EU ASYLUM POLICY: A BALANCING ACT?

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Abstract

This thesis uses the observation of different representations of asylum seekers in EU documents as a starting point to examine, against the backdrop of the concept of normative power Europe and the evolution of the EU as a human rights actor, how the EU attempted to balance protective, normative ambitions with more protectionist, exclusionary policies in its handling of the 2015-2016 "refugee crisis". It establishes that the categorization of individuals seeking international protection in discourse can be used as a strategic tool, for example through the use of a security-focused or humanitarian narrative. It also establishes that the 'refugee crisis' was in fact a governance crisis of the Common European Asylum System (CEAS). A discourse analysis of EU documents concerning the European Border and Coast Guard indicates a shift from a humanitarian narrative to a more security-focused narrative, which could be explained as the result of a clash between normative ambitions and limitations expressed by the technical environment. The analysis further determines that in the discourse on the reform of the Reception Conditions Directive asylum seekers are often strategically depicted as a threat, except not in the traditional way, but rather as a threat to the functioning of the CEAS. It is established that the description of policy decisions that support adherence to fundamental rights not as an expression of the EU's normative ambition, but rather as decisions to safeguard the functioning of the CEAS system could be considered an attempt by the Commission to adapt its discourse to its technical environment.

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Imi, köszönöm, hogy akkor is hiszel bennem, amikor én nem.

And finally, Balázs: köszönöm, hogy még időben szóltál.

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Introduction

The topic of this paper is based on an observation one might make when studying the EU's common asylum policy (CEAS). When analyzing the different texts, there seems to be an ever-present opposition, a tug-of-war almost, between the representation of the asylum seeker as a victim who needs protection on the one hand, and the asylum seeker as a potential abuser of the system on the other. This categorization is clearly reflected in the legislative texts that form the CEAS. At first glance it seems that, throughout the different documents, the EU is constantly trying to strike a balance between both sides of the spectrum, in an attempt to provide protection to those who need it while not indulging those who do not. This can be seen most clearly in provisions that concern the most controversial aspects of asylum policy, for example in provisions on border control, reception conditions or the detention of asylum seekers. This paper considers this contradiction the manifestation of a struggle to maintain a balance between the normative ambition to provide protection to those who need it and the aspiration to protect one's own interests by pursuing an asylum policy of a more exclusionary nature. The goal of this paper, therefore, is to place this struggle in a theoretical framework, understand its roots, analyze the different aspects that contribute to it and investigate how the EU handled it during the "refugee crisis" of 2015-2016. It is important to note that with a view to focusing the analysis, the scope of this thesis is limited to EU action during the immediate aftermath of the "refugee crisis" in 2015 and 2016. It therefore does not cover the more recent New Pact on Migration and Asylum and the related legislative proposals which were published in September 2020 and which constitute a new chapter in terms of the CEAS.

Chapter one: Theoretical perspectives: literature and legal background

1.1 Introduction

"In terms of normative power, I broadly agree: we are one of the most important, if not the most important, normative powers in the world."

- Jose Manuel Barroso

The European Union has repeatedly endorsed the idea that it aspires to be a 'normative power', a concept developed by Ian Manners in his landmark paper on the subject[1]. Different authors have indeed found considerable evidence to conclude that the European Union has expressed its intention to act as a normative power in its international relations. The most obvious example is of course the above-mentioned quote by Jose Manuel Barroso, referenced by – amongst others - Manners in one of his follow-up papers on the subject[2]. The quote is also referenced by Forsberg, who uses it as an illustration of the fact that the concept of 'normative power Europe' has been enthusiastically endorsed by important EU representatives[3]. Forsberg also mentions the popularity of the concept of 'normative power Europe' in EU studies, and observes the fact that the European Union in its 2013 Security

[1] Ian Manners, "Normative Power Europe: A Contradiction in Terms?," *JCMS: Journal of Common Market Studies* 40, no. 2 (June 2002): 235–58, https://doi.org/10.1111/1468-5965.00353.
[2] Ian Manners, "The Normative Ethics of the European Union," *International Affairs* 84, no. 1 (January 2008): 59, https://doi.org/10.1111/j.1468-2346.2008.00688.x.
[3] Tuomas Forsberg, "Normative Power Europe, Once Again: A Conceptual Analysis of an Ideal Type," *JCMS: Journal of Common Market Studies* 49, no. 6 (November 2011): 1186, https://doi.org/10.1111/j.1468-5965.2011.02194.x.

Strategy referred to itself as a "force for good"[4]. Finally, Bickerton remarks that the concept of 'normative power Europe' in no longer limited to the academic realm, but "has been taken up by policy-makers across the EU and is regularly part of the political discourse of EU member states"[5].

1.2 Normative power Europe

The concept of 'normative power Europe' was born out of a scholarly quest to better understand the role of the European Union (or, more precisely, its predecessors) in international politics. As mentioned above, the term was first coined by Ian Manners in his landmark paper published in 2002. In this paper, Manners offers a clear overview of the thought processes that led him to develop the concept of a 'normative power Europe'. A starting point for his work is the academic debate that had formed in the 1980s surrounding the role of the European Community in international relations: was the EU a civilian or a military power? Manners first refers to Dûchene's suggestion that Europe represented a 'civilian power', with a focus on economic power over armed force, and uses a quote by former European Commission president Prodi to illustrate that the "status of the EU as a global civilian power is one which is still central to a discussion of its role in international relations"[6]. Manners then refers to Bull's critique of the concept of civilian power, noting that Bull acknowledged the utility of military power and argued that the European Community needed to become stronger in terms of defense and security[7]. Important to note is Manners' argument that Duchêne's concept of civilian power and Bull's military power

[4] Forsberg, 1184.
[5] Chris J. Bickerton, "Legitimacy Through Norms: The Political Limits to Europe's Normative Power," in *Normative Power Europe*, ed. Richard G. Whitman (London: Palgrave Macmillan UK, 2011), 25–42, 27 https://doi.org/10.1057/9780230305601_2.
[6] Manners, "Normative Power Europe," 236.
[7] Manners, 237.

"share more common assumptions than is normally thought"[8]. As Manners explains, Bull and Duchêne both worked within a framework that was built around the centrality of the Westphalian nation-state. Manners believes that after the Cold War, the traditional nation-state was reduced in importance[9]. In this respect, Bickerton notes that Manners' argument was "clearly a product of its time", explaining that, at the time, it was generally considered that global politics was experiencing a shift away from the traditional nation state[10]. To return to Bull and Duchêne, Manners also indicated that both seemed to be focused on the value of empirical, physical power (economic power in the case of Duchêne, military power in the case of Bull)[11]. Manners refers to the end of the Cold War and the collapse of regimes in Eastern Europe to argue that, in order to better grasp the role of Europe in international relations, this focus on empirical force, on capabilities, shared by both Duchêne and Bull, might not be sufficient[12]. Instead, he suggests that the developments of the 1990s show that it might be useful to refocus away from the concepts of civilian and military power, and instead reflect on the power of ideas and norms, on the EU's ability to shape what is considered 'normal' in international affairs[13].

A major advantage of this concept of normative power, as Manners explains, is that it allows for the inclusion of cognitive processes[14]. Manners does not dismiss the characterization of the EU as a civilian or a military power, but rather expresses his view that one needs to go beyond these concepts to include "normative power of an ideational nature, characterized by common principles and a willingness to disregard Westphalian

[8] Manners, 238.
[9] Manners, 238.
[10] Bickerton, "Legitimacy Through Norms.", p 27.
[11] Manners, "Normative Power Europe," 238.
[12] Manners, 238.
[13] Manners, 238.
[14] Manners, 239.

conventions"[15]. This representation of the EU as a normative power seems especially relevant when one is trying to assess the EU's actions in a field that comes with a strong moral dimension. Debates surrounding asylum policy are often rife with moral arguments, spanning issues such as the moral obligation to admit refugees, the degree of assistance provided to them, the acceptability of detention of asylum seekers, and – of course – responsibility-sharing amongst Member States.

1.3 The normative basis of the EU

As for the question what exactly the EU's normative power is based on, Manners identifies five 'core norms' and suggests an additional four 'minor norms' within the large collection of EU laws and policies that form the "broad normative basis" of the EU[16]. The five core norms are peace, liberty, democracy, the rule of law and respect for human rights and fundamental freedoms[17]. As far as these last three - democracy, rule of law and human rights - are concerned, Manners explains the important historical context they have to them, since these norms grew when they were used to distinguish democratic western Europe from communist eastern Europe[18].

Having determined what constitutes the EU's normative basis, the question remains what makes the EU's claim to be a normative power unique. Manners attributes the 'normative difference' of the EU to three main elements: its historical context, its hybrid polity and its political-legal constitution[19]. The first element needs no further explanation.

[15] Manners, 239.
[16] Manners, 242.
[17] Manners, 242.
[18] Manners, 243.
[19] Manners, 240.

The second element, the hybrid polity, refers to the fact that the EU's political form differs from what was considered normal in the international system: Manners refers to King's work to describe the EU's system of governance as "a hybrid of supranational and international forms of governance which transcends Westphalian norms"[20]. This combination of both supranational and international forms of governance can generally be considered one of the most interesting aspects of EU governance. Manners refers to the wording of article 6 of the Treaty on European Union to indicate that in this hybridity more and more emphasis is placed upon the principles that the different Member States have in common, suggesting this is a contributing factor to the EU's normative difference[21]. This emphasis on Member States' common principles is reflected in the wording of the Treaty of Rome as well, with the signatories committing to lay the foundations of an 'ever closer union among the peoples of Europe' (*"une union sans cesse plus étroite entre les peuples européens"*)[22].The use of the phrase 'ever closer union' can indeed be considered a clear indication of the aim to work towards a more supranational entity. On the other hand, the second part of the hybrid polity, the intergovernmental aspect, is still present in the second part of the phrase ("among the peoples of Europe"). This way, the phrase can be considered rather symbolic for the tension between supranational and international aspects that has come to characterize the process of European integration. In practice, the tension between the supranational and international character of the EU often surfaces when decisions need to be made on policies that touch upon sensitive issues, which might pit Member States' national interests against the interests of the EU as a whole. Additionally, tensions might arise between different Member States.

[20] Manners, 240.
[21] Manners, 240.
[22] Traité instituant la Communauté Economique Européenne (Treaty establishing the European Economic Community), 1957, preamble. https://eur-lex.europa.eu/legal-content/FR/TXT/PDF/?uri=CELEX:11957E/TXT&from=EN

The common asylum policy is a good example of such sensitive policy area. However, this tension between the supranational and international character of the Union and tensions between different Member States do not detract from the fact that the EU treaties continue to indicate that cooperation based on principles common to the Member States, as referred to by Manners, continues to be the central foundation of the Union. The third element that Manners identifies as a determining factor for the EU's normative difference is its political-legal constitution. Manners indicates that the EU has largely been built upon a legal order that has been elite-driven end treaty-based, from which it follows that "its constitutional norms represent crucial constitutive factors determining its international identity"[23].

Of the five core norms that are identified by Manners as constituting the broad normative basis of the EU, the one that is most relevant for this paper is respect for human rights and fundamental freedoms. The centrality of this norm as a constitutional principle of the EU is illustrated by Manners when he refers to different EU documents and treaties in which it has been enshrined. Manners also cites different authors who have argued that commitment to human rights and fundamental freedoms is an important characteristic of the EU, one that distinguishes it from other polities. Ultimately, Manners concludes that "[…] we cannot overlook the extent to which the EU is normatively different to other polities with its commitment to individual rights and principles in accordance with the ECHR and the UN"[24]. For the purposes of the hypothesis of this paper, it is worth examining more thoroughly how this commitment to individual rights and principles, as mentioned in the founding treaties, has been embedded in the legal framework of the EU.

1.4 The codification of human rights in the EU

[23] Manners, "Normative Power Europe," 241.
[24] Manners, 241.

In the year 2000, the meeting of the European Council held in Nice, France, saw the adoption of the Charter of Fundamental Rights of the European Union (EUCFR), the main fundamental rights document of the EU. The Charter reaffirms that "the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law"[25]. The Charter is structured around six fundamental values – dignity, freedoms, equality, solidarity, citizen's rights and justice – which form the different titles of the document and which are supplemented by a chapter containing general provisions. The Charter applies whenever EU Member States or institutions apply EU law (EUCFR, art. 51(1)). In his work on normative power Europe, Manners refers to the Charter when he describes the EU's normative basis, calling it an expression of the EU's "desire for greater legitimacy through the fundamental norms that the EU represents"[26]. The Charter has often been called 'EU's version of a bill of rights', but this does not fully reflect the underlying complexities of how the document came to be, nor its rather complex status in the EU's legal framework.

A complete overview of the literature surrounding the history of the EU-level codification of fundamental rights would go far beyond the scope of this paper, but some specific issues need to be addressed. First, the codification of fundamental rights into a dedicated document at EU level is relatively new. The founding treaty of the European Community contained no reference to fundamental rights whatsoever. Later amendments of the treaties have seen the addition of references to the fact that the Member States of the Union are attached to the principles of respect for human rights and fundamental freedoms

[25] Charter of Fundamental Rights of the European Union, 2007, preamble. https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:12012P/TXT
[26] Manners, "Normative Power Europe," 244.

and of the rule of law (eg. Art. 2 TEU). As for concrete fundamental rights protection issues, the first indications of fundamental rights protection on a Community level appeared in cases mostly concerning economic integration, and often involved situations whereby national constitutional courts questioned the primacy of Community[27]. Eventually, in 1999 the European Council acknowledged in its conclusions that "at the present stage of development of the European Union, the fundamental rights applicable at Union level should be consolidated in a Charter and thereby made more evident[28]. The Charter was subsequently proclaimed in 2000, but only acquired the same legal value as the founding treaties with the entry into force of the Lisbon Treaty on December 1st 2009. A second issue that merits mentioning is the fact that the EU Charter is a clear example of the competition between supranational and intergovernmental forces that characterizes every attempt to codify an issue on an EU level. In the 1950s different drafting exercises were made in order to further the process of European integration. The aim was that this exercise would lead to a treaty for a European political community, a project which was eventually abandoned. As Grainne du Burca highlights, the drafts from the 1950s contained a much more ambitious role for the then Community in terms of human rights protection. Most striking is the fact that, as de Burca notes, the drafts of the 1950s considered that the Community would play a large role in monitoring human rights abuses by or within Member States[29]. Over the years, the EU has - in addition to its commitment to fundamental rights in its external action, indeed developed certain mechanisms to monitor Member States' adherence to fundamental

[27] S. Besson, "The European Union and Human Rights: Towards A Post-National Human Rights Institution?," *Human Rights Law Review* 6, no. 2 (July 22, 2006): 343, https://doi.org/10.1093/hrlr/ngl001.
[28] "Cologne European Council 3 - 4 June 1999 Conclusions of the Presidency - European Council," accessed July 11, 2019, http://www.europarl.europa.eu/summits/kol1_en.htm.
[29] Gráinne de Búrca, "The Road Not Taken: The European Union as a Global Human Rights Actor," *The American Journal of International Law* 105, no. 4 (2011): 688, https://doi.org/10.5305/amerjintelaw.105.4.0649.

rights. One example is the so called "article 7 procedure", which refers to the clause in article 7 of the Treaty on European Union which stipulates that the Council can, if strict conditions are fulfilled, suspend the membership rights of a Member State if it establishes a serious and persistent breach of the values referred to in art. 2 TEU (respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights). A second example is the establishment of the European Union Agency for Fundamental Rights, which has as its objective "to provide the relevant institutions, bodies, offices and agencies of the Community and its Member States when implementing Community law with assistance and expertise relating to fundamental rights in order to support them when they take measures or formulate courses of action within their respective spheres of competence to fully respect fundamental rights" Council Regulation (EC) No 168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights[30]. However, when it comes to the codification of fundamental rights on an EU level, in contrast to the drafts of the 1950s, the 2000 EU Charter is formulated so as not to create new obligations for Member States or interfere in Member States' domestic affairs. This is confirmed in the Charter itself, which, in its article 51, states that "[t]his Charter does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties"[31]. A third and last issue surrounding the EU fundamental rights system that merits mentioning here is the relationship between the EU system for fundamental rights protection and the system of the European Convention on Human Rights (ECHR). As was also indicated by Manners in the context of the EU's normative difference[32], the EU has made it clear that it is committed

[30] Council Regulation (EC) No 168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights, art. 2.
[31] EUCFR, art. 51.
[32] Manners, "Normative Power Europe," 241.

to adhering to the ECHR, a commitment which was even enshrined in the TEU[33]. In fact, on top of the fact that adherence to the ECHR is now included in the EU treaty base, it should also be noted that the ECHR already formed part of EU public law, since the Court of Justice of the EU (CJEU) has in the past taken jurisprudence from the European Court of Human Rights (ECtHR) in account[34]. Important to add here, however, is the remark by de Búrca that the aforementioned drafts of the 1950s envisaged a much stronger, formal relationship with the European Court of Human Rights, whereas the current EU framework stresses the autonomy of the EU system[35]. Additionally, in the case of asylum law issues, the relationship between the EU and the ECtHR is not only relevant from a normative point of view, but also from a more practical point of view. Asylum law cases often concern individual fundamental rights issues (protection from torture, the right not to be exposed to inhuman treatment, etc.). These individual issues often end up in front of the ECtHR, since this court is more oriented towards providing individual redress for violations than the EU system.

1.5 Conclusion

This chapter has explored how the EU has expressed its aspiration to be a normative power, a concept first described by Ian Manners. The concept of normative power makes it possible to look beyond the empirical focus inherent to the concepts of civilian or military power, to include normative, ideational aspects, or, in other words, a power's ability to shape what is considered "normal" in international affairs. The inclusion of these ideational aspects makes

[33] Consolidated version of the Treaty on European Union, art. 6.
[34] Eleanor Spaventa, *9. Fundamental Rights in the European Union*, vol. 1 (Oxford University Press, 2017), 247, https://doi.org/10.1093/he/9780198789130.003.0009.
[35] Gráinne de Búrca, "THE ROAD NOT TAKEN," 688.

the concept of normative power Europe an interesting point of departure to examine the EU's actions in the field of asylum policy. Respect for human rights and fundamental freedoms has been identified as one of the core norms that form the normative basis of the EU. Even though the European Union originally had no competence in the field of human rights, the Union has, over the years, developed its path as a human rights actor. This journey culminated in the adoption of the EU Charter of Fundamental Rights, which gained full legal effect after the entry into force of the Lisbon Treaty in 2009. This progress has, however, also been characterized by the tension between Member States' desire for sovereign control over their actions and the priorities of the EU as a supranational actor, as well as by tensions between different Member States.

Chapter 2: A balancing act

2.1 Introduction

As was mentioned earlier, the research question of this paper was developed based on the observation that the EU asylum acquis reflects a tension between two different views of the asylum seeker: the 'deserving' asylum seeker as someone who needs help and is deserving of assistance, as opposed to the 'undeserving' asylum seeker who is not actually in need of protection but aims to use the system of protection for his or her own benefit. This second chapter explores this dual categorization of asylum seekers, aiming to indicate how a dual categorization of asylum seekers in general discourse corresponds to a tension between inclusive and exclusionary measures on the policy or legislative level. It then explores how the categorization of asylum seekers can be employed as a strategic tool to justify asylum policy measures.

2.2 The categorization of asylum seekers: 'deserving' vs. 'undeserving' individuals

It is important to remember that the dichotomy between 'deserving' and 'undeserving' refugees in the debate on asylum policy is not a phenomenon that is limited to policy, legislation and political debate. Rather, it is a reflection of a categorization that occurs very frequently in discourse in general when asylum issues are discussed. It is most clearly reflected in the terminology used to refer to persons requesting international protection. Notwithstanding the individual's legal status, terms used to describe these individuals in general discourse will vary from 'refugees', over 'asylum seekers' to 'immigrants', often accompanied by an adjective adding a value judgement (such as 'real', 'bogus', 'legal', 'illegal', …), whereby each term comes with a certain connotation. The use of these terms

allows the users to attain certain discursive goals, such as expressing their support for '(real) refugees', while expressing their disagreement with measures supporting '(bogus) asylum seekers' or '(illegal) immigrants'. In this particular case, the use of terminology enables the speakers to present themselves as 'decent' people who care about refugee issues while simultaneously expressing support for policies that can have a limiting effect on asylum seekers' rights[36]. Important to note is that, even in general day-to-day discourse, this use of terminology to categorize asylum seekers is far from straightforward and the distinctions between categories are often blurred[37].

Beyond day-to-day conversations, terminology is often used strategically in general discourse to shape the public debate. Terminology use in media reports about the arrival of asylum seekers will vary heavily and will greatly influence the narrative, possibly leading to completely different accounts of the events: one article will describe asylum seekers as victims of horrendous events who have gone through a dangerous journey to secure the protection of the host country, whereas another article might describe arriving asylum seekers as people who are not actually in any danger but are looking for a short-cut to enjoy the economic benefits of migration. The representation in the media or by high-level politicians of asylum seekers can greatly influence public opinion and has large implications for the debate on how asylum seekers should be treated.[38] Presenting asylum seekers as 'genuine' refugees who are deserving of protection enables a climate in which people are more likely to approve of policy measures that are more lenient towards asylum seekers,

[36] Steve Kirkwood et al., *The Language of Asylum* (London: Palgrave Macmillan UK, 2016), 78, https://doi.org/10.1007/978-1-137-46116-2.
[37] Kirkwood et al., 83.
[38] Simon Goodman, Ala Sirriyeh, and Simon McMahon, "The Evolving (Re)Categorisations of Refugees throughout the 'Refugee/Migrant Crisis,'" *Journal of Community & Applied Social Psychology* 27, no. 2 (March 2017): 106, https://doi.org/10.1002/casp.2302.

whereas presenting them as potential abusers might, for example, increase calls for stricter border control. In other words, the categorization of asylum seekers goes beyond simply allocating people to a discursive category: the descriptions can be used to justify social practices and policy[39]. Important to note is that here too the categories are often not exclusive and the differences between them can be blurred[40]. Moreover, the category of 'threat' can cover multiple aspects: an economic threat (refugees represented as a burden to the social security system of a country), a threat in terms of security (refugees as potential terrorists, for example) or even in terms of identity (refugees threatening the composition of the population).

2.3 Inclusive vs exclusionary policies in international and EU asylum law

On a policy level the discursive categorization of asylum seekers into 'deserving' and 'undeserving' categories translates into the ever-present tension between inclusive and exclusionary policy elements. On the one hand states strive to live up to their legal and moral ambitions to provide protection to those who need it. This results in inclusive policy elements: based on the assumption that the individuals requesting international protection are in genuine need of protection (in other words: that they are 'deserving'), these measures are focused on safeguarding these individuals' (fundamental) rights. On the other hand, states strive to protect their national economic and political interests, especially against individuals who are deemed 'undeserving', resulting in protectionist, exclusionary policy elements. This tension between the normative aspirations of inclusive policy and the perceived need to safeguard own interests with exclusionary policy can, additionally, also be

[39] Kirkwood et al., *The Language of Asylum*, 14.
[40] Daria Davitti, "Biopolitical Borders and the State of Exception in the European Migration 'Crisis,'" *European Journal of International Law* 29, no. 4 (December 31, 2018): 1179, https://doi.org/10.1093/ejil/chy065.

considered a reflection of the tension that is at play whenever states agree to international legal commitments and need to find a balance between their own national interests and the international obligations they agree to.

In practice, this push-and-pull effect between inclusive and exclusionary aspirations can be observed in instruments of international and European refugee law. The inclusive, protective ambitions of the 1951 Convention Relating to the Status of Refugees[41] (RC) are clear: it aims to provide "the most comprehensive codification of the rights of refugees at the international level"[42], in order to form a framework that allows States to provide international protection to those who need it. This objective is underpinned by, amongst others, the principles of non-discrimination, non-penalization and non-refoulement[43], which are a clear expression of the protective ambition of the Convention. A first indication of attempts by States to counterbalance the protective ambition of the RC with more exclusionary elements can be found in the scope of the legal instrument. First, it needs to be noted that when the RC was first adopted in 1951, it contained major limitations in terms of both temporal and geographical scope. The protection offered by the Convention was only applicable to persons who had become refugees "as a result of events occurring before 1 January 1951" and States had the option to interpret this as events "occurring in Europe before 1 January 1951" (RC, art. 1). The limitation of the temporal and geographical scope of the Convention was later abolished by the 1967 Protocol, although for example Turkey has retained the geographical restriction. When assessing the scope of the RC, it should also be taken into account that the Conference of Plenipotentiaries clearly states in its resolution

[41] UNHCR, "Convention and Protocol Relating to the Status of Refugees - with an Introductory Note by the Office of the United Nations High Commissioner for Refugees," December 2010, https://www.unhcr.org/3b66c2aa10.
[42] UNHCR, 3.
[43] UNHCR, 3.

with respect to the draft Protocol that it hopes that the Convention will "have value as an example exceeding its contractual scope"[44]. Secondly, also the personal scope of the Convention reflects the quest to balance protective ambitions with States' desire to protect their national systems against 'undeserving' individuals. This can clearly be observed in article 1 of the RC. This article lays down the definition of a refugee, which includes strict requirements a person has to meet in order to enjoy the protections offered by the Convention. Moreover, the first article of the Convention also includes the different grounds for cessation of refugee status, provisions concerning non-application of the Convention, and specific grounds for exclusion. Another indication of attempts to counterbalance the protective, inclusive aspirations of this legal instrument can be found in the different degree of protection that the RC prescribes for different categories of rights of refugees. For some rights, States commit to extend to refugees the same treatment as they would to their own nationals. This is true for, amongst others, religious freedom and education, elementary education and access to the courts (including legal assistance). For the right to employment and membership of trade unions, States commit to accord to refugees the "most favorable treatment accorded to nationals of a foreign country, in the same circumstances". For housing, higher education and the right to own property States are obliged to accord to refugees treatment "as favorable as possible, and, in any event, not less favorable than that accorded to aliens". A clear example of the difficulty States encountered while trying to balance the different degrees of protection can be found in the travaux préparatoires concerning the chapter on labor legislation and social security[45], which shows how States struggled to determine who would be responsible for the payment of, for example, pensions

[44] UNHCR, 11.

[45] UNHCR, "The Refugee Convention, 1951: The Travaux Préparatoires Analysed with a Commentary by Dr. Paul Weis," 1990, 125, https://www.refworld.org/docid/53e1dd114.html.

or death benefits of recognized refugees. A last, and perhaps the most extreme, example of the push-and-pull dynamic between inclusive and exclusionary elements in the RC can be found in its article 33 on non-refoulement. This article includes in its first paragraph the well-known strict prohibition to "expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened […]", followed, in its second paragraph, by certain exceptions related to national security. Whereas it has been accepted by the international community that the principle of non-refoulement is considered jus cogens, it has been argued that States can rely on the exceptions of the second paragraph to enact anti-terrorism policies which can have a detrimental effect on the protection of asylum seekers[46].

The same dynamic between inclusive and exclusionary elements can be observed in EU asylum acquis. In fact, one could say that the dynamic is even more pronounced in the EU acquis than in the RC. This relates to the fact that the EU asylum acquis is much more elaborate than the RC, since contrary to the RC the EU acquis contains provisions on how the asylum procedures are to be implemented in practice by the Member States. Therefore the EU acquis provides many more opportunities for the push-and-pull-effect between normative, inclusive ambitions and exclusionary ambitions to manifest itself. A clear example is the issue of the detention of asylum seekers, with the provisions on detention in the EU Reception Conditions Directive[47] (EU RCD) reflecting the attempt to balance applicants' fundamental rights with Member States desire to contain the movement of applicants on

[46] Alice Farmer, "Non-Refoulment and Jus Cogens: Limiting Anti-Terror Measures That Threaten Refugee Protection," *Georgetown Immigration Law Journal* 23, no. 1 (2008): 4.
[47] The European Parliament and the Council of the European Union, "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," June 26, 2013, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32013L0033.

their territory. Other examples of the inclusive-exclusionary dynamic in the EU acquis include the provisions on health care ("at least emergency care and essential treatment of illnesses and of serious mental disorders" – RCD, art. 19) and access to the labor market (access no later than nine months after lodging the application for international protection, but a possibility for Member States to prioritize EU citizens – RCD, art. 15). An important characteristic of the EU RCD, however, is that it contains minimum standards, allowing Member States to provide for more favorable (i.e. inclusive) provisions for applicants in their national legislation.

2.4 The categorization of asylum seekers as a strategic tool to justify asylum policies

Earlier in this chapter it was established that the depiction of asylum seekers as 'deserving' or 'undeserving' individuals in discourse can influence their treatment and that the classification of asylum seekers in different discursive categories can be used by different actors to steer public opinion and influence the debate on how asylum seekers should be treated. One way a specific classification of asylum seekers is used strategically to justify asylum policy measures is the depiction of asylum seekers as a threat. This phenomenon has been widely discussed in the framework of securitization. Using the security narrative, a securitizing actor will depict a phenomenon as an existential threat to society or the State, and will call for extraordinary measures to address this threat[48]. These measures can be drastic or atypical measures which are aimed first and foremost at addressing the security concerns[49]. Asylum seekers will thus be depicted as potential security risks, often as potential

[48] Boldizsar Nagy, "Hungarian Asylum Law and Policy in 2015-2016: Securitization Instead of Loyal Cooperation," *German Law Journal* 17, no. 6 (November 2016): 1041.
[49] Daniel Ghezelbash et al., "Securitization of Search and Rescue at Sea: The Response to Boat Migration in the Mediterranean and Offshore Australia," *International and Comparative Law Quarterly* 67, no. 2 (April 2018): 331, https://doi.org/10.1017/S0020589317000562.

criminals or even terrorists, in other words: as people 'undeserving' of protection. More importantly, they will be opposed to a homogenized notion of citizens of a certain country (or continent) who need to be protected against this threat[50]. The threat posed by the asylum seekers, and thus the reason for their 'undeserving' nature, does not necessarily have to be strictly related to national security or criminal behavior: asylum seekers can be depicted as a threat to, for example, a country's social security system or its religious composition as well. Hence the security narrative can be related to a wider negative politicization whereby asylum seekers are depicted as challenging the protection of a country's welfare provisions and national identity[51]. Irrespective of the specific nature of the threat, this strategic depiction of asylum seekers results in their classification as 'undeserving' individuals, against whom (extraordinary) measures are justified.

More recently, however, and especially in the EU, this securitized rhetoric surrounding asylum seekers has evolved[52] towards a different narrative. Instead of being depicted as potential criminals or terrorists, asylum seekers are now being portrayed as victims of a humanitarian crisis who are at risk of suffering human rights abuses[53]. In this human rights-centered narrative arriving asylum seekers are for example portrayed as individuals who have embarked on a dangerous journey and who run the risk of falling victim to smugglers. This portrayal of asylum seekers as victims is then used to justify

[50] Nina Perkowski, "Deaths, Interventions, Humanitarianism and Human Rights in the Mediterranean 'Migration Crisis,'" *Mediterranean Politics* 21, no. 2 (May 3, 2016): 332, https://doi.org/10.1080/13629395.2016.1145827.
[51] Jef Huysmans, "The European Union and the Securitization of Migration," *JCMS: Journal of Common Market Studies* 38, no. 5 (December 2000): 751, https://doi.org/10.1111/1468-5965.00263.
[52] Another perspective could be that the security discourse has not necessarily evolved towards humanitarian framing, but that the security and humanitarian/human rights discourses now coexist and are used simultaneously, as argued by, among others, Perkowski (see footnote 51).
[53] Violeta Moreno-Lax, "The EU Humanitarian Border and the Securitization of Human Rights: The 'Rescue-Through-Interdiction/Rescue-Without-Protection' Paradigm," *JCMS: Journal of Common Market Studies* 56, no. 1 (2018): 119, https://doi.org/10.1111/jcms.12651.

extraordinary measures to protect the asylum seekers against human rights abuses. However, the measures that are introduced to achieve this life-saving protection of asylum seekers are in practice often of a protectionist, exclusionary nature and will for example include measures aimed at the further externalization of migration controls (e.g. by the use of the 'safe third country' principle). Thus the use of the humanitarian narrative has been argued to amount to "humanitarian posturing"[54]. In the humanitarian narrative, the relationship between the victims (the asylum seekers) and their 'saviors' is of a hierarchical nature[55]. Perhaps almost ironically, the extraordinary measures justified by the humanitarian discourse are often framed as an exercise in capacity building for the countries of origin[56]. Interestingly, in the humanitarian narrative asylum seekers are categorized as 'deserving' individuals (as opposed to the undeserving 'security threats' in the security narrative). Here it is relevant to note that at times the categorization of asylum seekers goes beyond the dual categories of deserving and undeserving asylum seekers. Organization into different sub-categories within the 'deserving' category can be used to rank refugees according to their "perceived deservedness"[57]. Notwithstanding this possibility of further sub-classification of asylum seekers, in the framework of the humanitarian discourse it is in fact asylum seekers' 'deserving' nature that leads to the justification of extraordinary measures. Therefore, the humanitarian narrative and its portrayal of asylum seekers as potential victims of a humanitarian crisis allows policy-makers to reconcile, at least rhetorically, the so-called

[54] Davitti, "Biopolitical Borders and the State of Exception in the European Migration 'Crisis,'" 1195.
[55] Perkowski, "Deaths, Interventions, Humanitarianism and Human Rights in the Mediterranean 'Migration Crisis,'" 332.
[56] Bill Frelick, Ian M. Kysel, and Jennifer Podkul, "The Impact of Externalization of Migration Controls on the Rights of Asylum Seekers and Other Migrants," *Journal on Migration and Human Security* 4, no. 4 (December 2016): 194, https://doi.org/10.1177/233150241600400402.
[57] Anne Neylon, "Producing Precariousness: 'Safety Elsewhere' and the Removal of International Protection Status under EU Law," *European Journal of Migration and Law* 21, no. 1 (February 26, 2019): 5, https://doi.org/10.1163/15718166-12340040.

protection of asylum seekers with measures aimed at keeping asylum seekers at bay. It is as such an excellent strategy to manage the struggle between normative aspirations and political pressure for more exclusionary asylum policy measures.

2.5 Conclusion

This chapter has explored how the dichotomy between 'deserving' and 'undeserving' refugees in the debate on asylum policy has its roots in general discourse. In addition to enabling speakers to reach certain discursive goals when discussing asylum policy issues, this categorization of asylum seekers as either 'deserving' or 'undeserving' categories can be used strategically to shape the debate on how asylum seekers should be treated. On the policy/legislative level the dual categorization of asylum seekers translates into the ever-present tension between inclusive and exclusionary policy elements, with States striving to adhere to their legal and moral aspirations and at the same time protect their national economic and political interests. Finally, this chapter has explored how the categorization of asylum seekers can be used to justify certain asylum policy measures. Whereas in the framework of the security narrative the categorization of asylum seekers as 'undeserving security threats' is used to justify extraordinary, and mostly exclusionary, asylum policy measures, the humanitarian narrative uses the depiction of asylum seekers as 'deserving victims' to achieve the same goal. This makes the humanitarian narrative an excellent tactic to handle the struggle between legal and moral aspirations of a normative nature on the one hand and political pressure for more exclusionary asylum policy measures on the other hand.

Chapter 3: Asylum policy and fundamental rights

3.1 Introduction

In the first chapter of this paper it was established that the EU has expressed its intention to act as a normative power. It was also determined that respect for human rights and fundamental freedoms is one of the core norms that form the 'broad normative basis' of the EU as described by Manners[58]. The aim of this chapter is to explore what respect for fundamental rights means in the context of asylum policy. This chapter explores the impact asylum policy can have on asylum seekers' fundamental rights. Ultimately, it tries to, at least partially, formulate an answer to the question "what would a normative asylum policy look like?".

In view of the topic and scope of this paper, this chapter's exploration of the effect of asylum policy on asylum seekers' fundamental rights will be based on the EU's Charter of Fundamental Rights[59] (EU CFR). Unsurprisingly, a brief glance at the different articles of the EU CFR is sufficient to understand that many, if not all, of these rights could be impacted by asylum policy: access to education, respect for family life, right to an affective remedy and a fair trial, etc. The goal of this chapter, however, is to address those fundamental rights which are impacted specifically by asylum policy choices.

[58] Manners, "Normative Power Europe," 242.
[59] European Union, "Charter of Fundamental Rights of the European Union," October 26, 2012, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12012P%2FTXT.

3.2 Prohibition of torture and inhuman or degrading treatment or punishment (art. 4 EU CFR)[60]

The first fundamental right that is often cited in the framework of asylum issues is the prohibition of inhuman or degrading treatment. This right is contained in article 4 of the EU CFR, which states that "no one shall be subjected to torture or to inhuman or degrading treatment or punishment". The explanation[61] for article 4 EU CFR is limited to a reference to the European Convention on Human Rights (ECHR), stating that article 4 EU CFR corresponds to the right guaranteed by article 3 of the ECHR and that it has the same meaning and the same scope as the ECHR Article. Therefore, in order to determine the scope and substance of the protection provided by article 4 EU CFR, it is useful to look at the scope and meaning of article 3 ECHR. With respect to the scope of this right there seems to be agreement in the legal community that the prohibition of torture and inhuman or degrading treatment is of an absolute character, allowing no exceptions[62]. Concerning the substance of this right, legal scholars have relied on case law from the European Court of Human Rights (ECtHR) to define the treatment that is prohibited under article 3 ECHR. Often the *Ireland v. the United Kingdom* case is mentioned, in which the ECtHR stated that the ill-treatment forbidden under article 3 "must attain a minimum level of severity if it is to fall within the scope of Article 3" [63]. In their handbook on European migration law, Boeles e.a. conclude that the ill-treatment must be of a minimum level of severity and that individual

[60] This section and part of section 3.3 heavily rely on a term paper I submitted for my EU Human Rights Law and Policy class in the winter term of the academic year 2018-2019 at CEU.
[61] European Union, "Explanations Relating to the Charter of Fundamental Rights," December 14, 2007, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32007X1214%2801%29.
[62] This is for example stated by the European Court of Human Rights (ECtHR) in its judgement in the case of M.S.S. v. Belgium and Greece.
[63] *Ireland v. The United Kingdom*, 5310/71, Council of Europe: European Court of Human Rights, 13 December 1977.

circumstances need to be taken into account[64]. Additionally, they determine that the ECtHR has decided that, apart from harm in the physical sense, other types of ill-treatment are possibly contained in the prohibition of ill-treatment resulting from article 3 ECHR: psychological harm, discrimination and socio-economic harm are cited as examples of different forms of harm that could, in certain cases, be considered a violation of article 3 ECHR[65].

It seems clear that the potential impact of asylum policy measures on this fundamental right is quite large, since asylum legislation will prescribe the procedures and reception conditions asylum seekers encounter when they arrive and lodge their application. A normative asylum policy would, therefore, be one that manages to assure that any individual applying for international protection is protected against ill-treatment falling under article 3 ECHR/article 4 EU CFR throughout the entire procedure. In the context of asylum law it is also of great importance to stress the absolute character of protection offered by article 4 EU CFR. This is particularly relevant in situations in which countries experience a large influx of migrants and asylum seekers. In *M.S.S. v. Belgium and Greece* the ECtHR expressed its understanding for the difficulties the influx created in the receiving country (Greece), but insisted that "having regard to the absolute character of Article 3, that cannot absolve a State of its obligations under that provision" [66]. Therefore, one can argue that decision-makers pursuing a normative asylum policy will strictly adhere to the absolute

[64] P. Boeles et al., *European Migration Law*, 2nd edition, Ius Communitatis, volume 3 (Cambridge, United Kingdom ; Portland, OR: Intersentia, 2014), 365.
[65] Boeles et al., 365.
[66] *M.S.S. v. Belgium and Greece*, Application no. 30696/09, Council of Europe: European Court of Human Rights, 21 January 2011.

character of the prohibition of ill-treatment under article 4 EU CFR and will not use a 'crisis' situation as a pretext to derogate from it in their treatment of asylum seekers.

3.3 Non-refoulement and protection in the event of removal, expulsion or extradition (art. 19 EU CFR)

In the context of the prohibition of the ill-treatment falling under article 4 EU CFR described in the section above an additional issue arises in the form of indirect exposure to the prohibited ill-treatment, which of course relates to the principle of non-refoulement. This principle, the notion that no one may be returned to a territory where their life or freedom would be threatened on account of a GC ground, is "solidly grounded in international human rights and refugee law, in treaty, in doctrine, and in customary international law"[67]. In an asylum policy context the indirect exposure would occur when a State removes asylum seekers from its territory and sends them back to a different country. This issue featured rather prominently in the *M.S.S. v. Belgium and Greece* case, in which it was established that Belgium had violated article 3 ECHR by sending an applicant back to Greece, where he was exposed to treatment prohibited by article 3 ECHR. Whereas the ECtHR bases itself on the application of article 3 ECHR for its handling of these cases of indirect exposure to ill-treatment, the EU CFR contains a separate provision on non-refoulement. Article 19 EU CFR contains in its first paragraph a prohibition of collective expulsions, and in its second paragraph it states that "no one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment".

[67] G. S. Goodwin-Gill, "The Right to Seek Asylum: Interception at Sea and the Principle of Non-Refoulement," *International Journal of Refugee Law* 23, no. 3 (October 1, 2011): 444, https://doi.org/10.1093/ijrl/eer018.

The potential impact of asylum policy on the right guaranteed by article 19 EU CFR needs to explanation. What should be stressed, however, is the fact that even if the asylum legislation includes procedural guarantees to protect applicants against removal to a country where they would be exposed to treatment prohibited according to article 4 EU CFR, extraordinary asylum policy measures can result in State action that amounts to refoulement in practice. It follows that a normative asylum policy would first of all guarantee a thorough individual examination of applicants' claims in order to prevent applicants being sent back to a country where they might be exposed to the prohibited ill-treatment. This also includes guarantees to make sure that if applicants are returned to a different country to continue their application (e.g. in the context of a Dublin decision), this country's asylum system also offers sufficient guarantees to assure adherence to article 19 EU CFR. However, a normative asylum policy would not be limited to these procedural, legal guarantees, but would also include safeguards to ensure that State action in practice does not enable refoulement. This is especially relevant in the case of extraordinary border control measures, as will be discussed later in this chapter.

3.4 The right to liberty and security of person (art. 6 EU CFR)

Article 6 of the EU CFR states that "everyone has the right to liberty and security of person". It is clear that asylum policy can have a significant impact on this right, since detention of asylum seekers is a rather common occurrence in many destination countries. The practical implementation of detention and its role in the asylum procedure varies considerably depending on the country: from mandatory detention in offshore centers during the entire procedure to limited stays in closed reception centers while an applicant's identity is being confirmed. The Explanations relating to the EU CFR clarify that the rights

ensured by article 6 EU CFR correspond to the rights guaranteed by Article 5 of the ECHR[68]. Article 5 ECHR states that "no one shall be deprived of his liberty", but adds a number of exceptions, one of which is "the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition." At first glance this exception might be applicable to asylum seekers who enter the country. However, the RC clearly states in its article 31 that asylum seekers' illegal entry or presence in a country is not a ground for penalties provided that the asylum seekers "present themselves without delay to the authorities and show good cause for their illegal entry or presence". This suggests that when an asylum seeker has entered a country's territory in order to seek asylum, his entry and presence cannot be considered a ground for detention as allowed by the exception contained in article 5 ECHR/article 6 EU CFR as long as the asylum seeker fulfils the criteria mentioned above. The detention of asylum seekers has been the subject of much debate. This is not surprising, since placing a person in detention touches upon what is probably the most important fundamental freedom of individuals. The controversy might, however, also be related to the fact that the detention of asylum seekers is perhaps the most straightforward manifestation of the clash between the perception of the asylum seeker as a 'deserving' victim versus an 'undeserving' criminal.

Determining what a normative asylum policy would look like in terms of detention is not an easy task. Considering the huge impact of the deprivation of liberty on a person and considering the abovementioned provision of article 31 RC, it seems clear that in a normative asylum policy there is no room for detention used as a deterrent or as

[68] European Union, "Explanations Relating to the Charter of Fundamental Rights."

punishment. However, the second paragraph of article 31 RC provides an opening for States to detain asylum seekers "until their status in the country is regularized or they obtain admission into another country", suggesting that the international community has come to the agreement that some restrictions of the freedom of movement of asylum seekers in the framework of the asylum procedure might be necessary. The best way to decide how a normative asylum policy would handle the issue of detention might be to rely on the 2012 UNHCR document on the matter[69]. Most importantly, it considers detention an exceptional measure that can only be justified for a legitimate purpose (public order, public health, national security – guideline 4.1). It also stresses the principles of necessity and proportionality (guideline 4.2) and the need to ensure that any decision surrounding detention is based on an assessment of an asylum seeker's individual circumstances (guideline 9). In short, it can thus be concluded that in a normative asylum policy detention must not be used as a deterrent or punishment, and when it is used for procedural reasons, the UNHCR guidelines should be strictly adhered to. Here it is important to remark that this means that other aspects of the asylum procedure will need to be regulated well enough to allow swift proceedings in order to reduce the need for detention to an absolute minimum.

3.5 The right to asylum (art. 18 EU CFR) and the externalization of asylum policy

Article 18 of the EU CFR states that "the right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union (hereinafter

[69] UNHCR, "Guidelines on the Applicable Criteria and Standards Relating to the Detention of Asylum-Seekers and Alternatives to Detention," 2012, https://www.refworld.org/docid/503489533b8.html.

referred to as 'the Treaties')". The description of the potential impact of asylum policy on fundamental rights in this chapter so far has been based on the assumption that asylum seekers make it to the country of destination and are able to start an application for international protection. In reality, however, asylum seekers may not even make it to the destination country. Chapter 2 of this paper outlined two strategic narratives that can be used to justify (extraordinary) asylum policy measures: the security narrative and the humanitarian narrative. More often than not these narratives are used to justify measures which in practice amount to externalization of migration controls with the aim to prevent individuals, including potential asylum seekers, from reaching the destination country and lodging an application. This externalization of migration controls has been defined as "extraterritorial state actions to prevent migrants, including asylum seekers, from entering the legal jurisdictions or territories of destination countries or regions or making them legally inadmissible without individually considering the merits of their protection claims"[70]. Since the asylum seekers never reach the country of destination, they never come under the jurisdiction of the States of destination, which limits these States' legal obligations, and thus limits asylum seekers' right to seek asylum[71].

To determine what a normative asylum policy would look like, this issue might be a crucial element. It has been established earlier that a normative asylum policy would contain sufficient guarantees to safeguard applicants' fundamental rights, but these guarantees are of no use if applicants are prevented from ever coming under the jurisdiction of the destination country. A normative asylum policy would, therefore, first and foremost be a policy that

[70] Frelick, Kysel, and Podkul, "The Impact of Externalization of Migration Controls on the Rights of Asylum Seekers and Other Migrants," 193.
[71] Frelick, Kysel, and Podkul, 197.

does not use the security or humanitarian narrative as a pretext to justify measures that prevent asylum seekers from exercising their right to seek asylum.

3.6 Conclusion

The aim of this chapter was to examine how certain fundamental rights of asylum seekers can be impacted by asylum policy measures, and, consequently, to determine what a normative asylum policy might look like. Firstly, a normative asylum policy would include sufficient guarantees in terms of the protection against ill-treatment as defined by article 4 of the EU CFR, in terms of non-refoulement as well as in terms of detention. A common denominator of these guarantees is that they require the individual circumstances of asylum seekers to be taken into account. However, none of the legal safeguards can be successful as the basis for a normative policy if asylum seekers are prevented from reaching the destination country and coming under the jurisdiction of the host State. Therefore, the starting point of any asylum policy with normative aspirations should be the safeguarding of the right to seek asylum. This also implies not using the security or humanitarian narrative as a pretext to justify measures that prevent asylum seekers from reaching the destination country.

Chapter 4: The EU 'refugee crisis'

4.1 Introduction

Beginning in 2014 the EU was confronted with what has been called the biggest 'refugee crisis' or 'migration crisis' in Europe since World War II. In both 2015 and 2016 more than 1 million asylum claims were submitted in the EU by third country nationals. Migration to the EU came to the forefront of the political landscape at both Member State and EU level. EU action to address the increased influx took the form of a complex combination of measures aimed at both the internal and external dimension of the crisis. In 2015 the European Commission published its European Agenda on Migration[72] , which outlined plans for both immediate action to address the crisis and plans for stronger migration management in general. Considering the scale of the crisis and the volume of arrivals, the first measures focused on immediate action to alleviate internal pressure. Frontex' budget was increased to allow for more joint operations to support Member States under pressure. A 'hotspot system' was created to assist Member States dealing with the highest numbers of arrivals. A temporary emergency relocation system was envisaged to relieve pressure from Italy and Greece and relocate arriving refugees to other Member States. These internally-oriented measures were accompanied by initiatives aimed at the external aspect of migration management. A proposal was made to develop Frontex into a European Border and Coast Guard Agency. The Emergency Trust Fund for Africa was set up "to deliver an integrated and coordinated response to the diverse causes of instability, irregular migration and forced

[72] European 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," May 13, 2015, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52015DC0240.

displacement"[73]. The Commission made a proposal to agree on a common list of safe countries of origin. Most importantly, EU States negotiated an agreement with Turkey aimed at stopping arrivals from Turkey to the EU. The resulting EU-Turkey Statement included the possibility for irregular migrants to be returned to Turkey from Greece, a resettlement scheme for Syrian refugees arriving through Turkey and a commitment from Turkey to avoid the creation of new migration pathways from Turkey to the EU.

In parallel with the immediate actions to alleviate the crisis, the European Commission aimed to improve the EU's common approach of asylum and migration issues in general. In light of this, in 2016, two packages of legislative proposals to reform the CEAS were published, including proposals to reform the Dublin system, amend Eurodac, replace the Asylum Procedures Directive and the Qualification Directive with regulations and amend the Reception Conditions Directive. However, progress with many of these legislative files has been painstakingly slow.

Unsurprisingly, the EU's handling of the crisis has been the subject of much debate and careful attention has been directed at what has, at best, been perceived as a 'chaotic' response to the events unfolding since 2014. Before proceeding to a more in-depth analysis of this EU response in order to examine the question that forms the topic of this thesis, two important issues need to be addressed: the designation of the 'EU refugee crisis' and, related to this, the history of the CEAS.

[73] Ivan CHAER, "Trust Funds," Text, International Cooperation and Development - European Commission, September 23, 2019, https://ec.europa.eu/international-partnerships/trust-funds_en.

4.2 What's in a name: 'refugee crisis', 'CEAS crisis' or 'organized hypocrisy'?

One issue that is often brought up in the academic literature concerning the EU refugee crisis concerns the designation 'refugee crisis' itself. The second chapter of this paper analyzed the use of terminology for discursive purposes and already addressed the choice of terminology to designate applicants for international protection ('deserving refugees' vs 'undeserving illegal immigrants'). When discussing the phrase 'refugee crisis', however, an additional aspect comes into play. Whereas the phrase 'refugee crisis' might seem the logical choice to refer to the events described in the introduction above, it is important to remark that 'refugee crisis' is logically interpreted as 'a crisis caused by refugees'. Niemann and Zaun address this point in the introduction to their assessment of the crisis. They argue that whereas the increasing number of arrivals is often perceived as having been the main cause for the EU crisis, the influx of arrivals was in fact only a trigger, uncovering "persistent dysfunctionalities and shortcomings" of the CEAS[74]. They suggest "crisis of the CEAS" would be a more accurate term[75]. In their paper aimed at explaining the different outcomes of two recent EU crises (the euro crisis and the refugee crisis), Börzel and Risse[76] use the phrase "Schengen crisis", based on the fact that European governments introduced national measures to tighten border controls because a working European solution to deal with the influx of refugees was not available due to a "governance failure". Lavenex, too, refers to the refugee crisis as a "governance crisis of the CEAS" and describes how, after the re-

[74] Arne Niemann and Natascha Zaun, "EU Refugee Policies and Politics in Times of Crisis: Theoretical and Empirical Perspectives: EU Refugee Policies in Times of Crisis," *JCMS: Journal of Common Market Studies* 56, no. 1 (January 2018): 3, https://doi.org/10.1111/jcms.12650.
[75] Niemann and Zaun, 3.
[76] Tanja A. Börzel and Thomas Risse, "From the Euro to the Schengen Crises: European Integration Theories, Politicization, and Identity Politics," *Journal of European Public Policy* 25, no. 1 (January 2, 2018): 90, https://doi.org/10.1080/13501763.2017.1310281.

introduction of internal border controls as a reaction to the refugee influx, the 'Schengen crisis' came to supplement the 'CEAS crisis'[77].

It is clear that many scholars agree that the so-called 'refugee crisis' was therefore a manifestation of a failure of the CEAS. Different authors have addressed the origin and substance of this failure. Lavenex, for one, looks to organizational sociology to explain the crisis and refers to what within organizational theory is called "organized hypocrisy": a mismatch between what an organization says it does and what it actually does[78]. She explains how this hypocrisy results from "complex organizations' struggle to uphold expected norms and values on the one hand while responding to the priorities and contingencies expressed by their technical environment", which eventually results in "incoherent action"[79].

Thielemann uses a public goods approach to understand the unequal distribution of the burden between different EU Member States during the CEAS crisis. He argues that public goods theory can help explain why some countries voluntarily take on more responsibility during the crisis: States do this since they realize that free-riding and burden-shifting in the framework of asylum policy can "undermine the provision of public goods, such as EU internal security"[80]. Nedergaard uses Beetham's framework on power and legitimacy to argue that the refugee crisis was, in fact, a legitimacy crisis for the EU, since the EU did not handle the crisis in accordance with its own legislation[81].

[77] Sandra Lavenex, "'Failing Forward' Towards Which Europe? Organized Hypocrisy in the Common European Asylum System," *JCMS: Journal of Common Market Studies* 56, no. 5 (2018): 1196, https://doi.org/10.1111/jcms.12739.
[78] Lavenex, 1196.
[79] Lavenex, 1200.
[80] Eiko Thielemann, "Why Refugee Burden-Sharing Initiatives Fail: Public Goods, Free-Riding and Symbolic Solidarity in the EU," *JCMS: Journal of Common Market Studies* 56, no. 1 (January 2018): 64, https://doi.org/10.1111/jcms.12662.
[81] Peter Nedergaard, "Borders and the EU Legitimacy Problem: The 2015–16 European Refugee Crisis," *Policy Studies* 40, no. 1 (January 2, 2019): 82, https://doi.org/10.1080/01442872.2018.1533112.

4.3 Historical aspect

One last aspect that needs to be taken into account when examining the origins and substance of the 2015-2016 crisis is the history of the CEAS. A full overview of the history of the common European asylum policy would go far beyond the scope of this paper, but two important aspects warrant mention. First, in the European context migration and asylum issues were traditionally discussed in intergovernmental fora, but were not formally part of the European integration process[82]. Even after the entry into force of the Treaty on European Union in 1992, migration and asylum issues remained topics of intergovernmental decision-making (as part of the Justice and Home Affairs pillar). It took until the entry into force of the Treaty of Amsterdam in 1999 for asylum and migration issues to become part of the community decision-making process. This strong history of intergovernmental decision-making on asylum issues might offer at least a partial explanation for the difficulties the EU is now encountering while trying to come to an agreement on the CEAS acquis. Second, it is important to remember that, apart from asylum and migration issues, the Justice and Home Affairs pillar contained mostly topics related to customs, police and judicial cooperation. Therefore, this pillar was traditionally rather security-oriented, which might be a contributing factor to policy-makers' tendency to focus on security aspects when discussing asylum policy, as opposed to, for example, the social or human rights aspects which seem far more relevant in the context of a policy aimed at providing international protection to those who need it. Now that the EU has evolved into a "Union of values" and developed its path as a human rights actor, this security-oriented approach contributes to what Lavenex referred to as the "cleavage between what the EU says it is doing […] and what it actually does"[83].

[82] Huysmans, "The European Union and the Securitization of Migration," 755.
[83] Lavenex, "'Failing Forward' Towards Which Europe?," 1200.

4.4 Conclusion

This chapter has explored the so-called 'EU refugee crisis' as a manifestation of a failure of the CEAS. The academic literature has offered many explanations for this failure. Most relevant for this paper is the angle of the CEAS failure as a form of 'organized hypocrisy', whereby the EU struggles to combine its normative aspirations with its technical environment. Contributing to this mismatch is the origin of the CEAS as a topic dominated by intergovernmental decision-making, as well as the security-oriented approach resulting from the CEAS' history as a part of the Justice and Home Affairs pillar.

Chapter 5: Analysis

5.1 Introduction

As mentioned earlier in this paper, a crucial characteristic of the concept of normative power Europe is that it makes it possible to refocus and include cognitive processes. It makes it possible to focus on the EU's "ability to shape conceptions of 'normal' in international relations"[84]. The concept of normative power is an excellent starting point to examine the EU's asylum policy, as it allows for a better inclusion of the moral element that makes asylum policy such a complex policy area. The EU's "hybrid of supranational and international forms of governance", which Manners described as one of the causes of the EU's normative difference[85], further increases the complexity of EU asylum policy issues. This combination of moral, normative aspects and the EU's complex institutional framework results in a perfect storm, creating perfect conditions for the 'organized hypocrisy" described in chapter 4.

The goal of this chapter is to examine how the EU deals with this perfect storm. This is achieved through a discourse analysis of different EU documents. The analysis builds upon the theoretical framework described in chapter 1 and uses the issues surrounding the representation of asylum seekers described in chapter 2 and the EU-specific issues explored in chapter 4 as a focal point to discover how the EU, in its asylum policy discourse, attempts to reconcile its ambition to act as a normative power on the world stage with the pressure it experiences, mostly from Member States, towards more exclusionary

[84] Manners, "Normative Power Europe," 239.
[85] Manners, 240.

asylum policies. Much attention is paid to the potential use by the EU of the security/humanitarian narrative described in chapter 2.

The scope of the analysis was chosen in order to best reflect the most pertinent fundamental rights-related issues in asylum policy as described in chapter 3. After careful deliberation it was decided to narrow the analysis down to two themes: the European Border and Coast Guard (EBCG) and the post-2015 proposal for the reform of the Reception Conditions Directive. The EBCG was chosen based on the fact that management of the external borders is, in many people's minds, closely linked to asylum policy. This makes the discourse used by the EU to refer to its related legislation an interesting subject for this analysis. The Reception Conditions Directive is an obvious choice, considering that it lays down the rules for the conditions asylum seekers will face when arriving in the EU, and therefore discourse surrounding this directive might offer insight into the EU's struggle to reconcile its inclusive and its more exclusionary policy ambitions. Unfortunately, however, an agreement about the proposal has not been reached, which renders a comparison of the Commission proposal and the final version agreed by Commission, Parliament and Council impossible. A request to the General Secretariat of the Council to access documents reflecting the state of negotiations was denied on the grounds that it would seriously undermine the decision-making process of the Council. This means that the analysis of the Reception Conditions Directive is limited to the documents which are publicly available.

5.2 The European Border and Coast Guard

While the European Commission struggled to come to an agreement with the Member States and the European Parliament on many of the 2016 legislative proposals to handle the CEAS crisis, one proposal was agreed on relatively swiftly: the proposal to develop Frontex

(the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union) into the European Border and Coast Guard[86]. Before looking at this legislative text, however, a useful starting point is to examine the depiction of Frontex/the future European Border and Coast Guard in the Commission's Communication on an Agenda on Migration[87], which was published in May 2015 and was considered to contain the guiding principles for the EU's response to the "refugee crisis". In the Agenda, Frontex operations were rather consistently referred to in the framework of "**saving migrants** at sea" . In fact, the Agenda opens, after a one-page introduction, with a reference to the need for "action in response to the **human tragedy** in the whole of the Mediterranean". Further down in the text, "helping to **save the lives of migrants** at sea" is described as one part of the dual goal of Frontex (the other part being "coordinating operational border support to Member States under pressure"). This representation of asylum seekers as victims who need to be saved is a clear example of the use of the humanitarian narrative. This continues further down in the Agenda, where the agency is mentioned in relation to the fight against **smugglers**, who, in a previous paragraph, had been described as "criminal networks which **exploit vulnerable migrants**". The Agenda seems to attempt to reconcile the humanitarian narrative in relation to Frontex with a more protectionist, exclusionary ambition by describing the role of Frontex in helping Member States "by coordinating the **return of irregular migrants**". But even then, it is stressed that this concerns those deemed *"***not in need** of protection*"* after an asylum procedure that was processed "as quickly as possible".

[86] The Commission proposal was first published in December 2015 and the final regulation was published in the Official Journal in September 2016.

[87] European 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."

The Commission proposal to develop Frontex into the European Border and Coast Guard[88] was published in December 2015. When one reads the proposal immediately after consulting the Agenda, what stands out is the difference in tone. It's explanatory memorandum starts off as follows: "The present proposal has the objective of setting up a European Border and Coast Guard in order to ensure a European integrated border management of the EU's external borders, **with a view to managing migration effectively and ensuring a high level of security** within the Union […]. In fact, the explanatory memorandum of the proposal makes no mention of the humanitarian narrative so often referred to in the Agenda at all. It is instead focused on the security narrative, referring to the need for borders to be "**effectively secured and protected**".

The humanitarian narrative is absent in the operative part of the proposal as well, except for a small number of technical references to search and rescue activities. This is, in itself, not entirely surprising, since the proposal concerns the management of the external borders of the EU, which could explain the use of a more security-oriented discourse. In fact, the original 2004 Regulation establishing Frontex[89] did not mention migration or asylum issues at all. Additionally, the lack of the presence of the humanitarian narrative can also be explained by the fact that this proposal is a legislative proposal, as compared to the Agenda, which was more of a guidance document. Still, the explanatory memorandum is not a legally binding part of the legislative proposal, so the complete lack of any reference to the

[88] European Commission, "Proposal for a Regulation of the European Parliament and of the Council on the European Border and Coast Guard and Repealing Regulation (EC) No 2007/2004, Regulation (EC) No 863/2007 and Council Decision 2005/267/EC," December 15, 2015, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52015PC0671.

[89] Council of the European Union, "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," October 26, 2004, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32004R2007.

humanitarian narrative in relation to the future EBCG's activities even in this part does seem remarkable. It might, however, make more sense if one considers the timeframe, with the proposal having been published in December 2015. This was very soon after the Paris terrorist attacks, which raised the issue of foreign fighters entering the EU masked as refugees. Indeed, this issue is mentioned in the explanatory memorandum of the proposal, which refers to "**intensified security concerns following the terrorist attacks of this year**".

Lastly, it is necessary to compare the original Commission proposal for the EBCG with the regulation which was eventually adopted at the end of the legislative process[90]. This reveals an interesting difference in Article 1, which describes the subject matter of the regulation. In the Commission proposal, article 1 was formulated as follows:

> *"A European Border and Coast Guard is hereby set up to ensure a European integrated border management at the external borders* ***with a view to managing migration effectively and ensuring a high level of internal security*** *within the Union, while safeguarding the free movement of persons therein."*

This evolved into the following in the final version of the regulation:

> *"This Regulation establishes a European Border and Coast Guard to ensure European integrated border management at the external* ***borders with a view to managing the crossing of the external borders efficiently. This includes addressing migratory challenges and potential future threats*** *at those borders, thereby contributing to addressing serious crime*

[90] The European Parliament and the Council of the European Union, "Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and Amending Regulation (EU) 2016/399 of the European Parliament and of the Council and Repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC," September 14, 2016, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32016R1624.

with a cross-border dimension, to ensure a high level of internal security within the Union in full respect for fundamental rights, while safeguarding the free movement of persons within it."

The wording in the Commission proposal seems to indicate a strong focus on migration management and, more importantly, implicitly suggest a strong link between migration and security issues. This suggested link seems to have been 'toned down' during the interinstitutional negotiations, although the security aspects are obviously still present, and there is no mention of the humanitarian narrative at all.

To conclude, there seems to be a clear evolution in the use of terminology to describe Frontex/EBCG activities. This can partly be explained by the different document types, policy orientations and current events. Interestingly, the shift from a humanitarian narrative to a more security-focused narrative seems to run counter to the evolution from security to humanitarian narrative most often described in the literature. This could, however, be explained in the framework of organized hypocrisy as described in chapter 4, whereby the normative ambitions expressed in the (not legally-binding) Agenda, when transferred to legislation in the field of border control, clash with limitations expressed by the technical environment of Member States trying to create a solid framework for border management.

5.3 The Reception Conditions Directive

In April 2016 the European Commission published its Communication titled "'Towards A Reform Of The Common European Asylum System And Enhancing Legal Avenues To

Europe"[91]. Published one year after the Communication on the Agenda, this Communication on the CEAS was used to set out the Commission's plans for the reform of the CEAS, including the Reception Conditions Directive. What stands out, especially when read immediately after the 2015 Communication on the Agenda, is its difference in style compared to the Agenda. Whereas the Agenda opened with a reference to the "plight of thousands of migrants putting their lives in peril to cross the Mediterranean" and the "duty to protect those in need", the tone of the 2016 Communication on the CEAS is much less emotional, much more distant. The humanitarian narrative is not present and the language used is one that seems focused on policy effectiveness, whereby the failure of the CEAS is treated as a technical issue to be solved through institutional efficiency. This seems to leave some room for use of the security narrative, with phrases such as "**restoring order** on the Eastern Mediterranean/Western Balkans route" and "**stem disorderly** irregular migration **flows**, **protect our external borders**, and **safeguard the integrity** of the Schengen area". The normative ambition is not entirely ignored, though, with the Commission reminding the reader that "European countries will continue to stand steadfast in **meeting their legal and moral commitment** to those who need protection from war and persecution".
Interestingly, in this Communication the Commission combines the issue of the reform of the CEAS with the issue of legal migration pathways to the EU. This results in the use of a rather diverse range of terms for people crossing the border throughout the document, with "refugees", "migrants", "legal migrants", "asylum seekers/refugees" and "applicants" all being used at least once.

[91] European Commission, "Communication from the Commission to the European Parliament and the Council: Towards a Reform of the Common European Asylum System and Enhancing Legal Avenues to Europe," April 6, 2016, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2016:197:FIN.

The more distant style described above is maintained in the Communication's discussion of the Reception Conditions Directive. Here, the Communication is rather to the point: "further harmonising the treatment of asylum seekers across the EU is critical, not only to ensure that this treatment is humane, but also to reduce incentives to move to Europe and to other Member States within Europe". Throughout the document, reception conditions seem to be mostly viewed as one of many components of a system aimed at creating order, while asylum seekers often seem to be depicted as possible threats to this order. Whereas the humanitarian narrative is missing entirely, the Commission seems to feel the need to confirm its commitment to fundamental rights several times, for example when it is stressed that a measure will be "without prejudice to the **principle of non-refoulement** and to the **right to an effective remedy**" or fully respect "the **requirements of the Charter of Fundamental Rights**".

The more distant, technical style used by the Commission to discuss the Reception Conditions Directive in the 2016 Communication is maintained in the Commission's proposal for the reform of the Reception Conditions Directive[92] itself. In the explanatory memorandum of the proposal, a few elements are used that could be considered to be part of the humanitarian narrative, such as the need to "address irregular and **dangerous movements** and **put an end to the business model of smugglers**". Overall, however, the use of the representation of asylum seekers as victims who need to be saved is very limited in the proposal. On the other hand, there are many references to the Union's international legal commitments and the ambition to protect asylum seekers' human rights. The assurance that

[92] European Commission, "Proposal for a Directive of the European Parliament and of the Council Laying down Standards for the Reception of Applicants for International Protection (Recast)," July 13, 2016, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52016PC0465.

the EU will act in accordance with fundamental rights and the rights of the child is reiterated many times throughout the explanatory memorandum. Different recitals of the proposal stress adherence to the EU Charter of Fundamental Rights and international legal instruments (see, for example, recitals 20, 24, 30, 32 and 53). Interestingly, upon closer analysis, it becomes clear that the parts of the proposal that support adherence to fundamental rights are often described not as the result of the EU's normative ambition, but rather as decisions to support the functioning of the CEAS system. Take for example the right of asylum seekers to seek access to the labor market (art. 15 on employment). In the explanatory memorandum of the proposal, limiting the differences between Member States' rules on access to the labor market is described as "essential in order to **reduce employment-related asylum-shopping and incentives for secondary movements**". The right of asylum seekers to be informed about their rights and obligations in relation to reception conditions (art. 5 on information) is, in the explanatory memorandum, represented mostly as a way to "ensure that applicants are aware of the **consequences of absconding**" (recital 11), absconding having been described earlier as a major threat to the functioning of the CEAS. A similar observation can be made about the provisions on detention. In this case, the Commission, probably motivated by the controversial nature of the issue of detention of asylum seekers, stresses multiple times that its provisions on the detention of asylum seekers correspond to the international legal standards applicable to the issue (not holding a person in detention for the sole reason that he or she is seeking international protection, detention only used if necessary, based on individual assessment, and if less coercive measures cannot be applied successfully). But in article 8 on detention an additional ground for detention is added: detention in cases where an applicant has been assigned a specific place of residence but has not complied with this obligation, and when "there is a

risk of absconding of the applicant". This additional ground for detention is clearly described as a way to decrease the risk of absconding. It is supposed to help limit the risk of the secondary movements, which are – throughout the proposal – referred to as the biggest risk to the well-functioning of the CEAS.

In conclusion, it seems that in the Commission's discourse on the Reception Conditions Directive, the humanitarian narrative is largely missing. Some aspects of the security narrative are present, but in a different way than one might expect based on the traditional use of this narrative. Throughout the proposal, asylum seekers are indeed presented as a "threat", but not as a traditional threat to safety or public order. Instead, they are presented as a threat to the functioning of the European asylum system, which is supposed to help protect European society from the "disorder" created by the "migration crisis". Of course, the picture painted by this analysis is limited by the fact that, as mentioned earlier, there has been no agreement reached on the Commission proposal, and the documents produced during the negotiations were not publicly available. This renders it impossible to compare the Commission proposal with a final version of the text agreed on by Commission, Parliament and Council, which would have provided more insight in the degree to which the forementioned "hybrid of supranational and international forms of governance", as described by Manners, complicated the handling of the EU's "CEAS crisis".

Conclusion

The idea for this paper originated in the observation that EU asylum legislation, and EU discourse related to this policy domain, contained different and often opposing depictions of persons seeking international protection. This paper has been an attempt to understand the roots of this phenomenon and further investigate its occurrence, against the backdrop of the framework of normative power Europe.

The first part of this paper established that the categorization of asylum seekers as "deserving" or "undeserving" individuals in general discourse can translate into inclusive and exclusionary measures at the policy level. It was further determined that this categorization can be used as a strategic tool, for instance through the use of a security or humanitarian narrative. It was also established, based on the relevant literature, that the 2015 "refugee crisis" should rather be viewed as a manifestation of the shortcomings of the CEAS. The literature offered many explanations for the EU's complex handling of this "crisis". Lavenex' explanation that the CEAS crisis was a symptom of 'organized hypocrisy', whereby the EU struggled to balance the norms and values expected of it with the demands of its technical environment, was especially useful. The analysis conducted in this paper aimed to observe how the EU attempts to balance its stated ambition to act as a normative power on the world stage with the pressure it experiences to use more exclusionary policies in the field of asylum policy. The main observation that stood out during the analysis was that in the discourse on and the proposal for the Reception Conditions Directive, asylum seekers were often described as a threat, except not in the traditional way (as a threat to national security, public order or even the economy), but rather as a threat to the functioning of the CEAS. The description of policy decisions that support adherence to fundamental rights not as the

result of the EU's normative ambition, but rather as decisions to safeguard the functioning of the CEAS system could be considered an attempt by the Commission to adapt its discourse to its technical environment. It would be interesting to examine whether or not this trend is continued in more recent EU asylum policy documents, such as the new Pact on Migration and Asylum and the related proposals.

It needs to be mentioned, however, that the varying discursive approaches observed in this admittedly limited analysis paint a picture of an EU that is rather undecided about the role it wishes to play in the world in terms of asylum policy. Adapting its discourse to its technical environment may help the Commission pass certain hurdles during the internal legislative process, but it cannot be sufficient as a general strategy. The big questions in terms of asylum policy are not going away any time soon. It might be time, therefore, for the EU as an institution to decide what kind of power it wants to be in the world, and to act accordingly.

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