ARTICLES

ARE THE EU MEMBER STATES STILL SOVEREIGN STATES UNDER INTERNATIONAL LAW?

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EUROPEAN MIGRATION LAW BETWEEN "RESCUING" AND "TAMING" THE NATION STATE: A HISTORY OF HALF-HEARTED COMMITMENT TO HUMAN RIGHTS AND REFUGEE PROTECTION

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ABSTRACT: EU primary law reaffirms that States have the right to control the entry and stay of non-nationals, but it also entrusts the legislature with deciding, within the confines of human rights, how open or closed the external borders shall be. The ensuing tension between protection and state control is deeply engrained in the history and presence of European migration law. Supranational legislation often establishes a higher level of protection than human rights in the form of individual rights to legal entry or stay; these statutory guarantees considerably curtail the room for manoeuvre of the Member States, albeit on the basis of their "voluntary" consent. At the same time, EU migration law and policy can increase the practical leverage of States by means of inter-state cooperation. These contrasting dynamics coalesce in the contemporary debate about asylum policy. Protective elements exist, but several Member States violate their obligations, notably in the external border control context ("pushbacks"). While such instances of open resistance are unprecedented, they build on a history of half-hearted commitment ever since the signature of the Refugee Convention. EU migration law comprises reasonably generous domestic legislation and contributes to reducing the numbers of arrival at the same time, in particular via cooperation with third states such as Tunisia, Turkey, or Morocco, thus reiterating the simultaneity of "rescuing" and "taming" the nation-state.

KEYWORDS: migration – asylum – Schengen – border controls – pushbacks – visas.

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I. Introduction

European migration law is habitually presented as a restriction of state sovereignty. Judgments of the CJEU regularly censure the Member States for having violated secondary legislation. Critical academics and NGOs reinforce the impression that European migration law gives preference to migrants' rights over state interests. EU institutions are generally more inclined to question entrenched national practices than domestic courts. The Court's reputation of dynamic interpretation with regard to free movement and Union citizenship reinforced the impression. It seemed as if the EU institutions "colluded" with the European Court of Human Rights (ECtHR) in Strasbourg to restrict state sovereignty.

The central argument will be that an overall assessment paints a nuanced picture. Union law establishes important limits to state discretion, while advancing sovereignty in other regards. To describe this ambiguity, the title takes up two famous descriptions of the European project which accentuate the diversity of driving forces. On the one hand, political theorist Jan Werner Müller highlights the traditional function of "taming" the excesses of the nation-state by means of legal and political oversight. Today's European Union builds upon a network of institutions and coordination frameworks which had been designed to curtail the freedom of Western European democracies after World War II.[1]

On the other hand, economic historian Alan Milward coined the catchphrase "the European rescue of the nation-state"[2] to emphasise the element of self-interest underlying EU integration. States cooperate to gain factual influence, which they cannot exercise by themselves any longer. States gain leverage by pooling resources. Such neorealist accounts of the integration process are based on a factual conceptualisation of sovereignty as the ability to influence political, economic, social, military, and other developments in practice rather than a formal independence as the absence of legal obligations.[3]

The ensuing tension between "taming" and "rescuing" the nation-state defines the evolution of EU migration law up until today, thus echoing the evolution of the European project more broadly. To substantiate this hypothesis, our analysis will proceed in three steps. It will begin with an inspection of primary law, which essentially reiterates pre-existing guarantees for migrants and entrusts the specification of the policy design to the EU institutions (section II). Numerous pieces of supranational legislation curtail the freedom of the Member States, whereas others enhance the level of control of migratory movements in a typical European combination of restriction and protection (section III).

[1] See JW Müller, *Contesting Democracy. Political Ideas in Twentieth-Century Europe* (Yale University Press 2011) chapter 4; doing so prevented a return to nationalism and also limited the freedom of manoeuvre of national governments at a time when socialist and communist political parties were successful in several countries.

[2] A S Milward, *The European Rescue of the Nation State* (2nd edn, Routledge 2000).

[3] See also the case study on external human rights by David Garciandía Igal in 'EU Coordination in Multilateral Fora as a Means of Promoting Human Rights Abroad' (2024) European Papers (forthcoming).

Asylum law and policy face pronounced challenges of legal design and compliance, which are amplified by the failure to reform core elements of the asylum *acquis*. While the degree of mismatch is unprecedented, going as far as open resistance to Union law in the form of "pushbacks", the underlying hesitation is not new as such. Widespread references to "values" and "human rights" occasionally hide the element of "organised hypocrisy" in the Western self-description. The history of asylum law and policy can be portrayed as a succession of half-hearted commitment, which continues in today's EU (section IV).

II. Primary Law: migration management and its limits

Judgments of the ECtHR habitually start with the formula that States have, "as a matter of well-established international law and subject to [their] treaty obligations", the right to control the entry and stay of non-nationals into their territory.[4] Postcolonial studies and Third World Approaches to International Law (TWAIL) criticise the underlying assumption of state control, which had emerged during the second half of the 19th century when Western countries closed their doors to Asians and other "unwanted" aliens, thus supplanting earlier episodes of comparatively liberal mobility regimes in the era of colonial conquest.[5]

This criticism may be intellectually sound, but it does not undo the basic contours of international custom as a matter of positive law, which both the European Convention and supranational Union law reaffirm. To start with, a cursory survey of the Treaty articles signals a distinct outlook differing markedly from the freedom-enhancing rationale of Union citizenship and the single market. Arts 77–79 TFEU lay down diverse objectives. The abolition of internal border controls within the Schengen area shall be combined with "enhanced measures to combat illegal immigration"[6] and respect for human rights and the Refugee Convention.[7] Generally speaking, "the efficient management of migration flows"[8] should be accompanied by "fair[ness] towards third-country nationals"[9]. The vague notion of an "area of freedom, security, and justice" does not shed much light on how to operationalise this conglomerate of objectives in arts 67 and 77-80 TFEU.[10] They may be legally binding at an abstract level but do not usually translate into judiciable yardsticks for the design of secondary legislation.

[4] First used by ECtHR *Abdulaziz et al. v the United Kingdom* App n. 9214/80, 9473/81 and 9474/81 [28 May 1985] para. 67.

[5] See K de Vries and T Spijkerboer, 'Race and the Regulation of International Migration. The Ongoing Impact of Colonialism in the Case Law of the European Court of Human Rights' (2021) NQHR 291; and V Chetail, *International Migration Law* (OUP 2019) 19–37.

[6] Art. 79(1) TFEU.

[7] *Ibid*. art. 78(1).

[8] *Ibid*. art. 79(1).

[9] *Ibid*. art. 67(2); similarly, art. 79(1).

[10] See D Thym, *European Migration Law* (OUP 2023) 33-40.

For our purposes, the contrast to Union citizenship stands out. Constitutional guarantees to transnational mobility give way to legislative competences on how to deal with third country nationals. The decision of how open or closed the external borders shall be rests with the legislative process. EU institutions benefit from a principled discretion on how to implement and balance policy objectives within the confines of human rights. When it comes to the latter, the Charter confirms the leeway, although it generally presents itself as an avant-garde catalogue.[11] In the field of migration, it essentially reiterates pre-existing guarantees. Free movement and labour market access are limited to Union citizens explicitly, in the same vein as the right to vote in municipal elections.[12]

When interpreting the Charter, the Court of Justice follows the guidance of the Strasbourg Court. The ECtHR has reinforced the principle of non-refoulement in the Refugee Convention, and it has also established limits for the expulsion of migrants residing in a country already.[13] With regard to access to the territory, however, neither the European Convention nor the Charter curtail state discretion extensively, with the exception of non-refoulement and the right to asylum.[14] There are few areas where the CJEU case law goes beyond the level of protection under the European Convention. The rights of the child and procedural guarantees in arts 24, 41, and 47 of the Charter are among them, as exemplified by an increasing number of judgments on these matters.[15] They are the exception to the rule that the EU Treaties refrain from introducing new limits to state sovereignty by essentially reiterating pre-existing obligations.

III. Secondary legislation: enhanced migrants' rights

Legislative leeway need not result in restrictive policy outcomes. Leaving room for political choices about how open or closed the external borders shall be entrusts the supranational institutions with taking the relevant decisions. Analysing the outcome of the legislative process, one notices a twofold dynamic: measures enhancing the rights of migrants coexist with instruments advancing state control. That combination does not come as a surprise. European politics are defined by a permanent "grand coalition", bringing together the views of political parties and national interests from across the political spectrum. The collection of policy objectives, enshrined in arts 77-79 TFEU, translates into a plethora of measures combining control imperatives with the interests of migrants.

[11] See Recital 4 EU Charter of Fundamental Rights.

[12] See arts 15(2), 39, 40, 45 CFR cit.; arts 52(2), (7) CFR and the official Explanations (OJ 2007 C 303/17) 23 confirm that they correspond to arts 45, 49, 56 TFEU.

[13] For a (critical) overview, see MB Dembour, *When Humans Become Migrants* (OUP 2015) chapters 4, 6, 7; as well as the contributions to D Moya and G Milios (eds), *Aliens before the European Court of Human Rights* (Brill 2021).

[14] On the case law on art. 3 ECHR and arts 4, 18, and 19 CFR, see D Thym, *European Migration Law* cit. 309-311, 351-355.

[15] See *ibid*. 135-136, 180-187.

III.1. Enhancing the rights of migrants

The relative weight of migrants' rights and control measures has fluctuated over time and according to the subject matter. Generally speaking, statal control imperatives gained the upper hand in the 1990s at a time which might be called Europe's first asylum policy crisis. Classic destinations countries in Western and Northern Europe sponsored the Europeanisation of asylum policy, as we shall see, to increase regulatory and practical leverage. In the new millennium, migrants' rights rose to prominence when intergovernmentalism gradually gave way to supranational co-decision and judicial oversight under the Treaties of Amsterdam, Nice, and Lisbon,[16] although migration control remained important. Recent years have witnessed a renewed emphasis on restrictions in the fields of border controls and asylum following the events of 2015/16.

This fluctuation entails that decisions taken years ago can limit state discretion in the future. The rigidity of the legislative procedure and the absence of a political consensus on how to move forward entail that States have to apply legislation which was agreed upon in a different geopolitical and factual context. The rise of populist parties across Europe reinforced the mismatch between contemporary policy preferences and the longevity of secondary legislation adopted previously.[17] States are often unhappy with what previous governments had signed up to. Rumour has it that the Commission has refrained from proposing a revision of the Family Reunification Directive in order not to provide governments with an opportunity to insist on stricter conditions during the negotiations. Directive 2003/86/EC has not been amended ever since its unanimous adoption two decades ago. Such rebuttal of legislative change can forestall toxic debates about migration, even though it is problematic from the perspective of democratic theory if statutory rules are effectively set in stone.[18]

External processing illustrates the underlying dynamics. The United Kingdom and Denmark, which has an opt out from the asylum directives, have recently initiated transfer arrangements with Rwanda and, possibly, Albania where asylum applicants shall be sent for status determination.[19] Populist politicians across Europe fancy the idea, which

[16] See K Groenendijk, 'Recent Developments in EU Law on Migration' (2014) European Journal of Migration and Law 313, 329–334; and D Acosta Arcarazo and A Geddes, 'The Development, Application and Implications of an EU Rule of Law in the Area of Migration Policy' (2013) JComMarSt 179.

[17] See the contributions to V Stoyanova and S Smet (eds), *Migrants' Rights, Populism and Legal Resilience in Europe* (CUP 2022).

[18] That limitation is rarely described as a deficit in the field of migration, unlike in monetary union; see C Colliot-Thélène, 'What Europe Does to Citizenship' in D Chalmers, M Jachtenfuchs and C Joerges (eds), *The End of the Eurocrats' Dream* (CUP 2016) 127.

[19] Domestic decisions and court challenges, including before the ECtHR, were ongoing at the time of writing; see further Memorandum of understanding for the provision of an asylum partnership arrangement, 14 April 2022, www.gov.uk.

has been discussed on several occasions over the past 20 years.[20] Other Member States than Denmark cannot pursue similar strategies without the prior consent of the EU institutions. External processing presupposes an amendment to the Asylum Procedures Directive, which appears highly unrealistic at this juncture. Supranational legislation serves as a stumbling block for overly restrictive proposals. Even if the Directive was changed, it would have to be determined whether it complies with human rights are not.

The Family Reunification Directive exemplifies the doctrinal features of how legislation bolsters the legal position of migrants. It had originally been criticised by NGOs and critical academics on account of optional clauses and stricter standards in comparison to Union citizens. Nevertheless, the Directive has proven valuable for migrants in many respects.[21] The underlying doctrinal construction is simple. In a judgment of principle, the Court concluded that the Directive "imposes precise positive obligations with corresponding clearly defined individual rights", which are "[g]oing beyond" human rights.[22] Otherwise put, States must issue an entry visa where human rights do not require so.

Multiple instruments replicate this model: they establish individual guarantees to be admitted if third country nationals fulfil the entry requirements laid down in secondary legislation. Corresponding guarantees cover a wide range of subject areas, including border controls, visas, asylum, family reunification, labour migration, long-term residents, and return. The level of protection stays short of Union citizenship, but it is significant nonetheless. Practical effects will vary between countries and over time, depending on national laws. Numerous Court judgments censure restrictive state practices in light of secondary legislation. Doing so does not require far-fetched dynamic interpretation. Rather, judges analyse the wording, the objective, the general scheme, and the drafting history meticulously.[23] Such analyses will often stretch over several dozen paragraphs. EU migration law "tames" the nation-state by means of individual rights.

III.2. Promotion of State interests

Individual rights of migrants go hand in hand with measures enhancing migration control. A good example are the seminal Tampere Conclusions of 1999, which are generally

[20] See G Noll, 'Visions of the Exceptional: Legal and Theoretical Issues Raised by Transit Processing Centres and Protection Zones' (2003) European Journal of Migration and Law 303; and C Levy, 'Refugees, Europe, Camps/State of Exception: "Into the Zone", the European Union and Extraterritorial Processing of Migrants, Refugees, and Asylum-Seekers (Theories and Practice)' (2010) Refugee Survey Quarterly 92.

[21] See K Groenendijk and T Strik, 'Directive 2003/86 on the Right to Family Reunification. A Surprising Anchor in a Sensitive Field' in E Tsourdi and P De Bruycker (eds), *Research Handbook on EU Migration and Asylum Law* (Elgar 2022) 306.

[22] See case C-540/03 *Parliament v Council* ECLI:EU:C:2006:429 paras 59–60.

[23] See D Thym, 'Between "Administrative Mindset" and "Constitutional Imagination"' (2019) ELR 138, 148–151.

cherished as the high point of progressive migration policies at a time of widespread optimism about globalisation. Besides protective elements, they similarly emphasised cooperation with third states and border controls to "stop" illegal immigration.[24] Such language gained prominence after the terrorist attacks of 2001 and the policy crisis of 2015/16.[25] "Securisation" has become a prominent theme in contemporary debates;[26] an embodiment is the impressive build-up of Frontex.

The underlying rationale can be explained by means of a historical example. The original choice for Schengen was primarily a political one. The abolition of internal border controls coincided with the single market and epitomised the move towards political union. Interior ministers were not a happy at first. Over the years, however, they understood that intergovernmental collaboration with peers in the Schengen area and under the Treaty of Maastricht allowed them to advance their agenda, thus spearheading the upsurge of control instruments. Political scientists speak of "venue shopping"[27], with governments escaping to Europe to realise policy objectives they cannot achieve domestically.

In doing so, Schengen was much more than the simple projection of previous internal practices upon the external borders. Schengen served as a laboratory for the design of new instruments, which gradually established a new "culture of border controls".[28] The Schengen Information System, for instance, was the prototype for other justice and home affairs databases, which have expanded significantly, and transnational operational cooperation prepared the ground for Frontex. A defining feature has been the move away from border-crossing points. The "control" of individual migrants by border guards is increasingly being replaced by generalised forms of "management" based on abstract risk assessments.[29] A decisive characteristic were pre-arrival measures, such as visas, and cooperation with third states, for instance with Turkey, which enhanced factual control over migration by means of a "border abroad"[30].

The element of "rescuing" the nation-state was particularly pronounced from the perspective of the classic destination countries in Western and Northern Europe. Germany

[24] See European Council Presidency Conclusions of 15 and 16 October 1999, 11-12, 22–27.

[25] On the change of direction in European Council conclusions, see CC Murphy and D Acosta Arcarazo, 'Rethinking Europe's Freedom, Security and Justice' in CC Murphy and D Acosta Arcarazo (eds), *EU Security and Justice Law* (Hart 2014) 1.

[26] On the theoretical concept, see the contributions to N Kogovšek Šalamon (ed.), *Causes and Consequences of Migrant Criminalization* (Springer 2020).

[27] V Guiraudon, 'European Integration and Migration Policy' (2000) 38 JComMarSt 251; see also S Lavenex, *The Europeanisation of Refugee Politics* (Ashgate 2001).

[28] See R Zaiotti, *Culture of Border Controls. Schengen and the Evolution of European Frontiers* (University of Chicago Press 2011) chapters 1, 2, 5.

[29] See T Spijkerboer, 'Changing Paradigms in Migration Law Research' in C Grütter, S Mantu and P Minderhoud (eds), *Migration on the Move* (Brill 2017) 13, 15–18.

[30] E Guild, 'The Border Abroad. Visas and Border Controls' in K Groenendijk, E Guild and P Minderhoud (eds), *In Search of Europe's Borders* (Kluwer 2003) 87.

received no less than two thirds (!) of all asylum seekers in Europe during 1985–2000.[31] It strongly supported Europeanisation to share that responsibility with other countries, including through the Dublin system on asylum jurisdiction. While "Schengen" is commonly remembered as an avant-garde of pan-European cooperation nowadays, the original debate embraced darker narratives. The exclusion of the founding member Italy was politically and symbolically significant; France, in particular, was doubtful as to whether it would control its external borders effectively.[32]

In the first years, Schengen was a closed shop of five countries facing comparable challenges and sharing similar interests at when governments in Western and Northern Europe were concerned with an increase in the number of asylum applications.[33] They agreed on a rulebook, in the Convention Implementing the Schengen Agreement and implementing decisions, which any country joining the Schengen area had to sign up to. One example was the minimum harmonisation of countries on the "black list" whose nationals required a visa for visiting the Schengen area.[34] When Italy joined Schengen, it had to introduce visa requirements for the Maghreb countries, thus closing a back-door for irregular onward movement to France.[35]

These historical anecdotes underline the element of self-interest, which has defined European migration law from the beginning – and continues to be critical. The example of France indirectly obliging Italy to introduce visa requirements exemplifies why Europeanisation can increase leverage. There is little France can do once Tunisians have reached the Franco-Italian border. Reintroducing internal border controls, as France has done repeatedly, is primarily a political symbol for a sceptical public opinion that the government is doing something.[36] In practice, migrants find it quite easy to enter France for the simple

[31] See the dataset of ER Thielemann, 'Why Asylum Policy Harmonisation Undermines Refugee Burden-Sharing' (2004) European Journal of Migration and Law 47, 48–54.

[32] See S Paoli, 'France and the Origins of Schengen' in E Calandri, S Paoli and A Varsori (eds), *Peoples and Borders* (Nomos 2017) 255, 258–265.

[33] On the historic context, see A Luedtke, 'Migration Governance in Europe. A Historical Perspective' in A Weinar, S Bonjour and L Zhyznomirska (eds), *The Routledge Handbook of the Politics of Migration in Europe* (Routledge 2019) 15, 16–19.

[34] See Annex I to Appendix I Decision SCH/Com-ex (99)13 on the definitive versions of the Common Manual and the Common Consular Instructions [2000] OJ L239/317.

[35] See S Paoli, 'The Schengen Agreements and their Impact on Euro-Mediterranean Relations' (2015) Journal of European Integration History 125.

[36] See D Thym and J Bornemann, 'Schengen and Free Movement Law During the First Phase of the Covid-19 Pandemic: of Symbolism, Law and Politics' (2020) European Papers www.europeanpapers.eu 1143, 1144–1146; on the illegality of the measures, see M Mykyliuk, 'How to Tango? The Contradictory Nature of the Public Order and National Security Exemption Within the Schengen Area' (2024) European Papers (forthcoming).

reason that an effective border closure is not practically feasible within continental Europe. Rejection at the border is a frequent occurrence,[37] but migrants will typically manage to sneak across the second or third time.

If, by contrast, Italy requires prior authorisation by means of a visa, Tunisians who do not fulfil the entry conditions must use smugglers to reach Italy. That costs a lot of money and is dangerous, thus reducing the number of arrivals.[38] Arguably, visa requirements are the single most effective migration control instrument to this date. They are reinforced by carrier sanctions: airlines must pay a fine if they allow anyone not fulfilling the entry conditions to board a plane. Airline staff exercises *de facto* border controls abroad. Today's Visa List Regulation (EU) 2018/1806 and the Carrier Sanctions Directive 2001/51/EC have been instrumental in spreading these control measures across the continent. Additional measures buttress the ability of States to "combat illegal immigration"[39]: databases, international cooperation, Frontex, and legislation on smuggling. They reiterate our overall conclusion that European migration law is about "rescuing" the nation-state as much as it is about "taming" national excesses.

IV. Asylum policy: reform failure and circumvention

Anyone reading a newspaper knows about the dire state of asylum policy. The term "pushback" has become a symbol of persistent violations of Union law. States no longer respect legislation agreed upon in a different geopolitical and factual context. Failure to reform core elements of the asylum *acquis*, notably the Dublin III Regulation (EU) n. 604/2013, reinforce a sense of practical and political impasse, even though the political agreement, at the Justice and Home Affairs Council in June 2023, indicates that some kind of reform might be adopted.[40] Even the absence of reform does not present a political or even legal justification for Member States violating Union law, but it substantiates our argument about the malaise of asylum policy. Contemporary struggles increase the ambivalence and hypocrisy of an asylum policy which had been defined by conflicting impulses and objectives from the beginning, thus substantiating the combination of protective and restrictive elements in the design of EU migration law.

[37] See S Casella Colombeau, 'Crisis of Schengen? The Effect of Two "Migrant Crises" (2011 and 2015) on the Free Movement of People at an Internal Schengen Border' (2020) Journal of Ethnic and Migration Studies 2258.

[38] Higher (financial) costs, (administrative) hurdles, and personal (risks) involve that less migrants can be expected to use the "illegal" route when legal pathways are closed or narrowed down; there is not usually a simple diversion from legality to illegality.

[39] Art. 79(1) TFEU cit.

[40] On the latest reform proposals, see the contributions to D Thym and Odysseus Academic Network (eds), *Reforming the Common European Asylum System* (Nomos 2022).

IV.1. "Pushbacks" as an extreme form of non-compliance

"Pushback" does not have a precise legal or practical meaning, although the term is usually employed for state practices which prevent entry onto the territory or force foreigners to leave without procedural safeguards. EU legislation lays down distinct procedures about refusal of entry at border crossing points.[41] By contrast, the legal regime for the surveillance of the (green) land and (blue) sea border is much more loosely knit; some uncertainties persist about the interaction of EU legislation on border controls with the asylum *acquis* and the outer limits of human rights.[42] Irrespective of the small print, domestic "pushback" practices are illegal whenever we conclude that an individual has applied for asylum with the border police. Doing so entails the obligation, on the part of the authorities, to respect the Asylum Procedures Directive 2013/32/EU.

Instances of non-compliance have haunted EU asylum policy from the beginning as a result of profound legal design and enforcement deficits. The Dublin system on asylum jurisdiction has never functioned well. States at the external borders have undermined Dublin for many years by not registering new arrivals, and even if they do so, they often refuse to accept take backs, as the Italian example illustrates.[43] Structural unfairness of the Dublin rulebook lent political support to a culture of tolerated non-compliance.[44] Member States saw that the legislation was structurally unfair and accepted - or even sponsored - onward movements of asylum applicants within the Schengen area. Informality became widespread, which is sustained, indirectly at least, by "voluntary" solidarity mechanisms on the basis of political *ad hoc* arrangements.[45]

Other core asylum instruments are similarly defined by structural design and enforcement deficits, of which the desolate state of receptions conditions and asylum procedures in the hotspots on the Greek islands are an extreme expression. These difficulties have to do with the lack of political will and administrative capacity by the Greek authorities, but they also reflect deeper problems. Reliance on complex procedures and court oversight in literally thousands of cases as the foundation of EU legislation has proven unrealistic, in particular in the geographical periphery or for higher numbers. One explanation for procedural complexity is the influence of the classic destination coun-

[41] See art. 14 of the Schengen Borders Code Regulation (EU) 2016/399.

[42] See D Thym, *European Migration Law* cit. 309-311, 330-334.

[43] In 2021, Italy took back 10.8 per cent of the asylum seekers from Germany for which it had assumed responsibility; see (German) Federal Government (*Bundesregierung*), 'Ergänzende Informationen zur Asylstatistik – Schwerpunktfragen zu Dublin-Verfahren' (Bundestag doc 20/861, 24 February 2022) 11; note that reasons for non-compliance include difficulties to enforce the law on the part of the German authorities.

[44] 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* (3rd edn, OUP 2021) 793, 797–798.

[45] See L Marin, 'Waiting (and Paying) for Godot: Analyzing the Systemic Consequences of the Solidarity Crisis in EU Asylum Law' (2020) European Journal of Migration and Law 60.

tries. They dominated the early debate not as political hegemons but as a result of profound expertise, thus effectively uploading their domestic models to Brussels.[46] States in Southern and, later, Eastern Europe took over sophisticated procedural patterns, which worked reasonably well in the West and North but proved not fit for purpose elsewhere.[47] The first ever activation of the Temporary Protection Directive during 2022 may be perceived an act of liberation from procedural rigidity.

"Pushbacks" build on this tradition of non-compliance but raise it to a new level, nonetheless. While they had been pursued in the limelight for many years, with governments denying that they engage in them, the last two years have seen open resistance. Geopolitical confrontation with Turkey and Belarus provided the background for Greece, Lithuania, and Poland challenging EU legislation openly.[48] Commission President von der Leyen and the European Council lent some political coverage when they spoke of a "hybrid attack"[49] by Turkey and Belarus, which might possibly justify non-compliance with secondary legislation in light of art. 72 TFEU. The Court has rejected that argument in a case concerning the internal border between Lithuania and Poland, even though some ambiguities remain as to whether the provision can be relied upon in a different context.[50]

Such open resistance is unprecedented, and it reaffirms that Union law restricts state policies from a legal perspective. Members States openly refuse to comply with supranational legislation protecting the rights of migrants to advance restrictive tendencies. While that reading is correct in many respects, it risks painting on overtly rosy picture of EU legislation advancing the legal position of individual vis-à-vis statal control imperatives. Subtle forms of indirect tensions have defined to European commitment to human rights and refugee law from the beginning, as a form of "organised hypocrisy"[51]. Western States sign up to liberal values with much fanfare, while circumventing them in practice.

IV.2. Continuity of "organised hypocrisy" over time

The postcolonial critique emphasises that the Western commitment to refugee law, including in art. 78(1) TFEU, has always been ambivalent, notwithstanding the official praise

[46] See N Zaun, *EU Asylum Policies. The Power of Strong Regulating States* (Palgrave 2017).

[47] See R Byrne, G Noll and J Vedsted-Hansen, 'Understanding the Crisis of Refugee Law' (2020) LJIL 871, 881–888.

[48] See A Skordas, 'The Twenty-Day Greek-Turkish Border Crisis (Part I & II)' (5 and 8 May 2020) EU Immigration and Asylum Law; and ECRE, 'Weekly Bulletin' (15 October 2021) mailchi.mp.

[49] See U von der Leyen, 'Strengthening the Soul of our Union' (State of the Union Address, 15 September 2021); and European Council Conclusions of 22 October 2021 paras 19–21.

[50] See case C-72/22 PPU *Valstybės sienos apsaugos tarnyba* ECLI:EU:C:2022:505 paras 68–74; and D Thym, 'Upholding the right to asylum in times of its "instrumentalization" by neighbouring States' (2023) CMLRev 1.

[51] SD Krasner, *Sovereignty. Organized Hypocrisy* (Princeton University Press 1999).

of the Refugee Convention as the "magna carta" for refugee protection.[52] The Convention had originally been based on a geographic and temporal limitation: it concerned only refugees from Europe which were residing in another country already; millions of displaced persons on the Indian subcontinent and victims of late colonial suppression were not included (with the exception of Palestinian refugees under the auspices of UNRWA).[53] This changed in 1967 when the Convention was universalised in a rather haphazard manner; the core motivation was to secure the predominance of Western-style multilateralism in the age of decolonisation.[54] States did not change the narrow refugee definition, although it was manifestly insufficient to deal with mass displacement in the global South, for instance during the Biafran War.

European States willingly gave money to UNHCR and other actors to take care of refugees in the global South.[55] Once these refuges and migrants started moving towards Europe in greater numbers from the 1980s onwards, however, States developed "non-arrival", "protection elsewhere", and "non-admission" policies to manage migratory movements. Visa requirements, carrier sanctions, asylum border procedures, and safe third countries are among the measures aimed at reducing the numbers of arrival. Union law was instrumental in spreading these restrictions across the continent. They took centre-stage in the non-binding London Resolutions adopted in a purely intergovernmental setting prior to the Treaty of Maastricht and have defined the Schengen rulebook and supranational harmonisation ever since.[56] The generous reception of Vietnamese boat people was the exception to the rule, allowing the West to present the Communist regimes of Southeast Asia as evil persecutors.[57]

This history of half-hearted commitment continues. "Externalisation" is a crucial component of Union law and policy. Both the Member States and the EU institutions cooperate with third states to indirectly reduce the number of arrivals. Germany spearheaded that practice thirty years ago, as did Spain and Italy in cooperation with Libya, Morocco, and Mauritania after the millennium change.[58] For the classic destination countries in Western and Northern Europe, the EU was an exercise of "externalisation" in itself. The Common

[52] The formula goes back to the first UN Deputy High Commissioner JM Read, *Magna Carta for Refugees* (UN Department of Public Information 1951).

[53] See N Soguk, *States and Stranger* (Minnesota UP 1999) chapter 4; and E Tendayi Achiume, 'Race, Refugees, and International Law' in C Costello, M Foster and J McAdam (eds), *The Oxford Handbook of International Refugee Law* (OUP 2021) 43.

[54] See SE Davies, 'Redundant or Essential? How Politics Shaped the Outcome of the 1967 Protocol' (2007) IJRL 703, 715–726.

[55] See A Betts, G Loescher and J Milner, *UNHCR* (2nd edn, Routledge 2012) chapter 2.

[56] On the early years, see E Denza, *The Intergovernmental Pillars of the European Union* (OUP 2002) chapter 3.

[57] See JC Hathaway, 'A Reconsideration of the Underlying Premise of Refugee Law' (1990) HarvIntlLJ 129, 144–56; and BS Chimni, 'The Geopolitics of Refugee Studies' (1998) Journal of Refugee Studies 350.

[58] See D FitzGerald, *Refuge beyond Reach* (OUP 2019) chapter 9.

European Asylum System established a *cordon sanitaire*, which allowed the Germany and France, among others, to outsource responsibilities to the States at the external border.

Under the current Multiannual Financial Framework (MFF), more than ten billion (!) euros are available to support neighbouring states in the areas of asylum, migration, and border management in the context or pre-accession assistance and development cooperation.[59] Morocco is a prominent partner, which receives an awful lot of money, together with political sweeteners such as a soft diplomatic stance of some governments on the status of the Western Sahara. Cooperation with Turkey, not least in the context of the EU-Turkey Statement, follows a similar script, as does the – controversial - cooperation with the Libyan coast guard.[60] Most recently, the EU institutions have invested quite some political - and financial - capital to cooperate with the Tunisian government.[61]

This brings me to one last example. Some readers be familiar with the *N.D. & N.T.* judgment of the Strasbourg Court, which famously accepted the Spanish practice of hot returns of those entering irregularly. The Grand Chamber found blanket refusal, without even a rudimentary procedure, to comply with the ECHR, although Spain arguably violates the higher standards in the Asylum Procedures Directive.[62] I'm not concerned with these legal details, however. Instead, the facts of the case deserve our attention.

The judgment describes the hypocrisy of European asylum policy bluntly. Spain does allow any third country national to apply for asylum at border crossing points in accordance with EU legislation. In practice, however, hardly anyone from sub-Sahara Africa will benefit from that possibility. Why? The Moroccan police engages in racial profiling: only Arabs, especially Syrians, will be allowed to proceed towards the Spanish border crossing point, where they can apply for asylum.[63] Senegalese and Nigerians, by contrast, will usually be prevented from doing so. They have no other option than to climb fences, which the Moroccans will not usually allow either. If they manage to cross the fence, Spain will engage in "hot return" without rudimentary screening.

Observers have noticed a general mismatch between domestic legislation and international cooperation for some time. The EU has adopted reasonably generous domestic rules, which look good on paper. At the same time, it engages Morocco and other third states as a doorman to prevent potential applicants from using these guarantees in practice. Progressive protection standards and sophisticated procedural safeguards in the

[59] See D Thym, *European Migration Law* cit.191-195.

[60] For an overview, see the contributions to F Ippolito, G Borzoni and F Casolari (eds), *Bilateral Relations in the Mediterranean* (Elgar 2020); and D Thym *European Migration Law* cit. chapter 18.

[61] See Commission Press Release IP/23/3887, Mémorandum d'entente sur un partenariat stratégique et global (16 July 2023).

[62] On the latter, see 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), arts 6 and 8, as interpreted by the CJEU in *Valstybės sienos apsaugos tarnyba* cit. paras 58-67; and case C-36/20 PPU *Ministerio Fiscal (Authority likely to receive an application for international protection)* ECLI:EU:C:2020:495.

[63] See ECtHR [GC] *N.D. & N.T. v Spain* App n. 8675/15 and 8697/15 [13 February 2020] paras 155, 163, 218.

Qualification Directive and the Asylum Procedures Regulation coincide with the proliferation of non-arrival policies and externalised migration control in cooperation with third states.[64] Events during 2015/16 can be presented as a temporary collapse of the externalisation architecture,[65] which was rebuilt even stronger in the years thereafter.

Disagreement over how to reform the Dublin system arguably increases the appetite for externalisation, which helps avoiding politically toxic disputes about intra-European responsibility-sharing and solidarity. Member States disagree quite fundamentally about how to reform asylum legislation, but they can agree to cooperate with third states to reduce the numbers of arrivals as a lowest common denominator. That may explain why the externalisation agenda has been flourishing over the past years at a time of political stalemate about internal policy reform. It may be no coincidence that the Memorandum of understanding with Tunisia, mentioned previously, was negotiated in parallel to the asylum legislation. That made it easier for Southern States, notably Italy, to accept mandatory border procedures, albeit for a limited number of persons, despite meagre solidarity. More legal pathways by means of resettlement or humanitarian visas can be a counter-balance, provided that the volumes involved are more than a humanitarian fig leave (something they have not usually been so far).[66]

An emphasis on international cooperation has several advantages for governments. Firstly, it allows them to leave their (internal) commitment to refugee protection untouched. The public discourse usually focuses on domestic events and gives a moral premium to physical presence,[67] while being less concerned with restrictive migration policies abroad. Successive Italian and Spanish governments have cooperated with Libya and Morocco below the threshold of extensive public scrutiny, before populist politicians, such as the former Italian interior minister Matteo Salvini, propagated more radical - and visible - measures, such as port closures. They are more extreme than the previous practice, which had conflicted with the public commitment to human rights nevertheless.

Secondly, externalisation has tangible legal advantages. Support for third states will not usually fall foul of EU migration law: access to the asylum procedure presupposes presence on the territory, or at the external borders;[68] the prohibition of refoulement does not apply extra-territorially, for instance with regard to humanitarian visas;[69] and financial, operational, and logistical support given to third states will not usually cross the

[64] See S Lavenex, '"Failing Forward" Towards Which Europe?' (2018) JComMarSt 1195, 1199–4201.

[65] See M den Heijer, J Rijpma and T Spijkerboer, 'Coercion, Prohibition, and Great Expectations' (2016) CMLRev 607, 618–623.

[66] See S Kneebone and A Macklin, 'Resettlement' in C Costello, M Foster and J McAdam (eds), *The Oxford Handbook of International Refugee Law* (OUP 2021) 1080, 1090–1095.

[67] See L Bosniak, 'Being Here. Ethical Territoriality and the Rights of Immigrants' (2007) Theoretical Inquiries in Law 389.

[68] See art. 3 Directive 2013/32 cit.

[69] See ECtHR [GC] *M.N. and others v Belgium* App n. 3599/18 [5 May 2020] paras 124–126.

jurisdictional hurdle under art. 1 ECHR (notwithstanding the attempts of critical academics to promote the notion of functional jurisdiction[70]).[71] Critical observers speak of "hyper-formalism"[72] or "legal black holes"[73], which States exploit to circumvent liberal values in line with the criticism of "organised hypocrisy". In doing so, rhetorical emphasis on migrant smuggling and the prevention of the loss of life at sea in the public discourse lends the externalisation agenda an aura of humanitarian ambition.[74]

V. Conclusion

EU integration is often presented as a value-driven process, especially in academic circles. Debates about migration law and policy sustain the impression that supranational law is primarily about advancing the legal position of migrants, mirroring Union citizenship. Our assessment of the EU Treaties and secondary legislation paints to a nuanced picture: instances of migration law "taming" domestic politics coexist with measures "rescuing" the nation-state by means of advancing control imperatives. This combination of protective and restrictive elements has defined the evolution of European migration law from the beginning. Primary law supports that outcome by means of open-ended objectives for lawmaking, which essentially entrust the EU institutions with deciding how open or closed the external borders shall be. The legislature benefits from a principled discretion, within the confines of human rights. With regard to the latter, the Charter reaffirms pre-existing guarantees under the European Convention and adds some additional safeguards, notably in the field of procedures.

There is a plethora of legislative instruments on diverse aspects ranging from visas and border controls over asylum and economic migration to long-term residence and return. These directives and regulations habitually go beyond the level of protection under human rights law by laying down individual statutory rights to be admitted under the conditions decided upon in the legislative process. Numerous Court judgments censure state practices on that basis by meticulously applying legislative standards without the need for dynamic interpretation. At the same time, European migration law advances state interests. The historic example of the original choice for Schengen and the evolution of the supranational rulebook ever since contributed to the spread of novel forms of migration control throughout the Union. A defining feature has been the move beyond the

[70] Cf. V Moreno-Lax, 'The Architecture of Functional Jurisdiction. Unpacking Contactless Control - On Public Powers, *S.S. and Others v Italy*, and the "Operational Model"' (2020) German Law Journal 385.

[71] For uncertainties regarding the Charter, see S Law, 'Humanitarian Admission and the Charter of Fundamental Rights' in MC Foblets and L Leboeuf (eds), *Humanitarian Admission to Europe* (Nomos/Hart 2020) 77, 97–109.

[72] D Ghezelbash, 'Hyper-Legalism and Obfuscation. How States Evade Their International Obligations Towards Refugees' (2020) AmJCompL 479.

[73] I Mann, 'Maritime Legal Black Holes' (2018) 29 EJIL 347.

[74] See R Dickson, *Migration Law, Policy and Human Rights. The Impact of Crisis in Europe* (Routledge 2022) chapter 8.

external border. Visa requirements and carrier sanctions, as well as cooperation with third states, effectively establish a "border abroad".

Anyone reading the newspaper learns about the dire state of asylum law and policies. "Pushback" practices are widespread. For our purposes, they reaffirm that supranational legislation contains important protective elements, which some Member States are violating openly. It would be one-sided, however, to present the EU's asylum *acquis* primarily as a bulwark against restrictive national policies. The history of refugee law and supranational harmonisation presents us with a sequence of half-hearted commitments. States sign up to human rights with much fanfare, while circumventing in practice. Cooperation with third states illustrates that the element of "organised hypocrisy" continues. EU institutions have introduced relatively liberal domestic asylum legislation. At the same time, they actively support third states financially and otherwise to indirectly reduce the number of arrivals. Such externalisation practices exploit the territorial underpinning of international human rights and refugee law, thus reiterating our conclusion about the mixed credentials of European migration law.