

On the Legal Priorities of the Common European Asylum System and its Incapacity to Handle the Asylum Migration in 2015

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Abstract

The asylum migration towards the European Union (EU) increased drastically in 2015 and led to the factual invalidation of the Common European Asylum System (CEAS), which proved unable to welcome and distribute roughly one million asylum seekers among a population of more than 500 million people in the European Union. In order to understand why this system failed, it is important to consider the legal intentions of its authors and their strategies to establish a European asylum system. The paper therefore presents the results of a combined discourse and process analysis investigating the discourse participation of the three central law-making institutions, namely the European Commission, the European Parliament and the Council of the European Union towards establishing the CEAS. The data material comprises the establishment of the CEAS from 1999 to 2005 and the reform period between 2008 and 2013. The paper first explains the methodology (I.) used to decipher the interests and ideals pursued by the different institutions in the first phase of establishing the CEAS (II.) as well as the second phase of reforming the CEAS (III.) which reveal unsustainable imbalances and coordination strategies incapable of achieving the envisaged harmonized common asylum system. Concluding on the misfit between the CEAS and the asylum migration in 2015 (IV.), the peculiar priorities and values of the different institutions help explain the inevitable crisis in the European asylum system.

Keywords: Common European Asylum System, legislation, norm competition, asylum, migration

Asylum Migration to the European Union before 2015

In 2015, the European Union experienced an unprecedented asylum migration of approximately one million asylum seekers. A great majority of those migrants claimed to come from Syria and accordingly escaped a civil war that has continued to exist for six years. Asylum migration has not emerged in 2015 as a new issue, but has become a pressing one in that year. Prior to that crisis, asylum migration towards the European Union has already been an issue during the 1990s and again increasingly since the early 2000s.

The routes from West Africa to Spain, from North Africa to Italy and Malta and from Turkey to Greece are the most important irregular immigration routes since the early 2000s. Irregular entry describes border crossings without the necessary legal documentation. Sometimes, irregular entry is also referred to as *illegal immigration* which illustrates the infringement of immigration law.¹ The choice of words thereby displays the norm competition between immigration law and human rights law. Since there are no general legal entry provisions for international protection, asylum seekers have to make use of irregular entry in a majority of cases. This often implies a life-threatening journey at the external maritime borders of the European Union.

This form of irregular asylum migration has not been responded to with long-term policy strategies or measures by the European Union, but rather with selective activities. Individual Member States have agreed on bilateral return agreements with North African neighbor countries. In 2004, the establishment of the European border control agency Frontex introduced a new level of European coordination.² Frontex coordinated and implemented border protection missions particularly on the Atlantic and Mediterranean route. However, a strategic and structural approach in dealing with irregular migration is missing.

What further aggravates the situation is the fact that the connection between irregular and asylum migration is mostly ignored. Rather than emphasizing ethical and moral obligations to receive and accommodate refugees according to international, European and domestic obligations, the Member States – particularly during meetings of the Interior Ministers –

¹ Cf. European Council (1999): Tampere European Council 15 and 16 October 1999, Presidency Conclusions, § 23: “The European Council is determined to tackle at its source illegal immigration, especially by combating those who engage in trafficking in human beings and economic exploitation of migrants.”; Council of Ministers, ‘2436th Council Meeting Justice, Home Affairs and Civil Protection’, 13.06.2002 Luxembourg, 9620/02, C/02/175, 7-8 (fight against illegal immigration); European Council, Presidency Conclusions, Annex I: The Hague Programme. Strengthening Freedom, Security and Justice in the European Union, 4/5 November 2004 Brussels, § 25 (fight against illegal immigration); European Council, European Pact for Asylum and Immigration, 24 September 2008 Brussels, 13440/08, 4; European Commission, COM(2009) 266 final, 10 June 2009, § 1.

² Council Regulation (EC) No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, OJ L 349/1.

emphasize the fight against the so-called 'illegal immigration'.³ This contributes to a criminalization of asylum migration. Although the Member States abide by the Geneva Convention to grant protection to refugees, there are no provisions of how to enable asylum seekers to enter a European country.

Data on the origin and motivation for irregular migration has been collected by the European border control agency Frontex since 2008 and demonstrates that a significant number of those irregular (often so-called 'illegal') migrants qualifies for international protection.⁴ Among those asylum seekers are Afghans fleeing from constant turbulences between the Afghan government and Taliban rebels and from discrimination in Iran. Tunisians, Libyans, Algerians and Egyptians flee from political instability and violence not only during the Arab Spring. Finally, many Syrian refugees are among the irregular migrants.⁵

This clash of normative provisions concerning both asylum migration and border policies demonstrates a crucial norm competition that has not yet been settled. It concerns the pre-eminence of border control and immigration policies on the one hand and fundamental rights and asylum on the other hand.

International law adds a further facet to this dilemma: Despite a lack of legal immigration options for asylum seekers, the Geneva Convention forbids the punishment of border policy infringements, if the 'illegal' entry – contrary to immigration law – happened to seek asylum. The Geneva Convention thereby reflects the close connection between border and asylum policy. European treaty law recognizes the principles of the Geneva Convention in art 78 of the Treaty on the Functioning of the European Union. In fact, asylum policy has little by little been Europeanized since the Treaty of Maastricht.⁶ By now, the Common European Asylum System constitutes more than a legal framework for European asylum law which has been elaborated by the European institutions. This raises the question whether the asylum provisions enable access to the European asylum system despite border policy provisions.

³ Cf. Council of Ministers, '2436th Council Meeting Justice, Home Affairs and Civil Protection', 13 June 2002, Luxembourg, 9620/02, C/02/175, 8.

⁴ Cf. Frontex, General Report 2008, Warsaw 2009, 12; Frontex, FRAN Quarterly, Issue 2, April-June 2011, Warsaw 2011, 13; Frontex, FRAN Quarterly, Issue 3, July-September 2011, Warsaw 2012, 5, 15; Frontex, FRAN Quarterly, Issue 4, October-December 2011, Warsaw 2012, 6, 18; Frontex, FRAN Quarterly, Issue 2, April-June 2013, Warsaw 2013, 14.

⁵ Vgl. Frontex, FRAN Quarterly, Issue 2, April-June 2014, Frontex reference number 16160/2014, October 2014, Warsaw, 6.

⁶ Cf. art K 1 Treaty on European Union, OJ C 191, 29 July 1992, Title VI: provisions on cooperation in the fields of justice and home affair, including asylum policy, external border protection and immigration rules.

I. Border and Asylum Policy of the European Union and its Assessment

The European Union has brought forward one of the most ambitious projects on abolishing borders within the Schengen Border System and with the creation of an area of freedom, security and justice. The abolition of internal border checks combined with the freedom of movement of people has established an unprecedented supra-state space.

The abolition of internal borders between European Union Member States necessitates a compensation at the external border. This has not only been established by the Court of the European Union,⁷ but follows the logic of open borders between cooperating states. Despite this logic, European institutions do not possess a significant competence to shape external border policies. What they do possess since the Treaty of Amsterdam in 1999, is a competence to shape a European asylum policy. In fact, the institutions are capable to design the setting of a European asylum system and have created the Common European Asylum System since 1999.

This paper addresses the emergence of this asylum system and seeks to answer the question, how the European legislation institutions position themselves in the conflict of border and asylum policies. An analysis of the emergence of the European asylum system will furthermore help explain the incapacity of the European asylum system to accommodate one million asylum seekers in 2015. Considering that the European Union is comprised of roughly 500 million citizens, the number of asylum migrants in 2015 constituted less than 0.2% of the overall population and cannot seriously be viewed as excessive.⁸

This paper therefore analyzes the establishment of the Dublin Regulations and the Reception, Procedures and Qualification Directives constituting the Common European Asylum System in two phases (1999-2005 and 2008-2013). It discusses the different positions of the European institutions in the legislation process and clarifies the meaning of the negotiated regulations as well as the included shortcomings and weaknesses of this system.

All 75 official discourse contributions during the legislative procedures were analyzed based on the same questionnaire pointing firstly to the structure of the discourse, arguments, justification processes and the mixture of asylum and illegal immigration. Secondly, the questionnaire entailed an institutional consideration of institutions changing their position during a negotiation phase or during the two phases of the investigation period. It required

⁷ Cf. ECJ, *Wijsenbeek*, C-378/96, Judgment 21 September 1999, ECR 1999I-06207, para 40.

⁸ Cf. UNHCR, *Global Trends. Forced displacement in 2014*, Geneva 2015, 44-47.

the assessment of the substantive legal result and the factual share of the different institutions. Thirdly, a focus on structures and effects carved out the intended and non-intended consequences of legislation based on wording, symbols and apparent value contradictions in the legislation process. In this paper, I will highlight the key disputes in the emergence of the four central legislation instruments to establish a Common European Asylum System. Those examples are instructive not only in terms of the normative substance, but also because characteristic preferences of the three law-making institutions Commission, Council and Parliament become apparent in these disputes. The examination reveals the underlying values of the European asylum system, the legal imbalances within the system and thereby approaches an assessment of the realization of European and international refugee law obligations.

II. Legal Preferences I: First Phase of the CEAS

The Treaty of Maastricht entered into force in 1993 with the hesitant explanation that asylum policy is an issue of common interest.⁹ The Treaty of Amsterdam follows suit in 1999 with specific assignments regarding visa, asylum and immigration legislation.¹⁰ Following these treaty instructions, one regulation and three directives were developed to create a Common European Asylum System. Ten years later, the Treaty of Lisbon provided for further reform and development of this common system in its article 78.

1. Emergence of a European Asylum System: Phase 1

The reduction of secondary movement is the number one argument for the common legislation and shall be achieved through harmonization of living conditions of asylum seekers, procedural rights and recognition rates.¹¹ Based on article 63 (1) No. 1 EC Treaty (Amsterdam) and in a reform phase based on article 78 TFEU (Lisbon), the Commission drafted a regulation proposal towards establishing clear and practical criteria and measures to specify the

⁹ Cf. art K 1 Treaty on European Union, OJ C 191, 29 July 1992, Title VI: provisions on cooperation in the fields of justice and home affairs. Cf. discussions in Duff, Andrew; Prace, Roy; Pinder, John (1994): *Maastricht and beyond: Building a European Union*. London: Routledge Chapman & Hall; Peers; Steve; Rogers, Nicola (2006): *EU Immigration and Asylum Law. Text and Commentary*. Leiden: Martinus Nijhoff Publishers; Barnard, Catherine (2010): *The Substantive Law of the EU. The Four Freedoms*, 3rd edition, Oxford: Oxford University Press.

¹⁰ Cf. art 62 Treaty of Amsterdam amending the Treaty of the European Union, the Treaties establishing the European Communities and certain related acts: extension of competence in border and visa policy, including measures concerning the crossing of external borders; cf. Geiger, Rudolf; Khan, Daniel-Erasmus; Kotzur, Markus (2010): *EUV-AEUV. Vertrag über die Europäische Union und Vertrag über die Arbeitsweise der Europäischen Union, Kommentar*, 5th edition, München: C.H. Beck (cited: Geiger/Khan/Kotzur/*editor*), Art. 67 AEUV Rn 2; Neumann, Simon (2014): *Die Europäische Grenzschutzagentur Frontex. Integrierter Aussengrenzschutz und humanitäre Standards*. Berlin: Duncker & Humblot, 47.

¹¹ Commission, 'Proposal for a Council Directive laying down minimum standards on the reception of applicants for asylum in Member States', COM (2001) 181 final, explanatory memorandum, section 2.

competent member state responsible to examine an asylum application (Dublin), a directive proposal on common minimum standards in line with the Geneva Convention when receiving asylum seekers, to frame common minimum procedural standards when assessing an asylum application and last but not least a proposal on eligibility criteria to ascertain an asylum application in order to abolish differences in the refugee recognition standards of states.¹² Due to the existing procedural differences, but also based on diverging reception policies in Member States, secondary movements are triggered to those countries, where applicants expect the best conditions. The Commission and the Member States hoped to reduce secondary movements with common standards in receiving and accommodating refugees and when judging their case.¹³ It is remarkable that the central argument for common legislation is not to guarantee protection in line with human rights standards, but to counter secondary movements and thereby increase efficiency in the European state system.¹⁴

a) Dublin Regulation

The central dispute that the European institutions needed to settle relates to the question: How do we assign jurisdiction to a Member State to examine an asylum application? Since responsibility to examine an asylum application entails the ensuing responsibility to accommodate and care for the asylum seeker, it finally also means responsibility to either integrate the asylum seeker into the host society or to return him to another country. Accordingly, the question of jurisdiction affects the future social composition of a society and has consequences for the social welfare system of a Member State. In order to figure out the responsible state, the Member States have agreed on a catalogue of common criteria. Responsibility is assigned to the state with the closest legal bond to the protection seeker. In most cases, this legal bond is based on the principle of first entry. This principle is only secondary, if family members of an asylum seeker already reside in a Member State or if an asylum seeker has a visa from one of the Member States. The principle of first entry is therefore the most significant. The inherent logic of this principle is that Member States are held responsible for irregular migration towards their territory. Following this logic of costs-by-cause,¹⁵ deficient external border controls shall not strain the other community members. The

¹² Commission, 'Proposal for a Council Directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection', COM (2001) 510 final, explanatory memorandum.

¹³ Commission, 'Proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status' COM (2000) 578 final, explanatory memorandum.

¹⁴ Commission, 'Proposal for a Council Directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection', COM (2001) 510 final, explanatory memorandum.

¹⁵ Cf. Marx, Reinhard, Europäische Integration durch Solidarität beim Flüchtlingsschutz. Kritische Justiz 2016, 49 (2), 150-166, 156.

Commission indeed advocates for the principle of first-entry on grounds of „solidarity“¹⁶ since Member States are individually responsible for the protection of their external borders and deficits resulting thereof (e.g. irregular immigration) should not become a community issue.¹⁷

The Parliament does not query this peculiar understanding of solidarity and the resulting pre-eminence of the first-entry principle. All of the 30 Parliament amendments are directed towards granting legal certainty to applicants,¹⁸ and consolidating the scope of international law.¹⁹ The Parliament clearly misses the point, since the regulation is mainly concerned with inter-state affairs and the assignment of state jurisdiction. In any case, none of the amendments are implemented. Although the Council members show awareness for the unbalanced strain on periphery states rooted in this provision, they nevertheless resume the continuity of the Dublin Convention of 1990.²⁰ Despite a lengthy discussion on the responsibility to grant asylum to protection seekers, the Council pays more attention to the external border protection on the high seas, with a focus on the effective ‘fight against illegal immigration’²¹. With this focus, the Council members demonstrate awareness for the compensation logic between the abolition of internal borders within the European Community and its implications for asylum legislation. There is however no attempt to reconcile this fundamental conflict between external border protection and the human rights promise to grant access to asylum.

b) Reception Directive

The Reception Directive’s intention is to standardize accommodation and reception conditions for asylum seekers in the European Union. The instrument is unprecedented and the reasoning for its introduction is based on the assumption that harmonized living conditions will decrease the incentive for secondary movements between asylum systems.²² If this functions as intended, then the directive also reinforces the application of the first entry principle.

¹⁶ Commission, ‘Proposal for a Council Regulation 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’, COM (2001) 447 final, recital 8.

¹⁷ *ibid*, art 6, 7, 9 (1), 15, 18.

¹⁸ European Parliament, ‘European Parliament legislative resolution on the proposal for a Council regulation 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’, EP-Document P5_TA(2002)0153, (Rapporteur Luis Marinho), 9 April 2002, amendment 1, recital 4.

¹⁹ *ibid*, amendment 2, art 3 (1).

²⁰ Council of Ministers, ‘2436th Council meeting, Justice, Internal Affairs and Civil Protection’, Council Document No. 9620/02, 13 June 2002, Luxembourg: Council of the European Union, sections 1.4.2., 3.8.

²¹ *ibid*, section 1.

²² Commission, ‘Proposal for a Council Directive laying down minimum standards on the reception of applicants for asylum in Member States’, COM (2001) 181 final, explanatory memorandum, section 2.

One could argue that the Member States try to agree on certain benefits that should be integral to the protection of asylum seekers on European territory. This could be read as a humanitarian approach to define minimum standards in living conditions for people seeking protection. Yet, this humanitarian reading hardly fits the normative disputes that can be traced in a process analysis regarding the creation of the directive. The disputes focus exactly on the extent of benefits to be granted to asylum seekers.

The biggest issue in adopting the directive relates to the question of access to the labor market for asylum seekers. While the Commission wants to facilitate such access in order to enable social integration, the Member States demand restrictions. The Parliament adds a surprising contribution to the debate by arguing that unlike material benefits, labor market access is not a benefit and access should therefore be allowed as soon as possible, in any case within four months.²³ Yet, the Parliament cannot convince the Council. Following the Member States' interests, the Commission suggests to block labor market access for six months' maximum, while allowing Member States to define specific rules for example on approved industries and working hours. Quite in contrast, the Council reduces obligations of Member States towards asylum seekers by further decreasing standards compared to the intentions of the Commission and the Parliament.²⁴ Illustrated at the example of access to the labor market, the Council finds a formula with considerable scope of action for the Member States:²⁵ Applicants may be excluded from the labor market for up to one year. After this period, domestic laws determine conditions of access.²⁶ Furthermore, the Reception directive regulates the issuing of an identity document within three days, the issuing of a residential status while the asylum examination is pending, social welfare support according to national standards and health care that guarantees for humane conditions. The general result is a Reception Directive that is characterized by common standards relative to national standards, but none that would constitute a European-wide reception system with harmonized standards.²⁷

²³ European Parliament, 'European Parliament legislative resolution on the proposal for a Council directive laying down minimum standards on the reception of applicants for asylum in Member States', EP-Document A5-0112/2002 (Rapporteur Jorge Salvador Hernandez Mollar), amendment 51, art 13 (1).

²⁴ Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers [2003] OJL 31/18 (Reception Directive), art 14 (4); Commission, 'Proposal for a Council Directive laying down minimum standards on the reception of applicants for asylum in Member States', COM (2001) 181 final, art 16 (4).

²⁵ Council of Ministers '2455th Council meeting, Justice, Home Affairs and Civil Protection', Council Document No. 12894/02, 14/15 October 2002, Luxembourg: Council of the European Union, 16.

²⁶ Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers [2003] OJL 31/18, 6.2.2003, art 11.

²⁷ Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers [2003] OJL 31/18, recital 7. The Reception directive regulates the issuing of an identity document within three days, the issuing of a residential status while the asylum examination is pending, social welfare support according to national standards and health care that guarantees for humane conditions.

c) Procedures Directive

The Procedures Directive aims for common minimum procedural standards during the assessment of an asylum application. It addresses formal standards of jurisdiction, admissibility of asylum applications, regular and accelerated procedures, legal assistance and remedy options for asylum seekers.²⁸ Accordingly, the Procedures Directive constitutes another instrument to reduce differences between Member States' asylum systems with the intention to decrease secondary movement and to reinforce the principle of first entry.

Once a responsible Member State has been established, the actual asylum application may begin. Each applicant has a right to a hearing, a right to legal assistance and right to remedy. Furthermore, interpreters support asylum seekers to bring their claims forward in their own language. This transparent and legally secured procedure is exemplary in terms of individual rights. It is apparent that the Procedures Directive determines rights of the asylum seekers in relation to the host state.

The most interesting observation in this legal process is the fact that Parliament and Council discuss totally diverging issues departing from the Commission's proposal. The Parliament primarily seeks to extend the guarantees and rights of asylum seekers. This includes access for asylum seekers to all organizations active in the support of refugees, including those providing legal assistance and health services.²⁹ Legal assistance shall be guaranteed free of charge in all phases of both regular and accelerated procedures in the Parliament proposal.³⁰ The Parliament is very specific on this issue and defines the preparation, filing of documents and personal hearing as instances where legal assistance applies.³¹ Yet, the Council ignores the considerations of the Parliament and discusses none of those procedural rights of asylum seekers. The Council members are most concerned about obligations. The Council extensively discusses the concept and creation of common lists based on political and legal criteria defining safe countries of origin and safe third countries – typically transit states – to hold accountable for asylum examinations.³² This is interconnected with the question of admissibility since applications from safe countries are deemed unfounded and may therefore

²⁸ Commission, 'Proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status' COM (2000) 578 final, art 25 (1), (4).

²⁹ European Parliament, 'European Parliament legislative resolution on the proposal for a Council directive on minimum standards on procedures in Member States for granting and withdrawing refugee status, EP-Document A5-2001/291 (Rapporteur Graham R. Watson), amendment 25, art 7 c.

³⁰ *ibid*, amendment 36, art 9 (4).

³¹ *ibid*, amendment 24, art 7 b.

³² Council of Ministers, '2529th Council meeting, Justice and Home Affairs', Council Document No. 12762/03 2/3 October, Brussels: Council of the European Union, 6.

undergo an accelerated procedure.³³ The delegation toward non-EU-states reveals yet another method to delegate responsibility for asylum examinations by way of externalizing responsibility towards third states.

Eventually, the Council reaches agreement on all issues in a more restrictive spirit than any of the Commission's and Parliament's intentions. For example, a personal hearing is central in ascertaining a protection status,³⁴ but the final legal instrument includes a list of numerous situations that make a hearing unnecessary due to inadmissibility.³⁵ The result is a Procedures Directive with prevailing rules on the admissibility of asylum claims, the delegation of responsibility to examine an asylum case based on the concept of safe third states, but also entailing procedural guarantees for asylum seekers including nationally defined legal assistance and remedy.

d) Qualification Directive

The Qualification Directive's purpose is to establish common eligibility criteria for refugee protection in order to abolish the huge differences in recognition rates of Member States.³⁶ Again, the motivation for legislation is found in the pragmatic objective to counter secondary movements.³⁷ A general precondition for recognition of protection is a situation in which the applicant is persecuted by a state or non-state actor.³⁸ For a protection status in the sense of the Geneva Convention, there necessarily needs to be a *reason for persecution*. A reason for persecution may be race, religion, nationality, membership of a social group or political conviction.³⁹ The reason for persecution must be related to a justified fear of persecution, meaning that an *act of persecution* is expected or impending. Another protection status is introduced by the Commission with this legal instrument: the so-called *subsidiary* protection. It is legally situated below the Geneva protection status and covers cases beyond the scope of the Geneva Convention considering persecution and emergency situations in the 21st century.⁴⁰ The subsidiary protection status is granted in cases of serious danger to the life and integrity

³³ *ibid*, 6; Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted [2004] OJ L304/12 (Qualification Directive), art 11, 15.

³⁴ Commission, 'Proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status' COM (2000) 578 final, art 8.

³⁵ Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status [2005] OJ L326/13 (Procedures Directive), art 12.

³⁶ Commission, 'Proposal for a Council Directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection', COM (2001) 510 final, explanatory memorandum.

³⁷ *ibid*, explanatory memorandum.

³⁸ *ibid*, art 9 (1).

³⁹ *ibid*, art 12 a-e.

⁴⁰ *ibid*, explanatory memorandum.

of a person because of torture, inhuman or degrading treatment or punishment, serious human rights violations or arbitrary violence in an armed conflict.⁴¹

The biggest challenge in adopting the Qualification Directive is dealt with in the Council and concerns the definition of subsidiary protection in comparison to the existing Geneva Convention refugee status.⁴² The Parliament urges Member States that the lower subsidiary protection status is granted *in addition to* and not *instead of* the Geneva Convention refugee status.⁴³ All institutions agree on this general definition to recognize asylum seekers. The trouble arises in the Council when it comes to determining general benefits, access to the labor market, social security and medical care.⁴⁴ The negotiation results of all these issues are restrictive when compared to the Commission's proposal and Parliament amendments. The rights of recognized refugees under both the Geneva Convention protection system as well as the emerging subsidiary protection system have been limited by the Council.⁴⁵ The difference in status comes with differing lengths of permit of residence and sharp differences in welfare rights and access to the labor market, education and integration programs, all restricted by the Council.⁴⁶ The Parliament's amendments directed at sensitive wording, fundamental rights protection, non-discrimination and a generally careful and respectful treatment of applicants demonstrate a primary view for the *human beings* who are affected by the legislation. This view is however not dominant in the legislation process. As a result, the Qualification Directive constitutes a legal instrument that merely specifies the existing Geneva Convention norms and introduces the subsidiary protection status with substantially restricted benefits.

2. Assessment: Positions of Legislation Institutions and Weaknesses of the Common European Asylum System

The Commission's general theme is the pursuit of reconciling Member State interests and asylum seekers rights. However, many claims in the interest of asylum seekers are exhaustingly addressed in the Explanatory Memorandum only and lack concise legal norms

⁴¹ *ibid*, art 15 a-c.

⁴² Council of Ministers '2455th Council meeting, Justice, Home Affairs and Civil Protection', Council Document No. 12894/02, 14/15 October 2002, Luxembourg: Council of the European Union, 16.

⁴³ European Parliament, 'European Parliament legislative resolution on the proposal for a Council directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection', EP-Document P5_TA(2002)0494 (Rapporteur Jean Lambert), amendment 11, recital 23c.

⁴⁴ Council of Ministers, '2561st Council meeting, Justice and Home Affairs', Council Document No. 5831/04, 19 February, Brussels: Council of the European Union, 11.

⁴⁵ Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted [2004] OJ L304/12 (Qualification Directive), art 18 (2).

⁴⁶ *ibid*, art 24 (1), (2), 26 (3), 28 (2), 29 (2).

and action.⁴⁷ Eventually, all the legislation instruments rather lean towards the Member States' interests which can be attributed to the negotiation impact of the Council. Obligations formulated by the Commission in all three directives have been mitigated by the Council negotiations. The Council focuses on fast, efficient and just decisions in the asylum system and thereby more on systemic issues than on the actual protection situation and living conditions of asylum seekers. The Council regularly weakens the obligations of Member States in order to keep their implementation of European legislation as flexible as possible. This is hardly compatible with the harmonization objective that is pursued by the Commission in the interest of the Member States in order to reduce secondary movements and thereby achieve more efficiency - again an important objective of the Member States. Very much in contrast to the Council positions are the contributions of the Parliament. Although the Parliament's positions do not deviate significantly from the Commission's draft, the representatives regularly advocate rights and safeguards of asylum seekers.⁴⁸ Yet, the Parliament's contributions are barely heard. The contribution of the Parliament is therefore often rhetorical in the inter-institutional setting of asylum legislation.

However, all these provisions are only relevant if an asylum seeker actually reaches European territory and this actual access is significantly impaired: There are no legal entry provisions for asylum seekers to travel to the European Union in order to seek protection. This hints to a general orientation in European migration policy to keep immigration at a minimum level. Asylum immigration is not welcome. Summing up, the four central legislation instruments in the Common European Asylum System constitute a system that does not welcome asylum seekers in general and – even worse – does neither address nor reconcile the conflict between border and asylum policies.

Furthermore, despite the precise criteria and standards introduced by the legal instruments, major differences in reception conditions, recognition rates of asylum seekers from same

⁴⁷ For example, in the Reception Directive legislation process: The Commission only explains in its explanatory memorandum that applicants shall be informed holistically in written about their legal status and asylum process, to provide study and recreation activities for children, and to recognize special protection for disabled and elderly applicants. Those specific provisions are not found in the suggested articles of the proposal, cf. European Commission, 'Proposal for a Council Directive laying down minimum standards on the reception of applicants for asylum in Member States', COM (2001) 181 final.

⁴⁸ Examples: Reception directive: emphasis on the necessity to inform applicants in an understandable language (amendment 37, art 5 (3)), by introducing compulsory schooling (amendment 47, art 12 (1), (2)), and facilitating access to education programs (amendment 48, art 12 (2)) which equals linguistic and cultural integration support; cf. European Parliament, 'European Parliament legislative resolution on the proposal for a Council directive laying down minimum standards on the reception of applicants for asylum in Member States', EP-Document A5-0112/2002 (Rapporteur Jorge Salvador Hernandez Mollar). During the Qualification Directive process, the European Parliament explicitly demands non-discrimination, also by seeing asylum seekers not generally with skepticism (amendment 24, 25, art 7); cf. European Parliament, 'European Parliament legislative resolution on the proposal for a Council directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection', EP-Document P5_TA(2002)0494 (Rapporteur Jean Lambert), amendment 20, 26, 34, 35, 85, concerning art 5, 7, 11, 35.

countries of origin continue to exist and thereby manifest considerable differences between the asylum systems of the Member States.⁴⁹ There are European Union Member States without basic provisions in social systems and other Member States with welfare benefits exceeding by far the average income in other member states. Based on those differences, asylum seekers understandably try to reach a European Union member state with good prospects in terms of accommodation, services and recognition rates. This leads to secondary migration within the European Union, by which the authors of the legal instruments imply such migratory movements that take place after an initial first entry in the European Union. Following the logic of the established system, this necessitates the return of migrants relying on the Dublin criteria. Therefore, the Commission defined *efficiency* – by way of reducing secondary migration based on harmonized standards – as primary concern in the reform phase of the Common European Asylum System that started in 2008. The idea was that an alignment of the asylum conditions would abolish the differing attractiveness of specific locations and in consequence, there would be no necessity for secondary movements. The Member States – quite contrary – insisted on further flexible implementation of European asylum law. The analysis results on the reform phase of the Common European Asylum System (2008-2013) reveals the consolidated deficits and failures of the European asylum policy up to the crisis of 2015.

III. Legal Priorities II: Second Phase of the CEAS

The most important revision in the second phase concerns the superordinate legal framework which has come into force with the Lisbon Treaty in 2009. This legal context gives priority to common general values as enshrined in article 2 of the Treaty on European Union. Those values are the respect for human dignity, freedom, democracy, equality, the rule of law, respect for human rights and principles such as pluralism, non-discrimination and tolerance. The legally codified common values achieve a status as guiding ideals and overarch the policy design in all policy fields.⁵⁰ Yet, the general and abstract values lack a clear translation in the Common European Asylum System of the European Union. There is neither textual nor another connection between the general values and border and asylum legislation.

⁴⁹ Cf. UNHCR, Observations on Greece as a Country of Asylum, December 2009 [16.03.2016]. More generally: Kraus-Vonjahr, Martin, Der Aufbau eines Raums der Freiheit, der Sicherheit und des Rechts in Europa. Die Innen- und Justizpolitik der Europäischen Union nach Amsterdam und Nizza. Frankfurt am Main: Peter Lang 2002, 172; Pelzer, Marei, Unsolidarisches Europa. Das Asylzuständigkeitssystem „Dublin II“ untergräbt den europäischen Flüchtlingsschutz. Kritische Justiz 2011, 44 (3), 262-271, 265, 268; Böhlo, Berenice; Dolk, Klaudia, Dublin II-Verordnung: Anwendungspraxis in Deutschland. Kritische Justiz 2011, 44 (3), 272-280, 272-277.

⁵⁰ art 2 TEU: “The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.”

Accordingly, it is not clear what the common values like human dignity, freedom, equality and pluralism imply for asylum and border policies.

Especially when looking at the reform phase of the Common European Asylum System, it becomes clear what values really count and which failures are manifested even in the reform phase, until the so-called asylum crisis hits the European Union in 2015. Therefore, the recast of the Dublin Regulation must be discussed in detail and the reform results of the three directives on reception, procedures and qualification are discussed in relation to the three institutions' top priorities, preferences and their ability to enable legal materialization.

1. Recast: Dublin Regulation

Despite a significant geographic imbalance between Member States' responsibility for asylum applications, the Commission does not suggest a general reform of the Dublin system.⁵¹ Only in its general explanations, the Commission favors a pragmatic approach to apply a principle of first application rather than first entry. This would reduce inefficient returns and it would entail the asylum seekers' rights to choose a destination country – with the potential of significant secondary movements. Although the Commission wants to improve the situation of periphery states in southern Europe, the Commission follows the preference of a majority of Member States to continue the existing framework and established rules of Dublin.⁵² In order to meet the imbalance in the existing Dublin system at least partially, the Commission suggests a legal provision to suspend Dublin transfers to overstrained (periphery) states for up to six months and to increase financial support for Member States particularly affected by irregular entry.⁵³ Thereby, the Commission changes its peculiar understanding of solidarity (responsibility for irregular immigration if external borders have not been controlled effectively) and advocates practical solidarity with periphery states.

The Parliament reinforces the revised understanding of solidarity in border and asylum policy with innovative forms of support and coordination between the Member States, for example by introducing the concept of re-distribution of people with a right to international protection in cooperation with UNHCR.⁵⁴ Yet, the Commission does not pick up on this suggestion until

⁵¹ Commission, 'Proposal for a Regulation of the European Parliament and of the Council 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)' COM (2008) 820 final, recital 26.

⁵² *ibid*, explanatory memorandum.

⁵³ *ibid*, recital 21, art 31 (1).

⁵⁴ *ibid*, art 32 (11) b

the drastically increased asylum migration in 2015.⁵⁵ Meanwhile, the discussion in the Council circles on the fight against irregular migration and the inhuman business of smugglers.⁵⁶ The focus of the following legislation process reveals clearly that no efforts are made to facilitate legal entryways for irregular migrants, but to make external border controls more effective and to increase cooperation with third countries by introducing mobility partnerships with countries of transit and origin.⁵⁷

Solidarity becomes an issue between the Member States, but not towards the asylum seekers. While Germany, the United Kingdom and Austria vote for a continuation of Dublin rules,⁵⁸ countries like Malta, Cyprus and Greece demand an adaptation of Dublin rules that allow for more practical solidarity and support in order to cope with the amount of applications.⁵⁹ Both policy approaches aim at the delegation of responsibility to take care of asylum seekers. The compromise focuses on the European Asylum Support Office (EASO),⁶⁰ to be established in 2010 as instrument for the practical cooperation and solidarity in asylum.⁶¹ Even the countries that are most affected by irregular migration due to their geographical location, accept this pragmatic solution.⁶² Thereby, both financial and technical questions of solidarity are outsourced to an agency of the European Union.

The final Regulation (EU) No. 604/2013 does not materialize the suspension of transfers. Instead, the Council urged the negotiation partners to introduce mechanisms of early warning, preparedness and crisis management,⁶³ adding up on the preventive policy to reduce asylum migration at an early stage.⁶⁴ The resulting Regulation is again a continuation of the Dublin

⁵⁵ Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A European Agenda on Migration', COM(2015) 240 final, 4-6, Annex 19-20

⁵⁶ Council of Ministers, '2946th Council meeting, Justice and Home Affairs', Council Document No. 10551/09, 4/5 June, Luxembourg: Council of the European Union, 21.

⁵⁷ Council of Ministers, '3034th Council meeting, Justice and Home Affairs', Council Document No. 14423/10, 7/8 October, Luxembourg: Council of the European Union, 10.

⁵⁸ *ibid*, 9.

⁵⁹ Council of Ministers, '2946th Council meeting, Justice and Home Affairs', Council Document No. 10551/09, 4/5 June, Luxembourg: Council of the European Union, 9.

⁶⁰ Council of Ministers, '2979th Council meeting, Justice and Home Affairs', Council Document No. 16883/1/09 30 November/1 December, Luxembourg: Council of the European Union, 14.

⁶¹ Council of Ministers, '3043th Council meeting, Justice and Home Affairs', Council Document No. 15848/10, 8/9 November, Brussels: Council of the European Union, 9.

⁶² Council of Ministers, '2979th Council meeting, Justice and Home Affairs', Council Document No. 16883/1/09 30 November/1 December, Luxembourg: Council of the European Union, 14.

⁶³ 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 [2013] OJ L180/31, art 33 (Dublin-III-Regulation).

⁶⁴ Council of Ministers 2012, '3207th Council meeting, Justice and Home Affairs', Council Document No. 17315/12, 6/7 December 2012, Brussels, 8.

system and does not respond appropriately to the realities of increasing irregular migration to the European Union periphery states observed since the early 2000s.

2. Revision of Reception, Procedures, Qualification Directive: Institutions' Positions, Priorities and the Legal Outcome

The three law-making institutions pursue different interests with the revision of the three directives of the Common European Asylum System.

For the Commission, it is important to harmonize standards to create a more unified asylum system with same conditions in different Member States. With its proposals, the Commission tries to improve the situation of individuals. This attitude is visible in efforts to facilitate labor market access for asylum seekers in the revised Reception Directive. The Commission argues that early access is both socially and economically more cost-efficient and therefore drafts the same proposal as in 2001, suggesting an exclusion for no more than six months.⁶⁵ Furthermore, the Commission strives to abolish the sharp contrast between Geneva Convention refugees and subsidiary status holders and to align status and rights in the Qualification Directive. In its proposal, the Commission therefore argues that the principle of non-discrimination entails that different treatment is unlawful, if there is no specific reason for different treatment.⁶⁶

The Council remains the most significant actor in the legislation process and prevents both legal developments. In the dispute on status and rights of Geneva Convention refugees and subsidiary protection status holders, the Council vetoes an alignment. This results in consistent and considerable differences in the status and treatment of Geneva Convention refugees in contrast to persons with subsidiary protection status.⁶⁷ A Union-wide applicable asylum status remains out of reach.⁶⁸ In the conflict on labor market access, the exclusion is only minimally reduced by three months compared to the former Reception Directive, with an applicable exclusion of asylum seekers from the job market for nine months.⁶⁹

⁶⁵ Commission, 'Proposal for a Directive of the European Parliament and of the Council laying down minimum standards for the reception of asylum seekers', COM (2008) 815 final, explanatory memorandum, recital 14, art 15 (1).

⁶⁶ Commission, 'Proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted' COM (2009) 551 final, explanatory memorandum, art 24 (1).

⁶⁷ Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted [2011] OJ L33/9 (Qualification Directive Recast), art 24, 29 (2).

⁶⁸ *ibid*, recital 7, 9.

⁶⁹ Council of the European Union, 'Position (EU) No 6/2013 of the Council at first reading with a view to the adoption of a Directive of the European Parliament and of the Council laying down standards for the reception of applicants for international protection (recast)', art 15 (1).

Confirming the priorities of the first phase of establishing the Common European Asylum System, the Parliament wants individual human rights respected and advocates for more sensitive wording of legal instruments and careful treatment of asylum seekers. This becomes particularly obvious in the creation of the recast Procedures Directive. For example, the Parliament includes sexual orientation, gender identity and physical illnesses as qualifying criteria for applicants with special needs.⁷⁰ Other amendments address the requirement for explanations of positive decisions,⁷¹ specifications of applicants' entitlements to legal assistance,⁷² and individual appeal rights of applicants on Dublin transfers.⁷³ As usual, the Parliament requires high standards of training for government personnel involved in the examination of cases⁷⁴ and transmission of information in a language that applicants understand.⁷⁵ All amendments are directed towards improving the legal status and asylum procedure of applicants. However, just a few of those amendments can be traced in the final directive which – again due to the Council – is not as far-reaching as the Commission's and Parliament's proposals. Progress is achieved in gender-specific hearings as suggested by the Commission already in 2001,⁷⁶ which is now included in the legislation.⁷⁷ Another progressive development is the guarantee for a hearing in both regular and accelerated procedures.⁷⁸ Setbacks concern broader detention rules, and the extended criteria for accelerated procedures.⁷⁹ A significant norm change addresses unfounded and inadmissible applications which may be estimated as such on the grounds of domestic law.⁸⁰ This regress to domestic law is obviously in contradiction to the aim of harmonizing standards.

The Member States wanted to achieve faster and more substantial decisions on the basis of clear, precise and sustainable provisions in order to reduce second-instance procedures.⁸¹ In

⁷⁰ European Parliament, 'European Parliament legislative resolution of 6 April 2011 on the proposal for a directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection (recast)' EP-Document P7_TA(2011)0136 (Rapporteur Sylvie Guillaume), amendment 13, art 2 d.

⁷¹ *ibid*, amendment 31, art 10.

⁷² *ibid*, amendment 47, 48, art 18.

⁷³ *ibid*, amendment 84, art 32.

⁷⁴ *ibid*, amendment 28, 29, art 9.

⁷⁵ *ibid*, amendments 34, 38, art 11 (1) a, 13.

⁷⁶ Commission, 'Proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status' COM (2000) 578 final, art 14 lit. b.

⁷⁷ Council of the European Union, 'Position (EU) No 7/2013 of the Council at first reading with a view to the adoption of a Directive of the European Parliament and of the Council on common procedures for granting and withdrawing international protection (recast)', 67.

⁷⁸ Commission, 'Communication from the Commission to the European Parliament pursuant to Article 294 (6) of the Treaty on the Functioning of the European Union concerning the position of the Council on adoption of a proposal for a Directive of the European Parliament and of the Council on common procedures for granting and withdrawing international protection' COM (2013) 411 final, section 3.

⁷⁹ *ibid*, section 3.

⁸⁰ Commission, 'Amended proposal for a Directive of the European Parliament and of the Council on common procedures for granting and withdrawing international protection status (Recast)' COM (2011) 319 final, art 32.

⁸¹ *ibid*, explanatory memorandum.

contrast, the institutions agree to allow for significant domestic principles in the asylum procedure, which is counterproductive for the envisaged common European asylum status.

The results of the first phase of asylum legislation have shaped the second phase with lasting effects since the revised versions of the regulation and directives of the Common European Asylum System merely specify several provisions.

3. Assessment: Deficits of the European Asylum System, Phase 2

The analysis results demonstrate that the European institutions are concerned with the most marginal details regarding specific provisions and enthusiastically dispute about wordings and definitions. What is missing in these discussions, is a recognition of the contextual broader border and migration policies of the European Union. Particularly the directives regulate details instead of focusing on the general policy design pursued by those instruments that manifest the legal relation between the European Union and third-country-nationals seeking international protection.

The common values of article 2 of the Treaty on European Union remain blank toward the creation of the legal instruments: respect for human rights, the pre-eminence of human dignity, the principles of pluralism and tolerance are not mirrored in the policy design of the asylum instruments. Immensely more important than the general values seem the strategy objectives adopted by the European Council in multi-annual papers. Furthermore, a very pragmatic objective like the reduction of secondary movements becomes a central and key guideline in the policy development of the European asylum legislation. This focus equals system optimization in the context of open internal borders within the Schengen-area and is far from focusing on protection strategies for asylum seekers. While the Common European Asylum System is supposed to build a common system with a unified asylum status, a harmonized asylum procedure and similar reception and procedure conditions in the different Member States, the European asylum system remains a highly-fragmented system.

The policy focus on minimal (asylum) immigration furthermore undermines the credibility of the European Union as a sponsor of human rights and good governance. The underlying motives of this policy strategy are hardly an issue. The European Union and its Member States have to ask themselves, whether their treatment of third-country-nationals is ethically justifiable. This applies particularly if the hostile attitude towards asylum migration is based on welfare interests:

„Is it morally permissible to deny asylum when admitting large numbers of needy peoples into our territories would cause a decline in our standards of living? And what amount of decline

in welfare is morally permissible before it can be invoked as grounds for denying entry to the persecuted, the needy, and the oppressed?"⁸²

This reflective quote by *Seyla Benhabib* makes clear that the safeguarding of prosperity cannot pass as justified motive for a preferably low immigration quota. In consequence, this argument does not hold for a restrictive external border policy, given that the European Union and its Member States recognize the precedence of general values such as human dignity (independent of national belonging), freedom, equality and pluralism. Such a focus on minimum immigration is furthermore incompatible with the general recognition of a duty to grant refuge according to the Geneva Convention on the Status of Refugees and the provisions of article 78 Treaty on the Functioning of the European Union. Hence, the respect for human dignity requires respect for human lives. Territorially justified entry provisions and social definitions of belonging must be subordinate.

IV. Concluding on the misfit between the CEAS and Asylum Migration in 2015: Legal Imbalances, Deficits and Necessary Reforms

The negotiation rounds of the European institutions Commission, Council and Parliament – while considering the strategic guidelines of the European Council –, have created a Common European Asylum System with a restricted scope. The provisions were not compatible with the reality of one million people migrating to the European Union in 2015. Although 500 million people live in 28 Member States of the European Union which reduces the asylum migration quota to 0,2% of the overall population,⁸³ questions of responsibility in receiving asylum seekers led to the decoupling of law and policy. Particularly the Dublin Regulation, but also the reception and standards in asylum procedures were levered.

The overwhelming misfit between the Common European Asylum System and the experienced asylum migration in 2015 can mainly be found in one profound legal imbalance that creates further imbalances. This significant imbalance concerns the depth of legal provisions during an asylum examination in contrast to the total lack of legal provisions to allow for legal entry for asylum seekers. While labor market access and restrictions have been discussed and disputed in-depth particularly in both phases of the Reception Directive, the general access to the asylum systems remains legally unsolved. Irregular asylum migration is criminalized as illegal immigration. This is illogical in itself, but it is a profound part and

⁸² Benhabib, Seyla, *The rights of others. Aliens, residents and citizens*, 4th edition, Cambridge: Cambridge University Press 2004, 37.

⁸³ Vgl. UNHCR, *Global Trends. Forced displacement in 2014*, Geneva 2015, 2, 44-47.

problem of the legal reality of the Common European Asylum System. The protection standards are very high once refugees have reached European territory, but huge obstacles challenge the general access to the European asylum system due to the implemented border policy.

The norm competition between immigration law and asylum rights of individuals has not yet been settled, but the different legal ideals co-exist without reconciliation. This hints to the second profound imbalance in the European asylum system. European institutions exhaustingly discuss the specificity of common standards, but they do not connect asylum matters with external border control and general migration policies. Although the Council requires ample external border controls to counter irregular migration and thereby recognizes the interconnectedness of border and asylum policies, there is not the slightest connection between those two fields in policy design or strategy to reconcile the norm competition between asylum and border policies. What is missing, is a structural and strategic approach that considers the interconnection between border and asylum policies. The one and only regulation that touches on both policies is the Dublin Convention that develops into the Dublin Regulation II (2003) and III (2013).

The Dublin Regulation is in itself full of imbalances, especially due to the geographic asymmetry that has been manifested in the continuation of the Dublin Convention despite the considerable enlargement of the Schengen area. Unlike the founding five Schengen states, the current Schengen area is comprised of countries with very different economic and social capabilities to accommodate asylum seekers. The legal provisions must respond to this heterogeneity and take those capabilities into consideration in order to reach a sustainable and fair agreement on the attribution of jurisdiction for asylum applications.

This issue is finally related to a third legal imbalance concerning the difference in the integration status of different policy fields of border and asylum. While asylum is a community matter, external border controls are a Member State issue. Due to the agreement on the first entry principle as standard for asylum jurisdiction, the responsibility particularly affects South-European Member States. This leads to a sharp geographic asymmetry of responsibility between Member States. The connection between the two policy fields of external border protection and asylum migration is not yet mirrored in the policy design of European law and accordingly, the norm competition does not take place in the legislation process. While external border policy is still a matter of national politics, asylum policies have been Europeanized in the last fifteen years with the creation of the Common European Asylum System. This discrepancy between those deeply intertwined policy fields creates sustainable tension.

These three imbalances will be crucial for reform of the Common European Asylum System in order to develop a sustainable European asylum system. Firstly, it is necessary to enable access to the European asylum system. Secondly, and this is an inherent aspect of the former, systemic reforms need to reconcile border and asylum policies. Thirdly, a reform of the Dublin rules requires to recognize the heterogeneity of the Member States, their capacity to absorb and accommodate refugees considering their national welfare standards and economic capabilities.