Imigracijska politika EU: (Ne)slaganje sa temeljnim dokumentima o ljudskim pravima i utjecaj na ljudska prava

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SUMMARY

The EU relocation policy, instituted as a response to the unprecedented migration crisis, raised significant concerns regarding its compatibility with fundamental human rights obligations. This thesis critically examines the legal framework of the EU relocation policy, analysing whether it violates core principles of international and European human rights law, particularly the rights to asylum, non-refoulement, and human dignity. The research delves into the legal instruments governing migration and asylum within the EU, including the Dublin III Regulation, the CFREU, and the ECHR. This study will evaluate, using CJEU and ECtHR case law, the policy's compliance with the principle of non-refoulement and the prohibition of collective expulsions.

The thesis further explores the legality of transferring asylum seekers to MS that are ill-equipped to provide adequate protection, questioning whether such practices infringe on the right to a fair and efficient asylum process. It also examines whether the relocation mechanisms enhances discrimination by disproportionately affecting asylum seekers based on their nationality and country of origin. By assessing the corelation between state sovereignty, EU burden-sharing mechanisms, and human rights obligations, this research argues that the EU relocation policy, while designed to alleviate the pressure on frontline MS, fails to fully comply with international human rights standards. It concludes that reform is necessary to ensure that EU asylum policies are harmonised with both EU and international human rights law.

Key Words: EU relocation policy, non-refoulement, prohibition of collective expulsions, burden-sharing mechanisms

1. INTRODUCTION

The project of integrating Europe and its countries presenting a united front, in both opinion and actions, on various topics and occurrences, has never, since its foundation, faced a more challenging situation than the arising in 2015 and continuing to this day with over a million asylum seekers and migrants coming to and crossing European Unions' (hereafter: EU) borders, causing migration crisis. The increase in the number of migrants and asylum seekers arriving in the EU during 2015 and 2016 was so significant and the pressure it placed on the EU's migration and asylum systems was unprecedented.

The EU's answer was the relocation policy and it has been a central and highly contested element of the EU's response to the migration crisis. Designed as a solidarity mechanism, the policy aimed to redistribute asylum seekers more equitably across Member States (hereafter: MS), alleviating pressure on frontline countries like Greece and Italy. However, its implementation has been fraught with legal and practical challenges, leading to debates about its legality, workability, and ultimate failure

This thesis explores whether the EU relocation policy, as designed and implemented, was legally sound, practically feasible and intended to uphold the fundamental human rights and comply with the EU's human rights obligations, and if not, what systemic flaws led to its collapse.The main hypothesis of this thesis is that the EU relocation policy was both legally and practically flawed, resulting in non-compliance by MS and systemic failures in its implementation along with the fact that its uneven application led to significant human rights violations, such as inadequate reception conditions, prolonged detention, and the denial of effective legal remedies, undermining the EU's human rights obligations.

In today's political and legal environment the topic of the EU relocation policy, the subsequent results and consequences is critically relevant for several reasons. First, it highlights the tensions between EU law and national sovereignty, where many MS have resisted or outright ignored their legal obligations under the relocation scheme. Second, it underscores broader challenges within the Common European Asylum System (hereafter: CEAS) and raises questions about the EU's ability to manage large-scale migration in a human rights-compliant manner. As the EU continues to face migratory pressures, especially due to conflicts, climate change, and economic instability, understanding the legal and operational failures of past policies is essential for designing future solutions. The ongoing negotiations around the New Pact on Migration and Asylum and the ways of its realisation make this examination particularly timely.

From a legal perspective, the policy may have overstepped the bounds of EU competencies, conflicting with MS' sovereignty and their ability to control borders and migration. Furthermore, its practical unworkability was evident in the lack of solidarity and cooperation, leading to non-compliance and litigation before the Court of Justice of the European Union (hereafter: CJEU).

The thesis is structured so that it firstly lays the groundwork for the thesis by explaining the significance of the relocation policy, its origins, and the research questions guiding the analysis. Next, it will delve into the legal basis of the relocation scheme, examining its alignment with the

Dublin III Regulation, the Asylum Procedures Directive, and the Reception Conditions Directive. It will also consider the Treaty on the Functioning of the European Union (hereafter: TFEU)[1] and the principles of solidarity and fair responsibility-sharing under Article 80 TFEU. Then focusing on the MS' non-compliance with the relocation policy and the subsequent legal actions brought before the CJEU and the key case law, including joint cases *Slovak Republic and Hungary v Council of the European Union*[2], will be analysed to assess how the EU legal system handled the refusal of certain states to comply. Following is the chapter on practical challenges in implementation where the operational failures of the relocation policy will be analysed. It will, also, examine the administrative, logistical, and political obstacles that rendered the policy unworkable, with a focus on the lack of enforcement mechanisms, insufficient cooperation from MS, and administrative bottlenecks in frontline states.
Having introduced the relocation policy, its legal basis and the problems it faced with its implementation and conduction, the chapter will explore the human rights concerns in relation to the relocation policy, particularly within the scope of its alignment to the Charter of Fundamental Rights of the European Union (hereafter: CFREU)[3] and the European Convention on Human Rights (hereafter: ECHR). It will focus mainly on discerning whether the policy violated non-refoulement, right to asylum and dignity provisions. It will do so, particularly in light of the treatment of asylum seekers in overburdened MS as well as the key case law to support the claims.

Following the (il)legality of the relocation policy is the chapter on human rights concerns surrounding the relocation policy, particularly concerning the Charter of Fundamental Rights of the EU (hereafter: CFREU) and the European Convention on Human Rights (hereafter: ECHR). This chapter will investigate whether the policy violated non-refoulement, right to asylum, and dignity provisions, particularly in light of the treatment of asylum seekers in overburdened MS as well as the key case law to support the claims.

Lastly, the thesis will reflect on the lessons learned from the operational failures of the relocation policy and its subsequent human rights violations followed by reflections on whether future migration policies, particularly under the New Pact on Migration and Asylum, will and can be designed to ensure legal compliance and operational success as a step towards safeguarding human rights or will it all just be a new way to ultimately remain in the status quo position.

The thesis is expected to conclude that the EU relocation policy, while rooted in the legal framework of EU solidarity and being based on legal grounds, ultimately proved unworkable due to a combination of political resistance, insufficient enforcement, legal ambiguities and the fact that the policies uneven application led to significant human rights violations, such as inadequate reception conditions, prolonged detention, and the denial of effective legal remedies, undermining the EU's human rights obligations. MS' reluctance to participate in the scheme, compounded by

[1] Consolidated Version of the Treaty on European Union [2012] OJ C326

[2] CJEU, *Slovak Republic and Hungary v Council of the European Union,* C - 643/15 and C-647/15, ECLI:EU:C:2017:631

[3] Charter of Fundamental Rights of the European Union (2007/C 303/01)

vague legal obligations and the lack of binding enforcement mechanisms, undermined its effectiveness. The CJEU's rulings in support of the policy did little to resolve the core issues of national sovereignty versus EU-wide responsibility. Moreover, the relocation policy infringed upon certain fundamental rights, particularly regarding the inadequate reception and protection of asylum seekers in states that were unable or unwilling to host them. The analysis will suggest that future policies must strike a better balance between legal compliance and practical enforceability, incorporating more robust mechanisms for solidarity, responsibility-sharing, and the protection of human rights.

Ultimately, the thesis will argue that while the EU's intentions behind the relocation policy were rooted in solidarity, responsibility-sharing and intended to uphold human rights, including the right to asylum and non-refoulement, its flawed execution raises important questions about the future of migration governance in the EU and the challenges of ensuring both legal soundness and operational feasibility in times of crisis.

2. HISTORICAL AND LEGAL CONTEXT OF EU MIGRATION AND ASYLUM POLICY

The EU legal system is unique in its solutions, particularly in its supranational nature and its ability to directly bind MS but it is not entirely authentic or without forerunners. It draws heavily from international law and other legal frameworks, including key elements of trade law and human rights law while also introducing new, groundbreaking mechanisms for integration.[4] The EU legal system's creation was triggered by the need to prevent further conflicts in Europe after World War II and foster economic cooperation and political stability. Its evolution has been shaped by key moments in European history, with varying levels of support and resistance from MS.[5] The system remains a work in progress, continuously adapting to new political, economic, and legal challenges. In particular, to determine the field of interest, EU migration and asylum policies emerged from the broader EU integration process, drawing inspiration from earlier international frameworks like the Geneva Convention on Refugees.[6] The creation of EU law, including migration and asylum law, was triggered by the need to promote economic cooperation and peace in post-WWII Europe. Over time, political and humanitarian crises, such as the Homeland war in Croatia and the war in Bosnia and the 2015 migration crisis, have further shaped these policies. Key players like Germany and France have often driven integration, while responses from other MS have varied based on national interests.

2.1. Historical context of EU migration and asylum policy

Early foundation and policy developments pertaining to EU's stance on migration and asylum can be traced to the very beginnings of the community that is the EU today. The today's policy on EU migration and asylum has been shaped by historical events, various legal frameworks, social and

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[4] Paul Craig, Gráinne de Búrca, *The Evolution of EU Law*, 3rd edition, Oxford University Press 2021

[5] ibid.

[6] Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention)

political changes across Europe taking place since the first talks of a united Europe began. The devastation caused after the WWII spurred the need for a framework that would ensure peace and cooperation in Europe, especially between historical rivals like France and Germany. The idea was that economic interdependence would help avoid future wars. The first step towards it can, in way, be traced to the Marshall Plan (1948) devised by the USA to provide economic aid to rebuild Europe and encourage European countries to cooperate. This set the stage for future European integration as in 1951 France, Germany, Italy, Belgium, Netherlands, and Luxembourg signed the Treaty of Paris[7] forming the European Coal and Steel Community. It was an unique legal concept as it introduced a supranational authority, marking the first time European countries gave up some sovereignty to an external body. At about the same the Geneva Convention on Refugees[8], established under international law, laid the foundation for refugee protection by defining refugee status and the principle of non-refoulement. 1957 saw yet another a new step taken into the new, and as yet unknown, legal territory that of the creation of the European Economic Community (hereafter: EEC) under the Treaty of Rome.[9] It marked the beginning of the common market and laid the foundation for the future legal integration and new law order of Europe. It extended the principles of supranational governance, with institutions like the European Commission and the European Court of Justice gaining more power to regulate and interpret laws across MS. True, the Treaty of Rome focused more on economic integration but it had also laid the groundwork for future cooperation on migration, as the free movement of workers became a key principle. This free movement applied only to nationals of EEC countries and did not extend to third-country nationals or refugees. This economic focus was evident in the fact that the EEC's migration policies during this period were largely concerned with facilitating the mobility of workers to support economic integration as the need for labor in European economies that were rebuilding after World War II, especially during the economic boom of the 1950s and 1960s. was ever increasing. In the end the EEC did not develop any common policies or mechanisms to address these migration trends, leaving it to the MS to manage migration through national legislation. True, the free movement policies were primarily economic but foreshadowed broader discussions about cross-border migration and asylum, since, at that time migration and asylum were considered matters of national sovereignty which led to divergence in national policies as each MS had its own approach to immigration, influenced by its historical and colonial ties[10], economic needs, and political priorities.

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[7] Treaty establishing the European Coal and Steel Community [1951] 11951K/ECL

[8] Geneva Convention of 28 July 1951 and Protocol Relating to the Status of Refugees of 31 January 1967 (France–Austria) (adopted 21 October 1974, entered into force 24 July 1975) 985 UNTS 303

[9] Treaty establishing the European Economic Community [1957] 11957E/AFI/CNF

[10] A significant development in migration patterns during this period was the increase in postcolonial migration. Several EEC countries, particularly France and the United Kingdom (which was not a member until 1973), experienced migration flows from their former colonies in Africa, the Caribbean, and Asia. This was often driven by the end of colonial rule, which led to the migration of former colonial subjects to their respective European metropoles.

Anna Kicinger, Katarzyna Saczuk, *'Migration Policy in the European Perspective- Development and Future Trends'* (CEMFR Working paper, 1/2004) < http://www.cefmr.pan.pl/docs/cefmr_wp_2004-01.pdf > accessed 25 September 2024

The effects of the Treaty of Rome really came to during the 1960s and 1970s with the expansion of EU law. Its competencies, especially through the European Court of Justice, which began to assert the primacy of EU law over national law through landmark cases like *Costa v. ENEL*[11], which established that EU law takes precedence over conflicting national law. This principle, unique to the EU, contrasts with international law where treaties are subject to national implementation. During the 1970s, when the oil crisis hit and resulted in an economic downturn, countries across the EEC began implementing more restrictive immigration controls, curtailing the recruitment of foreign workers, particularly from non-EEC countries. Several MS even terminated their guest worker programmes, which had been in place since the 1950s and 1960s to meet labor shortages.[12] While labor migration decreased, family reunification became one of the main channels for migration, as foreign workers who had settled in EEC countries began bringing their families to join them.[13] In the late 1970s, there were initial moves towards coordination in foreign policy and related areas, including migration and asylum, through the European Political Cooperation (hereafter: EPC) framework.[14] There was no binding legislative or regulatory framework at the EEC level to manage migration or asylum and although the 1960s and 1970s did not see the development of a supranational asylum or migration policy at the EEC level, this period laid the foundation for future cooperation that would eventually influence the creation of the CEAS and broader migration policies in the 1990s and beyond. The Treaty of Rome did not explicitly address migration, its principles of free movement of workers contributed to the gradual development of migration policies, generally regarding labor mobility within the EEC, particularly with the adoption of the Single European Act[15] which aimed to create a single internal market in order to further promote labor mobility. At about the same time the political pressure to harmonise asylum procedures grew ever more, as divergent national policies created inconsistencies and tensions across the EEC. The

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[11] CJEU, *Costa v Enel,* C- 6/64, ECLI:EU:C:1964:66

[12] In the 1970s, several European countries began to establish bilateral agreements for managing migration, primarily focused on labor migration to address post-war labor shortages. Countries like Germany, Switzerland, and France, implemented guest worker programs to attract labor from other countries, especially from Southern Europe (e.g., Italy, Spain, Greece, ex- Yugoslavia) and later from Turkey and North African countries.

Phillip Martin, *'The Global Challenge of managing Migration'* PRB 68/2, November 2013 < https://people.wou.edu/~mcgladm/Geography 370 Human Migration/global-migration report PRB Martin brief.pdf > accessed 25 September 2024

[13] The end of labor migration in the mid-1970s led to growing concerns about irregular migration and how to manage refugee flows, setting the stage for future EU-level cooperation and the question of family reunification became one such under the migration and asylum policies of the EU. Left ungoverned in its beginnings just showed that life and law follow no patterns but are ever growing and changing since the question of family reunification will become a major fixture of the EU law in 2000s.

[14] The implementation of European Political Cooperation (EPC) during the 1970s marked a key moment in the process of European construction. It helped take an important step towards political union, considered as the final goal of European integration from the outset, but which seemed inaccessible during the 1950s and 1960s.

EHNE < https://ehne.fr/en/encyclopedia/themes/international-relations/diplomatic-practices/european-political-cooperation-1970-1993 > accessed 2 October 2024

[15] Single European Act, 17 February 1986, 1987 O.J. (L 169) 1

evolution of the EEC's role in migration and asylum policy began with the Schengen Agreement[16] and the Dublin Convention[17]. The Schengen Agreement created a border-free zone within Europe. Although the agreement was originally focused only at internal borders, it prompted discussions on how to manage external borders and coordinate asylum policy across MS. The Dublin Convention, on the other hand, established the first country rule, stipulating that the MS where an asylum seeker first enters the EU is responsible for processing their claim.[18] Late 1980s and early 1990s marked the beginning of a more integrated and harmonised approach to asylum and migration. The pivotal moment in the EU's approach to migration, asylum and broader issues related to security and judicial cooperation, came in 1992 with the Maastricht Treaty.[19] Political, economic and geopolitical factors at the time made the need of a more integrated and coordinated approach to migration and asylum and the protection of human rights in regards to it, on the European level, all the more obvious.[20] Schengen was initially limited to a subset of the then European Community members, but its implementation raised significant concerns, mainly about external border control. What with internal borders becoming less restrictive, the EU needed to enhance security and control at its external borders to manage immigration and asylum claims.[21] This highlighted the need for a common asylum framework and judicial cooperation, particularly since the early 1990s Europe experienced a notable increase in asylum seekers and refugees from war-torn regions like the Balkans due to the Homeland war in Croatia and the war in Bosnia which all lead to calls for a more unified European approach to asylum as the influx of migrants put pressure on national asylum systems, highlighting the inconsistencies and inefficiencies in the way EU MS processed

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[16] Protocol to the Agreement on the Member States that do not fully apply the Schengen acquis—Joint Declarations [2007] OJ L129/35.

[17] Convention Determining the State Responsible for Examining Applications for Asylum lodged in one of the Member States of the European Communities OJ C 254 19/08/1997, p. 0001 - 001

[18] The Dublin Convention was only a partial solution, and by the early 1990s, it was clear that a more comprehensive approach to migration and asylum was necessary. The Area of Freedom, Security, and Justice introduced by Maastricht was intended to provide the legal and institutional basis for deeper cooperation and harmonisation in this area.

[19] Treaty on European Union OJ C 191, 29 July 1992

[20] The fall of the Berlin Wall in 1989 and the reunification of Germany in 1990, the end of the Cold War that had divided Europe for decades and the emergence of newly independent states in Central and Eastern Europe all marked a shift that increased migration pressures, including refugees, asylum seekers, and economic migrants, making it clear that migration would become a central issue for European nations.

ibid. 12

[21] Without internal borders, there was a risk of asylum shopping, where migrants might apply for asylum in multiple countries or move to the state with the most favourable conditions.

asylum applications. These pressures made it apparent[22] that the then European Community needed a more cohesive approach to manage both asylum seekers and migration more effectively, balancing the principles of free movement with the need for security and justice.

It was not, however, until 1997 and the Treaty of Amsterdam[23] that the asylum procedure and policy was transferred to the first pillar where the powers that the MS transfer sovereignty for, are excessed by the Community institutions.[24] Shortly after, more serious steps were taken towards harmonising the migration and asylum policy between MS. The Tampere Conclusions[25] are the result of the Tampere Summit in 1999 which was a landmark in EU policy, where MS committed to creating CEAS and formally acknowledged, for the first time, the need for a supranational asylum framework. The CEAS was influenced by international law, particularly the Geneva Convention, but sought to harmonise asylum procedures across the EU. Many countries, including Germany and France, pushed for stronger cooperation, while some eastern MS remained hesitant about sharing the burden of asylum seekers.[26] The new policies adopted under Tampere Conclusions had a five-year programme set up during which measures such as conferral of refugee status, asylum procedures and the determination which MS will be responsible for examining asylum had to be agreed upon so in 2003 Dublin II Regulation[27] and the Directives in regard to it were signed. It further cemented the first country rule for asylum applications. This legal framework created binding obligations on MS but implementation remained uneven, especially as the financial burden was not equally shared and even though many MS agreed to these harmonisation efforts, practical implementation varied widely, leading to inefficiencies and growing frustration in countries like Italy, which bore a disproportionate share of the asylum burden.[28] At this time it seemed the EU had its migration and asylum policy well in hand with a more or less expected level of complaints from

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[22] Countries like Germany and France were particularly strong advocates for enhanced cooperation in these areas, pushing for the inclusion of migration and asylum policies under the new third pillar of the EU (Justice and Home Affairs) introduced by the Maastricht Treaty. Their experience in dealing with rising asylum claims, particularly from the Balkans, made them aware of the need for common solutions. Feedback from other Member States varied, but there was general agreement on the need for some level of co-operation in the areas of migration and asylum, especially in light of the challenges posed by increased migration flows and concerns over external borders.

Christina Boswell, *'The 'external dimension' of EU immigration and asylum policy'* International Affairs 79/3, May 2003, p. 619–638 < https://library.fes.de/libalt/journals/swetsfulltext/16531733.pdf > accessed 25 September

[23]Treaty of Amsterdam Amending the Treaty on European Union, The Treaties Establishing the European Communities and Related Acts OJ C 97 340/01

[24] European Council , 'The Pillars of Europe, The Legacy of the Maastricht Treaty after 25 Years' EU 2018< https://www.consilium.europa.eu/media/38778/expo_maastricht-brochure_en.pdf > accessed 12 September 2024

[25] TAMPERE EUROPEAN COUNCIL 15 AND 16 OCTOBER 1999 < https://www.refworld.org/legal/resolution/council/1999/en/18427 > accessed 12 September 2024

[26] E. Guild, 'The Europeanisation of Europe's Asylum Policy' (2006) 18(3–4), IJRL, 634–635, 640.

[27] Commission Regulation (EC) No 1560/2003 of 2 September 2003 laying down detailed rules for the application of Council Regulation (EC) No 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national 32003R0323

[28] ibid. 21

MS more affected by the migration and asylum seeking. The situation continued on as was for another ten years until 2013 and the Arab Spring as well as conflicts in Syria and Libya led to a sharp increase in refugees seeking asylum in Europe. The EU's first response was the recast Dublin III Regulation[29] in 2013, which maintained the first-country rule but introduced new guarantees for asylum seekers, including the right to appeal. The crisis that began in 2013 resulted in a full-on migration crisis by 2015. Consequently, the model for migration and asylum that the EU was proud of and which it had been steadily working on for the past twenty years came tumbling down. The unprecedented numbers of refugees and migrants arriving in Europe exposed weaknesses in the existing CEAS framework, prompting calls for reforms in burden-sharing and the implementation of relocation mechanisms. All told it forced the EU to propose a number of various measures aiming to address immediate challenges and improve the overall asylum system. Starting from 2016 the EU has sought to reform its asylum policies, focusing on enhancing border management, establishing legal pathways for migration, and improving cooperation with non-EU countries. A temporary relocation scheme to distribute asylum seekers more equitably across MS had been adopted. However, the burden remained heavily skewed toward frontline states like Greece and Italy who soon struggled to cope, while countries like Hungary and Poland resisted relocation efforts and greater responsibility-sharing. It all led to lawsuits before the Court of Justice of the European Union (hereafter: CJEU) where MS questioned the legality of the relocation policy as well as opposing its realisation. Despite the CJEU rulings that all MS must comply with the burden-sharing mechanism some, like Hungary, Poland, and Czechia refused to implement the relocation quotas, leading to political tension and highlighting the difficulty of enforcing EU asylum laws against national interests. The CFREU guarantees the rights of asylum seekers, but political resistance and uneven application of EU law persisted, making the future of migration and asylum policy one of the most contentious areas in the EU legal system. Then, in 2020 the European Commission introduced the new Pact on Migration and Asylum (hereafter: the Pact)[30] aimed to balance responsibility-sharing with increased external border controls and returns of rejected asylum seekers by proposing mandatory solidarity between MS, with a focus on relocation, financial contributions, or sponsoring returns. The Pact is here, however, it seems that it raises even more question than it answers. It is a package consisting of a number of legislation intended to reform the EU's migration and asylum system by establishing a more humane approach to migration challenges. It is intended to prioritise securer European borders better procedures for asylum and return and more solidarity and burden sharing between MS.[31] As it stands now[32] it can be said that the EU's migration and asylum policies are influenced by international human rights

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[29] Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) 32013R0604

[30] Communication from the Commission on a New Pact on Migration and Asylum COM(2020) 609 final

[31] What is the EU Pact on Migration and Asylum, International Rescue Committee < https://www.rescue.org/eu/article/what-eu-pact-migration-and-asylum> accessed 2 October 2024

[32] Although the new Pact has entered into force in June 2024 there is a two-year transition period.

law and refugee conventions, but that the EU has developed its own complex legal framework to address the challenges of shared responsibility and free movement within its borders.

2.2. Legal context of EU migration and asylum policy

The EU migration and asylum policy is based on a number of legal documents that aim to balance the need for human rights protection, border security, and solidarity among MS. Those key legal documents are the Dublin III Regulation, the Asylum Procedures Directive and CJEU case law. Together, they create a form upon which the migration and asylum are managed within the EU. The TEU outlines the EU's values and objectives, establishing the principles of solidarity and respect for human rights that underpin migration policies. The TFEU details the operational aspects of EU law, including the legal basis for asylum and migration policies and the importance of fair burden-sharing among MS. The CEAS provides the legislative measures necessary for harmonising asylum policies, ensuring uniform protection for asylum seekers, and addressing the challenges faced by MS. Together, these documents form the legal backbone of the EU's approach to migration, shaping its policies and practices in response to the complexity and ever evolving state of migration and asylum seeking, particularly in connection to the protection of fundamental human rights which are undoubtably endangered.[33] Such, pertaining to migration and asylum was firstly acknowledged in 1974 at the Paris Summit of European Heads of State where the need for the same, or at least similar, rules regarding migration and asylum[34] as well as stating the need for abolishing the boarders between MS.[35] The same was repeated just a year later in the Tindemans Report on the European Union[36] stressing the importance of working towards the cancelling boarder and passport controls and allowing people free movement. It soon became quite clear that a harmonised policy on migration and asylum between MS cannot be achieved until the borders exist, so the Schengen Agreement and the Single European Act were the turning points in achieving this objective and it is exactly this period of transition before the Schengen Agreement came into force in 1992 that brought about the major changes concerning asylum and put down the foundations of harmonised

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[33] The founding treaties of the European Union (EU), particularly the Treaty of Rome (1957), did not explicitly address migration and asylum because the primary focus at that time was on creating an economic community. The evolution of migration and asylum policy within the EU was driven by the need to address new challenges and ensure legal coherence across Member States as the Union expanded. the creation of the Schengen Area, increasing migration pressures, and the desire for judicial cooperation and security led to the gradual development of a harmonised legal framework. This framework was intended to balance the free movement of people within the EU with the need for common external border control and solidarity in handling asylum seekers. The policy evolution reflects the growing recognition that migration and asylum are cross-border issues requiring coordinated action and mutual trust among EU countries.

ibid. 22

[34] Communication, Paris Summit of the Heads of State or Government, 9–10 December 1974, para 10.

[35] V. Chetail, P. De Bruycker, F. Majani, *'Reforming the Common European Asylum System: The New European Refugee Law*', (eds) Martinus Nijhoff) 2016, p.5-12

[36] L. Tindemans, European Union, Bulletin of the European Communities, Supplement 1/76, 29 December 1975, 27–28.

policy on migration and asylum, topics previously falling into the category of MS sovereignty.[37] There have been set backs along the way during this transitional period where MS decided on an inter government approach instead of heading in the direction of a common policy in the field of migration and asylum as clearly stated in the Palma Document[38] adopted by the European Council in 1989.[39] The Palma Document reflected the understanding that cooperation on migration was necessary but also showed a clear desire to retain national discretion in handling specific aspects of migration and asylum policies, such as determining admission criteria, managing borders, and granting asylum status. During the late 1980s and early 1990s, MS had widely diverging interests and migration pressures. Some countries, particularly those in Southern Europe (e.g., Spain, Italy, Greece), were dealing with growing migration flows, especially from Africa and the Middle East, while others, like Northern European countries, had different immigration and asylum experiences. These divergences made it difficult to agree on a single set of rules that would satisfy all MS. As a result, the intergovernmental approach allowed states to cooperate on a case-by-case basis without the need for binding EU-wide regulations that might not reflect each country's unique situation. Governments were concerned about public backlash if they were seen as ceding too much control over migration to the EU. By keeping the decision-making process intergovernmental, MS retained political accountability to their own voters while avoiding the perception that they were giving up control to EU institutions.[40] However, following the implementation of the Schengen Convention and the Dublin Convention when borders between the MS have been set aside, attention turned towards harmonising the asylum procedure between the MS and the development of a set of legal rules that will become the CEAS and for the first time, a proposal for an all around asylum system has been put forth by the Commission.[41] In 1999 European Council brought forth the Tampere Conclusions in which a common EU asylum and migration policy system was through partnerships with countries of origin, CEAS, fair treatment of third country nationals and management of

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[37] ibid. 35

[38] European Council, Presidency Conclusions, Madrid, 26 and 27 June 1989, sn 254/2/89, 6.

[39] The Palma Document of 1989 was a critical first step in acknowledging the need for European cooperation on migration and asylum issues, but the decision to pursue an intergovernmental approach instead of an immediate common policy reflected MS' concerns over sovereignty, diverging national interests, and the political sensitivities surrounding migration. The intergovernmental model allowed for flexible cooperation without forcing countries into a binding supranational framework, something that was later built upon with the gradual development of the CEAS. The evolution toward a common policy only occurred when political, legal, and institutional developments, particularly following the Maastricht Treaty and the Treaty of Amsterdam, enabled the EU to take on more binding and harmonised approaches to migration and asylum.

[40] S. Salomon, J. Rijpma,'*A Europe Without Internal Frontiers: Challenging the Reintroduction of Border Controls in the Schengen Area in the Light of Union Citizenship',* (2023) German Law Journal, 24(2) < https://www.cambridge.org/core/journals/german-law-journal/article/europe-without-internal-frontiers-challenging-the-reintroduction-of-border-controls-in-the-schengen-area-in-the-light-of-union-citizenship/1E2B43D2B7F58EE752053CD7F10C050E > accessed 30 September 2024

[41] Discussion Paper on the Right of Asylum, in Commission of the European Communities, Communication from the Commission to the Council and the European Parliament on the Right of Asylum, SEC(91) 1858 Final, 11 October 1991, 9, para 2.

migration flows.[42] The Tampere Conclusions laid the groundwork for the CEAS and significantly shaped the EU's approach to migration and asylum. They established principles of solidarity, common standards, and a rights-based approach to asylum seekers.[43] The directives that followed played crucial roles in standardising asylum processes across MS, ensuring basic rights and dignities for asylum seekers, and attempting to create a more coherent and effective asylum system.[44] First came the Temporary Protections Directive[45] regarding the minimum standards the MS country needs to offer to migrants and asylum seekers and the balance in numbers of people provided with such help between the MS. Secondly, the Reception Conditions Directive[46] set minimum standards for the reception of asylum seekers, ensuring that their basic needs were met while their applications were being processed. It addressed accommodation, food, healthcare, and access to education, thereby ensuring the humane treatment of asylum seekers. Thirdly, the Qualification Directive[47] established common criteria for the recognition of third-country nationals or stateless persons as beneficiaries of international protection. Lastly, the Asylum Procedures Directive[48] established minimum standards for the procedures for granting and withdrawing international protection. It aimed to ensure that all asylum seekers received fair and efficient processing of their applications, including provisions for the right to a fair hearing, access to legal assistance and the need for clear communication regarding asylum procedures. Alongside these four directives, two regulation have been adopted as well. Firstly, the Dublin Regulation established criteria for determining the MS responsible for examining an asylum application, aiming to prevent multiple applications and streamline processing. Secondly, the EURODAC Regulation[49], one of the key components of CEAS, whose primary aim is to help determine the member state responsible for examining an asylum application. It facilitates the identification of individuals who have previously applied for asylum in other EU countries. It also established the European fingerprint database to assist in the identification of asylum seekers and irregular migrants.[50]

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[42] ibid.

[43] C. Dias Urbano de Sousa, P. De Bruycker (ed), *The Emergence of a European Asylum Policy* (Bruylant 2004)

[44] However, the implementation of these directives faced challenges, particularly regarding the uneven application across member states and the ongoing debates about burden-sharing, which would later become more pronounced during the 2015 migration crisis.

[45] Council Directive 2001/55/EC OJ L 212/12, 7 August 2001

[46] Council Directive 2003/9/EC OJ L 31/18, 6 February 2003

[47] Council Directive 2004/83/EC OJ L 304/12, 30 September 2004

[48] Council Directive 2005/85/EC OJ L 326/13, 13 December 2005

[49] Council Regulation No. 2725/2000 of 11 December 2000

[50] ibid. 35

After the Treaty of Lisbon[51] came into force the institutional framework at the EU level had more leverage and power derived through TFEU.[52] Following the TFEU entry into force a recast on Asylum Procedures Directive[53] was adopted as one of the key components of the CEAS and it set forth minimum procedural standards for granting and withdrawing international protection.[54]

The Reception Conditions Directives[55] was also recast and it set governing the standards for the reception of applicants for international protection.[56] EURODAC and Dublin Regulation have been revised as well.[57] As for the recast EURODAC Regulation[58] it aimed to improve the efficiency, accuracy and scope of the Eurodac system, primarily for determining the Member State responsible

[51]Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community OJ C 306 13 December 2007

[52] Article 67 TFEU emphasises the creation of an area of freedom, security, and justice, including setting up common policies on asylum and migration thus providing the legal basis for the development of a cohesive migration policy within the EU framework. Furthermore Article 78 TFEU mandates the development of a common policy on asylum, intending to ensure fair and efficient asylum procedures and a uniform standard of protection across MS. The EU's approach to immigration, is outlined in Article 79 TFEU, including legal migration and integration policies. It grants the EU the competence to adopt measures on legal migration, which can influence the development of policies related to the relocation of migrants and asylum seekers and Article 80 TFEU emphasises the principle of solidarity and fair sharing of responsibilities among MS.

[53] 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), OJ L 180/160, 29 June 2013

[54] The recast directive replaced the earlier Asylum Procedures Directive and its main objective is to establish a common framework for asylum procedures in order to ensure equal and efficient processing of applications for international protection as well as aiming rectify procedural disparities across MS, which can result in inconsistent recognition rates, forum shopping, and secondary movements of asylum seekers.

[55] Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) OJ L 180, 29 June 2013

[56] The main purpose of the recast version was to establish minimum standards for the treatment of applicants for international protection within the EU, ensuring a dignified standard of living and access to certain rights while they await decisions on their asylum claims. It sought to improve uniformity and reduce discrepancies among Member States' reception practices, which had previously led to secondary movements of asylum seekers and varying standards of care.

[57] ACTIONES Handbook on the Techniques of Judicial Interactions in the Application of the EU Charter.

[58] Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice (recast) OJ L 180, 29 June 2013

for examining an asylum application.[59] As for the Dublin III Regulation[60] as a central component of the CEAS, it had been aimed at preventing multiple asylum claims (also known as "asylum shopping") and ensuring efficient burden-sharing among MS.[61] All these legal documents were set up to enhance the efficiency and security of the EURODAC system, while expanding its scope to include law enforcement access. At the same time, they were to maintain rigorous data protection standards to safeguard the fundamental rights of individuals whose biometric data is collected. However, it all but collapsed in the 2015 migration crisis which highlighted significant inefficiencies. These inefficiencies stemmed from uneven burden-sharing, political disagreements, and fragmented implementation of the EU's asylum rules. Therefore, after 2015, the EU focused on externalising migration controls by establishing agreements with third countries to prevent irregular migration at source.[62] True, these moves reduced arrivals through the Eastern Mediterranean route. However, concerns about legal compliance with international refugee law and the human rights of migrants rose rapidly. The EU has significantly increased its budget for migration and asylum management, including financial support to frontline MS to bolster reception capacities and improve asylum processing infrastructure. This funding is aimed at alleviating system bottlenecks.[63] In 2020 the European Commission proposed the Pact, which aimed to balance responsibility and solidarity more effectively. It was adopted in 2024 and while it faces ongoing challenges, it remains to be seen whether it will achieve the balance between solidarity and national sovereignty, as well as managing migration flows externally and internally while preserving the fundamental values and human rights of the EU.

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[59] The recast regulation is intended to provide a system that allows for the collection, transmission, and comparison of biometric data(fingerprints) of asylum seekers and certain categories of irregular migrants. It is to facilitate the identification of individuals who have applied for international protection in one MS and moved to another, ensuring that the responsible MS is determined efficiently according to the Dublin system and to assist law enforcement authorities in preventing, detecting, and investigating serious crimes, including terrorism, by giving them access to the Eurodac database under strict conditions.

Lehte Roots, *'The New EURODAC Regulation: Fingerprints as a Source of Informal Discrimination'* TalTech Journal of European Studies 5/2, October 2015 < https://sciendo.com/article/10.1515/bjes-2015-0016 > accessed 26 September

[60] Regulation (EU) No. 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), OJ L 180/31, 29 June 2013

[61] Dublin III established the legal framework for determining the MS responsible for examining an application for international protection lodged by a third-country national or stateless person within the European Union

[62] Like the EU Turkey deal (Resolution of 14 April 2016 on the 2015 Report on Turkey, 2015/2898(RSP)) which was aimed at stopping the flow of irregular migration via Turkey to Europe where all new irregular migrants and asylum seekers arriving from Turkey to the Greek islands and whose applications for asylum have been declared inadmissible should be returned to Turkey.

Jennifer Rankin, 'EU strikes deal with turkey to send back refugees' *The Guardian,* March 2016 < https://www.theguardian.com/world/2016/mar/18/eu-strikes-deal-with-turkey-to-send-back-refugees-from-greece > accessed 27 September 2024

[63] Peter Gladoic Hakansson, Predrag Bejakovic, *'Labour Market Resilience, Bottlenecks and Spatial Mobility in Croatia'* (2020) 11 Eastern Journal of European Studies 5

3. (IL)LEGALITY OF THE EU RELOCATION POLICY

The EU Relocation Policy sought to redistribute asylum seekers from overburdened MS, particularly the Med 5[64], to other EU MS by setting quotas for the relocation of applicants in clear need of international protection. Its legal framework consists of Dublin III Regulation, Asylum Procedures Directive, and the Reception Conditions Directive. In this analysis the (il)legality of the relocation policy its compliance with EU treaties, regulations, and directives will be ascertained, particularly regarding solidarity, responsibility sharing and fundamental rights protection.

3.1. Compliance with the EU law

3.1.1. Compliance with the EU Treaties

The legal basis for establishing the EU Relocation Policy is Article 78(3) TFEU, which permits provisional measures to address situations of sudden inflows of third-country nationals. It justified temporary relocation measures to alleviate the burden on the Med 5 MS. Furthermore, Article 80 TFEU gave way to a broader principle of solidarity and fair sharing of responsibility since the policy was designed to operationalise the principle of solidarity, which is foundational to the CEAS. Unfortunately, the voluntary nature of the policy and the non-compliance of certain MS (e.g., Hungary, Poland) undermined the policy's goal of fair responsibility-sharing, leading to a fragmented approach to asylum management within the EU.[65] The refusal of several MS to accept their relocation quotas raised significant legal issues regarding compliance with EU obligations. The CJEU ruling in joint cases *Commission v. Poland, Hungary, and Czech Republic* confirmed that the refusal to comply with relocation decisions constituted a breach of EU law since the MS are not allowed to derogate based on a their own assessment of the effectiveness of the mechanism without suggesting a sound legal basis.[66] In short, MS cannot merely invoke the existence of public order and security concerns under Article 72 TFEU, in order to avoid their obligations without first proving that it was necessary to do so.[67] They especially cannot do it unilaterally with no control whatsoever by the EU institutions.[68] CJEU rulings confirmed that some MS breached their obligations under the relocation scheme, creating a gap between policy design and its practical implementation. So, while the EU Relocation Policy was designed in line with TFEU principles on asylum and solidarity, the implementation failures by certain MS resulted in inconsistent protection of human rights.

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64 The MED 5 states are: Italy- Greece- Spain- Malta- Cyprus. Lucas Rasche, Natalie Welfens, Marcus Engler, *'The EU Migration Pact at Two: What Remains of the Fresh Start?'* Hertie School Jacues Delors Centre 2022 < https://www.delorscentre.eu/en/publications/the-eu-migration-pact-at-two > accessed 20 September 2024

65 Tim Hatton, *'European asylum policy before and after the migration crisis'* (2020) 480 I Z A World of Labour <https://wol.iza.org/articles/european-asylum-policy-before-and-after-the-migration-crisis/long> 21 September 2024

66 CJEU, *Commission v. Poland, Hungary, and Czech Republic,* C-715/17, C-718/17, C-719/17, ECLI:EU:C:2020:257

67 CJEU, *Commission v. Poland, Hungary, and Czech Republic,* C-715/17, C-718/17, C-719/17, ECLI:EU:C:2019:917, Opinion of AG Eleanor Sharpston, para 202 (2019)

68 CJEU, *Commission v. Poland, Hungary, and Czech Republic,* C-715/17, C-718/17, C-719/17, ECLI:EU:C:2019:917, Opinion of AG Eleanor Sharpston, para 196 (2019)

3.1.2. Compliance with the Dublin III Regulation

The EU Relocation Policy was designed to supplement and temporarily modify the Dublin III Regulation in light of the overwhelming pressures faced by frontline states like Greece and Italy. Under Dublin III, the primary rule for determining responsibility for asylum applications is based on the first country of entry and the relocation policy temporarily derogated from this provision, exactly because the frontline MS were facing extraordinary pressure, which, in the end, resulted in inhumane treatment, overburdened asylum systems and violations of fundamental human rights. By doing so, the relocation policy aimed to protect human rights guaranteed under the CFREU, such as Article 1 on human dignity and Article 4 on prohibition of inhumane or degrading treatment.[69] In theory, the policy ensured that asylum seekers were not relocated to MS where they faced inhumane treatment or degrading conditions. However, both the ECtHR and the CJEU have repeatedly ruled on the failure of MS to adequately protect human rights under the Dublin system. For example, in *M.S.S. v. Belgium and Greece*, the ECtHR found that returning asylum seekers to Greece under Dublin violated Article 3 ECHR due to substandard reception conditions.[70] This judgment underscored the risks of indirect refoulement, a concern relevant to the relocation policy, particularly if asylum seekers were transferred to states with inadequate asylum systems.

True, the Relocation Policy was designed to comply with the human rights safeguards enshrined in Dublin III, particularly regarding the right to asylum and non-refoulement. However, its implementation revealed significant challenges. The policy's failure to enforce compliance across all MS led to inconsistent protection of human rights, with some states disregarding their obligations and putting migrants and asylum seekers under serious risks of inhumane treatment, demonstrated that while the policy aligned with Dublin III in principle, its real-world application fell short of fully safeguarding the fundamental rights of asylum seekers.

3.1.3. Compliance with the Asylum Procedures Directive

The Asylum Procedures Directive establishes minimum standards for fair and efficient asylum procedures within the EU. It governs the procedural rights of asylum applicants, the right to a personal interview, access to legal remedies and specific procedural guarantees for vulnerable applicants.[71]

The right to be heard and the right to an individual assessment of each asylum application are key procedural safeguards under Articles 12 and 14 of the Asylum Procedures Directive. These provisions ensure that each asylum seeker has the opportunity to present their case and that decisions are made based on individual circumstances, including personal experiences of persecution or fear thereof. The relocation policy was designed to ensure that asylum seekers were

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[69] Relocating asylum seekers aimed to prevent overcrowded and degrading conditions in frontline states, ensuring the preservation of human dignity. The policy sought to reduce the risk of inhumane treatment in overburdened reception centers, which would otherwise violate Dublin III's principle of ensuring humane conditions for applicants.

[70] ECtHR, *M.S.S. v Belgium and Greece,* App no 30696/09, 21 January 2011

[71] European Parliament, 'Implementation of the 2015 Council Decisions Establishing Provisional Measures in the Area of International Protection for the Benefit of Italy and Greece' (PE 583 132) 2017

relocated without compromising their individual rights. It incorporated procedural safeguards to prevent automatic or collective transfers. The relocation policy, however, relied on nationality-based criteria, specifically Syrians and Eritreans as the main determinant for relocation eligibility.[72] This approach raised concerns about compliance with the directive's requirement for individual assessments. The CJEU ascertained the right to an individual assessment in *A.S. v. Republic of Slovenia* where the importance of ensuring that asylum seekers receive a personalised and individual assessment of their claims had been emphasised.[73] Also, the Asylum Procedures Directive mandates that asylum seekers have the right to information about their rights and obligations in a language they understand, including their right to access asylum procedures and the relocation process itself. However, under the relocation policy, concerns arose regarding the adequacy of information provided to asylum seekers. Many applicants were not fully informed of their rights, particularly regarding the criteria used for determining eligibility for relocation, the right to appeal, and potential delays. The lack of clear communication in accessible languages in hotspots and detention centres in Greece and Italy was flagged by human rights organisations such as the European Union Agency for Fundamental Rights (FRA). These violations of the Asylum Procedures Directive have been raised to the CJEU and in the *X v. Staatssecretaris van Veiligheid en Justitie*[74], the Court held that effective access to information is a fundamental requirement of the asylum procedure, particularly concerning applicants' right to understand the procedures applied to them. Failure to provide adequate information during relocation could violate Article 12 of the Asylum Procedures Directive.[75] Furthermore, the Asylum Procedures Directive places significant emphasis on the rights of vulnerable persons, requiring special procedural guarantees for applicants with specific needs, such as unaccompanied minors, victims of torture, or persons with disabilities. However, in practice, the identification and relocation of vulnerable individuals were sometimes inefficient or inconsistent, and many vulnerable asylum seekers were subjected to inadequate reception conditions or lengthy processing times.[76] Such was evident from *Haqbin v. Federaal Agentschap voor de Opvang van Asielzoekers*[77] a CJEU case where it was ruled that vulnerable applicants must be provided with appropriate procedural safeguards during asylum procedures,

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[72] The decision to prioritise the relocation of Syrians and Eritreans was based on objective criteria drawn from the EU asylum acquis and the UNHCR guidelines. These two nationalities had recognition rates for international protection that exceeded 75%, as per the data available in 2015. Under Recital 25 of Council Decision 2015/1601, the focus on these nationalities was justified by the high likelihood that applicants from these countries would be eligible for international protection under the Qualification Directive. By focusing on high-recognition nationalities, the EU sought to ensure that relocated individuals were those who had a strong prima facie claim to protection, thereby streamlining the process and reducing the administrative burden on receiving states.

[73] CJEU, A.*S. v Republic of Slovenia,* C-490/16, ECLI:EU:C:2017:585

[74] CJEU, X v. Staatssecretaris van Veiligheid en Justitie C-175/17 ECLI:EU:C:2018:776

[75] CJEU X v. Staatssecretaris van Veiligheid en Justitie, C-175/17 ECLI:EU:C:2018:34, Opinion of AG M. Yves Bot, para 9 (2018)

[76] Karin Schittenhelm, *'Implementing and Rethinking the European Union's Asylum Legislation: The Asylum Procedures Directive'* (2022) International Migration 57(1) p.229-244

[77] CJEU, *Haqbin v. Federaal Agentschap voor de Opvang van Asielzoekers,* C-233/18, ECLI:EU:C:2019:956

including access to specialised care and accommodations.[78] The relocation policy's failure to prioritise vulnerable groups could be viewed as a breach of Article 20 of the directive.[79]

In conclusion, even though the policy was designed to align with the principles and procedural safeguards of the Asylum Procedures Directive, its practical implementation revealed several potential human rights infringements like delays in access to asylum procedures, inadequate individualised assessments, limited access to legal remedies, and risks of indirect refoulement in some MS all posed challenges to compliance.[80]

3.1.4. Compliance with the Reception Conditions Directive

The Reception Conditions Directive set minimum standards, defines fundamental rights and guarantees, including the right to dignified living conditions, access to healthcare, freedom of movement and protection for vulnerable persons.[81] It lays down standards for the reception of asylum seekers across MS. A major legal challenge to the relocation policy's compliance with the Reception Conditions Directive was the uneven implementation of reception standards across MS.[82] Asylum seekers faced, in some countries, overcrowded and substandard reception centres, leading to potential breaches of Articles 17-19 of the Directive, which govern material reception conditions and healthcare access.[83] That includes ensuring that basic needs such as housing, food, and medical

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[78] CJEU, *Haqbin v. Federaal Agentschap voor de Opvang van Asielzoekers,* C-233/18 ECLI:EU:C:2019:468 Opinion of AG Campos Sánchez-Bordona, para 40-51

[79] ibid.

[80] ibid. 74

[81] Lieneke Slingenberg, '*Political Agreement on a Recast Asylum Reception Conditions Directive: Continuation of Tents, Containment and Discipline?'* in *Reforming the Common European Asylum System* (Nomos Verlagsgesellschaft mbH & Co KG, 2022)

[82] The Reception Conditions Directive includes specific provisions for vulnerable individuals, such as unaccompanied minors and victims of torture. Under the relocation policy, it was crucial that MS receiving relocated asylum seekers adhered to these provisions. However, the variability in national systems meant that certain vulnerable groups did not always receive the protection and support envisaged by the Directive, raising concerns about the adequacy of the legal framework for ensuring consistent protection for vulnerable asylum seekers.

[83] Ingrid Westendorp, *'A Right to Adequate Shelter for Asylum Seekers in the European union (2022)* Nordic Journal of Human Rights, 40(2), p. 328–345 < https://www.tandfonline.com/doi/full/10.1080/18918131.2022.2085007> accessed 22 September 2024

care are met, with particular attention to the needs of vulnerable individuals.[84] It allows for detention only in exceptional circumstances, subject to strict safeguards as asylum seekers be granted freedom of movement within the host country's territory, though certain restrictions can be applied under specific conditions.[85] Relocated asylum seekers were sometimes subjected to restrictive measures in receiving states, including detention-like conditions in closed reception centres, which potentially violated their right to freedom of movement.[86] The CJEU and ECtHR have consistently ruled against the arbitrary detention of asylum seekers, emphasising the need for detention measures to comply with human rights standards (e.g. ECtHR's ruling in *Amuur v. France*).[87] Delays and administrative bottlenecks in the relocation process sometimes led to prolonged detention or restrictions on freedom of movement. These restrictions raised concerns about compliance with Article 7 and Article 8, particularly since they were not individualised but applied broadly to all individuals in the facility, often without sufficient legal justification.[88] This was confirmed in the CJEU ruling *Ministerio Fiscal v VL*[89] where the court determined that detention or restrictions on movement must be proportional and justified by individual circumstances. The blanket restrictions imposed on asylum seekers in hotspots during the relocation process could be seen as disproportionate and thus non-compliant with Article 8 of the directive, which mandates that detention is a measure of last resort.[90] In addition, the Directive, grants access to employment within nine months after lodging an application as well guarantees to education for

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[84] The relocation policy was designed to reduce the overcrowding and inhumane conditions faced by asylum seekers in frontline states by transferring them to Member States with more capacity. In this sense, the relocation policy theoretically complied with the Directive's standards on ensuring adequate living conditions and protecting human dignity, as it aimed to alleviate the overload on reception systems in countries like Greece and Italy, where conditions were often substandard. However, in practice, the situation was more complex. Many relocated asylum seekers were transferred to states where reception conditions were not significantly better. In some instances, basic reception standards were not met in receiving states, resulting in violations of the right to an adequate standard of living and inadequate reception conditions can constitute violations of Article 3 ECHR, which prohibits inhumane or degrading treatment. Cases such as *M.S.S. v Belgium and Greece* serve as a legal precedent, highlighting how reception conditions can directly impact human rights obligations under both EU and international law.

Giuseppe Campesi, *'Crisis, migration and the consolidation of the EU border control regime'*, International Journal of Migration and Border Studies 4/3 (2018), p. 196-221 < https://www.inderscienceonline.com/doi/abs/10.1504/IJMBS.2018.093891 > accessed 29 September 2024

[85] Janna Wessels, '*Gaps in Human Rights Law? Detention and Area-Based Restrictions in the Proposed Border Procedures in the EU'* (2023) 25 EJML < https://brill.com/view/journals/emil/25/3/article-p275_2.xml > 22 September 2024

[86] ibid. 79

[87] ECtHR, *Amuur v France,* App no 19776/92, 22 EHRR 533, 1996

For instance, asylum seekers relocated to certain Member States faced prolonged detention or restrictive living conditions while waiting for their claims to be processed, raising concerns about compliance with Article 6 CFREU, which protects the right to liberty and security. The relocation policy thus faced challenges in ensuring that relocated individuals were not unlawfully detained or unduly restricted.

[88] ibid. 76

[89] CJEU, *Ministerio Fiscal v VL.,* C- 36/20, ECLI:EU:C:2020:495

[90] ibid. 76

minor asylum seekers.[91] In case *Federaal agentschap voor de opvang van asielzoekers v. Selver Saciri and Others*[92] the CJEU affirmed that MS must provide reception conditions that guarantee asylum seekers' dignity and allow them to participate in society, including through employment and education.

In conclusion, while the EU Relocation Policy aimed to reduce the pressure on the overburdened MS and improve reception conditions in line with the Reception Conditions Directive, its practical implementation revealed significant gaps. The policy was intended to comply with the Directive's human rights safeguards but its uneven application across MS often led to violations of these rights. Moreover, the lack of effective remedies to address these violations further underlined the human rights risks faced by asylum seekers. The policy's implementation demonstrated that while it was legally aligned with the Directive in principle, practical shortcomings and inconsistent application across MS meant that the human rights protections enshrined in EU law were not always fully realised.

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[91] European Council on Refugees and Exiles, *The Right to Education for Asylum Seekers in the EU* < https://ecre.org/wp-content/uploads/2023/03/Policy-Note-Accessing-to-Education-for-Asylum-Seekers-in-the-EU-March-2023.pdf > accessed September 23 2024

[92] CJEU, *Federaal agentschap voor de opvang van asielzoekers v. Silver Saciri and Others,* C-79/13, ECLI:EU:C:2014:103

4. (UN)WORKABILITY OF THE EU RELOCATION POLICY

The implementation of the EU Relocation Policy proved practically unworkable, as various MS either ignored or violated the policy's core requirements.[93] A legal analysis of its unsuccessful application revealed significant failures in compliance, burden-sharing, and cooperation, as well as violations of EU law and infractions of fundamental human rights.

4.1 Inconsistency with the Dublin III Regulation

The EU relocation policy temporarily suspended this first-entry rule for certain asylum seekers, creating legal tension with the principle of responsibility enshrined in Dublin III. This inconsistency undermined the legal certainty and predictability of the asylum process across MS..[94] This was evident in *M.A. v. Secretary of State for the Home Department*[95], where the CJEU reaffirmed that Dublin III could be suspended in cases of mass influx and, again, in practice, the conflicting legal obligations led to fragmented and inconsistent application of the relocation mechanism.[96]

4.2. Incompatibility with the Principle of Solidarity

While the relocation policy was based on the **principle of solidarity** under **Article 80 TFEU**, the **inconsistent participation** of MS revealed the lack of genuine commitment to burden-sharing. States in Central and Eastern Europe, for example, actively resisted implementing relocation quotas, leading to significant **non-compliance** and rendering the policy ineffective. The absence of **binding mechanisms** to enforce solidarity hindered its **practical implementation**.[97] For instance, Hungary, Poland, and Czechia refused to accept their assigned quotas of relocated asylum seekers, arguing that the policy undermined their national control over immigration and they were just the prominent MS refusing to do so.[98] Basically the MS turned a deaf ear and a blind eye towards the rulings of the CJEU.[99]

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[93] Sana Noor Haq, Caolán Magee and Barbie Latza Nadeau, 'Europe's migration policies in chaos as arrivals surge' *CNN* (2023) < https://edition.cnn.com/2023/04/16/europe/europe-migration-chaos-boat-arrivals-intl/index.html > accessed 25 September 2024

[94] ECRE, *Eternal Dublination: the Implementation of the Dublin System in 2022* (2023) < https://ecre.org/eternal-dublination-the-implementation-of-the-dublin-system-in-2022/ > accessed 16 September 2024

[95] CJEU, *M.A. v Secretary of State for the Home Department,* C-661/17, ECLI:EU:C:2019:53

[96] ibid. 113

[97] Gabriela Baczynska, Foo Yun Chee, 'Poland and Hungary Refuse Asylum Seekers, EU Brings Legal Case' *Global Citizen* (2017) < https://www.globalcitizen.org/en/content/eu-migration-case-hungary-poland-asylum-refugees/ > accessed 13 September 2024

[98] Patrick Wintour, 'EU takes action against eastern states for refusing to take refugees' *The Guardian* (London 2017) < https://www.theguardian.com/world/2017/jun/13/eu-takes-action-against-eastern-states-for-refusing-to-take-refugees > accessed 18 September 2024

[99] Amandine Crespy, Sabine Saurugger *'Resistance to Policy Change in the European Union. An actor- centred analytical framework.'* (2016) HAL open science < https://shs.hal.science/halshs-01327764/document > accessed 15 September 2024

4.3. Lack of Enforceability and Effective Sanctions

The policy suffered from a lack of enforceable measures and effective sanctions against MS that refused to comply with relocation obligations. While infringement proceedings were initiated, they were not enough to compel all states to meet their obligations, demonstrating the EU's limited capacity to ensure uniform compliance with migration policy.[100]

4.4. Lack of Political Will and National Sovereignty Concerns

Sovereignty concerns over immigration policy and national identity played a major role in the refusal to participate in the relocation mechanism.[101] MS expressed concerns over the erosion of national sovereignty, particularly regarding control over border management and asylum decisions. The relocation policy, seen as imposing obligations from the EU level, was viewed by some states as incompatible with their right to manage domestic immigration policies, which further contributed to its political unworkability.The perception of the policy as unfair, both within receiving states and those resisting relocation, contributed to its unworkability. [102]

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[100] Nicole Scicluna, 'Wilful Non- Compliance and the Threat of Disintegration in the EU's Legal Order' (2020) 27(3) Swiss Political Science Review < https://onlinelibrary.wiley.com/doi/pdf/10.1111/spsr.12471 > accessed 17 September 2024

[101] M. Kabata, A. Jacobs, '*The 'migrant other' as a security threat: the 'migration crisis' and the securitising move of the Polish ruling party in response to the EU relocation scheme'* (2022) Journal of Contemporary European Studies, 31(4), p. 1223–1239

[102] Emma Crawford, *'The European Migrant Crisis and Rise of Right-Wing Populism: Does Political Affiliation Determine Anti-Refugee Attitudes?'* (2019) Digital Georgetown < https://repository.library.georgetown.edu/handle/10822/1055082 > accessed 9 September 2024

5. (UN)COMPLIANCE WITH THE LEGAL DOCUMENTS ON HUMAN RIGHTS AND THE IMPACT ON HUMAN RIGHTS

The EU's extensive legislative framework on migration and asylum has, in many cases, led to better protection of human rights for asylum seekers and migrants, in line with both EU and international law, namely the CFREU and ECHR.On the other hand there are well-documented failures where these laws have not adequately ensured the protection of basic human rights as guaranteed by EU and international law. Several key issues have emerged in the practical application of these laws, leading to the violation of fundamental rights, particularly in the treatment of asylum seekers and migrants. What follows is a comprehensive analysis of both legislative shortcomings and failures as well as specific legislative acts and court cases where positive outcomes have been achieved in terms of protecting fundamental rights.

5.1. (Un)compliance with the CFREU

The EU Relocation Policy sought to comply with the CFREU by upholding key principles such as Articles 1 and 4 on dignity and prohibition of inhumane treatment, by insuring a fair distribution of asylum seekers across MS to alleviate overcrowded and degrading conditions in frontline states. It provides under Article 18 the right to asylum, and Article 19, which prohibits refoulement and inhumane or degrading treatment. Additionally, Article 47, ensuring the right to an effective remedy and fair trial, was preserved through procedural safeguards in asylum processes. Also, it puts a special emphasis on protection of children's rights.

5.1.1. Dignity and Prohibition of Inhumane Treatment

In some cases, the reception conditions in frontline states, like Greece and Italy, remained overcrowded and substandard, leading to degrading treatment of asylum seekers. In the case *Abubacarr Jawo v Bundesrepublik Deutschland*[103] the CJEU held that MS cannot transfer an applicant for international protection to another Member State if there is a real risk that the applicant would face inhuman or degrading treatment, particularly due to reception conditions. Basically, the concentration of asylum seekers led to severe overcrowding in reception centres, insufficient access to healthcare, inadequate sanitation and substandard living conditions. Hotspots like Moria camp on Lesbos, have been highlighted by human rights organisations, such as the Council of Europe Commissioner for Human Rights and the European Union Agency for Fundamental Rights, as places of clear violation of the right to be treated with dignity.[104] The hotspot approach was introduced by the European Commission in 2015 to manage large influxes of migrants at specific points, especially in Italy and Greece.[105] The EU-Turkey Deal from 2016 further stipulated that migrants arriving in Greece who did not qualify for asylum would be returned

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[103] CJEU, *Abubacarr Jawo v Bundesrepublik Deutschland*, C-163/17 ECLI:EU:C:2019:218.

[104] Council of Europe, Report of the Commissioner for Human Rights of the Council of Europe, CommDH(2018)24

[105] Federico Casolari, '*The EU's Hotspot Approach to managing the Migration Crisis: A Blind Spot for International Responsibility'* , Italian Yearbook of International Law Online, 18 October 2016 < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2800537 > accessed 2 October 2024

to Turkey. Both approaches have been criticised for violating human rights and legal principles.[106] The EU-Turkey deal has been criticised for violating the principle of non-refoulement, which prohibits returning individuals to countries where they face the risk of torture, inhuman treatment, or death. There have been numerous reports of summary returns of migrants without proper asylum assessment.[107] Lastly, it can be concluded that the EU Relocation Policy resulted in several human rights violations, particularly in relation to the right to dignity under Article 1 of the EU Charter, due to the deplorable reception conditions in hotspots.[108]

5.1.2. Right to a Fair Trial and Effective Remedy

Article 47 of the CFREU guarantees the right to an effective remedy and a fair trial. Asylum seekers in several MS have faced excessive delays in the processing of their claims and such delays have led to prolonged periods of uncertainty, forcing individuals to live in poor conditions without knowing the outcome of their asylum claims. What's more in many cases, asylum seekers have been denied effective legal representation or were not informed of their rights adequately or asylum seekers facing relocation decisions were not given full access to legal remedies to challenge errors or delays in the relocation process.[109] The relocation policy raised concerns about access to legal remedies and procedural safeguards for asylum seekers, particularly in the pre-relocation phase. In the case *M.M. v. Minister for Justice, Equality and Law Reform, Ireland*[110] the CJEU ruled that an asylum seekers must have a real opportunity to present their case and be heard, with full access to legal representation. However, multiple reports suggest that asylum seekers in certain MS, such as Hungary, have been denied these procedural rights, making the asylum process unfair and

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[106] EU-Turkey Statement (18 March 2016), Press Release 144/16.

Its main goal was to manage and curb the irregular migration flow from Turkey to the EU, particularly through Greece.Under the deal, all new irregular migrants crossing from Turkey to the Greek islands, who did not apply for asylum or whose claims were rejected, were to be returned to Turkey. This aimed to deter irregular crossings. The One-for-One Resettlement Scheme where for every Syrian returned to Turkey from Greece, another Syrian would be resettled from Turkey to the EU. This was designed to create a legal migration pathway. The EU agreed to provide Turkey with €6 billion in funding to support refugees in Turkey and improve living conditions and in exchange, the EU pledged to accelerate visa liberalisation for Turkish citizens and revive EU accession talks for Turkey. The EU-Turkey Deal was an informal political statement, not a formal legal treaty, and thus was not governed by the Treaty on the Functioning of the EU or EU asylum legislation. Its basis lies in cooperation between a third country (Turkey) and the EU to manage migration, reflecting broader principles of international cooperation on migration control. The deal has been highly contested on human rights grounds, particularly regarding the potential violations of the non-refoulement principle.

[107]Council of Europe, Commissioner publishes observations on summary returns of migrants from Croatia to Bosnia and Herzegovina, No. 18810/19, 18865/19 and 23495/19

[108] Handbook on European law relating to asylum, borders and immigration < https://fra.europa.eu/sites/default/files/fra_uploads/handbook-law-asylum-migration-borders-2nd-ed_en.pdf>

[109] Jacopo Barigazzi, '5 reasons relocating refugees is a nightmare' (2015) Politico < http://www.politico.eu/article/5-reasons-relocating-ref- ugees-is-a-nightmare-migration-crisis-malta-summit/ > accessed September 24 2024

[110] CJEU *M.M. v. Minister for Justice, Equality and Law Reform, Ireland* C-277/11

contributing to human rights violations. A failure to provide adequate judicial oversight during the relocation process could, therefore, violate Article 47 CFREU.[111]

5.1.3. Protection of children's rights

The relocation policy, while designed to distribute the asylum burden, often resulted in the separation of families, either by splitting them across different MS or by preventing family reunification due to delays or bureaucratic obstacles.[112] It was criticised for not giving adequate consideration to these family provisions in its operational framework, leading to instances of family separation during the relocation process. In case *Tsegezab Mengesteab v. Bundesrepublik Deutschland*[113], the CJEU reaffirmed the importance of family unity in the context of the Dublin Regulation. However, in practice, asylum seekers were sometimes relocated without their family members or separated within different MS, in clear contrast of the right to family life. The ECtHR, in *Tanda-Muzinga v. France*[114], emphasised the importance of maintaining family unity during asylum procedures. The Court held that separating family members without a valid reason could constitute a violation of Article 8 of the ECHR, which closely aligns with Article 7 of the CFREU. The failure to safeguard family unity during relocation under the EU policy could, therefore, be viewed as an infringement of this fundamental right.

5.1.4. The issue of "pushback"

The issue of pushback has often been addressed at the ECtHR as Article 6 CFREU guarantees the right to liberty, and Article 5 ECHR prohibits arbitrary detention. In the case *N. D. and N.T. v. Spain*[115], the Court ruled that Spain violated the prohibition of collective expulsion when it summarily returned migrants who had crossed the border from Morocco to the Spanish enclave of Melilla without considering their individual circumstances. This case underscored the illegal practice of pushing back asylum seekers without proper due process. However, in the review of the case in 2020 the ECtHR ruled that Spain did not violate the ECHR. This clearly indicates that the stance MS had on the relocation policy and their blatant ignoring of it spilt over to the Courts and only added another brick to the wall of "Fortress Europe".[116] In addition, the detention of asylum seekers was a widespread practice during the crisis, particularly in transit zones and hotspots.[117]

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[111] John Henley, 'EU refugee relocation scheme is inadequate and will continue to fail' (2016) The Guardian <https:// www.theguardian.com/ world/2016/mar/04/eu-refugee-relocation-scheme-inadequate-will-contin- ue-to-fail> accessed September 2024

[112] ibid. 47 paras 9-11

[113] CJEU, *Tsegezab Mengesteab v. Bundesrepublik Deutschland* ,C-670/16, ECLI:EU:C:2017:587

[114] ECtHR, *Tanda-Muzinga v. France*, Application No. 2260/10.

[115] ECtHR, *N.D. and N.T. v. SPAIN,* Application No. 8675/15

[116] European Centre for Constitutional and Human Rights, '*ND and NT v. Spain A major setback for refugee protection: ECtHR dismisses complaint against Spain'* (2020) < https://www.ecchr.eu/en/case/nd-and-nt-v-spain/ > accessed 12 September 2024

[117] Nóra Köves, 'Serious human rights violations in the Hungarian asylum system' (HBS, 10 May 2017) < https:// www.boell.de/en/2017/05/10/serious-human-rights-violations-hungarian-asylum-system > accessed 15 September 2024

Many asylum seekers were detained in conditions akin to de facto detention without proper legal safeguards like Hungary's detention of asylum seekers in transit zones along its border with Serbia.[118] The practice was condemned by the ECtHR in *Ilias and Ahmed v. Hungary*[119], where the Court ruled that the conditions amounted to unlawful detention. The asylum seekers were held in barbed-wire enclosed areas without access to judicial review or adequate legal assistance. Unfortunately, even though the Courts ruled on the infractions and violations of human rights, the non-compliance of the MS, with both the judgements and the policy enforcement, did not change.[120]

5.2. (Un)compliance with the ECHR

The Relocation policy had to ensure compliance with the ECHR, especially regarding fundamental human rights obligations. The right to life under Article 2 ECHR obliges states to take positive measures to protect individuals from real risks to their life. The policy sought to relocate asylum seekers to prevent overcrowding in frontline states like Greece, where poor conditions threatened lives, by distributing asylum seekers to states with better capacity.[121] Under Article 3 ECHR, states are prohibited from subjecting individuals to torture or inhuman or degrading treatment. Relocation was designed to improve reception conditions in overburdened states, like Greece and Hungary, which were notorious for overcrowded and unsafe facilities that violated human dignity.[122] Article 5 ECHR guarantees the right to liberty and security. The relocation process had to ensure that asylum seekers were not arbitrarily detained during their relocation. However, issues arose regarding the conditions of detention, including lack of oversight and excessive duration, potentially breaching Article 5 standards.[123] Article 6 ECHR guarantees the right to a fair trial, while Article 13 ECHR provides for an effective remedy before national authorities for violations of Convention rights. The relocation policy had to ensure that asylum seekers had access to fair procedures during their relocation and that their right to challenge decisions relating to their relocation was preserved.[124] The EU Relocation Policy particularly addressed concerns about the right to life, prohibition of inhumane treatment, and right to family life in order to comply with the ECHR. However, the inconsistent implementation across MS, inadequate reception conditions, and challenges in ensuring effective legal remedies have led to practical concerns about its full compliance with the ECHR.

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[118] ibid.

[119] ECtHR, *lias and Ahmed v Hungary ,* Application No 47287/15

[120] Boldizsár Nagy, '*Restricting access to asylum and contempt of courts: Illiberals at work in Hungary'* (EU Migration Law Blog, 18 September 2017) < https://eumigrationlawblog.eu/restricting-access-to-asylum-and-contempt-of-courts-illiberals-at-work-in-hungary/ > accessed 15 September 2024

[121] Finja Lübben, *'European Migration Policy The new Pact on Asylum and Migration through the Lens of Human Rights Compliance, Solidarity, and Accountability'* (CERGU, December 2021) < https://www.gu.se/sites/default/files/2022-01/Working Paper Finja Lubben.pdf > accessed 14 September 2024

[122] ibid.

[123] ibid.

[124] ibid.

5.3. The CJEU and the ECtHR case law comparison on migration and asylum in the context of preservation of fundamental human rights in the EU

The CJEU and the ECtHR share common objectives in safeguarding fundamental rights across Europe. However, their approaches and stances in decision-making often reflect the distinct legal frameworks, mandates, and jurisdictional scopes under which they operate. While there is increasing harmonisation in their case law due to judicial dialogue, certain institutional and legal differences continue to produce divergent outcomes.[125]

The CJEU predominantly relies on the CFREU in its rulings on fundamental rights. The CFREU encompasses many of the same rights found in the ECHR, but also includes additional rights specific to the EU legal order, such as those relating to EU citizenship, workers' rights, and economic freedoms. The CFREU applies only when MS implement EU law, making the CJEU's jurisdiction more limited than the ECtHR's broad remit under the ECHR.The ECtHR applies the ECHR across all MS of the Council of Europe, whether they are part of the EU or not. The Convention establishes minimum standards for human rights protection, with a particular focus on civil and political rights. This gives the ECtHR a broader human rights-centred mandate, irrespective of the national or supranational laws at play.[126]

In the context of migration and asylum, both courts have ruled on matters concerning the rights of migrants, refugees, and asylum seekers. Despite their similar outcomes, the legal reasoning and emphasis can diverge. The ECtHR has consistently adopted a rigorous rights-focused approach in cases related to migration and asylum. [127] The ECtHR emphasised the need for individualised assessments and set standards for how asylum seekers must be treated, particularly vulnerable groups such as families with children. On the other hand the CJEU, while acknowledging fundamental rights concerns, often takes a more balancing approach, weighing individual rights against the need to maintain the efficiency of the CEAS and the Dublin III Regulation.[128] However, the CJEU's reasoning involved balancing the principles of mutual trust and solidarity between MS.

It is also vital to take into account the divergence in approach. The CJEU emphasises national sovereignty and mutual trust and its jurisprudence in asylum cases reflects the court's role in promoting cooperation and mutual trust among MS. This may result in more deferential judgments towards MS in comparison to the ECtHR's individual-centred analysis thus often ruling more strictly in favour of protecting human rights. The ECtHR has no mandate to balance European

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[125] Tobias Lock, 'The Court of Justice and the European Court of Human Rights: A Special Relationship' Oxford Academic Books-3 [2015] p.167-242

[126] ibid.

[127] e.g. In cases like *M.S.S. v. Belgium and Greece* and *Tarakhel v. Switzerland*, the ECtHR found violations of Article 3 ECHR (prohibition of inhuman or degrading treatment) due to the poor reception conditions in Greece and the risk of ill-treatment upon return.

[128] e.g. in *N.S. v. Secretary of State for the Home Department* and *Jawo v. Germany*, the CJEU also ruled that asylum seekers should not be transferred to Member States where they face a risk of inhuman or degrading treatment.

integration with rights protection and therefore focuses solely on whether state actions comply with the minimum standards set out in the ECHR.[129]

Despite these differences, both courts engage in judicial dialogue and reference each other's decisions. This has led to increasing convergence in their jurisprudence, particularly in the field of fundamental rights.[130] Basically, the CJEU and ECtHR are increasingly aligned, particularly due to their cross-referencing and the similar nature of the rights they protect. Over time, the judicial dialogue has minimised differences, but some nuances in their legal reasoning persist due to their differing mandates and jurisdictions.[131]

6. OPERATIONAL FAILURES AND HUMAN RIGHTS VIOLATIONS

The scale and complexity of the migration crisis of 2015 overwhelmed many MS, resulting in systemic breaches of key human rights norms, particularly those enshrined in the CFREU, the ECHR and the UN Refugee Convention. Border closures and pushbacks at the EU's external borders, particularly in Hungary and Bulgaria, prevented asylum seekers from submitting asylum applications.[132] These challenges included delays in relocation procedures, administrative inefficiencies, and inadequate infrastructure in frontline states.[133] Pushback operations at the Greek-Turkish border and in the Mediterranean were common during the crisis.[134] Reports from NGOs like Amnesty International and Human Rights Watch documented multiple instances where asylum seekers were intercepted at sea by Frontex (the EU's border agency) and Greek authorities and forcibly returned to Turkey or left adrift without proper assessment of their asylum claims.[135] This Chapter will provide an overview of the operational failures, human rights violations and an overview of the "new wall of protection of human rights" the Pact- its legal framework, expected improvements in the preservation of fundamental human rights, solidarity and fair burden-sharing and lastly a comparison in differences from the EU Relocation Policy and why it is expected to be a safeguard and a new road for the redevelopment of the EU migration and asylum policy. For the purpose of this thesis a legal analysis of the Pact's key components is needed in order to bring into focus the differences between the EU Relocation Policy's unworkability and the Pact's expectations

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[129] This leads to a stricter scrutiny of national measures, especially in migration and asylum contexts, as seen in cases like *Hirsi Jamaa v. Italy* and *Ilias and Ahmed v. Hungary.*

[130] ibid. 119

[131] ibid. 119

[132] In Hungary, for instance, authorities established transit zones and restricted access to asylum procedures through strict legal and physical barriers. In practice, the policy also encountered significant operational challenges that undermined its efficacy.

[133] John Reynolds, *'Fortress Europe, Global Migration & the Global Pandemic'* (2020) 114 Cambridge university Press < https://www.cambridge.org/core/journals/american-journal-of-international-law/article/fortress-europe-global-migration-the-global-pandemic/72D9CB9397CD295DE477F96B70DD2D22 > accessed 10 September 2024

[134] ibid.

[135] ibid.

in fixing it, especially in the light of operational failures and human rights violations that occurred during the EU Relocation policy period.

The EU Relocation Policy was marked by significant legal and practical failures due to MS's non-compliance, political resistance, and the lack of effective enforcement mechanisms. Despite its legal foundation in EU law and CJEU case law, the policy was largely unworkable in practice for the non-compliance with the principle of solidarity under Article 80 TFEU, as several MS refused to accept relocated asylum seekers.[136] There have been conflicts with the Dublin III Regulation, which led to the continued overburdening of frontline states like Greece and Italy. Then systemic breaches of the Reception Conditions Directive occurred, with the asylum seekers being left in substandard conditions due to the failure to implement relocation effectively. All of this came as a result of lack of enforceability and political will, as the policy was hindered by national sovereignty concerns and weak sanctions for non-compliance.[137] Despite its legal foundation in EU law, the policy's success was contingent on the cooperation of MS which was never fully realised.[138] The lack of enforceability, political resistance, and failure to align with broader EU asylum principles rendered the policy ineffective. It can actually become a case study on the challenges of achieving solidarity between MS, particularly in the matter of how national sovereignty concerns and political considerations override any legal obligations the MS have towards the EU.[139]

6.1. The new Pact on Migration and Asylum- Keeping status quo or a step towards safeguarding human rights

The road towards the Pact began in 2020 when the European Commission proposed a comprehensive reform of the EU's approach to migration management, asylum procedures, and the preservation of fundamental rights. The Pact's purpose is to replace the fragmented and ineffective policies that characterised the EU's response to the 2015 migration crisis, namely the shortcomings of the EU Relocation Policy. It aims to create a more sustainable, solidarity-based, and rights-respecting framework that aligns with the TFEU , the CFREU and case law from the CJEU and the ECtHR.

6.1.1. Legal Framework of the New Pact on Migration and Asylum

The Pact includes several legislative proposals and policy measures that modify existing regulations, such as the Dublin III Regulation, and introduce new mechanisms namely burden-sharing, border procedures and crisis management. Key legislative proposals include; Regulation on

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[136] ibid.

[137] ibid. 121

[138] Lizzie Dearden, 'EU plan to relocate 160.000 refugees from Italy and Greece by September failing despite record deaths at sea' (The Independent, 16 May 2017) < http://www.independent.co.uk/news/world/europe/eu-refugee-quotas-160000-italy-greece-failing-european-commissioner-legal-cases-obliga-tions-a7739396.html> accessed 29 September 2024

[139] ibid.

Asylum and Migration Management[140], replacing the Dublin Regulation, the Screening Regulation[141], setting out procedures for health and security checks at the external borders, the amended Asylum Procedures Regulation[142], harmonising asylum decision processes and the Crisis and Force Majeure Regulation[143], governing exceptional migratory pressures. The final goal of the Pact is to balance responsibility-sharing among MS with effective border management in order to ensure the respect for fundamental rights under EU law, particularly the CFREU, and reduce irregular migration.

6.1.2. Reception Conditions and Human Dignity

The Pact proposes significant reforms to improve reception conditions for asylum seekers, a key issue during the 2015 crisis, particularly in overburdened countries like Greece and Italy. Asylum seekers will be housed in more humane and dignified conditions. The CJEU has consistently emphasised the importance of dignified treatment.[144] The Pact also enhances protections for family reunification, ensuring that asylum seekers are not separated from their families during the relocation or asylum processes. The new system will prioritise the placement of asylum seekers in locations where their family members already reside, further protecting this fundamental right.

A key improvement under the Pact is the emphasis on the right to an effective remedy ensuring that asylum seekers can challenge asylum decisions swiftly and fairly. Past failures in providing timely and accessible legal remedies led to widespread legal limbo for asylum seekers.[145]

6.1.3. Expected Improvements in the Preservation of Fundamental Rights

The Pact seeks to strengthen the protection of fundamental rights in several critical areas where both the EU Relocation Policy and CEAS fell short. Under the Pact, the right to seek asylum is preserved, with a more efficient and coordinated asylum procedures aimed at addressing the asylum backlog and enhancing the fairness and transparency of the asylum system.[146] The proposed

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[140] Regulation (EU) 2024/1351 of the European Parliament and of the Council of 14 May 2024 on asylum and migration management, amending Regulations (EU) 2021/1147 and (EU) 2021/1060 and repealing Regulation (EU) No 604/2013 [2024] OJ L, 2024/1351

[141] Regulation (EU) 2024/1356 of the European Parliament and of the Council of 14 May 2024 introducing the screening of third-country nationals at the external borders and amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817 [2024] OJ L, 2024/1356

[142] Regulation (EU) 2024/1348 of the European Parliament and of the Council of 14 May 2024 establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU [2024] OJ L, 2024/134

[143] Regulation (EU) 2024/1359 of the European Parliament and of the Council of 14 May 2024 addressing situations of crisis and force majeure in the field of migration and asylum and amending Regulation (EU) 2021/1147 [2024] OJ L, 2024/1359

[144] As seen in *Zubair Haqbin v Federaal Agentschap voor de opvang van asielzoekers*, where the Court condemned the removal of basic reception entitlements.

[145] ibid. 140

[146] Kevin Appleby, 'How Europe is Slowly Closing Its Doors to Asylum-Seekers' (CMS, 30 April 2024) < https://cmsny.org/how-europe-closing-doors-to-asylum-seekers/ > accessed 30 September 2024

screening regulation at external borders introduces mandatory fundamental rights checks, including an assessment of the potential risk of refoulement.[147] This responds to past criticisms, such as those in the ECtHR's judgment in *M.S.S. v. Belgium and Greece*, which condemned Greece for returning asylum seekers to dangerous conditions, violating Article 3 ECHR on prohibition of inhuman or degrading treatment. The new framework seeks to ensure that human rights violations like pushbacks at borders are prevented by requiring stronger oversight and transparency. One of the key criticisms of the EU Relocation Policy and broader migration measures, such as in Hungary's transit zones, was the indefinite and arbitrary detention of asylum seekers, as evidenced by the CJEU's ruling in *Ilias and Ahmed v. Hungary*. Under the Pact, detention must be proportionate, temporary, and subject to judicial oversight.[148]

[147] Goranka Lalić Novak, *'The Principle of Non-Refoulement and Access to Asylum System: Two Sides of the Same Coin'* (2015) < https://hrcak.srce.hr/clanak/228098 > accessed 15 September 2024

[148] ibid.

7. CONCLUSION

The critical question with the new Pact on Migration and Asylum is whether this new policy framework is moving towards maintaining the status quo or whether it represents a genuine shift towards safeguarding human rights. We are talking early days of its coming into force and even earlier days of the transitional period of 2 years. For now, however, it reveals mixed signals, with certain provisions offering potential improvements in the protection of human rights, while others risk perpetuating existing deficiencies. Several elements already show a continuation of the status quo, with measures that echo the problematic aspects of past policies, especially those tied to the Dublin III Regulation and the hotspot approach. Take the border procedures and screening process where the risk of pushing individuals into long-term detention without effective judicial oversight, as seen in the past where many asylum seekers were effectively detained in overburdened reception facilities under degrading conditions. It basically echoes the status quo as the border procedures also maintain a fast-tracking mechanism, which raises concerns about due process and access to effective legal remedies. Past case law from the CJEU and ECtHR demonstrate that expedited procedures often compromise asylum seekers' right to a fair hearing and undermine the principle of non-refoulement. Also, what is definitely not a step in the other direction is the continuation of the emphasis on partnerships with third countries to manage migration flows, which almost screams the EU-Turkey deal and similar externalisation strategies. This continued reliance on externalising responsibility does not demonstrate a substantive shift towards protecting human rights, as past practices have frequently violated the principle of non-refoulement and Article 19 of the CFREU. These agreements have historically led to human rights violations, including forced returns and inadequate reception conditions in third countries that do not meet EU standards of human rights protection.

Despite the concerning elements, the Pact shows potential for safeguarding human rights as it contains provisions that could represent a shift towards stronger human rights protections, though their effectiveness will depend heavily on implementation. One of the central proposals of the Pact is a solidarity mechanism that is still flexible and allows MS to contribute through relocation, sponsoring returns, or financial support. It attempts to address the disproportionate burden placed on frontline states under the Dublin III Regulation. If effectively implemented, this could mitigate the human rights violations arising from overburdened asylum systems and ensure better living conditions, in line with Article 1 of the CFREU, which guarantees respect for human dignity. Also, the Pact proposes improved reception conditions, which aim to prevent the severe overcrowding and inhumane conditions seen in hotspots such as Moria. By enforcing compliance with the Reception Conditions Directive the Pact could enhance the protection of asylum seekers' rights. However, whether these standards will be enforced uniformly across MS remains a critical question, as past implementation has been inconsistent and case law that established infractions remains largely ignored by the MS as there was no uniform enforcement. Another promising element of the Pact is the enhanced procedural guarantees for asylum seekers, particularly regarding legal assistance and access to justice. The Pact introduces safeguards to ensure effective remedies in the event of asylum rejections. If properly enforced, this could strengthen compliance with Article

47 of the CFREU, which guarantees the right to an effective remedy and fair trial. This could represent a significant improvement over the fast-tracked asylum decisions that often failed to ensure due process in the past.

All these reforms could, in theory, improve human rights protections, its practical success will depend on how MS interpret and implement these provisions. The EU's historical reliance on intergovernmental cooperation in the field of asylum has led to fragmented and inconsistent practices, as illustrated by non-compliance with past relocation mechanisms and resistance to solidarity measures. Additionally, the Pact's emphasis on border management, deterrence, and externalisation suggests that the EU is still prioritising migration control over the protection of human rights and it could indicate that "fortress Europe" remains strongly in place albeit with a few more chips in its "protective walls". Without significant changes to how these policies are implemented on the ground, the risk of perpetuating systemic human rights violations remains high, as evidenced by numerous cases before the CJEU and ECtHR.

For now, the Pact, unfortunately, largely maintains the status quo by continuing to focus on border control and externalising migration responsibilities. The true test of whether it represents a genuine step towards safeguarding human rights will lie in its implementation and whether MS are willing to comply with their obligations under EU law, including the CFREU and ECHR. On the final note, all this- the MS reactions and unwillingness with the relocation measures and solidarity measures comes as no surprise given the political atmosphere, not only in Europe, but the world in general. Unrests that have marked the past decade are not slowing or improving, on the contrary they are only escalating and have already arrived into Europe's backyard. What was a chance to offer a new perspective and neutralise the far right, as it stands now, it only risking in empowering it and we are witnessing this across Europe what with the results of general elections in MS and EU Parliament elections.[149] Its effect can even be directly seen in the Pacts provision that were heavily influenced by Italy[150].

One cannot know what the future will bring and there is still the two year implementation period where things could take a turn towards a safeguard of not only human rights but also the fundamental values that EU was based on. Unfortunately, the way the course is set, at the present moment, indicates the EU politics on migration steering in the direction of externalisation strategy and outsourcing the process of initial processing where migrants and asylum seekers would be

[149] Daniel Trilling, 'The EU's new migration pact is intended to neutralise the far right – it risks empowering it' (The Guardian, April 2024) <https://www.theguardian.com/commentisfree/2024/apr/16/eu-migration-pact-intended-neutralise-far-right-europe> accessed 3 October 2024

[150] Allan Naval, 'Immigration : la carte africaine de Giorgia Meloni' (Le Monde, February 2024) <https://www.lemonde.fr/idees/article/2024/02/13/immigration-la-carte-africaine-de-giorgia-meloni_6216317_3232.html > accessed October 1 2024

“shipped off the moment they darken EU doors”, to be processed in a third country, like the UK tried to do with Ruanda, or what Italy is trying to achieve with Albania.[151]

[151] Alessia Peretti, 'Meloni says EU migration policy should be based on Italy-Albania deal’ (Euractiv June 2024) <https://www.euractiv.com/section/politics/news/meloni-says-eu-migration-policy-should-be-based-on-italy-albania-deal/> accessed 3 October 2024

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