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'Failing Forward' Towards Which Europe? Organized Hypocrisy in the Common European Asylum System*

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Abstract

Exposing the ideological conflicts involved in the creation of a Common European Asylum Policy, this article calls for an extension of classic integration theories to look beyond whether crises result in 'more' or 'less' Europe and to address the substance of European integration. Drawing on actor-centered institutionalism and organizational sociology, the 'refugee crisis' is interpreted as a manifestation of the growing mismatch between the EU's normative striving towards a 'Union of values' and the political and institutional limits imposed. The result is organized hypocrisy: the concurrent reinforcement of protective claims and protectionist policies.

Introduction

Together with the preceding euro-crisis and the ensuing Brexit vote, the so-called 'refugee crisis' 'shook … [the] very foundation' of the European integration project (Juncker, 2017). Member States' positions on how to approach the inflow of migrants and refugees range far apart. For German Chancellor Merkel, strengthening the EU asylum system is 'the next major European project' (Merkel, 2015). Others, most vocally Hungarian Prime Minister Orbán, invoke the limits of acceptable Europeanization: 'We must decide who we let in, and who we do not let in. But who should decide on this: Brussels or the nation states?' (Orbán, 2016). The ongoing controversies on the Common European Asylum System (CEAS) expose the sensitivity of the EU's creeping transformation from a 'regulatory state' to a Union with 'core state powers' (Genschel and Jachtenfuchs, 2013). This sensitivity rests not only in the tension between state sovereignty and EU competence. It also emanates from the difficulty of striking a normative balance between freedom, security and justice in an increasingly political Union.

Inspired by classic integration theories, most accounts of recent crises focus on whether these result in the EU 'failing forward' (Jones *et al*., 2016), that is, whether we see 'more' or 'less' Europe arising. Less attention has been paid to 'the facticity of normative accounts' (Joerges and Kneuder-Sonnen, 2017, p. 126), the question 'which' Europe arises, and why. Mobilizing concepts of actor-centered institutionalism (Scharpf, 1999) and organizational sociology (Brunsson, 1989), this article interprets the 'refugee crisis' as a manifestation of a growing dissociation between the political Union's aspirations at 'normative power' (Manners, 2002) and the practical limits imposed by its

unsettled constitutional compromise. Whereas the move towards 'core state powers' commends the EU and in particular the Commission to seek conformity with the 'protective' (rights-enhancing) norms of 'world society' (Di Maggio and Powell, 1983) – in our case the refugee regime – its constituency and institutional set-up privilege compromise on common 'protectionist' (access-reducing) policies, leaving the protective aspects largely to the discretion of the Member States. Whereas the looming gap between practical capabilities and normative expectations jeopardizes the legitimacy of the European response, organizational sociology helps understand this gap as a form of 'organized hypocrisy' (Brunsson, 1989) – an unconscious organizational strategy to cope with irreconcilable demands.

The article first introduces the so-called 'refugee crisis' as a governance crisis of the CEAS. Section II reviews existing accounts and corroborates the contribution of more interpretative approaches addressing the substance rather than the level of integration. The following sections examine the sources of organized hypocrisy in the CEAS and the continuous de-coupling between protective aspirations and protectionist policies since 2015.

We acknowledge that organized hypocrisy is not exclusive to the EU and examples of inconsistent asylum policies abound. This analysis however shows why the EU's unsettled constitutional balance makes it particularly vulnerable to the combination of high normative ambitions and practical political limits. While such tensions are obvious in a field like refugee policy that takes its very existence from normative commitments, the argument that the EU's set-up favours particular substantive outcomes and generates imbalances is more general (see Scharpf, 1999). In many respects, the crisis of the CEAS showcases the limits of political unification. As in other sensitive areas we conclude that 'the degree to which a common European refugee policy is likely to be realized depends not only on institutional reforms in the sense of a reaffirmation of the "Community method", but also on the Union's ability to develop a "community of values"'(Lavenex, 2001 p. 852).

I. A Crisis of Governance

In 2015 and 2016, Europe experienced the largest influx of refugees since World War II. In 2015 over a million primarily Syrian refugees took the perilous Eastern Mediterranean Route to Europe. The EU's response disclosed the inadequacy of common protectionist instruments and most Member States' unwillingness to emphasize the protective elements of the CEAS.

Although the refugee movements were predictable, little was done to prevent escalation. The influx amplified after the main humanitarian organizations in the countries of first asylum were compelled to cut down food rations due to lack of funding from the international community (Cumming-Bruce and Gladstone, 2014). What some then depicted as 'invasion'[1] stood well behind the vast intakes by Lebanon, Jordan or Turkey. It constituted less than 0.2 per cent of the EU's total 510 million population; and concentrated in six EU countries, leaving the majority unaffected. The core of the CEAS, the Dublin and Schengen regulations proved unsuited to channel the inflows. Visa obligations and strict border control enforcement precluded safe and regular access to EU territory. The Dublin

[1]For instance Hungarian Prime Minister Orbán (Tharoor, 2015) and Czech President Zeman (Khan, 2015).

rules that determine the responsibility of the first country of entry for processing asylum seekers exacerbated distributional conflicts among Member States and led to the total collapse of the Greek asylum system – a system which the European Court of Human Rights and the EU Court of Justice had judged dysfunctional already in 2011.[2] The lack of solidarity also persisted on the Central Mediterranean migration route. Italy was compelled to discontinue its search and rescue operation 'Mare Nostrum' in October 2014 after Member States refused to share the costs. Frontex' operation 'Triton', which stepped in with a budget of less than a third and a much more limited mandate, proved insufficient and aggravated the situation (Carrera and Den Hertog, 2015). In consequence, and encouraged by Germany's decision to suspend Dublin transfers for Syrians, Greece and Italy reverted to a policy of 'waving through' migrants without registering them. Apart from burdening countries further up the route, in particular Hungary, this prompted first Germany, then Austria, Slovenia, Hungary, Malta, France, Norway, Denmark, Sweden and Belgium to re-introduce controls at their internal borders and hence to suspend one of the EU's major integration achievements: the internal system of free circulation (EU Council, 2016). The 'Schengen crisis' (Börzel and Risse, 2018) came to supplement the 'CEAS crisis', and asylum became the area of JHA responsible for the largest number of infringement proceedings (Commission, 2017b).

In defence of the EU's role, one may argue that in the end EU countries took in more Syrian refugees than Australia, Canada and the US together. This, however, was mainly thanks to the geography of flows and refugees' ability to overcome the national and European barriers[3] impeding access to Member States' asylum systems; it cannot be attributed to EU-level instruments.

Two years after the peak of the influx, the pressure for European solutions seems much reduced – and herewith the perception of crisis. According to European Commission President Juncker 'We have managed to stem irregular flows of migrants … We have reduced irregular arrivals in the Eastern Mediterranean by 97% thanks our agreement with Turkey. And this summer, we managed to get more control over the Central Mediterranean route with arrivals in August down by 81% compared to the same month last year' (Juncker, 2017). The apparent success has not eradicated the sources of Europe's crisis, however, nor all its manifestations. Externally, the EU has become vulnerable to the co-operation of third countries which do not live up to European legal standards and may take advantage of the situation. Internally, efforts to appease distributive conflicts have met hitherto unprecedented opposition thus perpetuating the causes of the 2015/16 governance crisis (see below).

Against this background it comes somewhat as a surprise that the European Commission, evaluating the progress made over the last two years, assures that 'the restoration of an orderly management of migration flows has been pursued in a spirit of solidarity, including through relocation schemes' (Commission, 2017a, p. 2). Also in the light of immigration's critical role in recent national elections such statements echo what Giandomenico Majone (2015) has recently coined a 'culture of total optimism'.

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[2]ECtHR (GC), Judgment *M.S.S. v. Belgium and Greece* of 21 January 2011 and CJEU, Joined Cases C-411/10 and C-493/10 N.S. v. Secretary of State for the Home Department, Judgment of 21 December 2011.
[3]Such barriers are for instance visa requirements, carrier sanctions, border control practices and physical fences, such as the one built with EU funds at the Greek land border to Turkey in 2011.

II. Addressing the Substance of Integration

Most accounts of EU crisis governance implicitly or explicitly refer to Jean Monnet's (1978, p. 417) famous dictum that 'Europe will be forged in crises, and will be the sum of the solutions adopted for those crises'. This perspective resonates with classic integration theories' assumption that crises accentuate the need for new solutions and may thereby generate political momentum (Schimmelfennig, 2017). In the following, we join Joerges' and Kneuder-Sonnen's (2017, p. 119) observation that this narrows 'the view on what is deemed relevant and in need of explanation' to 'structural outcomes in terms of integration/disintegration', thereby side-lining the substance of integration and the 'normatively problematical aspects of political order' (p. 122).

In order to address the substance of integration and the ideational conflicts involved we combine an institutionalist perspective that highlights the strategic and structural sources of a protectionist orientation in EU asylum policy, with a sociological focus on the ideational dynamics that motivate opposing protective ambitions, thereby generating a normative 'capabilities-expectations gap' (Hill, 1993), or, in other words, organized hypocrisy (Brunsson, 1989).

The Agnostic Frame of Integration Theory

An influential analysis of EU crisis governance is Jones *et al.*'s (2016) notion of 'failing forward'. Taking up Jean Monnet's dictum it elaborates the mix of intergovernmentalist and neofunctionalist dynamics that keep integration moving in a cyclical sequence of 'ups' and 'downs'. Accordingly, and in line with liberal intergovernmentalism, Member States' agreements tend to reflect lowest denominator solutions or incomplete bargains which soon prove inadequate to solve underlying problems and may result in crises. These crises generate a functionalist pressure for new common solutions which then lead to the next incomplete bargain, thereby moving Europe 'forward' through incremental steps.

Explicitly or implicitly, most accounts of recent crises link up with this motive and investigate the conditions under which crisis prompts integration. Whether adopting an intergovernmentalist (Biermann *et al.*, 2017), a neofunctionalist (Schimmelfennig, 2018), a 'failing forward' (Scipioni, 2017) or a postfunctionalist perspective (Börzel and Risse, 2018), these analyses converge on the assertion that, unlike for the euro area, no meaningful integration steps resulted from the CEAS crisis. Comparing both cases, Schimmelfennig (2018) states that Member States' failure 'to agree on substantial integration progress' in migration policy is mainly due to the weakness of transnational demand and the absence of supranational actors capable of technocratic solutions – such as, for the euro, the European Central Bank. Others acknowledge that 'the member states agreed on a whole set of joint measures' (Börzel and Risse, 2018, p. 8), in particular the relocation scheme, and thereby moved towards further 'centralization' (Scipioni, 2017 p. 8). But these measures have remained inconsequential due to poor implementation and, according to Börzel and Risse (2018), a postfunctionalist deadlock rooted in identity politics.

The hypothesis of constraining dissensus echoes comparativists' observations that immigration concerns and euroscepticism are at the core of a new transnational cleavage and the rise of right-wing populism (Hooghe and Marks, 2009, 2018; Hutter *et al.*, 2016). The

diagnosis of a general postfunctionalist deadlock and neofunctionalist or intergovernmentalist statements of an absence of integration however focus only on the empty half of the glass – the absence of supranational protective policies regulating refugee admission. This neglects the other half – the extension of principally intergovernmental protectionist policies limiting access to the CEAS (see below). Integration theories' traditional preoccupation with supranational versus intergovernmental processes adds to their indifference towards substantive outcomes of integration. This is not benign as this indifference bears the risk of '*ex-post* rationalizations' in so far as integrative outcomes can be uncritically justified as response to either common functionalist pressures or influential Member States' interests (Joerges and Kneuder-Sonnen, 2017, p. 126).

The substance of policy choices is particularly salient in the 'Area of Freedom, Security and Justice' (AFSJ) which needs to strike a balance between these partly conflicting principles (Lavenex and Wagner, 2007). Conflicts of values (Rittberger and Zürn, 1991) are inevitable in asylum law as it takes its justification from the universalist claim of human rights and yet remains dependent on particularist states' consent to grant asylum (Boswell, 2001). In these fields, Member States differ not only over interests but also over beliefs and norms and the very goal of a European policy. This may contrast with less value-loaded issues where states can agree on pareto-optimal solutions (Keohane *et al.*, 2009; Majone, 2015). Yet as Scharpf (1999) has shown, European integration has never been free of normativity, and the realization of the Single Market has engendered (often unconscious) choices over the balance between neoliberal market-making and socio-democratic market-correcting measures. With the EU's contested transformation from a regulatory polity to a political Union such conflicts of values move to the centre of the European project and require corresponding analytical approaches. Inspiration can be drawn from organizational sociology.

Views from Organizational Sociology

Organizational sociology sees organizations as a reflection of their environments. Two environments are distinguished: the strategic or technical one, consisting of the organizations' constituency, its actors, their interests and institutions-mediated interaction, and the normative environment, reflecting the social norms and values the organization seeks to conform to (Meyer and Rowan, 1977; DiMaggio and Powell, 1983). Both environments generate substantive expectations towards the organizational output which can sometimes be contradictory (Brunsson, 1989).

The technical environment is the sphere of material and institutional constraints within which rational actors pursue their interests according to a logic of consequentiality (Lipson, 2007, p. 8). This sphere can therefore usefully be studied through an actor-centred institutionalist framework (Scharpf, 1999). The normative environment in contrast consists of ideational pressures following a logic of appropriateness (Lipson, 2007, p. 8).

In his work on the Single Market, Scharpf highlights several factors that tilt economic integration in Europe towards market-making (neoliberal) policies focused on removing obstacles to trade and competition – in his terms 'negative' integration – while impeding 'positive', market-correcting integration in the sense of 'the reconstruction of a system of economic regulation' (1999, p. 45). These are a mandate focused on negative integration in primary law, and secondly, the tendency to circumvent value-loaded political debates

over common standards, for example by applying the principle of mutual recognition. Scharpf also echoes co-operation theorists' classification of conflict types (see above) when he states that 'ideological conflicts' arising from 'opposed normative or ideological positions held by member governments' for instance 'regarding the proper role of public policy vis-à-vis market forces or regarding the role of European policy vis-à-vis the nation state' are 'not generally amenable to compromise solutions' (1999, pp. 77–78).

Organizational sociology highlights next to the technical also the normative environment and the sometimes contrasting pressures emanating therefrom. In this logic, organizations seek to emulate the normative standards perceived as appropriate in their wider societal context – in our case, the liberal values embedded in 'world society' (Di Maggio and Powell, 1983). The increasingly political Union mirrors the norms of human rights and refugee law in its evolving constitution (the Charter and Treaties), policies (the formal set-up of the CEAS and in particular its directives establishing common protection standards) and rhetoric. Whereas protectionist policies against unfounded asylum claims are compatible with an ambitious protection policy, the latter starts to be undermined when the former no longer discriminate between genuine refugees and irregular migrants.

This situation amounts to what organizational theory refers to as organized hypocrisy: a cleavage between what the EU says it is doing – its espoused goals and ideals (the protective *acquis*) – and what it actually does (protectionist practices preventing access to protection) (Brunsson, 1989). Organizational sociology helps understand the structural causes of such cleavages. Importantly, 'hypocrisy' does not flow from intentional action but is the result of 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 – in our case decision-making rules and Member States' diverging preferences. The attempt to satisfy incompatible demands without giving in on either of them results in incoherent action and a sense of hypocrisy. The notion of organized hypocrisy therefore does not carry negative moral connotations, it is a structural outcome of loosely coupled complex organizations. As a multi-level polity striving for political union the EU is particularly vulnerable to such inconsistencies.[4]

Organizational sociology not only provides a theoretical explanation for the origins and substance of the CEAS' crisis, it also proposes explanations for crisis reactions. According to Brunsson, crises espouse hypocrisy but also yield a 'quest for action' producing 'a need for integration, for consensus and consistency' (1986, p. 174). Two avenues to integration are proposed (Brunsson, 2003, 216ff). The first is the availability of other means (than hypocrisy) of managing conflict, for instance authoritative decision rules or compromise. While the EU's political system precludes authority, compromise hinges on low perceived stakes. Given the depth of ideational cleavage, the persistence of migration pressure by both refugees and other migrants, the intensity of distributional conflicts among Member States and the issues' electoral sensitivity, the preconditions for forging compromise are less than ideal. The second avenue to overcome hypocrisy is pressure from public opinion and a norm of consistency. While Europeans have shown

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[4]The understanding of the EU as a complex organization differentiates Brunsson's notion of organized hypocrisy from its usage by Krasner (1999) who famously applied it to the norm of sovereignty in international relations. In contrast to organizational sociologists, Krasner applies this notion to states as unitary actors whose interests and behaviour are derived only from their material 'technical' environment. This sidelines the impact of the normative environment and therefore misses some of the normative ambiguities disclosed by organizational sociology (Lipson, 2007).

a great deal of solidarity with refugees in 2015/16, public opinion polls tend to replicate the normative conflicts inherent in the CEAS: a majority of respondents recognize that more should be done to protect refugees – but not in their own country.[5] There is however also a deeper factor adding to this lack of consistency and the intractability of hypocrisy. This is the contestation of the very definition of a refugee stemming from the difficulty to demarcate legitimate from non-legitimate grounds for protection (see, for example, Ramji-Nogales, 2017).

In the absence of viable solutions, organizations facing irreconcilable expectations find themselves in 'a true dilemma – there are no solutions, only ways of dealing with the problem' (Brunsson, 1986, p. 174). The default option then is to keep on with organized hypocrisy by further decoupling the policy's normative core and symbolic discourse from action. The following sections retrace the sources and manifestations of organized hypocrisy in the CEAS, and document its persistence in the reactions to the 2015/16 crisis.

III. Sources of Imbalance in the CEAS

The main elements of the CEAS were framed in the long period of intergovernmental co-operation from the First Schengen Agreement (1985) until the end of the transition phase under the Amsterdam Treaty (2004). The absence of normative guidelines at EU level during this period has been interpreted as offering home affairs ministers ample scope for 'venue-shopping' (Guiraudon, 2000) and circumventing their domestic normative environments (Lavenex, 2001). The fact that the EU started emulating these normative environments including human rights and refugee standards relatively late (roughly with the Amsterdam Treaty), privileged the priorities of its technical environment, including its inherent power relationships. As in the case of the Single Market, where the framing of co-operation, the institutional empowerment of particular actors and the avoidance of debates over values advanced 'negative' over 'positive' integration (Scharpf, 1999), in the CEAS protectionism prevailed over protection.

Co-operation on asylum came onto the European agenda together with irregular migration and organized crime as compensatory measures for the safeguarding of internal security after the Schengen Agreement's abolition of internal border controls. The 'Coordinators group on the free movement of persons' was created in 1988 to promote this co-operation. This was a sub-group of the transgovernmental network of EU interior ministries called TREVI who had been co-ordinating since 1976 on questions of internal security and public order. In 1989 the group issued the 'Palma-Document' that was to become the blueprint for the ensuing co-operation. According to its Title III 'The achievement of an area without internal frontiers could involve … a prior strengthening of checks at external frontiers' and 'determining the State responsible for examining the application for asylum' as well as 'simplified or priority procedures for the examination of clearly unfounded requests' (Coordinators Group, 1989). The nucleus of the CEAS, the system of responsibility allocation for examining asylum claims, became part of the Convention implementing the 1985 Schengen Agreement of 14 June 1990 (Art. 30). This rule was extended from the more limited Schengen group to all Member States with the

Dublin Convention signed just one day later – and allowed the traditional asylum countries forming the Schengen group (originally France, Germany and the Benelux) to upload their preferences on the common agenda.

The Preamble of the Dublin Convention reiterated 'the joint objective of an area without internal frontiers' and this frame of co-operation in view of protecting the Schengen area persists until today. It was maintained when asylum was officially embraced in the Third Pillar of the Maastricht Treaty (Art. K1 'For the purposes of achieving the objectives of the Union, in particular the free movement of persons') and when it moved to the Community pillar of the Amsterdam Treaty (Title I Art. 3: 'To maintain and develop the Union as an area of freedom, security and justice, in which the free movement of persons is assured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime'). This article became Art. 2 of the Lisbon Treaty whose Title IV laying down the more detailed mandate reads 'Visas, Asylum, Immigration and other policies related to the free movement of persons'. Much like the Single Market project that was framed in terms of abolishing Member States' barriers to trade and not as a common system of market regulation (Scharpf, 1999, p. 45) the CEAS was framed in view of protecting the EU's internal 'Area of Freedom, Security and Justice' and not as a genuine European policy of refugee protection.

This protectionist bias was again very clear on the occasion of the 60th anniversary of the Rome Treaties in 2017 when the EU Heads of State and Government declared as first goal of the Union, even before prosperity and growth, 'A safe and secure Europe: a Union where all citizens feel safe and can move freely, where our external borders are secured, with an efficient, responsible and sustainable migration policy, respecting international norms; a Europe determined to fight terrorism and organised crime' (European Council, 2017). Whereas earlier formulations always mentioned asylum explicitly, the Rome Declaration subsumes it under a 'responsible and sustainable migration policy'.

Thus codified in primary law, this frame has been promoted by a dense transgovernmental network dominated by home affairs officials who, by professional definition, are mainly concerned with internal security. Coupled with the rise of right-wing xenophobic parties in the Member States and traditional asylum countries' efforts to relieve the burden on their asylum systems (Lavenex, 2001), European co-operation thus concentrated on establishing strict criteria for crossing the external border; a tight visa policy; enforcement measures including carrier sanctions and joint operations at external borders – subsequently co-ordinated by Frontex; the interception and return of migrants entering the EU without the necessary authorization; and, from 1990 onwards, the enlisting of third countries of transit and origin in the expanding system of migration control (Lavenex, 1999 and 2006). These measures were to apply to all migrants irrespective of the special needs of refugees. Asylum co-operation was limited to designating the responsibility for examining asylum requests, the so-called Dublin system. The emphasis on the first country of entry under the Dublin scheme mirrors this general context of stepping up external border controls and sought to make the traditional transit countries of southern Europe take responsibility for the asylum seekers they let in. This engendered redistributive conflicts and bottlenecks that contaminated subsequent co-operation efforts. Much like the principle of mutual recognition adopted for Single Market integration, the system was introduced on the assumption that Member States' legal standards including

the definition of a refugee or procedural safeguards would be comparable – thereby circumventing deeper discussions on the objectives of a common European asylum policy and its underlying values (Lavenex and Wagner, 2007).

The Amsterdam Treaty gave the Union a mandate to develop a more harmonized CEAS and marks the point when the EU started to reflect more strongly on its normative refugee law environment. Apart from the recognition that a working Dublin system would necessitate greater approximation of national laws, the stronger mandate of the Amsterdam Treaty reacted to the refugee influxes from the Bosnian and Kosovo wars. This experience also prompted in 2001 the adoption of the Temporary Protection Directive, introducing a scheme for voluntary burden-sharing in situations of mass influx. Common standards were adopted only with great delays and hesitation over two periods: first through 'minimum standards directives' on asylum procedures, reception conditions and status determination between 2003 and 2005, and then through their recast into 'common standards' between 2011 and 2014. Even after the recast exercise, the directives remained relatively vague, leaving a large scope of discretion to the Member States (Trauner, 2016). Coupled with the inclusion of the asylum right in Art. 18 of the EU Charter and the rhetoric of a CEAS, this legislation however contributed to the impression of a well-developed European asylum policy. And by the time the next major refugee emergency occurred at Europe's borders, the EU seemed well prepared.

IV. Organized Hypocrisy as a Manifestation of Crisis

On 24 February 2016, when thousands of refugees and migrants a day kept crossing the Aegean Sea in most adverse weather conditions, Austrian Foreign Minister Sebastian Kurz declared: 'There is still no European solution in sight … For that reason, it is necessary for us to take national measures.'[6] Indeed, the CEAS seemed to exist only on paper. The 2001 Temporary Protection Directive, designed precisely for situations of mass influx and providing for a system of voluntary relocation on the basis of group determination (thereby relieving national asylum systems) was not activated. Ironically, Member States disagreed over the advent of a large influx. The Dublin system collapsed under the burden imposed on countries of first entry.[7] Irrespective of the two waves of European asylum legislation, Member States' practices regarding the processing of asylum claims, the reception conditions and the recognition practices continued to diverge significantly, with recognition rates for asylum seekers coming from the same countries of origin sometimes ranging from below 10 per cent in some Member States to more than 90 per cent in other Member States (Commission, 2016a, 3ff).

Systematic analyses based on national migration policy indexes confirm the weak impact of EU legislation on domestic policies, and show that Europeanization has been stronger for the protectionist acquis, for instance measures limiting access to the EU's territory (De Haas *et al.*, 2016; Helbling and Kalkum, 2017). With the crisis the trend towards national solutions intensified. By 2017, Hungary had built fences and started to automatically detain all asylum-seekers, thereby breaking European and international law. Also countries with a longer asylum tradition like Austria, France, Germany, the

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[6]https://euobserver.com/migration/132443.
[7]At the same time, this system never worked the way it was intended to, and effective relocations never exceeded 30 per cent of the formal requests (Council of Europe, 2015).

Netherlands, and Sweden introduced restrictive asylum reforms suspending the right to family reunification for beneficiaries of subsidiary protection; extending grounds for exclusion from refugee status; or cutting down on reception conditions.[8]

V. Crisis Reactions: Decoupling Internal Norms From External Action

Rather than fixing the root of the CEAS' failure, the Dublin system, and reinforcing abidance to common protection standards, the reforms proposed in reaction to the crisis tend to reify Dublin's disputed basis for responsibility allocation and perpetuate it towards allegedly 'safe' third countries. The result is a further strengthening of the CEAS' protectionist stance at the risk of undermining its protective claim.

The Inability to Fix the Protective Acquis

The first reactions to the crisis were a set of *ad hoc* measures designed to ease the situation at the ports of entry, including the relocation mechanism and the establishment of 'hotspots'. Agreement on strengthening co-operation at the external borders was also quickly found, resulting in Frontex' upgrading into a European Border and Coast Guard Agency and new competences in the fight against human smuggling and trafficking. Attempts to fix the protective capacity of the CEAS, in contrast, soon lost ambition. These attempts focus on two points: amendments to the Dublin system and stronger enforcement of common standards.

A key concern is to promote a fairer distribution of asylum seekers in the EU. The much disputed mandatory relocation mechanism of September 2015 for a total of 160,000 refugees from Greece and Italy was a bold step and provoked a hitherto unprecedented level of contestation. Not only did two Member States which had voted against the mechanism (Hungary and Slovakia) contest it in front of the CJEU, Hungary also refuted the Court's confirming judgment[9] thus challenging the EU's foundations as a system of governance based on 'integration through law' (Cappelletti *et al.*, 1986).[10] The fact that Hungary opposed the scheme even though it would have been one of its main beneficiaries discloses the deeper conflicts of values impeding a common sense of responsibility towards refugees.

Beyond this emergency measure the Commission sought a deep overhaul of the Dublin system. The Commission's original motivation deserves quotation (2016b): 'The overall objective is to move from a system which by design or poor implementation places a disproportionate responsibility on certain Member States and encourages uncontrolled and irregular migratory flows to a fairer system which provides orderly and safe pathways to the EU for third country nationals in need of protection ...'. The concrete proposal submitted two months later takes back this ambition and merely introduces a corrective 'fairness mechanism'. Based on the calculation of admission capacity quotas similar to those applied for the relocation decisions (based on size and wealth), this mechanism should automatically apply if a country receives applications exceeding 150 per cent of

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[8]On national asylum legislation see the AIDA database at http://www.asylumineurope.org/ .
[9]Court of Justice of the European Union Judgment in Joined Cases C-643/15 and C-647/15 Slovakia and Hungary v Council of 6 September 2017.
[10]At the same time, the relocation scheme was largely symbolic. The quota of 160,000 persons was minimal compared to the volume of influx, and only 37,000 of these were effectively relocated (Commission, 2017a).

the reference number. All further new applicants would be relocated across the EU until the number of applications is back below that level. Member States refusing to take part in the reallocation should pay a 'solidarity contribution' of €250,000 for each person refused. Not surprisingly, this aspect of the reform has remained the most controversial in the Council and has motivated Council President Tusk to condemn refugee quotas – and herewith the Commission's efforts – as 'divisive and inefficient' (Rankin, 2017). The latest proposal tabled by the EU Presidency in April 2018 no longer contains the idea of automatic relocations, and instead introduces under the heading 'The New Dublin. *Protecting Europe* - Reversing the Dynamics' (emphasis added) a three stage crisis response scenario putting the European Council in the driver's seat.[11]

Apart from a few improvements on existing rules, such as an extended definition of family members; an early access of asylum seekers to the labour market; and some more protection for unaccompanied minors, the legislative proposals reinforce rather than modify the existing system. The Dublin IV proposal and the proposal turning the existing Asylum Procedures Directive into a Regulation[12] strengthen Dublin's disputed redistributive effects by imposing new enforcement mechanisms. Asylum seekers will face a legal obligation to deposit their claim in the first country they enter and to keep residence there. Fingerprinting of all asylum seekers shall become mandatory, even by coercive means – a proposal that has evoked criticism on the part of the otherwise rather cautious European Agency for Fundamental Rights (2015). Failure to reside in the country responsible may lead to an application being considered as abandoned and rejected. Recognized refugees will be obliged to reside in the Member State which granted protection (Art. 29) – failing so, the five-year period after which they become eligible for long-term resident status would have to start all over again (Art. 44).

The Circumvention of EU Standards Through Externalization

Facing the impossibility of fixing the internal system of refugee admission, the lion's share of EU recent initiatives reinforce external migration policies towards countries of origin and transit for asylum seekers. This occurs through an expansion of the 'safe third country' rule in internal legislation and external co-operation agreements.

External migration policies need not as such be protectionist and could contribute to a better global regime. The Commission's 'European Agenda on Migration' of 13 May 2015 and the Partnership Framework Approach launched on 7 June 2016 (Commission 2016a) include several elements in this direction. EU action however privileges the course set by the European Council Conclusions of 15 October 2015 which frames external action in terms of fighting irregular migration and using all means at the EU's disposal to 'further increase leverage in the fields of return and readmission' (European Council, 2015, para. 2q). In sum, these policies emphasize refugee containment over the promotion

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[11]EU Council, Presidency Proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) - New Dublin: Reversing the Dynamics, Document 7674/18 of 9.4.2018.

[12]Proposal for a Regulation establishing criteria and mechanisms for determining the Member State responsible for examining an application for international protection (recast), COM(2016) 270 final, 4 May 2016; Proposal for a Regulation establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU, COM(2016) 467 final, 13 July 2016.

of asylum standards; they replicate the negative distributive conflicts embedded in the internal Dublin system and, eschewing basic EU human rights and rule of law principles, further decouple external policy from internal normative standards.

The 'safe third country' concept permits Member States to disregard an asylum claim on the grounds that the person can or could have found protection elsewhere. This notion has seen a formidable inflation over the last decades. First developed to disallow asylum seekers who had been granted formal refugee status in one country to re-apply for asylum in another (Lavenex, 1999), the rule was later expanded to asylum seekers who had passed through a country in which he or she encountered 'the *possibility to be recognised as a refugee*, and, if so, to receive *protection in accordance* with the Geneva Convention' (Art. 38(1)e EU Asylum Directive, emphasis added). The Asylum Procedures Regulation proposal tabled by the Commission in 2016 introduces three important amendments to this rule. First, the EU will dispose of harmonized lists of safe third countries. Second, the application of this rule will no longer be optional but becomes mandatory – Member States have first to check in an accelerated procedure whether an asylum seeker can be sent back to such a country before applying the Dublin rules. Third, the proposal significantly waters down the criteria for determining a country as safe and merely stipulates: 'the possibility to receive *protection in accordance with the substantive standards* of the Geneva Convention' (Art. 45(1)e, emphasis added) – and no longer the formal refugee status guaranteed by the Geneva Convention. Clearly, this change legalizes the externalization of asylum to countries that are not or are not fully party to the Geneva Convention, thus creating double standards that decouple external policy from internal norms and principles. One country that has motivated this derogation is certainly Turkey. The EU–Turkey Statement of 18 March 2016 provides that all asylum seekers and refugees entering the EU from Turkey without authorization will be returned to Turkey on the basis that it is a 'safe third country'. According to current EU legislation, however, Turkey does not fulfil the criteria for being determined as 'safe'. This is because it applies the geographical limitation to the Geneva Convention, meaning that non-Europeans cannot be granted refugee status in Turkey. Indeed no single EU Member State did designate Turkey as safe third country in its national legislation before the Statement was signed. Not only the missing legal basis, but also reported practices including instances of *refoulement* have led prominent legal scholars, all major human rights NGOs and the Council of Europe to question Turkey's designation as a safe third country (see, for example, Council of Europe, 2016).[13] The fact that German courts recognized the existence of persecution in Turkey and granted several Turkish officials refugee status in 2017 (Kampf and Spinrath, 2017) – at the same time as German and EU politicians praised the virtues of the EU-Turkey deal – symbolizes the deep clash between norms and deeds in the CEAS. Comparable, if less formalized dynamics are on the way with other countries in which the EU has tried to contain refugee flows. One example is Libya, where NGOs and the UN have found EU

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[13]The fact that Turkey does not fulfil the criteria of a safe third country given its limited application of the Geneva Convention was also confirmed by Greek immigration tribunals in May 2016 (Fotiadis *et al.*, 2016) – and is a major reason why Greek authorities long refrained from implementing the deal. In a decision of 22.9.2017 however Greece's highest administrative court, the Council of State, confirmed the lawfulness of forcible returns (see http://m.asylumlawdatabase.eu/en/content/greece-council-state-decision-no-23472017-22-september-2017).

governments 'complicit in horrific abuse of refugees and migrants' (Amnesty International, 2017; UN, 2017).

Beyond these substantive concerns, the deals defy EU normative standards also in formal terms. Concluded by an undefined 'EU' formation outside the procedures provided for by the Treaties, which would also involve the European Parliament, the non-legally-binding EU–Turkey 'statement' eschews fundamental principles of accountability and of the rule of law. This was exposed when the CJEU was asked to assess the Statement's conformity with EU law. Responding to the European Council's disclaimers, the Court confirmed that the Statement was not a measure 'attributable to' an EU institution, but had been concluded by the EU Member States in their capacity as independent legal subjects.[14] The negation of EU ownership and accountability stands in sharp contrast with the Commission's and the Council's regular appraisal of the deal as 'our agreement' (see Juncker, 2017). The deeper problem however is that by denying accountability, the architects of the deal automatically isolate it from the juridical oversight of the CJEU. In sum, the EU–Turkey statement and other informal deals confirm the persistence of intergovernmental 'venue-shopping' beyond the confines of the Treaties (Lavenex, 2006) and elude normative standards constitutive of the CEAS and the EU both in substance and in form.

Reconciling Externalization with Internal Commitment?

Ever since the launch of the 'Global Approach to Migration', the Commission has sought to complement the containment of asylum seekers in third countries with options for legal resettlement in the EU (Commission, 2005), thereby establishing a bridge between external protectionism and internal protection. The EU–Turkey Statement also contains this element by stipulating that for every Syrian refugee who is returned to Turkey for entering the EU irregularly another Syrian (and only Syrians) who has not chosen irregular routes shall be resettled from Turkey to the EU, up to a cap of 76,000 persons. By April 2018, that is two years later, only 12,476 persons have effectively been resettled (Commission, 2018).

Notwithstanding the difficulties encountered with the Turkey deal and the EU's internal relocation scheme, the Commission tabled a Regulation establishing a Union Resettlement Framework.[15] In the negotiations with the Council, commitments to EU solidarity and protection have gradually given way to Member States' discretion and protectionist measures. Contrary to the Commission's original proposal providing for a fixed resettlement quota across countries, the scheme will be conditional upon the adoption of an annual resettlement plan set by the Council. This plan will determine the total numbers of individuals to be resettled, the participation of Member States and the regions or third-countries from which resettlement is to occur. Considering the failure of existing resettlement and relocation mechanisms, it is doubtful whether Member States will show great ambition and solidarity. In addition, the Council insisted that only such countries will qualify for resettlement which, according to

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[14]This was confirmed on 28 February 2017 in the Orders of the General Court in Cases T-192/16, T-193/16 and T-257/16 NF, NG and NM v European Council.
[15]Proposal for a Regulation establishing a Union Resettlement Framework and amending Regulation (EU) No. 516/2014 of the European Parliament and the Council, COM(2016) 468 final, 13 July 2016.

Article 3(4)d, effectively co-operate with the Union in reducing irregular migration to the EU; creating the conditions for the use of the first country of asylum and safe third country concepts; increasing the capacity for the reception and protection of persons in need of international protection staying in that country; and the conclusion and effective implementation of readmission agreements. In sum the proposed resettlement scheme repeats an imbalance already observed for earlier external instruments such as the so-called Mobility Partnerships: the internal commitment of the Member States to open pathways for legal admission/resettlement – the protective *acquis* – is kept vague and subject to political will, while this uncertain promise is used to gain leverage towards third countries in migration control – the protectionist *acquis*.

Conclusion

The crisis of the EU's asylum policy mirrors the ideological conflicts involved in transforming the EU from a primarily regulatory polity into a political Union. Directing the analytical focus on whether a crisis results in 'more' Europe or 'less', and presenting such outcomes as responses to functional pressures, traditional integration theories are ill-suited to unpack these ideological conflicts and to explain 'which' Europe arises. Drawing a parallel to Scharpf's analyses of the Single Market, we argued that the origins and institutional framework of EU JHA co-operation favour a protectionist orientation, deriving asylum co-operation from the need to safeguard the interests of the Schengen zone. The EU's political transformation, however, pushes it to increasingly emulate normative standards perceived as generally appropriate, thus generating an ambitious asylum discourse anchored in the language of universal human rights. As evidenced during the crisis, these normative standards have remained largely decoupled from political practice, resulting in what organizational sociologists refer to as organized hypocrisy.

   The review of measures adopted or planned in reaction to the crisis does not suggest that the system will be more resilient towards future refugee challenges. The failure to fix the internal structures of refugee admission has gone hand in hand with the reinforcement of external measures which limit access to the CEAS and frequently defy the legal and institutional safeguards that make up the 'normative environment' of refugee law. As long as EU institutions lack the power and legitimacy to exert supranational authority towards unwilling Member States, and in the absence of compromise solutions or of public pressure for greater consistency, organized hypocrisy is likely to persist (Brunsson, 2003).

   In some respects, organized hypocrisy describes a necessity. As Brunsson (1989, p. 33) has argued, decoupling normative ambition from political action can be the only way organizations can manage inherently conflictual demands in their environments, which cannot be reconciled. In other words, decoupling allows the EU to uphold its normative standards of appropriateness at the level of 'talk' and 'decision' while at the same time in 'action' respecting the limits imposed by recalcitrant Member States (Brunsson, 1989). Organized hypocrisy can however also be disruptive as it creates a capabilities-expectations gap which, in times of political pressure, slowly undermines the organization's credibility. The implications of the EU's division over asylum and

immigration are already felt beyond the collapse of the CEAS and the difficulties with reforming it. In the course of the ongoing negotiations on the Global Compact on Safe, Orderly and Regular Migration in the United Nations, we have seen the EU dissolve as an international actor: in the third (and latest) round of negotiations, it was no longer the Commission who spoke 'on behalf of the European Union', but Austria who spoke 'on behalf of 27 European States', while Hungary spoke on its own (European Parliament, 2018; Lebada, 2018). In conclusion, the incapacity to bridge normative expectations and political action may, in the long run, challenge the very idea of a common European policy. For better or worse, organized hypocrisy nourishes a persistent sense of crisis over the EU's capacity to 'fail forward' towards a 'Union of values'.

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