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Article 78 TFEU and the Way to a Common European Policy in the Field of Asylum

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Introduction

The CEAS has been under constant development since its foundations were laid in international agreements between the Member States of the European Community in 1985. It is marked by differentiated cooperation and was only gradually supranationalized. Article 78 of the TFEU is one cornerstone in the development of the CEAS, but not the sole as it constitutes only a competence provision.

Differentiated Cooperation

Before analyzing how Art. 78 of the TFEU shapes the policy in the field of asylum, the title's reference to a common "European" asylum policy requires further clarification. The European asylum policy is a field of differentiated integration between the Member States. A group of Member States went forward, deepening cooperation in the field of border controls through inter-state agreements (see on this under B.). Other Member States later followed until all agreed to include these

intergovernmental treaties into the *acquis communautaire* of the European Community. Differentiated integration also means that for some Member States, the rules governing the European asylum policy do not apply because they chose not to participate in the integration process. On the other hand, not only EU Member States are part of the CEAS but also Iceland, Liechtenstein, Norway, and Switzerland. These countries have concluded separate Agreements with the European Community concerning e.g. the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a participating State (see Council Decision 2001/258/EC for Norway and Iceland; Council Decision 2008/147/EC for Switzerland; Council Decision 2011/351/EU on the conclusion of a Protocol between the EC, Switzerland, and Liechtenstein on the accession of Liechtenstein to the Agreement between the EC and Switzerland). The reason for differentiated integration lies in the conflicting interests of the Member States. Some had favorable asylum legislation and were not ready to compromise these standards; others feared an intense pressure of migration and – in order to protect their labor markets and social security systems – were unwilling to raise their asylum standards (Comte 2020), p. 7). The standards applied by the Member States to asylum seekers and refugees were differentiating significantly in the 1990s and so did the recognition rates vary. With view to the cooperative management of refugee movements in the EU, it is negligible that

the German basic right to asylum has in fact been rendered insignificant by Art. 16a (2) of the Basic Law, since Art. 16a (5) of the Basic Law opens itself up to integration into the European system of granting protection (cf. Hailbronner 1996, p. 625). The so-called asylum compromise in the Basic Law can be seen as an acknowledgment that global refugee movements cannot be solved solely on a national basis. Central elements of European asylum law, such as the concept of safe third countries, originally stem from German Law (Art. 16a (2) of the Basic Law; cf. Hailbronner and Thym 2016, p. 756). Also, in political science, a “German fingerprint” is noted in the Europeanisation of the border policy (Baumann 2006). The effectiveness of international refugee law depends on international cooperation. Thus, the Refugee Convention refers in its preamble to the consideration “that exercise of the rights to asylum places an undue burden on certain countries because of their geographical situation, and that a satisfactory solution of a problem of which the United Nations has recognized the international scope and nature cannot be achieved without international cooperation to help to distribute refugees throughout the world.” The EU’s common policy on asylum, immigration, and external border control constitutes such a form of international cooperation (Hailbronner and Thym 2016, p. 755).

Intergovernmental agreements ensured more freedom to those States that were reluctant to abolish their border controls and cooperate on asylum issues. A “common” European asylum policy is also not to be confused with a “uniform” policy. Whereas Member States are obliged to apply common rules, administrative and judicial decisions in the field of asylum are within their organisational autonomy. There is not one “uniform” European asylum procedure, but 27 procedural systems which are subjected to “common” standards. Nor is there one European recognition decision with corresponding freedom of movement of the protected person within the EU, but 27 different recognition decisions limited to the respective territories of the Member States. Contrary to the internal market, the CEAS is not marked by transnational administrative acts of

the Member States. Some Member States have claimed an opt-out from parts of the CEAS. According to Protocol No 21 provisions in the field of the area of freedom, security, and justice (Title V of the TFEU) as well as measures adopted pursuant to that Title or international agreements of the EU and CJEU decisions interpreting any such provision or measure shall not be binding upon or applicable in the UK and Ireland. The same applies to Denmark according to Protocol No 22. Secondary Law adopted pursuant to Art. 78 (2) of the TFEU is therefore not binding upon these Member States unless they make use of the possibility to opt in according to the Protocol. For example, according to Art. 4 of Protocol No 22, Denmark shall decide within a period of 6 months after the Council has decided on a proposal or initiative to build upon the Schengen acquis whether it will implement this measure in its national law. If it decides to do so, the measure will only create an obligation under international law between Denmark and the other Member States. Since the Brexit transition period ended on December 31st, 2020, the CEAS no longer applies to the UK (Withdrawal Agreement O.J. 2019 C 384 I/1). Thus, the area of freedom, security and justice turns out to be a fragmented area that is not uniformly governed by the supremacy of EU law (Funke 2021, para. 26; Monar 2009, p. 773). Differentiated cooperation was, however, from the beginning only viewed as a temporary method on the way to harmonisation. The long-term aim has always been to establish one common system in the EU.

Article 78 TFEU as a Competence Provision

Art. 78 (1) of the TFEU formulates the task of the Union to develop a common policy on asylum, subsidiary protection and temporary protection of third-country nationals. It has to be in accordance with the Geneva Convention and the Additional Protocol relating to the Status of Refugees as well as the other relevant treaties. The international legal framework marks the protection standard for a common European policy on asylum and

protection in humanitarian emergencies. The aim is to establish high EU-wide standards for the Member States' asylum procedures, in particular for the accommodation and care of asylum seekers, education and access to work. The CEAS comprises measures on a uniform status of asylum, a uniform status of subsidiary protection for nationals of third countries, who without obtaining European asylum, are in need of international protection, a common system of temporary protection for displaced persons in the event of a massive inflow and common procedures for the granting and withdrawing of uniform asylum or subsidiary protection status (Art. 78 (2) (a)–(d) of the TFEU). It further comprises criteria and mechanisms for determining which Member State is responsible for considering an application for asylum or subsidiary protection and standards concerning the conditions for the reception of applicants for asylum or subsidiary protection (Art. 78 (2) (e)–(f) of the TFEU). The competence enables the unification of the standards of protection to be granted beyond the level of protection under international law. It enables the centralisation, full harmonisation and increasing externalisation of EU asylum law (see Section E.). Art. 78 TFEU is a shared competence between the EU and its Member States (Art. 4 (1), (2) (j) TFEU). It does not create a subjective right to asylum (Rossi 2022, Art. 78 TFEU para. 3 with further references) or respective duties for the Member States, but primarily is a provision on the allocation of competences in the field of asylum, subsidiary and temporary protection, subject to the principles of subsidiarity and proportionality (Art. 5 (3) and (4) of the TEU). It does, however, establish at least the programmatic legal mandate – albeit not justiciable – to develop a common policy on asylum in accordance with the Geneva Convention and its Additional Protocol relating to the status of refugees (Funke 2021, para. 19).

The EU has to make use of these competences and adopt the necessary secondary legislation. Art. 78 TFEU neither marks the starting point of the CEAS nor is it its only component. The CEAS was based on previous Treaty provisions and is complemented by fundamental

rights, by secondary legislation enacted on the basis of Articles 77–80 of the TFEU as well as international agreements and the case law of the CJEU and international Human Rights Bodies (especially the European Court of Human Rights, ECtHR). The instruments to realize the CEAS are manifold. Art. 78 TFEU is not limited to the adoption of directives but also allows regulations aiming at full harmonisation. Further instruments of the CEAS include informal and coordinating measures as well as financial assistance, based inter alia on Art. 80 of the TFEU. The CEAS's purpose is to compensate the lack of internal border controls and to intensify the surveillance and control of movements at the external borders of the EU instead. The freedom of movement guaranteed for Union citizens within the EU (Art. 21 of the TFEU, Art. 45 of the Charter) does not apply to non-resident third-country nationals seeking asylum in the EU. Thus, with the increased freedom internally, the stricter control of the external borders became of more relevance, as the CEAS also aims at preventing secondary movement of asylum seekers within the EU. Located in primary law in the title on the area of freedom, security, and justice in Chapter 2 of Part V of the TFEU, the EU asylum policy is clearly in a constant tension between migration control on the one hand and human rights protection on the other. Viewed from the perspective of third-country nationals or stateless persons seeking protection in the EU, the CEAS is more an area of security and justice than an area of freedom. “Security” in this context refers primarily to internal security through the prevention of irregular migration (on the framing of migration policies as a “threat,” see Funke 2021, § 16 para. 7). The EU pursues efficient border management at the EU's external borders (Art. 77 TFEU) and, internally, a common asylum and immigration policy (Art. 78, 79 TFEU). The competence in the field of asylum policy is situated between Art. 77 TFEU on a common border policy and Art. 79 TFEU on immigration policy. All three areas are flanked by Art. 80 TFEU on the principle of solidarity, which aims at a fair burden sharing in the EU.

Secondary legislation currently does not contain an obligation to mutually recognize decisions on refugees or beneficiaries of subsidiary protection, nor, conversely, does recognition in one Member State simultaneously entitle to residence or freedom of movement in another. The aim of the CEAS is to avoid unilateral actions by the Member States and to prevent the responsibility being shifted to a few states at the EU's external borders.

Ever since its beginnings, the CEAS was formed not solely by supranational legislation, but also by instruments of international law. EU law limits the Member States' sovereign right to enter into bilateral agreements on migration either with third countries or within the EU. In this respect, the CEAS is an expression of the fact that sovereignty is increasingly exercised cooperatively. It is understood less formally and more functionally in the association of interdependent states (Farahat and Markard 2018, p. 352). According to traditional principles of international law, border crossing, asylum, and immigration are issues reserved for sovereign states. The CEAS, meanwhile, stands for the de-territorialisation of borders and the internationalisation of border controls (see Mau 2021). As asylum and migration are closely linked to state sovereignty, there is a permanent tension in the relationship between the Member States and the EU. While preventing unregulated migration and reducing flight movements are readily handed over to the EU, the allocation of asylum seekers within the EU is regularly met with sovereignty-preserving defense mechanisms of the Member States (Wallrabenstein 2020, Ch. 42, para. 4).

From Intergovernmental Cooperation to Supranational Legislation

This section will provide a historic overview of the development of the CEAS. It has not always been an area of supranational legal integration but was developed through intergovernmental cooperation. With the integration of the Schengen framework into primary law, asylum policy was formally supranationalized but initially remained

an issue of intergovernmental legislation where the community method did not apply. It was with the Treaty of Lisbon in 2009 that the European asylum policy was fully supranationalized and subjected to the ordinary legislative procedure. However, the European Council remains the central body setting the political and legal guidelines on the basis of regular multi-annual programs (Tampere 1999, Hague Program 2004, Stockholm Program 2009) (see also Funke 2021, § 16 para. 10).

Internationalisation of Border Regimes

The CEAS goes back to inter-state coordination on an intergovernmental basis between some Member States (on the internationalisation of migration administration, see Thym 2010, pp. 346). On June 14, 1985, five of the then 12 Member States of the EC signed the Schengen Agreement, acting within the framework of enhanced cooperation. According to the Schengen Agreement, the participating states agreed on the gradual abolition of checks at their common borders and on the introduction of joint border control posts at the external borders. In particular, the Schengen Agreement already addressed intensified cooperation to prevent the unauthorized entry and residence of persons from third countries. With the abolishment of internal borders, the need to coordinate legislation concerning third-country nationals within the EU arose. Five years later, in 1990, the governments of the states of the Benelux Economic Union, Germany, and France signed the Convention Implementing the Schengen Agreement (CISA, also known as "Schengen II"). With the abolition of common internal border checks, the parties agreed to create a common area of security and justice. Thereby, the provisions relating to entry into and short stays in the Schengen area by third-country nationals as well as asylum matters should be harmonised. The Schengen II Agreement already contained provisions to determine the responsible contracting party for processing an asylum application. Gradually, all Member States except for the UK and Ireland acceded to

the Schengen Agreement, albeit with differentiating degrees.

In 1989, the European Council set the goal of harmonising asylum policies at its meeting in Strasbourg. In 1990, the then Member States of the EEC concluded the Dublin Convention (DC) on determining the State responsible for examining an asylum application lodged in one of the Member States of the European Communities. Despite being an intergovernmental agreement, it was closely connected to the institutional framework of the European Community. It entered into force in 1997 with the signature of all twelve Member States, and was applied in parallel to the CISA, which only covered the Schengen area (see in detail Thym 2021, Art. 78 TFEU, para. 1). Until today, the Schengen area is not identical with the area of freedom of movement, security, and justice, though they overlap to a high extent. While some EU Member States (Ireland, Cyprus, Bulgaria, Romania, Croatia) do not participate in the Schengen area or only participate in it under international law (Denmark, cf. Protocol No. 22 to the Treaty of Lisbon), four non-EU states (Switzerland, Liechtenstein, Norway, Ireland) do participate in it (cf. also Funke 2021, § 16 para. 24 f.). These Non-EU Members abolished border controls and also participate in the cooperation on asylum, whereas some Member States (the UK, Ireland) did not join the Schengen area but opted in the cooperation on asylum.

In the Maastricht Treaty (1992), asylum policy and external border control were for the first time recognized as matters of common interest (Art. K.1 TEU). Although the development of the CEAS occurred under the umbrella of the Community institutions, the policy was intergovernmental in nature and took place within the framework of police and judicial cooperation (third pillar) of the EU. The Treaty did not envisage the supranationalisation of asylum issues. It was with the Treaty of Amsterdam in 1997 that the Schengen acquis (the Agreements on the Schengen area since 1985), which was intergovernmental in nature, was integrated into the legal framework of the European Community (see the Protocol integrating the Schengen acquis of

10 November 1997) and the policy in the field of asylum was shifted from the third pillar to the first pillar (Community pillar). The Protocol nevertheless took into account the special position of Denmark and the fact that Ireland and the UK are not parties to the Schengen Agreements of 1985 and 1990, enabling closer co-operation between some Member States only.

At the special summit of the EU Council in Tampere in 1999, the foundations were laid for a common European asylum and migration policy. The objective of creating a CEAS was explicitly outlined (EU Council Conclusions of 15/16 October 1999). The heads of state and governments agreed on the “full and inclusive application of the Geneva Convention” (para. 13), in particular the implementation of the principle of non-refoulement within the territory of the Community. The short-term goal was the establishment of a clear and workable determination of the State responsible for examining an asylum application. There shall be common standards for a “fair and efficient asylum procedure, common minimum conditions of reception of asylum seekers, and the approximation of rules on the recognition and content of the refugee status” (para. 14). The long-term objective was to establish “a common asylum procedure and a uniform status for those who are granted asylum valid throughout the Union” (para. 15). The area of freedom, security, and justice in the EU is to be an area of free movement not only for citizens of the Union but also for third-country nationals under certain conditions. The common European asylum policy as outlined in the conclusions of the Tampere Council in 1999 was implemented in the following years through secondary legislation.

State-Centered Legislation Under Primary Law

One of the objectives of the Treaty of Amsterdam, which entered into force in 1999, was the establishment of an “area of freedom, security, and justice”. For the first time, the Treaty included Community competences (Art. 61–64 of the TEU version under Amsterdam). Art. 63 TEU

(Amsterdam version) corresponds in essence to today's Art. 78 TFEU and was the Community's relevant competence during the first phase of the CEAS. It was on this basis that the measures recommended by the Tampere Council were implemented.

Asylum policy was included into the supranational first pillar. Nevertheless, traces of the intergovernmentalist origins of the CEAS remained visible under the Treaty of Amsterdam, where the legislative power in the field of asylum lay primarily with the Council. According to Art. 63 TEU (Amsterdam version), the Council was obliged to act on asylum policy within a period of 5 years. Art. 67 TEU (Amsterdam version) stipulated the principle of unanimity in the Council for all measures in the area of the common asylum policy for a transitional period. The Council had to unanimously adopt measures on criteria for determining the Member State responsible for considering an asylum application, on the reception of asylum seekers in Member States, on the qualification of third-country nationals as refugees, and on procedures in Member States for granting or withdrawing refugee status. The competence was limited to "minimum standards" for the Member States; it did not yet aim at maximal harmonisation. Consequently, the legislative acts in the first phase mainly consisted of Directives, leaving the Member States more flexibility. The procedure of unanimity in the Council applied for this 5-year period and provided only for consultation of the European Parliament (Art. 67 (1) TEU Amsterdam version). Another relict of intergovernmentalism was that, exceptionally, not only the Commission but also the Member States were entitled to initiate legislative proposals. In the first phase of the CEAS, international law was replaced by supranational secondary law. The international Dublin Agreement was replaced by the Dublin Regulation (EC) No. 343/2003 ("Dublin II"), the principles of which remained essentially unchanged to this day (see Section D. for the successor regulations). The Regulation applied to all Member States, with the exception of Denmark. The Council also passed a Reception Conditions Directive (343/2003), a Qualification Directive (2004/83/

EC), and an Asylum Procedures Directive (2005/85/EC). Only at the end of the first phase did the Council have to take an unanimous decision pursuant to Art. 67 (2) TEU (Amsterdam version), according to which the co-decision procedure was to be applied to all measures in the fields of visa, asylum, and immigration. By virtue of primary law, the co-decision procedure applied only to individual measures in the field of the visa policy (Art. 67 (4) TEU Amsterdam version). For all other areas, in particular asylum policy, a Council decision was initially required. The Treaty of Nice, which entered into force in 2003, extended the co-decision procedure to other areas of asylum policy (Art. 67 (5) TEU Nice version) – giving the European Parliament more legislative powers. In 2004, the Council adopted the decision under Art. 67 TEU (Nice version), according to which the co-decision procedure applied to all measures aimed at strengthening freedom in the areas of visa, asylum, and irregular migration (Decision 2004/927/EC). Thus, although the European Parliament had equal legislative powers in the area of asylum policy, it did not have equal powers in the area of legal migration. Only under the Lisbon Treaty in 2009, the co-decision procedure was introduced in all fields concerning the CEAS. Expecting the entry into force of the Treaty on a Constitution for Europe after its signature in 2004, the Council was reluctant to adopt a decision, as the Treaty would have comprehensively introduced the co-decision procedure in the area of asylum policy. However, the Constitutional Treaty of the EU failed in the referenda the Netherlands and France in 2005 and was replaced with the Lisbon Reform Treaty in 2009. With Art. 78 TFEU, the Lisbon Treaty established a legal basis for deepening the CEAS, in particular through full harmonisation and declaring the ordinary legislative procedure to be the rule.

Supranationalisation

In 2004, at the end of the 5-year period laid down in the Treaty of Amsterdam, the European Council adopted the multi-annual Hague Programme for strengthening freedom, security and justice in

the European Union. By then, the Council had laid the foundation of the common asylum and immigration policy through secondary legislation. The Hague Programme was influenced by international terrorism and set the parameters for the second phase of the CEAS. The focus was on security, especially the creation of coherence between the internal and external policy in the field of security in the EU.

The Treaty of Lisbon was a major step introducing the Community method in the field of asylum. According to its Protocol No. 19 on the Schengen Acquis integrated into the framework of the EU, the enlisted Member States were authorized to establish enhanced cooperation (Art. 20 TEU) among themselves.

For Germany, the supranationalisation of the common external border regime and controls in the Schengen area must occur in accordance with Art. 23 of the Basic Law. The dismantling of border controls in the Schengen area and the introduction of an integrated management system for the external borders have decreased the importance of territorial sovereignty of the Member States (cf. Joined Cases 2 BvE 2/08, 2 BvE 5/08 et al. [2009], BVerfGE 123, 267, p. 403). Territorial sovereignty aims at preventing the exercise of foreign autonomous power within the borders of a state. However, as the Federal Constitutional Court of Germany makes clear, the EU exercises public authority in Germany with the express permission of the Federal Republic of Germany and only within the competences transferred to it in the Treaty of Lisbon: “Territory-related state authority continues to exist unchanged under the changed conditions of cross-border mobility” (Joined Cases 2 BvE 2/08, 2 BvE 5/08 et al. [2009], BVerfGE 123, 267, p. 403 para. 322). With the area of freedom, security, and justice, the EU does not replace the territorial sovereignty of the Member States. Rather, the territorial scope of the EU Treaties is “ancillary to the state territory of the Member States” – the sum of the territories of the Member States constitutes the territorial scope of Union law (Joined Cases 2 BvE 2/08, 2 BvE 5/08 et al. [2009], BVerfGE 123, 267, p. 403 para. 345). An immediate EU territory does not exist. Even though the asylum

policy has been supranationalized and internal borders are abolished, the right to asylum remains territorially bound. The Treaty of Lisbon does not abolish statehood of the Member States.

The third phase was initiated with the adoption of the Stockholm Programme by the European Council in 2010, entitled “An Open and Secure Europe Serving and Protecting Citizens”. It envisaged a “common area of protection and solidarity” in the field of asylum, a goal that remains in place until today. Common rules and their consistent application in all Member States should prevent secondary movements within the Union and increase mutual trust between the Member States. Based on Art. 78 of the TFEU, a common asylum procedure and a uniform status for persons seeking asylum or subsidiary protection shall be established.

Measures under Art. 78 of the TFEU are adopted in the ordinary legislative procedure. This means with equal involvement of the Council and the European Parliament. Whereas the measures under the Amsterdam Treaty were merely of an accompanying nature with regard to external border control, asylum, and immigration (Art. 61 (a) TEU Amsterdam version), the Lisbon Treaty ensures the absence of internal border controls and frames a “common policy on asylum, migration and external border control” (Art. 67 (2) TFEU).

Human Rights Framework in EU Asylum Law

Art. 78 (1) of the TFEU referring to the Geneva Convention and its Additional Protocol is both programmatic and progressive in character. It is neither a provision obliging the Member States to accede to these Treaties nor a dynamic reference to international law binding the EU to the mentioned international Treaties. On the contrary, Union law presupposes that the Member States are bound to and that they adhere to these Treaties already. The EU itself cannot accede to the Geneva Refugee Convention and its 1967 Additional Protocol for lack of statehood (see Art. 39 (1) of the Geneva Convention). It has also not yet acceded to the European Human Rights Convention, although it is obliged to do so under Art. 6 (2) of TEU (on the last failed

accession see CJEU, Opinion 2/13 of 18 December 2014). The CEAS enables the effective enforcement of the existing obligations of the Member States under international law (Art. 33 Geneva Convention, Art. 3 ECHR, Art. 3 Convention Against Torture) by a supranational organisation. Without the common framework, obligations under international law would be implemented inconsistently at the domestic level. The European asylum policy is strongly shaped by the case law of the ECtHR and the CJEU (Bast et al. 2020; Wallrabenstein 2020, Ch. 42 para. 161 ff.). The human rights jurisprudence of the ECtHR and the CJEU cannot be discussed here in detail (on this see Czech in his chapter on “Jurisdiction of Strasbourg from Hirsi to now”; for the CJEU case law, see Epiney in the chapter on “Jurisdiction of Luxembourg concerning Dublin, distribution and solidarity”). This section focusses on the guiding function of the ECtHR jurisprudence and the importance of the CJEU, which, since the Treaty of Lisbon, is fully competent to adjudicate on issues relating to asylum law.

The ECtHR as the Main Human Rights Body

Human rights set boundaries to EU asylum law. Most importantly, the principle of non-refoulement prohibits the return of refugees to the persecuting state (see Art. 78 (1) TFEU, referring to Art. 33 of the Geneva Convention). A prohibition of refoulement has also been developed by the ECtHR in its case law on Art. 3 ECHR (ECtHR, No. 14038/88, Soering/United Kingdom; No. 15576/89, Cruz Varas and Others/Sweden). Article 3 ECHR prohibits torture and inhuman or degrading punishment or treatment. According to the ECtHR it would be incompatible with the values of the ECHR if a fugitive was surrendered to another State where there would be substantial grounds for assuming the danger that the person will be subjected to torture or degrading treatment. Art. 2 of the ECHR on the right to life and Art. 1 of Protocol No. 13 on the abolition of the death penalty are also interpreted

as prohibitions on refoulement. Art. 4 of Protocol No. 4 prohibits the collective expulsion of aliens. In its recent case law, the ECtHR has decided on the extra-territorial application of this provision in order to provide human rights protection against the Member State’s practice of intercepting vessels on the high seas and pushing migrants back to their country of origin. Even if third-country nationals are removed to their countries of origin before entering the national territory of a Member State, the ECHR applies. Thus, EU Member States are bound by the human rights obligations under the ECHR when they exercise jurisdiction outside their national territories, especially in the maritime environment (ECtHR, No. 22765/09, Hirsi Jamaa and others/Italy). The ECtHR has repeatedly adjudicated on such practices, abolishing them if they amount to prohibited collective expulsion.

The judgments of the ECtHR are directly binding on the contracting state party concerned (Art. 46 ECHR). Vis-à-vis the other states, they create an indirect binding force. They also create precedents that must be taken into account by the CJEU insofar as the Charter contains rights which correspond to the rights guaranteed by the ECHR. The CJEU must ensure coherence when defining the meaning and the scope of those rights (Art. 52 (3) of the Charter).

The CJEU as an Asylum Court

The Rights enshrined in the Charter, a legally binding source of law that has the same legal value as the Treaties (Art. 6 (1) of the TEU), are applicable to the EU and its Member States when enforcing EU law according to Art. 51 (1) of the Charter. When applying the secondary legislation and national law transposing secondary legislation of the EU forming the CEAS, Member States are acting within the scope of the law of the EU. With the Treaty of Lisbon, the jurisdiction of the CJEU has been extended to the area of visas, asylum, and immigration. The CJEU is competent to interpret the fundamental rights of the Charter protecting refugees and is increasingly viewed as a “refugee law court” or “asylum court”

(Costello 2016, p. 174; Lührs 2020, p. 9) next to the ECtHR, a court actually designed to be a Human Rights Court. Thus, in the last decade, the CJEU has been able to become a decisive actor in the development of the CEAS, even in cases where the Member States exercise discretionary powers implementing and applying the Directives of the CEAS.

In contrast to the ECHR, the Charter contains a right to asylum in Art. 18, stipulating that the right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention in accordance with the TEU and the TFEU. Mediated by Art. 78 (1) of the TFEU and Art. 18 of the Charter, the Refugee Convention has become the standard of review for the CJEU, although the EU has not formally acceded to it. The United Nations High Commissioner for Refugees (UNHCR) is responsible for supervising the application of the Geneva Convention. Thus, the CJEU interprets it only insofar as it has been concretized by secondary law. According to settled case law, the Qualification Directive must be interpreted in accordance with the Geneva Convention and other treaties to which Art. 78 (1) TFEU refers (CJEU, Case C-31/09, [2010] ECR I-5572, para. 38 – Bolbol). Also, the Court reviews the validity of secondary legislation with view to its compatibility with the Geneva Convention, even though the EU is not a contracting party to it. According to the CJEU, “Article 78 (1) TFEU and Article 18 of the Charter nonetheless require it to observe the rules of [the Geneva Convention].” As a consequence, the CJEU is competent to examine the validity of secondary legislation on the CEAS “in the light of Article 78 (1) TFEU and Article 18 of the Charter and, in the context of that examination, to verify whether those provisions of [the Qualification Directive] can be interpreted in a way which is in line with the level of protection guaranteed by the rules of the Geneva Convention” (CJEU, Cases C-391/16, C-77/17, C-78/17, [2019] EU:C:2019:403, paras. 74–75 - M, cited case-law omitted). In so far as secondary law refers to the Geneva Convention and its Additional Protocol, it is interpreted in line with the principles of international law, taking into account the Vienna Convention on the Law of Treaties as

well as state practice of the contracting parties to the Geneva Convention (CJEU, Case C-63/09, [2019] EU:C:2010:251, para. 22 – Walz). The Geneva Convention is interpreted in a constant “transnational dialogue of the Courts” (Thym 2021, Art. 78 TFEU para. 8).

The effect of international law on the CJEU’s jurisprudence in the field of the CEAS is therefore twofold: On the one hand, the ECHR, the Geneva Convention, and other treaties in the field of refugee protection are guidelines for the interpretation of the Charter and reinforce human rights protection. For example, the CJEU interprets Art. 4 and Art. 19 (2) of the Charter in the light of Art. 3 of the ECHR (CJEU, Case C-353/16, [2018] EU:C:2018:276, para. 43 – M.P./Secretary of State for the Home Department).

On the other hand, the Geneva Convention forms the direct standard of review for secondary law that concretises refugee protection. Art. 78 (1) TFEU and Art. 18 of the Charter thus oblige the Court to interpret secondary law “in a way that ensures that the level of protection guaranteed by the rules of the Geneva Convention is observed” (CJEU, Cases C-391/16, C-77/17, C-78/17, [2019] EU:C:2019:403, para. 78). International refugee law thus forms a minimum standard of protection and secondary legislation must not fall short of it, even though the Treaties have not been formally incorporated into EU law. In this respect, Art. 78 (1) TFEU indirectly binds the EU to international Human Rights Treaties by providing that the right to asylum is guaranteed in accordance with these instruments of international law.

Other relevant fundamental rights are Art. 6 of the Charter on the right to liberty and security and Art. 4 and Art. 19 (2) of the Charter guaranteeing protection against deportation and expulsion. They correspond to Art. 3 ECHR. Furthermore, Art. 47 of the Charter corresponding to Art. 13 ECHR guarantees judicial legal protection against rejection decisions in the field of asylum. These rights are further concretised in secondary legislation, especially in the Qualification Directive and the Asylum Procedure Directive (see under D.). Whereas material law on asylum is widely harmonised and interpreted by the CJEU, the case law’s impact on the procedural autonomy

of the Member States is relatively weak. Since national asylum procedural law is largely determined by EU law within the meaning of Art. 51 (1) of the Charter through EU secondary legislation, the Charter is applicable in most cases of the Member States. Nevertheless, national procedural rules and administrative practice as well as legal protection vary to a great extent within the EU, and fewer preliminary procedures concern the Asylum Procedures Directive compared to the Qualification Directive (see on a thorough analysis of EU case law in the field of migration Thym 2019, p. 66; Staffans 2012). This is mainly due to the indirect enforcement of EU Law, but also the greater Member States' autonomy in procedural issues. The EU-wide coherence of the CEAS is therefore not equally ensured in all sectors of asylum law.

Secondary Legislation

Secondary legislation adopted on the basis of the competence provision marks the core of the CEAS. As already mentioned in the introduction, the primary law provisions in Art. 77–79 TFEU alone do not give rise to rights and obligations for individuals seeking protection. At present, secondary legislation still mainly consists of directive law. This means that European asylum law does in principle not give rise to rights for third-country nationals and stateless persons on its own, but only if transposed by the Member States. According to Art. 67 (2) of the TFEU, the EU “shall frame a common policy on asylum, immigration and external border control, based on solidarity between Member States, which is fair towards third-country nationals.” EU legislation in the field of the CEAS mainly focusses on the prevention of abuses of the asylum system and the restriction of secondary movements of third-country nationals seeking asylum or protection.

The secondary legislation enacted on the basis of Art. 78 of the TFEU is a complex framework of directives and regulations, which cannot be presented in detail here (see the contributions of Hruschka, “The future of the Geneva Refugee Convention, temporary protection and subsidiary protection,” of N.N. on “The importance of Resettlement as the second pillar of Refugee

Protection,” of Kluth on “Return Instruments,” of N.N. on the “CEAS and the reform of Dublin” and of Epiney on the “Jurisdiction of Luxembourg concerning Dublin, distribution and solidarity”). This section is limited to an outline of the phases in which the CEAS has been realized and provides an overview of the specific EU competences. In addition, the CEAS is based on the unwritten premises of solidarity and mutual trust.

The Development of Secondary Legislation

The CEAS is under constant revision and was enacted in phases, first on the basis of Art. 63 TEU (version of Amsterdam) and, since 2009, of Art. 78 TFEU (see the overview by Rossi 2022, Art. 78 TFEU, paras. 4–7; on the entire secondary legislation, see Hailbronner and Thym 2021). As it is a shared competence, the EU is limited by the principles of subsidiarity and proportionality (Art. 5 (3) and (4) of the TEU). During the first phase from 1999 to 2004, the Dublin Convention was replaced by the Dublin II-Regulation, establishing a mechanism to determine the Member State responsible for examining an asylum application. In order to ensure the effective application of the Dublin Regulation, the Council adopted the Eurodac-Regulation, setting up a biometric database of fingerprints of asylum seekers (Regulation (EC) No. 2725/2000). During the first phase, the Council established minimum standards on the reception conditions of asylum seekers in Member States (Directive 2003/9/EC), on the qualification and status of third-country nationals as refugees or as persons who otherwise qualify for subsidiary protection (Qualification Directive 2004/83/EC), and on procedural rules for each asylum seeker's application (Asylum Procedures Directive 2005/85/EC). Furthermore, the Council adopted the Directive 2001/55/EC “on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof” (on this, see the

contribution in this volume by Schmidt). These first legislative measures did not reach harmonisation in the European Union. This was achieved in the second phase of the CEAS from 2005 to 2013. The Dublin II-Regulation was revised by the Dublin III-Regulation (No. 604/2013), which is currently in force and will soon be replaced by the Asylum und Migration Management-Regulation (COM 2020, 610 final). The Eurdac-Regulation was also revised (No. 603/2013). In this phase, the European Asylum Support Office (EASO) was established through Regulation (EC) No. 439/2010. The Directives on qualification, asylum procedures, and reception conditions were revised and replaced with new Directives, aiming at further harmonisation, and establishing a common system of temporary protection, creating coherence between the recognition of refugees and persons seeking subsidiary protection. In the words of the Commission, the CEAS “consists of a legal framework covering all aspects of the asylum process and a support agency – [the EASO] – to support the implementation of the legal framework and facilitate practical cooperation between Member States” (COM 2016, 197 final).

The Competence Provisions

Uniform Protection

According to Art. 78 (2)(a) and (b) of the TFEU, the European Parliament and the Council shall adopt measures on a uniform status of asylum (a) and of subsidiary protection for third-country nationals (b). The uniform status of asylum shall be valid throughout the EU. Subsidiary protection shall be provided for third-country nationals who need international protection but do not qualify for asylum under the Geneva Convention. Based on this competence, the Qualification Directive (Directive 2011/95/EU) was enacted. It harmonises “the standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection” and provides “a uniform status for refugees or for persons eligible for subsidiary protection.” However, this

Directive does not yet establish a uniform status valid throughout the EU and has not reached a “common” system as envisaged, as the recognition of a refugee or subsidiary protection status in one Member State does not result in a decision that is binding on all other Member States (see German Federal Administrative Court [BVerwG], NVwZ 2014, p. 1463). If a Member State nevertheless recognizes the Decision of another Member State’s asylum authority, for example, for the protection from deportation, this occurs on a voluntary basis (see, e.g., Sec. 40 (1) of the German Residence Act [AufenthG]).

Whereas the predecessor Directive, enacted in 2004 during the first phase, only established minimum standards, the revision aimed at creating a uniform status in the EU. By determining common criteria for the recognition of refugees and persons qualifying for subsidiary protection, “asylum shopping” shall be prevented and secondary migration be limited within the EU. With the revised Qualification Directive, the refugee status and the subsidiary protection status are approximated to a large extent. Whereas refugee protection is limited to persons who are persecuted in the sense of the Geneva Convention, subsidiary protection is provided for persons who, despite not being persecuted in the narrow sense, fled from existentially threatening circumstances. Subsidiary protection is granted if a person shows substantial grounds for believing that, if returned to his or her country of origin, he would face a real risk of suffering or serious harm in the sense of Art. 15 of the Qualification Directive. Art. 1 of the Qualification Directive contains the definition of a refugee, which is aligned to the Geneva Convention’s definition. The CJEU interprets this definition in the light of the Geneva Convention and the UNHCR’s commentary (CJEU, Case C-391/16, 77 and 78/17, [2019] EU:C:2019:403, para. 75 – M, X and X; Case C-472/13, [2015] EU:C:2015:117, para. 23 – Shepherd). For the determination of subsidiary protection, the human rights commitments of the Member States under international law are especially relevant. Still, the CJEU undertakes an autonomous interpretation under EU law, applying the Charter, for example, in order to decide, whether a person is threatened

by “serious harm” in the sense of the Qualification Directive (see CJEU, Case C-353/16, [2018] EU: C:2018:276, para. 43 – M.P./Secretary of State for the Home Department referring to Art. 4 of the Charter).

Asylum Procedure

The CEAS depends on the decentralized implementation of secondary legislation by the Member States’ courts and authorities. Art. 78 (2)(d) of the TFEU therefore authorizes the EU to adopt measures on common procedures for the granting and withdrawing of uniform asylum or subsidiary protection status. The Asylum Procedures Directive was enacted during the first phase in 2005 and recasted in the second phase in 2013 (Directive 2013/32/EU on common procedures for granting and withdrawing international protection). The Directive was transposed by the Member States into their respective Asylum Procedure Provisions and harmonises applications for international protection made in the territory of a Member State or at the border, in the territorial waters or in the transit zones of Member States (Art. 3 (1) of the Asylum Procedures Directive). The harmonisation of the asylum procedures goes back to the Tampere Conclusions, which provided that the CEAS should include common standards for fair and efficient asylum procedures in the short term and a common asylum procedure in the EU in the longer term (Recital 4 of the Asylum Directive). To ensure uniform application of the Asylum Procedures Directive, the Member States are encouraged to take into account the guidelines of the EASO. Each person seeking international protection under the Qualification Directive shall only be subject to one single procedure within the EU. Thus, an application may be treated inadmissible by a Member State if the applicant was already granted subsidiary protection or refugee status in another Member State.

The Asylum Directive allows Member States to retain or introduce more favorable standards on procedures for third-country nationals or stateless persons applying for international protection (Art. 5 of the Asylum Procedures Directive). The Directive contains guarantees and procedural rights for applicants, especially the elementary

right to access to the procedure. These rights do not establish a subjective right to asylum, but a right to an asylum procedure (on this see Groß 2013). Whereas the qualification of asylum seekers is directly determined by the Geneva Convention, the procedural rights are mainly interpreted in the light of the ECHR and the Charter. Especially the right to an effective remedy is of relevance for the procedures. The concept of safe third countries and of European safe third countries is also laid down in the Directive (Art. 38 and 39 of the Asylum Procedures Directive). Applications may be considered inadmissible if a person has a safe country of origin or was in a safe first country of asylum.

Responsible Member State

For the functioning of the CEAS, secondary legislation aims at clearly assigning the responsibility for applications of refugees and stateless persons to specific Member States. There should be no unilateral rejection of responsibility for the protection of refugees, and applicants shall not choose their favorable Member State they want to settle in. The Dublin II-Regulation was recasted and replaced with the Dublin III-Regulation No. 604/2013 based on Art. 78 (2)(e) of the TFEU concerning measures on determining the responsible Member State for considering an application for asylum or subsidiary protection. The Dublin system establishes a hierarchy of criteria and mechanisms for the determination of the responsible Member State for international protection application. The criteria laid down in the Dublin Regulation are not determined by primary law but within the legislative discretion of the legislature. Especially with regard to the principle of solidarity in Art. 80 of the TFEU, the EU could also adopt a different system of responsibility-sharing, e.g., resettlement measures or quotas (Thym 2021, Art. 78 TFEU, para. 38). The introduction of a quota system was proposed by the Commission with the Dublin IV-Regulation (Art. 34–43, see COM 2016, 270 final). However, the proposal was rejected by the Member States’ Representatives in the Council of the EU.

In order to prevent the “refugees in orbit,” i.e., to ensure that no applicant falls out of protection, the Dublin III-Regulation provides that in case no responsible Member State can be designated according to the Dublin criteria, the first Member State in which the application for international protection was lodged shall be the responsible examining state. In practice, the main criterion for the determination of the responsible Member State is the country of first irregular entry or stay. If an applicant has irregularly crossed the border of a Member State by land, sea, or air from a third country, this State of first entry is responsible for the examination of the application for international protection. The ratio behind this is to encourage the Member States to effectively protect their external borders and to transfer individuals to the responsible Member State under the Dublin Regulation within the determined period of time. If they fail to do so, they bear responsibility for the individuals seeking protection. This, however, does not consider situations of mass influx and stretched capacities of some Member States at the external border, in which the application of the Dublin criteria is factually impossible. It disproportionately burdens the Member States located at the external borders of the EU, especially at the Eastern Mediterranean Sea. In times of intense migration pressure, the Dublin system was factually suspended, and secondary migration was tolerated in order to relieve Member States like Greece, Italy, and Spain. Other countries, especially on the Western Balkans route, also refused to provide protection and waived third-country nationals to the neighboring borders. Instead of preventing secondary migration, the deficiencies of the CEAS lead to the re-introduction of internal border controls by some Member States to prevent the movement of third-country nationals.

The Dublin Regulation also establishes procedures for taking charge and taking back requests on the transfer of applicants. However, the responsible Member States often refuse to take charge of an applicant if requested by another Member State. Only in a quarter of cases does an effective transfer take place (COM 2016, 197 final). In the wake of the European humanitarian refugee crisis

in 2015, the Commission diagnosed “significant structural weaknesses and shortcomings in the design and the implementation of European asylum and migration policy” (COM 2016, 197 final). The transfer of applicants to the responsible Member States also often fails due to systemic flaws in the asylum procedures or reception conditions of some Member States. In the Case of *N.S. versus Greece* in 2011, the CJEU found that it could not be presumed that each responsible Member State observes the fundamental rights of the EU. An individual may not be transferred to the Member State responsible according to the Dublin system, if the systemic deficiencies in the asylum procedure and the reception conditions in that Member State amount “to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of [Art. 4 of the Charter]” (Joined Cases C-411/10 und C-493/10, [2011] ECR I-13905, para. 106 – *N.S. u. a./Greece*). The Court thereby significantly relied on the ECtHR’s decision of January 21, 2011 concerning detention and living conditions in Greece (No. 30696/09, *M.S.S. v. Belgium and Greece*, paras. 358–360). In this case, the ECtHR ruled that Belgium had violated Art. 3 of the ECHR by subjecting an asylum seeker to the deficient conditions in Greece. If the CEAS is not or poorly implemented in a Member State, transfers cannot be made under the Dublin system. Member states must assess the risks to asylum seekers in the event of a transfer based on reports from non-governmental organisations and the UNHCR. Member States may not transfer an asylum seeker to the Member State responsible under the Dublin Regulation “where they cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that Member State amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of Art. 4 of the Charter” (CJEU, Joined Cases C-411/10 und C-493/10, [2011] ECR I-13905, para. 94 – *N.S. u. a./Greece*). The violation of Art. 4 of the Charter in the event of transfer of an applicant to the Member State responsible

must have reached a “particularly high level of severity” (CJEU, Case C-163/17, [2019] EU:C:2019:218, para. 92 – Jawo).

Systemic violations of Charter provisions also occur if the asylum procedure itself is fundamentally deficient or if during the asylum procedure the elementary basic needs of the person cannot be met in a reasonable manner (CJEU, Case C-4/11, [2013] EU:C:2013:740 – Puid; ECtHR, No. 29217/12 – Tarakhel). Such systemic deficiencies were found to exist in Bulgaria, Greece, and, with regard to the special needs of minors, even in Italy. For example, German courts have repeatedly found systemic deficiencies in Bulgaria’s asylum system because the right to substantive examination of the asylum application was de facto inexistent (Highest Administrative Court North Rhine Westphalia [OVG NRW], Case 1 A 21/12.A; Administrative Court Hannover [VG Hannover], Case 10 A 375/16, para. 19). Italy and Hungary have been criticized for shortcomings in their asylum procedures and the accommodation of protection seekers and refugees (Bergmann 2015, p. 71). This jurisprudence may create misdirected incentives, as Member States with systemic deficiencies may have no interest in taking back applicants (see the critical analysis of Hailbronner and Thym 2016, p. 758). For example, the refugees travelling along the Western Balkans Route neither wanted to stay in these countries, nor did these Member States (Croatia, Slovenia, Hungary) wish them to apply for international protection there. By “waving through” the third-country nationals to reach their destination of choice, the responsible Member States successfully circumvented their responsibility under the Dublin Regulation. At the same time, applicants cannot be transferred back in line with the CEAS due to systemic deficiencies in many countries of first entry.

With view to these deficiencies, the Commission has presented different approaches to reform the Dublin regime since 2016 (Chetail et al. 2016). The first package contained the proposal of a revised Dublin IV-Regulation (COM 2016, 270 final), which however failed in 2020 due to lack of support in the Council and was replaced with a Commission proposal for a Regulation on

asylum and migration management (COM 2020, 610 final, see on this comprehensively Lührs 2021).

Reception Conditions

Article 78 (2)(f) of the TFEU contains a competence for the adoption of measures on standards concerning the conditions for the reception of applicants for asylum or subsidiary protection. Based on this provision, the European Parliament and the Council enacted the Reception Conditions Directive (Directive 2013/33/EU) laying down standards for the reception of applicants for international protection. It aims at establishing a dignified standard of living and comparable living conditions for applicants for international protection in all Member States (Recital 11 of the Reception Conditions Directive), thereby limiting secondary movements within the EU. The protection under the Directive applies from the date on which an application for international protection has been made to the final decision of the responsible authority. It also covers the transfer of an applicant under the Dublin III-Regulation to the responsible Member State. In particular, the Directive prohibits the detention of applicants for international protection solely for the reason of having applied for asylum in accordance with the Asylum Procedures Directive (Art. 8 of the Reception Conditions Directive). Detention is defined by the CJEU as “a deprivation, and not a mere restriction, of freedom of movement, which is characterised by the fact that the person concerned is isolated from the rest of the population in a particular place” (Joined Cases C-924/19 PPU, C-925/19 PPU, [2020] EU:C:2020:367, para. 217 – Országos Idegenrendészeti). Administrative detention of asylum seekers is only allowed in certain cases laid down in the Directive, e.g., for the protection of national security or public order. Protection under the Reception Conditions Directive no longer applies once the application for asylum is rejected and no longer amenable to appeal. The administrative detention of third-country nationals in transit zones, whose applications for asylum have been rejected, thus falls out from the protective regime. Third-country nationals are then considered to be

staying illegally on a Member State's territory and come within the scope of the Return Directive (Directive 2008/115/EC on common standards and procedures in Member States for returning illegally staying third-country nationals).

Emergency Competence

The Council may according to Art. 78 (3) of the TFEU adopt provisional measures for the benefit of the Member States concerned, if they are confronted by an emergency situation characterised by a sudden inflow of third-country nationals. Such a situation was deemed to have occurred in 2015, when the so-called refugee crisis led to a very high number of entries of people from the Middle East and Northern Africa. For the first time, the Council made use of this competence and adopted Decisions No. 2015/1523 and 2015/1601 establishing provisional measures in the area of international protection for the benefit of Italy and Greece. The ad hoc-relocation mechanism expired in September 2017 and shall be replaced with a permanent resettlement mechanism.

Premises of the CEAS

The recitals of secondary legislation often claim that the CEAS “should be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States” (see Recital 2 of the Asylum Procedures Directive).

The Principle of Mutual Trust

The CEAS is based on the principle of mutual trust, which is not explicitly laid down in Art. 78 of the TFEU. It is only mentioned in Art. 67 (3) and (4), Art. 81 (1), and Art. 82 (1) of the TFEU in the context of judicial cooperation of the Member States. One expression of the principle of mutual trust is found in Protocol No. 24 annexed to the Treaty of Lisbon on “Asylum for Nationals of Member States of the European Union.” It is part of primary law (see Art. 6 TEU). According to Protocol No. 24, “Member States shall be regarded as constituting safe countries of origin

in respect of each other for all legal and practical purposes in relation to asylum matters.” The Protocol only makes a few exceptions to this general presumption. For example, an application may be taken into consideration or declared admissible in another Member State, if suspension proceedings under Art. 7 (1) TEU have been initiated by the Council against a Member State. In general, the application of a citizen of a Member State is inadmissible in another Member State, as long as the Council has not determined the existence of a serious and persistent breach of fundamental rights in a Member State. The Qualification Directive thus excludes nationals of a Member State from the right to make an application for international protection in its Art. 1. However, this only applies to subsidiary protection and not to the rights under the Refugee Convention. Member States' nationals may thus make the claim of persecution in another Member State under the Geneva Convention. The Dublin Regulation is founded on the principle of mutual trust and the general presumption that Member States treat persons seeking international protection in accordance with the human rights framework, especially the Geneva Convention, the Charter, and the ECHR.

The principle of mutual trust is a fundamental premise in secondary legislation and the case law of the CJEU. As the Court pointed out in its landmark case *N.S. versus Greece*, the CEAS is based on the assumption “that all the participating States, whether Member States or third States, observe fundamental rights, including the rights based on the Geneva Convention and the 1967 Protocol, and on the ECHR, and that the Member States can have confidence in each other in that regard” (Case C-411/10, [2011] ECR I-13905, para. 78). The principle of mutual trust is fundamental for the functioning of the CEAS, which relies on the decentral implementation of EU secondary legislation in the Member States. It is the central precondition for the functioning of the CEAS (Funke 2021, § 16 para. 20). Without this principle, “the *raison d'être* of the European Union and the creation of an area of freedom, security and justice and, in particular, the Common European Asylum System, based on mutual

confidence and a presumption of compliance, by other Member States, with European Union law and, in particular, fundamental rights” would be at stake (CJEU, Case C-411/10, [2011] ECR I-13905, para. 83 – N.S./Greece).

There is no irrebuttable presumption between Member States that fundamental and human rights are respected. The CJEU made this clear in the leading decision N.S. (Case C-411/10, [2011] ECR I-13905), in which it found “systemic inadequacy of the asylum procedure and reception conditions for asylum seekers in Greece” and degrading circumstances (para. 89). The principle of mutual trust is shattered once a Member State no longer ensures the application of the most basic fundamental rights. Under such exceptional circumstances, if the adherence to the common values of the EU is no longer guaranteed in one Member State, this state can no longer be cooperated with or expected to execute another Member State’s judgments and administrative decisions. Thus, the principle of mutual trust has been described as a “horizontal Solange” principle between the Member States that enable the national courts to review whether another Member State and its authorities comply with the rule of law (Art. 2 TEU) and the EU fundamental rights (Canor 2013, p. 387; Franzius 2015, p. 406; Lühns 2021, p. 69). In contrast to the Solange-principle established by the German Federal Constitutional Court (2 BvL 52/71 [1974], BVerfGE 37, 271 and 2 BvR 197/83 [1986], BVerfGE 73, 339), the principle of mutual trust concerns the horizontal relationship between the Member States and not the vertical relationship between the Community and the Member States. Mutual trust is the basis for mutual recognition and for the horizontal enforcement of Member States’ judgments in the area of freedom, security, and justice. According to the Solange II-Judgment, the German Federal Constitutional Court held that it will no longer exercise its jurisdiction to decide on the applicability of secondary legislation “so long as the European Communities and in particular the case law of the European Court, generally ensure an effective protection of fundamental rights against the sovereign powers of the Communities which is to be

regarded as substantially similar to the protection of fundamental rights required unconditionally by the Constitution [...]” (2 BvR 197/83 [1986], BVerfGE 73, 339 at p. 377). The principle of mutual trust, however, is less general, as it limits the horizontal cooperation in case of systemic violations of the essence of absolute human rights provisions in a Member State (on the difficulty in determining these exceptional circumstances, see Lühns 2020, pp. 96). The domestic court further has to assess, whether the individual concerned will be subjected to these systemic deficiencies in another state, and if so, it has to refrain from transferring him or her under the Dublin regime (see in more detail on this principle Lühns 2020, pp. 69–99).

Solidarity

According to Art. 67 (2) of the TFEU, the common policy on asylum, immigration, and border control is “based on solidarity between Member States”. European solidarity was especially demanded from Germany in the 1990s, which then was the most affected Member State at the external border of the Community until the accession of Austria in 1995 and the eastward enlargement of the EU in 2004. Therefore, it faced the highest influx of refugees from eastern and southern Europe, especially with view to the Yugoslav wars (Hailbronner 1996, p. 625). The principle of solidarity is enshrined in Art. 80 of the TFEU and enforced in different forms (see on the instruments Rossi 2022, Art. 80 para. 4). Solidarity has a strong horizontal dimension, addressing the Member States to support each other. While the CEAS is grounded on the principles of responsibility and solidarity, it is mainly criticised for only paying lip service to these principles. From the view of the EU, the aim is to curb the high numbers of refugees arriving at the external borders of the EU and to have a migration policy that meets the needs of the EU internal market. Measures adopted to achieve solidarity are the fair allocation of asylum seekers and EU funding of Member States’ activities in the field of migration management. However, until today, a real solidarity mechanism has not been established, as all Dublin reforms insisted on the criterion of first entry and

disregarded personal preferences or social integration of the asylum seekers. During the refugee “crisis” in 2015, asylum seekers were neither allocated according to the Dublin Regulation nor as intended by the ad hoc relocation measures under Council Decisions (EU) 2015/1523 and 2015/1601. There have been recent attempts to reform the Dublin system in order to introduce a solidarity mechanism and balance it with responsibility. The Commission aimed at replacing the temporary relocation scheme of 2015 with permanent measures, but still prioritised the criterion of first arrival (see the criticism of Hruschka 2016; Di Filippo 2016). However, the solidarity mechanism was blocked by a number of Member States, especially Bulgaria, Hungary, and Poland, and thus failed to reach a majority in the Council. The New Asylum Migration and Management Regulation proposed by the Commission in 2020 provides for solidarity contributions for the benefit of a Member State under migratory pressure, such as relocation of applicants, return sponsorship of illegally staying third-country nationals, or capacity-building measures in the field of asylum, reception, and return (Art. 45 of the Proposal, COM (2020) 610 final). It also proposes the establishment of a “Solidarity Forum” comprised of all Member States and chaired by the Commission (Art. 46 of the Proposal, COM 2020, 610 final). With view to the global perspective, solidarity and shared responsibility of the EU vis-à-vis the world community are expressed in the resettlement policy. The newly proposed EU Agency for Asylum is conceived to be a “tangible example of European solidarity” (COM (2018) 633 final), providing operational support to the Member States where needed.

Financial instruments are currently the predominant means to compensate the deficiencies of the CEAS and the main expression of solidarity. From 2014 to 2020, Member States were granted financial support of 1.8 billion Euros under the Asylum, Migration and Integration Fund (AMIF) and the Internal Security Fund (ISF) in order to enhance reception capacities, improve the quality of asylum procedures and integrate migrants (Press Release IP/15/4662). The AMIF was established with Regulation

(EU) No. 516/2014, based on Art. 78 (2) and 79 (2) and (4) of the TFEU. At the height of the influx of asylum seekers, the Council passed Regulation (EU) 2016/369 on the provision of emergency support within the Union. The legal basis was however not Art. 78 or 80 TFEU, but Art. 122 (1) of the TFEU. Framed as a fundamental expression of “the universal value of solidarity between people and a moral imperative” (Recital 1 of the Regulation (EU) 2016/369), the Council provided humanitarian assistance for the countries facing large numbers of refugees and migrants. Emergency support under this Regulation is granted in case of natural or man-made disasters that give rise to “severe wide-ranging humanitarian consequences in one or more Member States” where no other EU-instrument is sufficient (Art. 1 (1) of Regulation (EU) 2016/369). Based on this Regulation, the EU in 2018 provided financial support to Italy worth 200 million Euros to improve healthcare for refugees, additionally to 650 million Euros granted from the AMIF and the ISF. Financial incentives are also part of the New Asylum Migration and Management Regulation. According to its Art. 36, Member States carrying out the transfer of an applicant shall be paid a contribution in accordance with the AMIF. A rather controversial form of solidarity is the newly proposed “return sponsorships” under Art. 55 of the proposed New Asylum Migration and Management Regulation. A Member State may support another Member State to return illegally staying third-country nationals, e.g., by taking measures to facilitate the return and transfer from the territory of the benefitting Member State (see the criticism by Lührs 2021, p. 1334).

Perspectives: Post-Stockholm Phase

The “Post-Stockholm-Phase” is still ongoing (see also Funke 2021, § 16 para. 10) and does not follow a specific political program of the EU Council. Instead, the measures are more reactive in nature. The main focus lies on intensifying the cooperation with third countries of origin and transit, enhancing border management and preventing irregular migration, the reinforcement of the EASO’s mandate, the establishment of high common standards instead of minimum

harmonisation and the creation of legal pathways to Europe (see also EU Council Conclusions of Ypres, EUCO 79/14 and COM 2016, 197 final).

A turning point in the development of the CEAS were the refugee movements in 2015/2016, when up to two million irregular border crossing occurred at the EU external borders (COM 2020, 609 final; see on this more detailed, Schmidt, “How to cope with mass influx – What did we learn from the refugee crises 2015/2016?”). The Commission’s communication on “A European Agenda of Migration” of May 2015 marks the beginning of the current, third phase of the CEAS (COM 2015, 240 final). It contained proposals such as the reinforcement of Frontex, a recommendation for a permanent EU resettlement scheme and a clear framework for legal pathways to entrance in the EU. In 2016, the Commission further concretised these ideas and proposed a Reform of the CEAS also aiming at enhancing legal avenues to Europe (COM 2016, 197 final). This contained a comprehensive legislative package of seven measures. The goal was “a robust and sustainable common asylum policy” in the EU. The shortcomings of the Dublin system shall be tackled and replaced with a sustainable and fair system to determine the responsible Member State. The allocation of asylum seekers should not be linked with the Member State of first irregular entry, but instead occur on the basis of a distribution key reflecting the size, wealth, and absorption capacities of the Member States. Moreover, the CEAS shall be further harmonised by replacing the discretionary provisions in the Asylum Procedures Directive, the Reception Conditions Directive and the Qualification Directive with Regulations to achieve greater convergence in the EU asylum system. Also, the EASO’s mandate should be amended to enable it to actively implement policies and play a strengthened operational role. The package was partly withdrawn after it failed to find a majority in the Council. It was revised in September 2020, when the Commission proposed a “New Pact on Migration and Asylum” (COM 2020, 609 final), consisting of nine legislative proposals. A new focus is put on migrant workers who are of existential relevance to the EU. The

comprehensive approach builds on the proposals made in 2016 and furthermore concentrates on the external dimension. It seeks further harmonisation as well as centralisation of administrative decisions and the replacement of the Dublin Regulation with a broad instrument, the Asylum and Migration Management Regulation.

Externalisation of Asylum Policy

Based on Art. 78 (2)(g) of the TFEU, the EU shall conclude partnerships and cooperation with third countries for the purpose of managing inflows of people applying for international protection. The measures included in this competence are particularly Migration Partnerships and International Agreements with third countries (see also Art. 3 (2), Art. 216 of the TFEU on the competence of the EU to conclude treaties). The aim of the external dimension of migration and asylum policy is to improve the conditions in the third countries in order to prevent migration and to effectively return those who do not qualify for international protection under EU legislation. Over the past decade, the focus of the EU asylum policy has increasingly shifted to the external dimension. The reason for this shift was the Arabian spring in 2011 and the destabilisation of the authoritarian regimes in the following years, particularly the war in Syria that caused huge waves of refugees. These events clearly marked a turning point, as expressed in the Commission’s Communication on “The Global Approach to Migration and Mobility” (COM 2011, 743 final). In 2011, following the events in the northern Arabian countries, the EU launched dialogues with Tunisia, Morocco, Egypt, and Libya that led to the establishment of Mobility Partnerships. The aim of these partnerships is primarily to meet labor market shortages and vacancies with skilled workforce from outside the EU. On the other hand, the third countries are obliged to cooperate in the field of border controls and return policy. Migration is a decisive issue in comprehensive partnerships with third countries. The policy tools do not only include classical international agreements, but the EU also increasingly resorts

to flexible soft law instruments, like partnership frameworks and memoranda of understanding. Most prominently, the EU-Turkey-Declaration (EU Council Press Release 144/16) formally lacks binding force, but in fact is the basis for the resettlement of irregular migrants from Greece to Turkey and the relocation of Syrian refugees from Turkey to the EU (on the classification of this measure as decision of the Member States or the EU see Case T-192/16, [2017] EU:T:2017:128). In its Conclusions from June 2018, the EU Council stresses the need for flexible instruments to combat illegal migration and the importance of a strong partnership with the African Union (EUCO 9/18). An example of a legally binding international agreement is the Post-Cotonou Partnership, a deal between the EU and the Organisation of African, Caribbean and Pacific States (OACPS) that has not yet entered into force. One of its strategic priority areas is migration.

Centralisation

The CEAS is marked by the specific transnational cooperation of the Member State's authorities (on these "multi-layered interdependencies," see Mrozek 2016, p. 150). Art. 72 of the TFEU makes sure that the area of freedom, security, and justice does not affect the exercise of the Member States' responsibility with regard to national security. Nevertheless, the administrative powers in the field of border control as part of internal security have slowly been centralised over the last decades. The Schengen Information System and the EU Visa Information System determine Member State's border control measures. The tasks of Frontex, an agency initially established for the purpose of operational cooperation at the external borders, have been expanded vastly with Regulation (EU) 2019/1896, establishing a European Border and Coast Guard Agency (on the agencies see Groß "FRONTEX and EASO – (how) can agencies solve the problem?"). Not only integrated border management is more centralized; the Commission – based on Art. 78(1) and (2) of the TFEU – proposed a Regulation on the EU Agency for Asylum replacing the EASO with an

agency (COM 2018, 633 final), which was adopted in December 2021 (Regulation (EU) No. 2021/2303). The EASO was established in 2010. Its role is to help improve the implementation of the CEAS and to strengthen practical cooperation among the Member States in the field of asylum (Art. 1 of the EASO-Regulation). It provides operational support to Member States when they are faced with a particular pressure on their asylum and reception systems. It currently is a body of the EU with its own legal personality (Art. 40 EASO-Regulation) and provides independent expertise on asylum issues. The Asylum Office has no powers to take decisions on individual applications for international protection (Art. 2 (6) EASO-Regulation). Furthermore, it provides training to national staff in the field of asylum determination. According to Art. 1 of the Regulation (EU) No. 2021/2303, the newly created EU Agency for Asylum replaces the EASO with full continuity in all its activities and procedures, whilst enjoying a wider range of tasks (Art. 2). The "enhanced assistance" as foreseen in the Commission's Proposal, which allowed the asylum support teams of the Agency to carry out the entire procedure for international protection under certain circumstances (Art. 16a COM 2018, 633 final), is no longer included in the Regulation. However, the Agency can provide operational and technical assistance, especially with the deployment of asylum support teams (Art. 16 Regulation (EU) No. 2021/2303). The deployment of competent EU Agency personnel at the external borders in so-called hotspots has been repeatedly discussed since 2015 (see Dörig and Langenfeld 2016; also in the Migration Agenda of the Commission, COM 2015, 240). However, the centralisation of procedural powers would mean that the applications are bundled at the few EU agencies with lesser capacities compared to the authorities of the Member States. This in turn would lead to the formation of camps at the EU's external borders, which clearly is contrary to human rights obligations and prevents the social integration of migrants into the Member States' societies while their applications are pending. The gain in efficiency and uniformity of enforcement will be entailed by significant

sociopolitical disadvantages as well as a renewed unfair allocation of burden sharing within the EU (see also the criticism by Papier 2016, p. 2393, warning of social hotspots). One of the main problems would be the sole competence of the CJEU for asylum decisions, which would replace the decentralised judicial review by the Member State's courts and tribunals (on the high number of lawsuits in the field of asylum, see Bathe 2017, p. 65). Above all, Art. 291 (1) of the TFEU stipulates that Member States adopt all measures of national law necessary to implement legally binding EU acts. Thus, indirect enforcement of EU law is the rule, whereas direct and central enforcement by EU agencies and organs is the exception. The transfer of full administrative competences for asylum procedures to the EU would be contrary to primary law (Dörig and Langenfeld 2016, p. 4).

Full Harmonisation

As Art. 78 (2) of the TFEU refers to “measures” it does not restrict the EU to a certain form of legal action. The New Pact on Migration and Asylum encompasses the thorough replacement of the current Directives with Regulations to achieve more uniformity in the implementation of the CEAS. The Asylum Procedures Directive is to be replaced with a Regulation establishing a common procedure for international protection in the EU (COM 2020, 611 final). The Qualification Directive shall be replaced with a “Regulation on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection and for the content of the protection granted and amending Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents” (COM 2016, 466 final). The core of the CEAS, the Dublin Regulation, will be replaced with the Asylum and Migration Management Regulation (COM 2020, 610 final). With the replacement of the Directives, Member States will no longer have to transpose the EU asylum provisions into their respective laws. Instead they directly apply the Regulation provisions.

Resettlement

The Commission further proposed a Regulation “establishing a Union Resettlement Framework” (COM 2016, 468 final) based on Art. 78 (2) (d) and (g) of the TFEU. Resettlement of third-country nationals or stateless persons is viewed as “a tool of international solidarity and responsibility sharing” as well as of migration and crisis management (COM 2016, 468 final). Persons in need of international protection should thereby be offered alternative ways of asylum in order to prevent the risk of dangerous routes to the EU. Until now, resettlement initiatives of the EU occur on an ad hoc basis, on the Council Decisions based on the emergency competence in Art. 78 (3) of the TFEU, within the scope of the EU-Turkey Declaration of March 2016 and a Commission Recommendation of September 2017 (COM 2017, 558 final, p. 18). These instruments should be replaced with a structured, harmonised, and permanent framework for resettlement across the EU (this instrument is dealt with in more detail in the contributions of N.N. “Resettlement as the second pillar of Refugee Protection” and Frei “Helping countries of origin and transit”).

Conclusion

The integration method is reaching its limits in the area of freedom, security, and justice. Despite supranational competences, executive or inter-governmental agreements are still additionally in place. The much criticized deficits of the CEAS are also an expression of the more fundamental structural deficits within the EU and symptomatic for a deeper crisis. The economic imbalance between the Member States is substantial, and states of the eastern and southern peripheries suffer from high unemployment rates and low economic growth. It is therefore not surprising that the EU is not perceived as one common economic area from the perspective of asylum seekers and refugees but that the economically strong countries in central Europe are the main destination. The financial and economic crisis of the EU has

not only revealed but even deepened these weaknesses. Moreover, the East-West divide within the EU has only seemingly been overcome. The Visegrád states (Poland, Czech Republic, Hungary, Slovakia) in the former Eastern Bloc have been in the EU since 2004 but pursue a regional common foreign and security policy that is often contrary to the European common asylum policy. At the same time, they form a significant part of the EU's external borders in the Balkans. The considerable differences between the national asylum systems are only revealed by the fact that the Dublin system depends on their respective functioning. However, it is doubtful whether sanctioning secondary movement and thus the persons seeking international protection as foreseen by the latest proposal of the reformed Dublin system, instead of improving the reception conditions in all Member States and ensuring full fundamental rights protection within the EU, is the right approach. As critics put it, it is not the CEAS as a self-referential system that triggers push and pull factors and provokes onward movements, but rather reasons "such as family links or cultural reasons or the economical situation of a specific country [which] are widely ignored by the proposed measures" (Hruschka 2016). The decisive question for the future of the CEAS will be how to balance Member State's security interests, the principles of solidarity, and responsibility with individual's right to protection. Indeed, it is the latter – the human beings seeking protection – that should be at the center of a human rights-based asylum system and not be reduced to an object of diverging interests (see also Di Filippo 2016).

Cross-References

- ▶ [CEAS and the Reform of Dublin](#)
- ▶ [Coping with Mass Influx – What did the EU Learn from the Refugee and Migrant Crisis 2015/16](#)
- ▶ [FRONTEX and EASO – \(How\) Can Agencies Solve the Problem?](#)
- ▶ [Helping Countries of Origin and Transit](#)
- ▶ [Jurisdiction of Luxembourg Concerning Dublin, Distribution and Solidarity](#)

- ▶ [Jurisdiction of Strasbourg from Hirsi to Now](#)
- ▶ [Return Instruments](#)
- ▶ [The Future of the Geneva Refugee Convention, Temporary Protection and Subsidiary Protection](#)
- ▶ [The Importance of Resettlement as the Second Pillar of Refugee Protection](#)

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