises" (humanitarian, practical, political) it was supposed to avoid. The Dublin regime,[29] the oldest piece – the "cornerstone" – of the CEAS,[30] has constrained the possibilities of deployment and evolution of the system. The "one-chance only" rule and the "authorisation" principle, according to which applicants' claims can only be assessed in one of the Dublin countries whose responsibility is determined by the part it may have played in allowing the refugee's presence in the EU – understood as a sign of negligence in the control of the common external borders[31] – is what has led to the very failings considered as "crisis" of the system. The uneven distribution of responsibility and concentration effects of applicants in external border Member States inscribed in the rules is what brought it to implosion in 2015.[32]

What I show in the next sections is how this "crisis thinking", in the origins and design of the CEAS, has come to dominate law and policy in the field, structuralising crisis (its means and modes of action) as a form of governance. In my view, it is the ensuing "crisification" of (irregular) migration, expounded in Section II, that has led to the incorporation of strategies that negate access to rights (including to international protection) as part of the system. The process will be traced starting with the reaction to the 2015 "refugee crisis", explored in Section III. This was marked by the suspension of the Dublin arrangements and their replacement with a (sub-par) relocation-plus-hotspots scheme beset by a host of problems, ranging from lack of capacity and coordination of the actors and authorities concerned to the violation of key legal commitments. However, rather than a return to pre-crisis norms, a package

[26] D Joly and R Cohen, 'Introduction: the "New Refugees" of Europe', in D Joly and R Cohen (eds), *Reluctant Hosts* (Aldershot 1989) 5.

[27] S Lavenex, '"Failing Forward" Towards Which Europe? Organized Hypocrisy in the Common European Asylum System' (2018) JComMarSt 1195.

[28] See further V Moreno-Lax, *Accessing Asylum in Europe* cit. especially ch. 3.

[29] Regulation (EU) No 604/2013 of the 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) ("Dublin Regulation").

[30] *Ibid*. recital 7.

[31] *Ibid*. recital 25. See also case C-646/16 *Jafari* EU:C:2017:586 para. 88.

[32] See, *e.g.*, E Guild, C Costello, M Garlick and V Moreno-Lax, *Enhancing the CEAS and Alternatives to Dublin* (European Parliament 2015) www.europarl.europa.eu.

of reforms attached to the *New Pact*,[33] currently under negotiation, has been put forward, which, once formally adopted, will embed and generalise crisis-based derogations as part of the "normal" borders and asylum framework. This will reverse the usual relation between rule and exception, using harmonisation to "influence the flow of asylum seekers",[34] to control the numbers (through deflection, containment, and coercion[35]), standardising measures that impede, rather than facilitate, access to asylum in the EU.

II. "Crisification": the incremental normalisation of exceptions

The association of irregular migration with crisis has a long history in EU politics,[36] to the point that it has been deemed a "permanent" condition.[37] Irregular migration *in itself* is routinely apprehended *as* crisis.[38] Irregular migration *is* (viewed as) crisis, framed as abnormal, aberrant, as "threatening" and jeopardising socio-economic and democratic structures in countries of destination.[39] It constitutes a challenge to the "normalcy" (or normative desirability) of regular migration (considered the preferred state of affairs), authorised and sanctioned by the legal regime (in line with the sovereign preferences of the Member States).

Rather than a factual reality, however, (the constant threat of) irregular migration is legally and politically constructed as crisis[40] – its size, dimensions and actual implications not being determinant for portraying the possibility of its occurrence as perilous and unwanted.[41] Recourse to crisis discourse in this connection is performative.[42] It produces a

[33] New Pact on Migration and Asylum cit.

[34] This has always been the veritable object and purpose of harmonisation in this field, according to: Report from the Ministers Responsible for Immigration to the European Council Meeting in Maastricht - Work Programme, SN 4038/91 (WGI 9030) 3 December 1991, 450, unpublished but printed in E Guild and J Niessen (eds), *The Developing Immigration and Asylum Policies of the European Union* (Kluwer 1996) 449-491.

[35] Mapping these dynamics, 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* (Oxford University Press 2021) 793.

[36] See, *e.g.*, D Maddaloni and G Moffa, 'Migration Flows and Migration Crisis in Southern Europe', in C Menjívar, M Ruiz and I Ness (eds), *The Oxford Handbook of Migration Crises* (Oxford University Press 2019) 603.

[37] M Rice-Oxley and P Walker, 'Europe's Worsening Migrant Crisis' (5 May 2015) The Guardian www.theguardian.com.

[38] A Lindley, 'Exploring Crisis and Migration: Concept and Issues', in A Lindley (ed.), *Crisis and Migration: Critical Perspectives* (Routledge 2014).

[39] A Boin, 'Lessons from Crisis Research' (2004) International Studies Review 165.

[40] *Cf*. R Paul and C Roos, 'Towards a New Ontology of Crisis? Resilience in EU Migration Governance' (2019) European Security 393.

[41] Compare EU approaches to the 2015 "refugee crisis", where most of the (non-white, non-Christian) one million refugees came from Syria, to the (predominantly white and Christian) Ukrainian refugee outflow, in relation to which crisis labelling has been much less pervasive and nearly six million persons have been granted either Temporary Protection or a similar national protection arrangement according to: UNHCR, 'Ukraine situation Flash Update #66' (12 March 2024) data.unhcr.org.

[42] On the "narrative" process of crisis constitution, see, *e.g.*, C Estes, 'Social Security: the Social Construction of a Crisis' (1983) Health and Society 445; C Hay, 'Narrating Crisis: The Discursive Construction of

specific disposition (an aversion) that justifies "exceptional" measures. The crisis construal introduces a cognitive order that rationalises irregular migration as anomalous, calling for urgent and extraordinary interventions to reverse it and counter it.[43] The ensuing "crisification" of the (irregular) migration field – the process and result of (re)presenting and governing unauthorised migration as crisis[44] – allows (EU) law – and policymakers to reorient the political agenda to address and defuse the phenomenon. The task becomes one of crisis identification, prevention, and minimisation (in the case of eventuation). As a result, dealing with crisis (and the continual prospect of its materialisation), managing risks, reacting to events, and coping with their aftermath, has developed into a system of governance with its own dynamics and inertia.[45]

The conceptualisation of irregular migration as crisis (and its administration as such) rests on the understanding of unauthorised movement across borders as suspect, potentially dangerous,[46] and as subversive of the established (or intended) political and legal order.[47] Against this background, migration control – "transformed into the new last bastion of sovereignty"[48] – acquires symbolic value as a marker of State authority. In this context, the securitisation of migration works as a vehicle of validation; it reasserts the relevance and legitimacy of the State and its control over national territory.[49] It also allows for targeted forms of exceptionalism, directed at specific (typically "undesirable") groups, and the exercise of "emergency" or "extraordinary" powers that normally restrict freedoms and curtail the rights of law-defying subjects (including irregular migrants).

Experience shows that once new, emergency-countering measures have been adopted to regulate crisis situations, they are not retracted. They tend to consolidate.[50] A process of "incremental normalisation" leads to their incorporation within the system.[51]

the "Winter of Discontent"' (1996) Sociology 253; A De Rycker and Z Mohd Don (eds), *Discourse and Crisis: Critical Perspectives* (John Benjamins 2013).

[43] A Broome, L Clegg, and L Rethal, 'Global Governance and the Politics of Crisis' (2012) Global Society 3.

[44] See further, V Moreno Lax, 'The "Crisification" of Migration Law' cit.

[45] For an early formulation of crisis *as* governance, see J Brassett and N Vaughan-Williams, 'Crisis is Governance: Subprime, the Traumatic Event, and Bare Life' (2012) Global Society 19.

[46] J Huysmans and V Squire, 'Migration and Security' in M Dunn Cavelty and V Mauer (eds), *The Routledge Handbook of Security Studies* (Routledge 2010) 169.

[47] On the "sedentarist metaphysics" pervading Global North understandings and regulation of mobility, see T Cresswell, *On the Move: Mobility in the Modern Western World* (Routledge 2006) 26.

[48] C Dauvergne, 'Sovereignty, Migration and the Rule of Law in Global Times' (2004) ModLRev 588, 588 and 600.

[49] D Bigo, 'Security and Migration: Toward a Critique of the Governmentality of Unease' (2002) Alternatives: Global, Local, Political 63.

[50] See, *e.g.*, P Genschel and M Jachtenfuchs, 'From Market Integration to Core State Powers: the Eurozone Crisis, the Refugee Crisis and Integration Theory' (2018) JComMarSt 178.

[51] A Neal, 'Securitization and Risk at the EU Border: The Origins of Frontex' (2009) JComMarSt 333, 353.

They eventually become standard. The crisis label sticks and perpetuates them with lasting effects.[52] Cycles of (actual or prospective) "acute" and "protracted" crises combine and extend the (perceived) need for continued exceptionalism (at least, in certain circumstances),[53] demanding pre-emptive action and infusing a sustained sense of urgency that legitimises constant "special" derogations to confront the challenges they entail. Exceptional actions (possibly including those formerly considered to be violations of the applicable norms) become justifiable and widespread. Crisis foments a notion of necessity that conceals and normalises transgressions, making them admissible, legitimate, and even indispensable. It obscures the structural complexities and long-term causes underlying the phenomenon thereby being "crisified".

This applies to irregular migration. Once "crisification" enters the scene and becomes the dominant rationality of governing, arranging, and managing, irregular migration transfigures into an area of "routinized emergency",[54] requiring a permanently "crisified" response that progressively normalises exceptions, limitations, and derogations from the relevant rules.[55] New legalised restrictions and contractions of pre-existing legal safeguards transform the EU *acquis* as a result, downgrading protections (of the target group) on a durable basis.

As the next Sections demonstrate, this is precisely what has happened with the supposedly "exceptional" and "temporary" measures introduced by the EU legislator in response to the 2015 "refugee crisis".[56] What was originally conceived of as short-term, emergency-driven interventions have crystalised in permanent reforms – for the EU "to be prepared for any similar situations in the future".[57] Once adopted, these reforms will fragment and discontinue the legal protections that irregular migrants, including refugees, derive from the EU borders and asylum framework. The risk is that they generalise derogations to a point that reverses the relation between rules and their exceptions, with fundamental rights becoming only formally applicable but their protection illusory and practically unattainable.

[52] F Schimmelfennig, 'Theorising Crisis in European Integration' in D Dinan, N Nugent and W Paterson (eds), *The European Union in Crisis* (Palgrave Macmillan 2017) 316.

[53] N Perkowski, M Stierl and A Burridge, 'The Evolution of EUropean Border Governance through Crisis: Frontex and the Interplay of Protracted and Acute Crisis Narratives' (2023) Environment and Planning D: Society and Space 110.

[54] R van Reekum, 'The Mediterranean: Migration Corridor, Border Spectacle, Ethical Landscape' (2016) Mediterranean Politics 336, 339.

[55] Mapping these developments, see Z Sahin-Mencutek, S Barthoma, NE Gökalp-Aras and A Triandafyllidou, 'A Crisis Mode in Migration Governance: Comparative and Analytical Insights' (2022) Comparative Migration Studies 1.

[56] Communication COM(2015) 240 final from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 13 May 2015 on a European agenda on migration (hereinafter "EU Agenda on Migration").

[57] Proposal COM(2021) 890 final for a Regulation of the European Parliament and of the Council of 14 December 2021 addressing situations of instrumentalisation in the field of migration and asylum ("Instrumentalisation Proposal"), Explanatory Memorandum 8.

III. The 2015 "refugee crisis": the suspension of governance (as a form of governance)

The 2015 "refugee crisis" has been portrayed as "a crisis of unprecedented magnitude", tied to "the largest refugee crisis since the end of World War II"[58] (at least, until the Russian invasion of Ukraine[59]). The arrival of up to one million protection seekers through irregular means[60] (since there were no legal pathways to reach safety in the EU otherwise) led then Commissioner Avramopoulos to demand for "that…collective European sense of urgency…consistently shown…in times of crisis" to be mobilised.[61] Proposals for "immediate" operational, budgetary, and legal measures to "manage" the crisis followed promptly,[62] in a bid to implement the *European Agenda on Migration* adopted earlier that year to confront the situation.[63]

Rather than developing a humanitarian response to cater for the heightened need for international protection, the "four pillars" strategy put forward by the Commission to "manage migration better"[64] mostly replicated past initiatives, doubling down on securitisation.[65] It focused on "[r]educing the incentives for irregular migration",[66] through "[t]he fight against smugglers and traffickers"[67]; on "securing external borders",[68] via enhanced border management; on guaranteeing "[a] coherent implementation of the [CEAS]", as a "more effective approach to [counter] abuses" of the system[69]; and on providing a "[w]ell managed regular migration and visa policy", maximising EU and Member State interests.[70] In the short term, the Commission proposed some "immediate action",[71] reinforcing EUNAVFORMED and Frontex presence at sea, "[t]argeting criminal smuggling networks", and "[w]orking in partnership with third countries to tackle migration upstream" in order to prevent departures.[72] In relation to refugees, two measures were suggested, designed as

[58] Joint Communication JOIN(2015) 40 final from the Commission and the High Representative of the Union for Foreign Affairs and Secutirty Policy of 9 September 2015 addressing the Refugee Crisis in Europe: The Role of EU External Action 2.

[59] Cf. UNHCR, 'Ukraine situation Flash Update #66' cit.

[60] UNHCR, 'Over one million sea arrivals reach Europe in 2015' (30 December 2015) www.unhcr.org.

[61] European Commission, 'Ten Point Action Plan on Migration' (20 April 2015) ec.europa.eu.

[62] Communication COM(2015) 490 final from the Commission of 23 September 2015, Managing the refugee crisis: immediate operational, budgetary and legal measures under the European Agenda on Migration.

[63] EU Agenda on Migration cit.

[64] *Ibid*. 6.

[65] J Jeandesboz and P Pallister-Wilkins, 'Crisis, Routine, Consolidation: The Politics of the Mediterranean Migration Crisis' (2016) Mediterranean Politics 316.

[66] EU Agenda on Migration cit. 7.

[67] *Ibid*. 8.

[68] *Ibid*. 10.

[69] *Ibid*. 12.

[70] *Ibid*. 14.

[71] *Ibid*. 3.

[72] *Ibid*. 3 and 5.

"tools to help frontline Member States"[73]: a relocation scheme, to "[r]espond[] to high-volumes of arrivals within the EU",[74] and a "hotspot approach" to buttress it. The two instruments entailed the suspension of CEAS and Schengen structures as a way to address the "crisis". So, the suspension of governance became a new form of governance.

III.1. Relocation (and Dublin prorogation)

Given the collapse of the domestic asylum systems in Italy and Greece, overburdened by the sudden arrival of a high volume of applicants – who, under Dublin rules, were their (sole) responsibility, two Relocation Decisions were adopted in September 2015 and September 2016,[75] aiming for the relocation of a combined total of 160,000 asylum seekers to other (less affected) Member States. They were explicitly conceptualised as "emergency measures" in the sense of art. 78(3) TFEU,[76] based on the suspension of Dublin arrangements (derogating from the usual responsibility allocation criteria[77]) to alleviate overstretched domestic reception and processing facilities. The continued operation of Dublin provisions would have worsened the situation. The "first country of entry" rule would have added pressure, exacerbating the Member States' (capacity) crisis – the Relocation scheme came, precisely, to correct the imbalances generated by the Dublin regime. Performance, however, was meagre and plagued by multiple complications. Only a fraction of the intended relocations was carried out due to resistance by fellow Member States, lack of adequate capacity by the beneficiary countries, and disengagement on the part of the refugees concerned.[78]

Structural inadequacies compounded the workability of the scheme. Eligibility was based on nationality. And only certain nationalities were considered eligible for relocation if the average recognition rate EU-wide in the previous year was 75 per cent or above,[79] which did not account for rapid changes, actual necessities, or the wide disparities in recognition rates across Member States for the same cohorts.[80] Nationality as a proxy for protection needs is, also, generally inadequate in relation to complex cases where no generalised risk of persecution affecting the population at large may be identified but

[73] *Ibid*. 6.

[74] *Ibid*. 4.

[75] Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece; and Council Decision (EU) 2016/1754 of 29 September 2016 amending Decision (EU) 2015/1601 establishing provisional measures in the area of international protection for the benefit of Italy and Greece.

[76] Council Decision 2015/1601 cit. recitals 1, 21, 22; and Council Decision 2016/1754 cit. recital 1.

[77] Dublin Regulation cit. ch. III.

[78] For a thorough analysis, see E Guild, C Costello and V Moreno-Lax, *Implementation of the 2015 Council Decisions Establishing Provisional Measures in the Area of International Protection for the Benefit of Italy and Greece* (European Parliament 2017) www.europarl.europa.eu.

[79] Council Decision 2015/1601 cit. art. 3(2).

[80] E Guild, C Costello and V Moreno-Lax, *Implementation of the 2015 Council Decisions* cit. 17 ff.

where specific profiles do, nonetheless, qualify for refugee recognition under the 1951 Convention – *e.g.*, due to gender, sexual orientation or other individual factors .[81] The scheme was thus flawed on this basis – which is, however, the same utilised in the *New Pact* reforms reviewed below. Also, subordinating relocation to nationality determination maintained the need for processing (to identify potential beneficiaries), thus not relieving Italy and Greece of their key burden.

Although the relocation Decisions were legally binding, several Member States defied their application. Bitter disagreements over solidarity and responsibility allocation sparked across the Union, revealing deep rifts on how to address the "crisis". Hungary, Czech Republic, and Slovakia, which had voted against their adoption in the Council, either failed to relocate any asylum seekers (a strategy also shared by Austria and Poland) or brought a legal challenge against the scheme.[82] Other countries failed to pledge or to provide sufficient relocation places, while still others rejected requests for relocation on "national security" (as authorised by the Decisions), on other grounds (beyond those allowed), or without providing any reasons at all.[83] Italy and Greece also faced internal obstacles impeding smooth implementation, ranging from lack of preparedness and coordination between the authorities concerned to cumbersome procedures leading to long delays.[84] Other problems included the interaction with Dublin rules, which was not clear – at some point the Commission proposed to resume Dublin transfers in parallel to relocations, which would neutralise the solidarity impact of the scheme.[85] That the relocation preferences of asylum seekers were not necessarily taken into account and that the avenues for appeal and redress against (non)transfer decisions were defective were also major drawbacks.[86]

III.2. The Hotspot Fiasco

The hotspot approach was equally unsound. It was equally designed as an emergency, temporary mechanism, to support the relocation scheme.[87] Discursively, it designated the physical locations where new arrivals tended to concentrate as well as the policy strategy to be applied in those locations. But, differently from the relocation scheme, there was no specific legal framework sustaining the approach. Originally, it worked to facilitate the identification of candidates for relocation, involving the EU agencies (mainly Frontex and EASO) to "swiftly identify, register and fingerprint incoming migrants".[88] Mixed teams, of host country, EU

[81] United Nations Convention relating to the Status of Refugees [1951] (hereinafter "Refugee Convention").
[82] Joined cases C-643/15 and C-647/15 *Slovakia and Hungary v Council* ECLI:EU:C:2017:631.
[83] E Guild, C Costello and V Moreno-Lax, *Implementation of the 2015 Council Decisions* cit. 25-35.
[84] *Ibid*. 35-40.
[85] *Ibid*. 60 ff.
[86] *Ibid*. 40-43.
[87] European Council Conclusions of 25 and 26 June 2015, 4.
[88] EU Agenda on Migration cit. 6.

agencies, and seconded personnel from other Member States, assumed a variety of functions, including screening, referral, and direct assistance in the implementation of the relevant procedures, on the assumption that persons could be triaged quickly to the appropriate channel (relocation, asylum or return) and some of them "returned immediately" without extensive investigations of their individual circumstances.[89]

The approach rapidly deteriorated into a warehouse and expulsion mechanism, focusing mostly on border control and "the conduct of policing activities", including through "the use of force".[90] In Italy, only soft law, in the form of a Roadmap and SOPs,[91] buttressed the scheme. Given the difficulties of swift referrals and the lack of sufficient relocation spaces elsewhere in the EU, removal procedures soon became predominant, with credible reports proliferating of beatings, ill treatment (via the deprivation of food, water, and basic necessities), and *de facto* detention (without any judicial oversight) used to effect them.[92] Even the Italian police officers' Union expressed criticism of the malpractices burgeoning at the hotspots.[93] Return proceedings were undertaken without proper hearing, legal assistance, or access to adequate processing, treating arrivals from non-relocation countries automatically as non-refugees (solely on grounds of nationality) and directly expelling them,[94] in a manner akin to pushbacks.[95] A de-briefing form, called the *foglio notizie*, was used to record information and note the intention of the person concerned to apply for international protection. But asylum seekers were not properly informed that, "[f]or those who ha[d] not expressed the intention to apply" at this preliminary stage, the return procedure would start right away for their expulsion to "be executed immediately".[96] In practice, therefore, the screening process worked as a super-accelerated border procedure impeding access to asylum without effective safeguards –

[89] European Commission, 'Exploratory Note on the Hotspot Approach' (July 2015) www.statewatch.org, 4-5.

[90] Italian Ministry of the Interior, *Standard Operating Procedures (SOPs) applicable to Italian Hotspots* www.libertaciviliimmigrazione.dlci.interno.gov.it 4 and 15.

[91] *Ibid*. and Ministero dell'interno, Roadmap Italiana, 28 September 2015 www.meltingpot.org. In fact, Italy has been condemned for the inadequacy of these arrangements in a string of cases, see ECtHR *J.A. and Others v Italy*, App n. 21329/18 [30 March 2023] (Lampedusa hotspot); ECtHR *M.A. v Italy*, App n. 13110/18 [19 October 2023] (Lampedusa hotspot); ECtHR *A.S. v Italy*, App n. 20860/20 [19 October 2023] (Lampedusa hotspot); ECtHR *A.B. v Italy*, App n. 13755/18 (Lampedusa hotspot); ECtHR *A.T. and Others v Italy*, App n. 47287/17 [23 November 2023] (Taranto hotspot). In all instances has the Court declared a violation of arts 3 and 5 of the European Convention on Human Rights [1950] ("ECHR"), in both their substantive and procedural facets (adding art. 13 ECHR cit. in *A.T.*, concerning the situation of thirteen unaccompanied minors).

[92] ECRE, *The Implementation of the Hotspots in Italy and Greece: A Study* (October 2016) www.ecre.org, 16 and 23.

[93] UGL Polizia di Stato, 'Fotosegnalamento forzoso, la risposta del Dipartimento' (11 January 2016) www.uglpoliziadistato.it.

[94] D Neville, S Sy and A Rigon, *On the Frontline: The Hotspot Approach to Managing Migration* (European Parliament, 2016) 40.

[95] The ECtHR in fact draws on its caselaw on pushbacks to condemn this practice in *J.A*. cit. paras 115-116.

[96] Italian Standard Operating Procedures (SOPs) cit.

in a way not dissimilar to the one suggested by the Commission as part of the *New Pact* instruments.

In fact, the Strasbourg Court has condemned Italy on various counts for its malpractices at the Lampedusa and Taranto hotspots. In *J.A.* – which acts as a "pilot case" to which all the other judgments refer,[97] it considered the living/detention conditions as amounting to inhuman and degrading treatment and recalled the "absolute" obligation to honour human rights even when confronted with "difficulties deriving from the increased inflow of migrants" to which "States which form the external borders of the European Union" are particularly exposed.[98] The lack of hygiene, basic necessities, and overcrowding at the centre had already been denounced by multiple organisations, including the European Committee for the Prevention of Torture (CPT) as well as the UN Committee against Torture, on several occasions.[99]

The situation of *de facto* detention, without an adequate legal basis either in Italian or EU law,[100] not subjected to judicial scrutiny,[101] nor to any effective remedy, and given the "absence of a reasoned measure ordering their retention before being [forcibly] removed to their country of origin" also led the Court to find a violation.[102] Without "a clear and accessible legal basis for detention", the Court "fail[ed] to see how the authorities could have informed the applicants of the legal reasons for their deprivation of liberty or have provided them with sufficient information or enabled them to challenge the grounds for their *de facto* detention", which contravened arts 5(2) and 5(4) on top of art. 5(1)(f) ECHR.[103] The Court considered that it was for "the Italian legislature to clarify the[] nature [of the hotspots' regime] as well as the substantive and procedural rights of the individuals staying therein" to guarantee their protection against arbitrariness.[104] Soft law was deemed insufficient in this regard.

The immediate removal of the applicants following their unlawful detention was equally considered in breach of the Convention. The practice of serving deferred-refusal-of-entry orders (*respingimento differito*), without an interview and with no consideration of the individual situation of each applicant,[105] "constituted a collective expulsion".[106] The whole process occurred with the sole intermediation of the *foglio notizie* questionnaire,

[97] *J.A.* cit.; *M.A.* cit. paras 16, 19, 21; *A.S.* cit. paras 23 and 25; *A.B.* cit. paras 24, 27, 30; *A.T.* cit. paras 17 and 24.

[98] *J.A.* cit. para. 65.

[99] *Ibid*. paras 39 (CPT), 41 (CAT), and 55-63 (both).

[100] *Ibid*. para. 90.

[101] *Ibid*. para. 92.

[102] *Ibid*. para. 97.

[103] *Ibid*. paras 98-99.

[104] *Ibid*. para. 96, repeated nearly verbatim in *M.A.* cit. paras 23-24; *A.S.* cit. paras 26-27; *A.B.* cit. paras 32-33; *A.T.* cit. paras 26-27.

[105] *J.A.* cit. paras 107-112 and 115.

[106] *Ibid*. para. 116.

that the Court considered "standardised",[107] "formulated in an extremely concise way" and "difficult to understand",[108] with no possibility to contact a lawyer or to appeal against the decisions it buttressed. The lack of translation and adequate legal information, the confiscation of mobile phones until *after* expulsion, the lack of evidence of a proper identification procedure having been undertaken, the practice of not handing out copies of the relevant decisions nor of ensuring that the applicants understood the content of official documents before signing them, as well as the swift character of proceedings contributed to the infringement.[109]

The situation in Greece was equally despairing. Two phases need to be distinguished in this context, before and after the EU-Turkey Statement.[110] Before the Statement, the focus of the Greek hotspots (in the islands of Lesvos, Chios, Samos, Leros, and Kos) was reception for EU relocation, channelling sea arrivals to the appropriate procedure (relocation, asylum or return). However, only a minority were concerned, since most of them instead continued their (irregular) journeys across the Balkan route (up until its closure) to other destinations.[111] The intolerability of "secondary movements" led EU leaders (at Germany's behest) to conclude an agreement with Turkey (which eventually took the form of a Council Press Release) to contain departures.[112] The practical implementation of the Statement, on the EU side, in respect of those irregularly reaching Schengen shores, fell on Greece. This is how the Greek hotspots transformed into grand scale, closed, pre-removal detention centres.[113] The Commission itself encouraged the transformation, requiring that "the current focus on registration and screening before swift transfer to the [Greek] mainland [in preparation for relocation, was to be] replaced by the objective of implementing returns to Turkey".[114]

[107] *Ibid*. para. 108.

[108] *Ibid*. para. 112.

[109] *Ibid*. paras 107-110 and 113.

[110] European Council, EU-Turkey Statement, 18 March 2016 www.consilium.europa.eu.

[111] Danish Refugee Council, 'Closing Borders, Shifting Routes: Summary of Regional Migration Trends Middle East, Report' (31 May 2016) reliefweb.int.

[112] For analysis, V Moreno-Lax, 'EU Constitutional Dismantling through Strategic Informalisation: Soft Readmission Governance as Concerted Dis-integration' (2024) ELJ (forthcoming) cadmus.eui.eu.

[113] According to the ECtHR, confinement on an island the person cannot leave without authorisation amounts to detention. See ECtHR *Labita v Italy*, App n. 26772/95 [6 April 2000]. The CJEU has reached a similar conclusion in case C-808/18 *Commission v Hungary (Accueil des demandeurs de protection internationale)* ECLI:EU:C:2020:1029 para. 159, construing "detention" as "any coercive measure that deprives that applicant of his or her freedom of movement and isolates him or her from the rest of the population, by requiring him or her to remain permanently within a restricted and closed perimeter". See also joined cases C-924/19 PPU and C-925/19 PPU *FMS and Others* ECLI:EU:C:2020:367 paras 223-224, according to which "detention" has a uniform and autonomous meaning under EU law.

[114] Communication COM(2016) 166 final from the Commission of 16 March 2016 on next operational steps in EU-Turkey cooperation in the field of migration 4.

The new orientation was supported by domestic legal reforms in April and June 2016. Law 4375/2016 introduced a new fast-track asylum procedure at border sites – a precursor of the border procedure proposed by the Commission as part of the *New Pact* package discussed below. It incorporated the notions of "safe third country" (STC) and "first country of asylum" (FCA) into Greek law to allow for expulsions to Turkey. However, many removals were prevented by the courts, with most inadmissibility decisions being reversed, given the serious human rights violations facing applicants in Turkey.[115] Under pressure from the EU, Greece changed the composition of Asylum Appeal Committees via Law 4357/2016 in a bid to enable deportations.[116] The new arrangements foresaw (and continue to foresee) very short time limits (at least on paper) for the submission, processing, and appeal of claims (just a few days) – again, similarly to the Commission plans for its screening and border procedure discussed in the next section, which hardly amount to the "reasonable time" required under the Asylum Procedures Directive that applicants are to be granted to prepare their submissions.[117] The insufficient, stereotypical substantiation of rejection decisions (most of which based on STC rules and worded in identical terms),[118] the absence of automatic suspensive effect of legal challenges, and the lack of other minimum safeguards,[119] permitted "immediate" expulsions – equivalent to *refoulement*.[120]

Like Italy, Greece has also been condemned for its hotspot policy. Conditions in the Moria camp have been deemed contrary to arts 3 and 13 ECHR.[121] Placement in a reduced and extremely overcrowded space, similar to a "cage", for the "screening" of new arrivals before registration,[122] alongside inhuman living and detention conditions upon

[115] Communication COM(2016) 792 final from the Commission to the European Parliament, the European Council and the Council of 8 December 2016 Fourth Report on the Progress made in the implementation of the EU-Turkey Statement 6.

[116] Keep Talking Greece, 'Greece's Asylum Appeals Committees denounce changes to facilitate mass deportations to Turkey', Keep Talking Greece (20 June 2016) www.keeptalkinggreece.com.

[117] Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) ('APD'), art 43. See also case C-69/10 *Diouf* ECLI:EU:C:2011:524 and ECtHR, *Jabari v Turkey*, App n. 40035/98 [11 July 2000].

[118] ECRE, *The Implementation of the Hotspots in Italy and Greece* cit. 38.

[119] European Commission, *Implementing the EU-Turkey Statement – Questions and Answers* ec.europa.eu.

[120] Ekathimerini, 'Greece and Turkey build on plan for return of refugees' (23 March 2016) www.ekathimerini.com.

[121] ECtHR, *H.A. and Others v Greece* Appn. 4892/18 and 4920/18 [13 June 2023] (in French) (Moria hotspot). *Cf*. earlier cases, where the Court did not find a violation of art. 3 ECHR cit., only of art. 5 ECHR cit. due to the lack of sufficient information regarding the reasons for detention (art. 5(2) ECHR cit.) and the absence of judicial oversight (art. 5(4) ECHR cit.): *J.R. and Others v Greece* App n. 22696/16, 25.1.2018 (in French) (Chios hotspot) (violations of arts 5(2) and 5(4) ECHR cit.); and *O.S.A. and Others v Greece* App n. 39065/16, 21.3.2019 (in French) (Chios hotspot) (violation of art.5(4) ECHR cit.). The newer case of ECtHR, *A.K. and A.S. v Greece* App No. 45337/20 [2 February 2023] (Samos hotspot), has been stricken out the list of cases because of the absence of a response by the applicants' lawyer to Court communications.

[122] *H.A.* cit. para. 41, referring to description by applicants in paras 8-12.

registration,[123] have been considered a breach of the prohibition of ill treatment and the right to an effective remedy.[124] Forced to live in tents, exposed to heat, wind and rain, without safe and sufficient food or medicine,[125] electricity,[126] or access to water, toilets, and washing facilities,[127] in dirty and unhygienic conditions, surrounded by waste, excrements, swage and fumes from burning plastic bottles used to cook, heat and warm up, made for a "nauseating environment",[128] putting health at risk. The sheer overpopulation of the centre (housing 9,000 rather than 3,000 inmates[129]) also made the delivery of adequate legal information, let alone legal aid,[130] to contest rights abuses impossible in practice – the lack of legal assistance and legal representation are of concern in the Chios hotspot cases as well.[131] In such circumstances, according to the Court, no effective remedies were available to the applicants, placing Greece in violation of the Convention.[132]

Against this background, the Commission's approach to the "emergency" relocation-plus-hotspots formula is most disquieting. Despite irregular arrivals having decreased by 92 per cent,[133] instead of propounding a return to the *status quo ante* or a fundamental revision of the Dublin principles to avoid future (capacity/solidarity) "crises", the plan is to embed the scheme as part of the permanent EU borders and asylum *acquis*. The *New Pact* instruments, examined in the next section, prolong and normalise the crisis response in ways that erode the legal framework – arguably pushing the CEAS and the Schengen regime beyond the rule of law.

IV. The *New Pact* reforms: generalising derogations

The relocation and hotspot initiatives have been heavily criticised for their suspension of basic legal guarantees, their disregard for the rights and agency of asylum seekers, and the serious violations they have led to.[134] However, instead of pressing for an overhaul

[123] *Ibid*. paras 41 and 43, referring to description by applicants in paras 8-12 and paras 15-22.
[124] *Ibid*. paras 45-46.
[125] *Ibid*. para. 11.
[126] *Ibid*. para. 12.
[127] *Ibid*. para. 10.
[128] *Ibid*. para. 9.
[129] *Ibid*. para. 22.
[130] *Ibid*. para. 30.
[131] *J.R.* cit. para. 102, and *O.S.A.* cit. paras 53 and 56.
[132] *H.A.* cit. paras 45-46. The same conclusion is reached with regard to art. 5(4) ECHR in both *J.R.* cit. and *O.S.A.* cit.
[133] Amended Proposal COM(2020) 611 final for a Regulation of the European Parliament and of the Council of 23 September establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU (hereinafter "Border Procedure Proposal"), Explanatory Memorandum 1.
[134] ECRE, *The Implementation of the Hotspots in Italy and Greece* cit. See also FRA, 'Update of the 2016 Opinion of the European Union Agency for Fundamental Rights on fundamental rights in the "hotspots" set up in Greece and Italy' (4 March 2019) fra.europa.eu.

of (pre-)crisis arrangements, as mentioned above, the Commission has pushed for their incorporation into the mainstream via a new screening and border procedure[135] – which the Council and the European Parliament have largely endorsed and is expected to be formally adopted by June 2024.[136] This will provide legal coverage to existing malpractices, consolidating pushback-like initiatives into "the *de facto* general policy" of the EU.[137] Much like the hotspot triage system, these have been designed as filtering mechanisms, introduced at a (fictional) pre-entry stage, giving access to a series of solidarity relocation (and other) measures – that will not be further investigated here, since they are dependent on, and subsequent to, the pre-entry process.[138] The (potential) disruption that the constant "challenge" of irregular arrivals may pose (including of refugees reaching the EU as part of "mixed flows") is considered best confronted by deepening control and coercion,[139] rather than by fundamentally revisiting the (failed) vision underpinning the CEAS – that led to the Dublin suspension in the first place.

The idea is to embrace a "comprehensive approach", based on "integrated policy-making", bringing together related policies, "enhancing the synergies between external border controls, asylum and return procedures" in order to tackle "the whole of migration management" at "all stages of the migration procedure", ultimately with a view to "protecting the Schengen area" – rather than the rights of refugees and migrants under EU law.[140] The "efficient management of irregular migration" constitutes the overarching aim, introducing "[a] seamless link between asylum and return" to "prevent[] and reduc[e] absconding",

[135] Proposal COM(2020) 612 final for a Regulation of the European Parliament and of the Council of 23 September introducing a screening of third country nationals at the external borders and amending Regulations (EC) n. 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817 (hereinafter "Screening Proposal"); Border Procedure Proposal cit.

[136] European Commission, *Historic agreement reached today by the European Parliament and Council on the Pact on Migration and Asylum* (20 December 2023) home-affairs.ec.europa.eu. See also European Parliament News, *MEPs approve the new Migration and Asylum Pact* (10 April 2024) www.europarl.europa.eu; and European Council, *Work on the Asylum and Migration Pact* www.consilium.europa.eu.

[137] United Nations Special Rapporteur on the human rights of migrants, Report of Human rights violations at international borders: trends, prevention and accountability cit. para. 70.

[138] Proposal COM(2020) 279 final for a Regulation of the European Parliament and of the Council 23 September 2020 on Asylum and Migration Management and amending Council Directive (EC) 2003/109 and the proposed Regulation (EU) XXX/XXX [Asylum and Migration Fund] ('Asylum and Migration Management' or 'AMM Proposal'); and Proposal COM(2020) 613 final for a Regulation of the European Parliament and of the Council of 23 September 2020 addressing situations of crisis and *force majeure* in the field of migration and asylum ('Crisis and *Force Majeure* Proposal'). For analysis, see F Maiani, 'Into the Loop: The Doomed Reform of Dublin and Solidarity in the New Pact' in D Thym (ed) *Reforming the Common European Asylum System* (Nomos 2022) 43.

[139] Screening Proposal cit. Explanatory Memorandum 1; Border Procedure Proposal cit. Explanatory Memorandum 1; and AMM Proposal cit. Explanatory Memorandum 1.

[140] Screening Proposal cit. Explanatory Memorandum 1-2 and draft Regulation, recital 2. See also Border Procedure Proposal cit. Explanatory Memorandum 1 and 3; and AMM Proposal cit. Explanatory Memorandum 1.

adopting the broad understanding that "entry is not [considered] authorised to third-country nationals unless they are *explicitly* authorised entry".[141] The plan is to introduce "simpler, clearer and shorter procedures" with a view to responding to "abuses" of the asylum system and "preventing unauthorised movements".[142] In this context, the special treatment applicable to (irregularly arriving) refugees under the 1951 Convention is not given particular attention. The special provisions contemplated therein, preventing the penalisation of unauthorised entry under certain conditions (on consideration that normally refugees have no access to legal means for reaching safety), are not even mentioned in the Commission proposals.[143] To the contrary, the Commission plans to generalise derogations to existing legal protections, eroding the "fine line" that separates protection seekers from other migrants in international and EU law,[144] building on the premise that both pertain to the same category of (unwanted) unauthorised entrants.[145]

IV.1. Screening process: hotspots extended

Pre-entry arrangements in the *New Pact* proposals, including a screening process and a border procedure, are designed as "applicable to all third-country nationals who are present at the external border without fulfilling the entry conditions", expressly without distinction (and whatever the mode of arrival, by land or sea, including upon disembarkation following a search and rescue operation).[146] What is more, the proposal excludes "persons seeking international protection" from the scope of the exceptions contemplated in the Schengen Borders Code,[147] according to which third-country nationals (presumably including refugees) who do not fulfil the entry conditions may, nonetheless, be authorised admission "on humanitarian grounds…or because of international obligations".[148] The situation of those "who request international protection at a border crossing point

[141] Screening Proposal cit. Explanatory Memorandum 2 (emphasis added); and Border Procedure Proposal cit. Explanatory Memorandum 2. Cf. on this particular point V Moreno-Lax, 'Beyond *Saadi v UK*: Why the "Unnecessary" Detention of Asylum Seekers is Inadmissible under EU Law' (2011) Human Rights and International Legal Discourse 166, relying on the Joint Partly Dissenting Opinion of Judges Rozakis, Tulkens, Kovler, Hajiyev, Spielmann and Hirvelä in *Saadi v UK* App n. 13229/03 [29 January 2008].

[142] Border Procedure Proposal cit. Explanatory Memorandum 2-4.

[143] Especially art. 31 Refugee Convention cit. See also, V Moreno-Lax, *Accessing Asylum* cit. 351ff.

[144] L Jakuleviciene, 'Pre-Screening at the Border in the Asylum and Migration Pact: A Paradigm Shift for Asylum, Return and Detention Policies?' in D Thym (ed) *Reforming the Common European Asylum System* cit. 81, 83-84.

[145] J Vedsted-Hansen, 'Border Procedure on Asylum and Return: Closing the Control Gap by Restricting Access to Protection?' in D Thym (ed) *Reforming the Common European Asylum System* cit. 99, 110.

[146] Screening Proposal cit. Explanatory Memorandum 1 and 3, and draft Regulation arts 1 and 3.

[147] *Ibid*. Explanatory Memorandum 14.

[148] Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders ("Schengen Borders Code" or "SBC") art. 6(5)(c), explicitly referred to in Screening Proposal cit., draft Regulation, art. 3(3).

without fulfilling the entry conditions", which constitute the near-totality of refugees arriving in the EU,[149] is assimilated to the case of "third-country nationals who try to avoid border checks".[150] This equalises their treatment and disregards the good faith attachable to presenting oneself to an official check point,[151] presuming an intention to abuse and deceive the system by default.

Mimicking the arrangements deployed at the Italian and Greek hotspots, the Commission proposes a "swift" screening procedure "allowing for the identification, at the earliest stage possible, of persons who are *unlikely* to receive protection"[152] – the whole process is skewed towards expulsion/non-admission, rather than effectively ensuring access to protection; the ambition is to "complement[] the obligations of the Member States…to prevent unauthorised entry [and] carry out border controls" for the benefit of the entire Schengen area, "help[ing] to combat illegal migration…and to prevent any threat to the Member States' internal security".[153] Accordingly, on arrival, those concerned will be subjected to "preliminary" health and vulnerability checks (unless omitted on indeterminate grounds[154]), an identity check (against EU and national databases), the registration of their biometric data, and a security control.[155] Upon completion of a debriefing process (undertaken without legal representation or assistance) that should last no more than five days,[156] each person will be directed to the "appropriate procedure", whether non-admission/return, asylum, or relocation.[157]

Those who (unprompted) may apply for international protection, "at the moment of apprehension or in the course of border control…or during the screening", will be channelled to the asylum procedure.[158] But there is no obligation foreseen to explicitly inform them of their right to do so.[159] By contrast, those "not asking for international protection

[149] European Parliament resolution (2018/2271(INL)) of 11 December 2018 with recommendations to the Commission on Humanitarian Visas, para E: "an estimated 90 % of those granted international protection have reached the Union through irregular means" www.europarl.europa.eu.

[150] Screening Proposal cit. draft Regulation recital 7. See also recitals 2, 11, and 45.

[151] Explicitly mentioned in art. 31 Refugee Convention cit.

[152] Screening Proposal cit. Explanatory Memorandum 1 (emphasis added).

[153] *Ibid*. Explanatory Memorandum 6 and 8, and draft Regulation recital 4 and art. 1.

[154] *Ibid.* draft Regulation art. 9(1): The "preliminary medical examination" may be omitted if "the relevant competent authorities are satisfied that no preliminary medical screening is necessary", whatever the reasons, which makes it unclear how, then, are medical care needs and vulnerabilities to be established.

[155] *Ibid.* draft Regulation recitals 26, 28 and 35, and arts 1, 6(6), and 9-12.

[156] *Ibid.* draft Regulation recital 19 and arts 6(3) and 13.

[157] *Ibid.* draft Regulation recitals 8 and 17, and art. 14.

[158] *Ibid.* Explanatory Memorandum 5.

[159] What the Screening Proposal foresees in draft art 8(1) is generically that "[t]hird-country nationals subject to the screening shall be *succinctly informed about the purpose and modalities of the screening*" and, in draft art 8(2)(b), that "…*where they have applied, or there are indications that they wish to apply*, for international protection, *information on the obligation to apply for international protection in the Member State of first entry*…" should be provided (emphasis added). Nowhere does the proposed instrument provide for a clear obligation,

who neither fulfil the entry conditions [...] should be refused entry in accordance with Article 14 of [the] Schengen Borders Code".[160] Not asking for international protection immediately at this preliminary stage will, therefore, be directly equated with a lack of protection needs and attract non-admission. It is unclear who will instead be referred to the (full) return procedure under the Return Directive.[161] Possibly, only the cases "related to search and rescue operations" will,[162] which leaves vast discretion to the Member States (and further diminishes the procedural guarantees available to the person concerned against potential pushbacks[163]).

The screening process should be conducted "at or in proximity to the external border", including specifically "in hotspot areas" (on which the Proposal builds),[164] and it entails a duty for the persons concerned "to remain in the designated facilities during the screening".[165] This will require the concentration of third-country nationals in closed spaces in conditions of *de facto* detention, without making express provision for judicial oversight or other safeguards – arrangements that, contrary to the Strasbourg Court's caselaw regarding hotspots, may generate the impression that the right to liberty is unaffected and does not apply. The absence of specific safeguards generates ambiguity and possibly arbitrariness, which is why ECHR parties are obliged to adopt legislation that provides for a "clear and accessible legal basis" for detention, regulating its purpose, grounds, and conditions, specifying the need for reasoned and well-substantiated detention orders for each individual concerned, subjecting them to judicial scrutiny and related guarantees.[166] A general and implicit *renvoi* to the EU Charter or the ECHR in this context is simply not enough. It fails the legal "quality" test that Strasbourg imposes, according to which any deprivation of liberty must be specifically provided for in a legal instrument,

as currently reflected in art 8(1) APD, to the effect that "[w]here there are indications that third-country nationals...present at border crossing points...may wish to make an application for international protection, Member States *shall provide them with information on the possibility to do so*" including by "mak[ing] arrangements for interpretation to the extent necessary to facilitate access to the asylum procedure".

[160] Screening Proposal cit. Explanatory Memorandum p 4.

[161] Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals ("Return Directive").

[162] Screening Proposal cit. draft Regulation art. 14(1): "The third-country nationals...who have not applied for international protection and [who do] not...fulfil [the] entry conditions...shall be referred to the...return [procedure]", however "[i]n cases *not* related to search and rescue operations, entry *may* be refused in accordance with Article 14 [SBC]" (emphasis added).

[163] A practice already explicitly condemned by the ECtHR *vis-à-vis* several Member States, *e.g.*, in ECtHR, *M.H. v Croatia* App n. 15670/18 and 43115/18 [18 November 2021]; ECtHR, *Shahzad v Hungary* App n. 12625/17 [8 October 2021]; ECtHR *D v Bulgaria* App n. 29447/17 [20 July 2021]; ECtHR, *D.A. v Poland* App n. 51246/17 [8 July 2021]; ECtHR, *M.K. and Others v Poland* App n. 40503/17, 42902/17 and 43643/17 [23 July 2020]; and ECtHR, *M.A. and Others v Lithuania* App n. 59793/17 [11 December 2018].

[164] Screening Proposal cit. draft Regulation recitals 12 and 20 and art. 6(1).

[165] *Ibid.* draft Regulation art. 8(1)(b).

[166] *Cf*. *J.A.* cit. paras 79-99, specially 90, 92, 96 and 97.

introducing a "procedure prescribed by law" – a law adopted by the "legislature"[167] – that manages, in effect, to "protect[] the individual from arbitrariness".[168] "Compliance with national law is not … sufficient" on its own, if it does not succeed in this objective.[169] In such circumstances, "a deprivation of liberty may be lawful in terms of domestic law but still arbitrary and thus contrary to the Convention".[170]

The Commission proposal also foresees that it is the "relevant information obtained during the screening" that will be used as a basis for referral and further processing,[171] which makes the absence of robust legal representation and assistance provisions particularly disquieting. These arrangements, indeed, set the scene for a replica of the defects observed at the Italian and Greek hotspots. In fact, the Commission suggests that the persons concerned be only "*succinctly informed* about the purpose and the modalities of the screening" and receive any further information (only) "as appropriate" and in a language they may "reasonably [be] supposed to understand",[172] using a "standardised"[173] "de-briefing form",[174] very similar to the failed *foglio notizie*, containing very little information, "formulated in an extremely concise way",[175] that will not allow for proper consideration of "the applicants' personal situations".[176] Applicants may thus remain unaware of the implications of their (non)statements at this level and their consequences for subsequent processing. No appeals or judicial review of any of the screening steps have been contemplated, which seriously risks excluding those with legitimate claims through incomplete and abrupt assessments,[177] reproducing the collective expulsion and other malpractices already condemned by the Strasbourg Court.[178] In addition, given past experience in Italy and Greece, unless significant investments are made by the Member States, vastly increasing material and procedural resources, the envisaged "swiftness" of proceedings may reveal impracticable and translate into prolonged periods of despair and the quick spread of Moria-like conditions.[179]

[167] *Ibid.* para. 96.
[168] *Ibid.* para. 80.
[169] *Ibid*.
[170] *Ibid*.
[171] Screening Proposal cit. draft Regulation recitals 16 and 24, art. 10(1)(b) and 13, and Annex I.
[172] *Ibid.* draft Regulation art. 8(1), (2) and (3) (emphasis added).
[173] *J.A.* cit. para. 108.
[174] Screening Proposal cit. draft Regulation art. 13 and Annex I.
[175] *J.A.* cit. para. 112.
[176] *Ibid.* para. 108.
[177] L Jakuleviciene 'Pre-Screening at the Border in the Asylum and Migration Pact: A Paradigm Shift for Asylum, Return and Detention Policies?' cit. 82.
[178] *J.A.* cit. paras 106-116.
[179] *Cf*. *H.A.* cit.

IV.2. Border Procedure: hotspots normalised

A new border procedure is intended to complement screening arrangements at the pre-entry stage for the "better management of [supposedly] abusive and inadmissible asylum requests [made] at the border", impeding "migrants from delaying [expulsion/non-admission] procedures…and misusing the asylum system", and "without authorising the[ir]…entry into the Member State's territory" for the duration of the process.[180] Most asylum claimants at the border are thus considered *a priori* bogus/non-genuine, with this assumption then used to structure and justify the new arrangements. This is intended to "reduce the risk of absconding and the likelihood of unauthorised movements".[181] As mentioned already, despite the 92 per cent decrease in arrivals since 2015,[182] the Commission unreservedly equates "recognition rates lower than 20 per cent" of certain nationalities with abuse of the CEAS and the "resulting increased administrative burden and delays" of processing these claims with a form of crisis or, at least, a "challenge" requiring "new migration management tools".[183] For the purpose, the new "joint asylum and return border procedure" will "provide the necessary flexibility to Member States" so they can "quickly assess abusive asylum requests" and expel those concerned.[184]

That flexibility translates into "quick" processing targets and reduced procedural safeguards, on account that such claims – deemed *a priori* "abusive" – will be categorised as "unfounded or inadmissible".[185] The depersonalised assessment of individual applications,[186] based on fixed percentages of (non)recognition rates and STC/FCA rules – as used in the Italian and Greek hotspots, is also part of the procedure, as are "limit[ed] appeal possibilities", while applicants await decisions without authorisation to (legally) enter the territory.[187] The proposal provides "additional grounds" to "accelerate" procedures and assess asylum requests summarily at the external border,[188] while simultaneously "extending the maximum length of such procedure[s]" – an arrangement that, albeit incoherent with the "swiftness" target, somehow, should "deliver faster decisions" that "contribute to a better and more credible" system.[189]

[180] Border Procedure Proposal cit. Explanatory Memorandum 4, 5 and 7, and draft Regulation recital 40.

[181] *Ibid.* draft Regulation recital 31a.

[182] *Ibid.* Explanatory Memorandum 1.

[183] *Ibid*. Explanatory Memorandum 1 and 4.

[184] *Ibid.* Explanatory Memorandum 4.

[185] *Ibid.* draft Regulation recital 40a.

[186] Cf. according to art. 47 CFR and art. 13 ECHR, as reflected in art. 10(3)(a) APD cit., "applications are [to be] examined and decisions are [to be] taken individually, objectively and impartially". This is a requirement that the proposed border procedure arrangements will water down to a point difficult to reconcile with the standards of effective legal and judicial protection applicable under EU law.

[187] Border Procedure Proposal cit. Explanatory Memorandum 4, 7 and 14, and draft Regulation recast art. 41(6).

[188] *Ibid*. draft Regulation recital 39a.

[189] *Ibid*. Explanatory Memorandum 12-14, and draft Regulation recast art. 41(11).

The proposal allows Member States to subject to the new procedure all applicants who have not yet been authorised admission, having made their claims at an external border, following apprehension in connection with an irregular crossing, following disembarkation upon rescue, or even following relocation[190] – capturing the situations in which the absolute majority of protection seekers find themselves.[191] Not only admissibility but also decisions on the merits may be adopted in this format,[192] which is obligatory for applicants who are considered to pose a risk to national security or public order; for those who may be deemed to have misled the authorities (*e.g.*, by presenting false documents, which most refugees need to use to be able to flee[193]); and for those coming from countries for which the past average recognition rate EU-wide in the previous year was 20 per cent or lower. The latter measure is bound to artificially consolidate low recognition levels over time, since such claims will be processed without looking into their full substance,[194] thereby perpetuating assumptions of unfoundedness and undeservability for the nationalities concerned.[195] Member States will also be permitted, on an "optional" basis, to use these arrangements regarding applicants to whom a STC/FCA clause can be applied or who are coming from supposedly "safe countries of origin" (SCO).[196]

Only a few exceptions are contemplated (for minors and their family members, regarding some vulnerable cases, and for those whose expulsion is unlikely in practice[197]). The 20 per cent rule, in particular, should not apply in situations of a "significant change" of circumstances in the country concerned since the last statistics or when the individual applicant belongs to a specific group for whom the figure "cannot be considered as representative for their protection needs".[198] But these terms have not been defined. When will a "significant change" or under which conditions will the 20 per cent rule be considered unrepresentative has not been specified. The Commission also fails to determine how exactly the

[190] *Ibid*. draft Regulation recast art. 41(1).

[191] European Parliament resolution on Humanitarian Visas cit. For analysis, see ECRE, *Access to protection in Europe: Borders and entry into the territory* (June 2018) asylumineurope.org.

[192] Border Procedure Proposal cit. draft Regulation recast art. 41(2).

[193] Art. 31 Refugee Convention cit. and V Moreno-Lax, *Accessing Asylum* cit. 351 ff and references therein.

[194] It will seemingly only be once an applicant attempts to rebut the presumption that the substance of their claims will come to the fore. The problem with this approach is that it is not clear when, how and through which means may claimants submit a rebuttal, nor which level of proof will be considered sufficient. Also, such an arrangement undoes prevailing rules on "benefit of the doubt" and "shared" burden of proof propounded by UNHCR and partly reflected in current art. 4 of the Qualification Directive 2011/95/EU. See UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status* (re-issued 2019), www.unhcr.org paras 196 (shared burden of proof) and 203-4 (benefit of the doubt).

[195] Border Procedure Proposal cit. Explanatory Memorandum, and draft Regulation recital 40b and recast art. 41(3).

[196] *Ibid*. For a critique, see C Costello, 'Safe Country? Says Who?' (2016) IJRL 601.

[197] Border Procedure Proposal cit. Explanatory Memorandum 14-15, and draft Regulation recital 40d and recast art. 41(4), (5) and (9).

[198] *Ibid.* draft Regulation recast art. 40(1)(i).

safety presumption may be rebutted in such cases or how rebuttals may possibly be articulated effectively in this context. What the level of proof or the type of evidence to be adduced should be, in an environment of "swift" processing, without legal representation or proper guidance, is also left obscure. In addition, the *New Pact* package foresees that in a (declared) "crisis" or "an imminent risk of such situation"[199] (according to an evaluation by the European Commission as part of the proposed yearly Migration Management Report[200]) the rate of applicants to be subjected to the border procedure can be lifted to cover also those coming from countries for which the average recognition rate EU-wide in the past year was up to 75 per cent. This generalises the presumption of safety of the country concerned beyond any reasonable basis and against actual realities on the ground.[201] And, in emergency scenarios involving the "instrumentalisation of migrants"[202] (similar to the ongoing "crisis" at the border with Belarus[203]), *all* applicants can be assessed on an enhanced version of the procedure: the "*emergency* migration and asylum management procedure", with even less guarantees.[204] Such arrangements will completely "exceptionalise" the general rule of effective legal and judicial protection at the heart of the rule of law principle that supposedly governs the whole of the EU legal order.[205]

Similarly to the screening phase, for the full length of proceedings, applicants should be accommodated in purpose-built facilities located "at external borders or transit zones" situated "in proximity".[206] Those whose asylum claims are rejected in the *asylum* part of the process will directly enter the "border *return* procedure" and be "kept at the external borders" throughout (either in formal detention or in detention-like conditions).[207] On

[199] Crisis and *Force Majeure* Proposal cit., draft Regulation arts 1(2)(a)-(b).

[200] AMM Proposal cit. draft Regulation art. 6(4); and Crisis and *Force Majeure* Proposal cit. draft Regulation art. 3(8).

[201] Crisis and *Force Majeure* Proposal cit. draft Regulation recital 14 and arts 1(2) 4(1)(a). *Cf*. arrangements applicable in situations of exceptional "migratory pressure" in AMM Proposal cit. draft Regulation arts 50-53 and 49(3).

[202] The Proposal COM(2021) 891 final for a Regulation of the European Parliament and of the Council of 14 December 2021 amending Regulation (EU) 2016/399 on an Union Code on the rules governing the movement of persons across borders, draft recitals 8-16 and art. 2(27), vaguely and broadly defines the "instrumentalisation of migrants", as "a situation where a third country instigates irregular migratory flows into the Union by actively encouraging or facilitating the movement of third country nationals to the external borders, onto or from within its territory and then onwards to those external borders, where such actions are indicative of an intention of a third country to destabilise the Union or a Member State, where the nature of such actions is liable to put at risk essential State functions, including its territorial integrity, the maintenance of law and order or the safeguard of its national security".

[203] For a critique and further references, see V Moreno Lax, 'The "Crisification" of Migration Law' cit.

[204] Instrumentalisation Proposal cit. Explanatory Memorandum 5, and draft Regulation recital 3 and arts 2-6.

[205] *Associação Sindical dos Juízes Portugueses* cit. para. 35.

[206] Border Procedure Proposal cit. Explanatory Memorandum 15, and draft Regulation recital 40c and recast art. 41(15).

[207] *Ibid. cf*. draft Regulation recitals 40f and 40i, and arts 41(13) and 41a(1), (2), (5)-(7).

the whole, the pre-entry phase will, therefore, necessitate the construction of massive "border camps" at the external frontiers of the Member States[208] – in the image of the Greek island-hotspots and running similar risks of illegality.[209]

The procedural guarantees available to claimants during this process are scarce. Very short time limits will play against the preparation of their cases and the planned "streamlining" of appeals – whereby asylum rejections and return decisions are intended to be examined together, "within the same judicial proceedings and time limits" – fails to reach effective remedy standards.[210] Claimants will only have five days from registration to formally lodge their complete applications and five days upon receipt of a rejection decision to request to be allowed to remain during the appeal process, with no special provision made for legal assistance or representation – except at the appeal level and under strict conditions.[211] This is particularly problematic. The Strasbourg Court has made clear that "insufficient information for asylum seekers about the procedures to be followed,...shortage of interpreters...[as well as the] lack of legal aid effectively depriving the asylum seekers of legal counsel", insofar as it may impede "access to the asylum procedure", contravenes art. 3 ECHR.[212] Adequate procedural guarantees, including legal assistance, are essential to ensure the appropriate conduct of proceedings already at first instance.[213] And when the person concerned does not have sufficient resources, *free* legal aid, representation, and translation must be facilitated[214] – a requirement also imposed by EU law, when the opposite would undermine access to justice.[215]

The whole process should take no more than a few weeks, "encompassing both the decision on the examination of the application as well as the decision of the first level of appeal"[216] – which the experience at the hotspots has proven wholly unrealistic. Such

[208] G Campesi, 'The EU Pact on Migration and Asylum and the Dangerous Multiplication of "Anomalous Zones" for Migration Management' in S Carrera and A Geddes (eds), *The EU Pact on Migration and Asylum in Light of the United Nations Global Compact on Refugees* (EUI 2021) 195.

[209] *H.A.* cit.; and *Commission v Hungary* cit.

[210] Border Procedure Proposal cit. Explanatory Memorandum 17. *Cf*. ECtHR, *I.M. v France* App n. 9152/09 [2 May 2012]; and ECtHR, *A.C. and Others v Spain* App n. 6528/11 [24 April 2014]. See further, V Moreno-Lax, *Accessing Asylum in Europe* cit. 395ff.

[211] Border Procedure Proposal cit. draft Regulation recast art. 41(10) and art. 54(5).

[212] ECtHR, *M.S.S. and Others v Greece* App n. 30696/09 [21 January 2011] para. 301; *H.A.* cit. para. 30.

[213] *Ibid.* para. 304. See also *I.M.* cit. paras 151ff; ECtHR, *Sharifi and Others v Italy and Greece* App n. 16643/09 [21 October 2014] para. 168.

[214] *M.S.S.* cit. para. 319.

[215] Case C-279/09 *DEB* ECLI:EU:C:2010:811 para. 60.

[216] Border Procedure Proposal cit. draft Regulation recital 40e and recast art. 41(11). The asylum border procedure should last 12 weeks, while "to ensure continuity between the asylum procedure and the return procedure, the return procedure should also be carried out in...a period not exceeding [an additional] 12 weeks".

time pressure and limited safeguards are due to impact the overall quality of assessments and decisions by the relevant authorities, putting rights in jeopardy.[217] This will be aggravated by the fact that there will only be one level of appeal where the applicant may be allowed a right to remain (remain, not *inside* the Member State in the legal sense, but at the external border facility where the processing is taking place[218]); subsequent levels will not produce automatic suspensive effect.[219] However, the Strasbourg Court requires that any and every action by a public authority that exposes to a risk of *refoulement* be challengeable under the ECHR. To avoid the irreversible damage that may otherwise ensue, the Convention requires thorough examinations of art. 3 ECHR risks to be conducted *ex nunc* and with appeals endowed with automatic suspensive effect at the time of assessment.[220] So, if there are several levels of appeal, where several assessments by different authorities are to be conducted at different points in time, the execution of the removal/non-admittance measures envisaged must be automatically suspended. Otherwise, *refoulement* may well materialise.

The merging of asylum and return procedures is equally controversial, since each supposedly has different objects and scopes, and are adjudicated by different organs with different functions and expertise, and for different purposes, which will become blurred. This is why the rules governing the regimes of detention under the first and the second limbs of art. 5(1)(f) ECHR are separate, because they serve separate objectives. Pre-entry detention is intended to prevent unauthorised entry, while pre-removal detention is supposed to facilitate the conduct of deportation or extradition proceedings that must be "in progress" and "prosecuted with due diligence" for the related deprivation of liberty to be legitimate.[221] Their relationship is (and should be kept) sequential. It is "when the first limb…ceases to apply…if entry has been refused [e.g. upon an asylum rejection that] any deprivation of liberty under the second limb…will be justified".[222] Assimilation, therefore, contravenes ECHR standards; it risks banalising automatic detention on grounds of administrative convenience for prolonged periods and with no judicial control.

Yet, not only does the Commission ignore this separation, it equally suggests that, if the application is rejected in the asylum part of the process, the applicant, rather than subjected to the full "border return procedure", may instead be summarily refused entry

[217] G Cornelisse and M Reneman, 'Border Procedures in the Member States: Legal Assessment', in *Asylum Procedures at the Border: European Implementation Assessment* (European Parliament Research Service 2020) www.europarl.europa.eu 39, 100 ff. See also M Den Heijer, 'The Pitfalls of Border Procedures' (2022) CMLRev 641.

[218] Border Procedure Proposal cit. draft Regulation recast arts 41(13) and 41a(1).

[219] *Ibid.* Explanatory Memorandum 17-18, and draft Regulation recitals 65, 66, 66a and 66b, and art. 41(12), referring to arts 53-54.

[220] Cf. *I.M.* cit. para. 127ff; and *A.C.* cit. para. 81ff.

[221] *J.A.* cit. para. 83.

[222] *Ibid*.

"where the conditions of Article 14 [SBC]… are met".[223] Such refusal of entry (in disregard of effective remedy standards) "shall take effect immediately" and "shall not have suspensive effect".[224] It is not clear whether and how any persisting *refoulement* risks may be evaluated and with which procedural guarantees. The problem is also that the criteria for the application of art. 14 SBC are somewhat circular, especially when taken together with the proposed reforms. The Schengen Borders Code, as currently drafted, obliges (the *border* rather than the *asylum* authorities of the) Member States to refuse entry to any "third-country national who does not fulfil all the entry conditions…and does not belong to the categories of persons referred to in Article 6(5) [of the Code]". The exception in that provision, as already noted, is intended to cover asylum seekers, as persons whose admission Member States *may* authorise "on humanitarian grounds…or because of international obligations",[225] taking into account that entry rules are "without prejudice to the application of special provisions concerning the right of asylum and to international protection".[226] However, the Screening Proposal seems to nullify the applicability of this exception precisely *vis-à-vis* refugees, establishing that pre-entry arrangements, as designed by the Commission, are "without prejudice of the application of Article 6(5) [of the Schengen Borders Code] *except* the situation where the beneficiary of an individual decision [based on that provision] is seeking international protection".[227] This, coupled with the fact that Member States issuing a refusal of entry (based on the exiguous *foglio notizie*-like de-briefing process discussed above) may also decide "not to apply" Return Directive guarantees[228] – subject only to a duty to ensure standards in their national law that are "equivalent" to the minimum provided for in art. 4(4) thereof – cannot effectively exclude *refoulement*. The provision on remedies in the Border Procedure Proposal, as it currently stands, further contributes to this risk, when establishing that "the right to an effective remedy" only applies against decisions rejecting the asylum claim or a return decision,[229] omitting any mention of refusals of entry. So, with refusals of entry designed in the Schengen Code as "immediate" and without suspensive appeals, [230] pushbacks may become normalised.

Indeed, that persons in need of international protection arriving at the external borders may not be systematically informed of their right to asylum,[231] since there is no obligation inscribed in the envisaged reforms to do so,[232] along with the fact that potential applicants will be (*de facto*) detained and with no clear provision for them to access legal assistance,

[223] Border Procedure Proposal cit. draft Regulation recital 40g.
[224] SBC cit. art. 14(2) and (3).
[225] *Ibid*. art. 6(5)(c).
[226] *Ibid*. art. 14(1).
[227] Screening Proposal cit. draft Regulation art. 3(3) (emphasis added).
[228] Border Procedure Proposal cit. draft Regulation art. 41a(8).
[229] *Ibid*. art. 53(1).
[230] SBC cit. art. 14(2)-(3).
[231] CFR cit. art. 18.
[232] See discussion above on draft art. 8 of the Screening Proposal.

will expectedly lead to the generalisation of a refusal of entry process very similar to the "deferred refusal of entry" or *respingimento differito* operating at the Lampedusa hotspot that the Strasbourg Court has specifically condemned as a violation of the prohibition of collective expulsion.[233]

Therefore, if adopted as they are or without substantial variation, the Commission proposals will firmly entrench the problematic hotspot arrangements deployed during the 2015 "refugee crisis", structuralising unfairness against protection seekers on a grand scale.[234] These arrangements rest on and routinise a (long discredited[235]) legal fiction of non-entry that (re)conceptualises territory as non-territory, through an artifice of de-territorialisation that splits geography from the legal order for the purpose of excluding the full application of fundamental rights.[236] Since neither during the screening nor during the border procedure should "the third-country nationals concerned…be authorised to enter the territory" in the *juridical* sense,[237] un-doing the whole extent of legal guarantees normally applicable upon *physical* arrival at the external frontiers of the Member States becomes essential. The pre-entry phase, ignoring the norms currently delimiting the territorial reach of the CEAS,[238] in an environment of default *de facto* detention, thereby denies full reception conditions, the guarantees attached to the "normal" asylum procedure, and the general Return Directive safeguards, which "should apply only *after* the screening has ended".[239] As a result, frontally contradicting the Strasbourg Court, the proposed regime "selectively restrict[s]" the application of central protections to which asylum seekers are entitled "by means of an artificial reduction in the scope" of the rules

[233] *J.A.* cit. para. 100ff.

[234] Very similar "fast-track detained" arrangements have been deemed unlawful in the UK. See *Detention Action, R (on the Application of) v Secretary of State for the Home Department*, [2014] EWCA Civ 1634; *Detention Action v Secretary of State for the Home Department*, [2014] EWHC 2245 (Admin); *Detention Action v First-Tier Tribunal (Immigration and Asylum Chamber) and Ors*, [2015] EWHC 1689 (Admin); and *Detention Action, R (on the Application of) v Secretary of State for the Home Department*, [2014] WLR(D) 426, [2014] EWCA Civ 1270).

[235] ECtHR, *Amuur v France* App n. 19776/92 [25 June 1996]. On the EU side: *Commission v Hungary* cit.

[236] J-P Cassarino and L Marin, 'The Pact on Migration and Asylum: Turning European Territory into a Non-territory' (2022) European Journal of Migration and Law 1. See also, M Mouzourakis, 'More Laws, Less Law: The European Union's New Pact on Migration and Asylum and the Fragmentation of "Asylum Seeker" Status' (2021) ELJ 171; and V Moreno-Lax, 'Meta-Borders and The Rule of Law: From Externalisation to Responsibilisation in Systems of Contactless Control', (2024) NILR (forthcoming) papers.ssrn.com.

[237] Screening Proposal cit. Explanatory Memorandum 1, and draft Regulation art. 4(1); and Border Procedure Proposal cit. Explanatory Memorandum 4, and draft Regulation arts 41(13) and 41a.

[238] Current art. 3(1) APD cit. specifies that: "This Directive shall apply to all applications for international protection made in the territory, *including at the border*, in the territorial waters or in the transit zones of the Member States" (emphasis added). There are similar provisions in Dublin Regulation, art. 3(1), and in Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast), art 3(1). See also case C-36/20 PPU *Ministerio Fiscal v VL* ECLI:EU:C:2020:495.

[239] Screening Proposal cit. Explanatory Memorandum 5 (emphasis added), *cf.* draft Regulation recital 27.

concerned.[240] The fiction does not entirely negate the application of the law – it is more sophisticated; it rather restricts it in fundamental ways but only *vis-à-vis* a specific category of persons: the (unwanted) irregular migrants (including the refugees amongst them) that apply for asylum at the external border (the only option available to them in practice). "Crisification" is what propels this transformation.

V. Conclusion: reversing the rule, decreasing legality

As the previous sections have shown, the "crisification" of irregular migration entails significant continuities and path-dependency in the manner in which it is governed,[241] cementing deficient norms and institutions as part of the "normal" legal framework, despite their proven inadequacy/illegality. With the pre-entry screening process and border procedure proposals, the "crisis" paradigm dominating the hotspot approach infiltrates the CEAS, converting it into a system of summary and systematic rejection of "unwanted" migrants. Protection needs (including those deemed "genuine"[242]) become secondary. The main preoccupation becomes "the need to sustain a reduced pressure from irregular arrivals and maintain strong external borders" (whatever the cost).[243] Whether in a (declared) crisis or non-crisis situation, the standardisation of hotspot arrangements in the "streamlined" procedures tabled by the Commission embed and normalise the fiction of non-entry, denying fundamental protections to third-country nationals, negating them "access not only to territory but also to law",[244] thereby dismantling the rule of law – not generally, but for the specific (target) group of unwanted migrants, carving out a space of decreased legality (exclusively) for them.

This "crisification" trend contravenes recent pronouncements by the Grand Chamber of the Strasbourg Court affirming that

> "the special nature of the context as regards migration cannot justify an area outside the law where individuals are covered by no legal system capable of affording them enjoyment of the rights and guarantees protected by the [European] Convention [of Human Rights and, by extension, EU law[245]] which the [EU Member] States have undertaken to secure to everyone within their jurisdiction".[246]

[240] Cf. ECtHR, *N.D. and N.T. v Spain* App n. 8675/15 and 8697/15 para 110.

[241] On this point and further on the contribution of law to the construction (and exacerbation) of crisis, see J Ramji-Nogales, 'Migration Emergencies' (2017) HastingsLJ 609, 611-612.

[242] Border Procedure Proposal cit. Explanatory Memorandum 1.

[243] Instrumentalisation Proposal cit. Explanatory Memorandum 8.

[244] V Mitsilegas, 'The EU External Border as a Site of Preventive (In)justice' (2022) ELJ 263, 263.

[245] Art. 52(3) CFR cit.: "In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, *the meaning and scope* of those rights *shall be the same* as those laid down by the said Convention…" (emphasis added).

[246] *N.D. and N.T.* cit. para. 110.

What is more, the legal order "cannot be selectively restricted to only parts of the territory of a State by means of an artificial reduction in the scope of its territorial jurisdiction".[247] The opposite "would amount to rendering the notion of effective human rights protection…meaningless", undoing the rule of law at will, to the detriment of specific/targeted individuals.[248]

With this in mind, the pre-entry arrangements, as currently designed, geared as they are towards repelling irregular entrants above all else, should be abandoned. Like their hotspot precursors, there is a high chance that they, too, become a vehicle for cursory decisions without substantive assessment of protection needs, "closing the control gap" decried by Member States,[249] but by unduly restricting, if not entirely exceptionalising, access to protection. Such an outcome would fundamentally reverse the relation between (what should remain) the rule and its exception, normalising hotspot-like derogations from the applicable norms, treating all (potential) irregular migrants (including refugees) as undesirable, undeserving, and as a "threat" (through their mere presence) to the integrity of the Schengen zone.

The mobilisation of crisis as (asylum/migration) governance and its structuralisation as part of the EU *acquis* takes law *outside* the law, unmooring it from its core founding values, including minimum human rights standards.[250] At the receiving end of the proposed reforms are "not…those who have committed criminal offences [that may attract punishment] but…aliens who, often fearing for their lives, have fled from their own country",[251] to whom the EU owes and has pledged protection, not as a grace or a favour, but as a matter of legal commitment.[252] "Un-crisis" thinking is thus necessary,[253] for the "humane" CEAS and Schengen regime promised by Commission President von der Leyen to materialise.[254] As shown by the hotspot case law,[255] it is essential to find and formulate "liberatory solutions"[256] to the regulation of irregular migration that align with the fundamental principles at the centre of the EU system.[257] A return to non-crisis formulas is vital to regain normative soundness and restore the rule of law.

[247] *Ibid*.

[248] *Ibid*.

[249] J Vedsted-Hansen, 'Border Procedure on Asylum and Return' cit. 102.

[250] Art. 2 TEU and art. 67(1) TFEU.

[251] *J.A.* cit. para. 82.

[252] Art. 18 CFR.

[253] D Otto, 'Decoding Crisis in International Law: A Queer Feminist Perspective', in B Stark (ed.), *International Law and its Discontents: Confronting Crisis* (Cambridge University Press 2015) 115, 135.

[254] European Commission, *Press statement by President von der Leyen on the New Pact on Migration and Asylum* ec.europa.eu.

[255] *J.A.* cit.; *M.A.* cit.; *A.S.* cit.; *A.B.* cit.; *A.T.* cit.; *H.A.* cit.; *J.R.* cit.; and *O.S.A.* cit.

[256] D Otto, 'Decoding Crisis in International Law' cit.

[257] Art. 6 TEU and art. 51 CFR.