Regulating Asylum: the Refugee Crisis and the Search for Common Standards

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Abstract

The 2015 refugee crisis in Europe represented a major test for the Common European Asylum System (CEAS), a hybrid system combining hard and soft law methods to facilitate cooperation among EU member states. Based on in-depth, empirical scrutiny, this research asks: what does the response to the 2015 refugee crisis indicate about the potential for such hybrid structures to facilitate interstate cooperation in 'hard cases', such as refugee protection? The CEAS had been in place for more than fifteen years. Why was it unable to advance coordinated action in response to a rapid increase in the arrival of asylum seekers to the bloc?

Two separate theoretical frameworks are utilized to explore this research question. First, collective action theory provides a lens for characterizing the problem posed by the provision of refugee protection. Second, new governance theory is utilized as a means of understanding the manner in which the CEAS seeks to encourage progressive coordination among EU member states over time.

The empirical body of the research focuses on the crisis response in three EU member states demonstrating strikingly different responses to the crisis: Sweden, Germany, and Hungary. The data analyzed, composed of interviews, as well as documentary, legal, statistical, and media analysis, provide insights into why achieving a coordinated response in the context of the refugee crisis has proven so challenging. The preexisting lack of effective solidarity among EU member states came under additional scrutiny during the crisis, when arrivals disproportionately applied for asylum in a few EU member states, raising the 'costs' of contributing to collective action. At the same time, the public and private 'benefits' accruing to providers of refugee protection became less persuasive as voters grew increasingly skeptical of receiving asylum seekers. Some states, meanwhile, managed to deter asylum seekers and free ride on the efforts of others without significant penalties – practices that were then replicated by other member states.

From the collective action perspective, this research suggests that states are complex actors that should be understood through their political structures and discourse as having unstable, varying preferences. Perceptions of fairness and solidarity, moreover, play a critical role in states' calculations, in part due to domestic political dynamics focused on the effectiveness of government actors. In the context of new governance theory, this research highlights the criticality of shared goals among states, the challenges presented by contexts in which states cooperate across a variety of subject matter areas, the potential for rapid rather than incremental change, particularly during crises, and the risk for new governance methods to produce policy learning that undermines the broader goals of the cooperative structure.

In practical terms, this research underscores the importance of adapting coordination structures to more effectively respond to the diverse and dynamic preferences of states, including in times of crisis. By unpacking the interests of governments and the political considerations that inform states' cost-benefit analyses, states can be incentivized to work together and to show solidarity in providing refugee protection to those in need of it.

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Acknowledgements

This research grew out of my experience working in Serbia during the refugee crisis, seeing first-hand the human impact of a lack of coordination and free riding among states providing refugee protection: refugees uncertain of where they should go or how they would be received on arrival, vulnerable to misinformation and exploitation. People forced to flee their homes were confronted with confusion and unpredictability when they hoped to find safety. Throughout this project, this experience reminded me that this is not a purely academic undertaking, but rather a practical inquiry with real-world consequences for vulnerable people.

My profound appreciation goes first to my supervisors, Drs. Marina Kurkchiyan and Christopher Decker at the Centre for Socio-Legal Studies at the University of Oxford. Both have been generous with their time and suggestions, helping me to stretch beyond my practitioner's perspective to consider this research from multiple vantage points. Marina's analytical framing and thoughtful guidance throughout this process helped to steer this project through several iterations, consistently pulling me back to the foundational questions of this study. Her insights and suggestions have sharpened my writing and my perspective on this topic. Since joining as a supervisor, Chris's expertise and guidance helped me to expand my understanding of the theoretical aspects of this research. His structured approach and considered questions have been invaluable in prompting me to evaluate my arguments from different angles.

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Chapter 1 Introduction

1 Situating the research in the context of the 2015 refugee crisis

'Wir schaffen das!' – 'we can do this!' – became a rallying cry in the early days of the 2015 refugee crisis in Europe.[1] With these words, Chancellor Angela Merkel leaned into a complex political moment, in which the rapid arrival of large numbers of refugees to Europe was animating European citizens on both sides of the issue. By mid-2015, when the European refugee crisis began, the conflict in Syria had led to the displacement of more than 4.2 million people,[2] driving the total number of refugees globally to its highest level in two decades.[3] Europe seemed to be well-placed to respond to this need – certainly it was better placed than Jordan, Lebanon, Turkey, and other countries in the region that had been carrying a far greater burden in the preceding years. Yet the arrival of more than one million people to the European Union (EU) in the course of 2015 triggered a profound reaction on the continent, which has reverberated through the decade that has followed.

Did the events of 2015 represent a genuine crisis in Europe? From a strict numerical perspective, this would be difficult to argue. Even with over a million refugees arriving, this figure represents roughly two-tenths of one percent against an EU population of 500 million. Lebanon, with a population of roughly 6.5 million and far fewer resources at its disposal, had been hosting a similar number of Syrian refugees for nearly four years by this point.[4] These figures should not have presented a practical challenge for EU member states, yet the reaction to these refugee arrivals was much more forceful than the overall numbers would suggest - the inability of the EU

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[1] Matthew Karnitschnig, '5 years on from Angela Merkel's three little words: 'Wir schaffen das!'' *Politico* (August 31, 2020) <https://www.politico.eu/article/angela-merkel-wir-schaffen-das-5-years-on/>

[2] UNHCR, *Mid-Year Trends 2015*, 2015, 4

[3] Ibid.

[4] *See* ibid., 7

to respond to the crisis collectively called into question the efficacy of legislative instruments, European Asylum Support Office (EASO) guidance, and other structures designed to facilitate cooperation between member states on issues relating to asylum and migration, while also prompting calls for more effective solidarity.

The number of refugees globally remains close to record levels as solutions to conflicts prove elusive: by the end of 2024, there were 42.7 million refugees globally, double the figure in 2015.[5] The increasing interconnectedness within and among regions means that refugee crises rarely confront one state alone – interstate cooperation towards provision of protection to refugees is, as a result, likely to remain a critical objective, both in the EU and in other regions. This thesis, accordingly, seeks to explore the obstacles encountered in coordinating action among EU member states in the context of the 2015 refugee crisis as a means to better understand the challenges involved in interstate provision of refugee protection and inform potential approaches to overcoming them.

1.1 The international legal framework for refugee protection

Refugee protection is not a particularly controversial proposition in the abstract. One hundred and forty-nine states are parties to the 1951 Convention relating to the Status of Refugees and/or its 1967 Protocol (hereinafter collectively referred to as 'the 1951 Refugee Convention'), including all EU member states.[6] The principle of *non-refoulement*, moreover, which forms the core of protection provided by the 1951 Refugee Convention and imposes a prohibition on return of an individual to a state or territory where their life or freedom would be threatened, is widely considered a norm of customary international law (and arguably *jus cogens*).[7] The distributional aspect of refugee protection is subject to significantly more

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[5] UNHCR, *Global Trends: Forced Displacement in 2024*, 2025, 7; UNHCR, *Global Trends: Forced Displacement in 2015*, 2016, 2 (noting 21.3 million refugees at the end of 2015)

[6] UNHCR, 'About UNHCR: The 1951 Refugee Convention' <https://www.unhcr.org/about-unhcr/overview/1951-refugee-convention> accessed 14 March 2025; *see also* UNHCR, 'Rights Mapping and Analysis Platform: Refugee treaty and legislation dashboard' <https://tinyurl.com/43kydf88> accessed 12 April 2025

[7] *See, e.g,* Phil C.W. Chan, 'The Protection of Refugees and Internally Displaced Persons: Non-Refoulement under Customary International Law' (2006) 10 International Journal of Human Rights 231, 236; Cathryn Costello and Michelle Foster, 'Non-refoulement as Custom and Jus Cogens? Putting the Prohibition to the Test' in Maarten den

debate, however: accepting that refugees cannot be returned to their countries of origin and are, as a result, entitled to international protection, who is responsible for providing that protection?

On this point, there is no clear-cut legal answer: the 1951 Refugee Convention does not speak to the question of whether a refugee should be protected in state A or state B. An individual fleeing persecution might find different paths to protection; the 1951 Refugee Convention is focused on the characteristics and experience of the individual that would require a state to provide that person with protection rather than with the identity of the protecting state. There is, however, a reference to the need for international cooperation in the document's preamble, as well as mention of the potential for granting asylum to 'place unduly heavy burdens on certain countries.'[8] The collective or distributive dimension of refugee protection is therefore recognized as an issue, but not explicitly addressed, leaving a situation in which states may recognize their obligation to provide refugee protection in the abstract, but nonetheless dispute the applicability of this obligation in particular cases.

In general, the state that provides refugee protection is a matter of geography: most refugees globally flee to a state in close proximity to their country of origin.[9] In some cases, however, refugees find protection farther afield – possibly as a result of not being able to access effective protection in the first country of asylum; due to family, language, or cultural links; or perhaps to access educational or economic opportunities in the country of destination (or some combination of the foregoing). Cases of secondary or onward movements tend to produce some of the most heated debates about provision of refugee protection, with measures intended to prevent so-called 'asylum-shopping' appearing in both national and regional legislation.

With some of these measures, states seek to deny access to asylum procedures to persons in need of refugee protection who could, in theory, have sought protection earlier in

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Heijer and Harmen van der Wilt (eds), *Netherlands Yearbook of International Law 2015: Jus Cogens: Quo Vadis?* (T.M.C. Asser Press 2016), 309

[8] Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137, recital 4

[9] UNHCR, 'About UNHCR: Figures at a glance' 2025 <https://www.unhcr.org/about-unhcr/overview/figures-glance> accessed 12 April 2025 (noting that 69% of refugees are hosted in neighboring countries)

their journey. At the regional level, EU member states have agreed on a framework that establishes responsibility among participating states (the Dublin Regulation, discussed in more detail in Chapter 2).[10] Going beyond these explicit legal provisions, in some cases states also seek to take unilateral steps to avoid creating a 'pull factor' for refugees to apply for asylum on their territory. This may involve limiting access to territory and asylum procedures, contracting the scope of rights associated with refugee protection or lowering reception standards, for example.[11]

In all of these scenarios, it is evident that despite agreeing on the fundamental proposition that individuals who cannot receive effective protection from the country where they hold citizenship should be able to seek and receive protection elsewhere, states are often reluctant to provide that protection themselves. They may have different reasons for their position, stated or unstated, related to their sense that the responsibility should rest with others, the fact that they have provided protection to a large number of individuals already, or concerns about the inclusion and integration in their society of the individuals who are seeking protection. What becomes critical, from the perspective of effective coordinated action, is how the question of who is responsible for providing refugee protection is addressed, and whether the system put in place to facilitate coordinated action is able to guide state behavior, despite the concerns and limitations described above.

1.2 The refugee crisis of 2015

The refugee crisis in Europe in 2015 provides a particularly useful example of the collective challenge posed by the provision of refugee protection. In total, EU member states received more than 1.2 million asylum applications in 2015, the height of the refugee crisis.[12]

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[10] For the purposes of the present discussion, it should be noted that the Dublin Regulation assigns responsibility for processing an asylum application to the first member state an asylum seeker reaches within the EU. There are exceptions to this general rule, but these do not tend to meaningfully alter the balance of responsibility among EU member states. It is also the case that significant numbers of asylum seekers are not returned to the country of first entry due to the absence of information or documentation of where they entered the EU.

[11] *See* Eiko R. Thielemann, 'Why asylum policy harmonisation undermines refugee burden-sharing' (2004) 6 Eur J Migr Law 47, 54

[12] *UNHCR, Global Report 2015: Every Life Matters, 2016,* 84. Expanding the scope to EU and non-EU countries in Europe, this figure increases to more than two million.

From a largely positive and welcoming reception in the earliest stages of the crisis, a number of debates arose in the public and political spheres as the high rate of arrivals continued week after week. Many of these centered around the ability of states to know and control who was entering their territory, how to process this higher number of asylum applications, the scope of rights and assistance accorded to asylum seekers and refugees, the integration prospects of the arriving populations, and the distribution of the refugee 'burden' across receiving states.

Notwithstanding the existence of regional legal instruments speaking to states' obligations toward asylum seekers and refugees, described in more detail below, responses by EU Member States differed markedly: while Germany initially welcomed refugees, as noted above, other countries built fences, set quotas, or introduced internal border controls to limit the number of potential asylum-seekers reaching their territory.[13] Some EU member states took steps to amend legislation to restrict the rights accorded to refugees, including limiting family reunification, shortening the validity period of residency permits, and limiting access to social welfare benefits.[14] The protection designations used by member states when they extended protection to asylum seekers also varied, with some States granting subsidiary rather than refugee status, perhaps due to its more limited scope of benefits.[15]

These disparate responses led to questions about the efficacy of inter-state cooperation to provide refugee protection at the regional level through the Common European Asylum

[13] *See*, *e.g.,* Amnesty International, *Fear and Fences: Europe's approach to keeping refugees at bay*, 2015 (detailing efforts by EU member states to prevent entry of refugees and migrants onto their territory)

[14] *See, e.g.,* Nils Muiznieks, Ending restrictions on family reunification: good for refugees, good for host societies (2017) (noting that many countries either restricted access to family reunification for recipients of subsidiary protection or introduced lengthy waiting periods in response to high rates of arrival in 2015); David Crouch, 'Sweden slams shut its open-door policy towards refugees' *The Guardian* (24 November 2015) <https://www.theguardian.com/world/2015/nov/24/sweden-asylum-seekers-refugees-policy-reversal> (explaining Sweden's shift from permanent to temporary residence permits for refugees); Jenny Gesley, 'Germany: Parliament Adopts Legislative Package on Asylum and Refugees' *Global Legal Monitor* (2 Nov 2015) <https://www.loc.gov/item/global-legal-monitor/2015-11-02/germany-parliament-adopts-legislative-package-on-asylum-and-refugees/> (detailing that asylum seekers in reception facilities would no longer be eligible for cash assistance but rather would receive benefits only in kind)

[15] Eurostat, *EU Member States granted protection to more than 330,000 asylum seekers in 2015* (2016) (providing statistics for protection rates showing that in 2015, 18% of protection recipients in the EU received subsidiary protection overall, while for Sweden this figure was 54% and for the Netherlands it was 56%). It should be noted, however, that for the purposes of the analysis contained in this thesis, 'refugee protection' as a term will generally be used to refer to both refugee and subsidiary status under EU law, with both being treated as part of refugee protection or international protection in the global sense. A distinction will be drawn only when it is important to understand state actions or particular debates.

System (CEAS). If the mechanisms in place could not ensure a common response in the face of a crisis, were they fit for purpose? Or was the scale of the crisis beyond the capacity of any framework to ensure compliance? Should the regional system be rethought? Would states be willing to accept a more prescriptive legal framework if it had the ability to facilitate coordinated action in case of a sudden influx of asylum seekers?

As time moves on, the lasting political impact of the refugee crisis has also become clearer. With some citizens becoming more concerned about the number of refugees arriving to their countries, asylum and migration became a central issue in the political debates in many EU member states. Several countries saw far right candidates espousing extremely restrictive approaches to asylum and migration gaining in popularity.[16] The rhetoric from these groups tended to raise security, identity, and economic arguments related to the arrival of large numbers of refugees to their countries' territories. This populist positioning, in some cases, pushed other parties further right, as they sought to hold on to power.[17]

The refugee crisis of 2015 is therefore a key inflection point from several angles. First, it marked the first major test of EU cooperation to provide refugee protection since the inception of the CEAS sixteen years earlier. Second, it highlighted the continued divergence among the approaches taken by EU member states, despite their ongoing cooperation through the CEAS and apparent agreement on minimum standards. Third, it has cast a long shadow over EU politics and continues to be very much at the forefront of the political conversation about asylum. Fourth and finally, the gaps observed during the crisis created momentum for eventual revision of the key instruments of the CEAS through the adoption of the EU Pact on Migration and Asylum (hereinafter 'EU Pact') in 2024, scheduled to come into application in 2026.[18] This

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[16] *See, e.g.,* 'Success for right-wing AfD, losses for Merkel's CDU' *DW* (13 March 2016) <https://www.dw.com/en/german-state-elections-success-for-right-wing-afd-losses-for-merkels-cdu/a-19113604> (linking the rise of the AfD in Germany to the debate around asylum and criticism of Merkel's position); Jon Henley, 'Sweden: far right gains threaten Europe's most stable political order' *The Guardian* (<https://www.theguardian.com/world/2018/sep/09/despite-making-gains-swedens-far-right-party-remains-out-of-power> (noting a 4.8% gain in the Swedish Democrats' vote share between 2014 and 2018)

[17] *See, e.g.,* Holly Ellyatt, 'Sweden told people to open their hearts to immigrants 10 years ago. Its U-turn has been dramatic' *CNBC* (7 October 2024) <https://www.cnbc.com/2024/10/07/swedens-immigration-stance-has-changed-radically-over-the-last-decade.html>

[18] European Commission, 'Pact on Migration and Asylum: A commmon EU system to manage migration' 2024 <https://home-affairs.ec.europa.eu/policies/migration-and-asylum/pact-migration-and-asylum_en> accessed 16 August 2025

new agreement, while representing a step forward in terms of solidarity, does not comprehensively address the distributional issue that has been at the heart of challenges to provide refugee protection, both in the region and farther afield, thus leaving open the question of how cooperation between states may best be supported in this context.[19]

1.3 Progress toward collective provision of refugee protection in the EU: the development of the CEAS prior to the crisis

The timeline of the CEAS is indicative of slow but steady progress toward cooperation on the issue of refugee protection in the EU. The principle of joint action on asylum was set out in 1993, when asylum was brought within the competence of the EU by the Maastricht Treaty, but was concretized with plans for promulgating legal instruments covering relevant areas of cooperation in the Treaty of Amsterdam in 1999.[20] In broad terms, the Treaty on the Functioning of the European Union provides that the EU 'shall frame a common policy on asylum, immigration and external border control, based on solidarity between Member States, which is fair towards third-country nationals.'[21] The goals of EU cooperation around refugee protection, then, are situated within the broader context of migration management, also inclusive of border control, and have as related objectives ensuring solidarity among member states and fairness to asylum seekers.

The conclusions from the Tampere European Council meeting, held on 15 and 16 October 1999, addressed the creation of an area of freedom, security, and justice in the EU and provided content to the idea of a common policy on asylum, explaining that it would include 'full and inclusive application of the Geneva Convention,' to be effected by 'a clear and workable determination of the State responsible for the examination of an asylum application,

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[19] Regulation (EU) 2024/1351 of the European Parliament and of the Council of 14 May 2024 on asylum and migration management, amending Regulations (EU) 2021/1147 and (EU) 2021/1060 and repealing Regulation (EU) No 604/2013, 32024R1351, 14 May 2024, Art. 56. Despite establishing a mandatory solidarity mechanism to provide support to overburdened frontline states, 'flexible' provisions allow member states to choose how to contribute to collective efforts in times of crisis rather than providing a clear formula for the distribution of responsibility for asylum applications across the bloc.
[20] European Parliament, *Migration and Asylum: a challenge for Europe* (2018), 3
[21] Consolidated version of the Treaty on the Functioning of the European Union, OJ L. 326/47-326/390; 26.10.2012, European Union, 26 October 2012, Art. 67(2)

common standards for a fair and efficient asylum procedure, common minimum conditions of reception of asylum seekers, and the approximation of rules on the recognition and content of the refugee status.'[22] Subsequently, the intention was for this cooperation to result in a 'common asylum procedure and a uniform status for those who are granted asylum valid throughout the Union.'[23] The intention of the European Council was clear: to progressively realize a common system among EU member states for provision of refugee protection.

This process began with the promulgation of the CEAS legislative instruments, covering reception, asylum procedures, and the status and rights associated with recognition of international protection needs.[24] The allocation of responsibility among EU member states was addressed, as mentioned above, by the Dublin Regulation. This first phase of integration concluded in 2005 (with the last of the core instruments going into effect in 2006).

The European Commission noted as early as 2008, however, that there was a lack of convergence in the outcomes of asylum decisions by EU member states that was, in its view, indicative of a 'critical flaw' in the CEAS, namely, 'a lack of common practice, different traditions and diverse country of origin information sources.'[25] This lack of convergence was, in turn, linked to secondary movements within the EU.[26] While noting the progress made in the first phase of the CEAS, the Commission reflected that 'it is clear that the agreed common minimum standards have not created the desired level playing field.'[27]

Researchers, conversely, raised the possibility of minimum standards triggering a race-to-the-bottom, though little evidence could be marshaled to demonstrate such a consequence following the first phase of the CEAS.[28] On the contrary, certain literature, analyzed in Chapter 2, cited a modest improvement of protection standards in the EU, while on the whole,

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[22] Council of the European Union, *Presidency Conclusions, Tampere European Council, 15-16 October 1999* (1999), paras 13-14
[23] Ibid., para 15
[24] See Chapter 2, Section 1.2.1 for discussion of the CEAS instruments
[25] European Commission, *Policy Plan on Asylum: An Integrated Approach to Protection Across the EU* (2008)
[26] Ibid. It should be noted, however, that the literature questions this direct link between asylum decisions and secondary movements.
[27] Ibid.
[28] *See* Eiko Thielemann and Nadine El-Enany, 'Refugee protection as a collective action problem: is the EU shirking its responsibilities?' (2010) 19 European Security 209, 226; Dimiter Toshkov and Laura de Haan, 'The Europeanization of asylum policy: an assessment of the EU impact on asylum applications and recognitions rates' (2013) 20 Journal of European Public Policy 661, 670

observations tended to emphasize continuity – a finding consistent with the Commission's analysis.[29] At the same time, however, the literature cited a lack of responsibility sharing and the continued uneven distribution of asylum applications across the region.[30]

In line with the Commission's intent to further advance harmonization, the second phase of the CEAS began in 2009. This stage of harmonization saw the revision of each of the constituent instruments of the CEAS, with the exception of the Temporary Protection Directive (which remained in its original form).[31] These instruments entered into force in 2012 and 2013, though the period for transposition continued through July 2015, when the refugee crisis was already well advanced.[32] At the same time, a number of non-legislative, informal modes of cooperation were put in place to encourage closer ties and cooperation in the area of asylum, including, most notably, the establishment of the EASO in 2010, but also encompassing various forms of capacity building support and exchange of good practice among EU member states. In addition, responding to the increase in arrivals in 2014, the Commission set out an Agenda on Migration in May 2015, which included a proposal for a temporary relocation mechanism for emergency situations[33] – an idea that was later formalized in a much different context, when the 2015 refugee crisis was well underway.

Overall, then, the picture leading into the refugee crisis in 2015 was one of a progressively integrated cooperative system for provision of refugee protection by EU member states. While arguably falling short of the level of coordination and uniformity foreseen by the Tampere Conclusions, the challenges evident in the implementation of the CEAS stemmed from EU member states' interest in preserving a measure of independence in asylum (and, relatedly, migration) policy. In this sense, the slow progress toward more effective coordination

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[29] *See* Natascha Zaun, 'Why EU asylum standards exceed the lowest common denominator: the role of regulatory expertise in EU decision-making' (2016) 23 Journal of European Public Policy 136, 136; Christina Boswell and Andrew Geddes, *Migration and mobility in the European Union* (The European Union series, Palgrave Macmillan 2011), 151, 155; Cathryn Costello, *The human rights of migrants and refugees in European law* (Oxford University Press, 2016), 199

[30] Thielemann, 'Why asylum policy harmonisation undermines refugee burden-sharing', 47; Toshkov and de Haan, 'The Europeanization of asylum policy: an assessment of the EU impact on asylum applications and recognitions rates', 679

[31] The majority of the CEAS instruments remained as directives, however, with only Dublin and Eurodac taking the form of regulations.

[32] European Parliament, *Migration and Asylum: a challenge for Europe*, 5

[33] European Commission, *Managing migration better in all aspects: A European Agenda on Migration* (2015)

among EU member states reflects the fact that refugee protection is a 'hard case' for interstate cooperation due to strong national interests. The refugee crisis of 2015 provides an interesting vantage point for evaluating cooperation in the sense that this sort of extraordinary situation is precisely what many EU member states may have had in mind as they argued for preserving member state autonomy within the EU's legal framework in this area of policy. At the same time, it was also arguably a situation in which cooperation among states was critical. This period was, accordingly, a key test of the functioning of the CEAS.

1.4 Cooperation under pressure in 2015 – the failure of the CEAS?

As outlined above, the idea of cooperation to provide refugee protection in the EU was not new. The system had been under development for more than two decades, though the goals of a common asylum procedure and uniform status across the EU remained elusive. As will be explored in the following chapters, the crisis brought into starker relief several longstanding trends, which have since been cited as failures of cooperation and fed into the widely held perception that the systems established by the CEAS were not able to produce a coordinated response.

First, it is notable that the 1.2 million asylum applications presented in 2015 were not distributed evenly across the bloc - 80% of asylum applications were received in six of the (then) 28 EU Member States: Germany, Hungary, Sweden, Austria, Italy, and France.[34] Even among these states, there were significant discrepancies: Germany received 35% of the total number of applications, while France received just 6%.[35] Adjusting for population size, however, the proportionately highest figures across the EU fell to Hungary, Sweden, Austria, Finland, and Germany.[36] This was not a new phenomenon, as noted in the previous section, but the profile of the crisis brought much more attention to the uneven distribution of asylum seekers among EU member states and, in turn, put pressure on politicians in top receiving

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[34] Eurostat, *Record number of over 1.2 million first time asylum seekers registered in 2015* (2016)
[35] Ibid.
[36] Ibid. It should be noted that this list is mainly comprised of states that are not considered as part of the 'front line' of EU states. Although most asylum seekers arriving to Europe in 2015 traveled from Türkiye to Greece, they did not apply for asylum in Greece but rather continued traveling north, ultimately applying for asylum in other EU member states.

states to demonstrate to their constituents that they were taking steps to address the unequal burden carried by their citizens.

During the crisis, differences in legislation that could be interpreted as creating a more generous system of protection (both in terms of rights and reception standards) and differences in outcomes that indicated higher levels of protection than was the norm across the region were linked, by some national actors, to higher rates of arrivals.[37] As migration and asylum increasingly became central to public and political debates due to the number of asylum seekers arriving and, arguably, media focus, defending higher standards became difficult (notwithstanding, in most cases, the lack of real evidence for a link between standards and arrival rates).[38] Accordingly, legislators under pressure to show that they were responding to the crisis reacted – by lowering standards, with the justification and explanation that this would serve to ease the pressure on the national asylum system.[39] In some cases, the lowering of standards went towards or even reached the minimum standards set by the CEAS, thus still complying with the regional legislation, though in others this limit was exceeded.[40] In the chapters that follow, this trend will be demonstrated across all three states examined - Sweden, Germany and Hungary - highlighting the strong political element that underscores many actions taken on this issue and, arguably, the delayed onset of the feared race-to-the-bottom.

Beyond legislative adjustments, EU member states responded to the sudden increase in the arrival of asylum seekers in 2015 in different ways, some of which were intended to avoid providing international protection to the arriving population. Such measures, taken unilaterally by EU member states to avoid being the provider of refugee protection, can be

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[37] *See, e.g.,* Government Council, *The government is proposing measures to create room for Swedish refugee reception (translated from Swedish)* (2015)
[38] *See* Elspeth Guild, 'The Complex Relationship of Asylum and Border Controls in the European Union' in Vincent Chetail, Philippe De Bruycker and Francesco Maiani (eds), Reforming the Common European Asylum System: The New European Refugee Law (Brill Nijhoff, 2016), 45
[39] *See* Government Council, *The government is proposing measures to create room for Swedish refugee reception (translated from Swedish)*; Constantin Hruschka and Tim Rohmann, 'Excluded by crisis management? Legislative hyperactivity in post-2015 Germany' (2023) 61 International Migration 12
[40] *See* Commission v Hungary (Accueil des demandeurs de protection internationale) C-808/18, ECLI:EU:C:2020:1029, European Union: Court of Justice of the European Union (finding Hungary's amended legislation in violation of the requirements of the CEAS)

viewed as a form of 'free riding' in the sense that the idea underlying them is that another state will step in to provide protection, while the free rider avoids incurring costs. In the worst case, no state will provide protection and refugees will either live in a state where they do not have full access to the rights to which they are entitled or return home despite the risks to their lives and freedom that prompted them to flee.

As will be explored in subsequent chapters, EU mechanisms for enforcement are not necessarily designed to respond to blatant disregard of applicable legal provisions. Systems are in place to put member states on notice and give them an opportunity to course correct, but the refugee crisis demonstrated the challenge inherent in seeking to promptly respond to free riding. If free riding serves to avoid otherwise applicable obligations for a period of years while the challenge is pending in court, the state in question may succeed in evading its responsibilities for the duration of a crisis.

1.5 Questions to be addressed

The dilemma of how to secure agreement to cooperate from member states and enforce the terms of that agreement is one that the EU has faced in a number of subject matter areas – including but certainly not limited to asylum and migration. Hybrid instruments, such as the CEAS, combine traditional legal regulation with a soft law approach, with the overall aim of moving member states in the direction of greater cooperation over time, and in spite of sovereignty concerns. Taking into account the numerous critiques of the CEAS that emerged during the period following the crisis, my research seeks to respond to a central question: ***what does the response to the 2015 refugee crisis indicate about the potential for hybrid structures to facilitate interstate cooperation in 'hard cases'?*** Stepping back from the specific context, this project offers the possibility to draw insights from the 2015 refugee crisis that speak to the broader challenges to cooperation among states with divergent interests and the potential for EU actions and policies to facilitate cooperation in contexts where collaboration appears elusive.

Within this inquiry, various questions arise in relation to the nature of the problem presented by cooperation to provide refugee protection, the states who seek to cooperate, and the structures that regulate state action:

- First, it is necessary to clearly articulate the challenge presented by inter-state cooperation to provide refugee protection in the EU. Related questions include: What type of problem is the provision of refugee protection, and how does that impact the nature and likelihood of solution-oriented interstate cooperation? What are the costs and benefits associated with being a provider of refugee protection, both in general and in the EU? What are the key obstacles to providing refugee protection at the regional level? Is this activity uniquely difficult or challenging, as compared to other areas of interstate cooperation? If so, what aspects of refugee protection make it more difficult as an area of cooperation? Is refugee protection more challenging to provide in the EU than elsewhere? If so, why?
- A second level of inquiry focuses on the characteristics of the states who are expected to be the providers of refugee protection, seeking to understand their key motivations. This will largely focus on the three states that are the subject of this research, namely, Sweden, Germany, and Hungary, each of which represents a different approach to cooperation with their crisis response. In this regard, the thesis will explore the following questions: Do all states weigh the costs and benefits related to refugee protection in the same way? If not, what impacts their motivation structures? Are some states more or less inclined to be providers of refugee protection? What is the role of political actors at the national level in shaping state preferences related to asylum? Are states influenced by external factors, including the behavior of their neighbors? Do state preferences related to refugee protection remain consistent over time?
- The third line of exploration examines structures and potential actions to facilitate interstate cooperation to provide refugee protection. In this regard, the central questions are: What actions are required for states to comply with their

obligations toward refugees at global and regional levels? What are the legal and practical consequences of non-compliance? How effective are these consequences in guiding or influencing state behavior? Are there additional incentives, positive or negative, that influence cooperation among EU member states in provision of refugee protection? Are the existing incentive structures similarly successful in persuading different member states to cooperate? If not, why does their impact vary?

2 Situating the research in collective action theory and new governance

Cooperation on issues related to asylum and migration is demonstrably complex and may be seen as defying, on a certain level, the formulas for cooperation that have proven successful in other cases (both in the region and elsewhere). This project, accordingly, brings together two separate theoretical frameworks, incorporating **collective action theory** to frame the challenges to cooperation to provide refugee protection, while also drawing on **new governance theory** (referenced by the European Commission itself in this context more than two decades ago) as an approach to analyzing the actions taken by EU member states in addressing this collective action problem.

2.1 Conceptualizing the challenge: collective action theory as a lens for understanding refugee protection

As will be elaborated in Chapter 3, refugee protection satisfies the essential characteristics of a collective action problem: there is general agreement that people in need of refugee protection should receive it, but in many cases, states would prefer to 'free ride' on the efforts of others, rather than be the provider of refugee protection.[41] To be more specific, collective action problems arise in the context of group action to produce a public/collective

[41] Peter H. Schuck, 'Refugee Burden-Sharing: A Modest Proposal' (1997) 22 Yale Journal of International Law 243, 253

good that is both *non-excludable*, in the sense that non-contributors cannot be prevented from accessing it, and *non-rivalrous*, or undiminished by others' use, in nature.[42] Common examples of such goods include streetlights and clean air.

This theoretical foundation provides certain insights into why effective inter-state collective action is so challenging in practice and allows refugee protection to be situated within the spectrum of collective action problems. It allows exploration of the public/collective good(s), as well as potential private benefits (meaning benefits that accrue only to contributors), that may result from collective action to provide refugee protection. This opens a window into the possible motivations of states and relevant considerations in assessing state responses, including potential explanations as to why state actors may be inclined to respond differently when faced with the same crisis. Finally, this framing offers insights into the slow progress toward effective cooperation by EU member states to provide refugee protection.

At the same time, collective action theory also speaks to the conditions and structures that may increase the likelihood of cooperation. Collective action theory considers, in general, that heterogeneity among actors is an asset, and that small groups are generally more able to achieve collective action than larger ones.[43] The literature also suggests that positive inducements or punishments may be utilized to increase the likelihood of cooperation among a given group of actors.[44] In the absence of effective enforcement structures, collective action theory explains the potential tendency of states to seek to free-ride on the efforts of others, in order to be able to enjoy the public/collective good without any of the associated costs. These insights will be applied to the context of EU member state cooperation through the CEAS in the chapters that follow.

Drawing on these theoretical elements, this thesis uses collective action theory to explore the baseline for interstate cooperation to provide refugee protection in the EU pre-crisis, as well as the shifts in member states' calculations regarding the potential rewards of cooperation as a result of increased pressure on the system and other changes that may have

[42] *See, e.g.,* Eiko R. Thielemann and Torun Dewan, 'The myth of free-riding: Refugee protection and implicit burden-sharing' (2006) 29 West European Politics 351, 356, 359
[43] Mancur Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups* (Harvard University Press 1971), 218
[44] Ibid., 133-34;Paul Pecorino, 'Olson's "Logic of Collective Action" at fifty' (2015) 162 Public choice 243, 244, 250

taken place in the context of the emergency response. Ultimately, this framing serves to provide a lens for analyzing state behavior before, during, and following the 2015 refugee crisis. At the same time, as a 'difficult case,' refugee protection provides a case study to critically examine and potentially contribute to the key insights of the literature on collective action.

2.2 Evaluating solutions: using new governance theory to understand how states can work together

Building on the discussion in collective action theory of conditions that may facilitate cooperation between states, this project further delves into the specific context of situations in which there exists no system of effective enforcement to ensure cooperation. In doing so, this project draws on academic literature examining the potential for self-governance to enable groups to establish and maintain common-pool resource systems (a collective action dilemma presenting similar challenges to those experienced in the context of seeking to provide a public good), particularly the work of Elinor Ostrom.[45] As described in further detail below, this project uses new governance theory, which suggests the possibility to coordinate state behavior without recourse to binding legal structures, to frame the potential contribution of non-binding, 'soft' elements of the CEAS to enhance cooperation among EU member states to provide refugee protection.

The above analysis of the early stages of EU member state cooperation through the CEAS makes clear that EU member states responding to the rapid arrival of refugees to the EU in 2015 were not operating in a vacuum – there was a well-established system in place, comprising both legal instruments and less formal coordination structures. In the first category are the regulations and directives relating to reception, temporary protection, asylum procedures, standards for recognizing international protection claims and the rights associated with international protection, data collection and the allocation of responsibility for processing an asylum claim. Concurrently, EU member states were coordinating and cooperating in a

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[45] Elinor Ostrom, *Governing the commons : the evolution of institutions for collective action* (Political economy of institutions and decisions, Cambridge University Press Cambridge 1990), 29, 32

number of less formal ways as well – receiving guidance, training, and support from EASO (now replaced by the EU Agency for Asylum or EUAA); exchanging good practice between member states through study visits and twinning; and distributing/receiving EU funding through the European Refugee Fund (ERF), which later became the Asylum, Migration, and Integration Fund (AMIF). These informal coordination structures can be characterized within the broad frame of new governance, as detailed further below.

In line with the work of Trubek, Cottrell, and Nance, this research conceptualizes the CEAS as a hybrid system, composed of both 'hard law' and 'soft law' elements.[46] In the context of the EU, the hard law elements are the result of the Community Method, which produces decisions and legislation through the actions of the EU's supranational bodies – the Council of the European Union, the European Commission, and the European Parliament.[47] Complicating this picture, however, is the fact that some elements are regulations and thus specific in their application and enforceability, while others take the form of directives and allow some level of variation between member states, provided that minimum standards are met. There are thus degrees of 'hard law' in the sense of the requirements they impose for cooperation. The 'soft law' elements comprise a range of bilateral and multilateral modes of cooperation, as articulated above, including those designed to bring about convergence of law and policy through sharing experience and mutual learning.

The advantage of such a hybrid system, according to Trubek et al., and the reason for its use in the EU, is that it allows a policy goal to be 'pursued through two routes, one of which leads to hard measures and the other to soft ones,'[48] with soft law, in particular, serving to lower 'contracting' and sovereignty costs, permit greater diversity among participants, and, relatedly, expand participation, as well as offering flexibility, simplicity, and an incremental

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[46] *See* David Trubek, M. Cottrell and Mark Nance, ''Soft Law,' 'Hard Law,' and European Integration: Toward a Theory of Hybridity' in Joanne Scott and Grainne de Burca (eds), *New Governance and Constitutionalism in Europe and the US* (Oxford University Press 2006), 93; *see also* Burkard Eberlein and Dieter Kerwer, 'New Governance in the European Union: A Theoretical Perspective' (2004) 42 JCMS: Journal of Common Market Studies 121, 136 (noting the need for research to examine 'patterns of interaction between 'old governance' (regulatory standards) and 'new governance' (best practice))

[47] European Union, *The Community and intergovernmental methods*

[48] Trubek, Cottrell and Nance, ''Soft Law,' 'Hard Law,' and European Integration: Toward a Theory of Hybridity'

approach to coordination.[49] Other scholars have used 'governance' or 'new governance' to refer to the forms of soft law described by Trubek et al.: in other words, 'governing mechanisms which do not rest on recourse to the authority and sanctions of government.'[50] In the specific context of the EU, Cardwell defines 'new governance' as 'a term understood to include a variety of diverse modes including coordination, target-setting, benchmarking and peer-review,' which 'has provided legal scholars with an opportunity to investigate the effects of informal mechanisms on the European integration process and their relationship with 'traditional' law.'[51]

In line with this recognition of the hybrid nature of coordination around asylum and migration in the EU, this thesis uses new governance as the second theoretical frame for the examination of the progressive realization of collective action within the context of the CEAS. Given the informal and non-binding nature of many aspects of coordination around the provision of refugee protection, new governance provides a means of interrogating the efficacy of these tools in complementing traditional legislation and advancing cooperation toward a common goal. This framing also facilitates the evaluation, more broadly, of the structures in place to respond to the collective action problem posed by refugee protection.

More precisely, this research explores the question of when and how new governance may be effective in advancing state behavior toward collective action. As described in more detail in Chapter 3, there are divergences in the literature around whether new governance methods are preference aggregating or whether they may be preference transforming.[52] These two schools of thought, logically, may also imply different views as to what degree of agreement between actors is required at the outset of cooperation in order for new governance to be effective.[53] This research seeks to contribute to the exploration of this

[49] Ibid., 73-74
[50] Gerry Stoker, 'Governance as theory: five propositions' (1998) 50 International Social Science Journal 17, 17
[51] P. J. Cardwell, 'Rethinking Law and New Governance in the European Union: the Case of Migration Management' (2016)
[52] Eberlein and Kerwer, 'New Governance in the European Union: A Theoretical Perspective', 127
[53] *See* James N. Rosenau, 'Governance, order, and change in world politics' in James N. Rosenau and Ernst-Otto Czempiel (eds), *Governance without government : order and change in world politics* (Cambridge University Press 1992), 4; Maria Fletcher, 'EU Governance Techniques in the Creation of a Common European Policy on Immigration and Asylum' (2003) 9 Eur Pub L 533, 554

question regarding the limits of governance, evaluating the impact of these measures in advancing cooperation between EU member states over time and particularly in the context of the 2015 crisis.

3 Methodology

In the chapters that follow, this thesis explores the suitability of new governance, as part of a hybrid structure, to address the collective action problem presented by refugee protection by facilitating closer cooperation among states. In doing so, the discussion focuses on the specific context of the 2015 refugee crisis and the responses in Sweden, Germany, and Hungary, as three of the top receiving countries in the EU,[54] to illustrate the obstacles encountered in securing collective action to provide refugee protection at the EU level. While scholarship seems to converge around a conclusion that the CEAS failed to facilitate collective action to respond to the rapid arrival of asylum seekers to the region, this project takes an empirical and more nuanced approach to explore whether and, if so, why, this was the case.

Sweden, Germany, and Hungary were selected for this study on the basis of the fact that they received the highest absolute number of first-time asylum applications in the EU in 2015, with Hungary and Sweden also receiving the highest number of applications relative to their respective populations.[55] These three EU member states also represent a range of different responses to the crisis, with Germany having pursued a largely open-door policy, while Hungary sought to sharply limit the number of asylum seekers entering, both by building a fence and by systematically returning asylum seekers found on its territory to Serbia. Sweden fell somewhere between the two, initially welcoming but subsequently reintroducing controls at the border with Denmark and tightening its asylum legislation in response to having received a large number of asylum seekers in the summer and fall of 2015.

How did three EU member states, subject to the same regional legal regime, reach such different conclusions about how to respond to the arrival of asylum seekers to their territory?

[54] Eurostat, News Release 44/2016, 1
[55] Eurostat, News Release 44/2016, 1-2

What factors were relevant in each state's public dialogue on the events of 2015? How did each state decide whether to contribute to collective action to provide refugee protection? Did state perspectives change during the refugee crisis? And finally, to what extent did each state's behavior reflect its perspective on the potential for collective action toward refugee protection and the appropriateness of the 'solution' presented by the CEAS?

The data sources for this project comprised documentary, legal, and statistical analysis, media reviews, and thirty interviews with persons with first-hand knowledge of the government responses in the selected EU member states.[56] For the purposes of this research, the pre-crisis period encompasses the time elapsed between the initial promulgation of the CEAS instruments, beginning in 1999, and June 2015. The crisis is treated as lasting from approximately July 2015 until the conclusion of the EU-Türkiye statement in March 2016. The post-crisis period is treated as encompassing the period from April 2016 through 2020, though because some interviews occurred later, there may be some mention of subsequent developments, including with relation to the EU Pact.

3.1 Documentary, legal, statistical and media analysis

This research sought to examine the events around the refugee crisis through a thorough examination of the relevant laws, statistical trends, and public dialogues, from both a national and regional perspective. Key documentary sources included the CEAS instruments, national laws on asylum and migration, Eurostat and UNHCR analyses of asylum applications and decisions, polling data compiled at the country level, official statements and press releases from EU and national authorities, and contemporaneous media coverage of the crisis. Through examination of these diverse sources of information, this project seeks to assemble an account of the broader regional context, how each state responded to the rapid increase in the arrival of asylum seekers to their territory, how governments presented (and in some cases, justified) their actions and how these responses were perceived/received by the public – as well as the interplay between these three elements.

[56] In two cases, interviewees brought a second person with relevant information to the interview, so eleven persons were interviewed in the case of Sweden and Hungary, though ten interviews were conducted.

Given the focus on the selected states' compliance with regional standards and contributions to collective action, it was important to review how states characterized the challenges they faced and the actions they took in response, and how they situated these actions within international, regional, and national legal frameworks. As such, the research in this regard included review of government reports, announcements of policy and legislative changes, and press releases issued by the three governments concerned. Beyond what governments did, this research was also concerned with how they communicated about the steps taken and the justifications provided for changes to preexisting practices. The discussion of these elements also draws on statistical analysis as necessary and relevant to situate the government's framing of the challenges faced in a broader, objective context.

While the analysis of state actions is not solely focused on the legal aspects of the response, it does require examination of the CEAS instruments and key provisions of national legislation as they related to/arose in the context of the crisis response. This included consideration of how each state sought to implement the CEAS during the pre-crisis period and how they amended their legislation during and after the crisis. A particular emphasis was placed on linking legislative amendments to the problems they purported to solve in order to better understand how suitable the steps taken by government officials were in responding to the crisis and how they impacted broader efforts toward regional cooperation to provide refugee protection.

Last, numerous contemporaneous media reports were reviewed as a means of understanding the public dialogue around the 'crisis.' Given the rapidly shifting views among the public during the crisis period, it was critical to see how the events were reported as they occurred – understanding that subsequent coverage tended to reflect stronger political perspectives and to converge around particular narratives about what had occurred. The extent to which coverage was sympathetic to the plight of refugees, the characterization of challenges faced by receiving states, and quotes from key political figures, among other elements, provided a window into the public debate around the crisis and how it changed over time. As highlighted by some interviewees, the media focus, moreover, may also have played a more direct role, as it not only reflected ongoing debates but also shaped them, due to its emphasis on certain 'newsworthy' topics, such as the possibility of many more refugees arriving through family reunification or the security threat posed by uncontrolled borders.

3.2 Interviews

The interviewees included persons who were working or had worked for the concerned governments, NGOs, UN agencies, and academic institutions. The interviews for this project were conducted in a semi-structured manner, with questions seeking to elicit each interviewee's perspective of Sweden's, Germany's, or Hungary's actions in the area of refugee protection before, during, and after the 2015 crisis. These interviews sought to explore key events, in a chronological manner, with a focus on how each government responded to the pressures presented by the refugee crisis. Equally important were perspectives on the main currents of the political dialogue around the crisis, as well as views of the EU and regional cooperation to provide refugee protection, with a particular focus on the potential tension between domestic pressures and priorities, on the one hand, and the CEAS and the regional dialogue. Interviews also explored, in some detail, how decisions to depart from the requirements of the CEAS or otherwise alter domestic law and policy were taken, and whether any justification was provided for doing so. Through this exploration of varied perspectives, this research sought to balance and contextualize other information sources, creating a more holistic picture of the refugee crisis as it happened.

A snowball sampling method was used to identify potential interviewees in each country. This followed compilation of a list of interviewees identified through a desk review as working in organizations active in the response or as having published relevant analysis or commentary on the crisis. In some cases, as described further below, I identified interviewees through contacts that I established in the course of my work or was able to secure contacts, particularly of government staff, from colleagues. After each interview, I asked interviewees to recommend potential key informants with relevant information, seeking a balance between government, NGOs, and academics, as well as potentially different roles in terms of hands-on crisis response, advocacy, analysis, and policy making.

My own background in the humanitarian sector played a role in facilitating access as an initial matter, as I have worked for the United Nations High Commissioner for Refugees (UNHCR) since 2010, including in Denmark between 2017 and 2019, and in Hungary in 2022. Through these experiences, I had developed a limited number of contacts in the Swedish and Hungarian governments and in the UN representation in-country, as well as in NGOs in the case of Hungary. I had not previously worked in Germany, but through colleagues was able to identify several interviewees with first-hand knowledge of the situation, both in the government and NGOs, who became entry points, after which snowball sampling informed my identification and outreach to other interviewees.

From a technical perspective, I conducted all interviews over Zoom, recording audio in all cases and video in most, as preferred by the interviewees, while also taking contemporaneous notes, to which I referred in formulating questions. I subsequently had each interview professionally transcribed. There were some instances in which the interview recording was impacted by internet interruption, but these did not have a meaningful effect on the flow of the interview or the content of the interviewees' responses. Although I had been prepared to arrange for interpretation, there was ultimately not a need to do so, as all of the interviewees I identified were able to communicate in English, in many cases due to the nature of their work and their involvement with international actors/entities.[57]

3.3 Challenges, limitations, and positionality

Several challenges arose while conducting the research for this project. The first, and most notable, was the onset of COVID-19. While I had initially planned to travel to each of the three countries and conduct my interviews in person, as lockdowns were announced in March 2020, coinciding with the start of my research on Sweden, it quickly became apparent that this would not be possible. At that time, all of the interviewees whom I had identified had a preference for avoiding in-person interviews, a practice I continued throughout this research for the sake of consistency. A distinct advantage of this methodology was that I was able to wait for interviewees to be available in a way that I could not have if I had only been in-country

[57] I would note, however, that as I reached out by email and, in some cases, LinkedIn messages sent in English, there may have been potential interviewees who did not respond due to the perceived language barrier.

for a limited period of time. At the same time, however, there may have been instances in which people were more hesitant to speak openly than they might have been during an in-person interview. This tendency may have been at least partially mitigated by the use of video, though as noted above, video was not utilized in every instance due to the preferences of a few individuals for an audio-only format. As people everywhere became more accustomed to communicating via zoom, moreover, I believe that the potential impact of distance interviews was likely further mitigated. Nonetheless, it is acknowledged that the virtual interview format may have had an effect, in particular on the first interviews conducted.

Additional obstacles were encountered in gathering information about the decision-making processes within governments. I was not able to speak to high-level decision makers in all cases – in particular, despite a long exchange and provision of detailed information regarding the subjects to be covered, I was not able to secure an interview with a senior government official in Germany due to the onset of the Ukraine refugee crisis just before I was conducting my interviews. I did, however, speak to other current and former government officials, including at the Federal Office for Migration and Refugees (BAMF) and from the regional level (where officials are responsible for reception and integration). In Sweden, moreover, I noted that government staff were extremely reluctant to provide information and confined their responses strictly to their areas of direct involvement and experience, declining broader questions about the political debate and attitudes toward refugees in Sweden more broadly. Former Swedish government staff were more willing to speak to broader issues, however. It should be noted that no similar challenges were noted with respect to Hungary: both current and former government staff spoke openly and at length about Hungary's actions, the political climate, and public attitudes, though I spoke primarily to former government officials, in part because there had been significant turnover of staff since the refugee crisis by the time I conducted my interviews.

In addition, I do not speak Swedish, German, or Hungarian. As noted above, given the international context of work on asylum and migration issues, all of the people who responded to my outreach for interviews were able to participate in interviews in English. For legal texts, as well as a limited number of press releases and news articles, I relied on machine translation of the relevant documents. It is acknowledged, however, that I might have encountered different sources had I been able to conduct searches directly in the relevant languages.

As mentioned above, I have also been employed by UNHCR, a relevant entity in relation to the crisis, throughout the period I conducted my research. Given that my purpose in approaching interviewees was this research, I presented myself through my affiliation to the University of Oxford and my role as a researcher. Nonetheless, I disclosed my association with UNHCR at the outset of each interview as a matter of transparency and also to explain my familiarity with some of these events, and it would also have been known to those interviewees with whom I had previously worked. This could potentially have made some interviewees less willing to express anti-refugee sentiments or indicate their agreement with restrictive government policies, as they might have assumed that I would disagree. Given that these topics were not directly at the center of my research, however, I do not believe that this potential social desirability bias would have had a substantial impact on the answers provided. I also sought to ask questions in a manner that focused on the broader context and government actions, confining questions about the interviewee's role and actions to the introductory portion of the interview, also with the intention of avoiding more political aspects of the crisis.

At the same time, my background meant that I had direct knowledge of the events at the center of this project, as I worked in Serbia from November 2015 through the end of 2016, corresponding with the late crisis response and the initial post-crisis period. This allowed me to begin my research with a certain level of understanding of the crisis, the contemporaneous debates, and the different approaches taken by the states concerned. I do not believe that this directly influenced my approach or conclusions, however, as Serbia was not one of the countries studied and is not an EU member state. My work with Sweden was later and more limited in scope, as I was covering from a regional perspective and worked only on capacity building and quality assurance initiatives related to the refugee status determination process. In Hungary, I was present in the country nearly seven years after the crisis and focused on the Ukraine emergency response, a distinct context with very different dynamics.

Finally, an additional challenge was posed by the fact that this research was completed on a part-time basis, meaning that the information that serves as the basis of the empirical chapters was gathered over a relatively longer period – in this case, approximately three years. Accordingly, the views expressed by interviewees in some cases reflect a longer perspective, particularly in the case of Hungary (2023) as compared to Sweden (2020). Given that the primary focus was the events of 2015-2016, this did not change the data collected in a meaningful way, but meant that in Hungary, certain post-crisis events, such as litigation outcomes, may have been taken into account by interviewees in assessing the impact of the crisis, while in contrast the 2022 election in Sweden would not have been part of interviewees' perspective.

4 Structure

The thesis opens with an exposition of the CEAS in Chapter 2, titled, '**Achieving a Common European Asylum System: A Hybrid Approach.'** In this chapter, the history, structure, and scope of the CEAS is presented, with particular focus on its hybrid nature, as it is composed of legislative instruments alongside informal modes of cooperation. This helps to establish a baseline for the cooperation achieved prior to the crisis and to explain what is meant by 'soft law' or informal cooperation, as treated in the remainder of the dissertation. In Chapter 3, **'Refugee Protection in the EU: Addressing a Collective Action Problem with Government and (New) Governance,'** the dual theoretical frameworks are presented. The conceptualization of refugee protection as a collective action problem related to various public goods and private benefits is linked, in this review of the relevant literature, to new governance as an approach to challenges to coordinated action. Next, Chapter 4 begins the empirical body of the thesis, with **'Sweden, Model Country of Asylum?'** presenting an analysis of the response to the refugee crisis in Sweden, historically one of the most generous providers of refugee protection in the EU, examining how the pressure of the crisis shifted Sweden's perspective on contributing to collective efforts to provide refugee protection. In Chapter 5, **'Germany: Seeking a Collective Response,'** the German perspective, arguably the most prominent during the crisis, is explored in detail, tracing the initial welcome of refugees at the train station to the negotiation of the EU-Türkiye statement, and particularly focusing on Germany's emphasis on a common or collective action driven response to the crisis. Chapter 6, **'Hungary: Evading Responsibility,'** examines the pattern of defiance and free riding in Hungary, where instruments of regional cooperation seemingly had scant influence during the crisis, seeking to understand what elements of the CEAS may have been relevant to Hungary's decision not to contribute to collective action to resolve the crisis. Finally, the thesis concludes with Chapter 7, presenting observations about the implications of this research for both the understanding of refugee protection as a 'hard case' for collective action and the potential for new governance to facilitate progress toward interstate cooperation on this issue. A list of recommended elements for cooperation is distilled from the data gathered as part of this project, with a strong emphasis on solidarity or responsibility sharing, adaptability, and enforceability.

Chapter 2 Achieving a Common European Asylum System: A Hybrid Approach

This chapter provides an overview of the objectives, structure and impact of the CEAS. Its aim is to address three fundamental questions: i) What is the CEAS? ii) How was the CEAS intended to operate? and iii) How has the CEAS functioned in practice? In examining these questions, the CEAS is situated within the broader frame of cooperation between EU member states. The development and implementation of the CEAS demonstrates the way in which the issue of asylum, so often thought of as being fundamentally within the sovereign authority of states, has gradually come into closer focus from the standpoint of interstate cooperation at the regional level.

The analysis begins in Section 1 with an overview of the development of the CEAS, including its objectives as well as its key elements, both in terms of 'hard' and 'soft' law. The combination of traditional legislation and soft law methods are framed as a hybrid system, recognized by EU actors as a precursor to closer cooperation on asylum issues. In Section 2, the perspectives of commentators on the CEAS during the first phase of its implementation are explored, including, critically, expressed fears that the CEAS would trigger a race-to-the-bottom among member states keen to avoid being seen as more generous than their neighbors.[1] This is followed by a review of the progress, challenges, and gaps in the period leading up to the refugee crisis in 2015. Section 3 looks at the crisis period and, specifically, the perspectives of the European Commission and commentators regarding the performance of the CEAS during the emergency. The chapter concludes in Section 4 with a brief stocktaking of the CEAS's trajectory across two decades, including when the system came under pressure, and sets the stage for a closer examination of the nature and impact of the CEAS in the chapters that follow.

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[1] Zaun, 'Why EU asylum standards exceed the lowest common denominator: the role of regulatory expertise in EU decision-making', 136

1 EU cooperation on asylum: navigating sovereignty concerns and finding common ground

The CEAS came into being as a pragmatic response to the reality presented by the abolition of internal European borders as part of the creation of the Schengen Zone. With free movement throughout the area, EU+ members would potentially become collectively responsible for the asylum decisions made by any individual State with regard to a request for asylum and sought to regularize cooperation in this area. This cooperation formally began in 1993, when the Treaty of Maastricht brought cooperation on asylum and migration matters within the competence of the EU.[2] In 1999, the Treaty of Amsterdam extended the EU's authority to act in the area of asylum and migration, as part of broader EU cooperation to establish an area of freedom, security, and justice.[3] In this initial period, a five-year transition was envisioned, after which the Council could opt to take binding action in this area by qualified majority voting.[4] The period of 1999-2004 is thus considered the 'first phase' of the CEAS, during which the groundwork was laid for a European asylum and migration system.[5] Following this first phase, the Hague Programme set the objective of initiating the 'second phase' of the CEAS with the adoption of recast instruments by the end of 2010, a deadline later extended to 2012.[6] The Treaty of Lisbon, in 2007, articulated the ambition of this second phase as a common system of asylum, to include uniform

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[2] European Union, *Treaty on European Union, Treaty of Maastricht*, Official Journal of the European Communities C191, 7 February 1992, https://www.cvce.eu/content/publication/2002/4/9/2c2f2b85-14bb-4488-9ded-13f3cd04de05/publishable_en.pdf, Article 2, Declaration on Asylum

[3] European Union, *Treaty of Amsterdam Amending the Treaty on European Union*, The Treaties Establishing the European Communities and Related Acts, 10 November 1997, https://www.refworld.org/legal/agreements/eu/1997/en/97640, Article 1(5)

[4] Ibid., Article 73o

[5] European Parliament, *Migration and Asylum: a challenge for Europe*, 4

[6] Council of the European Union, *The Hague Programme: Strengthening Freedom, Security and Justice in the European Union*, 2005/C 53/01, European Union, 13 December 2004, https://www.refworld.org/legal/resolution/eu/2004/en/19952, 1.3. The majority of the recast instruments ultimately entered into force only in 2013, after which point they had to be transposed into national legislation.

protection statuses recognized throughout the bloc, as well as common procedures to determine those statuses.[7]

The first of the CEAS instruments, however, actually pre-dates the first phase of the CEAS: the Dublin Convention entered into force in 1997, as a means of addressing the narrow issue of secondary movements of asylum seekers within the EU, establishing rules for the assignment of responsibility for determining asylum cases among member states.[8] The scope of coordination was further extended through the London Resolutions' discussions of 'Host Third Countries' (the precursor to the concept of a 'Safe Third Country'),[9] 'Countries in Which There is Generally No Serious Risk of Persecution' (later termed 'Safe Countries of Origin'),[10] and 'Manifestly Unfounded Applications for Asylum' (later 'Manifestly Unfounded Claims').[11] The resolutions in the latter two cases provided for accelerated procedures to determine the asylum claim at issue, if consistent with national law, while the former provided for the removal of the asylum seeker to the Host Third Country for substantive determination of their asylum claim.[12] Notwithstanding these early attempts at coordination, however, it was only with the Treaty of Amsterdam that systematic cooperation on the issue of asylum became an objective within the EU, with clear deliverables and timelines.

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[7] Conference of the Representatives of the Governments of the Member States, *Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community*, 2007/C 306/01, European Union, 13 December 2007, https://www.refworld.org/legal/agreements/eu/2007/en/71085, Article 63

[8] European Union, *Convention Determining the State Responsible for Examining Applications for Asylum lodged in one of the Member States of the European Communities ("Dublin Convention"),* 15 June 1990, Official Journal C254, 19/08/1997 p. 0001 – 0012 (entered into force 1997), https://www.refworld.org/legal/agreements/eu/1990/en/36990

[9] European Union, *Council Resolution of 30 November 1992 on a Harmonized Approach to Questions Concerning Host Third Countries ('London Resolution'),* 30 November 1992, https://www.refworld.org/legal/resolution/council/1992/en/14015

[10] European Union, *Conclusions on Countries in Which There is Generally No Serious Risk of Persecution ('London Resolution'),* 30 November 1992, https://www.refworld.org/legal/resolution/eu/1992/en/16736

[11] European Union, *Council Resolution of 30 November 1992 on Manifestly Unfounded Applications for Asylum ('London Resolution'),* 30 November 1992, https://www.refworld.org/legal/resolution/council/1992/en/71868

[12] *See,* European Union, *Conclusions on Countries in Which There is Generally No Serious Risk of Persecution ('London Resolution'),* 30 November 1992, https://www.refworld.org/legal/resolution/eu/1992/en/16736, para 3; European Union, *Council Resolution of 30 November 1992 on Manifestly Unfounded Applications for Asylum ('London Resolution'),* 30 November 1992, https://www.refworld.org/legal/resolution/council/1992/en/71868, para 1; European Union, *Council Resolution of 30 November 1992 on a Harmonized Approach to Questions Concerning Host Third Countries ('London Resolution'),* 30 November 1992, https://www.refworld.org/legal/resolution/council/1992/en/14015, para 1

As further detailed below, subsequent actions have sought to advance coordination on asylum and migration through revisions to the original CEAS instruments and through their 'hardening' into regulations, as well as with the introduction of new instruments. Progressive coordination has proven difficult, however, given the sovereignty concerns tied to questions of asylum and migration and the reticence of EU member states to surrender control over decision-making on this issue.[13] Despite attempts to advance cooperation, there remain numerous gaps, as well as compliance issues, that complicate efforts to respond to asylum and migration challenges (including the 2015 'crisis') as a bloc. These gaps, their impact, and the underlying reasons for their persistence are further explored in the chapters that follow. Before reaching these analyses, however, the sections below will set out, in more detail, the CEAS as it has developed from 1999 onwards.

1.1 The goals of the CEAS

On a fundamental level, the aim of the CEAS is to align the policy and practice of EU member states in a manner that serves their common interests, facilitates cooperation, and ensures provision of protection in line with their international commitments. Following the extension of the EU's competency in the area of asylum with the Treaty of Amsterdam, the discussions at the Tampere Council in 1999 underscored the commitment of Member States and the EU to developing a common system.[14] The elements of this system were to include 'a clear and workable determination of the State responsible for the examination of an asylum application, common standards for a fair and efficient asylum procedure, common minimum conditions of reception of asylum seekers, and the approximation of rules on the recognition and content of the refugee status.'[15] These goals would later

[13] *See, e.g.,* Fletcher, 'EU Governance Techniques in the Creation of a Common European Policy on Immigration and Asylum', 534 (noting the 'strong, historical links between immigration and asylum matters and national sovereignty' that have resulted in a situation in which 'states have been reluctant to cede control over these fields and so efforts to establish cooperation between states have been rather ad hoc, loose and complex in nature and for a long time took place outside the EU context')
[14] Council of the European Union, *Presidency Conclusions, Tampere European Council, 15-16 October 1999*, 16 October 1999, paras 13-17
[15] Ibid*.,* para 14

translate directly to the regulations and directives comprising the first phase of the CEAS, as set out in Section B, below. As the process continued, moreover, these objectives would be further elaborated and the intention of the EU to comprehensively regulate asylum processes and outputs would become clearer.

As an initial matter, the EU based its aspirations for a regional system in existing international law obligations: all EU member states were signatories to the 1951 Refugee Convention and the European Convention on Human Rights, and these international obligations would necessarily form the core of the regional framework as it developed. The Tampere Conclusions accordingly specified that the regional system would be grounded in 'the full and inclusive application of the Geneva Convention, thus ensuring that nobody is sent back to persecution.'[16] With this wording, the CEAS made reference to the fact that EU member states have a foundational obligation of *non-refoulement*, which requires them to avoid returning asylum seekers to any country in which their lives or freedom would be under threat for any of the reasons specified in the 1951 Refugee Convention.[17]

In the longer term, the Tampere Conclusions foresaw the establishment of a 'common asylum procedure and a uniform status for those who are granted asylum valid throughout the Union.'[18] While the initial aims of the CEAS included a certain level of coordination among member states (as they describe 'common standards' related to asylum procedures, 'common minimum conditions of reception,' and 'the approximation of rules' related to recognizing refugees and defining the rights associated with this status), these long-term goals are more ambitious: a single procedure and a single status valid

[16] Ibid., para 13
[17] It should be noted that states have also have additional obligations under human rights law that are relevant in this context, including the Universal Declaration of Human Rights and the Convention against Torture and other Cruel, Inhuman, and Degrading Treatment or Punishment. *See* UN General Assembly, *Universal Declaration of Human Rights*, 217 A (III), 10 December 1948, https://www.refworld.org/legal/resolution/unga/1948/en/11563, Art 14 (providing for the right to seek and enjoy asylum); UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, United Nations, Treaty Series, vol. 1465, p. 85, 10 December 1984, https://www.refworld.org/legal/agreements/unga/1984/en/13941, Art 3 (prohibiting states from returning anyone to a state when there are substantial grounds for believing he or she could be subject to torture there). For the purposes of this thesis, however, the focus will be on the obligations that relate directly to asylum seekers and refugees.
[18] Council of the European Union, *Presidency Conclusions, Tampere European Council, 15-16 October 1999*, 16 October 1999, para 15

across the bloc. With this objective, it was clear that the first phase of the CEAS was a starting point rather than the ultimate destination of regional cooperation on asylum issues.

The European Commission's Policy Plan on Asylum, which was set out following the conclusion of the first phase of the CEAS, elaborated upon the anticipated elements and objectives of the CEAS, explaining that

> the CEAS should provide Member States with a series of uniform legal norms and standards, common devices and cooperation mechanisms to secure the availability of high quality protection standards throughout the asylum process, from the moment of the reception of asylum seekers to the full integration of those granted protection, whilst maintaining the integrity of the asylum system by preventing abuse.[19]

The Policy Plan also included the external dimension, emphasizing the importance of effective partnership with third countries to 'improve their capacity for migration management and refugee protection.'[20] This document, then, sets out an ambitious level of cooperation and coordination among EU member states, intended to ensure positive protection outcomes, prevent abuse, and a set out a common position with respect to third countries among EU member states. Notably, this system, from an early stage, went beyond legal instruments, specifying 'common devices and cooperation mechanisms' as a means of supporting the quality of the asylum system and preventing abuse.[21]

In sum, the CEAS aims to coordinate regional action on issues around migration and asylum in a manner that ensures both quality and consistency. The first of these objectives looks to compliance with international commitments, that is, adherence to the legal instruments that detail when and how states are obliged to extend international protection to persons in need of it. The second point, however, is explicitly about coordination

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[19] European Commission, 'Policy Plan on Asylum: An Integrated Approach to Protection Across the EU,' COM (2008) 360 final, 17 June 2008, 3

[20] Council of the European Union, The Hague Programme: Strengthening Freedom, Security and Justice in the European Union, 2005/C 53/01, European Union, 13 December 2004, https://www.refworld.org/legal/resolution/eu/2004/en/19952, 1.6.1

[21] European Commission, *Policy Plan on Asylum: An Integrated Approach to Protection Across the EU*, 3. In this context, it should be noted that 'preventing abuse' is also a way to refer to the goal of consistency – in other words, it reflects the position that if states treat asylum seekers the same way, there will be no impetus for secondary or onward movements by asylum seekers looking for the most favorable treatment.

between EU member states, and links back to the same concerns about onward movements that animated the drafting of Dublin Convention by suggesting that asylum procedures need to result in similar outcomes across the EU. The underlying reasoning, made explicit in subsequent statements by the European Commission, is that failure to do so may impact the distribution of asylum seekers across member states. While these two goals are complementary, they are not always in alignment and do not necessarily suggest the same priorities or actions, as further elaborated below.

1.2 Elements of the CEAS

1.2.1 Legislative or 'hard law' instruments of the CEAS

The program of deliverables for the first phase of the CEAS led, in turn, to the establishment of the core legislative instruments comprising the CEAS: the Dublin Regulation (also referred to as 'Dublin II'), the Eurodac Regulation, the Asylum Procedures Directive, the Reception Conditions Directive, and the Qualification Directive. With these instruments, and in line with the Tampere Conclusions, the EU sought to define which member state is responsible for processing each asylum application (and to put in place the mechanism by which asylum seekers could be identified and returned to the responsible state), as well as set baselines for the procedures to be followed in determining an asylum-seeker's claim, the conditions under which asylum seekers should be received and accommodated, the standards for recognizing an asylum claim and the rights that should attach to protection statuses. Also closely related and sometimes included in the collection of core CEAS instruments, is the Temporary Protection Directive, intended to provide asylum seekers with temporary protection on a group basis in situations of mass influx that make processing individual claims difficult or impossible.

The first of these instruments to enter into force was the Eurodac Regulation in 2000.[22] This regulation established a system for capturing, storing, and exchanging

[22] Council of the European Union, *Council Regulation (EC) No 2725/2000 of 11 December 2000 Concerning the Establishment of 'Eurodac' for the Comparison of Fingerprints for the Effective Application of the Dublin*

fingerprint data collected from persons crossing external EU borders irregularly and/or presenting applications for asylum.[23] This would, in turn, facilitate the functioning of the Dublin Convention, which, as noted above, went into effect in 1997 and was therefore was therefore already in force at that time.

Next came the Temporary Protection Directive in 2001, establishing a system by which EU member states could offer temporary protection to large groups of persons in need of international protection arriving in a situation of mass influx.[24] The legislation set out minimum standards for temporary protection status, while also seeking to ensure compatibility with states' obligations under relevant refugee instruments.[25] This legislation remained unchanged and unused for more than two decades, until the Ukraine crisis in 2022.

The Reception Conditions Directive followed in 2003, setting out the minimum standards for reception of asylum seekers.[26] For the purposes of this instrument, 'reception' refers to accommodation, food, and clothing, which can be provided by member states in kind, or through cash or vouchers.[27] These standards were intended to ensure 'a dignified standard of living' as well as common standards across EU member states.[28] Once again, consistency was cited as a means of mitigating or preventing secondary movements aimed at securing more favorable living conditions.[29]

The Dublin Regulation also took effect in 2003, representing an evolution of the same system set out in the Dublin Convention for determining which member state should

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Convention, *OJ L 316,* p. 1-10, 11 December 2000, https://www.refworld.org/legal/reglegislation/council/2000/en/72538

[23] Ibid., preamble

[24] Council of the European Union, *Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof*, *OJ L 212,* 7 August 2001, p. 12–23, https://www.refworld.org/legal/reglegislation/council/2001/en/17729

[25] Ibid., preamble

[26] Council of the European Union, *Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers*, *OJ L 31,* 6 February 2003, p. 18–25, https://www.refworld.org/legal/reglegislation/council/2003/en/13734

[27] Ibid., Art 2

[28] Ibid., preamble

[29] Ibid.

be responsible for examining an asylum application.[30] Consistent with the logic of the Dublin Convention, the Dublin Regulation provided for the member state where an asylum seeker first irregularly crossed into the EU to generally be responsible for examining the application for asylum.[31] Other criteria could also be considered alongside the country of first entry, and could shift this responsibility to another member state, including whether the asylum seeker had family members or had been granted residence in another member state.[32] The regulation further provided procedures for the Member State deemed responsible to 'take charge' or 'take back' an asylum application from another member state.[33]

With the finalization of the Qualification Directive in 2004, the CEAS instruments crossed into more substantive asylum-related issues.[34] This instrument had two complementary aims: first, to set out the criteria for determining whether an asylum applicant is in need of international protection, and, second, to establish minimum standards for the rights and benefits associated with refugee status in each member state.[35] Once again, the rationale for this standardization referred to secondary movements that could be motivated by 'differences in legal frameworks.'[36] At the same time, however, the document acknowledged that states may opt to exceed these minimum standards,[37] suggesting that at this point in time, the Council wanted to forestall the possibility of some member states seeking to undercut their neighbors' asylum policies, but was less concerned with uniformity as such.

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[30] Council of the European Union, *Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, OJ L 50,* 25 February 2003, p. 1–10, https://www.refworld.org/legal/reglegislation/council/2003/en/21981

[31] Ibid., Art 10
[32] Ibid., Art 7-9
[33] Ibid., Art 16-20
[34] Council of the European Union, *Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, OJ L 304,* 30 September 2004, p. 12–23, https://www.refworld.org/legal/reglegislation/council/2004/en/115605
[35] Ibid., preamble
[36] Ibid.
[37] Ibid.

The first round of CEAS instruments was complete with the finalization of the Asylum Procedures Directive in 2005 (and its entry into effect in 2006).[38] This instrument set out the objective of establishing minimum standards for granting or revoking refugee status, again with the stated objective of reducing the impetus for secondary movements.[39] In addition, the text noted the objective of promptly determining asylum claims, but left decisions about accelerated procedures or prioritizing certain categories of asylum applications within the discretion of individual member states.[40]

The second phase of the CEAS began in 2009 and, as the passage of the recast instruments required more time than anticipated, continued through 2013. By the end of this period, each of the primary instruments of the CEAS had been recast: the Qualification Directive in 2011 (entering into force in 2012),[41] followed by the Eurodac Regulation,[42] the Dublin Regulation (Dublin III),[43] the Reception Conditions Directive,[44] and the Asylum

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[38] Council of the European Union, *Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status*, *OJ L 326,* 13 December 2005, p. 13–34, https://www.refworld.org/legal/reglegislation/council/2006/en/58536

[39] Ibid., preamble

[40] Ibid.

[41] Council of the European Union, *Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), OJ L 337,* 20 December 2011, p. 9–26, https://www.refworld.org/legal/reglegislation/council/2011/en/84781

[42] Council of the European Union, *Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice (recast), OJ L 180,* 29 June 2013, p. 1–30, https://www.refworld.org/legal/reglegislation/council/2013/en/89216

[43] Council of the European Union, *Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), OJ L 180,* 29 June 2013, p. 31–59, https://www.refworld.org/legal/reglegislation/council/2013/en/14874

[44] 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 (recast), OJ L 180,* 29 June 2013, p. 96–116, https://www.refworld.org/legal/reglegislation/council/2013/en/102659

Procedures Directive in 2013.[45] The Temporary Protection Directive remained unchanged in its 2001 form.[46] The second phase of the CEAS also included the establishment of the European Refugee Fund, intended to provide support to Member States receiving disproportionate shares of the asylum applications lodged in the EU,[47] as well as the establishment of the European Asylum Support Office (EASO),[48] discussed in section 2.

Two points should be noted regarding the development of these core legislative instruments. First, the regulations and directives that were promulgated as part of the CEAS are outcomes of the 'Community method.' The 'Community method' refers, broadly, to 'regulation through legislation' in the EU.[49] More specifically, the Community method may be described as a 'top-down process, beginning with initiatives from the Commission, followed by decisions taken by the EU's legislative branch and ending, if need be, with enforcement by the Court of Justice.'[50] Some commentators have focused on the Community method's institutional aspect, noting in particular 'the role played by EU Legislative, executive and judicial institutions.'[51] Looking to the intergovernmental/supranational dimension, one might view the Community method as

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[45] Council of the European Union, *Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), OJ L 180,* 29 June 2013, p. 60–95*,* https://www.refworld.org/legal/reglegislation/council/2013/en/97663

[46] Council of the European Union, *Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof*, *OJ L 212,* 7 August 2001, p. 12–23*,* https://www.refworld.org/legal/reglegislation/council/2001/en/17729

[47] European Parliament and Council, *Decision No 573/2007/EC of the European Parliament and of the Council of 23 May 2007 establishing the European Refugee Fund for the period 2008 to 2013 as part of the General programme 'Solidarity and Management of Migration Flows' and repealing Council Decision 2004/904/EC*, *OJ L 144,* 6 June 2007, p. 1–21*,* https://www.refworld.org/legal/reglegislation/eu/2007/en/58963

[48] Council of the European Union, *Regulation No 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office, OJ L 132,* 29 May 2010, p. 11–28, https://www.refworld.org/legal/reglegislation/eu/2010/en/73493*.* This regulation was subsequently repealed by the regulation establishing EASO's successor, the EU Asylum Agency, in 2021.

[49] Eberlein and Kerwer, 'New Governance in the European Union: A Theoretical Perspective', 122

[50] Renaud Dehousse, 'Has the European Union moved towards soft governance?' (2016) 14 Comparative European Politics 20, 20-21

[51] Kenneth A. Armstrong et al., 'New Governance and the European Union: An Empirical and Conceptual Critique', *Critical Legal Perspectives on Global Governance : Liber Amicorum David M Trubek* (Hart Publishing 2014), 252

'supranational joint decision-making.'[52] Importantly, the Community method produces 'hard law,' or legal instruments that are binding on EU Member States.[53]

A second salient characteristic of these core legislative instruments is the fact that three of the five take the form of minimum standards set out in the form of directives. Minimum standards regulation may be described as 'a useful way for the EU to set a floor of entitlements while ensuring that Member States may offer further migration and asylum opportunities, and contribute to the progressive development of international human rights and refugee law.'[54] In other words, minimum standards legislation locks in cooperation at the agreed level but seeks to leave space for member states to contribute to the provision of refugee protection as a public or collective good at a higher level. Some academics have taken a more critical perspective, however, noting the potential for minimum standards legislation to negatively impact state practice in asylum and migration, as 'a levelling-down of provision and lowest-common-denominator policy-making, which reduces standards rather than improving them.'[55] The evidence of outcomes produced by the CEAS's minimum standards legislation prior to the refugee crisis will be reviewed in Part IV, below.

1.2.2 'Soft law' elements of the CEAS

Alongside the regulations and directives detailed above, cooperation on migration and asylum in the EU also includes 'common devices and cooperation mechanisms' (to use the phrasing of the European Commission). While Chapter 3 contains a more detailed discussion of how these soft law elements may be understood as representing 'new governance,' for current purposes it is sufficient to note that this category of tools

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[52] Tanja A. Börzel, 'From EU Governance of Crisis to Crisis of EU Governance: Regulatory Failure, Redistributive Conflict and Eurosceptic Publics' (2016) 54 JCMS: Journal of Common Market Studies 8, 10; *see also,* Kenneth A. Armstrong et al., 'New Governance and the European Union: An Empirical and Conceptual Critique', 258-59 (suggesting that the Community Method seeks a balance between supranationalism and intergovernmentalism)
[53] Trubek, Cottrell and Nance, ''Soft Law,' 'Hard Law,' and European Integration: Toward a Theory of Hybridity', 65; *see also,* Alexander Caviedes, 'The open method of co-ordination in immigration policy: a tool for prying open Fortress Europe?' (2004) 11 Journal of European Public Policy 289, 305 (observing a greater desire among EU member states for binding standards in the area of asylum as compared to immigration more broadly); *Cf.* Dehousse, 'Has the European Union moved towards soft governance?', 23 (noting that despite the claims of EU law, it 'lacks any coercive power' and depends on national authorities for enforcement)
[54] Costello, *The human rights of migrants and refugees in European law*, 32
[55] *See* Boswell and Geddes, *Migration and mobility in the European Union*, 152 (summarizing the critiques of the CEAS and ultimately arguing for a 'more nuanced' picture)

encompasses ‘governing mechanisms which do not rest on recourse to the authority and sanctions of government.’[56] These cooperation mechanisms may include elaboration and exchange of country of origin information, twinning programs, shared/common funding, and European Asylum Support Office (EASO) guidelines and support, among other tools.[57] Related to the area of migration management, examples of ‘soft law’ or informal modes of cooperation also include partnerships between EU member states and third states (such as the Pilot Project on Return to Pakistan and the Joint Way Forward with Afghanistan).[58] Cardwell has suggested that the EU-Turkey statement could be considered within this category, at the nexus of asylum and migration policy.[59] In all of these examples, soft law mechanisms may offer the opportunity for states to engage in exchange of best practice and mutual learning even in the absence of the consensus necessary for promulgation of legislation.[60]

In addition to these more general approaches, during the first phase of the CEAS the Commission specifically endorsed use of the Open Method of Coordination (OMC) with respect to EU coordination on asylum policy.[61] The EU had previously explained that ‘[t]he union must renew the Community method by following a less top-down approach and complementing the EU’s policy tools more effectively with non-legislative instruments.’[62] In contrast to the use of regulations and directives, the OMC offers ‘a flexible means of cooperation through which it is possible to develop a common approach and objectives,

[56] Stoker, 'Governance as theory: five propositions', 17

[57] The European Commission presents the EUAA (EASO’s successor agency as of 2022) as a governing structure of the CEAS alongside the five legislative instruments developed in this area. European Commission, 'Common European Asylum System' <https://home-affairs.ec.europa.eu/policies/migration-and-asylum/common-european-asylum-system_en> accessed 27 June 2024

[58] Paul James Cardwell, 'Tackling Europe's Migration ‘Crisis’ through Law and ‘New Governance’' (2018) 9 Global Policy 67, 72

[59] Ibid., 72-73

[60] *See* Fletcher, 'EU Governance Techniques in the Creation of a Common European Policy on Immigration and Asylum', 552; Cardwell, 'Rethinking Law and New Governance in the European Union: the Case of Migration Management'

[61] European Commission, *Communication from the Commission to the Council and the European Parliament, On the common asylum policy, introducing an open coordination method, COM (2001) 710 final* (2001)

[62] European Commission, *Communication from the Commission of 25 July 2001, European Governance: A White Paper, COM (2001) 428 final* (2001), 2

identify best standards and encourage convergence of practice and procedure.'[63] It provides a format for

> [A]n iterative process of mutual learning on the basis of diverse national experiences with reform experiments. It avoids strict regulatory requirements and allows experiments that are adapted to local circumstances, while fostering policy improvement, and possibly policy convergence, through institutionalized mutual learning processes.[64]

This approach has been considered particularly appropriate in circumstances in which adoption of a single, harmonized approach is not yet possible due to political sensitivities or sovereignty concerns, new areas of public regulation for which existing tools are not well-suited, or policy areas with a clear regional aspect.[65] In such circumstances, the open method may promote convergence of national policies through such effects as 'shaming, diffusion through mimesis or discourse, deliberation, learning, and networks.'[66] It is described in the relevant literature as being situated 'somewhere between legislative integration (the adoption of common rules) and straightforward intergovernmental cooperation'[67] or 'between the Community method and the international method.'[68]

The OMC has been used within the EU to coordinate other subject matter areas falling within the three broad categories or use cases articulated above. The European Employment Strategy marked the first notable use of the OMC, and was followed by initiatives regarding pensions, healthcare, and education, among other areas of member state cooperation.[69] Alongside asylum, the Commission also recommended the use of the OMC in the context of immigration policy.[70]

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[63] Fletcher, 'EU Governance Techniques in the Creation of a Common European Policy on Immigration and Asylum', 551
[64] Eberlein and Kerwer, 'New Governance in the European Union: A Theoretical Perspective', 123
[65] Susana Borrás and Kerstin Jacobsson, 'The open method of co-ordination and new governance patterns in the EU' (2004) 11 Journal of European Public Policy 185, 191-92; *see also* Cardwell, 'Rethinking Law and New Governance in the European Union: the Case of Migration Management', 7
[66] David M. Trubek and Louise G. Trubek, 'Hard and Soft Law in the Construction of Social Europe: the Role of the Open Method of Co-ordination' (2005) 11 European Law Journal 343, 356
[67] Fletcher, 'EU Governance Techniques in the Creation of a Common European Policy on Immigration and Asylum', 551
[68] Borrás and Jacobsson, 'The open method of co-ordination and new governance patterns in the EU', 187
[69] Trubek, Cottrell and Nance, ''Soft Law,' 'Hard Law,' and European Integration: Toward a Theory of Hybridity', 78
[70] European Commission, *'On an open method of coordination for the community immigration policy,' COM (2001) 387 final, 11 July 2001* (2001)

The Commission envisioned that implementation of the OMC in the area of asylum would include development of guidelines, preparation of national action plans, exchange of best practices, evaluations of the impact of Community policies, and consultations with third countries and international organizations.[71] The first communication by the Commission, in fact, proposed five thematic guidelines, which were to be adopted prior to the end of the Spanish presidency in 2002, while the first evaluation cycle was foreseen to be completed by 2003.[72] Ultimately, however, the OMC was not taken forward in the contexts of asylum or migration.[73]

Despite the abandonment of this initiative, the broader concept of non-legislative or soft law cooperation remains applicable in the context of asylum in the EU. In particular, one may look to the various channels of informal cooperation through guidance, policy, exchange of best practice, common funding, and other mechanisms as establishing a more expansive basis for cooperation among EU Member States than the scope of legislation under the CEAS. As will be discussed in the next chapter, these areas of cooperation may be seen as a precursor to more comprehensive legislation or as ends/objectives in their own right.

1.2.3 The CEAS as a hybrid structure

As described by Trubek, Cottrell, and Nance, a situation of hybridity arises when there is a ‘simultaneous presence of “hard” and “soft” measures in the same policy domains.’[74] EU cooperation and coordination on asylum combines the traditional legislative products of the Community Method with informal modes of cooperation, creating a system in which EU member states are encouraged to work closely together both formally and informally in the area of asylum. The five constituent legislative instruments

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[71] European Commission, *‘On the common asylum policy, introducing an open coordination method,’ COM (2001) 710 final, 28 Nov 2001* (2001), 17

[72] Ibid., 17-19, 21

[73] Vassilis Hatzopoulos, 'Why the Open Method of Coordination is Bad for You: A Letter to the EU' (2007) 13 European Law Journal 309, 323

[74] Trubek, Cottrell and Nance, '‘Soft Law,’ ‘Hard Law,’ and European Integration: Toward a Theory of Hybridity', 93

provide a framework for determining the state responsible for an asylum application and the baseline standards for provision of reception conditions, fair asylum procedures, standards for recognizing an asylum claim and rights upon recognition of international protection needs. At the same time, since 2011, EASO (and now the EU Asylum Agency (EUAA)) has also formed part of this framework, facilitating cooperation between EU Member States, as well as between EU Member States and Third Countries; supporting EU Member States with a variety of activities including relocation and resettlement; and developing training materials, guidelines, and indicators.[75] As noted above, other modes of informal cooperation between Member States, such as the European Refugee Fund (which later became the Asylum, Migration, and Integration Fund, or AMIF), exchange of best practice, and twinning programs, also fall within the broad scope of 'soft law' methods. These types of approaches, while perhaps not sufficient to serve as the basis for regional coordination in their own right, may, when combined with the regulations and directives of the CEAS, serve to support long-term policy convergence among EU member states.[76]

Given the sovereignty concerns that often accompany decision making on asylum issues and the challenges to achieving consensus around a more comprehensive regulatory system, the EU saw a need for non-legislative approaches, including the OMC, as a means to advance member state cooperation on this issue in 2001.[77] While the iterative process of mutual learning and exchange foreseen by the OMC did not ultimately materialize, other types of informal cooperation have nonetheless been implemented alongside the CEAS instruments to facilitate and structure cooperation among member states that goes beyond the provisions of the CEAS directives and regulations. As Borrás and Jacobsson observe, 'diversity is no longer antagonistic to the European integration project, but a positive asset that can unleash mutual learning and change affecting in a

[75] European Asylum Support Office, *European Asylum Support Office: About Us* (European Union 2014), 8
[76] *See* Kenneth A. Armstrong, 'The Character of EU Law and Governance: From 'Community Method' to New Modes of Governance' (2011) 64 Current Legal Problems 179, 200
[77] European Commission, *Communication from the Commission of 25 July 2001, European Governance: A White Paper, COM (2001) 428 final*; European Commission, *'On the common asylum policy, introducing an open coordination method,' COM (2001) 710 final, 28 Nov 2001*

constructive way the overall European project.'[78] Through this structure, hard and soft law asylum instruments are seen as having the potential to complement each other and advance the broad goals of ensuring quality and consistency on asylum across the EU.

2 The pre-crisis CEAS: analysis and critiques

As the CEAS began to take shape, commentators foresaw numerous potential challenges related to its implementation. Chief among these was the concern that, by seeking to accommodate EU member states with widely varying asylum systems, the EU was establishing minimum standards that would create an incentive for states with more generous or protective asylum systems to lower their standards.[79] In other words, a race-to-the-bottom could occur, with states fearing that setting higher bar could create a 'pull' factor for asylum seekers.[80] In response, states might seek to reduce the level of rights and benefits provided to refugees or recognize fewer refugees overall. Even if these negative effects did not come to pass, it was unclear what the CEAS would achieve: specifically, whether minimum standards legislation could overcome domestic opposition to providing refugee protection or address the divergence in recognition rates that gave rise to perceptions of inconsistency across the region. Each of these concerns is addressed below.

2.1 Refuting race-to-the-bottom claims

As noted above, the Asylum Procedures Directive and the Qualification Directive (both subsequently recast) established minimum standards, but permitted upward deviation by member states willing to legislate more protective asylum policies.[81] In

[78] Borrás and Jacobsson, 'The open method of co-ordination and new governance patterns in the EU', 202
[79] Boswell and Geddes, *Migration and mobility in the European Union*, 152
[80] *See* Toshkov and de Haan, 'The Europeanization of asylum policy: an assessment of the EU impact on asylum applications and recognitions rates', 664
[81] Cathryn Costello and Minos Mouzourakis, 'The Common European Asylum System: Where did it all go wrong?' in Maria Fletcher, Ester Herlin-Karnell and Claudio Matera (eds), *The European Union as an area of freedom, security,*

contrast to many other EU legislative instruments, however, the CEAS directives did not include a 'standstill clause' intended to prevent member states from tailoring their legislation to meet only the minimum acceptable requirements.[82] This meant, in practice, that there were no safeguards to prevent EU member states from aligning with the minimum requirements of the CEAS instruments, even if doing so meant retreating from more generous or protective provisions under national law.

There were few indications of falling standards in practice following implementation of the CEAS, however. Thielemann and El-Enany, writing in 2010, found that 'there is no evidence to support the claim that European cooperation on refugee policy has led to policies that have been particularly restrictive as the "Fortress Europe" notion implies.'[83] They suggested that the implementation of the Qualification Directive and the Asylum Procedures Directive may in fact have helped to avoid a race-to-the-bottom, instead prompting some Member States to expand the scope of refugee protection under their national laws.[84] Overall, they saw the trend in the wake of the CEAS as indicative of continuity and stability, with little change in terms of protection outcomes in EU Member States.[85] Examining policy outcomes for the period of 1997 to 2010, Toshkov and de Haan, similarly, found in 2013 that there had been no sustained decrease in the rates at which asylum seekers were recognized as refugees by EU Member States.[86] On the contrary, EU protection rates for most major countries of origin began increasing after the mid-2000s.[87] Put simply, despite the logic regarding the potential for minimum standards legislation to

and justice (Routledge 2016), 273; Costello, *The human rights of migrants and refugees in European law*, 8, 27; Fletcher, 'EU Governance Techniques in the Creation of a Common European Policy on Immigration and Asylum', 541

[82] Costello, *The human rights of migrants and refugees in European law*, 30

[83] Thielemann and El-Enany, 'Refugee protection as a collective action problem: is the EU shirking its responsibilities?', 226

[84] Ibid., 216-17

[85] Ibid., 225-6. They did, however, observe some 'redistribution of responsibilities between old Member States and new Member States.'

[86] Toshkov and de Haan, 'The Europeanization of asylum policy: an assessment of the EU impact on asylum applications and recognitions rates', 670

[87] Ibid., 672-73

exert downward pressure on asylum standards, during the first years of the CEAS, there was little evidence to indicate that this was happening in practice.

2.2 Persuading domestic audiences and expanding the scope of refugee protection

In line with the above-mentioned analysis, Zaun, similarly, found in 2016 that refugee protection standards remained constant or improved following implementation of the CEAS.[88] Examining the nature of the system, however, she argued that the CEAS did not represent a lowest-common-denominator baseline for the EU as a whole, but rather for a group of member states she characterized as ‘strong regulators,’ meaning that they had both high levels of governmental efficacy and actively engaged with the issue of refugee protection.[89] She further found that risk-averse Member States generally preferred to maintain the status quo in terms of their domestic asylum laws, which represented the outcome of political advocacy and compromise at the national level, even if these were more generous than the CEAS minimum standards.[90] Finally, she argued that Member States falling within the category of ‘weak regulators’ (in the sense that they had low levels of government effectiveness and/or less exposure to issues around immigration and asylum) were able to utilize EU directives in public discourse as a justification for raising protection standards in order to avoid triggering adverse political consequences at the national level.[91]

Boswell and Geddes, writing in 2011, had similarly argued that the CEAS could serve to provide a kind of political cover for Member States to adopt more liberal legislation than their domestic constituencies would otherwise accept.[92] National political actors could to point to cooperation with EU Member States as a way in which they are taking

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[88] Zaun, 'Why EU asylum standards exceed the lowest common denominator: the role of regulatory expertise in EU decision-making', 136
[89] *See* ibid., 150
[90] Ibid., 150
[91] Ibid., 140, 150
[92] Boswell and Geddes, *Migration and mobility in the European Union*, 155

steps to address the challenges posed by immigration, while simultaneously shifting blame for more generous measures to protect refugees to the supranational level.[93] In this sense, they might pair restrictive rhetoric intended for domestic audiences with policies that were, in practice, more protective of the rights of asylum-seekers and refugees.[94] They noted that this relationship was not inevitable, however: national legislation on asylum might 'progress' in the sense of moving closer to common standards and procedures, without those procedures necessarily representing an expansion of access to procedures and substantive rights for persons in need of international protection.[95]

While acknowledging that the EU has produced some measures that may be more restrictive than the preexisting national legislation, however, Boswell and Geddes argued that on the whole the CEAS has had a liberalizing effect.[96] In this regard, they highlighted, in particular, the expansion of categories of individuals granted leave to remain in Europe, despite not having been recognized as refugees.[97] While not expanding the scope of asylum as such, such categories/statuses nonetheless provides a measure of protection to people who cannot safely return home.

Costello, similarly, cited the CEAS's distillation of subsidiary protection status as indicative of the positive impact of EU regulation in the area of asylum.[98] The creation of a legal status for non-removable persons, with a defined set of rights, provided greater predictability for individuals falling into this category and can be seen as a progressive protection outcome of the CEAS. Nonetheless, as Costello observed, subsidiary protection does not confer the same rights as refugee status, with shorter residency permits and a lack of access to family reunification as the most notable differences.[99]

[93] Ibid., 174
[94] Ibid., 156
[95] Ibid., 150
[96] Ibid., 151, 155
[97] Ibid., 156
[98] Costello*, The human rights of migrants and refugees in European law,* 199
[99] Ibid., 200

2.3 Progress toward common procedures and standards?

2.3.1 The view of the European Commission

The European Commission took stock of progress made toward the stated goals of the CEAS during its first phase (1999-2005) in 2008. In doing so, they noted three trends emerging from statistical data regarding asylum applications in the EU: first, an overall decrease, to historically low levels, of asylum applications; second, the fact that similar claims continued to be treated differently by EU Member States; and third, the increasing use of subsidiary protection and other forms of protection defined under national law, as opposed to refugee status in accordance with the 1951 Refugee Convention.[100] The Commission highlighted the lack of consistency in asylum decisions across the EU, in particular, as indicative of a 'critical flaw' in the CEAS.[101] Looking to secondary movements, moreover, they drew an explicit link to these inconsistencies, suggesting that asylum seekers base their decision making in terms of where to seek asylum on the policies and outcomes in member states.[102]

Overall, it is noteworthy that the Commission was principally concerned with uniformity of outcomes. Expectations of consistent outcomes seem out of step with a system that tolerates significant diversity, provided that states comply with minimum standards. It also stands out that the Commission spoke to the continued uneven distribution of asylum cases across the bloc, but only as a consequence of perceived differences in member states' handling of asylum claims (as opposed to geographic and structural factors that may influence decision making by asylum seekers). There was, notably, no discussion of the unequal burden on member states as an issue to be addressed directly to advance the goal of responsibility sharing among EU member states.

[100] European Commission, 'Policy Plan on Asylum: An Integrated Approach to Protection Across the EU,' COM (2008) 360 final, 17 June 2008, 3
[101] Ibid.
[102] Ibid.

2.3.2 Views from the literature

Notwithstanding the general consensus that the CEAS has not had a negative impact on the standard of protection in the EU, explained above, advocates and academics have consistently noted that evidence of progress toward the articulated long-term goals of convergence of national asylum procedures, standards, and the content of statuses granted, including the scope of substantive rights, remains very limited.[103] Both the asylum procedures applied by member states and the resulting recognition rates continue to vary significantly across the EU.[104] It would be assumed that if Member States were applying the same standards through similar procedures, asylum seekers from the same country of origin should have the same recognition rates, in the aggregate, regardless of where their application is processed.[105] This has not been the case, however.

Toshkov and de Haan, looking at protection rates through 2010, found some evidence of 'limited convergence' in protection rates,[106] but this modest progress was marked by notable exceptions – nationalities for whom the protection rate across the EU varied dramatically, including Afghans, who constituted one of the largest groups of asylum seekers in the EU during this period.[107] They attributed this continued lack of consistency to the fact that 'national authorities have retained enough control over asylum policy as to produce quite different outcomes in the different EU member states.'[108] In other words, the

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[103] Toshkov and de Haan, 'The Europeanization of asylum policy: an assessment of the EU impact on asylum applications and recognitions rates', 680

[104] *See* Costello, *The human rights of migrants and refugees in European law*, 257; Cathryn Costello and Minos Mouzourakis, 276-278; Elspeth Guild, "The Complex Relationship of Asylum and Border Controls in the European Union," in Vincent Chetail, Philippe De Bruycker, Francesco Maiani, eds., *Reforming the Common European Asylum System: The New European Refugee Law* (2016), 45

[105] It should be noted that it is complicated to control for possible differences in the profiles and claims presented by asylum seekers. If asylum seekers from a particular region or with a particular profile tended to end up in one member state over another, that could account for some differences. It would be assumed, however, that any potential differences would be moderated over time, in particular for asylum seekers coming from the most common countries of origin.

[106] Toshkov and de Haan, 'The Europeanization of asylum policy: an assessment of the EU impact on asylum applications and recognitions rates', 680

[107] Ibid., 675

[108] Ibid., 680

level of consistency required by the CEAS's minimum standards allowed sufficient leeway for national legislation and policies that produce significantly different results in practice.

2.4 Responsibility sharing

While not directly named by the Commission as a goal of the CEAS, scholars have also noted that responsibility sharing did not increase as a result of implementation of the CEAS.[109] As Thielemann explains (and as has been suggested by the European Commission in its observations regarding the CEAS), '[p]olicy convergence in the field of asylum is seen as the key toward more equitable burden-sharing and less competition for the most effective deterrence measures.'[110] In other words, this reasoning suggests that if all Member States of the EU had the same asylum policy, there would not be dramatic differences in the relative number of asylum-seekers presenting applications in EU Member States. For reasons explained in more detail below, this assumption may not be well-founded. The converse may, however, be true: the fact that relative responsibility for determination of asylum applications remains unequal may impede progress toward greater integration around asylum and migration issues, as states that are already overburdened may be reluctant to adopt more generous standards and risk receiving still more applications.

The distribution of responsibility for asylum applications in the EU reflects two separate variables: first, where asylum seekers present their claims as an initial matter; and second, the rules that determine where asylum seekers' claims are ultimately adjudicated. The first of these factors, application rates, reflects both structural and policy-related factors that may influence the decision made by asylum seekers in terms of where to make their claims for asylum.[111] Which member state is responsible for adjudicating a

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[109] Thielemann, 'Why asylum policy harmonisation undermines refugee burden-sharing', 47; Toshkov and de Haan, 'The Europeanization of asylum policy: an assessment of the EU impact on asylum applications and recognitions rates', 679

[110] Thielemann, 'Why asylum policy harmonisation undermines refugee burden-sharing', 47

[111] Eiko Thielemann, 'Why Refugee Burden- Sharing Initiatives Fail: Public Goods, Free-Riding and Symbolic Solidarity in the EU' (2018) 56 JCMS: Journal of Common Market Studies 63, 64

particular claim, on the other hand, is largely determined by the content and application of the procedures set out in the Dublin Regulation.[112] The practical impact of Dublin, however, may be limited if a member state is unable to ascertain or prove where an asylum seeker first entered the EU, or if transfer to that state is not possible as a legal or practical matter.[113]

One of the key assumptions behind arguments for policy harmonization is that asylum seekers make decisions about where to seek asylum based on the protection rates in that country. The Commission, in its 2008 Policy Plan on Asylum, explicitly noted that 'a lack of common practice, different traditions and diverse country of origin information sources are, among other reasons, producing divergent results,' which in turn were 'creating secondary movements.'[114] Research does not support the presumption that asylum seekers select their countries of asylum based on recognition rates for similarly situated applicants, however: as Guild has noted, 'year after year, asylum-seekers from countries of origin with very low recognition rates in one Member State still continue to apply for asylum in that State.'[115]

Thielemann looked at the question of policy-related pull-factors in a holistic manner, analyzing States' attempts to deter asylum seekers through restrictive approaches to: access to territory, refugee status determination procedures, and integration.[116] He similarly found little evidence to substantiate the assumption that more lenient or generous asylum legislation would serve to draw higher numbers of asylum seekers.[117] He explained this finding by noting the broader context in which asylum seekers take decisions about where to lodge their applications, noting that 'policy differences are of course only one of several determinants for a protection-seeker's choice of host country, with structural factors, such as historic networks, employment opportunities, geography, or a

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[112] Ibid.
[113] As an example, Dublin relocations to Greece were halted following the decision in *MSS v. Belgium and Greece,* with its finding that reception conditions in Greece constituted a violation of Article 3 of the ECHR.
[114] European Commission, 'Policy Plan on Asylum: An Integrated Approach to Protection Across the EU,' COM (2008) 360 final, 17 June 2008, 3
[115] Guild, 'The Complex Relationship of Asylum and Border Controls in the European Union', 45
[116]Thielemann, 'Why asylum policy harmonisation undermines refugee burden-sharing', 54
[117] Ibid., 63

host country's reputation being at least equally, if not more, important.'[118] Accordingly, while policy harmonization may impact the decision of where to apply for some asylum seekers, suggestions that there will be a strong correlation between policy changes and application rates significantly overestimates the historical relationship between these two variables.

Finally, it should be noted that the Dublin System, in addition to dictating the Member State responsible for an asylum application, also requires that other Member States recognize any decision rejecting a claim. This is, ostensibly, to prevent strategic behavior by asylum seekers in applying in one Member State after another in hopes of receiving a positive result. As has been noted by Costello and others, however, mutual recognition of decisions is applied in an asymmetric manner: while Dublin ensures that rejected claims cannot be heard by another Member State, there is no corresponding requirement that Member States recognize positive decisions.[119] This lack of reciprocity means that recognized refugees have limited mobility within the EU until they are able to qualify under the long-term residents directive.[120]

In practice, this provision creates the wrong incentives for both asylum seekers and member states. Knowing that they will not be able to leave the State in which they are recognized for five years, asylum seekers will seek to avoid applying for asylum in a country in which they do not want to live (reinforcing pre-existing structural factors that contribute to unequal distribution of applications). Member states, meanwhile, are compelled to recognize the validity of negative decisions, and face no obligation to systematically confirm that the procedures followed were adequate: rejections are treated as valid absent any confirmation that the decision was reached through a process consistent with human rights norms.[121] Indeed, it would be contrary to member states' interests to examine

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[118] Ibid., 59; Thielemann, 'Why Refugee Burden- Sharing Initiatives Fail: Public Goods, Free-Riding and Symbolic Solidarity in the EU', 74

[119] Costello, *The human rights of migrants and refugees in European law*, 257; Costello and Mouzourakis, 'The Common European Asylum System: Where did it all go wrong?', 278

[120] Elspeth Guild, 'The Europeanisation of Europe's Asylum Policy' (2006) 18 International Journal of Refugee Law 630, 637; Costello, *The human rights of migrants and refugees in European law*, 256-7

[121] Guild, 'The Europeanisation of Europe's Asylum Policy', 643; Costello, *The human rights of migrants and refugees in European law*, 37

procedures too closely, in that questioning the validity of another State's procedure would both create political tensions and potentially bring additional obligations in the case at hand and the cases of any other similarly-situated rejected asylum seekers.

In sum, the evidence leading up to the refugee crisis did not suggest that the CEAS had created a race-to-the-bottom or otherwise negatively impacted protection standards, but neither had it yielded significant gains in terms of convergence of procedures, policy and outcomes. In addition, the distribution of applications among EU Member States had not become more equitable. While the logic of the European Commission suggested that making headway on policy convergence will help to address responsibility-sharing challenges, the literature indicated a more complex relationship between these two variables, particularly given the incentives created by the Dublin Regulation, with few indications that policy alignment alone would help to address historic and persistent differences in the number of asylum applications received by Member States. Accordingly, the narrative of incremental change that underlies the EU's planning in the area of asylum legislation did not seem to be borne out in practice: there were few indications that the first two phases of the CEAS brought the EU closer to a unified system of asylum, and the same front-line states continued to bear the heaviest burden in terms of receiving asylum applications year on year. These patterns were also clear in the context of the crisis, as discussed in more detail below.

3 The CEAS and the refugee crisis: views of the Commission and commentators

In total, EU Member States received more than 1.2 million asylum applications in 2015, the height of the refugee 'crisis.'[122] While this figure was roughly double the number of asylum seekers registered in 2014,[123] the overall number of asylum seekers was not

[122] UNHCR*, Global Trends: Forced Displacement in 2015,* 84. Expanding the scope to EU and non-EU countries in Europe, this figure increases to more than two million.

[123] Eurostat, *Asylum in the EU: The number of asylum applicants in the EU jumped to more than 625000 in 2014, 20% were Syrians* (2015)

unmanageable for a region with a population of 500 million. Indeed, it should be noted that as of the end of 2015, Turkey's refugee population stood at 2.5 million and Lebanon, with a population of 6 million, had been receiving Syrian refugees since the start of the conflict and was then hosting 1.1 million refugees.[124] It would be hard to argue, then, that refugee arrivals had outpaced Europe's capacity during the course of 2015 – rather, one could argue that the crisis arose from the political aspect of the response, distribution or responsibility sharing challenges, and the divergent approaches taken by Member States seeking to avoid bearing the brunt of the perceived burden.

When the number of arrivals began to increase in late spring and summer 2015, the impact was felt much more acutely by a handful of EU Member States, including Germany, Hungary, Sweden, Austria, Italy and France, which received more than 80% of the first-time asylum applications made in the EU in 2015.[125] As the perceived crisis continued into the fall, it was clear that there was no unified approach among EU member states: while some states welcomed refugees, others sought to limit arrivals to their territory and/or encourage asylum seekers to move on.[126] When the EU sought to respond with a redistribution scheme at the regional level to relieve pressure on front-line states, the initiative was challenged by Hungary and Slovakia.[127] In short, the EU was not able to respond to the crisis as a collective, notwithstanding the existence of the CEAS and a decade and a half of cooperation on asylum.

As indicated below, both the Commission and commentators tended to view the refugee crisis as exposing critical gaps in the CEAS, while acknowledging that these issues were not, on the whole, new. In particular, both groups highlighted inconsistent state

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[124] UNHCR, *Global Trends: Forced Displacement in 2015*, 3
[125] Eurostat, *Record number of over 1.2 million first time asylum seekers registered in 2015*
[126] *See, e.g.,* Emma Graham-Harrison, Patrick Kingsley, Rosie Waites and Tracy McVeigh, 'Cheering German crowds greet refugees after long trek from Budapest to Munich' *The Guardian* (5 September 2015) <https://www.theguardian.com/world/2015/sep/05/refugee-crisis-warm-welcome-for-people-bussed-from-budapest>; 'Hungary closes border with Serbia and starts building fence to bar migrants' *The Guardian* (17 June 2015) <https://www.theguardian.com/world/2015/jun/17/hungary-closes-border-serbia-starts-building-fence-bar-migrants>
[127] Hans von der Burchard and Jacopo Barigazzi, 'Slovakia files lawsuit against EU's refugee relocation' *Politico* (2 December 2015) <https://www.politico.eu/article/slovakia-files-lawsuit-against-eus-refugee-relocation-september/>; 'Hungary sues EU over migrant quotas' *DW* (3 December 2015) <https://p.dw.com/p/1HGsQ>

practice and unequal distribution of asylum seekers as key issues, though they differed in the way they saw these issues influencing the behavior of states and asylum seekers. The proposed way forward, accordingly, differs in accordance with how these groups have diagnosed the critical issues at play.

3.1 The European Commission's perspective

In 2016, the European Commission indicated its intent to revisit the structure of the CEAS in light of 'significant structural weaknesses and shortcomings in the design and implementation of European asylum and migration policy.'[128] First among these weaknesses, in the Commission's view, was the implementation of the Dublin Regulation (Dublin III), with the Commission explaining that 'the experience of recent years has shown that, especially in situations of mass influx along specific migratory routes, the current system places responsibility, in law, for the vast majority of asylum seekers on a limited number of individual Member States, a situation that would stretch the capacities of any Member State.'[129] The Commission acknowledged, at the same time, that this is precisely the purpose of Dublin: not to create an equitable system of responsibility sharing, but rather to establish and maintain a system in which States have an incentive to 'respect…their obligations in terms of protection of the external border.'[130] Beyond this conceptual flaw (from the perspective of responsibility-sharing), there are also pragmatic obstacles: even prior to the crisis, transfers had rarely been effected successfully, given challenges in proving the transferee state's responsibility, subsequent secondary movements, and systemic flaws in asylum systems deemed serious enough to foreclose the possibility of transfer to some Member States.[131]

[128] European Commission, *'Towards a Reform of the Common European Asylum System and Enhancing Legal Avenues to Europe,' COM(2016) 197 final, 6 April 2016* (2016), 2
[129] Ibid., 3-4
[130] Ibid., 4
[131] Ibid., 4

Nor were the challenges identified limited to Dublin: the Commission further argued that the widely divergent treatment of asylum seekers in asylum procedures in EU Member States has contributed to secondary movements.[132] The Commission specifically cited reception conditions and the pace of asylum procedures, as well as divergent application outcomes and grant of different statuses (subsidiary status as compared to refugee status), as areas in which inconsistent state practice increased the likelihood of onward movement.[133] In the cases of the Reception and Asylum Procedures Directives, the Commission suggested that the variance might reflect the application of discretionary provisions.[134] With respect to the Qualification Directive, the Commission cited recognition rates for Afghan refugees in 2015 that varied from 5.88% to nearly 100% across the bloc, while also noting the 'lack of adequate convergence' on decisions to grant subsidiary or refugee protection.[135]

3.2 Other views of the crisis

Academics observed similar protection gaps and challenges to those articulated by the Commission during the refugee crisis. The failure of responsibility sharing in the context of the crisis was frequently cited, given the disproportionate burden imposed on countries of arrival in accordance with the logic of the Dublin Regulation.[136] Interestingly, despite the failure of the so-called 'Hotspot Relocation Scheme'[137] to meaningfully alter this dynamic,

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132 Ibid., 4
133 Ibid., 4-5
134 Ibid., 4
135 Ibid., 5
136 *See* Rainer Bauböck, 'Refugee Protection and Burden-Sharing in the European Union' (2018) 56 JCMS: Journal of Common Market Studies 141, 154; Eleni Karageorgiou, 'Solidarity and sharing in the Common European Asylum System: the case of Syrian refugees' (2016) 17 European Politics and Society 196, 209; Ferruccio Pastore and Giulia Henry, 'Explaining the Crisis of the European Migration and Asylum Regime' (2016) 51 The International Spectator 44, 50
137 The Hotspot Relocation Scheme, based on decisions taken by the European Commission in May and September 2015, aimed to relocate 160,000 asylum seekers likely to be in need of international protection from the 'hotspots' or locations under the greatest pressure due to the high number of asylum seekers arriving – Greece, Italy, and Hungary (though Hungary opted not to be included). This proposal was part of the implementation of the European Agenda on Migration announced in May 2015. European Commission, *European Commission makes*

some observers nonetheless saw the attempt as a positive development, representing a 'first effort by the EU towards sharing the responsibility for refugees among Member States.'[138] At a minimum, the proposal of this distribution scheme indicated acknowledgement of the need for a different approach than that presented by Dublin's allocation of responsibility to the first member state reached by asylum seekers.

The lack of coherence among the asylum policies of EU member states, similarly, was also noted by academics as a critical gap in formulating an effective response to the crisis.[139] Karageorgiou noted that, in this context, 'Europe's response is echoed in 28 individual policies, raising a lot of issues with regards to intra-EU solidarity and at the same time making its external contribution toward that crisis problematic.'[140] Niemann and Zaun underscored this point still more emphatically, arguing that 'the raison d'être, added-value and resilience of the European integration project have been increasingly called into question' by the lack of consistency and cooperation between member states.[141]

Interestingly, while the Commission focused on disparate policies and policy implementation as an impetus for onward movement by asylum seekers, Karageorgiou homed in on a different causal link, arguing that the lack of effective responsibility sharing mechanisms led states to reject the prescriptions of the CEAS.[142] She explained that 'European states resort, by necessity, to a voluntary compliance according to perceived self-interest mainly due to the lack of a common understanding and comprehensive regulation of solidarity and sharing.'[143] The difference in this analysis is significant, as it calls into question whether it is possible to harmonize procedures and policies if the question of equitable responsibility sharing remains unaddressed.

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progress on Agenda on Migration (2015); European Commission, *Refugee Crisis: European Commission takes decisive action* (2015)

[138] Arne Niemann and Natascha Zaun, 'EU Refugee Policies and Politics in Times of Crisis: Theoretical and Empirical Perspectives' (2018) 56 JCMS: Journal of Common Market Studies 3, 7

[139] *See* Bauböck, 'Refugee Protection and Burden-Sharing in the European Union', 154; Karageorgiou, 'Solidarity and sharing in the Common European Asylum System: the case of Syrian refugees', 210

[140] Karageorgiou, 'Solidarity and sharing in the Common European Asylum System: the case of Syrian refugees', 210

[141] Niemann and Zaun, 'EU Refugee Policies and Politics in Times of Crisis: Theoretical and Empirical Perspectives', 4

[142] Karageorgiou, 'Solidarity and sharing in the Common European Asylum System: the case of Syrian refugees', 210

[143] Ibid.

The most significant point of departure from the Commission's analysis in the academic literature, however, is around the issue of the lack of safe routes into the EU, which was cited by many commentators as a serious gap.[144] Moreno-Lax explained that the EU's external border policy 'leaves no alternatives but an illegal, perilous voyage across the Mediterranean.'[145] This was the case due to the general lack of protected entry procedures, including for Syrians.[146] While the Commission notes the 'need to enhance legal and safe pathways to Europe,'[147] this is intended more as a contrast to the irregular movements that occurred during the crisis than a suggestion of improving access to EU territory for persons in need of international protection.

4 Conclusions and future prospects for the CEAS

The first two phases of the CEAS have seen the promulgation of a complex array of hard and soft law mechanisms, including regulations, directives, guidelines, capacity building initiatives, and funding allocation programs. Recognizing the challenges associated with increased integration in areas that have traditionally been associated with sovereign authority, the European Commission saw use of soft law methods as offering the possibility of building consensus in preparation for the next phase of the CEAS, in which a 'common asylum procedure' and 'uniform status' for recipients of international refugee protection would be introduced.[148] Although the specific proposal related to the Open Method of Coordination was ultimately not followed through, the reasoning behind this

[144] *See* Costello, *The human rights of migrants and refugees in European law*, 23; Guild, 'The Complex Relationship of Asylum and Border Controls in the European Union', 39; Karageorgiou, 'Solidarity and sharing in the Common European Asylum System: the case of Syrian refugees', 196

[145] Violeta Moreno-Lax, 'The EU Humanitarian Border and the Securitization of Human Rights: The 'Rescue-Through-Interdiction/Rescue-Without-Protection' Paradigm' (2018) 56 JCMS: Journal of Common Market Studies 119, 133.

[146] *See* Karageorgiou, 'Solidarity and sharing in the Common European Asylum System: the case of Syrian refugees', 201

[147] European Commission, *'Towards a Reform of the Common European Asylum System and Enhancing Legal Avenues to Europe,' COM(2016) 197 final, 6 April 2016*, 3

[148] European Commission, *Communication from the Commission to the Council and the European Parliament, On the common asylum policy, introducing an open coordination method, COM (2001) 710 final*, 16

initiative is instructive: because control of territory and admission of non-citizens is such an essential component of statehood, it is fundamentally different from market integration and may not follow the same model.[149] As such, the utilization of the OMC and other soft law methods was based on the idea that a more gradual approach would be required to overcome the greater obstacles to integration presented by strong state interests.[150]

Over time, however, only limited evidence of convergence of policies and outcomes in the asylum systems of EU Member States has been observed, as outlined above. The idea of gradual or incremental progress toward integration does not seem to be supported by the data on state practice leading up to and during the refugee crisis in 2015: in the face of a mass influx, there remained marked differences in the way that individual Member States approached reception and asylum procedures, as well as made decisions on asylum applications. The refugee crisis highlighted this gap: when coordinated action was critical, member states pursued divergent practices that, in many cases, broke with CEAS prescriptions by elevating their domestic interests above their common interest (reintroducing border controls, building fences, and setting quotas for asylum applications, among other measures).

In the chapter that follows, the collective action problem presented by the provision of refugee protection at the regional level will be addressed from a theoretical perspective. The EU's approach will be situated within the broader frameworks of collective action and new governance theory, with the aim of providing a deeper understanding of the significance of the events prior to and during the 2015 crisis.

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[149] Ibid., *see also* Philipp Genschel and Markus Jachtenfuchs, 'From Market Integration to Core State Powers: The Eurozone Crisis, the Refugee Crisis and Integration Theory' (2018) 56 Journal Of Common Market Studies 178, 179 (explaining that in contrast to market integration, core state powers are 'constrained by a high propensity for zero-sum conflict, high political salience, and a functional requirement for centralized EU capacities')

[150] Borrás and Jacobsson, 'The open method of co-ordination and new governance patterns in the EU', 191-192

Chapter 3 Refugee Protection in the EU: Addressing a Collective Action Problem with Government and (New) Governance

The previous chapter explored efforts to align the interests of EU member states and coordinate action to provide refugee protection. The purpose of this chapter is to consider the challenges encountered in doing so from the perspective of collective action theory. Accordingly, this chapter considers refugee protection as presenting a collective action problem at the regional level. It explores insights from the collective action literature in terms of when cooperation may be possible and what steps can be taken to overcome the tendency of state actors to seek to free ride on the efforts of others rather than cooperate in pursuit of a common goal. The chapter then introduces 'new governance' theory as one possible method of addressing obstacles to collective action in the context of provision of collective or public goods, including refugee protection. It concludes by critically considering the question of the extent to which new governance methods have advanced collective action among member states to provide refugee protection in the EU.

The chapter comprises two parts. Section 1 provides a high-level overview of collective action theory in the context of interstate cooperation, including in provision of refugee protection. It begins in Section 1.1 with an account of the challenges to organizing collective action by a group of states to provide public or collective goods, as well as a description of the conditions that may be conducive to successful collective action and how cooperation may best be structured to avoid free riding. Next, Section 1.2 turns to refugee protection as a collective action problem, presenting an analysis of the nature of the public or collective good(s) associated with provision of refugee protection, and the potential characterization of refugee protection as an 'impure' public good. Section 1 concludes by bringing a lens to the specific characteristics of refugee protection in the EU, looking first to regional challenges and then reviewing the steps that have been taken to facilitate cooperation among EU member states.

Section 2 of the chapter focuses on new governance as a potential means of addressing the collective action problem presented by refugee protection. It begins by defining new governance before presenting a summary of the ways in which new governance methods have been used in refugee protection in the EU. Section 2 concludes with an articulation of critical questions in terms of the potential and actual impact of new governance measures, both at a theoretical level and concretely in the context of refugee protection.

The conclusion of the chapter brings together these two theoretical frameworks and highlights key insights drawn from the collective action and new governance literature, pointing to how these themes will inform the discussion in the chapters to follow.

1 Collective action and refugee protection

Collective action theory, as a framework, serves to identify and analyze obstacles to effective cooperation by a group of actors and to explore the possibility to overcome these obstacles in furtherance of the shared goals of the group.[1] In the section below, the specific application of this theory to the context of interstate cooperation to provide refugee protection will be examined. Although it might be possible to frame refugee protection as presenting a collective action problem at the global level, for the purpose of this analysis, the focus will be regional, given that states within the same geographic area tend to share, to a greater extent, the impact of particular forced displacement events, as well as the existence of regional instruments seeking to facilitate interstate cooperation in this area, as detailed in the prior chapter.

[1] *See* Elinor Ostrom, 'Analyzing collective action' (2010) 41 Agricultural Economics 155, 156

1.1 Collective action, public goods, and interstate cooperation

The frame of collective action has often been used to describe challenges to achieving effective interstate cooperation, even in situations in which one would expect that consensus could be easily reached in pursuit of a common goal. As explained by Olson, collective action theory posits that despite the existence of a common interest or shared objective, rational actors who are part of a larger group will, as a general rule, fail to take action to advance their common interest.[2] This seems counterintuitive, as Olson acknowledges:

> The idea that groups tend to act in support of their group interests is supposed to follow logically from this widely accepted premise of rational, self-interested behavior. In other words, if the members of some group have a common interest or objective, and if they would all be better off if that objective were achieved, it has been thought to follow logically that the individuals in that group would, if they were rational and self-interested, act to achieve that objective.[3]

Yet it has often been demonstrated that actors do not, in practice, act in what we would perceive to be a rational manner that advances their common interest, including in the context of interstate cooperation. Collective action theory seeks to explain this tendency and to explore what steps, if any, can be taken to overcome this impasse and facilitate joint action.

Collective action theory, generally speaking, is concerned with the provision (and non-provision) of certain public or collective 'goods'.[4] 'Goods' are defined broadly, and include a range of goods and services, as well as policy or regulatory outputs intended to avoid harm or conflict.[5] Provision of streetlights, construction and maintenance of public roads, and collective defense are often identified as contexts in which a group of actors can benefit from acting in a joint or collective manner.[6] At the national level, these goods will often be provided by a governmental entity as a way of addressing the challenges to coordinating group action toward

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[2] Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups*, 1-2
[3] Ibid., 1
[4] Throughout this chapter, 'public goods' and 'collective goods' will be used interchangeably to refer to benefits that satisfy the criteria of non-excludability and non-rivalry, as further explained below.
[5] *See, e.g.,* Mette Eilstrup-Sangiovanni, 'Re-bordering Europe? Collective action barriers to 'Fortress Europe'' (2021) 28 Journal of European Public Policy 447, 450; Philipp Lutz, Anna Stünzi and Stefan Manser-Egli, 'Responsibility-Sharing in Refugee Protection: Lessons from Climate Governance' (2021) 65 International Studies Quarterly 476, 478
[6] Eilstrup-Sangiovanni, 'Re-bordering Europe? Collective action barriers to 'Fortress Europe'', 450

a collective benefit. At the international level, there is no corresponding authority given the same latitude to act on behalf of all actors, so cooperation among states is required.

By definition 'pure' public goods are both non-excludable and non-rivalrous in nature.[7] This means, first, that access to the good cannot be restricted to only those who have contributed to its provision and, second, that consumption by one actor does not meaningfully detract from the amount of the good that continues to be available to others.[8] An example of such a good is clean air, which benefits everyone equally, regardless of whether they have contributed to its provision or maintenance, and which is not reduced by the consumption of others.

The core insight or prediction from collective action literature is the conclusion that collective or public goods will be provided at a sub-optimal level or, in some cases, not at all.[9] As Olson notes, this conclusion is, on first examination, counterintuitive, given that it is in the interest of all actors that the good in question be provided.[10] The challenge in providing collective or public goods, however, arises from one of their fundamental characteristics: because no one can be prevented from accessing public goods, actors have an incentive to avoid contributing and instead seek to free ride on the contributions of others. This is the crux of the collective action problem, as explained in further detail below.

To be more specific, Olson argues that, in most cases, 'the provision of the collective good will be strikingly suboptimal and the distribution of the burden will be highly arbitrary.'[11] If a group is sufficiently large, moreover, this tendency will culminate in non-provision of the collective good, while smaller groups will tend to provide the good at a suboptimal level.[12]

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[7] Thielemann, 'Why Refugee Burden- Sharing Initiatives Fail: Public Goods, Free-Riding and Symbolic Solidarity in the EU', 69
[8] Eilstrup-Sangiovanni, 'Re-bordering Europe? Collective action barriers to 'Fortress Europe'', 450
[9] Giandomenico Majone, 'The limits of collective action and collective leadership' in Damian Chalmers, Markus Jachtenfuchs and Christian Joerges (eds), *The End of the Eurocrats' Dream: Adjusting to European Diversity* (Cambridge University Press 2016), 218; Thielemann, 'Why Refugee Burden- Sharing Initiatives Fail: Public Goods, Free-Riding and Symbolic Solidarity in the EU', 69
[10] Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups*, 1
[11] Ibid., 27-28
[12] Ibid., 28

Subsequent analyses over the past fifty years have tended to reinforce the substance of Olson's descriptions of cooperation challenges, though in some cases in a more moderate form.[13]

1.1.1 Challenges to providing international public/collective goods

Although many classic examples of public goods come from the domestic context,[14] collective action problems have also been noted across a range of interstate cooperation settings, including common defense,[15] economic integration,[16] and climate change mitigation,[17] among others. While the details of each situation are specific, certain commonalities can be observed in terms of why these problems arise and how actors respond to them. The fact that the actors seeking to cooperate in provision of public goods at the international level are states, moreover, introduces certain additional complexities.

Building on Olson's prediction of sub-optimal provision, described above, Majone elaborates on the way in which the non-excludable nature of public goods drives the challenges to their provision:

> Such a tendency towards sub-optimality is due to the fact that by definition a collective good [] is available to all members of a group once it has been provided by any member. Since an individual gets only part of the benefit of any expenditure he makes to obtain more of the collective good, he will discontinue his purchase of it before the optimal amount for the group as a whole has been obtained.[18]

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[13] Pecorino, 'Olson's "Logic of Collective Action" at fifty', 249-51 (arguing that in the case of genuinely non-rivalrous goods, the strong form of the group-size paradox does not hold – in other words, participants remain willing to contribute if they are also able to draw on the public good)
[14] Alexander Betts, 'Public Goods Theory and the Provision of Refugee Protection: The Role of the Joint-Product Model in Burden-Sharing Theory' (2003) 16 Journal of Refugee Studies 274, 275 (providing the example of streetlights)
[15] Eilstrup-Sangiovanni, 'Re-bordering Europe? Collective action barriers to 'Fortress Europe'', 450
[16] Majone, 'The limits of collective action and collective leadership', 218
[17] Lutz, Stünzi and Manser-Egli, 'Responsibility-Sharing in Refugee Protection: Lessons from Climate Governance', 478
[18] Majone, 'The limits of collective action and collective leadership', 218

In other words, as group size increases, the benefit gained by a contributor as compared to that actor's contribution decreases, a trend that eventually erodes the motivation of the individual actor to contribute absent a guarantee that others will do so as well.

Ostrom, similarly, provides a general and succinct explanation for the collective action problem associated with public goods in noting that each actor in the collective action scenario 'is motivated not to contribute to the joint effort, but to free ride on the efforts of others.'[19] If all participants in the group attempt to free ride, there will be no production of the public good or collective benefit; if some contribute while others free ride, the good will be provided at a sub-optimal level.[20] In this way, an actor pursuing their perceived best interest within a group may ultimately contribute to an outcome that is not in their (or any other actor's) interest from a broader, long-term perspective.

Applying this logic to the specific context of interstate cooperation, this implies that notwithstanding the fact that all states may stand to benefit from provision of an international public or collective good at either the regional or global level, each individual state has incentives to shirk their responsibilities – whether in terms of monetary contributions, adhering to specific rules, or otherwise – and seek to free ride on the actions taken by other states. The best-case scenario for a state is enjoying the benefits of the international collective good without having assumed any of the costs of its provision. This tendency may be further exacerbated by the fact that state governments are accountable to domestic constituencies who may not want to see their resources being extended in a manner that benefits non-contributing states.

This situation bears certain similarities to the classic Prisoner's Dilemma framing,[21] though the nature of the interactions between group members will often change key

[19] Ostrom, *Governing the commons : the evolution of institutions for collective action*, 6
[20] Ibid.
[21] A classic Prisoner's Dilemma scenario posits that two prisoners who have agreed among themselves that they will not cooperate or provide any information to the police are held separately and cannot communicate with each other. The government is unable to convict either of them of the more serious crime with which they are charged absent testimony from one of them. Assuming that both stick to their agreement, they will receive a light sentence for a lesser crime the government can prove. If one prisoner provides testimony implicating the other in the more serious crime, however, he stands to receive a reduced sentence and his co-conspirator will receive a much more severe sentence. Each prisoner, seeking to maximize his own personal benefit, is likely to break the agreement, resulting in a situation in which both prisoners are implicated in the more serious crime and receive sentences that

assumptions that lead to sub-optimal outcomes in that modeling.[22] For instance, participants generally have the possibility to communicate with each other and will not be taking decisions at precisely the same time, meaning they can wait to see what others do before determining whether to cooperate/contribute or not. Furthermore, the interaction may be continuing, such that defection will carry mid- or long-term negative consequences alongside short-term gains.

From the above reasoning, two questions follow: 1) Are there particular group and/or individual characteristics that may render cooperation more likely? And 2) Can conditions or rules be put in place to facilitate successful cooperation? The discussion below explores these two topics, as discussed in collective action literature, to understand their implications for provision of refugee protection.

1.1.2 What group characteristics tend to facilitate cooperation?

A number of characteristics emerge from the collective action literature as facilitating cooperation, with group size and heterogeneity of participants (particularly size) standing out among them as particularly important.[23] As will be explained below, other forms of heterogeneity may also be relevant, in particular motivational heterogeneity.[24] In the context of interstate provision of refugee protection, collective action literature would thus suggest that the number of states participating, alongside the level of variance in their relevant characteristics and motivation to provide refugee protection, will be important determinants of the success of efforts to facilitate collective action.

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are more severe than if they had cooperated and remained silent. Game theory suggests that certain changes in assumptions may alter the outcome of the scenario, including iterative interactions in which each player has information about the behavior of the other(s).

[22] *See* Betts, 'Public Goods Theory and the Provision of Refugee Protection: The Role of the Joint-Product Model in Burden-Sharing Theory', 275; *cf.* Ostrom, *Governing the commons : the evolution of institutions for collective action*, 47 (suggesting that rather than the Prisoner's Dilemma, the tragedy of the commons may constitute an assignment game, in which participants decide both whether to defect and also whether to monitor the actions of others)

[23] Majone, 'The limits of collective action and collective leadership', 218-19; Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups*, 34

[24] T. K. Ahn, Elinor Ostrom and James M. Walker, 'Heterogeneous Preferences and Collective Action' (2003) 117 Public Choice 295, 295

Olson argues that the heterogeneity of the group and the size of the group are both key attributes impacting the likelihood of effective and sustained cooperation between individual actors to provide a collective good.[25] In particular, he argues, perhaps counterintuitively, that small groups in which the members are unequal in size are most likely to provide a public or collective good, as in the case of NATO.[26] The reason for this is that these conditions increase the odds that one actor 'will get such a significant proportion of the total benefit from the collective good that he will gain from seeing that the good is provided, even if he has to pay all of the cost himself.'[27] This tendency can lead to a situation in which large group members bear an outsized portion of the responsibility for providing a public good, a situation referred to as the exploitation of the large by the small.[28]

Other advantages may attach to small groups as well. First, it may be simpler to identify and provide incentives that are persuasive for all members of a group when the number of members is limited.[29] Political transaction costs (including those related to monitoring and enforcement) and decision-making costs, similarly, may be lower with smaller groups.[30]

At the other end of the spectrum, increasing group size will lead to greater divergence between the optimal and actual levels of the public good.[31] In the context of interstate cooperation in the EU, including to provide refugee protection, Olson's logic implies that we might expect: a) large states to bear a disproportionate burden in terms of supplying or producing the public good; and b) that challenges to cooperation will increase as the number of

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[25] Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups*, 34
[26] Ibid., 28-29, 34, 36; *see also* Majone, 'The limits of collective action and collective leadership', 218 (noting that 'the greatest likelihood that a collective good will be provided occurs in the case of small groups of members of unequal size' because each, or at least some, member(s) will gain enough benefit for it to be consistent with their self-interest to provide the good). NATO illustrates this example in the sense that larger members of the group have historically been willing to contribute even in the face of defection or underspending by some group members because the larger group members still benefit significantly from their contributions. Collective action theory suggests that this effect would be diluted if there were more members or if members were similarly situated.
[27] Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups*, 34
[28] Majone, 'The limits of collective action and collective leadership', 220. This situation is arguably also represented by NATO, whose largest member, the U.S., has historically significantly outspent other members in terms of its defense budget.
[29] *See* ibid., 219
[30] Ibid., 221, 223
[31] Pecorino, 'Olson's "Logic of Collective Action" at fifty', 244

EU member states (or the number of EU member states expected to take part in providing the public or collective good) increases.

Although in the above-referenced analysis, heterogeneity is mainly focused on the size of individual participants in a group, other commentators have pointed to heterogeneity of interests as an enabling factor for collective action. Ahn, Ostrom, and Walker refer to 'motivational heterogeneity,' including with relation to ideas of distributive fairness, as having relevance in analyzing state behavior and particularly in explaining why some states may seem to act against their rational interest.[32] Pecorino, similarly, points to 'warm glow' benefits, meaning the 'psychological benefit that an individual obtains from making contribution to, for example, a charity,' as a potential secondary or additional benefit to the individual actor that may motivate contribution to a public or collective good.[33] Ostrom highlights the value that individuals place on 'norms of behavior,' meaning the extent to which individuals want to comply with rules or cooperate, independent of any sanction that may be applied for non-compliance.[34] On the other side of the coin, however, Majone notes that social and economic heterogeneity may mean that 'members are less likely to agree on the exact nature of whatever collective good is at issue or on how much of it is worth "buying."'[35] In short, the analysis above implies that in the context of refugee protection, in addition to the number of states participating and their relative size, the distinct motivation and characteristics of each EU member state will impact their incentives to cooperate, and may either help or hinder efforts to provide the public or collective good.

1.1.3 Facilitating successful cooperation and avoiding free riding

Moving beyond the characteristics of groups and group members to conditions that can improve the potential for cooperation, the primary focus in the literature has been on provision of selective benefits to cooperators, or the so-called 'by-product theory.'[36] As Pecorino explains,

[32] Ahn, Ostrom and Walker, 'Heterogeneous Preferences and Collective Action', 295
[33] Pecorino, 'Olson's "Logic of Collective Action" at fifty', 255
[34] Ostrom, *Governing the commons : the evolution of institutions for collective action*, 35
[35] Majone, 'The limits of collective action and collective leadership', 220
[36] Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups*, 133-34

these benefits may take the form of either positive inducements to cooperate or punishment for non-cooperation, and have the effect of reducing the incentives for free-riding, at least to a certain extent.[37] These inducements or incentives may be administered by an external actor or by a system of self-organization that effectively monitors compliance and addresses free-riding.[38] Olson provides the example of a labor union, organized for the purpose of lobbying for better conditions, that incentivizes membership by restricting certain jobs/opportunities to union members.[39]

In the context of interstate cooperation within the EU, one can identify a variety of selective benefits, both positive and negative, imposed by the institutional structure of EU membership. Because EU membership is linked to free movement, access to common funds, and the absence of tariffs, among other economic benefits, one might argue that there are myriad incentives associated with complying with EU regulations. At the same time, there are also infringement procedures that can be deployed in the event of a deviation from expected norms of cooperation. The effectiveness of these measures, however, may depend on how closely tied they are to cooperation – the more tenuous the link between benefits and cooperation (in terms of either predictability or proximity), the more likely that the incentive to free ride will continue.

A final point in the collective action literature concerns the concept of 'impure' public goods. As noted previously, 'pure' public or collective goods are characterized by their non-excludable and non-rivalrous characteristics. The example of clean air given above illustrates this principle: no one can be prevented from consuming clean air, and one person's consumption does not reduce the amount available to others. 'Impure' public goods, in contrast, may be either partially excludable or only partially non-rivalrous.[40] This distinction has

[37] Pecorino, 'Olson's "Logic of Collective Action" at fifty', 244, 255; *see also* Majone, 'The limits of collective action and collective leadership', 219-20 (noting that '[c]ollective action can be promoted, up to a point, by selective incentives and/or institutional design' but that identification of suitable incentives becomes more difficult as the size and heterogeneity of the group increases)
[38] *See generally* Ostrom, Governing the commons : the evolution of institutions for collective action, 27-28, 44-45
[39] Olson, The Logic of Collective Action: Public Goods and the Theory of Groups, 135-137 (explaining that labor unions such as the AFL-CIO became politically influential largely because of their non-lobbying activities; their membership is more contingent upon their work in bargaining with employers, whom they may pressure to hire only union members)
[40] Eilstrup-Sangiovanni, 'Re-bordering Europe? Collective action barriers to 'Fortress Europe'', 450

the potential to alter the incentive structure for actors considering provision of a public good. The ability to exclude non-contributors, in particular, would tend to increase the potential to overcome obstacles to collective action.

In this vein, various commentators have suggested that purely public goods may be an exception in the context of interstate collective action problems, given that there are many contexts in which states stand to gain 'a mix of general ("public") and country specific ("private") benefits, which accrue only to contributors.'[41] Some commentators have captured this dynamic through reference to the so-called joint-product model, which explores the potential for collective action to produce a range of goods (rather than focusing on a single public or collective good) that differ in terms of the extent to which they may be considered 'public.'[42] Provision of a diverse array of potential goods or benefits should increase the likelihood of cooperation and of a group being able to avoid a worst-case outcome in which a public good is not provided at all. This is the case for two reasons: first, because different goods or benefits may appeal to different actors, increasingly the likelihood that many will benefit sufficiently to be willing to engage in collective action, and second, because private benefits accrue only to contributors, reducing the likelihood of free riding.

To conclude, collective action theory posits that, in the context of interstate cooperation, states will struggle to provide public or collective goods, even though each participating state has an individual interest in the good being provided. This is the case because a good, once provided, is available to all members, irrespective of their contribution, meaning that states will have an incentive to free ride. Moreover, the larger the group of states concerned, the more likely it is that the provision of the good will be suboptimal. At the same time, however, the literature suggests that public goods are often provided in a manner that results in private benefits for contributors, a possibility that may help to counter the tendency toward free riding.

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[41] Ibid., 451; *see also* Thielemann and Dewan, 'The myth of free-riding: Refugee protection and implicit burden-sharing', 353 (citing Sandler, Forbes, and Hartley in describing pure collective goods as 'a rare phenomenon'); Betts, 'Public Goods Theory and the Provision of Refugee Protection: The Role of the Joint-Product Model in Burden-Sharing Theory', 277 (suggesting the need to situate a collective good between the extremes of purely public and purely private)

[42] *See* Betts, 'Public Goods Theory and the Provision of Refugee Protection: The Role of the Joint-Product Model in Burden-Sharing Theory', 277

It may also be the case that collective action produces a mix of public goods and private benefits, consistent with the joint product model. These concepts are further elaborated in the context of refugee protection below.

1.2 Refugee protection as a collective action problem

Refugee protection has been characterized as presenting a problem of collective action by a number of commentators.[43] States largely agree on the necessity of cooperation in providing protection to refugees, as described in further detail below, but at the same time, 'each state…possesses powerful disincentives to provide relief, especially on its own territory.'[44] These disincentives reflect the fact that host states face both practical and political costs. The former include the necessary investments to receive refugees, process their asylum applications, and support their integration,[45] while the latter may involve, depending on the political climate and the number of refugees arriving, an expenditure of political capital, development of key messages/information campaigns to shape the public dialogue, or even a potential backlash in the form of loss of support for the party in power.[46] In this context, free-riding may be seen by many states as the dominant strategy – in other words, each state seeks to 'accept[] as few refugees as possible in the hope that others will assume the burdens of resettling or otherwise dealing with them.'[47]

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[43] *See, e.g.,* Astri Suhrke, 'Burden-sharing during Refugee Emergencies: The Logic of Collective versus National Action Refugee Studies and the Refugee Regime in Transition' (1998) 11 Journal of Refugee Studies 396, 400; Thielemann, 'Why Refugee Burden- Sharing Initiatives Fail: Public Goods, Free-Riding and Symbolic Solidarity in the EU', 69; Betts, 'Public Goods Theory and the Provision of Refugee Protection: The Role of the Joint-Product Model in Burden-Sharing Theory', 274

[44] Schuck, 'Refugee Burden-Sharing: A Modest Proposal', 252

[45] *See,* ibid. (noting that such costs include, as a baseline, 'food, clothing, shelter, and information')

[46] *See* María Hierro, Adolfo Maza and José Villaverde, 'Asylum burden-sharing within the EU revisited: are we moving on the right track?' (2023) 26 Journal of Economic Policy Reform 126 (noting 'non-monetary costs involved in the issue, such as potential threats that immigration may pose to national security and labour market opportunities of natives, or the ascent of far-right parties, among others'); *cf,* Lutz, Stünzi and Manser-Egli, 'Responsibility-Sharing in Refugee Protection: Lessons from Climate Governance', 481 (arguing that public sympathy does not impact the capacity of a host country to receive asylum seekers, but rather goes to their willingness to do so)

[47] Schuck, 'Refugee Burden-Sharing: A Modest Proposal', 253; *see also,* Suhrke, 'Burden-sharing during Refugee Emergencies: The Logic of Collective versus National Action Refugee Studies and the Refugee Regime in Transition',

1.2.1 Does international law address the collective action problem presented?

Despite broad agreement on the fundamental principles of refugee protection, the practical implementation of these ideals by states has proven challenging in certain respects. As will be elaborated below, the international legal framework for refugee protection does not provide guidance regarding the distribution of responsibility among states, leaving considerable leeway for responsibility shirking.[48] The collective action problem presented by refugee protection therefore remains unaddressed at the international level, leaving space for regional action or other modes of cooperation among states.

As a preliminary matter, it might be argued that challenges to collective action, including the ability of individual states to free ride, are limited in the refugee context by the fact that many states have committed to a preexisting baseline level of cooperation at the international and regional level. To date, 149 states have signed on to the 1951 Refugee Convention, which requires signatories to take certain actions to protect individuals in need of international protection, including by avoiding their return to situations that would place their lives or freedom at risk.[49] The only explicit statement regarding responsibility sharing in the Refugee Convention is found in the Preamble, however, and while it observes the necessity of international cooperation in providing refugee protection, it is not binding and there is no explicit requirement of signatories related to participation in collective action.[50]

Views from the literature tend to express doubt regarding the capacity of the Refugee Convention to facilitate collective action without further measures to promote or facilitate

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400 (noting that ‘if one state admits refugees, others will benefit from the greater international order that ensues regardless of their own admissions’, with the consequence that ‘all will be tempted to cheat by letting “the other” state do the job’)

[48] *See* Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137; Thielemann and El-Enany, 'Refugee protection as a collective action problem: is the EU shirking its responsibilities?', 209-10

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

[50] Ibid., recital 4 (‘considering that the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of a problem of which the United Nations has recognized the international scope and nature cannot therefore be achieved without international co-operation’)

cooperation. Thielemann and El-Enany, for example, highlight the prevalence of free-riding incentives even for states parties to the Refugee Convention, explaining:

> [T]he responsibilities of states under the 1951 United Nations Convention Relating to the Status of Refugees and its 1967 Protocol (the Refugee Convention) are limited to those asylum seekers that arrive on their territory…This provides states with an incentive to discourage or prevent asylum seekers from seeking protection on their territories, or to encourage them indirectly to seek protection elsewhere.[51]

Schuck frames the dilemma posed by international refugee law similarly, noting that '[t]he duty of *non-refoulement* – the obligation not to return a refugee to conditions of persecution - is clear enough, but most of the other right-defining provisions of the Convention contain qualifying phrases and other limitations designed to protect the interests and prerogatives of the receiving state.'[52] According to this analysis, the Refugee Convention entails few positive obligations, and leaves ample room for states to engage in measures designed to shift the responsibility to provide protection to others (i.e., to free ride).

In line with this minimalist interpretation of the formal obligations inherent in the international refugee law framework, many authors note a motivation for states to protect their ability to act in line with their interests by avoiding taking on additional responsibilities. Schuck argues,

> Under the existing regime, after all, states that are not states of origin or first asylum are entirely free to join in, or refrain from, refugee protection efforts, as their interests dictate. Why then would they choose to surrender that freedom of action and accept a burden-sharing obligation that is likely to be costly, risk domestic political tensions, and probably ratchet upwards over time?[53]

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[51] Thielemann and El-Enany, 'Refugee protection as a collective action problem: is the EU shirking its responsibilities?', 209-210

[52] Schuck, 'Refugee Burden-Sharing: A Modest Proposal', 253; *see also* Lutz, Stünzi and Manser-Egli, 'Responsibility-Sharing in Refugee Protection: Lessons from Climate Governance', 477 (noting that 'the only binding principle for allocating responsibilities is the "non-refoulement" rule in international law, which forbids countries receiving asylum seekers to return them to a country in which they would be likely to be subjected to persecution')

[53] Schuck, 'Refugee Burden-Sharing: A Modest Proposal', 249

This may be true, in particular, for states that are geographically shielded from refugee flows by virtue of their distance from states or regions where displacement is frequent or ongoing.[54] Referring to sovereignty considerations, then, preserves states' ability to decide whether to act on a case-by-case basis, provided that a displacement crisis does not evolve in a manner that triggers their non-refoulement obligations.[55]

The above high-level description of the incentives and ability of individual states to seek to evade obligations under the Refugee Convention and Protocol accords with many of the trends, and, arguably, breaches of international obligations observed in the context of refugee protection. These range from restricting the scope of rights and benefits accorded to refugees to placing limits on the number of asylum seekers admitted, building fences, and engaging in push backs, and may fit within non-admission, non-arrival, or criminalization paradigms of deterrence.[56] As Niemann and Zaun explain, 'there is clearly a tendency to circumvent the established institutional context to pursue restrictive and even human rights violating practices,' with many states seeking to utilize 'legal grey-zones' in international and regional instruments to do so.[57] Lutz, Stunzi, and Manser-Egli, in the same vein, describe a 'paradox' of asylum policy in which states 'have internationally committed themselves to fairly assess requests for asylum and grant protection to those people who qualify as refugees' but 'are nevertheless reluctant to accept refugees to their countries and seek to prevent them from reaching their territories.'[58]

In sum, many academics have argued that the international refugee law regime has not succeeded in establishing effective interstate cooperation to provide refugee protection, despite the fact that the clear majority of states globally agree that refugee protection should be provided. The prohibition of refoulement is clear under international refugee law, but it is less clear how much a state is expected to contribute to regional efforts to provide protection to

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[54] Lutz, Stünzi and Manser-Egli, 'Responsibility-Sharing in Refugee Protection: Lessons from Climate Governance', 478
[55] Ibid., 484-85
[56] *See* Thomas Gammeltoft-Hansen and Nikolas F. Tan, 'The End of the Deterrence Paradigm?' (2017) 5 Journal on Migration and Human Security 28, 34-38
[57] Niemann and Zaun, 'EU Refugee Policies and Politics in Times of Crisis: Theoretical and Empirical Perspectives', 15
[58] Lutz, Stünzi and Manser-Egli, 'Responsibility-Sharing in Refugee Protection: Lessons from Climate Governance', 476 (citing Suhrke, Betts, and others)

those in need of it. The provision of refugee protection, therefore, remains an intractable collective action problem, with strong incentives to free ride. Against this backdrop, the discussion below considers the parameters of this collective action problem, including the international public goods associated with refugee protection.

1.2.2 Refugee protection and international public goods

Unlike some classes of collective action problems, which directly correspond to a single and clear benefit associated with the provision of a collective or public good, review of the literature analyzing the collective action problem posed by refugee protection reveals significant diversity in commentators' perspectives and framing. As a preliminary matter, it should be noted that refugee protection is, in an immediate sense, a private good – as it provides protection and access to rights to an asylum seeker who feared serious harm in his/her country of nationality or habitual residence. Shifting to the perspective of states, one might ask, why is refugee protection a matter of common interest, such that its provision constitutes a collective action problem? What benefits does it bring to the states that form part of the collective?

Despite general agreement in terms of the barriers to coordinated interstate action in this field, commentators see a range of potential goods or benefits flowing from the provision of refugee protection, and their framing of these is not always as clear as in other areas of collective action.[59] With this point in mind, the section below elaborates on the most frequently cited collective benefits derived from interstate cooperation to provide refugee protection. These include arguments that refugee protection is, itself, a public good or that it avoids a 'common bad'; security and stability; insurance; and burden or responsibility sharing.

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[59] *See* Betts, 'Public Goods Theory and the Provision of Refugee Protection: The Role of the Joint-Product Model in Burden-Sharing Theory' (noting that there is a lack of literature identifying and analyzing the nature of the public good provided by refugee protection)

Refugee protection as a common good or avoiding a 'common bad'

For some commentators, humanitarian or refugee protection is, itself, a public good.[60] This baseline seems to rest on the reasoning that if states have committed to provide refugee protection on a humanitarian basis, then following through with this commitment is necessarily in the public interest and can therefore be defined as a public good.[61] In some sense, however, there is an inconsistency in this framing, as it is refugees, rather than states, who directly or immediately benefit from the provision of refugee protection – in contrast to other examples of public goods such as common defense provision, economic cooperation, or environmental protection.[62]

Lutz et al. also offer what may be considered an alternative framing in arguing that refugee protection is essential to 'avoid a common bad' in which states' avoidance of responsibility or free riding creates negative externalities for their neighbors.[63] That is, they posit that by each state doing their share, the collective avoids a situation in which one state has to bear a disproportionate burden because its neighbor opts not to participate. By providing protection, conversely, states create an enabling environment that 'makes it possible to uphold public order and stability, enhances security, secures human rights norms, and avoids unilateral deterrence efforts.'[64] They may also be able to secure private benefits as contributors,[65] as explored in more detail below.

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[60] Lutz, Stünzi and Manser-Egli, 'Responsibility-Sharing in Refugee Protection: Lessons from Climate Governance', 478

[61] *See* ibid., 477

[62] *See* Thielemann, 'Why asylum policy harmonisation undermines refugee burden-sharing', 70 (noting that 'protection provided to individuals fleeing persecution is above all a private good for the individuals concerned'). Lutz et al. acknowledge that states do not treat refugee protection as a public good, though they argue that this is due to their focus on national sovereignty. Lutz, Stünzi and Manser-Egli, 'Responsibility-Sharing in Refugee Protection: Lessons from Climate Governance', 484-85

[63] Lutz, Stünzi and Manser-Egli, 'Responsibility-Sharing in Refugee Protection: Lessons from Climate Governance', 478

[64] Ibid.

[65] Ibid.

Refugee protection as producing security or stability

Security has often been identified as the primary public good provided by interstate cooperation on refugee protection.[66] To be more precise, this argument may look to the threat posed by refugees to 'a society's political regime, cultural identity, socio-economic order and environment (at least locally if they arrive in large numbers), and national security (if they get militarily involved in the conflict from which they fled).'[67] In this broad framing, 'security' encompasses national security as well as issues linked to the state's identity (from a range of perspectives, notably including continuity of the current political regime).

It seems unlikely that the arrival of refugees would pose a serious security threat to an individual state, as noted by Suhrke.[68] While states may struggle to meet their obligations under international law following the arrival of a large number of refugees (for example in terms of reception or access to asylum procedures), a serious threat to national security is less probable. The fact that collective action is not absolutely required from this perspective tends to undercut the argument that security, without more, would constitute the primary public good provided by refugee protection. Nonetheless, security continues to be mentioned by scholars examining the public good characteristics of refugee protection, though often in a general manner that does not necessarily suggest a threat to the integrity of host states.[69]

Some commentators have broadened the concept of security to include aspects of stability, suggesting that by accepting asylum seekers, states help to reduce the destabilizing impact of secondary movements on the region.[70] Thielemann explains that 'refusal to protect refugees or efforts to divert refugee flows onto other countries can be expected to lead to

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[66] *See, e.g.,* Betts, 'Public Goods Theory and the Provision of Refugee Protection: The Role of the Joint-Product Model in Burden-Sharing Theory', 26; Thielemann and El-Enany, 'Refugee protection as a collective action problem: is the EU shirking its responsibilities?', 214

[67] Suhrke, 'Burden-sharing during Refugee Emergencies: The Logic of Collective versus National Action Refugee Studies and the Refugee Regime in Transition', 401 (citing Weiner, 1996)

[68] Ibid., 401 (explaining that '[r]efugees, by contrast, rarely represent a threat that even a small and weak state cannot handle on its own by applying some military force – even when the asylum seekers arrive *en masse*.')

[69] *See, e.g.,* Betts, 'Public Goods Theory and the Provision of Refugee Protection: The Role of the Joint-Product Model in Burden-Sharing Theory', 276; Thielemann and El-Enany, 'Refugee protection as a collective action problem: is the EU shirking its responsibilities?', 214

[70] *See* Thielemann, 'Why asylum policy harmonisation undermines refugee burden-sharing', 64, 70; Eilstrup-Sangiovanni, 'Re-bordering Europe? Collective action barriers to 'Fortress Europe'', 457; Lutz, Stünzi and Manser-Egli, 'Responsibility-Sharing in Refugee Protection: Lessons from Climate Governance', 478

increased instability and heightened insecurity as a result of tensions at the border, irregular onward movements and tensions with other states which might end up being the new target countries for such migrants as a result of such restrictive policies by other states.'[71] This interpretation of stability may overlap with the idea of a 'common bad', or negative externalities produced by free riding, as suggested by Lutz, et al. and discussed above.

Yet this explanation, too, is arguably somewhat overbroad, as refugee movements, in isolation, would rarely be destabilizing for a region. Thielemann acknowledges that stability is likely to be in play primarily in the context of large-scale refugee movements.[72] The example of the 2015 crisis tends to underscore this potential risk, given the tensions that arose among EU member states as a result of their inability to agree on a common approach to providing refugee protection to the large number of asylum seekers who arrived to the region.

One might also conceptualize stability from a domestic political perspective, in terms of the potential for high rates of refugee arrivals leading to a domestic political backlash.[73] Domestic audiences may question their government's policies in the context of significant arrivals of asylum seekers to the territory, in particular if the state seems to be carrying a disproportionate burden as compared to its neighbors. In this sense, either security or stability may refer to the likelihood of the internal political dynamics of a state being impacted by the arrival of large numbers of asylum seekers, potentially including the electoral defeat of the party in power when such an event occurs.

Insurance

Other scholars frame collective efforts toward refugee protection as a form of insurance.[74] According to this reasoning, states may seek to contribute to collective efforts to provide refugee protection in cases of influx, trusting that a future movement that

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[71] Thielemann, 'Why asylum policy harmonisation undermines refugee burden-sharing', 70

[72] Ibid. (explaining that 'in large-scale, "mass-influx" situations during a major refugees crisis, one would expect the stability and security dynamics induced by such flows to be much more prominent')

[73] *Accord* Eilstrup-Sangiovanni, 'Re-bordering Europe? Collective action barriers to 'Fortress Europe'', 457 (noting the potential political costs of providing refugee protection)

[74] *See* Suhrke, 'Burden-sharing during Refugee Emergencies: The Logic of Collective versus National Action Refugee Studies and the Refugee Regime in Transition', 298; Schuck, 'Refugee Burden-Sharing: A Modest Proposal', 250; Thielemann and El-Enany, 'Refugee protection as a collective action problem: is the EU shirking its responsibilities?', 211

disproportionately impacts them will trigger a similar collective response. Suhrke explains that this rationale is particularly compelling for 'states within a region that are likely to experience mass movements of people,' since it serves to ensure that 'a state will not alone face a refugee or migration emergency.'[75]

Thielemann and El-Enany see a similar rationale in terms of the motivations a state would have to participate in a collective arrangement, noting that 'it might make sense for states to accept losses in the short term in order to insure themselves against the possibility of being faced with even higher costs at some point in the future.'[76] Schuck further notes that the insurance rationale is becoming more compelling over time, explaining that '[a]s the world grows smaller and more interconnected, and as an increasing number of refugees can more easily reach more places and claim protection there, such "refugee crisis insurance" might well be a "good buy" – perhaps even for relatively insular states.'[77] By reducing the likelihood that a state bearing a disproportionate or unilateral burden would close its borders, such a scheme would, moreover, 'serve the interest of states, strengthen international order and stability, and simultaneously protect the rights of refugees.'[78]

The insurance rationale for interstate cooperation to provide refugee protection is arguably much stronger for some states than others, however. This is the case because, notwithstanding increasing interconnectedness, differing geographic and structural characteristics mean that some states face a much higher prospect of influx than others.[79] States may also vary in their assessment of the possibility of taking effective (and legal) unilateral deterrence measures in case of such an influx. A state that sees little risk of being impacted by a future refugee crisis may, if insurance is its primary/sole motivator, therefore opt

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[75] Suhrke, 'Burden-sharing during Refugee Emergencies: The Logic of Collective versus National Action Refugee Studies and the Refugee Regime in Transition', 298

[76] Thielemann and El-Enany, 'Refugee protection as a collective action problem: is the EU shirking its responsibilities?', 212

[77] Schuck, 'Refugee Burden-Sharing: A Modest Proposal', 250

[78] Suhrke, 'Burden-sharing during Refugee Emergencies: The Logic of Collective versus National Action Refugee Studies and the Refugee Regime in Transition', 412

[79] Suhrke acknowledges the challenges to the insurance rationale, arguing that uncertainty about future refugee crises make it difficult for states to evaluate the expected benefits of such a scheme. Schuck, on the other hand, notes an 'apparently permanent refugee crisis' that will lead states to believe they are more likely to become a destination for asylum seekers. Ibid., 402; Schuck, 'Refugee Burden-Sharing: A Modest Proposal', 289-90

to continue to free ride on the efforts of others rather than contributing to collective efforts. Given that refugee crises tend not to be truly random or unpredictable in terms of their impact, this may limit the persuasive force of an insurance argument to facilitate interstate cooperation.

Burden or responsibility sharing

Finally, some theorists have framed the rationale for interstate cooperation in the context of refugee protection around burden or responsibility sharing as a public good.[80] This relates to the insurance concept just described, but with a different angle, in the sense that it implies participation that may not be solely motivated by self-interest in the sense of avoiding bearing full responsibility for a future refugee crisis. Rather, responsibility sharing may also encompass situations in which a particular state contributes to refugee protection due to a sense of solidarity or common purpose, in accord with the concept of inequity aversion advanced by Ahn, Ostrom, and Walker.[81]

This concept, then, also speaks to participants' sense that the system for collective action is fair – a factor that Ostrom has highlighted as crucial in terms of states' willingness to participate.[82] Although the idea of burden or responsibility sharing as a public good may overlap somewhat with the private altruistic benefits discussed below, there is also a separate consideration for the collective in terms of avoiding overburdening a state or group of states, which may have positive dividends for interstate relations and cooperation in other areas as well. In this sense, the argument for contributing to refugee protection on this basis accounts for the fact that refugee protection is one of many areas in which states in a region cooperate, with the potential for relations in one area, whether positive or negative, to spill over into others.

In brief, academics approaching refugee protection as a collective action problem have not necessarily shared a common perspective as they sought to define the nature of the public or collective good to be produced by cooperation among states. In some accounts, refugee

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[80] E.g., Hierro, Maza and Villaverde, 'Asylum burden-sharing within the EU revisited: are we moving on the right track?', 128
[81] *See* Ahn, Ostrom and Walker, 'Heterogeneous Preferences and Collective Action', 295; Suhrke, 'Burden-sharing during Refugee Emergencies: The Logic of Collective versus National Action Refugee Studies and the Refugee Regime in Transition', 398
[82] Ostrom, 'Analyzing collective action', 161

protection is itself a public good (in addition to being a private good for refugees themselves). A related but distinct framing suggests that provision of refugee protection may help to avoid a 'common bad,' namely a situation in which one state has to carry the burden of providing refugee protection alone. Other views suggest that provision of refugee protection may produce security and/or stability, establish a system of insurance, or facilitate responsibility sharing.

1.2.3 Refugee protection as an 'impure' public good

As explained above, where public or collective goods are not, in a strict sense, non-excludable and non-rival, the public good at issue may be described as 'impure.'[83] That is, an impure public good may provide a combination of public and private benefits to a contributing state. In the collective action literature, the 'joint-product model,' similarly, suggests that 'rather than a given good or service simply yielding a single non-excludable and non-rival benefit, it will provide multiple benefits which vary in their degree of publicness amongst a given group of states.'[84]

Some commentators argue that the flexibility offered by the concept of impure public goods or the joint-product model may be a better framework for examining the collective action challenge presented by refugee protection, as it captures both the collective and private benefits that may accrue to individual states participating in interstate efforts toward the provision of refugee protection.[85] In other words, given that there are a range of factors and interests involved in states' decisions regarding whether and how much to contribute to refugee protection, the joint-product model may more fully capture the relevant considerations and allow for a more holistic understanding of state behavior in this area of policy and practice.

Roper and Barria argue that 'refugee protection offers several private benefits that transform the calculations made by states in the provision of refugee protection,' which in turn 'changes the contribution calculation that alters the nature of refugee protection from a pure

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[83] Eilstrup-Sangiovanni, 'Re-bordering Europe? Collective action barriers to 'Fortress Europe'', 450

[84] Betts, 'Public Goods Theory and the Provision of Refugee Protection: The Role of the Joint-Product Model in Burden-Sharing Theory', 277

[85] Ibid., 286; Thielemann, 'Why asylum policy harmonisation undermines refugee burden-sharing', 70; Steven D. Roper and Lilian A. Barria, 'Burden Sharing in the Funding of the UNHCR: Refugee Protection as an Impure Public Good' (2010) 54 Journal of Conflict Resolution 616, 628

public to an impure public good.'[86] Thielemann and Dewan similarly note that 'refugee protection provides more than the single output of "security" implied by the pure public goods model: it also provides country-specific benefits such as status enhancement or the achievement of ideological goals.'[87] Elsewhere, Thielemann further explains that 'a number of the "goods" produced by refugee protection clearly do not fulfil the essential requirements to qualify as public goods, namely those of non-excludability and non-rivalry,' citing in particular the private nature of the protection provided to refugees and the reputational benefits to states offering refugees protection.[88]

What, then, are the specific public and private benefits foreseen by the joint product model? These may include security, stability, insurance, and responsibility-sharing among the public goods provided by collective action around refugee protection, as outlined in the preceding section. In addition to these public benefits, Lutz et al. suggest that private benefits accruing only to contributing states may include reputational dividends, progress toward domestic and foreign policy objectives, and economic benefits gained through the work and experience of refugees.[89] The literature also highlights private benefits that flow from complying with a moral or legal duty,[90] which Betts separates out into excludable prestige and altruistic benefits.[91] Per his explanation, '[i]n the case of states where norms of solidarity are entrenched and the *scope* of that society's ethical values are global,' it may follow that 'excludable altruistic benefits derive from *being* the provider of both asylum and unconditional contributions to multilateral refugee agencies,' with prestige benefits resulting 'as a by-product.'[92]

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[86] Roper and Barria, 'Burden Sharing in the Funding of the UNHCR: Refugee Protection as an Impure Public Good', 617-18
[87] Thielemann and Dewan, 'The myth of free-riding: Refugee protection and implicit burden-sharing', 359
[88] Thielemann, 'Why asylum policy harmonisation undermines refugee burden-sharing', 70
[89] Lutz, Stünzi and Manser-Egli, 'Responsibility-Sharing in Refugee Protection: Lessons from Climate Governance'
[90] *See generally,* Suhrke, 'Burden-sharing during Refugee Emergencies: The Logic of Collective versus National Action Refugee Studies and the Refugee Regime in Transition', 398 (noting that helping refugees is a 'jointly held moral duty and obligation under international law'); Thielemann and El-Enany, 'Refugee protection as a collective action problem: is the EU shirking its responsibilities?', 212 (noting that 'long-standing commitments to refugee protection might enable effective protection in the context of significant collective action challenges')
[91] Betts, 'Public Goods Theory and the Provision of Refugee Protection: The Role of the Joint-Product Model in Burden-Sharing Theory', 286
[92] Ibid., 292

Ultimately, what emerges from these discussions of refugee protection as an impure public good or within the joint-product framework is the sense that states are balancing a complex set of collective and individual motivations and perceived benefits in deciding whether and how to cooperate with other states to extend protection to refugees. Suhrke points to the successful interstate cooperation to resettle refugees following World War II and the Vietnam War as scenarios that demonstrate how a confluence of individual and collective obligation, values, and political considerations may enable collective action at a particular point in time.[93] These examples highlight the extent to which the motivations of actors are a key factor to be unpacked in order to understand how states assess the benefits and costs associated with cooperation in provision of refugee protection – a point Betts also highlights in arguing that 'divergences between states' cost-benefit evaluation, and therefore provision, can be shown to stem from differences in norms of solidarity and human rights across states.'[94]

Whether or not solidarity and human rights norms remain central to state decision making in the context of interstate cooperation toward refugee protection now, more than two decades after Betts provided this analysis, it is clear that there does not seem to be a simple formula for facilitating interstate cooperation on these issues, as evidenced by continuing debates over state obligations and attempts to organize collective action in the context of large-scale displacement. Suhrke's focus on specific examples of successes, similarly, highlights the extent to which cooperation may be context-dependent, reflecting a confluence of factors that may create favorable conditions for addressing collective action challenges. Later chapters of this thesis address this question in the EU by examining the considerations that influenced state decision making and cooperation during the 2015 refugee 'crisis.'

As elaborated above, international refugee law, despite establishing certain safeguards, does not speak to the question of how states collectively provide refugee protection; as a result, refugee protection continues to pose an intractable collective action problem for states. Elaborating on the nature of this collective action problem, a review of the literature reveals

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[93] Suhrke, 'Burden-sharing during Refugee Emergencies: The Logic of Collective versus National Action Refugee Studies and the Refugee Regime in Transition', 404-6, 413

[94] Betts, 'Public Goods Theory and the Provision of Refugee Protection: The Role of the Joint-Product Model in Burden-Sharing Theory', 287

considerable variance in the definition of the public good(s) provided by refugee protection. Some commentators view refugee protection itself as a public good, or, at a minimum, as avoiding a 'common bad', while others point to security and stability, insurance, or responsibility sharing as the public good resulting from provision of refugee protection by states. Despite the persuasiveness of each of the arguments above in certain contexts, no single framing of the public or collective good resulting from interstate cooperation on refugee protection seems to be entirely satisfactory. This is perhaps not surprising, because although commonalities exist, states have distinct perceptions of the risks, benefits, and costs associated with refugee protection,[95] which seem to go considerably beyond a single rationale for cooperation. As suggested by the concept of impure public goods or the joint product model, it may be necessary to conceive of a range of public and private benefits related to the provision of refugee protection.

Many of the rationales for cooperation around refugee protection, moreover, are not necessarily fixed – a factor that does not seem to be accounted for in the discussions outlined previously but which features prominently in my own research. As discussed in greater detail in subsequent chapters, states' perceptions of the value they derive from refugee protection, as well as the attendant costs of providing these goods through extension of protection to refugees, will vary over time in response to both the regional/global environment as well as their own internal political dynamics. This temporal aspect, too, would need to be accounted for in any model designed to facilitate collective action in this area – a topic treated in the section that follows.

1.3 Challenges to organizing collective action in support of refugee protection in the EU

Before turning to the specific governance measures that have been introduced in the context of refugee protection in the EU, it is useful to note that, in principle, organization of

[95] *See* Lutz, Stünzi and Manser-Egli, 'Responsibility-Sharing in Refugee Protection: Lessons from Climate Governance', 478 (noting that 'asymmetries stem from countries' geographic location, their attractiveness as destination countries and the varying costs of admitting refugees')

collective action around refugee protection at the regional level in the EU might seem to be a relatively straightforward proposition. Given the baseline of obligations under the 1951 Refugee Convention, described in section B. 1 above, as well as the practical necessity of cooperation on asylum in the absence of internal EU border controls, one would expect that efforts to coordinate would have a higher likelihood of success than elsewhere. More specifically, one might expect that coordination would be seen as essential, given that a lack of cooperation regarding asylum and migration could threaten the principle of free movement and, by extension, the single market.[96] Yet this has not been borne out in practice. As Neiman and Speyer, writing in 2018, observe,

> [T]he EU migration/refugee regime has been characterized by partial integration with gaps and deficiencies. Although it was clear to the Schengen countries that the abolition of internal border controls would require (close) cooperation with regard to safeguarding external borders and a common asylum/migration policy, substantial integration has partly been lacking because Member States wanted to preserve their sovereignty in these sensitive areas.[97]

Some of the details of these persistent gaps and challenges to integration were elaborated in the prior chapter, while those specific to the 2015 refugee crisis will be further explored in later chapters. Accepting, for now, the broad conclusion that effective collective action toward refugee protection in the EU has not been achieved to date, the relevant question becomes: what characteristics of refugee protection make this issue so challenging in the region?

1.3.1 Structural barriers to solidarity in the EU

As noted earlier, the 1951 Refugee Convention and Protocol require states to avoid returning refugees to situations in which their lives or freedom would be in danger – that is, they are bound by the principle of *non-refoulement*. Critically, however, this obligation is only triggered upon the arrival of asylum seekers to a state's territory. Many states have, as a result,

[96] *See, e.g.,* Thielemann and El-Enany, 'Refugee protection as a collective action problem: is the EU shirking its responsibilities?', 212

[97] Arne Niemann and Johanna Speyer, 'A Neofunctionalist Perspective on the European Refugee Crisis: The Case of the European Border and Coast Guard Special Issue: EU Refugee Policies and Politics in Times of Crisis' (2018) 56 Journal of Common Market Studies 23, 29 (internal citations omitted)

sought to avoid arrivals to their territory by interventions or policy changes intended to redirect asylum seekers toward their neighbors.[98]

In addition, as discussed in Chapter 2, EU member states located away from the bloc's external borders also have recourse to the Dublin Regulation. This regulation establishes a system that formally places responsibility for processing an asylum application on the first EU member state reached by an asylum seeker as a means to avoid 'asylum shopping' by refugees and, additionally, to incentivize front-line states to protect EU external borders.[99] This system has served to give states farther from refugee producing states or regions a mechanism for returning asylum seekers who reach their borders to front-line EU Member states and, in doing so, has arguably reduced their motivation to contribute to a collective effort to provide refugee protection.[100]

As Hierro, Maza and Villaverde explain, in the EU, 'bi-polarization, with one group of countries relatively free of asylum pressure and another one overwhelmed by it, represents a setback for any future negotiation on solidarity mechanisms to achieve a fair-sharing agreement.'[101] Suhrke similarly observes, as a general proposition, that

> Sharing proposals authored by states have typically come from governments trying to relieve what they perceive as a disproportionate influx on their own territory. To other states, sharing mostly appears as an added burden.[102]

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[98] *See, e.g.,* Eilstrup-Sangiovanni, 'Re-bordering Europe? Collective action barriers to 'Fortress Europe'', 458 (noting that the lack of border controls within the EU means that states may seek to provide less assistance or benefits upon reception to prompt asylum seekers to target other countries)

[99] Council of the European Union, *Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast),* 29 June 2013, OJ L. 180/31-180/59; 29.6.2013, (EU) No 604/2013; *see also* Thielemann, 'Why Refugee Burden- Sharing Initiatives Fail: Public Goods, Free-Riding and Symbolic Solidarity in the EU', 64, 79

[100] Though it should be noted that the Dublin system has been difficult, time consuming, and expensive to apply in practice, it nonetheless provides a permission structure for states that do not sit along the EU's external borders to claim that they are not responsible for receiving asylum applications from individuals who transited other EU Member States.

[101] Hierro, Maza and Villaverde, 'Asylum burden-sharing within the EU revisited: are we moving on the right track?', 135, 135

[102] Suhrke, 'Burden-sharing during Refugee Emergencies: The Logic of Collective versus National Action Refugee Studies and the Refugee Regime in Transition', 397

In other words, the fact that the same EU member states tend to be on the frontlines when refugees arrive to the region, and that this uneven distribution tends to be reinforced rather than alleviated by existing legislation, results in an impasse in which those EU states in a protected position do not have a strong motivation to cooperate or enter into collective action arrangements. This is notwithstanding their regional and international legal obligations and, more generally, the security, stability, and insurance rationales for refugee protection noted earlier. Whether, and how, the refugee crisis of 2015 affected the incentives and the cost-benefit analyses of some states, and how this impacted coordination during the crisis, is an important question, explored in later chapters.

It should be noted that there are exceptions to the above reasoning in terms of motivation, however, and that in practice the incentives of EU member states to cooperate may be more nuanced and individualized than might be suggested by the baseline created by international and regional legal frameworks. Thielemann and Dewan, looking at data for OECD states from 1994 to 2002, find that, despite the lack of pressure on their borders and contrary to Olson's hypothesis of exploitation of the large, it is in fact small, northern European states that consistently bear the highest relative asylum burden.[103] In line with Betts' arguments regarding altruistic and prestige benefits,[104] Thielemann and Dewan conclude that 'states' willingness to shoulder protection burdens are positively correlated with their relative commitment to the norm of solidarity with the people in need and that countries which accept a disproportionate number of protection seekers are also the ones with strong domestic redistribution (extensive welfare states) and above average foreign aid contributions.'[105]

1.3.2 Political barriers to implementation of the CEAS

The prior chapter examines the scope and purposes of the CEAS in detail. For present purposes, it is important to note that while the overarching aim of the CEAS has been to progressively harmonize Member States' legal frameworks as applicable to asylum procedures,

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[103] Thielemann and Dewan, 'The myth of free-riding: Refugee protection and implicit burden-sharing', 352
[104] Betts, 'Public Goods Theory and the Provision of Refugee Protection: The Role of the Joint-Product Model in Burden-Sharing Theory', 292
[105] Thielemann and Dewan, 'The myth of free-riding: Refugee protection and implicit burden-sharing', 359

protection standards, and reception conditions, as well as (arguably) promoting solidarity,[106] there were challenges to these efforts toward regional cooperation from the start.

In particular, the CEAS has been in tension with domestic political agendas and interests in retaining control over decisions relating to asylum and migration. Asylum and migration issues have often been characterized as triggering concerns about sovereignty, given their inherent connection to a state's ability to control its own territory, including who may enter and remain.[107] These considerations have contributed to an impasse as concerns progressive harmonization of asylum standards: on the one hand, states need to cooperate on asylum and migration issues due to the lack of border controls within the Schengen area, but they are, at the same time, reluctant to surrender their ability to act unilaterally, given the potential political and electoral implications of decisions on asylum matters.

In addition, refugee protection has, at various moments, acquired a considerable degree of political salience at both the domestic and the regional level. Unlike the structural factors above, the political salience of refugee protection is not constant; there are moments at which this issue is not at the center of political dialogues and others where it factors heavily into politics and political debates.[108] For reasons which will be explained in further detail in subsequent chapters, refugee protection has had a high degree of salience throughout the period examined in this research and beyond. At certain moments, this level of attention weighed in favor of providing refugee protection, but throughout most of the relevant period, the converse was true. This has created additional hurdles to cooperation, as domestic audiences were wary of any actions that would imply more refugees arriving to their country's territory.

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[106] European Commission, *Green paper on the future Common European Asylum System* (European Commission 2007), COM (2007) 301 final, 1

[107] Börzel, 'From EU Governance of Crisis to Crisis of EU Governance: Regulatory Failure, Redistributive Conflict and Eurosceptic Publics', 18 (noting that 'migration and refugee policies touch upon core issues of state sovereignty and national identity which are particularly likely to get politicized')

[108] *See, e.g.,* Leo Lucassen, 'Peeling an onion: the "refugee crisis" from a historical perspective' (2018) 41 Ethnic and Racial Studies 383, 406 (noting 'a "perfect storm" that dramatically changed the context…highlighting that we face not so much a "refugee crisis" as a complex political, cultural and socio-economic crisis')

On balance, application of collective action theory in the context of refugee protection provides several important insights into the nature of challenges to effective interstate cooperation in this area. These help to elaborate why, despite broad consensus and acceptance of international obligations related to refugee protection, organizing collective efforts to provide refugee protection remains difficult in practice. The most salient of these in the context of the EU are elaborated below.

First, collective action theory helps to explain why, notwithstanding the fact that states seem, based on their international commitments, to value refugee protection in the abstract, they often act to evade precisely these commitments when asylum seekers arrive to their territory. In other words, they are motivated to take advantage of their ability to free ride on the efforts of others. Collective action theory sheds light on why it may be seen as an 'optimal' strategy for states (including but not exclusively in the EU) to support refugee protection from a principled standpoint but allow other states to carry the burden of actually providing protection to the refugees arriving to the region. In doing so, states may benefit from the public good(s) associated with refugee protection with minimal effort or cost.

Second, in further parsing the interests of states, existing research and commentary on collective action in the context of refugee protection yield a range of possible public or collective goods associated with refugee protection, which give content to possible rationales or motivators of interstate cooperation in this context. These include security, stability, insurance, and responsibility sharing, as well as a possible characterization of refugee protection itself as a public good. It has also been suggested that refugee protection may produce private benefits for contributing states, including reputational and altruistic benefits. States may, moreover, view and weigh the importance of these public and private benefits differently, leading to a complex set of considerations that should be taken into account when designing systems to encourage contribution to collective action in this area, in accordance with the by-product theory articulated above. This research further suggests that states' assessments of these benefits may vary over time, meaning that efforts to facilitate collective action may need to have a certain amount of flexibility to respond to shifting preferences.

2 Governance to enable cooperation towards refugee protection

In Part 1, it was observed that collective action problems frequently arise in the context of interstate cooperation, including in refugee protection. In Part 2, the focus is on modes of governance that seek to align incentives and enable closer cooperation between states, in the absence of a fully elaborated regulatory structure. As explained in the preceding chapter, these governance tools comprise the 'soft law' component of the CEAS's hybrid structure. Before looking at this specific application of governance, however, it is helpful to start with a note on definitions and what is meant, throughout this thesis, by the concept of governance.

2.1 What is (new) governance?

There is an extensive literature on governance, and the concept is articulated in different ways and from different vantage points by academics seeking to explain its potential for achieving consensus or cooperation between diverse actors.[109] One prominent definition, which will form the baseline for the discussion of governance in this thesis, describes governance broadly as 'activities backed by shared goals that may or may not derive from legal and formally prescribed responsibilities that do not necessarily rely on police powers to overcome defiance and attain compliance.'[110] Proponents of this concept suggest that these activities may achieve the same outcomes as more traditional forms of government, arguing that 'it is possible to conceive of governance without government – of regulatory mechanisms in a sphere of activity which function effectively even though they are not endowed with formal authority.'[111] A related concept of governance from the collective action literature looks to 'institutions' as 'both informal constraints (sanctions, taboos, customs, traditions, and codes of conduct), and formal rules (constitutions, laws, property rights)' that 'have been devised by human beings to create order and reduce uncertainty in exchange.'[112]

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[109] *See, e.g.,* R. A. W. Rhodes, 'The New Governance: Governing without Government' (1996) 44 Political Studies 652, 658; Stoker, 'Governance as theory: five propositions'; Fletcher, 'EU Governance Techniques in the Creation of a Common European Policy on Immigration and Asylum', 552
[110] Rosenau, 'Governance, order, and change in world politics', 4
[111] Ibid., 5
[112] Douglass C. North, 'Institutions' (1991) 5 The Journal of Economic Perspectives 97, 97

The important point in the above definition of governance is the idea that behavior – including the behavior of states – can be shaped by informal norms and self-governing initiatives. This is often referred to, particularly in the EU context, as 'new governance' or 'new modes of governance'.[113] In a sense, new governance is less clearly defined by what it is than by what it is not: as used here, it is not a traditional legal system in which particular actions are required or prohibited, with legal consequences following directly from non-compliance. This is, instead, how most new governance scholars would describe government.[114] Rather, new governance is defined precisely by its lack of formal enforcement mechanisms.[115] According to Rhodes, 'you get governance without government when there are "regulatory mechanisms in a sphere of activity which function effectively even though they are not endowed with formal authority."'[116]

New governance's informal mechanisms may comprise, as in the case of its use in the EU, 'a variety of diverse modes including coordination, target-setting, benchmarking and peer-review.'[117] These tools, in turn, may produce positive outcomes in the sense of compliance through such processes as 'shaming, diffusion through mimesis or discourse, deliberation, learning, and networks.'[118] Despite the distinct methodologies, however, the destination remains unchanged: as Stoker explains, 'the outputs of governance are not [] different from those of government.'[119]

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[113] *See,* Rhodes, 'The New Governance: Governing without Government', 657-58; Eberlein and Kerwer, 'New Governance in the European Union: A Theoretical Perspective', 123. Note that 'governance' is commonly used in the earlier discussions of the concept, but 'new governance' tends to be used more commonly in later works; for the purposes of this thesis, I will refer to 'new governance' to indicate the current or more recent definition, encompassing as well the idea of 'soft law' and certain specific concepts such as the open method of coordination (OMC).

[114] See, e.g., Stoker, 'Governance as theory: five propositions', 17 (noting that '[g]overnment is characterized by its ability to make decisions and its capacity to enforce them' and that 'government is understood to refer to the formal and institutional processes which operate at the level of the nation state to maintain public order and facilitate collective action')

[115] See, e.g., Rhodes, 'The New Governance: Governing without Government', 657-58; Dermot Hodson and Imelda Maher, 'The Open Method as a New Mode of Governance: The Case of Soft Economic Policy Co-ordination' (2001) 39 JCMS: Journal of Common Market Studies 719, 741

[116] Rhodes, 'The New Governance: Governing without Government', 658 (citing Rosenau, 'Governance, order, and change in world politics', 3-6)

[117] Cardwell, 'Rethinking Law and New Governance in the European Union: the Case of Migration Management', 1

[118] Trubek and Trubek, 'Hard and Soft Law in the Construction of Social Europe: the Role of the Open Method of Co-ordination', 356

[119] Stoker, 'Governance as theory: five propositions'

Some scholars have characterized new governance as a form of 'soft law.' Trubek, Cottrell, and Nance explain,

> '[S]oft law' is often used to describe governance arrangements that operate in place of, or along with [] 'hard law'…These new governance methods may bear some similarity to hard law. But because they lack features such as obligation, uniformity, justiciability, sanctions, and/or an enforcement staff, they are classified as 'soft law'….[120]

Graziano and Halpern, similarly, describe 'softer integration modes' that are 'less hierarchical in nature but with the potential of effectiveness and democratization.'[121] In line with these definitions, it is suggested that there exists the possibility of 'hybridity,' in which both hard and soft law may be utilized in the same policy areas, with soft law 'establishing non-binding standards that can eventually harden into binding rules once uncertainties are reduced and a higher degree of consensus ensues.'[122]

It has been observed that new governance tends to be well-suited to and utilized in situations in which there does not (yet) exist sufficient consensus to support promulgation of a more traditional legal framework.[123] Pollak and Slominski explain that new governance may be 'particularly relevant in policy areas which are characterized by vastly heterogeneous interests, legal traditions and ideas.'[124] Eberlein and Kerwer, similarly, argue that new governance methods 'are almost always introduced after legislative deadlocks,' in situations in which 'central legislative policies are not feasible because the solutions to policy problems are uncertain and politically sensitive.'[125] Critically, Trubek et al. note the potential for new governance (as soft law) to 'promote cooperation while preserving sovereignty.'[126]

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[120] Trubek, Cottrell and Nance, ''Soft Law,' 'Hard Law,' and European Integration: Toward a Theory of Hybridity', 65
[121] Paolo R. Graziano and Charlotte Halpern, 'EU governance in times of crisis: Inclusiveness and effectiveness beyond the 'hard' and 'soft' law divide' (2016) 14 Comparative European Politics 1, -
[122] Trubek, Cottrell and Nance, ''Soft Law,' 'Hard Law,' and European Integration: Toward a Theory of Hybridity', 93, 89
[123] *See* ibid., 73-75
[124] Johannes Pollak and Peter Slominski, 'Experimentalist but not Accountable Governance? The Role of Frontex in Managing the EU's External Borders' (2009) 32 West European Politics 904, 905 (specifically referencing experimentalist governance)
[125] Eberlein and Kerwer, 'New Governance in the European Union: A Theoretical Perspective', 125
[126] Trubek, Cottrell and Nance, ''Soft Law,' 'Hard Law,' and European Integration: Toward a Theory of Hybridity', 74; *see also* Cardwell, 'Rethinking Law and New Governance in the European Union: the Case of Migration Management', 7

2.2 New governance measures as a means of support to refugee protection in the EU

Given the political sensitivities around refugee protection, it is easy to understand why new governance might be considered the most practical way forward for collective action in this area. As discussed in the previous chapter, a certain level of consensus could be found around the need for collective action on refugee protection following the establishment of the Schengen Zone, but this consensus only went as far as minimum standards regulation. More comprehensive regulation, including on issues around responsibility sharing, remained out of reach, necessitating a form of hybridity. Looking ahead, new governance was identified as one way to facilitate gradual progress toward a unified asylum system across the region, as described further below.

2.2.1 The limits of the standard interstate regulatory model in the context of refugee protection

The collective action literature described in Part 1 illustrates how efforts to coordinate interstate cooperation around the provision of refugee protection confront a collective action problem that defies easy solutions. The heterogeneous characteristics and preferences of EU member states, as elaborated above, produce varying incentives and cost-benefit calculations as states consider the potential of interstate cooperation. This, in turn, complicates the process of designing institutional frameworks or providing private incentives that will overcome this collective action problem and motivate all member states to contribute.

As a starting point, there does not seem to be a streamlined model for addressing the collective action problem presented by refugee protection that effectively captures the different state motivations in this regard (i.e., to promote security, stability, insurance, or responsibility sharing as public goods, and/or to obtain private altruistic or prestige benefits). This complicates the process of designing and securing support for comprehensive regulatory solutions in this area. Some states may be willing to contribute, even if others do not, due to the excludable benefits doing so would yield in the form of altruistic and prestige benefits – Sweden has historically been seen in this category, for example. Other states, such as Greece and Italy, may be likely to participate due to their geographic position and the attendant high risk of asylum seekers arriving at their borders in significant numbers (in line with an insurance or responsibility sharing rationale). A substantial number of states, in line with a security/stability rationale or the idea of avoiding a 'common bad,' may adopt a pragmatic perspective and seek a level of cooperation that prevents asylum-related issues from becoming a disrupting force in the context of broader regional cooperation; one might situate Germany, for example, in this category. Some states, however, fit within none of these categories and would prefer to do the absolute minimum necessary to preserve cooperation on other fronts, notably those related to economic integration, while maintaining a considerable degree of autonomy on asylum and migration issues. This latter category may be seen as inclusive of the Visegrad states, Czech Republic, Poland, Hungary, and Slovakia, though it should be noted that some of these took a different orientation with respect to the Ukraine crisis.

To date, the latter group appears to have prevented significant progress toward a comprehensive collective solution to the challenges posed by refugee protection in the EU. Their position renders impractical a stand-alone regulatory model addressing all aspects of refugee protection, as applied to interstate cooperation in other areas such as trade and monetary policy. The lack of consensus has led the EU to assume a more gradual and differentiated approach to encourage greater levels of cooperation and coordination on refugee protection and the progressive alignment of EU member states' individual asylum systems.

2.2.2 The incorporation of new governance mechanisms for refugee protection in the EU

In recognition of the limited consensus around collective provision of refugee protection, the EU began with minimum standards asylum legislation,[127] with the intention of following this with a second phase in which the EU would be able 'to achieve both a higher common standard of protection and greater equality in protection across the EU and to ensure a higher degree of solidarity between EU Member States.'[128] This incremental approach to cooperation was

[127] Vincent Chetail, 'The Common European Asylum System: Bric-à-brac or System?', vol 39 (Immigration and Asylum Law and Policy in Europe, Brill | Nijhoff 2016), 12
[128] European Commission, *Green paper on the future Common European Asylum System*, 1

intended to allow sufficient time and space for Member States to overcome their sovereignty-based objections and reach consensus on collective measures to be adopted in the area of refugee protection. As an initial matter, however, states could begin with a minimal level of coordination and contribution to the public good(s) associated with refugee protection, consistent with the baseline of their shared responsibility for managing asylum and migration in the Schengen zone. This approach aligns with the view of some commentators who have suggested that minimal levels of initial coordination may over time produce a convergence of values and allow for promulgation of a comprehensive legal framework,[129] an intention also echoed by the European Commission in its 2001 White Paper.[130]

The CEAS was, in line with this reasoning, established as a collection of regulations and directives, as well as informal methods of cooperation. As described in Chapter 2, regulations under the CEAS include, notably, the Dublin and Eurodac regulations, while the Asylum Procedures Directive, Qualification Directive, and Reception Conditions Directive were aimed at establishing minimum standards rather than an overarching regulatory system in line with the longer term objectives of 'a common asylum procedure and a uniform status for those who are granted asylum.'[131] Given this composition, the CEAS by its nature tolerates a certain amount of diversity among states. To complement this structure, a range of new governance tools and methods of cooperation that lack the level of prescriptiveness and enforceability of the instruments developed through the Community Method have been utilized in parallel to bring about greater convergence of law and policy: policy coordination, published guidance, support by EASO/EUAA, exchange of best practice, study visits, and twinning, among others.[132]

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[129] *See* Fletcher, 'EU Governance Techniques in the Creation of a Common European Policy on Immigration and Asylum', 554; Hodson and Maher, 'The Open Method as a New Mode of Governance: The Case of Soft Economic Policy Co-ordination', 722

[130] European Commission, *Communication from the Commission of 25 July 2001, European Governance: A White Paper, COM (2001) 428 final*, 5 (explaining that '[t]he use of an open method of co-ordination, specifically adapted to the immigration field, and as a complement to the legislative framework, will provide the necessary policy mix to achieve a gradual approach to the development of an EU policy, based, in a first stage at least, on the identification and development of common objectives to which it is agreed that a European response is necessary')

[131] Council of the European Union, *Presidency Conclusions, Tampere European Council, 15-16 October 1999*, 16 October 1999, para 15

[132] *See* Dehousse, 'Has the European Union moved towards soft governance?', 23; Trubek, Cottrell and Nance, ''Soft Law,' 'Hard Law,' and European Integration: Toward a Theory of Hybridity', 65

Two observations about the nature of new governance structures in this context are important at this stage. First, as a definitional matter, new governance tools in the context of refugee protection may offer positive inducements to cooperation but lack the potential to impose punishment. While this may seem obvious, it bears repeating in the sense that the lack of enforcement mechanisms forecloses one of the key strategies outlined in the collective action literature as a means of addressing states' tendency to free ride – a reliable system to monitor compliance and punish defection. Second, although the EU did not pursue the structured approach to new governance foreseen by the Open Method of Coordination, as discussed in Chapter 2, the initial discussion of this possibility illustrated the importance of informal structures and progressive coordination in the long-term plan of the bloc for cooperation in this area. In this sense, informal or soft law approaches were seen as critical to bridging the gap between where the current consensus among member states ended and the ultimate goals of the EU for coordination on issues involving asylum.

2.2.3 The potential efficacy of new governance in the context of refugee protection in the EU

At a general level, scholars differ in terms of their views of both the prerequisites to implementation of a system of new governance and the longer-term prospects for solutions to collective action problems initiated through new modes of governance. Rosenau, for example, builds the need for 'shared goals' into his definition of governance and argues that 'governance is a system of rule that works only if it is accepted by the majority (or, at least, by the most powerful of those it affects), whereas governments can function even in the face of widespread opposition to their policies.'[133] This suggests that new governance is unlikely to 'work' in the sense of facilitating cooperation absent a certain baseline consensus; the precise extent of agreement required is not entirely clear.

[133] Rosenau, 'Governance, order, and change in world politics', 4 (defining governance as 'activities backed by shared goals that may or may not derive from legal and formally prescribed responsibilities that do not necessarily rely on police powers to overcome defiance and attain compliance')

Fletcher makes a similar argument, explaining that the Open Method of Coordination, as a particular form of governance, is suited for areas in which 'Member States are not ready to embrace common legislation immediately but do have the political will to take very concrete steps toward an identified common objective.'[134] While largely similar to Rosenau's definition, this articulation seems to tolerate greater divergence in terms of perspectives, as it explicitly acknowledges that there is not sufficient agreement to embrace a legislative framework. She further suggests, in these cases, that the Open Method has an 'inevitable tendency to cultivate common values' and therefore constitutes 'a pre-curser to more traditional legal methods.'[135] Eberlein and Kerwer, in a similar vein, note that 'one of the most consistent observations about the new modes of governance is that they exert influence by fostering policy learning.'[136]

Eberlein and Kerwer highlight the distinction between these two broad perspectives on governance methods as being based on 'whether they conceive of political decision making mainly as preference aggregating or preference transforming.'[137] In other words, these perspectives speak to the prerequisites for use of new governance, but also about where new governance may lead: is new governance an end in itself, enabling cooperation to the extent possible under current conditions, or a bridge to a comprehensive legislative framework? The former perspective places new governance methods in the position of effectively facilitating cooperation (or lowering transaction costs) in situations in which states are already inclined to move in the same direction. The latter foresees cooperation as producing an evolution of perspectives, ultimately giving rise to conditions that would allow for further regulation or formalization of cooperation.

This distinction is a critical one: because new governance methods lack formal enforcement mechanisms, states may 'opt out' if their view of the utility of cooperation changes in response to a shift in the domestic or international environment (e.g., a new political party assumes control of government, or the profile or arrival rate of asylum seekers to their territory changes). Hodson and Maher, recognizing the fragility of new governance arrangements,

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[134] Fletcher, 'EU Governance Techniques in the Creation of a Common European Policy on Immigration and Asylum', 552
[135] Ibid., 554
[136] Eberlein and Kerwer, 'New Governance in the European Union: A Theoretical Perspective', 125
[137] Ibid., 127

observe in the context of the Open Method that 'the lack of formal sanctions or binding legal norms allows states to proceed in opposition to any agreed principles (as contained in the guidelines), thus potentially undermining the credibility of this form of governance.'[138] In other words, states participating in this system, notwithstanding their initial decision to participate, are not prevented from undermining it if and when their preferences change.

If this is the case, one might question what impact new governance methods can have. In other words, will states coordinating under the auspices of a new governance structure contribute to collective action efforts when doing so aligns with their interests, and free ride when it does not? This possibility seems more likely in a scenario in which preferences are not necessarily consistent, and states chose to opt in at a point in time when doing so happens to align with their interests. In such a circumstance, the idea of cultivating common values may be less likely – rather, if states are variable in terms of their preferences, they may be more inclined to respond to internal political dynamics and external pressures in an opportunistic manner.

This brings us to the central question of this thesis: why has progress toward the collective goals identified by the EU in the area of asylum proven to be so challenging? The hybrid structure applied by the EU, comprised of the Community method[139] in combination with new governance methods, did not produce the anticipated convergence of views along the expected timeline.[140] The 2015 refugee crisis, as will be explored further in subsequent chapters, revealed serious concerns, even among member states inclined to provide refugee protection, about the efficacy of the CEAS.[141]

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[138] Hodson and Maher, 'The Open Method as a New Mode of Governance: The Case of Soft Economic Policy Co-ordination', 741

[139] The Community method is discussed in greater detail in Chapter 2, where it is defined with reference to its focus on 'regulation through legislation.'

[140] *See* Council of the European Union, *Presidency Conclusions, Tampere European Council, 15-16 October 1999*, para 15 (setting as longer term goals 'a uniform status (noting as longer-term goals 'a common asylum procedure and a uniform status for those who are granted asylum valid throughout the Union'); Conference of the Representatives of the Governments of the Member States, *Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community*, 2007/C 306/01, European Union, 13 December 2007, https://www.refworld.org/legal/agreements/eu/2007/en/71085, Article 63 (setting out as key objectives uniform protection statuses recognized throughout the EU and common procedures governing grant or withdrawal of those procedures, among other goals)

[141] *See* European Commission, *'Towards a Reform of the Common European Asylum System and Enhancing Legal Avenues to Europe,' COM(2016) 197 final, 6 April 2016*

At a high level, and as discussed in Chapter 2, it is clear that many commentators would describe the CEAS as ineffective, highlighting the diversity of approaches taken by states in 2015 as illustrative of its failure. Neimann and Speyer, for example, argue that:

> The refugee and asylum crisis itself can be understood as the result of existing dysfunctionalities, mainly between a supranational Schengen, and a weak external border regime in the hands of the Member States. The half-way-house solution worked sufficiently well as long as the system was not put under stress. This changed with the high number of refugees arriving in the EU in 2015. The crisis thus constituted a catalyst that exposed the weaknesses of the system that had been constructed in the 1990s and not been sufficiently advanced and Europeanized since.[142]

Eilstrup-Sangiovanni, similarly, points to calls by Germany and Sweden for more systematic responsibility sharing during the 'crisis,' and the refusal of states who were not seeing high rates of arrival of asylum seekers on their territory to contribute to a collective response.[143] In short, when a challenge arose that called for concerted action across the region, EU Member States did not respond as a collective.

In the chapters that follow, I will unpack the perceived failings of the CEAS during the 2015 crisis and consider what they may indicate about the potential for new governance to meaningfully contribute to addressing the collective action problem presented by refugee protection. Critically, can a hybrid structure like the CEAS, which does not uniformly resort to enforcement mechanisms to ensure cooperation, respond to a collective action problem as persistent, complex, and politically sensitive as the provision of refugee protection? Have the perceived failures of the EU's efforts toward collective action provided any lessons about how new governance can be more effective in this area? And finally, what does the experience of 2015 reveal, if anything, about the potential for regional cooperation to provide refugee protection, especially in times of crisis, going forward?

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[142] Niemann and Speyer, 'A Neofunctionalist Perspective on the European Refugee Crisis: The Case of the European Border and Coast Guard Special Issue: EU Refugee Policies and Politics in Times of Crisis', 38

[143] Eilstrup-Sangiovanni, 'Re-bordering Europe? Collective action barriers to 'Fortress Europe'', 458-59

3 Conclusion

This chapter aimed to conceptualize provision of refugee protection as a collective action problem, noting that despite high-level agreement by states on the importance of ensuring international protection to those who need it, there nonetheless remains an apparent tendency to seek to avoid being the provider of that protection. Focusing on the specific context of the EU, the chapter also presented actions taken by the EU to facilitate progressive collective action in support of refugee protection at the regional level, situating some of these actions within the framework of new governance methods. Both of these theoretical frameworks were, in this way, brought together as means to analyze progress toward cooperation to provide refugee protection among EU member states.

With regard to the first part of the chapter, it was observed that the provision of refugee protection by states presents a classic collective action problem. Although states share the common objective of protecting refugees, individual states are reluctant to contribute to this collective goal, hoping instead that other states will carry the costs of doing so – in other words, the temptation to free ride is strong. Turning to the nature of refugee protection as a public good or as producing public/collective goods, some ambiguity was noted, with a few scholars setting refugee protection itself out as a public good, while others pointed to security, stability, insurance, or responsibility sharing as public goods associated with effective systems of refugee protection. Private benefits or by-products have also been identified as accruing to states that provide refugee protection, including both prestige and altruistic benefits.

Implicit in the divergence of opinion around the public and private goods resulting from refugee protection is the possibility that states have distinct individual calculations tied to participation in collective action around refugee protection, arguably reflecting a number of public and private benefits, along with associated costs. One important difference in the assessments by states, linked to their geographic position, tends to be reinforced rather than reduced by the CEAS, and in particular by the Dublin Regulation's placement of responsibility on the first state reached by an asylum seeker. Other factors may also contribute to distinct calculations by states, including the extent to which a state's citizens recognize the prestige or altruistic benefit resulting from provision of refugee protection (linked to the value placed on solidarity and compliance with international norms, in some cases) or the extent to which the arrival of refugees might benefit a state's economy. As a result, it is challenging to leverage private benefits, as suggested by the collective action literature, given that member states approach the provision of refugee protection from significantly different perspectives and do not place the same value on private benefits. An important general insight, which is borne out in subsequent chapters, is that in these circumstances, a one-size-fits-all approach to promoting or facilitating cooperation is unlikely to prove effective, and careful consideration of the motivations of individual states, which also may shift over time and in response to external pressures, is necessary to address states' tendency to seek to free ride on the protection provided by their neighbors.

Next new governance was explored as a potential way forward for particularly challenging collective action problems such as refugee protection. New governance methods, comprising informal or soft law coordination structures that do not rely on legal enforcement, were set out as an option in cases in which consensus around adoption of comprehensive, binding legislation is not achievable at a particular point in time. The key question of what level of agreement is required at the outset of cooperation was identified, alongside the related query of whether governance systems may ultimately serve to transform state preferences. Taking refugee protection as a 'difficult case' for the reasons explored above, the steps taken by the EU in utilizing governance methods to complement the traditional regulatory tools contained in the CEAS were briefly described.

This led to the central query of the thesis, namely why the provision of refugee protection in the EU has proven to be so difficult to address through collective action, and what, if anything, this example may tell us about the potential for new governance to address collective action problems. This question is explored, using the events of 2015 as a lens, in the empirical chapters that follow. Through each of these chapters, this thesis will engage, from a practical perspective, with the observations and hypotheses set out in the collective action and new governance bodies of literature, with the goal of better elaborating the contours of refugee protection as a collective action problem and understanding the impact of new governance methods in this context.

Chapter 4 Sweden: Model Country of Asylum?

Sweden has long seen itself as having established and maintained a 'model' asylum system, according to both regional and international legal standards. National asylum legislation has historically exceeded the minimum standards established in the CEAS,[1] and the Swedish Migration Agency (SMA) has taken an active interest both in ensuring the quality of its own procedures[2] and in sharing its expertise with countries with less developed asylum systems.[3] Having a generous asylum system has been a point of pride in Sweden, in fact, with the country going beyond adherence to its obligations under international legal instruments to create a policy framework that recognizes the positive benefits of migration.[4] By every measure, Sweden has a record of contributing to the collective effort to provide refugee protection in the EU, and of having sought to assist other countries to do the same.

During the refugee crisis in Europe, however, the prevailing attitude toward refugees and asylum seekers began to shift. Sweden received 162,450 asylum-seekers in 2015, most of whom arrived in the last months of the year.[5] This figure represented more than double the number of asylum applications received in 2014, and triggered concerns that Sweden was 'at capacity' in

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[1] Henrik Emilsson, *Continuity or Change? The refugee crisis and the end of Swedish exceptionalism* (MIM Working Paper Series, Malmö University, Malmö Institute for Studies of Migration, Diversity and Welfare (MIM) 2018), 8

[2] *See* 'Promoting Quality Outcomes in Asylum Adjudication through Lean Management,' PowerPoint Presentation by the Swedish Migration Agency, 16 December 2015, *available at* https://www.refworld.org/ru/reference/legalpolicy/unhcr/2015/ru/141934?prevDestination=search&prevPath=/ru/search?keywords=Effective+processing+of+asylum+applications%3A++Practical+considerations+and+practices&order=desc&sort=score&result=result-141934-ru (describing the Swedish Migration Agency's efforts to improve the efficiency of its asylum system from 2009 to 2015)

[3] Swedish Migration Agency, 'International development cooperation' <https://www.migrationsverket.se/English/About-the-Migration-Agency/EU-and-international/Inter-na-tional-deve-lop-ment-coope-ra-tion.html> accessed 13 August 2020

[4] Bernd Parusel, *Sweden's Asylum Procedures* Bertelsmann Stiftung, 2016, 3

[5] European Migration Network, 'Country Factsheet: Sweden 2015' (2016)

terms of its ability to receive asylum-seekers.[6] Sweden's geographic position, which had historically limited the number of asylum seekers arriving to its borders, was no longer as protective as it had been previously, given the 'wave-through' policy adopted by a number of EU Member States. Facing this unprecedented situation, Sweden reexamined its legal framework for migration under the justification of necessity. What emerged is a fundamentally altered structure, alongside a retreat from Sweden's traditional leadership role on asylum in the region and beyond.

While Sweden has not withdrawn from regional cooperation to provide refugee protection, as explained later in the chapter, it has adapted its asylum system to meet the minimum standards set out by the CEAS. Further, Sweden has reconsidered certain voluntary contributions to regional cooperation, such as those related to relocation. A theme that emerges clearly in the dialogue around asylum in Sweden during the crisis and post-crisis period is solidarity – Sweden wanted to see other EU member states contribute to regional efforts before it was prepared to exceed standards in the same manner it had done in the past.

In the text that follows, the impact of the refugee crisis on Sweden's willingness to cooperate to provide refugee protection in the EU will be closely examined. Section 1 details Sweden's treatment of asylum prior to the 2015 crisis, including the country's positive orientation towards asylum and interest in demonstrating leadership in the humanitarian sphere. Section 2 examines the 2015 refugee crisis, including Sweden's initial welcoming stance, subsequent shifts in public opinion, and the introduction of border controls to decrease arrivals to Swedish territory. Sweden's attitude toward cooperation with its neighbors will be a particular focus, as the crisis led Sweden to consider how its own actions fit within the regional system. In Section 3, the post-crisis period is in focus, including legislative changes and shifts in the political climate regarding asylum, as Sweden increasingly sought to position itself as a 'normal' state.

[6] *See* Elin Hofverberg, 'Sweden: Limit on Asylum-Seekers Reached, Measures to Cope with Influx' Global Legal Monitor (12 November 2015) quoting Sweden's Minister of Migration and Justice as saying, 'all countries have a limit – this is where we are now.')

1 Before the refugee crisis: exceeding standards

Sweden's asylum tradition reflects the influence of the state's historically welcoming attitude toward migration and proactive stance on integration, arguably traceable to the extension of welfare benefits to guest workers in 1968.[7] From this point, Sweden's tradition of delinking vital social and economic rights from citizenship was established, which has had important implications for asylum policy in the country. The 1976 Aliens Act reflected the same orientation and rights-forward approach: the legislation went beyond the 1951 Geneva Convention in establishing additional grounds for protection and guaranteeing expansive rights for refugees, including and perhaps most notably by providing permanent rather than temporary residence permits.[8] Sweden's inclusive welfare regime, alongside generally permissive asylum and migration legislation, established a relatively stable migration environment,[9] though periodic shocks, generally in the form of a rapid influx of asylum-seekers, proved a threat to this model, even prior to the 2015 refugee crisis. Some commentators have observed that the combination of generous asylum standards and full participation in the Swedish welfare system may give rise to tension in their application, given that the capacity of the welfare system may limit the number of persons who would otherwise qualify for some form of protection under Sweden's asylum legislation, as further explained below.[10]

Alongside its stance in support of equal rights for refugees, Sweden also actively implemented a social policy supportive of multiculturalism, funding minority cultural activities and providing instruction in students' mother tongues in public schools.[11] In addition, naturalization processes were based primarily upon continuous residence, and did not

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[7] Admir Skodo, *Sweden: By Turns Welcoming and Restrictive in its Immigration Policy* Migration Information Source, 2018, 6

[8] Emilsson, *Continuity or Change? The refugee crisis and the end of Swedish exceptionalism*, 5

[9] Carl-Ulrik Schierup and Aleksandra Ålund, 'The end of Swedish exceptionalism? Citizenship, neoliberalism and the politics of exclusion' (2011) 53 Race & Class 45, 48

[10] Tomas Hammar, 'Closing the Doors to the Swedish Welfare State' in Grete Brochmann and Tomas Hammar (eds), *Mechanisms of immigration control: a comparative analysis of European regulation policies* (Berg 1999), 175-76 (noting that 'in order to create conditions favourable for integration, Sweden had to regulate the immigration flows')

[11] Skodo, *Sweden: By Turns Welcoming and Restrictive in its Immigration Policy*, 6

historically include language tests or income requirements.[12] All of these factors, taken together, supported an inclusive legal and social structure for refugees and migrants, with a strong emphasis on prompt integration into the Swedish social welfare system, often referred to as 'Swedish exceptionalism.'[13] This status quo, moreover, enjoyed widespread support among the public: one interviewee, describing the pre-crisis period, noted that 'the Swedish political climate was very much in favour of a generous asylum policy.'[14] This positive public attitude towards asylum permitted Sweden to exceed minimum standards: Sweden contributed to regional efforts not only to comply with the CEAS, but because the public believed in taking a proactive stance toward provision of refugee protection.

1.1 Sweden's first refugee crisis and the *Lucia* decision

The most notable challenge to the Swedish asylum model prior to the refugee crisis in 2015 came in 1989. A steep increase in the number of asylum applications received in Sweden, from 20,000 per year in the early-/mid-1980s to 70,000 in 1989, triggered concerns that the rate of arrivals to Sweden exceeded the government's capacity to respond in line with established reception and case processing standards.[15] With this increase, the waiting period for decisions on asylum applications had significantly lengthened and the refugee centers providing accommodation to asylum seekers with pending claims filled to capacity, necessitating the use of emergency accommodation including hotels, vacation cabins, and ships for the asylum-seeking population.[16] Perhaps equally significant, however, was the composition of the newly

[12] Schierup and Ålund, 'The end of Swedish exceptionalism? Citizenship, neoliberalism and the politics of exclusion', 48

[13] Magnus Dahlstedt and Anders Neergaard, 'Crisis of Solidarity? Changing Welfare and Migration Regimes in Sweden' (2016) 45 Critical Sociology 121

[14] Interview 7, 5 November 2020, former Swedish Migration Agency staff/academic

[15] Mikael Byström and Pär Frohnert, *Reaching a state of hope : refugees, immigrants and the Swedish welfare state, 1930-2000* (Nordic Academic Press 2013), 229, 279

[16] Tomas Hammar, 'Closing the doors to the Swedish Welfare State,' in Tomas Hammar and Grete Brochmann, *Mechanisms of immigration control: a comparative analysis of European regulation policies* (Berg 1999), 185

arrived asylum seeking population – several thousand ethnic Turks from Bulgaria had arrived, and it was feared that many more would follow if this group were to receive asylum.[17]

Faced with this unprecedented situation, the government declared, in a statement foreshadowing its response in 2015, that Sweden's capacity was exhausted and that the country could not continue to accept asylum applications at the same rate.[18] The Minister of Immigration expressed concern about the fact that asylum seekers would not 'be treated in a dignified way,' as well as the impact of the influx on Sweden's ability to provide asylum 'for those who need it most' going forward.[19] As would later occur in 2015 as well, possible modalities for directly addressing the backlog in decision making or the shortage of accommodation, such as by implementing group-based asylum determinations or allowing asylum seekers to live in their own accommodation, were not seriously considered as alternatives.[20]

In line with the statement by the Minister of Immigration, in order to slow the arrival of asylum seekers and relieve the strain on both reception facilities and asylum decision makers in the Swedish Migration Agency, Sweden took the decision to temporarily limit the definition of refugees to that contained in the 1951 Geneva Convention on 13 December 1989.[21] In doing so, the government excluded from eligibility for protection and residency persons displaced by generalized violence or conflict as well as other categories of persons included in the broad provisions of Sweden's Aliens Act. Named after the holiday on which the decision was taken, St. Lucia Day, this policy shift invoked a paragraph of the asylum legislation that permitted narrowing of the population entitled to protection to the definition prescribed by international

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[17] Emilsson, *Continuity or Change? The refugee crisis and the end of Swedish exceptionalism*, p5; Skodo, *Sweden: By Turns Welcoming and Restrictive in its Immigration Policy*, p8; Byström and Frohnert, *Reaching a state of hope : refugees, immigrants and the Swedish welfare state, 1930-2000*, 278

[18] Hammar and Brochmann, *Mechanisms of immigration control: a comparative analysis of European regulation policies*, 195. It should be noted, however, that this was not the first time that the so-called 'exception clause' contained in the Aliens Act had been invoked: this provision was also triggered in 1976. Commentators point to the events of 1989 as more significant in terms of the public debate and long-term impact of the decision to utilize this control mechanism, however. *See* Emilsson*, Continuity or Change? The refugee crisis and the end of Swedish exceptionalism*, 5; Skodo, *Sweden: By Turns Welcoming and Restrictive in its Immigration Policy*, 8

[19] Byström and Frohnert, *Reaching a state of hope : refugees, immigrants and the Swedish welfare state, 1930-2000*, 279

[20] Tomas Hammar, 'Mechanisms of immigration control: a comparative analysis of European regulation policies' in Grete Brochmann and Tomas Hammar (ed), (Berg 1999), 195

[21] Skodo, *Sweden: By Turns Welcoming and Restrictive in its Immigration Policy*

refugee law.[22] In taking this decision, it is notable that the government did not consult Parliament[23] – in effect, the decision to invoke this limiting provision was seen (or cast) as a practical response to the ongoing crisis rather than a political shift subject to deliberation prior to decision.

1.2 Asylum and the administrative state

The fact that the *Lucia* decision was made by the government directly, in the absence of serious or sustained public debate or parliamentary involvement, may reflect a broader trend in Swedish politics, which has generally sought to situate asylum in the administrative rather than the political sphere.[24] Krzyzanowski has observed that this administrative tradition stands in stark contrast to other EU countries, where asylum policy has often been deliberately and explicitly politicized by xenophobic, far-right rhetoric intended to rally popular support behind restrictive measures.[25] In Sweden, however, one can observe a tendency to treat asylum policy from a pragmatic, seemingly apolitical perspective, as with the declarations both in 1989 and in 2015 that Sweden cannot accept more asylum seekers due to the exhaustion of available resources related to reception.[26] This sequencing, in which policy change (arguably) precedes and potentially informs shifts in public opinion, has been observed by several commentators to be an unusual, distinguishing feature of the asylum dialogue in Sweden.[27]

The preference for pragmatism over politics, while providing a certain level of protection against changing political winds, may carry risks at the other end of the spectrum: it is possible

[22] Emilsson, *Continuity or Change? The refugee crisis and the end of Swedish exceptionalism*, 5
[23] Ibid.
[24] Mauro Zamboni, 'Swedish legislation and the migration crisis' (2019) 7 The Theory and Practice of Legislation 101, p114; Michał Krzyżanowski, '"We Are a Small Country That Has Done Enormously Lot": The 'Refugee Crisis' and the Hybrid Discourse of Politicizing Immigration in Sweden' (2018) 16 Journal of Immigrant & Refugee Studies 97, 98, 102
[25] Krzyżanowski, '"We Are a Small Country That Has Done Enormously Lot": The 'Refugee Crisis' and the Hybrid Discourse of Politicizing Immigration in Sweden', 98
[26] *See* Byström and Frohnert, Reaching a state of hope : refugees, immigrants and the Swedish welfare state, 1930-2000*,* 279; Crouch, 'Sweden slams shut its open-door policy towards refugees'
[27]Krzyżanowski, '"We Are a Small Country That Has Done Enormously Lot": The 'Refugee Crisis' and the Hybrid Discourse of Politicizing Immigration in Sweden', 98 (referring to Sweden as demonstrating a 'reverse overall politicization logic'); Byström and Frohnert, *Reaching a state of hope : refugees, immigrants and the Swedish welfare state, 1930-2000*, 279 (noting that popular opinion may have been shaped by the restrictive policy, rather than the converse)

to read in the *Lucia* decision a kind of regulatory inertia, or more precisely, what has been described as 'institutional inelasticity of the administrative legislative model.'[28] From this viewpoint, one might argue that in the context of asylum policy, Sweden has a persistent preference, both in the 1980s and today, for adhering to established practices rather than innovating in response to novel situations or challenges. This is, according to Zamboni, at least in part due to bureaucratic obstacles to change, including the staffing and career trajectory within the Swedish Migration Agency.[29] The impact of this tendency may be viewed from different angles: while perhaps slow to adapt to changed circumstances, such systems may afford better insultation against political pressure as the party in power changes.

Notwithstanding this historically apolitical orientation, it can be observed that there were domestic pressures in play in 1989: rising unemployment in Sweden, alongside the prospect of sustained high rates of arrivals (both from Eastern Europe and farther afield), triggered calls for greater burden-sharing among European states in the same way as would happen twenty-five years later, during the refugee crisis in 2015. [30] One Swedish municipality, Sjobo, declined to participate in the national refugee resettlement program in 1987, after which a local referendum in 1988 confirmed that 65% of the population did not wish to admit refugees.[31] Although this explicit rejection of asylum seekers and refugees was very limited in scope, it may have been viewed as indicative of an impending shift in public opinion by politicians, and it helped to raise the profile of this issue within the domestic political sphere. Several weeks prior to the *Lucia* decision, State Secretary Bo Goransson had foreshadowed impending changes to refugee policy in Sweden.[32] Within three years, all major political parties in Sweden would be expressing critical views of the country's immigration policy and a new party, calling itself New Democracy, would organize around this issue in 1991.[33]

[28] Zamboni, 'Swedish legislation and the migration crisis', 120
[29] Ibid.
[30] *See* Hammar, 'Closing the Doors to the Swedish Welfare State', 177
[31] Ibid., 179
[32] Byström and Frohnert, *Reaching a state of hope : refugees, immigrants and the Swedish welfare state, 1930-2000*, 278
[33] Hammar, 'Closing the Doors to the Swedish Welfare State', 179

The decision to restrict the number of asylum-seekers arriving to Sweden during this period should also be understood in the broader socioeconomic context of the government's emphasis on integration and equal rights for immigrants to Sweden. At the moment of the *Lucia* decision, 'government officials deemed the situation an existential threat to the Swedish welfare state and a policy of regulated migration.'[34] As noted above, this perspective is informed by Sweden's tradition of providing non-citizens, including refugees, welfare benefits on par with those available to Swedish citizens.[35] Practically, the influx situation put two overarching themes in Sweden's asylum tradition in conflict: inclusivity, or swift and effective integration of immigrants, including refugees, came into conflict with Sweden's interest in being a leader in the international human rights sphere in the sense of extending protection to as many people as possible. Accepting higher numbers of asylum seekers would foreclose the possibility to accord recently arrived refugees full welfare benefits. Beginning from the supply side, in this context, tends to protect the principle of economic inclusion but may result in failure to provide protection to all asylum seekers who need it.[36]

1.3 Post-*Lucia*: a reversal accompanied by new restrictions

The *Lucia* decision was reversed just two years later,[37] in what has come to be understood by some observers as part of a cyclical pattern of expansion and contraction within the Swedish asylum system.[38] Interestingly, these patterns of expansion and contraction are not necessarily or inevitably keyed to the volume of asylum applications: the reversal of the *Lucia* restrictions shortly preceded the arrival of a large number of asylum seekers from the Balkans, with more than 80,000 arrivals in 1992 – seemingly confirming the fears that had motivated the

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[34] Skodo, *Sweden: By Turns Welcoming and Restrictive in its Immigration Policy*, 8

[35] *See* Emilsson, *Continuity or Change? The refugee crisis and the end of Swedish exceptionalism*, 3 (discussing Banting and the idea of 'two forms of welfare chauvinism')

[36] Byström and Frohnert, *Reaching a state of hope : refugees, immigrants and the Swedish welfare state, 1930-2000*, 281. Sweden did, however, signal its intention to adhere to international standards, so this is not to suggest that they did not recognize individuals meeting the 1951 Refugee Convention's definition.

[37] Ibid*.,* 229

[38] *See* Skodo, *Sweden: By Turns Welcoming and Restrictive in its Immigration Policy*, 8*;Zamboni, 'Swedish legislation and the migration crisis'*, 106

restrictive stance taken in *Lucia* but without a corresponding reaction.[39] Zamboni explains these divergent responses to influxes as consistent with 'a dichotomous attitude, either of closing or opening the borders,' but with an overall tendency toward 'legislation of a kind that is rather welcoming towards foreign nationals, both for work and humanitarian reasons.'[40]

Notwithstanding Sweden's seeming about-face, restrictive policies continued to cast a shadow across the next decade, with measures at both the national and regional levels impacting the overall number of applications in a negative manner. The provisions of the Aliens Act outlining specific protection statuses not drawn from the 1951 Geneva Convention had been reinstated – reestablishing as protected persons 'de facto' refugees, war-resisters, and persons granted residency on humanitarian grounds[41] – but attention then shifted to other areas for potential regulation. Interest in establishing a quota system for refugees persisted as a means of ensuring that the asylum seekers most in need of protection and assistance would be able to access it in Sweden.[42] At the same time, a range of policies sought to address the increasing number of asylum applications by other, less overt, means: utilization of temporary protection rather than refugee status, development investment in countries of first asylum, and assisted voluntary return programming foremost among them.[43]

These policies were implemented against a backdrop in which the anti-immigrant New Democracy party won seats in parliament in 1991, stoking fears of rising xenophobia.[44] Although the extreme sentiments of the New Democracy politicians were countered by a diverse coalition of more moderate parties,[45] the success of politicians focused closely on

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[39] Skodo, *Sweden: By Turns Welcoming and Restrictive in its Immigration Policy*, 8
[40] Zamboni, 'Swedish legislation and the migration crisis', 106
[41] *See* Human Rights Watch, *Swedish Asylum Policy in Global Human Rights Perspective*, 1996 (explaining the differences between Sweden's Aliens Act and the 1951 Refugee Convention)
[42] Byström and Frohnert, *Reaching a state of hope : refugees, immigrants and the Swedish welfare state, 1930-2000*, 281
[43] Skodo, *Sweden: By Turns Welcoming and Restrictive in its Immigration Policy*, 8; Krzyżanowski, '"We Are a Small Country That Has Done Enormously Lot": The 'Refugee Crisis' and the Hybrid Discourse of Politicizing Immigration in Sweden', 102
[44] Schierup and Ålund, 'The end of Swedish exceptionalism? Citizenship, neoliberalism and the politics of exclusion', 49; Krzyżanowski, '"We Are a Small Country That Has Done Enormously Lot": The 'Refugee Crisis' and the Hybrid Discourse of Politicizing Immigration in Sweden', 103
[45] Schierup and Ålund, 'The end of Swedish exceptionalism? Citizenship, neoliberalism and the politics of exclusion', 49. Interestingly, some observers have suggested that the success of the New Democracy party in effect

immigration-related issues effectively brought asylum policy into the center of the political debate.[46] Other parties faced pressure to engage in the conversation, and were compelled to take public positions on asylum policy, many of which contributed to an overarching narrative that the number of asylum seekers arriving in Sweden was somehow no longer 'under control.'[47]

Some aspects of the restrictive turn in Sweden's asylum policies during the 1990s can, arguably, also be attributed to the process of regional coordination, which commenced along the same timeline, beginning with the Dublin Convention in 1990 (though entering into force only in 1997), as well as the London Resolutions' treatment of host third countries, countries in which there is generally no serious risk of persecution, and manifestly unfounded applications for asylum.[48] Through cooperation with EU states on issues around visas and public messaging to potential asylum seekers, Sweden, like other EU countries, saw a marked decline in the number of applications received in the mid-1990s.[49] By 1995, applications had dropped to a ten-year low of 10,000, largely due to visa requirements that prevented asylum seekers from reaching Sweden as an initial matter.[50] Despite this shift toward coordination on some points, Sweden's substantive asylum legislation remained more liberal overall than those of most other EU member states.[51] In this manner, Sweden was able to satisfy growing calls from citizens for a more restrictive asylum policy by focusing on entry conditions, while continuing to set a higher

pushed other parties further left, as they did not want to be associated with the extremist views of this group (Emilsson, *Continuity or Change? The refugee crisis and the end of Swedish exceptionalism*, 6).

[46] Krzyżanowski, '"We Are a Small Country That Has Done Enormously Lot": The 'Refugee Crisis' and the Hybrid Discourse of Politicizing Immigration in Sweden', 103

[47] Ibid.

[48] Ibid., 102; European Union, *Convention Determining the State Responsible for Examining Applications for Asylum lodged in one of the Member States of the European Communities ("Dublin Convention"),* 15 June 1990, Official Journal C254, 19/08/1997 p. 0001 – 0012 (entered into force 1997); Council of the European Union, *Council Resolution of 30 November 1992 on a Harmonized Approach to Questions Concerning Host Third Countries ("London Resolution"),* 30 November 1992; European Union, *Conclusions on Countries in Which There is Generally No Serious Risk of Persecution ("London Resolution"),* 30 November 1992; Council of the European Union, *Council Resolution of 30 November 1992 on Manifestly Unfounded Applications for Asylum ("London Resolution"),* 30 November 1992

[49] Hammar, 'Closing the Doors to the Swedish Welfare State', 195

[50] Human Rights Human Rights Watch, *Swedish Asylum Policy in Global Human Rights Perspective*

[51] Krzyżanowski, '"We Are a Small Country That Has Done Enormously Lot": The 'Refugee Crisis' and the Hybrid Discourse of Politicizing Immigration in Sweden', 102

bar for refugee and human rights protection and for the scope of rights granted to refugees and other protected persons who had reached Swedish territory.

1.4 The Aliens Act and regional cooperation

Entering the 2000s, the tone of the debate shifted once again, with observers noting that '[t]he focus was no longer on migration control or integration considerations but, rather, on principles such as the rights of the child, equal rights in general, openness and the rule of law.'[52] This shift towards a rights-based approach occurred alongside the first phase of the CEAS (1999-2005), when the legislative instruments at the core of the regional framework were adopted. From 2005, Swedish asylum legislation and policy became less restrictive overall, and the 2005 asylum bill (which went into effect in March 2006) also replaced the Alien Appeals Board (within the administrative structure) with the Migration Courts and Migration Court of Appeal.[53] This shift toward a neutral arbiter of asylum disputes was, again, in line with the long-term apolitical tradition in Swedish asylum law, and all political parties supported the legislation.[54]

The 2005 Aliens Act, like its predecessor, remained quite generous in terms of both the range of persons granted refugee status and the scope of rights attaching to that status. While terminology changed, the substantive protections continued to exceed the baseline established in the 1951 Geneva Convention and the CEAS, including in their scope persons who might not be subject to individualized persecution on account of one of the 1951 grounds, but would nonetheless face serious harm upon return to the country of origin. Specifically, the Act established a category of persons 'otherwise in need of protection,' which included a person who:

> 1. feels a well-founded fear of suffering the death penalty or being subjected to corporal punishment, torture or other inhuman or degrading treatment or punishment,
> 2. needs protection because of external or internal armed conflict or, because of other severe conflicts in the country of origin, feels a well-founded fear of being subjected to serious abuses or

[52] Emilsson, *Continuity or Change? The refugee crisis and the end of Swedish exceptionalism*, 6
[53] Zamboni, 'Swedish legislation and the migration crisis', 106; *see Sweden: Aliens Act (2005:716)*, 31 March 2006, available at: https://www.refworld.org/docid/3ae6b50a1c.html [accessed 15 Oct 2024], Chapter 14, 16
[54] Emilsson, *Continuity or Change? The refugee crisis and the end of Swedish exceptionalism*, 6

> 3. is unable to return to the country of origin because of an environmental disaster.[55]

The legislation, moreover, provided for residence permits to be granted to individuals who would face 'exceptionally distressing circumstances' if forced to leave Sweden.[56] This ground allowed for consideration of the applicant's health status, connection to Sweden, and situation or likely situation upon return to the country of origin.[57] Alternatively, the Aliens Act provided for the possibility of grant of a humanitarian visa, 'if it is necessary for humanitarian reasons, because of Sweden's international obligations or if there is some other strong national interest in granting a visa.'[58] This option typically did not offer a longer term solution, however – the visa would generally be granted for three months or, if special grounds were involved, up to one year.[59]

In 2009, Sweden revised the 2005 Aliens Act to incorporate the provisions of the EU's Qualification Directive into its domestic legislation. Sweden was, in the words of one interviewee, 'very positive towards that process of creating a common European asylum system and was, therefore, also eager to adhere to the common rules that were made.'[60] Although the government was led by the center-right party, issues around migration and asylum were not prominent in the public discourse at that point in time, and there was no substantive political debate prior to the incorporation of these changes.[61] The implementation process, interviewees observed, was more formal than substantive: while terminology changed to match CEAS definitions, the content of the provisions of the 2005 law remained largely unchanged because Swedish law already exceeded the CEAS minimum standards on a number of points.[62]

The fact that Sweden generally adhered to a higher standard than required by CEAS legislation was supported by all political parties at that time.[63] In one interview, it was explained

[55] *Sweden: Aliens Act (2005:716)*, 31 March 2006, available at: https://www.refworld.org/docid/3ae6b50a1c.html [accessed 15 Oct 2024], Chapter 4, Sections 1, 2
[56] Ibid., Chapter 5, Section 6
[57] Ibid.
[58] Ibid., Chapter 3, Section 4
[59] Ibid.
[60] Interview 2, 23 September 2020, Swedish Migration Agency staff
[61] Emilsson, *Continuity or Change? The refugee crisis and the end of Swedish exceptionalism*, 7
[62] Interviews 3, 8, 9
[63] Emilsson, *Continuity or Change? The refugee crisis and the end of Swedish exceptionalism*, 7

that, in discussions with Brussels, Swedish politicians took 'pride in being the good guys,' and noted that their positions were often closest to those of the NGOs.[64] Another interviewee described Sweden's approach as fundamentally 'a bit conservative [] towards European legislation' in the sense that there was an intention, upon adopting CEAS standards 'to preserve the system as much as you can, and you prefer other countries adapting to what you yourself think is a good system.'[65]

Sweden's support for the CEAS, then, was offered more with a view to raising the standards in other countries – Sweden was quite confident in its own system and did not believe that it needed to make changes.[66] Raising standards in other EU member states, however, was seen as potentially beneficial to Sweden in the sense of both enabling return of asylum-seekers to the first member state reached under Dublin[67] and encouraging participation in organized relocation schemes from front-line member states.[68] There were, at the same time, concerns in some quarters about the potential for Sweden's standards to be lowered by the common legislation – a possible race-to-the-bottom was anticipated, long before the crisis, as a possible negative consequence of minimum standards legislation.[69]

As the revision of Sweden's legislation advanced, it was taken for granted by policymakers that Sweden's preexisting legislation was compliant, and that only minor (effectively cosmetic) changes were required to ensure consistency with regional standards.[70] As one interviewee explained,

> [W]e didn't actually change anything when we implemented the EU common European asylum policy. We didn't change a single policy. We stuck to, we adapted some so it would be in line with the, I mean, deleted some of our terminology and things like that…And we were, kind of, proud of it. It shouldn't affect Sweden, and it didn't affect Sweden.[71]

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[64] Interview 3, 25 September 2020, former government agency staff/academic
[65] Interview 2, 23 September 2020, Swedish Migration Agency staff
[66] Interview 2, 23 September 2020, Swedish Migration Agency staff
[67] Interview 1, 16 September 2020, Swedish Migration Agency staff
[68] Interview 7, 5 November 2020, former Swedish Migration Agency staff/academic
[69] Interview 3, 25 September 2020, former government agency staff/academic
[70] Interviews 1, 3, 8, 9
[71] Interview 3, 25 September 2020, former Swedish Migration Agency staff/academic

Another interviewee was more direct, noting, 'of course you would like to follow your legal obligations, and you will do that but you have this kind of feeling that, we're better at the outset so we don't really need to make that much effort.'[72]

The primary changes to Sweden's legislation related to the terminology and definitions relating to persons in need of international protection. To align with the Qualification Directive, Sweden's provision for a 'person otherwise in need of protection,' excerpted above, was separated into two sections, with the first, Section 2, applicable to a 'person eligible for subsidiary protection.' The phrasing of this section was brought in line with the language contained in the Qualification Directive with regard to subsidiary protection being extended to persons who 'run a risk of suffering the death penalty or being subjected to corporal punishment, torture or other inhuman or degrading treatment or punishment.'[73] Situations of indiscriminate violence in the context of an external or internal armed conflict also fall under subsidiary protection, to the extent that they entail 'a serious and *personal* risk of being harmed' for the applicant (emphasis added).[74]

In addition to this provision, a separate Section 2a was created, retaining the title 'person otherwise in need of protection,' with the remaining two categories from the 2005 Act included. The first category refers to a situation of indiscriminate violence, including external or internal armed conflicts or 'other severe conflicts in the country of origin' (suggesting inclusion of those which may not rise to the level of external or internal armed conflict under international humanitarian law), and without any requirement of a personal threat or risk.[75] The second category extends protection to persons impacted by environmental disasters.[76] Last, it should be noted that the provision for grant of a residence permit in situations of 'exceptionally

[72] Interview 8, 24 November 2020, former UN staff/former Swedish Migration Agency staff
[73] *Sweden: Act Amending the Aliens Act (2005: 716)*, 30 December 2009, available at https://www.refworld.org/docid/5d271e784.html [accessed 4 August 2021], Chapter 4, Section 2.
[74] Ibid.
[75] *Sweden: Act Amending the Aliens Act (2005: 716)* [Sweden], 30 December 2009, available at https://www.refworld.org/docid/5d271e784.html [accessed 4 August 2021], Chapter 4, Section 2a
[76] Ibid.

distressing circumstances' remained unchanged, as did the possibility for grant of a humanitarian visa.[77]

Standards for reception in Sweden in 2009, similarly, exceeded those contained in the CEAS's Reception Conditions Directive, on the whole: Sweden's policies were among the most generous in the EU.[78] Housing was provided from the day on which an asylum application was lodged, at which point asylum-seekers were also entitled to material support, intended to cover the cost of food (if not provided at the center where the asylum seeker was staying), clothing, shoes, toiletries, medicine, and miscellaneous other needs.[79] Asylum seekers could also immediately enter the labor force, if they were able to find jobs.[80] In effect, the process of integration began from the time of arrival, in keeping with Sweden's emphasis on integration and on equal social and economic rights for immigrants.

1.5 The pre-crisis status quo in the regional context

Notwithstanding the overall trajectory of Swedish asylum policy toward providing greater protection and exceeding minimum standards, the Sweden Democrats, with their strict anti-immigration stance, began increasing their presence in government from 2010.[81] Although they did not initially manage to shift Sweden's immigration policy, which remained open,[82] the Sweden Democrats further increased their vote share in 2014.[83] Still, the political climate in Sweden was seen as generally favoring a liberal asylum policy at the outset of the refugee crisis. Interviewees cited the commonly held belief by Swedes that they were 'the good guys,'[84] a 'role

[77] *Sweden: Act Amending the Aliens Act (2005: 716)*, 30 December 2009, available at https://www.refworld.org/docid/5d271e784.html [accessed 4 August 2021] (no change to the relevant provisions); *Sweden: Aliens Act (2005:716)*, 31 March 2006, available at: https://www.refworld.org/docid/3ae6b50a1c.html [accessed 2 August 2021], Chapter 5, Section 6; Chapter 3, Section 4.
[78] Parusel, *Sweden's Asylum Procedures*, 6
[79] Ibid., 10
[80] Bernd Parusel, 'Sweden's U-turn on asylum' (2016) 52 Forced Migration Review 89, 89
[81] Skodo, *Sweden: By Turns Welcoming and Restrictive in its Immigration Policy*, 11
[82] Bernd Parusel, *Sweden's Immigration Policy* (Bundeszentrale fur politische Bildung 2015)
[83] Skodo, *Sweden: By Turns Welcoming and Restrictive in its Immigration Policy*
[84] Interview 5, 27 October 2020, NGO staff

model'[85] or the 'best in the class'[86] on matters related to asylum and noted that this was a source of pride for the country.[87]

There was little disagreement on this point – both the public and political actors generally supported a liberal asylum policy. As one interviewee explained,

> The Swedish political climate was very much in favour of a generous asylum policy with the sort of ideological backdrop that Sweden was an international humanitarian superpower…it used to be used all the time by Swedish politicians that, like, 'We're a small country, we can't engage in international politics in many ways but in this area we're like supposed to be a superpower.'[88]

The asylum context, then, provided an opportunity for Sweden to show leadership within the international community and to establish itself as adhering to a higher standard than that required by international or EU law, setting an example for other states.[89]

In line with this self-perception as a leader on refugee law and policy, the Swedish Migration Agency considered that it should assume a leading role in the EU asylum context, specifically around contributing to EASO initiatives and serving as an 'expert agency.'[90] Sweden has historically played a significant role in developing EASO training materials and country guidance, as well as conducting twinning programs with EU candidate countries.[91] Consistent with Sweden's image of itself as being 'best in the class' in the area of asylum, this aspect of Sweden's engagement with the EU was informed by Sweden's sense that it was setting an example, and that its asylum system was one to be emulated. As one interviewee explained, 'Sweden feels that it's a very natural partner in these kinds of international exchanges…Sweden definitely feels that it has a very important role to play in these contexts.'[92]

At the same time, the CEAS was not particularly important to the administration of asylum within Sweden. As one interviewee summarized, 'when we talk about some kind of baseline, the reference quite often really hasn't been the European standard – it's more like a

[85] Interview 3, 25 September 2020, former government agency staff/academic
[86] Interview 1, 16 September 2020, Swedish Migration Agency staff
[87] Interview 3, 25 September 2020, former government agency staff/academic
[88] Interview 7, 5 November 2020, former Swedish Migration Agency staff/academic
[89] Interview 3, 25 September 2020, former government agency staff/academic
[90] Interview 4, 9 October 2020, Swedish Migration Agency staff
[91] Ibid.
[92] Interview 8, 24 November 2020, former UN staff/former Swedish Migration Agency staff

national standard and our national courts by their jurisprudence stating what really is the national provisions and how far they go.'[93] For case workers in the Swedish Migration Agency, their primary, or even exclusive, frame of reference for decision making remained the national law on asylum.[94]

Sweden's generous asylum system was very often associated with the conferral of permanent residency on recipients of international protection: upon recognition of their claims, refugees and recipients of subsidiary protection in Sweden were immediately entitled to receive permanent residence permits and had access to equal social and economic rights.[95] Provisions for family reunification were also more generous than required by the CEAS, with the right to bring eligible family members available to both refugees and recipients of subsidiary protection immediately upon recognition of their status and without any income requirements.[96] Separately, but also consistent with its liberal approach to asylum, Sweden declined to apply 'safe country of origin' legislation, though the Swedish Migration Agency did develop legal positions to be referenced in decision making, based on available country of origin information.[97]

Interestingly, some interviewees noted that the perception of Sweden's laws as setting a higher standard than EU legislation was not necessarily accurate in every instance.[98] While Sweden did have higher standards in some areas, there were some aspects of Sweden's asylum policy that did not necessarily fully comply with EU standards.[99] It should also be noted that

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[93] Interview 1, 16 September 2020, Swedish Migration Agency staff
[94] Interview 7, 5 November 2020, former Swedish Migration Agency staff/academic
[95] Emilsson, *Continuity or Change? The refugee crisis and the end of Swedish exceptionalism*, 8. It should be noted that while asylum seekers already access a range of social and economic rights as mentioned above, there are certain divergences between the material assistance provided to asylum seekers and maintenance support under the Swedish welfare system: the former is calculated daily rather than monthly, and on average are approximately 25% lower. *See* Parusel*, Sweden's Asylum Procedures*, 10
[96] Emilsson, *Continuity or Change? The refugee crisis and the end of Swedish exceptionalism*, 8
[97] Parusel, *Sweden's Asylum Procedures*, 11
[98] Interviews 1, 5, 9
[99] Two interviewees pointed to detention as an area where Sweden had been non-compliant. The Migration Court of Appeal in Sweden in 2019 ruled that, contrary to Sweden's practice and consistent with the CJEU's interpretation of the Return Directive, 12 months was the maximum period for which an individual could be detained pending removal. Migration Court of Appeal, MIG 2019:17, 22 October 2019, available at: http://bit.ly/3WDmk2H; *see also* Swedish Refugee Law Center, *Judicial review of the detention order* Country Report: Sweden, 2025 (summarizing the key provisions on detention of refugees and migrants under Swedish law, including as provided in the 22 October 2019 decision of the Migrant Court of Appeal)

Sweden was not consistently or systematically applying the respective refugee and subsidiary protection definitions to determine which status was appropriate in a given asylum case.[100] In principle, an individual entitled to refugee status should have been recognized as a refugee, with subsidiary protection considered only following a negative finding on refugee status.[101] In practice, however, the majority of persons receiving protection received subsidiary status, with few seeking to challenge the decision given that the substantive rights associated with both statuses were, up until 2015, the same.[102] This issue gained additional significance as the crisis continued, however, as will be further explained below.

Exceeding minimum standards

In sum, the history of asylum in Sweden prior to the crisis tended toward having a generous asylum system that easily exceeded the CEAS minimum standards. While asylum was generally not an overtly political subject, the late 1980s saw pressure on the asylum system trigger a tightening of standards, intended to limit the number of asylum seekers to whom Sweden would grant refugee protection. Shortly after the peak of the crisis passed, however, Sweden's prior legislation was restored, and Sweden was once again contributing more than its share towards collective action to provide refugee protection in the EU. These contributions included provision of support and guidance to other EU member states – examples of governance being used to try to raise standards. In return, Sweden claimed what one interviewee described as a 'humanitarian superpower' status, indicating a private altruism benefit derived from the provision of refugee protection.

2 The refugee crisis in Sweden

As a country located at a distance from external EU borders, Sweden did not immediately feel the impact of the refugee crisis in Europe – news of the refugee crisis reached

[100] Interviews 3, 6, 8, 9
[101] *Sweden: Act Amending the Aliens Act (2005: 716)*, 30 December 2009, https://www.refworld.org/docid/5d271e784.html, Chapter 4, Section 2 (noting that a 'person eligible for subsidiary protection' is 'an alien who in cases other than those referred to in section 1….')
[102] Interviews 6, 9

Sweden considerably before its reality did. Shortly after the rate of arrivals to Greece and Italy began to climb, however, asylum applications in Sweden began to increase as well. In September 2015, this trend accelerated, and 24,000 new asylum applications were received, bringing the total as of October 1 to more than 74,000 asylum-seekers (compared to 81,000 for the entirety of 2014).[103] Arrivals continued to increase through the autumn, culminating in the arrival, during the first week in November alone, of 10,000 asylum-seekers.[104]

In the midst of this surge, on 5 November, Sweden's total accommodation capacity was reached, and asylum seekers who could not be provided with accommodation in accordance with normal procedures were permitted to sleep in SMA offices.[105] Subsequently, asylum seekers were told to find their own accommodation or to go to either Germany or Denmark; Sweden also requested that the EU pursue the possibility of relocating asylum-seekers from Sweden to other countries (a suggestion that was never followed through).[106]

2.1 Shifting public opinion

As the number of asylum seekers arriving in Sweden climbed, public support for accepting additional asylum seekers was falling. A 9 November poll indicated that 41% of respondents believed that Sweden should reduce the number of residency permits it granted to refugees, an increase of 12% as compared to just two months before.[107] In parallel, support for accepting more refugees had decreased from 44% of those polled in September to 26% in November.[108] Confronted with a changed situation, with the potential for much greater responsibility falling on Sweden, the idea of welcoming refugees began to lose sway with the public.

As one interviewee explained, 'In the beginning of the so-called Refugee Crisis, we had quite a majority of both Swedes as such but also decision-makers and politicians framing the

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103 'Sweden sees record number of asylum-seekers in 2015' *Reuters* (2 October 2015)
104 Euractiv.com with AFP, 'Poll: Swedish support for refugees falls' *Euractiv* (9 November 2015)
105 Hofverberg, 'Sweden: Limit on Asylum-Seekers Reached, Measures to Cope with Influx'
106 Ibid.
107 Euractiv.com with AFP, 'Poll: Swedish support for refugees falls'
108 Ibid.

discussion around that we need to open our hearts and we have to be, do a solidarity act towards all these people on the move…and just like two, three weeks after this it was completely changed.'[109] Public sentiment shifted, in a very short period of time, from showing solidarity with refugees to supporting temporary legislation intended to reduce the number of asylum seekers arriving in Sweden.[110] One interviewee described the change, saying, 'it was like this, like overnight, people just flipped…[i]t was like someone just pulled down a curtain and then everyone said, "Yeah, of course, this is the new legislation, we have no other choice."'[111]

What drove the shift? The rapidly increasing rate of arrival of asylum seekers to Sweden certainly played a role. But there was also a sense that the situation in Sweden was somehow out of control – police stated that they did not know who was entering Sweden and agencies admitted that the situation was no longer manageable.[112] As one interviewee phrased it, 'it was very publicly admitted by the Migration Agency, municipalities and so on that chaos reigned, and chaos is not a positive thing in Sweden.'[113] Interestingly, this did not seem to be explicitly linked to a security narrative, though the fact that law enforcement could not follow who was arriving to the country was perhaps a precursor to a security-driven argument. At this moment, however, the reasoning was more tied to a lack of control and inability to muster sufficient resources to receive additional asylum seekers.

Some interviewees cited the very high number of unaccompanied children from Afghanistan as a critical factor as well: while families arriving from Syria were welcomed, the large number of boys (some of whom were suspected of being adults) arriving alone was not so positively received.[114] This was partially due to the anticipated family reunification cases, which could ultimately result in exponentially more refugees arriving in Sweden over the next several years.[115] In the bigger picture, however, the dramatic increase in the number of unaccompanied children arriving in Sweden was seen as an indication of the failure of Swedish migration policy:

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[109] Interview 6, 5 November 2020, NGO Staff
[110] Ibid.
[111] Interview 7, 5 November 2020, former Swedish Migration Agency staff/academic
[112] Interview 8, 24 November 2020, former UN staff/former Swedish Migration Agency staff
[113] Ibid.
[114] Interviews 9, 10
[115] Interview 10, 9 December 2020, academic

it meant that some groups were deliberately selecting Sweden as their destination.[116] Sweden's leadership in asylum policy began to be seen by the public as having triggered a specific consequence: generous policies were creating a pull factor and leading to more asylum seekers opting to lodge their applications on Swedish soil as opposed to elsewhere in the EU.

2.2 Introduction of border controls and temporary legislation

Shortly thereafter, policy followed public opinion. On November 12, 2015, following Germany and Austria,[117] the Swedish government introduced internal border controls, initially for a period of 10 days.[118] This decision, as part of a larger trend stemming from the refugee crisis, had economic repercussions and prompted emergency talks hosted by the EU Migration Commissioner.[119] Notwithstanding these discussions, however, Sweden maintained the restrictions, repeatedly renewing its exception to Schengen procedures, though claiming to allow for application for international protection by prospective asylum seekers at the border.[120]

Practically, however, lodging an asylum application at the border became difficult, as Sweden also instituted ID checks for persons entering Sweden on public transportation beginning in January 2016.[121] For the bulk of prospective asylum seekers arriving from Denmark, these checks were carried out upon purchasing a ticket in Denmark (prior to crossing the Oresund bridge, either by bus or train). Interviewees were unaware of examples of asylum-seekers being permitted to lodge an application with Sweden from Denmark, and one suggested it was more likely that they would have been directed to the Danish asylum authorities.[122]

Less than two weeks after the reintroduction of border controls, on 24 November 2015, the Swedish government proposed a number of measures intended to bring Swedish asylum

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[116] Interview 9, 1 December 2020, former Swedish Migration Agency staff/NGO staff
[117] Evelien Brouwer Elspeth Guild, Kees Groenendijk and Sergio Carrera, 'What is happening to the Schengen borders?' (2015) 86 Liberty and Security in Europe (noting that Germany introduced border controls on 13 September and Austria on 16 September 2015)
[118] Ministry of Justice, Ministry of Industry, and Cabinet of Ministers, *The government decides to temporarily re-introduce border control at the internal border (translated from Swedish)* (2015)
[119] Christopher Harress, 'Europe Refugee Crisis: Sweden-Denmark Border Checks Extended Amidst Surge of Asylum-Seekers' *International Business Times* (21 January 2016)
[120] European Migration Network, 'Country Factsheet: Sweden 2015'
[121] Ibid.
[122] Interview 5, 27 October 2020, NGO Staff

policies in line with CEAS minimum standards.[123] The proposed policy changes included time-bound residence permits, limitations on family reunification, and use of medical testing to determine the age of unaccompanied children.[124] The most significant policy shift, however, related to the introduction of time-bound residency permits.

Previously, as noted above, all refugees and recipients of subsidiary protection were granted permanent residency. With the introduction of the revised policy measures, however, residence permits valid for three years would be granted to refugees, while recipients of subsidiary protection would receive permits for one year (later modified to 13 months).[125] Both categories of protected persons would have the possibility to extend their residency permits, if the conditions that gave rise to their claim continued beyond this period.[126] The possibility for permanent residency, following the expiration of the first period of temporary residency (three years or 13 months), would be tied to an individual's ability to demonstrate the ability to support him or herself.[127]

From the outset, these shifts in policy were explicitly connected to the prevailing belief that Sweden was bearing a disproportionate burden for the refugee crisis within the EU.[128] The introduction to the government announcement of stricter measures noted both that Sweden had taken greater responsibility during the refugee crisis than any other western country and that Sweden adhered to international asylum law.[129] This framing both confirmed Sweden's commitment to maintaining international refugee law standards and underscored the need for other EU member states to do more. If other countries contributed, Swedish officials argued, the EU could 'easily handle this task for a million, a million and a half or 2 million [refugees] a year to Europe.'[130]

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[123] Government Council, *The government is proposing measures to create room for Swedish refugee reception (translated from Swedish)*
[124] Ibid.
[125] Ibid.; Government Offices of Sweden, *Proposal to temporarily restrict the possibility of being granted a residence permit in Sweden* (2016)
[126] Government Council, *The government is proposing measures to create room for Swedish refugee reception (translated from Swedish)*
[127] Ibid.
[128] Ibid.
[129] Ibid.
[130] David Sirota, 'Europe Refugee Crisis: Sweden Says EU Can "Easily" Accept Millions of Refugees' *International Business Times* (21 January 2016)

In this argument, the limits of Sweden's interest in setting an example are clear. The Swedish government expressly called for greater solidarity in terms of reception of asylum-seekers and refugees, suggesting a redistributive mechanism to replace the Dublin Regulation.[131] Similar to Sweden's interest in the CEAS as a means of raising standards in the region, responsibility sharing in the context of the influx was seen as necessary to ensure that Sweden did not become an outlier in its adherence to international law and human rights principles. In other words, Sweden was no longer willing to contribute more than its share to collective efforts to provide refugee protection.

The temporary legislation in Sweden, accordingly, squarely aimed at eliminating the features of the Swedish asylum system that were thought to make Sweden more attractive than other EU member states as a destination for asylum seekers: the possibility of permanent residency and the right of all recipients of protection statuses to family reunification. As noted above, temporary residency periods, extended only while the situation giving rise to the protection concern persisted, became the standard. In addition, only persons found to be in need of refugee protection would have the possibility to apply for family reunification to bring nuclear family members in their country of origin or elsewhere to Sweden.[132]

Thus, while Sweden was clear that it would continue to comply with the requirements of the CEAS and international law,[133] the goal was to reduce Swedish asylum standards to the minimum as a means of deterring asylum seekers.[134] This was made explicit by the government's announcement of the measures, which explained that '[t]he government therefore wants to adapt the asylum rules to the minimum level in the EU for a period so that more people choose to seek asylum in other EU countries.'[135] In other words, Sweden thought that it could eliminate 'pull factors,' and in so doing, reduce the rate of arrivals to its territory. If

[131] Government Council, *The government is proposing measures to create room for Swedish refugee reception (translated from Swedish)*
[132] Ibid.
[133] Interview 2, 23 September 2020, Swedish Migration Agency staff
[134] Interview 3, 25 September 2020, former government official/academic
[135] Government Council, *The government is proposing measures to create room for Swedish refugee reception (translated from Swedish)*

other EU member states were not willing to accept a greater share of responsibility, Sweden would, at a minimum, reduce its contribution.

This policy shift represented a decisive break from Sweden's long tradition of seeking to set an example within the international community. As one interviewee explained,

> [T]hat is something, a kind of way of looking at our immigration legislation that has never occurred before. And in particular, we have been, I think, our politicians have been proud in saying that we don't use that kind of legislation to deter people from coming to Sweden. And suddenly they shifted 180 degrees in saying the aim of this legislation is to make people choose another country.[136]

The thinking was that Sweden should 'not be more generous than necessary,' but rather adhere to the minimum standards it had previously eschewed.[137] From Sweden's initial position of viewing the CEAS as being primarily relevant to other countries, the country had shifted to believing that the CEAS could be a tool to limit the number of arrivals to Sweden.

Despite their formal announcement following the peak of arrivals in November, these legislative changes were formally adopted only on 28 April 2016, with an effective date of 20 July 2016.[138] Initially, they were set to remain in place for a period of three years, though this was later extended by an additional two years, through 2021.[139] In 2021, many of these changes would be made permanent, as explained further below.

The changes to Sweden's legislation were indicative of a profound shift in the country's orientation to asylum and migration. No longer responsive to a crisis, they were neither temporary nor required by any exigent circumstances. Rather, Sweden was responding to what it had come to see as a structural flaw in the CEAS: the lack of solidarity among EU member states. Upon passing the legislation, the government explained that they were intended "to ensure that Swedish migration policy is sustainable in the long term and provides a humane, legally secure and effective regulatory framework that is not materially different from migration policies in other EU Member States."[140]

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[136] Interview 1, 16 September 2020, Swedish Migration Agency staff
[137] Interview 2, 23 September 2020, Swedish Migration Agency staff
[138] Government Offices of Sweden, *Proposal to temporarily restrict the possibility of being granted a residence permit in Sweden*
[139] ECRE, *Sweden: Parliament Extends the Temporary Law*, 2019
[140] Lisa Pelling, *Sweden: Revised Aliens Act Adopted*, 2021

2.3 The end of the crisis and the shaping of a narrative

By the end of 2015, the total figure for asylum applications in Sweden had climbed to more than 162,450, doubling the total applications received in 2014.[141] This figure reflected rapid arrivals during the fall, as described above, though the number of asylum seekers arriving had significantly slowed by the end of the year (following the introduction of border controls on 12 November). Also notable was the arrival of more than 35,000 unaccompanied children.[142] During the course of 2015, Sweden made a total of 14,000 requests for transfer of asylum seekers to the state responsible under the Dublin Regulation, roughly 8,000 of which were accepted.[143] Ultimately, however, only 5,800 of those transfers took place, while the remainder of the new applicants remained in Sweden for the determination of their asylum claims.[144]

The increased number of applications caused a significant lengthening of the average processing time for asylum applications, from 142 days in 2014 to 229 days in 2015 (notwithstanding efforts by the SMA to expedite processing).[145] Despite concerns about the number of applications received and resulting delays in processing rates, the overall rate of recognition of asylum claims remained quite high as compared to the rest of the EU.[146] While Sweden may have had concerns about the number of asylum applications it was receiving, these did not seem to influence the substantive decision making process in a way that negatively impacted individual asylum seekers.

The pressure of the arrival rate was felt in other policy areas, however: as one example, Sweden decided to expand development assistance to Afghanistan, where the Taliban had not yet come back into power, with the intention that improved conditions would reduce migratory outflows toward western Europe, including Sweden. [147] This assistance was discussed, moreover, in connection with a bilateral readmission agreement that included provisions for Afghanistan's acceptance of the return of rejected asylum-seekers as a condition for receiving

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[141] European Migration Network, 'Country Factsheet: Sweden 2015'4
[142] Ibid., 2
[143] Parusel, *Sweden's Asylum Procedures*, 6
[144] Ibid.
[145] Ibid., 9
[146] Ibid., 12
[147] Press Release, Prime Minister's Office, *Sweden and Afghanistan begin negotiations on readmission agreements* (2015)

aid.[148] Afghanistan was a focus for this conversation due to the high percentage of Afghan boys among the unaccompanied children arriving in Sweden in 2015.[149]

At the same time, the Swedish government also sought to send a message of deterrence to asylum seekers themselves. Anticipating an acceptance rate of 55% for the asylum applications received in 2015, government officials publicly stated that up to 80,000 asylum-seekers could be deported following the high rate of arrivals in 2015.[150] The EU Commission voiced support for Sweden's announcement, noting the important role that return of failed asylum seekers plays within the CEAS.[151] Both public statements appeared to be designed to send a clear message to prospective asylum seekers: arriving in Sweden, or in the EU, was no guarantee of receiving permission to remain legally.

The picture emerging at the end of 2015, then, was of a system under pressure, but with a clear end in sight: the number of arrivals had slowed significantly from the peak arrivals of November 2015, and the EU-Turkey Statement would follow a few months later. In other words, the practical crisis had abated. But the political crisis continued.

Sweden's announced legislation, as noted above, was passed in April 2016 and took effect three months later. Interviewees agreed that the temporary legislation ultimately had little impact on new arrival rates; instead, border controls and the EU-Turkey agreement were cited as having reduced the number of asylum seekers reaching Sweden.[152] Regardless of asylum seekers' intentions and whether these were tied to specific policies (a point called into question by the literature, as noted in Chapter 2), it became much more difficult, as a practical matter, to reach Sweden by late 2015, and more difficult to reach the EU as a whole a few months later. By the end of the first quarter of 2016, northern countries like Sweden were largely shielded from any further impacts of the refugee crisis.

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[148] Ibid.
[149] Ibid.
[150] 'Sweden: 80,000 could be expelled after refugee influx' *Al Jazeera* (28 January 2016) <https://www.aljazeera.com/news/2016/01/sweden-expel-80000-refugees-160128041124534.html> accessed 18 August 2020
[151] *See* ibid.
[152] Interviews 1, 2, 6, 7, 10

Notwithstanding this timeline of events, one interviewee noted that public figures in Sweden often argue that the temporary legislation was a factor in the reduction in asylum applications, alongside border controls.[153] This could perhaps be supported from the perspective that the announcement of the impending change was sufficient to alter decisions taken by prospective asylum seekers, though no clear evidence of this happening has been cited by government officials. Another interviewee suggested that the temporary legislation and the shift in policy in Sweden was not, ultimately, a reaction to the current crisis, but rather an indication of Sweden's desire to be 'a normal European country.'[154] Maintaining legislation more generous than that of other EU Member States came to be seen as risky, and Sweden was not willing to assume this level of uncertainty, nor the disproportionate burden that had become associated (at least as a matter of public opinion) with exceeding minimum standards.[155]

The changed landscape of refugee protection in Sweden

The crisis in Sweden, then, was relatively short in duration – the critical period started in October 2015 and ended with the imposition of border controls, paired with ID checks, in January 2016. During that time, however, Sweden's view of regional cooperation to provide refugee protection was profoundly altered: the national dialogue came to focus on the fact that Sweden was bearing a disproportionate burden and the lack of solidarity among neighboring states presented a serious obstacle to Sweden continuing its historical tendency to exceed standards in providing refugee protection. With the perceived lack of control of its borders and the inability of agencies to cope with the influx of asylum seekers in focus, Sweden's calculation regarding the private benefits of providing refugee protection arguably shifted. Under these circumstances, private benefits were no longer sufficient to motivate Sweden's contributions to the collective and it opted, instead, to step back to adhering to the minimum standards required by the CEAS.

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153 Interview 6, 5 November 2020, NGO staff
154 Interview 3, 25 September 2020, former government agency staff/academic
155 Ibid. (noting '[T]hat's the discourse we have today, that we need to be normal…we cannot sustain more asylum seekers than other countries.')

3 After the crisis: no going back

Even after experiencing a dramatic reduction in the rate of arrivals of asylum seekers from 2015 to 2016, Swedish politics retained an echo of the events of the refugee crisis. The impact of the surge in arrivals in late 2015 would reverberate over the next several years, as asylum seekers waited for very long periods to be interviewed, then to have their cases decided, and subsequently to integrate into Swedish society or to pursue appeals through the Swedish Migration Agency and the court system. The Sweden Democrats, moreover, continued to gain ground in Parliament in 2018, reaching 17.6 percent of the national vote.[156] In this context, with asylum still at the center of the political agenda despite the change in circumstances, reversion to Sweden's prior, more generous asylum legislation was never seriously considered.

What happened to Sweden's commitment to having a model asylum system? Interviewees explained the lasting nature of the legislative changes as tied to a fear of returning to the 2015 rate of arrivals, despite the absence of any indications that this was likely to occur.[157] Previously shielded by its geographic position, Sweden had not reckoned with the domestic political impact of asylum policy in the same manner as frontline EU Member States. The link between high rates of arrivals and high standards, however, once made in the public dialogue, became unassailable: there was a sense that, as one interviewee explained, pursuing more generous legislation inevitably entailed a risk of increased arrivals, a possibility that was impossible to entertain in the post-2015 political climate.[158]

Another interviewee described the temporary legislation as having fundamentally changed the nature of the conversation around asylum in Sweden by making it more socially and politically acceptable to voice support for restrictive immigration policies. He explained,

> When they did the first restricted policy, it was a shock because it broke all traditions. And when you break this taboo of speaking about volumes and reducing…then you could suddenly suggest other policy options. [159]

[156] Skodo, *Sweden: By Turns Welcoming and Restrictive in its Immigration Policy*, 11
[157] Interviews 1, 2, 6, 7
[158] Interview 2, 23 September 2020, Swedish Migration Agency staff
[159] Interview 3, 24 September 2020, former government agency staff/academic

The political debate in Sweden was reoriented from one that was fundamentally about Swedish values, equality, and diversity, in line with the Swedish tradition of welcoming various forms of migration and granting equal rights to non-citizens, to one focused on Sweden adhering to EU minimum standards as a matter of necessity. The conversation, in effect, became less about Sweden's perspective and policies than about those pursued by other EU Member States, as explained further below.

3.1 The long shadow of 2015

What stands out in this sequence of events is the extent to which the events of two weeks in November 2015 fundamentally altered the conversation about asylum in Sweden. The discourse in Sweden shifted to center around the impossibility of returning to the prior system, which was cast as having made the high rates of arrivals in 2015 possible.[160] This was the case in spite of the fact that the EU-Turkey agreement, as mentioned above, stemmed the flow of refugees to the EU, making the policy changes in the temporary legislation unnecessary by the time of their enactment.[161] Even so, and in the absence of any indication of recurrence, the idea now, according to one interviewee, is 'not so much a response to a current threat…the narrative is that we will make a viable and sustainable system that will work under all conditions.'[162]

Some interviewees attributed the durability of the 2015 narrative to the fact that the refugees and migrants who arrived during that period were seen by many as not having been effectively integrated into Swedish society, and were linked in the media and in the political discourse to an increase in violence in Sweden.[163] This line of argument effectively drew a link between the challenges Sweden faced in 2015 and the events of the next several years, maintaining the asylum debate as a fixture of Sweden's political/public dialogue. At the same

[160] *See* Interview 6 (describing the narrative that Sweden can never have a situation like 2015), 7 (describing the key message as being '[w]e will never go back to the way that it was before')
[161] *See* Interviews 1, 2, 6, 7, 10
[162] Interview 7, 5 November 2020, former Swedish Migration Agency staff/academic.
[163] Interviews 1, 6.

time, and notwithstanding the absence of clear evidence to this effect, there was a persistent argument that more restrictive policies 'worked': it was consistently argued that policy changes helped lower the numbers, alongside border controls.[164] One interviewee, reflecting on the evolution of thinking around asylum in Sweden, described the gradual hardening of public opinion and increasing support for a restrictive asylum policy: '[T]he need for time to breathe, and reflect, to start with, was done, then just turned into something that was the only normal way of doing things…they repeated some things so often that it's become the truth.'[165]

In this way, the events of 2015 may have been the 'but for' cause of the changed attitudes toward collective action to provide refugee protection in Sweden, but they cannot be viewed in isolation. The increased arrival rate of asylum seekers was compounded by the sense of a lack of control over the situation – in effect, the perception that Sweden's policies related to refugee protection were placing it in the position of having to receive and host a disproportionate number of asylum seekers. Changing Sweden's asylum legislation, even if not necessary to restore 'normalcy' by July 2016, therefore provided a sense that Sweden was taking proactive measures to ensure that it would not be exposed to a similar situation in the future, as explained further below.

3.2 Stepping back from higher standards and focusing on solidarity

With this intent focus on the events of 2015, it also follows that Sweden's prior orientation toward standard setting became far less important than it had been previously. Sweden's more generous standards came to be perceived as carrying serious negative consequences in terms of creating a pull factor for asylum seekers to choose Sweden as their destination. One interviewee explained Sweden's abandonment of its interest in being 'best in the class,' noting, 'We want to be one member of the European Union as all the others, and applying the same legal provisions, having the same standards, that is something that is now a focus from the political side.'[166] Other interviewees, similarly, cited the political debate as being

[164] Interview 6, 5 November 2020, NGO staff
[165] Interview 5, 27 October 2020, NGO staff
[166] Interview 1, 16 September 2020, Swedish Migration Agency staff

heavily tilted towards determining how best to position Sweden as adhering to EU standards but not exceeding them.[167] The prospect of a potential increase in asylum applications, even if remote, came to outweigh Sweden's sense of pride and leadership in its 'humanitarian superpower' status.

At the same time, a second theme emerged in Sweden's national asylum debate: solidarity. Specifically, alongside the narrative that Sweden could not again accept asylum-seekers in the numbers it had in 2015, a related but distinct argument that it was 'time for others to step up now' threaded through the debate.[168] This narrative again looks back to 2015 and the number of asylum seekers accepted by Sweden at that time, to argue that Sweden has already 'done its share' to contribute to the EU's efforts in terms of accepting refugees.[169] As one interviewee explained, 'There is this overall impression that if the rest of Europe is not stepping up, why should we?'[170] Another interviewee situated this argument in Sweden's historical orientation toward asylum and rightward shift following the crisis, explaining,

> [W]e want to see ourselves as a good and, a generalism, 'humanitarian' people. But then, also, there was a lot of negative response, of course, to the fact that Sweden stood out as a country that did accommodate relatively many while other countries didn't do anything, so the solidarity aspect became quite strong, and still affects policy and discussions in Sweden today, in the sense that you still get the argument sometimes that since we have so many asylum seekers back in 2015, now it's the time for other countries to step up and help people.[171]

This view of solidarity effectively provides a second justification, beyond the forward-looking view toward future crises, for why Sweden could not or should not return to its pre-crisis orientation toward asylum.

With these two shifts, the values underlying the historic development of Sweden's asylum system had been fundamentally altered and arguably abandoned. Sweden was no longer measuring itself against Swedish values and its own sense of what was right – it was explicitly cleaving to regional standards and aligning itself with its neighbors. From taking pride

[167] *See* Interviews 5, 6
[168] Interview 2, 23 September 2020, Swedish Migration Agency staff
[169] Interviews 5, 6, 8
[170] Interview 8, 24 November 2020, former UN staff/former Swedish Migration Agency staff
[171] Interview 2, 23 September 2020, Swedish Migration Agency staff

in its status as a standard-setter, Sweden had begun to see any kind of exceptionalism as giving rise to risk – the risk of too many arrivals, system overwhelm, and negative domestic political reactions. The costs and benefits associated with being a provider of refugee protection had thus shifted for Sweden, and the altruistic private benefit that had motivated its actions previously no longer provided a strong enough incentive for Sweden to be a leader in the region.

From a regional perspective, one might argue that Sweden's shift toward CEAS minimum standards represented the consolidation of views around a common position, which could lead to greater uniformity among EU member states. From the perspective of provision of a collective/public good, however, it was clear that this change would translate to a reduced level of contribution, and a net loss for refugee protection in the region.

3.3 Practical effects: Sweden's outlook on relocation and resettlement

Sweden might no longer be setting the standard for refugee protection in the EU, then, but it had still done more than others. This argument arose again in explaining Sweden's refusal to accept any of the unaccompanied children being relocated from the Greek islands as part of an EU initiative to decongest asylum seeker facilities in 2020.[172] As one interviewee explained,

> [T]he tradition in Sweden is that we take the lead, we take the humanitarian lead and then we hope that the other will follow, we demonstrate by good example. Now it's the other way around, the other ones have to step up before we do anything.[173]

With this position, as another interviewee noted, Sweden broke with its past image as a humanitarian superpower,[174] and in fact found itself out of step with the majority of similarly situated EU Member States. The program for unaccompanied children involved limited numbers of asylum seekers and enjoyed widespread support by other EU countries – Sweden's refusal to accept any asylum seekers from this group was notable, as it seemed to indicate a principled

[172] Interviews 2, 5, 6, 8
[173] Interview 6, 5 November 2020, former NGO staff
[174] Interview 10, 9 December 2020, academic

opposition to participating in any joint initiative falling outside the bounds of what was required by the CEAS.[175]

One interviewee, however, noted that some politicians linked this decision directly to the arrival of so many unaccompanied children in 2015, rather than the high number of asylum seekers overall during that period.[176] This group of children was the subject of significant political controversy during the crisis, with one interviewee suggesting that the potential deportation of this group posed a threat to the government coalition.[177] The compromise ultimately reached between the government and advocates for the children, the 'Upper Secondary School Act,' inspired strong opinions in Sweden, particularly because it offered a path to integration for children found not to be in need of international protection. More specifically, the act allowed for the grant of residency permits for those enrolled in schools and for those who completed their secondary education and sought employment.[178]

The post-crisis landscape was not universally restrictive, however: even as Sweden sought to limit the overall number of asylum seekers received on its territory, it increased the number of quota refugees accepted for resettlement. Seen as a concession to the Green Party for their support for the temporary legislation,[179] this figure was increased from 1,900 to 5,000 in 2018. The adoption of this measure served to create a regular or legal route to safety for those persons most in need of refugee protection, one of the measures called for during the crisis as a means of avoiding large-scale, irregular movements.[180]

As one interviewee highlighted, the focus on resettled refugees ultimately could be seen as supporting the narrative put forward by politicians favoring a restrictive territorial asylum

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[175] *See* Matthew Mpoke Bigg, Explainer: Relocation of unaccompanied children from Greece to other EU countries (2020)(detailing the commitment by 11 EU member states to accept up to 3,300 asylum seekers, including 1,600 unaccompanied children, for relocation from the Greek islands)
[176] Interview 9, 1 December 2020, former Swedish Migration Agency staff, NGO staff
[177] Interview 8, 24 November 2020, former UN staff/former Swedish Migration Agency staff
[178] This legislation, too, was ultimately amended to phase out the possibility for children and young adults to obtain a residency permit to seek work opportunities after completing their secondary education. *See* Migrationsverket, The Upper Secondary School Act will be amended on 20 July (2024) (link since removed)
[179] Interview 5, 27 October 2020, NGO staff
[180] Interview 2, 23 September 2020, Swedish Migration Agency staff. It should be noted that this measure was reversed in 2023, when the resettlement quote was reduced to 900 persons per year, in line with the restrictive rhetoric of the new government. European Migration Network, *Sweden 2023: Main developments in migration and international protection, including latest statistics* Country Factsheet

policy, who argued that it was the refugees being resettled who were truly vulnerable and in need of protection.[181] Those arriving to Sweden on their own, according to this argument, had in a sense proven their lack of vulnerability – they were strong enough to make the trip.[182] As another interviewee explained, this led to the Swedish Democrats and the Conservatives suggesting abolition of the territorial right to asylum, which allows refugees to seek asylum upon arrival to Sweden, because 'maybe we don't need the right to apply for asylum, the Refugee Convention, anymore, because we only would need resettlement and then it would be done in an orderly way.'[183] Denial of a right to seek asylum at the border would introduce absolute predictability and control into the asylum system, a consistent theme in the Swedish political conversation around asylum.

Notwithstanding the hypotheticals floated by conservative political actors, the public debate in Sweden never went so far as to seriously contemplate disregarding international or EU asylum standards. Sweden continued to maintain, in one interviewee's phrasing, its 'obedient pupil and stick-to-the-rules' orientation.[184] Nonetheless, Sweden's newfound emphasis on meeting but not exceeding the minimum requirements of the CEAS represented a sharp reorientation and reimagining of Sweden's role and perspective on international protection – one that was more inward looking and less concerned with Sweden's leadership on the international stage.

3.4 New asylum legislation

In mid-2021, Sweden's temporary legislation expired and was replaced by a new Law on Asylum. The provisions of the law were developed through an inter-party parliamentary committee, who were appointed to examine the question of how Sweden should adapt its asylum legislation after the temporary measures introduced in 2016 expired.[185] Ultimately, the

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[181] Ibid.
[182] See Ibid.
[183] Interview 5, 27 October 2020, NGO staff
[184] Interview 5, 27 October 2020, NGO staff
[185] The Local Sweden 'Swedish committee presents proposals for new migration laws' *The Local* (15 September 2020) <https://www.thelocal.se/20200915/swedish-committee-to-present-proposals-for-new-migration-laws/>

Commission's recommendations exceeded 600 pages, composed of a series of individual recommendations, each of which was endorsed by separate coalitions among the participating parties/members due to the inability of all members of the Commission to agree on a unified draft law.[186] The overall direction of the recommendations tended toward making the temporary legislation permanent, though Commission members differed on certain key provisions, including language and civic education requirements.[187]

As adopted by Parliament, the Law on Asylum closely parallels the temporary legislation, including by providing that refugees, recipients of subsidiary protection, and family members joining relatives in Sweden would receive temporary rather than permanent residency.[188] As an initial matter, recognized refugees would receive residence permits for three years while recipients of subsidiary protection would receive residency permits for 13 months.[189] The new legislation also retained the temporary legislation's requirement that an individual be able to demonstrate a minimum income level in order to subsequently receive permanent residency, which would only be possible after the individual has been in Sweden for three years.[190] In addition, the legislation allowed Sweden to establish a safe countries of origin list, which the Swedish Migration Agency did in May 2021.[191] The Green Party played a critical role in blocking further rightward shifts, including a proposed cap on the total number of asylum applications accepted.[192] The legislation came into effect on 20 July 2021.[193]

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[186] Ibid.
[187] Ibid.
[188] Pelling, *Sweden: Revised Aliens Act Adopted*; The Local Sweden, 'Sweden's Migration Rules Tightened as New Law Comes Into Force' *The Local* (20 July 2021) <https://www.thelocal.se/20210720/latest-swedens-new-migration-law-comes-into-force/>; Euronews, 'New Swedish Migration Law Makes Permanent Residency Harder for Refugees and Visitors' *Euronews* (20 July 2021) <https://www.euronews.com/2021/07/20/new-swedish-migration-law-makes-permanent-residency-harder-for-refugees-and-visitors>
[189] European Migration Network, *Sweden 2021: Main developments in migration and international protection, including latest statistics*, 2021
[190] Euronews, 'New Swedish Migration Law Makes Permanent Residency Harder for Refugees and Visitors'(noting that in 2021, this minimum income level amounted to approximately 809 euros per month)
[191] European Migration Network, *Sweden 2021: Main developments in migration and international protection, including latest statistics* (noting that the initial list of safe countries of origin included Albania, Bosnia and Herzegovina, Chile, Georgia, Kosovo, Mongolia, North Macedonia and Serbia)
[192] The Local Sweden, 'Sweden's Migration Rules Tightened as New Law Comes Into Force',
[193] It should be noted that 2023 saw still further tightening of Swedish asylum legislation, in particular to limit the grant of residency permits in relation to family reunification and to eliminate the grant of permits based on 'particularly distressing circumstances.' European Migration Network, *Sweden 2023: Main developments in migration and international protection, including latest statistics*

With these changes, Sweden effectively made the shift in its asylum system permanent. The justification for the changes in Sweden's temporary law as a response to current conditions had changed: restrictive legislation was seen as necessary in order to protect Sweden going forward, to ensure a system that worked 'under all conditions.' Sweden's perspective on collective action at the regional level had been altered by the crisis, and this, more than the current rate of arrivals or any anticipated future waves, dictated the Swedish government's actions. The Swedish government did not trust that other EU member states would contribute meaningfully to collective action to provide refugee protection in the future – irrespective of the post-2015 reality in terms of arrivals to the region. The potential private benefits of being a provider of refugee protection had, at the same time, seemingly reduced – leading to a shift in Sweden's calculus and overall willingness to provide a disproportionate share of this collective/public good.

3.5 Sweden's perspective on regional cooperation

Against this backdrop, views of the CEAS in Sweden shifted considerably – from a minimum threshold that Sweden felt confident in exceeding, the CEAS had become a kind of guide to how to be a 'normal' EU state. Rather than worrying about a race-to-the-bottom, Sweden began to view the minimum standards of the CEAS as potentially serving Swedish interests.[194] As one interviewee explained,

> Sweden is using the EU policy today exactly like the people who were against it from the start…[I]t's only used as a tactical or practical policy. It has no moral meaning in Sweden.[195]

In effect, the CEAS has become a guideline for Sweden as to how to maintain its policies in lockstep with the rest of the EU, to ensure that it will not be a more attractive destination for asylum seekers than any other EU member state.

[194] Interview 3, 25 September 2020, former government agency staff/academic
[195] Ibid.

At the same time, supporting the CEAS has remained strategically important for Swedish officials for the purpose of shaping the asylum narrative for more liberal segments of the voting population. Being able to point to Sweden's policies as being in line with those of other EU member states may be seen as having provided a kind of political cover for Sweden's retreat from its previous generosity in granting asylum seekers and refugees more rights than required by regional or international standards. In one interview, an academic and former government agency staff explained that the Swedish government's position had in fact started to shift prior to the crisis, but that the government was, at that time, unwilling to impose restrictions unilaterally, but rather 'hoped that the EU would deal with it.'[196] Ultimately, however, Sweden found a reason to lower its standards, and has shown no willingness to deviate upward in a significant way from the policies implemented by its neighbors.

Looking to the future, interviewees noted greater interest by Sweden in the asylum systems of other EU member states.[197] This interest, moreover, has taken on a different tone in that Sweden isn't merely observing or seeking to raise the bar in other Member States, but rather considering the extent to which it may adapt its asylum procedures in line with those of its neighbors.[198] In line with the point above regarding the avoidance of pull factors, interviewees saw the future of the CEAS in Sweden linked to avoiding a situation in which Sweden is compelled to shoulder more responsibility for providing international protection than other EU member states.

Consistent with this distribution-oriented perspective, it is notable that the meaning of solidarity, in the Swedish context, has shifted: Sweden previously thought of solidarity as meaning solidarity with refugees, rather than solidarity between states.[199] With 2015, however, Sweden's orientation to this issue, as with many others, has changed, and interstate solidarity in the sense of sharing a common obligation has become integral to the dialogue on asylum in Sweden. Interviewees differed as to whether greater solidarity among EU member states carried the possibility to alter Sweden's trajectory on asylum, however: one interviewee

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[196] Ibid.
[197] Interviews 1, 2
[198] Interview 2, 23 September 2020, Swedish Migration Agency staff
[199] Interview 7, 5 November 2020, former Swedish Migration Agency staff/academic

thought that it could prompt a return to more liberal policies,[200] while another was more skeptical, noting, ‘in the fundamental issue of having a restrictive migration policy, they’re not going to budge on that and I really can’t see that changing for almost any reason.’[201]

A renewed focus on regional cooperation?

In a paradoxical way, then, post-crisis Sweden can be argued to place greater importance on regional cooperation and systems than had historically been the case. Whereas the generous standards for asylum in place before 2015 reflected Swedish values and beliefs about the necessity of accepting and promptly integrating refugees, Sweden’s revised asylum legislation closely mirrors regional baselines. At the same time, however, there was a rise in skepticism in Sweden regarding the good faith efforts of other EU member states in providing refugee protection. Sweden repeatedly cited the need for its neighbors to contribute to regional efforts and underscored the potential for the EU to have a much greater impact in the area of refugee protection if all member states participated in collective action toward this end.[202] This critical perspective underscored and justified Sweden’s adherence to minimum standards, with Sweden’s early promise to return to its historic orientation to provision of asylum having completely disappeared from the public dialogue.[203]

4 Conclusion

Prior to the refugee crisis, Sweden placed a strong emphasis on adhering to high standards for refugee protection and contributing to regional cooperation in a meaningful way that emphasized the promotion of high standards for its neighbors as well. At the same time, however, Sweden was largely protected from the challenges faced by frontline states by its geographical position within the EU. The refugee crisis prompted Sweden to change course in a

[200] Interview 2, 23 September 2020, Swedish Migration Agency staff
[201] Interview 7, 5 November 2020, former Swedish Migration Agency staff/academic
[202] *See, e.g.,* Government Council, The government is proposing measures to create room for Swedish refugee reception (translated from Swedish); Sirota, 'Europe Refugee Crisis: Sweden Says EU Can “Easily” Accept Millions of Refugees'
[203] *See* Parusel, 'Sweden’s U-turn on asylum'

dramatic manner: from a self-designated 'humanitarian superpower' seeking to lead the provision of refugee protection in the EU, it has become keenly interested in strictly complying with the minimum standards established in the CEAS and ensuring that it would be perceived as 'a normal European country.'[204]

What precipitated this shift? Certainly, the surge in the number of arrivals to Sweden played a part, as they also did in past crises. Sweden was also concerned, however, with the fact that other EU member states were not contributing at a similar level – Sweden's efforts to provide leadership and support in the region had not produced a willingness among other EU member states to contribute similarly to collective efforts. The number of asylum seekers arriving to Sweden exceeded Sweden's reception capacity, and there seemed to be no possibility to look to Sweden's neighbors for support. With a situation that was cast in Sweden's political dialogue as being out of Sweden's control or ability to manage within the existing structure, drastic action in the form of border controls paired with legislative reform was ultimately seen as necessary to ensure non-recurrence of the crisis situation.

4.1 Solidarity, defection, and imperfect systems to coordinate collective action

Sweden's focus on solidarity in the context of the refugee crisis can be viewed through different lenses. On a very basic level, one could argue that solidarity in this context is an indicator of cooperation toward collective action. The EU member states who were not adhering to their commitments under the CEAS because they were building fences, setting quotas, or applying the CEAS in a manner designed to deter applications[205] were defecting – they were not complying with the obligations set out in the CEAS instruments and assumed by all EU member states. Seeing this behavior, Sweden had the sense that they were complying and contributing positively toward the collective provision of refugee protection while others failed to do so. Collective action theory would tend to predict Sweden's response – seeing that

[204] Interview 3, 25 September 2020, former government agency staff/academic
[205] This could be through, for example, very low recognition rates or poor reception conditions.

there was no effective mechanism for addressing defection, Sweden lost confidence in the potential for meaningful cooperation and reduced its participation in the collective action to a minimal level. This is generally consistent with the idea, from the collective action literature, that collective goods tend to be produced at a sub-optimal level.

It is important to note, here, that Sweden did not withdraw from the CEAS - it reduced its standards to be consistent with a minimal baseline, in compliance with both international refugee law and the CEAS. This points to the importance of the ‘hard law’ aspects of the CEAS, as well as the fact that the CEAS grew out of preexisting international obligations. As indicated above, this can also be (somewhat paradoxically) viewed as an action that in fact places greater importance on regional cooperation, as it tended to increase the congruence of legislative standards for refugee protection across the EU. At the same time, however, it was not an action in support of collective efforts that increased the provision of refugee protection as a collective/public good in the region – it was, rather, a retreat from Sweden’s previously higher standards.

Alternatively, one might think of solidarity in more explicitly redistributive terms. In this sense, Sweden had discovered, during the refugee crisis, the perspective long experienced by front-line states – that there were no guarantees that the burden of providing refugee protection would be borne by EU member states in an equitable manner. Being on the receiving end of a disproportionate share of arrivals led Sweden to call, with some urgency, for a redistributive mechanism to replace the Dublin Regulation. While the Hotspot Relocation Scheme did result in relocation of a modest number of refugees from Italy and Greece, the pace of progress toward broader solidarity provisions was slow, leading Sweden to seek to find its own solution to the distributional issue it had identified during the crisis.

Sweden’s sense that it could not count on EU member states to take in their share of refugees in need of protection directly contributed to its decision to put in place border controls as well as ID checks and to revise its asylum legislation. This was the case despite Sweden’s prior efforts to show leadership and work to develop the consensus toward higher standards during the period leading up to the refugee crisis. The fact that some states managed to deflect their responsibilities without consequence, as well as the lack of effective distribution mechanisms that could respond to differences in the rate of arrivals across member states, contributed to Sweden's loss of confidence in regional cooperation.

4.2 Changing cost-benefit analyses in Sweden

Underscoring Sweden's abrupt but enduring change in approach to refugee protection was a changed analysis of the costs and benefits associated with being a provider of refugee protection. As described earlier in this chapter, Sweden had consistently done more than its share in terms of providing refugee protection and had derived private altruistic or reputational benefits from doing so – it was a source of pride in the period leading up to 2015. Sweden's geographic positioning had historically meant that it did not face a situation of large numbers of asylum seekers arriving, however, and the practical 'costs' of its generous system did not manifest in terms of high numbers of applications. This changed with the easing of border controls across the EU in 2015. Very suddenly, maintaining high standards was seen as carrying much more significant costs (whether this association was correct or not), and Sweden's valuation of the altruistic and reputational benefits of being a leader on asylum could not fully offset these.

In addition, there was a shift in the political dialogue, which came to focus on the perception that the reception system was overwhelmed and that Sweden was unable to control who was arriving to its territory. Rather than an affirmative choice made by Sweden to extend protection in a generous manner, the situation in 2015 looked like something that was imposed on Sweden – both as a result of the arrival of many refugees to the EU, but also by the inaction or defection of other EU member states. This shift in perception arguably served to reduce the private altruistic benefits that would otherwise accrue to Sweden – if they were not in control of the situation, it wasn't to their credit that they received and accommodated so many refugees.

One could also suggest that the political conversation changed materially in 2015, in that it became more outwardly or regionally focused. Prior to the crisis, Sweden had generally considered its actions through the lens of its own values and domestic political dialogue. Given that the impact of increased arrival rates was felt across the EU, however, in 2015 Sweden was not solely inward-looking, but rather considered also its neighbors, some of whom were taking unilateral measures to control the arrival of asylum seekers to their territory. As Sweden saw its accommodation capacity exhausted, necessitating further investments in reception and hiring of additional staff, continuation with the same policies and practices it had favored previously, from a comparative perspective, may have seemed less generous than naïve. The sense that Sweden was being taken advantage of by other EU member states came through clearly in political calls for other states to 'step up' before Sweden would be willing to take on a greater burden.

In this sense, the perceived costs of providing refugee protection increased even as the private benefits of doing so decreased. This resulted in Sweden choosing to change course rather than maintain its pre-2015 orientation to refugee protection. While not surprising, this finding highlights the fact that much of the literature around collective action treats states' interests and motivations as somehow fixed. But the process of preference formation at the state level is dynamic and strongly influenced by political and practical considerations. In the case of Sweden, these interests were strongly aligned towards reducing its provision of refugee protection as a collective good during and after the crisis of 2015.

4.3 Racing to the bottom?

Sweden's decision to lower its standards for refugee protection to be in line with the CEAS baseline requirements seems to validate the idea that minimum standards legislation may contribute to a race-to-the-bottom mentality. The fact that this phenomenon was not observed during the initial period following the first phase of the CEAS, as discussed in Chapter 2, may be indicative of a certain level of legislative inertia, which contributed to states, in general, preferring to maintain the legislative standards that reflected the outcome of political dialogue at the national level. Later, however, the pressure from the refugee 'crisis,' in combination with the expectation from the Swedish public that the government would find a solution to the disproportionate burden on the Swedish asylum system, produced a lowering of standards consistent with the idea of a race-to-the-bottom.

Interestingly, interviewees observed that the CEAS provided a kind of political cover, as it allowed Swedish politicians to cite their compliance with regional standards as indicative that their actions were reasonable and compliant with international requirements, if not consistent with Sweden's previous tradition. It should be noted that this is precisely the opposite of Zaun's findings, which had suggested that states might use regional legislation as political cover to raise standards.[206] Given that Sweden had entered into the CEAS with standards that were generally higher than those of other states, however, this perhaps suggests a corollary to Zaun's hypothesis: states with higher standards might, conversely, use regional instruments as a justification to lower them.

In the context of collective action theory, Sweden's actions are interesting because they suggest the limited efficacy of minimum standards legislation in lowering the barriers to collective action. While some states might, under other circumstances, opt to contribute to a collective/public good at a higher level, as Sweden previously did, minimum standards legislation may be seen as exerting downward pressure on these 'enthusiastic contributors.' Under these circumstances, notwithstanding the existence of legislation to facilitate collective action, the situation may remain one in which a good will be provided at a suboptimal level (albeit a higher level that might be possible in the absence of legislation). This would seem to represent a partial solution to the collective action problem, whose limits may become more pronounced in crisis situations.

This shift is also consistent with the effects of new governance, though perhaps not in the way anticipated by the Commission. While the Commission's White Paper had anticipated that states would engage in a process of mutual learning, this was foreseen as the result of exchange of good practice, twinning, and production of guidance, for example – all methods Sweden had engaged in to try to raise standards in other states. In this case, however, the opposite occurred – Sweden 'learned' from states who sought to avoid receiving higher numbers of asylum applications and took from them the idea that lower standards would translate to lower application rates over time. Harmonization of standards at a lower level

[206] Zaun, 'Why EU asylum standards exceed the lowest common denominator: the role of regulatory expertise in EU decision-making', 140, 150; *see also* Boswell and Geddes, *Migration and mobility in the European Union*, 155

highlights a specific challenge faced by states in that coordinated action may not necessarily be optimal for provision of a collective good – uniformity or consensus may be reached among states at a baseline that differs significantly from the level that some or even most states would otherwise prefer.

Chapter 5 Germany: Seeking a Unified Response

In the span of a few weeks in August and September 2015, Germany distinguished itself as a leading proponent of collective action and solidarity among EU member states in the context of asylum and migration. A history of limited engagement with regional mechanisms and efforts to upload its national asylum policies to the EU level[1] gave way to a call, in the face of crisis, for coordinated action by EU Member States.[2] The plight of asylum-seekers stranded in Hungary became the catalyst for more comprehensive engagement with regional mechanisms and attempts to steer the EU toward a unified response to the perceived crisis.[3] These calls, moreover, were accompanied by meaningful contributions to collective action to provide refugee protection: Germany, alongside Sweden, led the EU in terms of its admission rates as well as financial assistance.[4]

Germany's increased engagement at the regional level was not consistently echoed in the reactions of other EU member states, however.[5] Expectations that neighboring states would respond to the crisis in a manner similar to Germany were not borne out; the proposed relocation mechanism met with limited support across the region and still less success in terms of execution.[6] Among some member states, there was a perception that Germany's approach to

[1] *See, e.g.,* Christian Freudlsperger and Markus Jachtenfuchs, 'A member state like any other? Germany and the European integration of core state powers' (2021) 43 Journal of European Integration 117, 125
[2] Wulf Reiners and Funda Tekin, 'Taking Refuge in Leadership? Facilitators and Constraints of Germany's Influence in EU Migration Policy and EU-Turkey Affairs during the Refugee Crisis (2015–2016)' (2020) 29 German Politics 115, 124
[3] Lucas Schramm, 'Solidarity – from the Heart or by Force? The Failed German Leadership in the EU's Refugee and Migrant Crisis' (2019) SSRN Electronic Journal 4
[4] Nicole Ostrand, 'The Syrian Refugee Crisis: A Comparison of Responses by Germany, Sweden, the United Kingdom, and the United States' (2015) 3 Journal on Migration and Human Security 255, 258, 266
[5] Schramm, 'Solidarity – from the Heart or by Force? The Failed German Leadership in the EU's Refugee and Migrant Crisis', 4-5
[6] Reiners and Tekin, 'Taking Refuge in Leadership? Facilitators and Constraints of Germany's Influence in EU Migration Policy and EU-Turkey Affairs during the Refugee Crisis (2015–2016)', 118

the surge in arrivals had exacerbated the crisis and that Germany should find a corresponding solution.[7] Ultimately, this is what occurred: although outside the structures established by the CEAS to manage asylum, the German-negotiated EU-Turkey statement, alongside resumption of border controls along the Western Balkans route, served to significantly reduce the number of asylum seekers arriving to the EU as the first quarter of 2016 drew to a close.[8]

The domestic response to the refugee crisis in 2015 and 2016 was, similarly, varied over time and not always fully supportive of the actions taken by the Merkel government. At the outset of the crisis, the public reaction was overwhelmingly positive: following Chancellor Merkel's declaration of 'wir schaffen das,' which can be translated to 'we can do this,' refugees arriving on 31 August were met at the train station in Munich with signs, cheers and applause.[9] This reception was in line with the German concept of *wilkommenskultur,* or culture of welcome to foreigners.[10] As time went on, however, the community welcome faded and the expectation of a common EU solution to the refugee crisis increased.[11] Gradually, as had occurred in Sweden, a sense developed among the public that Germany had lost control of its borders and that too many asylum seekers were arriving to Germany.[12]

The text that follows analyzes Germany's approach to regional efforts to collectively provide refugee protection before, during, and after the 2015 refugee crisis. Section 1 looks at the pre-2015 period, with an emphasis on the tension between Germany's principled support for asylum and the provision of protection in practice. Section 2 examines the crisis period, particularly in terms of Germany's reception of asylum seekers, shifting public support, and the ultimate reaction, from the public and from legislators, to sustained high numbers of arrivals.

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[7] Schramm, 'Solidarity – from the Heart or by Force? The Failed German Leadership in the EU's Refugee and Migrant Crisis', 11

[8] Chase Winter, 'EU asylum applications drop by a third' *DW* (16 June 2016) <https://www.dw.com/en/eu-asylum-applications-drop-by-a-third-in-first-quarter/a-19336296>

[9] Wesley Dockery, 'Germany and refugees: A chronology' *DW* (4 September 2017) <https://www.dw.com/en/two-years-since-germany-opened-its-borders-to-refugees-a-chronology/a-40327634>; Der Spiegel Staff, 'Two Weeks in September: The Makings of Merkel's Decision to Accept Refugees' *Der Spiegel* (24 August 2016) <https://www.spiegel.de/international/germany/a-look-back-at-the-refugee-crisis-one-year-later-a-1107986.html>

[10] Dockery, 'Germany and refugees: A chronology'

[11] Natascha Zaun and Ariadna Ripoll Servent, 'One step forward, two steps back: the ambiguous role of Germany in EU Asylum policies' (2021) 43 Journal of European Integration 157, 161-62

[12] Reiners and Tekin, 'Taking Refuge in Leadership? Facilitators and Constraints of Germany's Influence in EU Migration Policy and EU-Turkey Affairs during the Refugee Crisis (2015–2016)', 123

Section 3, finally, analyzes the post-crisis period, including legislative measures, attitudes toward regional cooperation, and reactions to new flows of asylum seekers.

1 Before the refugee crisis: principle vs. pragmatism

Much of Germany's positioning with respect to asylum, including during the refugee crisis, has its roots in history: World War II and Germany's role in the events that led to the promulgation of the 1951 Refugee Convention has been, for the past 75 years, a key driver of German asylum policy.[13] In addition to its participation in international and regional efforts, Germany also included in its Basic Law of 1949 an individual guarantee of the right to asylum, positioning protection for 'victims of political persecution' as a fundamental right.[14] Accordingly, in Germany, asylum was conceived of from the start as a rights-based system, deemed important enough to be enshrined in its constitution. That right was subsequently eroded through restrictions and exceptions, however.[15] As was also observed in Sweden, the potential economic consequences of provision of refugee protection served to limit the scope of this right over time, and, by extension, Germany's contribution to collective action to provide refugee protection.

1.1 Economic considerations in tension with rights

The first real challenge to Germany's liberal asylum framework came in the form of a steady increase in the number of asylum applications in Germany from the late 1980s, culminating in 438,200 applications received in 1992.[16] In contrast to the Cold War period, when refugees' arrival to the west was viewed positively, this arrival rate triggered concerns about the strain this number of applicants would place on the German social welfare system.[17] In

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[13] Gunther Hellmann, Rainer Baumann, Monika Bösche, Benjamin Herborth and Wolfgang Wagner, 'De-Europeanization by Default? Germany's EU Policy in Defense and Asylum' (2005) 1 Foreign Policy Analysis 143, 150
[14] Jochen Oltmer, 'Germany and Global Refugees: A History of the Present' (2016) 4 CESifo DICE Report 26, 27
[15] Roman Lehner, 'The EU-Turkey-'deal': Legal Challenges and Pitfalls' (2019) 57 International Migration 176, 176
[16] UNHCR, *Asylum Applications in Industrialized Countries: 1980-1999*, 61
[17] Oltmer, 'Germany and Global Refugees: A History of the Present', 28

response, the government revisited the scope of the right to asylum enshrined in the German Basic Law. The Christian Democratic Union (CDU)/Christian Social Union (CSU) and Free Democratic Party (FDP) coalition concluded a compromise, which became effective in mid-1993 and put in place restrictions on the right to asylum for anyone who traveled from a country ‘free of persecution’ or reached Germany by transiting ‘safe third states.’[18]

What did this shift mean in practice? First, the idea of a country ‘free of persecution,’ a predecessor to the ‘safe country of origin’ concept found in the CEAS, effectively restricted individuals from applying for asylum if their country of origin was believed not to engage in persecutory acts toward its citizens. Second, with the mention of ‘safe third states,’ Germany anticipated the ‘safe third country’ restriction later taken up at the regional level, which prevented applications from asylum seekers who had transited through a country deemed ‘safe’ in terms of its capacity to provide international protection. In effect, if a person was not arriving by air, it would be impossible that they would not pass through a safe third country on their way to Germany, given that Germany is surrounded by states deemed to meet this standard.[19] Together, these two concepts represented a significant restriction in terms of the scope of the right to seek asylum in Germany in practice, reducing Germany’s individual contribution to collective efforts in the region and presenting the potential for increased pressure on EU member states on the frontline.

1.2 Strategic support for regional cooperation on asylum

At the interstate level, Germany’s support for asylum system integration underwent a similar evolution. Germany’s liberal national stance with regard to asylum was initially echoed by an equally liberal position with respect to ensuring the coherence of national asylum systems at the EU level during the 1980s and early 1990s.[20] In 1992, however, with asylum applications on the rise, German politicians cited the regional asylum framework as requiring revision of the

[18] Ibid.
[19] Ibid.
[20] Hellmann, Baumann, Bösche, Herborth and Wagner, 'De-Europeanization by Default? Germany's EU Policy in Defense and Asylum', 150

scope of the right to asylum contained in Germany's constitution.[21] Hellman argues that Germany's support for EU integration during this period was in fact predicated upon the utility of this position in providing political justification for backing away from Germany's initially more liberal national policies.[22] Although asylum integration at the EU level did not require lowering of national standards, this argument was instrumentalized by the governing coalition to justify the decision to derogate from the historical protection for the right to asylum contained in the German constitution.[23]

More broadly, German support for a common asylum policy at the EU level can be seen as fitting within the frame of its broader support for EU integration, which has arguably characterized German politics across the ideological spectrum since unification.[24] As a leading proponent of a single market across the EU, Germany recognized the repercussions of this policy decision in terms of the resulting need for a common asylum system.[25] Beginning with the Amsterdam summit in 1997, however, Germany's position changed, with the expanded role accorded to the regions, or länder, resulting in a rightward shift away from Germany's previously held positions, including its advocacy in support of qualified majority voting.[26]

Stepping back from this specific issue, some commentators would argue that Germany can be best described as having taken a strategic approach in its support for asylum system integration over time, in the sense of advocating for integration when and to the extent that it is in Germany's national interest to support EU-level regulation of asylum. Zaun and Servent explain that '[o]ver almost three decades, Germany has only promoted European integration when it served its own interests.'[27] They see Germany's instrumentalist approach as driven by the 'politicization of migration at the domestic level,' which results in 'high electoral costs attached

[21] Ibid., 161
[22] Ibid., 152
[23] Ibid. A similar tactic would be used by CSU politicians in 2015-16, to argue that Germany was compelled by the CEAS to enforce border controls and to apply the Dublin Regulation, as described further below.
[24] Christiane Lemke, 'Germany's EU Policy: The Domestic Discourse' (2010) 33 German Studies Review 503, 504, 518
[25] Hellmann, Baumann, Bösche, Herborth and Wagner, 'De-Europeanization by Default? Germany's EU Policy in Defense and Asylum', 151
[26] Zaun and Ripoll Servent, 'One step forward, two steps back: the ambiguous role of Germany in EU Asylum policies', 162
[27] Ibid., 157

to migration policies, especially when mainstream political parties face competition from far-right challengers.'[28] Freudlsperger and Jachtenfuchs present a similar perspective, characterizing asylum, alongside fiscal policy, as a core state power over which Germany wants to retain a significant measure of control, given its centrality to the country's collective identity and potential to impose costs on the population.[29] They argue that Germany consistently favors regulation of national capacities over the creation of capacity at the EU level, except in situations of 'existential crises', during which 'Germany supports the build-up of state-like capacities on the supranational level, while insisting on intergovernmental control and/or their temporal nature.'[30]

This instrumentalist approach to regional cooperation on issues of asylum law and policy, moreover, has been equally reflected in the positions taken by political parties and by the German public.[31] Concretely, German voters have tended to favor greater regional cooperation when the number of asylum applications received by Germany is high, with an EU-level asylum response serving as a means of 'ensuring that Germany does not have to bear the "burden" alone.'[32] When applications are low, the public has generally favored national control of asylum.[33] Overall, both German politicians and voters have historically been in favor of EU cooperation on asylum when it tends to restrict the number of asylum-seekers on German territory.[34]

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[28] Ibid., 157
[29] Freudlsperger and Jachtenfuchs, 'A member state like any other? Germany and the European integration of core state powers', 127-28
[30] Ibid., 117-118
[31] Ibid., 117 (noting that 'there exists no major gap between state elites and political parties or public opinion on German preferences'); Zaun and Ripoll Servent, 'One step forward, two steps back: the ambiguous role of Germany in EU Asylum policies', 161 (explaining that 'taking an instrumental approach to European integration in asylum policies is not characteristic only of elites' and that 'the German public tends to favour national policymaking').
[32] Zaun and Ripoll Servent, 'One step forward, two steps back: the ambiguous role of Germany in EU Asylum policies', 165
[33] Ibid., 161
[34] Ibid., 161; Freudlsperger and Jachtenfuchs, 'A member state like any other? Germany and the European integration of core state powers', 124

1.3 ‘Uploading’ German legislation to the EU

Germany has, moreover, generally sought to upload its own asylum legislation and policies to the EU level.[35] Doing so was seen as a way to avoid implementation costs by ensuring that the changes required for Germany to align its national legislation with the CEAS would be limited.[36] As one interviewee observed, Germany’s size and influence within the EU allowed it to largely succeed in this, noting that: ‘because of the political power on the European level that Germany had, they were always able to have their system or at least many parts of their system being brought to the European level.’[37]

At the same time, however, Germany did not always recognize areas where its national standards were not in conformity with the CEAS – it was assumed that efforts to ensure that the CEAS mirrored German law had been successful. An interviewee explained that there existed a ‘conviction’ that ‘basically the CEAS has developed from German asylum law so it should not be different.’[38] Practically, this also meant that caseworkers within the German asylum system focused exclusively on German asylum law: there was no need to refer to EU legislation, given that it was assumed to be in alignment with German asylum law.[39] When a decision came from the Court of Justice for the European Union finding otherwise, both legislators and case workers exhibited some level of surprise.[40]

1.4 Raising standards as part of a measured approach to asylum

In line with the logic above, Germany has also seen the CEAS as an opportunity to exert control over asylum procedures in other EU member states. As one interviewee explained, for Germany, the point of greater integration was to raise standards across the region: ‘the goal

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[35] *See* Zaun and Ripoll Servent, 'One step forward, two steps back: the ambiguous role of Germany in EU Asylum policies', 159, 163; Freudlsperger and Jachtenfuchs, 'A member state like any other? Germany and the European integration of core state powers', 125
[36] Zaun and Ripoll Servent, 'One step forward, two steps back: the ambiguous role of Germany in EU Asylum policies', 159
[37] Interview 2, 30 June 2022, NGO staff
[38] Interview 3, 3 August 2022, former UN staff/academic
[39] Interview 4, 11 August 2022, former regional government staff/academic
[40] Interviews 3 and 4 (providing the example of the CEAS requiring that asylum seekers be kept separate from prisoners)

[was] to have every European member state to have the same good standards and asylum procedure and government accommodation standards.'[41] This objective may be viewed in two ways: on the one hand, raising standards for reception and asylum procedures helps to ensure that asylum seekers meet with systems that are fair and comply with international law across the region, which is a positive outcome in itself in terms of adherence to international obligations and upholding human rights. At the same time, consistency also ensures that Germany is not an outlier, and that there are no impediments to returning asylum seekers to the first country reached within the EU, consistent with the Dublin regulation.[42]

It is important, then, to observe that Germany's approach to the CEAS was largely focused on securing the most advantageous outcome for Germany. While this may often have taken the form of supporting and bringing other countries toward higher, more uniform regional standards, this was not stemming from a conviction, like Sweden's, that this was an independent goal or good in the regional context, but rather in consideration of the positive impact that high standards would have on the number of asylum seekers received in Germany (a perspective that emerged in Sweden after the refugee crisis as well). With similar standards across the region, asylum seekers would not be motivated to seek out Germany to secure particular benefits, and Germany would be able to apply Dublin to return asylum seekers who had passed through another EU member state to that country for processing.

A pragmatic orientation

In sum, Germany's approach to asylum regulation both domestically and at the regional level was fundamentally pragmatic prior to 2015. While there were strong elements of principle, particularly in Germany's provision for a right to asylum in its Basic Law, these were eroded over time as the number of asylum applications grew and political considerations became more prominent as a result. Germany often seemed to take an instrumentalist

[41] Interview 1, 2 June 2022, former NGO staff/academic

[42] Council of the European Union, *Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), OJ L 180,* 29 June 2013, p. 31–59, https://www.refworld.org/legal/reglegislation/council/2013/en/14874

approach to asylum law and policy, seeking measures both domestically and at EU level that would serve to ensure that Germany did not receive a disproportionate share of asylum applications. This aim was, nonetheless, largely consistent with support for the CEAS, though Germany's support for regional structures often took the form of seeking to have other countries adopt similar asylum legislation to its own, a goal in which it largely succeeded. Leading into the crisis in 2015, Germany had consistently resisted suggestions to create supranational authorities or mechanisms with the ability to limit national autonomy on issues around asylum, preferring instead that regional coordination take the form of intergovernmental regulation of national systems. From a collective action perspective, this position served to foreclose one of the key modes by which collective action could be monitored and consequences to defection could be ensured, with states instead retaining significant autonomy to determine how to contribute to regional efforts.

2 The refugee crisis in Germany

The 2015 refugee crisis did not, in fact, begin in 2015 in Germany.[43] Similar to the pattern observed in the early 1990s, the number of asylum applications began growing earlier, from 45,740 in 2011 to 64,540 in 2012, 109,580 in 2013 and 173,070 in 2014 – a nearly four-fold increase in four years.[44] This shift was, moreover, part of a 47% increase in applications across Europe between 2013 and 2014, fueled in part by increasing arrivals of refugees from Syria.[45] Germany received nearly one-third of the total applications lodged in EU member states in 2014, though this represented a smaller share per capita than arrivals to Sweden, Hungary, Austria, Malta or Denmark.[46]

Over time, as described below, the number of arrivals became less manageable. At the same time, however, other EU member states were confronting challenges, and Germany saw itself as well-positioned to help. Germany's enthusiastic reception of asylum seekers in autumn

[43] Interviews 2, 4
[44] UNHCR, *Asylum Trends 2014: Levels and Trends in Industrialized Countries*, 2015, 20
[45] Ibid., 2, 3
[46] Eurostat, *Asylum in the EU: The number of asylum applicants in the EU jumped to more than 625000 in 2014, 20% were Syrians*

2015 was at once unprecedented and short-lived, with 'we can do this' swiftly giving way to anxiety regarding continuing arrivals. As described in the sections that follow, the crisis became central to media narratives and public debate, with political divisions emerging that continue to give shape to German politics a decade later. It also illustrated, as in Sweden, how quickly the cost-benefit analysis related to being a provider of refugee protection can change, altering state-level calculations related to contributing to collective efforts.

2.1 Growing pressure but limited attention on asylum

This increase in arrival rates in the years before the crisis resulted in significant challenges to the functioning of the German asylum system, though these were not part of the public dialogue about asylum prior to 2015.[47] As one interviewee explained,

> Germany was always thought to have a proper asylum system, a working asylum system…if you really have a look into it then you can really question whether it was a proper functioning system…from the legal content I'd say it was a proper system but from the practical side there were many difficulties.[48]

Another interviewee elaborated on the significant delays in processing times for asylum applications, noting that BAMF saw that the agency was not able to keep pace with the asylum applications being lodged but that 'it also took them quite some time to get the ear of the government, of Parliament…'[49] Some legislative changes reflective of the increased burden on the German asylum system did take place in 2014, however, including designation of Bosnia and Herzegovina, Serbia, and the Former Yugoslavian Republic of Macedonia as safe countries of origin, as well as reform of zoning laws to allow municipal authorities more flexibility in expanding accommodation for asylum seekers.[50] Notwithstanding these measures, the increased numbers and resulting backlog of applications remained more an administrative than a political problem for as long as awareness of the problem remained largely confined to the circles of case workers and experts.

[47] Interviews 2, 4
[48] Interview 2, 30 June 2022, NGO staff
[49] Interview 4, 11 August 2022, former regional government staff/academic
[50] BAMF and European Migration Network, *Migration, Integration, Asylum: Political Developments in Germany 2014*, 2015, 49-50

With asylum not really on the political or public agenda, interest in the CEAS prior to 2015 was limited. The Dublin Regulation meant that the EU member states in the south and east bore primary responsibility for asylum-seekers arriving to the region, and one interviewee explained that 'there was no feeling of solidarity with member states in the south' prior to the crisis.[51] Moreover, while some sections of the government, including the Commissioner for Integration of Refugees, were attentive to the protective standards contained in the CEAS, others remained very focused on the restrictive aspects of the regional legislation.[52] As one interviewee explained, the human rights protections embedded in the Dublin Regulation, which prohibit transfer of an asylum applicant to a member state in which there are systemic flaws in the asylum procedure or reception conditions,[53] were seen by some elements within the government as 'a hindrance to effective migration management.'[54] The greater solidarity that Germany would call for in 2015 was not only absent from the political dialogue one year prior, but in fact antithetical to Germany's previous focus on 'managing' flows of asylum seekers and effectively utilizing the 'take back' provisions of the Dublin Convention.

Ultimately, 2015 represented a continuation of a trend of increasing arrivals of asylum seekers to Germany that had started much earlier. While the further spike in numbers certainly contributed, the visibility of the issue in the public sphere, not only in Germany but across the region, arguably had a greater role than sheer numbers in shaping the country's reaction to the perceived crisis. Asylum would become a political and a politicized topic: while the initial reaction of the German public was positive, as described further below, maintaining this positive orientation to the reception of asylum seekers would prove challenging. The issue salience of asylum brought scrutiny, and with it, concern regarding related issues, from border

[51] Interview 2, 30 June 2022, NGO staff
[52] Interview 3, 3 August 2022, former UN staff/academic
[53] Council of the European Union, *Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), OJ L 180,* 29 June 2013, p. 31–59, https://www.refworld.org/legal/reglegislation/council/2013/en/14874, Art 3(2)
[54] Interview 3, 3 August 2022, former UN staff/ academic

security to family reunification to integration. Once raised, these issues would remain in the spotlight, as political debates persisted even after arrival rates dropped.

2.2 A crisis in focus

With arrivals already steadily increasing in spring 2015, on May 7th, the Federal Office for Migration and Refugees (BAMF) estimated that Germany would receive more than 450,000 asylum seekers in the course of the year.[55] Just three months later, this figure was raised to 800,000, or more than four times the prior year's total number of asylum applications.[56] On August 21, facing this steep increase and the prospect of long wait times to process asylum applications, BAMF took the decision to suspend application of the Dublin Regulation to Syrian nationals, instead opting to process these claims in Germany, with a view to expediting decision making.[57] Four days later, a BAMF official, perhaps inadvertently, seemed to announce this decision as policy when he tweeted that BAMF was 'at present largely no longer enforcing Dublin procedures for Syrian citizens.'[58] Word rapidly spread among Syrian refugees along the Western Balkans route, culminating in the congregation of a large number of asylum seekers at the train station in Budapest, determined to continue to Germany.[59]

Shortly thereafter, as numbers continued to increase, Germany seemed to reaffirm its commitment to contributing to refugee protection in the region. Angela Merkel's August 31 statement 'we can do this' was both statement of fact and a rallying cry, linked to what she called a 'national duty' to provide protection to refugees.[60] As the number of refugees in Budapest increased, however, there was a need to translate this idea into practice. Growing frustrated, with trains halted, refugees began walking toward the Austrian border on September 4th.[61]

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[55] Der Spiegel Staff, 'Two Weeks in September: The Makings of Merkel's Decision to Accept Refugees'
[56] Ibid.
[57] Krishnadev Calamur, 'The Tweet That Made a Crisis Worse' *The Atlantic* (19 September 2015) <https://www.theatlantic.com/international/archive/2015/09/the-tweet-that-made-a-crisis-worse/626535/>
[58] Ibid.
[59] Janne Grote, *The Changing Influx of Asylum Seekers in 2014-2016: Responses in Germany*, 2018, 22
[60] Dockery, 'Germany and refugees: A chronology'
[61] Der Spiegel Staff, 'Two Weeks in September: The Makings of Merkel's Decision to Accept Refugees'

At this point, Germany faced a choice: close its border, as the head of the Federal Police advised, or allow the refugees to enter.[62] In September, closing the border would have been at odds with popular opinion: Germany's historic orientation to protection of victims of political persecution loomed large in the national consciousness in the face of this challenge, driving an upsurge in public support for asylum seekers arriving to the country.[63] As one interviewee explained, Merkel 'has always been a person really looking into what's happening within society and she could see that society was changing into welcoming refugees.'[64] Her subsequent decision to support movement of the refugees in Budapest toward Germany on September 4th and 5th, arguably, followed public opinion as much as it rallied it.[65]

Equally important, however, was what came next: after the initial decision to accept the group stranded in Budapest, Germany decided on 12 September to continue to admit asylum seekers arriving from Austria to its territory, notwithstanding the reintroduction of border controls with Austria on 13 September.[66] As explained in a retrospective analysis in Der Spiegel,

> It wasn't Merkel's initial decision to take in the Budapest refugees that decided the way things went, even though today it's the decision that overshadows everything else. In truth, it was the second, the one to not completely seal off the country after a week, that did it.[67]

In other words, Germany could have accepted the refugees arriving from Budapest as a one-off act of solidarity with Hungary, subsequently imposing border controls to prevent the continued arrival of asylum seekers. It opted not to do so, however, and instead confirmed its decision to accept arrivals, though its own internal legal analysis indicated that it would have been legally possible to refuse to admit asylum seekers arriving to its border.[68]

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[62] Ibid.
[63] Dockery, 'Germany and refugees: A chronology'
[64] Interview 2, 30 June 2022, NGO staff
[65] Ibid. It has been suggested that Merkel may have taken the decision to accept the refugees in Budapest after the buses had already been dispatched to the Austrian border, her hand effectively forced by Hungary's unilateral action. Regardless, however, Germany's borders stayed open, both to the initial arrivals and to those who arrived in the weeks that followed. Der Spiegel Staff, 'Two Weeks in September: The Makings of Merkel's Decision to Accept Refugees'
[66] Elspeth Guild, 'What is happening to the Schengen borders?'Der Spiegel Staff, 'Two Weeks in September: The Makings of Merkel's Decision to Accept Refugees'
[67] Der Spiegel Staff, 'Two Weeks in September: The Makings of Merkel's Decision to Accept Refugees'
[68] Ibid.

This decision cannot be meaningfully examined without also considering its converse: as some commentators have observed, strict implementation of border controls in contravention of the Schengen Agreement could have posed a threat to the EU internal market.[69] One interviewee elaborated on this point, noting

> We need Schengen to export our goods and if we're not careful, Schengen will be questioned, Schengen won't be implemented at all and German businesses will suffer…that can also explain, at least in part, the German position, this will to preserve the CEAS because it's so important for Schengen.[70]

This point circles back to the initial argument for developing a common approach to asylum and migration across the EU: without internal border controls, EU member states would not have the possibility to implement unilateral approaches to asylum or migration. Reinstating border controls for this purpose was seen as undermining the CEAS and, by extension, Schengen.

There was an additional pragmatic angle to Germany's acceptance of refugees, though this does not seem to have been very prominent in the public discourse and was not emphasized by any of the experts interviewed. Germany's population was shrinking: contemporaneous models predicted that Germany's 83 million citizens could decrease by 13.2 million by 2060.[71] As the refugee crisis began, Germany also had a low unemployment rate and employers were struggling to find workers in many skilled professions – a gap that Syrian refugees, in particular, were believed to be able to address.[72] Accordingly, the addition of refugees to the working age population in Germany had the potential to yield concrete economic benefits, not immediately but over time, by addressing this growing demographic shortfall. While the extent to which these economic considerations may have figured into Germany's decision making in 2015 remains unclear, it can be argued that the decision to admit asylum seekers at this moment in time was both popular and potentially beneficial to Germany.

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[69] Constantin Hruschka and Miriam Schader, *We Managed - And We Changed in the Process*, 2020, 14
[70] Interview 7, 26 August 2022, immigration attorney/ academic. It should be noted, however, that Germany has more recently opted for this course of action, having introduced border controls at all of its borders in September 2024.
[71] Anthony Faiola, 'The refugee crisis could actually be a boon for Germany' *The Washington Post* (10 September 2015)
[72] Ibid.

2.3 A fleeting 'wilkommenskultur'

As noted above, it was also significant that the public was strongly in favor of accepting asylum seekers in Germany: in a September 2015 survey, 96% of respondents agreed with the statement that 'it was right to receive war refugees.'[73] This support extended to significant numbers of arrivals, moreover, with 37% of respondents supporting admission of asylum seekers in line with the current (high) rate of arrivals, while 22% indicated support for an *increase* in the arrival rate.[74] As one interviewee explained, 'there was for the first time after many years a positive reference to accommodating refugees, and taking in refugees in Germany.'[75] Press coverage was similarly focused on the positive aspects of these events: another interviewee explained that 'there was a lot of positive coverage in the beginning and images of people with teddy bears at train stations and the signs…a little bit like this was an opportunity for Germany to do something good.'[76]

Public support for refugees went beyond voicing approval, moreover – German society was also very active in terms of its participation in the response, with one study indicating that as many as one in ten citizens provided support to refugees in 2015.[77] This support spanned a range of initiatives from emergency/urgent assistance upon arrival with shelter, food, and clothes to long-term integration initiatives, such as language and literacy classes, many of which were initiated and managed at the local level.[78] In an interview, a former NGO staff who now works in academia described this as 'a big moment' to have German society indicating 'refugees don't need to stay in Hungary, come to Germany, and we are acting in a solidarity way.'[79]

Despite these initially positive reactions, the 'refugees welcome' period was short in duration – one interviewee explained that the positive reception of asylum seekers in Germany

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[73] Schramm, 'Solidarity – from the Heart or by Force? The Failed German Leadership in the EU's Refugee and Migrant Crisis', 4
[74] Ibid.
[75] Interview 1, 2 June 2022, former NGO staff/academic
[76] Interview 8, 24 October 2022, NGO staff; *see also* Interview 1, 2 June 2022, former NGO staff/academic
[77] BAMF and European Migration Network, *Migration, Integration, Asylum: Political Developments in Germany 2015*, 2016, 20 (citing a study commissioned by the Evangelical Church in Germany)
[78] Ibid., 19
[79] Interview 1, 2 June 2022, former NGO staff/academic

during 2015 has come to be described as the 'summer of migration,' referencing the brief window during which German society held a clearly favorable attitude toward the arrival of asylum seekers.[80] Some interviewees saw press coverage, which began favorably, anticipating or driving a negative shift in public opinion as high rates of arrival continued.[81] One interviewee explained this shift by the media as being motivated by the fact that the positive stories were 'not really any longer interesting,' as a result of which they 'tried to find negative cases of reception.'[82] He continued,

> We have one million [arrivals] and then tabloid papers brought up that every refugee has the right for family reunification and Syrians all have like eight to ten family members, meaning six or eight million would come. And this was really….how the debate started.[83]

By October 2015, 'opinion polls showed for the first time that a majority of Germans were scared that "so many refugees were coming to Germany."'[84] Alongside this concern, xenophobic sentiments became more prominent in the public discourse and crimes against asylum shelters quadrupled in 2015 compared to 2014.[85]

Events in the fall and winter of 2015 further contributed to the shift in public opinion. One interviewee cited the press coverage of both the November 2015 terrorist attacks in Paris at the stadium, restaurants and Bataclan music hall and the sexual assaults carried out on New Year's Eve 2015 in Cologne (despite not ultimately being linked to asylum seekers) as influencing the tenor of press coverage and driving the public dialogue in the direction of security concerns.[86] Following Cologne, another interviewee noted, 'government also wanted to respond to these changes within media, within society.'[87]

Notwithstanding the shift in support for receiving asylum seekers in Germany, it is notable that throughout the crisis, public opinion remained strongly in favor of a coordinated

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[80] Interview 1, 2 June 2022, former NGO staff/academic
[81] Interviews 2, 8
[82] Interview 2, 30 June 2022, NGO staff
[83] Ibid.
[84] Reiners and Tekin, 'Taking Refuge in Leadership? Facilitators and Constraints of Germany's Influence in EU Migration Policy and EU-Turkey Affairs during the Refugee Crisis (2015–2016)', 123
[85] BAMF and European Migration Network, *Migration, Integration, Asylum: Political Developments in Germany 2015*, 20
[86] Interview 8, 24 October 2022, NGO staff
[87] Interview 2, 30 June 2022, NGO staff

EU-level response.[88] In September 2015, 92% of respondents indicated support for 'fixed and mandatory quotas for all EU member states,'[89] a finding very much in line with the tendency of Germany to support a common EU approach in times of crisis, as described above. Throughout the crisis and in the years that followed, however, support for a common EU migration policy remained above 80%.[90] As one interviewee explained, the public perspective was that 'Germany is doing something about it, but a little bit of frustration with the rest of Europe – why aren't they doing something about it?'[91] Importantly, however, and similarly to the situation in Sweden, there was not a tendency to seek to stop arrivals to the region, at least initially, but rather a call for a more effective means of implementing collective action to provide refugee protection.

2.4 Increasing politicization and waning public support

With the issue of asylum firmly on the political agenda by fall 2015, the positions taken by Germany's political parties came into sharper relief. The Minister of Interior, who was from the CSU, publicly distanced himself from Merkel's September decision, claiming that it was unconstitutional and inconsistent with the rule of law to fail to enforce border controls.[92] He also marshaled arguments based on the CEAS, claiming that the Dublin Regulation required EU member states to return asylum seekers to the first EU member state they reached for adjudication of their asylum claims[93] (despite the fact that the text of Dublin provides that member states may opt to examine the asylum claim rather than pursue transfer). Gradually, CDU voters who did not support Merkel's stance on asylum shifted to other parties, including

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[88] *See Schramm, 'Solidarity – from the Heart or by Force? The Failed German Leadership in the EU's Refugee and Migrant Crisis'*, 4
[89] Ibid.
[90] Zaun and Ripoll Servent, 'One step forward, two steps back: the ambiguous role of Germany in EU Asylum policies', 162-63
[91] Interview 8, 24 October 2022, NGO staff
[92] Interviews 3, 4
[93] Interview 4, 11 August 2022, former regional government staff/academic (noting that this was 'probably the first and only time in history that Bavaria was, yes, asking to observe the standards of EU legislation')

Alternative for Germany (AfD).[94] The AfD had already begun gaining support in 2014, when they won seats in Parliament for the first time, but following the crisis that support further increased, reaching 15%.[95]

Experts differ as to whether public opinion on migration meaningfully changed during the 2015 crisis. Mader and Shoen argue strongly that 'immigration touches upon deep-seated values and identities and evokes emotions that make it hard for political parties to influence voters with respect to this issue.'[96] Instead, they suggest, 'voters responded to the flow of events by changing parties in line with their attitudes towards immigration.'[97] According to their hypothesis,

> Immigration attitudes remained relatively stable during the crisis and were not influenced by party cues...the refugee crisis focused attention on the openness dimension of political competition and may have triggered an enduring shift in its salience and in the alignment of parties and voters.[98]

One interviewee took issue with this argument, explaining that there was a shift in public opinion, though not so much from supporting a liberal asylum policy to opposing it, but rather from holding moderate views on asylum to becoming more strongly in favor or against receiving additional asylum seekers.[99] During the crisis, from this perspective, 'the silent majority shrunk at the expense of either side, pro and contra, becoming more vocal, becoming more fundamentalist.'[100]

One might argue that these two camps can be reconciled, to some extent, with both seeing an impact on voting preferences triggered by the increased prominence of asylum in the national political sphere. Mader and Shoen would attribute this to prioritization of asylum as a voting issue rather than changing opinions, while the view expressed by the expert interviewee would say that issue salience drove voters toward stronger, more settled opinions. Whether or

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[94] Matthias Mader and Harald Schoen, 'The European refugee crisis, party competition, and voters' responses in Germany' (2019) 42 West European Politics 67, 69

[95] Reiners and Tekin, 'Taking Refuge in Leadership? Facilitators and Constraints of Germany's Influence in EU Migration Policy and EU-Turkey Affairs during the Refugee Crisis (2015–2016)', 123

[96] Mader and Schoen, 'The European refugee crisis, party competition, and voters' responses in Germany', 68

[97] Ibid., 83

[98] Ibid., 69

[99] Interview 9, 30 October 2022, UN staff

[100] Ibid.

not underlying preferences regarding asylum and migration changed, however, voters' reading of the current situation and how it should best be handled could change, as seemed to be indicated by the polling that followed in 2016.

A poll conducted in June 2016 stands in stark contrast to the 2015 attitudes toward asylum and migration set out above. By this time, a clear majority of voters across most of the major parties indicated that they 'did not believe Germany should shoulder these refugees, or were uncertain.'[101] As compared to nine months before, when nearly 60% of all respondents felt that Germany could absorb the current number of refugees arriving or even more, only among the Greens did a similar level of support continue (with 55.6% indicating that Germany could absorb the number of asylum seekers arriving).[102] But this shift had started much earlier: already by the end of September 2015, polls had begun to indicate a change, emerging more strongly in the east of the country, in support for the arrival of refugees to Germany.[103] At that stage, 51% of respondents indicated that they were 'worried that so many refugees are coming to Germany.'[104]

In some sense, these results may represent the intersection of beliefs about what Germany could or should do and the position, evident from the beginning of the crisis, that the rest of the EU should be doing more. Over time, as had also occurred in Sweden, support for continued high rates of arrival may have been impacted by the sense that Germany had done enough and that other EU member states should contribute. As one interviewee described the political climate, there was a rapid shift from 'refugees welcome' to 'we did take so many refugees, and we want this to stop.'[105] The sense that the arrival of refugees to Germany constituted a crisis emerged, and proved quite durable as a retrospective frame, despite the much more positive reception of refugees in real time.[106] However, unlike in Sweden, there

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[101] Zaun and Ripoll Servent, 'One step forward, two steps back: the ambiguous role of Germany in EU Asylum policies', 161-62 (noting that 60.1% of CDU/CSU voters, 58.1% of SPD, 61.3% of FDP, and 56.3% of *Die Linke* voters held this view)

[102] Ibid. It should be noted that this poll came after the EU-Turkey statement, as detailed further below, and is meant to indicate where public opinion on this issue settled.

[103] 'Poll notes rise in fear of refugees' *DW* (2 October 2015) <https://www.dw.com/en/german-poll-notes-rise-in-fears-over-refugee-influx/a-18757023>

[104] Ibid. It should be noted that this included 48% of respondents in the west and 59% of respondents in the east.

[105] Interview 1, 2 June 2022, former NGO staff/academic

[106] Interview 2, 30 June 2022, NGO staff

were not clear references to system overwhelm or capacities being exceeded: while there are different ways to interpret the polling data, one argument could be that the change in attitude was less about what Germany could do and more about what it should do, a determination that also included an assessment of the efforts of neighboring countries. As further elaborated below, however, the lack of engagement by other EU member states meant that the search for solutions went beyond EU borders, seeking to find ways to stem the flow of asylum seekers to the bloc as a whole.

2.5 Germany's response to the crisis

As public opinion turned, Merkel's rhetoric changed in parallel to focus on the need for solutions at the regional level.[107] One interviewee suggested that German politicians 'lost their courage after a while because of public opinion, because of the media, and they had to do something.'[108] Regional solutions proved elusive, however, as explained in greater detail below. One interviewee explained that Merkel 'learned very fast that her idea that there would be some kind of solidarity in Europe so that other countries would follow, that this was a political, let's say, misunderstanding.'[109] With regional progress stalled, Germany was under pressure to show that it was taking action at the national level.

A rapid succession of legislative changes in Germany responded to the 441,900 asylum applications received in 2015,[110] with the first coming roughly six weeks after Merkel's September decision. In October 2015, three new countries were added to the list of safe countries of origin: Albania, Kosovo, and Montenegro; other provisions of the Act on the Acceleration of Asylum Procedures aimed to expedite processing of asylum claims, reduced cash benefits in favor of in-kind assistance, reformed integration policies, and increased the maximum period for which asylum seekers could be obliged to stay at reception centers

[107] Interview 1, 2 June 2022, former NGO staff/academic
[108] Interview 2, 30 June 2022, NGO staff
[109] Interview 3, 3 August 2022, former UN staff/academic
[110] UNHCR, *Global Trends: Forced Displacement in 2015*, 3

pending a decision in their case from three to six months.[111] A second set of legislative changes was proposed in November 2015 and passed in late January 2016, including, most notably, suspension of family reunification for a period of two years for all recipients of subsidiary protection (seemingly in reaction to the public concern about family reunification serving as the basis for millions of additional arrivals to Germany).[112] The legislation also set out measures intended to facilitate return of people found not to be in need of international protection and added Morocco, Tunisia, and Algeria to the list of safe countries of origin.[113]

At the same time, there was also a push to enhance integration of refugees whose asylum claims had been recognized. To combat concentration of refugee communities in urban areas, a new law obligated refugees to stay in the länder assigned to them when they registered their asylum application in accordance with the 'Konigstein Key', a distribution mechanism based on the number of inhabitants and tax revenues of each federal state.[114] The only exception was for refugees who had a firm offer of employment in another part of the country, with employers also able to hire refugees more easily under the new legislation.[115] Alongside this 'carrot' to encourage employment, there was also a 'stick': government benefits could be reduced for refugees not actively looking for work or participating in integration classes.[116]

These legislative developments were the start of what has been described by Hruschka and Schader as a period of legislative 'hyperactivity,' which in fact continued for several years after peak asylum applications were received in Germany.[117] In short, public concerns about a

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[111] Gesley, 'Germany: Parliament Adopts Legislative Package on Asylum and Refugees'; BAMF and European Migration Network, *Migration, Integration, Asylum: Political Developments in Germany 2015*, 47
[112] BAMF, *Green Light for Second Asylum Package*, 2016; Nicole Sagener, 'Legal experts cast doubt on new German asylum measures' *Euractiv* (9 February 2016) <https://www.euractiv.com/section/justice-home-affairs/news/legal-experts-cast-doubt-on-new-german-asylum-measures/>
[113] BAMF, *Green Light for Second Asylum Package*
[114] *See* Anthony Faiola and Stephanie Kirchner, 'German government leaders back plan to push migrants to integrate' The Washington Post (25 May 2016) <https://www.washingtonpost.com/world/europe/germany-nears-new-plans-on-migrant-integration-more-help-but-tougher-rules/2016/05/25/2be5d702-21b6-11e6-b944-52f7b1793dae_story.html>; BAMF and European Migration Network, *Migration, Integration, Asylum: Political Developments in Germany 2015*, 45
[115] Faiola and Kirchner, 'German government leaders back plan to push migrants to integrate'
[116] Ibid.
[117] Eva Volker, 'A hyperactive legislator' <https://www.mpg.de/15273107/hyperactive-legislative-activity?c=11863336>, 1-2 (describing a 'hyperactive legislation' phase from 2015-2020 during which more than 40 amendments to laws related to asylum and residency were passed by the German parliament)

lack of control over the number of people arriving to Germany, as described above, led to pressure for legislators to demonstrate that they could manage the situation through amendments to the legislation in place at the national level.[118] As will be further explored below, most of the legislative amendments during this period did not meaningfully address the challenges posed by an increased rate of arrivals, but instead aimed to send a message about government efficacy and responsiveness to voters' concerns.

2.6 The search for solidarity

As previously observed , it is not clear that Germany intended to set a precedent during the 'summer of migration' by suspending transfer of Syrians to the country of first entry in accordance with the Dublin Regulation; nonetheless this initiative, followed by Germany's decision to receive the asylum seekers stranded in Hungary, was seen by some as moving the region toward a common resolution of the perceived crisis.[119] Yet Germany failed to convince other countries in the region to follow its example: as one commentator argued, 'German policy-makers called for responsibility, solidarity, and greater burden-sharing, whereas policy-makers from other countries regarded the "German" approach as politically wrong and hence favored national measures to deter migrants from coming to Europe or from staying in their respective country.'[120] Regional solidarity remained an elusive goal, despite Germany's efforts.

One reason for this, suggested above, is that the political dialogue in Germany was more focused on the refugee crisis, as well as being more receptive to accepting refugees, than in other EU member states. As one interviewee explained, in 2015, the political salience of asylum in Germany changed dramatically: 'within the German government, the refugee policy became the number one policy field.'[121] While experts point out that Germany was already facing an

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[118] *See* Hruschka and Rohmann, 'Excluded by crisis management? Legislative hyperactivity in post-2015 Germany'
[119] *See* Reiners and Tekin, 'Taking Refuge in Leadership? Facilitators and Constraints of Germany's Influence in EU Migration Policy and EU-Turkey Affairs during the Refugee Crisis (2015–2016)', 115
[120] Schramm, 'Solidarity – from the Heart or by Force? The Failed German Leadership in the EU's Refugee and Migrant Crisis', 11
[121] Interview 1, 2 June 2022, former NGO staff/academic

asylum crisis prior to 2015, it certainly was not at the center of the public dialogue in the same way previously.

Germany's experience was not representative of a similar shift in terms of the centrality of asylum and migration issues across the EU, however: because the distribution of asylum applications was uneven across EU member states, it was very challenging to secure support for a regional solution to the issue.[122] Countries with low arrival rates had little incentive to help 'solve' the problem by taking on additional applications they were not required to receive under the CEAS in the name of solidarity. Worse still, some leaders (particularly in the Visegrad states) blamed Germany for creating a 'pull factor' by its establishment of an 'open door' policy for asylum seekers.[123] As Schramm explains, there was a perception by some that Germany's leadership on asylum was an attempt 'to "Europeanise" an asymmetric phenomenon which by many other EU member states was seen first and foremost as a German problem.'[124] One interviewee suggested that this perception extended to the national dialogue, where '[t]his was very much perceived by the public as a decision taken by Germany, with Germany now required to deal with the consequences.'[125]

On top of this, many countries saw Germany's call for solidarity as lacking in credibility – after all, Germany had been far less concerned with solidarity previously, when it was the southern EU member states on the frontline.[126] As one interviewee observed, 'migration and asylum issues were not really relevant in society in the political sphere before…then in '15, '16 it really changed because we hoped for solidarity from other member states.'[127] Another interviewee noted that Germany had, in fact, taken more than a strictly proportional share of refugees previously, but explained, 'the distribution key was not a discussion in Germany before 2015…the German government didn't take the initiative to change the legal system - it was only

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[122] Schramm, 'Solidarity – from the Heart or by Force? The Failed German Leadership in the EU's Refugee and Migrant Crisis', 4
[123] Ibid., 6, 11; Reiners and Tekin, 'Taking Refuge in Leadership? Facilitators and Constraints of Germany's Influence in EU Migration Policy and EU-Turkey Affairs during the Refugee Crisis (2015–2016)', 124
[124] Schramm, 'Solidarity – from the Heart or by Force? The Failed German Leadership in the EU's Refugee and Migrant Crisis', 11
[125] Interview 9, 30 October 2022, UN staff
[126] *See* Zaun and Ripoll Servent, 'One step forward, two steps back: the ambiguous role of Germany in EU Asylum policies', 157; Interview 2, 30 June 2022, NGO staff
[127] Interview 2, 30 June 2022, NGO staff

then, later, after the experience of 2015.'[128] This rapid shift in Germany's stance did not go unnoticed: Zaun and Servent argue that Germany's inconsistent approach over time undercut its attempts to lead the EU toward more meaningful cooperation in the context of the 2015 crisis.[129] Schramm reached the same conclusion, arguing that Germany's historical lack of support for reforming the CEAS was detrimental to its attempts to find collective solutions through legislative changes in 2015.[130]

At the same time, there were no serious objections in the region to Germany's leading role in accepting refugees. As one interviewee suggested, 'the other EU member states were quite happy that the solution came from Germany…[they] were very happy about not having to bear it, the political cost of explaining to their own population why we had to take these numbers of refugees and not apply the Dublin Regulation.'[131] Contrary to the national political discussion inside Germany, there was no sense across the region that Germany was undermining the CEAS by accepting the applications of asylum seekers rather than applying the Dublin Regulation to send them back to the country of first entry, but neither was there any real momentum behind reforming the CEAS.[132] In fact, Germany's willingness to lead by example may have, ironically, undercut its calls for responsibility-sharing. As Reiners and Tekin observed, 'Germany's structural resources could also be detrimental to it, as other member states may use the opportunity to hide and delegate to Germany, as the biggest country and economy in Europe.'[133] In practice, this meant that front-line EU member states generally continued to allow refugees to enter their territory, believing that the majority would ultimately seek asylum in Germany or perhaps another member state where they had family or community ties – free-riding, effectively, on the efforts of Germany and other 'destination' countries.

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[128] Interview 1, 2 June 2022, former NGO staff/academic
[129] Zaun and Ripoll Servent, 'One step forward, two steps back: the ambiguous role of Germany in EU Asylum policies', 157
[130] Schramm, 'Solidarity – from the Heart or by Force? The Failed German Leadership in the EU's Refugee and Migrant Crisis', 5
[131] Interview 7, 26 August 2022, immigration attorney/academic
[132] Ibid.
[133] Reiners and Tekin, 'Taking Refuge in Leadership? Facilitators and Constraints of Germany's Influence in EU Migration Policy and EU-Turkey Affairs during the Refugee Crisis (2015–2016)', 126 (noting that Eurostat indicates that Germany accepted 37% of the total applications across the EU in 2015 and 59% in 2016)

Faced with a lack of consensus around potential responses to the refugee crisis, in September 2015, the EC adopted two separate decisions for the relocation of 40,000 and 120,000 refugees from Greece and Italy to other EU member states. The second of these measures initially included refugees arriving to Hungary as well, but Hungary indicated prior to the passage of the decision that it did not wish to be included.[134] The refugee quota assigned to each EU member state was to be determined based on a 'redistribution key' arrived at by weighing the state's population, GDP, asylum applicants per one million residents from 2010-2014, and unemployment rate.[135] These factors, taken together, were seen as indicative of the state's absorption and integration capacity, as well as the pre-existing burden posed by recent asylum applications.[136] Given the lack of agreement regarding the need for a new redistributive mechanism (particularly among the many states within the EU that were well-served by the Dublin regulation), the two decisions were taken by qualified majority voting, with the Czech Republic, Slovakia, Hungary and Romania voting against the scheme.[137] Poland, Hungary, the Czech Republic, and Slovakia would later propose 'flexible solidarity,' which offered options to support the collective EU response through financial or other means, without necessarily accepting relocation of asylum seekers, as their preferred form of responsibility sharing.[138]

While nominally signaling solidarity, it is important to note that the Hotspot Relocation Scheme required front line countries to register and fingerprint arrivals, laying the groundwork for implementation of a more organized system of redistribution.[139] This particularly served Germany's interest in having the option of exercising greater control over the number of people able to access its territory and apply for asylum. As Zaun and Servent note, '[w]hile Germany generally presented its support towards the Relocation Decisions and subsequent debates

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[134] Grote, *The Changing Influx of Asylum Seekers in 2014-2016: Responses in Germany*, 25
[135] Ibid.
[136] Ibid.
[137] Reiners and Tekin, 'Taking Refuge in Leadership? Facilitators and Constraints of Germany's Influence in EU Migration Policy and EU-Turkey Affairs during the Refugee Crisis (2015–2016)', 118
[138] Georgi Gotev, ''Flexible solidarity' becomes new tool in response to refugee crisis' *Euractiv* (19 September 2016) <https://www.euractiv.com/section/justice-home-affairs/news/flexible-solidarity-becomes-new-tool-in-response-to-refugee-crisis/>; Reiners and Tekin, 'Taking Refuge in Leadership? Facilitators and Constraints of Germany's Influence in EU Migration Policy and EU-Turkey Affairs during the Refugee Crisis (2015–2016)', 124
[139] *See* Rosie Scammell and Fotini Rantsiou, 'Hotspot solution deepens refugee crisis' IRIN <https://www.refworld.org/docid/563096664.html>

about a permanent quota system as a means of showing solidarity with the overburdened border countries, the timing suggests that the actual aim was to stop asylum-seekers from self-relocating to Germany.'[140] In effect, even in September 2015, one can argue that Germany was looking toward a more predictable mechanism for distributing asylum applications across the EU, having by then seen first-hand the potential impact of dramatically unequal arrival rates across Member States.

Another incremental solution was adopted following a 'mini-summit' held in late October 2015 to discuss the Western Balkans route, with participation from Austria, Bulgaria, Croatia, Germany, Greece, Hungary, Romania, and Slovenia, as well as Albania, Serbia, and the former Yugoslav Republic of Macedonia, under the leadership of EC President Jean-Claude Juncker.[141] The participant list reflected the states located along the dominant route during the crisis with asylum seekers entering the EU in Greece or Bulgaria, then passing through one or more non-EU member states before reaching their destination – Germany, in most cases. The summit also acknowledged that an EU solution would not necessarily address all coordination gaps: cooperation from non-EU member states was essential as well, given their critical position along the route. Among other conclusions, participants agreed to share information, improve coordination, and enhance border management.[142] Although the meeting explicitly recognized the need for cooperation among states in the region, the focus throughout remained on non-binding forms of interstate cooperation, with states assuming no formal obligations.

Both the Hotspot Relocation Scheme and the Western Balkans 'mini-summit' reflected a piecemeal approach to the crisis. While on some level both initiatives recognized the regional impact of the crisis and the need for corresponding regional solutions, in practice neither forum sought to meaningfully or permanently alter the existing framework for cooperation among EU member states to provide refugee protection – including, importantly, the pressure on front-line states. The Hotspot Relocation Scheme, on its face, imposed some additional responsibilities on EU member states, but the overall number of relocations planned (160,000) was extremely

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[140] Zaun and Ripoll Servent, 'One step forward, two steps back: the ambiguous role of Germany in EU Asylum policies', 164

[141] European Commission, *Meeting on the Western Balkans Migration Route: Leaders Agree on 17-point plan of action* (European Commission 2015)

[142] Ibid.

modest relative to the total number of arrivals, and just a fraction of those took place in the months that followed.[143] As illustrated above, there was no consensus across the EU to develop measures that would allow the bloc to more effectively and equitably address refugee protection as a collective action problem going forward. Nonetheless, the Hotspot Relocation Scheme, at a minimum, acknowledged the need to respond to crises in a collective manner, and can be seen as a first step toward the reform of the CEAS.

2.7 An external solution

Faced with a lack of support from EU member states, Germany quickly pivoted to an external solution driven by 'enhanced cooperation with third countries and a stronger protection of the EU's external borders.'[144] One interviewee suggested that Merkel 'learned very quickly she didn't have much support in the EU to reach this political goal, so she focused on her other political idea that was the EU-Turkey deal that was to stop migration to Greece.'[145] While it was clear that an external solution would not address the significant internal disagreements, pursuing this option promised some respite from continuing high rates of asylum applications and, by extension, potentially more space for the debate about internal reform.[146]

Once again, Germany acted in a somewhat unilateral manner, without meaningful consultation or consensus building at the outset: as one commentator observed, 'the EU's agreement with Turkey was mainly driven by Germany and Chancellor Merkel in particular.'[147] An interviewee noted that the 'proposal for the EU-Turkey deal, it came from Germany and it came as a surprise at the meeting…[t]he dynamic was really a dynamic taken on by Germany.'[148]

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[143] *See* Georgi Gotev, 'Schulz admits mandatory relocation of refugees has failed' *Euractiv* (16 September 2016) <https://www.euractiv.com/section/justice-home-affairs/news/schulz-admits-mandatory-relocation-of-refugees-has-failed/>; Reiners and Tekin, 'Taking Refuge in Leadership? Facilitators and Constraints of Germany's Influence in EU Migration Policy and EU-Turkey Affairs during the Refugee Crisis (2015–2016)', 118
[144] Schramm, 'Solidarity – from the Heart or by Force? The Failed German Leadership in the EU's Refugee and Migrant Crisis', 13
[145] Interview 1, 2 June 2022, former NGO staff/academic
[146] Lehner, 'The EU-Turkey-'deal': Legal Challenges and Pitfalls', 183
[147] Schramm, 'Solidarity – from the Heart or by Force? The Failed German Leadership in the EU's Refugee and Migrant Crisis', 10
[148] Interview 7, 26 August 2022, immigration attorney/academic

In this case, however, Germany's approach was broadly supported by EU member states, who were willing to contribute to the 6 billion euro cost of the agreement in order to slow the arrival of asylum seekers to the EU, once again highlighting the greater willingness among EU member states to contribute financially rather than as a provider of refugee protection.[149] Ultimately, then, Germany did contribute to the resolution of the crisis, albeit not in the way it originally intended.

Adapting solutions

Germany's perspective on the refugee crisis in Europe, then, was seen to evolve over time. From beginning 2015 with little focus on asylum as a political issue, despite increasing numbers of asylum seekers over a period of several years, Germany came to be very focused on finding a humanitarian solution to the 2015 crisis. Leading by example and hoping other EU member states would follow proved not to yield significant results, however: other EU member states were content to allow Germany to carry the weight of its decisions – a situation consistent with the idea, in collective action theory, of the exploitation of the large by the small.[150] With support for continued hosting of refugees falling in Germany almost as quickly as it had risen, however, Germany ultimately stepped outside of the collective action frame to resolve the crisis externally, while continuing to look for ways to strengthen cooperation among EU member states in the mid- to long-term.

3 After the crisis: a continued focus on asylum

In Germany as elsewhere in Europe, the drop in arrivals did not lead to a corresponding drop in attention on asylum matters. Although the circumstances that gave rise to the crisis had been addressed by the EU-Turkey agreement, the focus on asylum, both in the public sphere and in the political debate, continued. In response, changes to Germany's asylum system continued to be proposed, debated, and ultimately implemented, despite the absence of any

[149] Reiners and Tekin, 'Taking Refuge in Leadership? Facilitators and Constraints of Germany's Influence in EU Migration Policy and EU-Turkey Affairs during the Refugee Crisis (2015–2016)', 125
[150] Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups*, 29

clear indication of their necessity. Unsurprisingly, these changes tended to introduce restrictive measures, designed to ensure that Germany was protected against having to bear a disproportionate share of arrivals in case of a renewed influx of asylum seekers. At the same time, however, there were early indications that the political impact of the crisis might be limited in duration.

3.1 Legislative 'hyperactivity'

Commentators have observed that the crisis and post-crisis period in Germany was characterized by a strong legislative response.[151] Beginning in the fall of 2015, legislative amendments were made in rapid succession, a trend which did not slow after the EU-Turkey agreement was reached.[152] As explained in greater detail below, these changes often occurred in an ad hoc manner, without sufficient consideration of how amendments fit into the existing legal framework.[153] More important than the content of the changes, arguably, was the perception that legislators recognized and were responding to the challenges posed by the crisis, reassuring the public that the factors that had led to the sharp increase in asylum applications had been addressed, and that such a situation would not recur.

The legislative response, according to Hruschka and Rohmann, was '[d]riven, in particular, by the number of arrivals, the "over-proportional burden" on Germany…the lack of efficiency and a perceived loss of control'[154] - a dynamic similar to that seen in Sweden. This led the legislature to 'oppose[] the wave of refugees, as portrayed by the media, with a wave of legislation.'[155] Legislative measures targeted asylum procedures, integration, returns, and security related issues.[156] Pressure on the legislature intensified following the events on New Year's Eve 2015 in Cologne, as well as the attack at the Berlin Christmas Market at the end of

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[151] *See* Volker, 'A hyperactive legislator', 1-2
[152] *See* ibid.
[153] Hruschka and Schader, *We Managed - And We Changed in the Process*, 29
[154] Hruschka and Rohmann, 'Excluded by crisis management? Legislative hyperactivity in post-2015 Germany', 2
[155] Hruschka and Schader, *We Managed - And We Changed in the Process*, 25
[156] Ibid.

2016.[157] These two events, in particular, led to legislative amendments aimed at enhancing penalties for asylum seekers failing to provide evidence of their identity and for those committing criminal offenses.[158]

Other legislative changes specifically focused on expediting processing of claims and, tied to this, return procedures for asylum seekers whose claims were denied. In addition to addressing the backlog of claims, more efficient asylum procedures were expected to deter 'unjustified asylum applications,' thereby reducing the overall number of people presenting asylum claims in Germany.[159] One of the most significant and widely debated changes in this regard was that the reception facilities or 'Welcome Centres' located in the states changed to AnkER Centres (or Arrival, Decision, and Municipal Distribution or Return Centres). These centers were characterized by the co-location of federal asylum procedures within state-managed reception centers, with the intent of shortening the process for decision-making and expediting return of asylum seekers who were not recognized as refugees.[160] Practically speaking, the name change was the most significant aspect of this reform, as it served to show that the government was taking action to facilitate more effective return of persons not in need of international protection.[161]

As these changes proceeded, little attention was granted to the possibility of advocacy or change at the regional level; rather, all efforts were focused on reforming German legislation. As one interviewee noted, 'they were going into old fights on how the German asylum policy should look and German asylum legislation, and so the European dimension got lost.'[162] This was perhaps, at least in part, tied to the sense that Germany had been alone in seeking to address the challenges of the refugee crisis. As one interviewee explained, there 'was a series of many legislative changes we had after the summer of 2015 where the whole political atmosphere, perspective, and also the position of Chancellor Merkel changed and they were

[157] Volker, 'A hyperactive legislator', 2;Hruschka and Rohmann, 'Excluded by crisis management? Legislative hyperactivity in post-2015 Germany', 5
[158] Volker, 'A hyperactive legislator'
[159] Hruschka and Rohmann, 'Excluded by crisis management? Legislative hyperactivity in post-2015 Germany', 2
[160] ECRE and AIDA, *The AnkER centres: Implications for asylum procedures, reception and return*, 2019, 4
[161] Interview 6, 12 August 2022, government official
[162] Interview 3, 3 August 2022, former UN staff/academic

thinking, how can we meet the goal that…the situation we have self-inflicted never occur again?'[163]

Beyond avoiding a repeat of the refugee crisis, the legislative changes served to demonstrate the responsiveness and the efficacy of German legislators. In one interview, the legislative amendments were explained as being intended to send a message to the German population that the asylum system was under control:

> All of that was tightened in the process, and tightened with the intent of demonstrating a firm stance, right, of demonstrating that we are mindful that we have to respond to the sentiments in the population, and we have to demonstrate…that the state is back in control. Because part of that narrative, of course, was a loss of control, right, that things happened based on one magnanimous decision that resulted in that perception of loss of control.[164]

This signaling was particularly important as the AfD gained vote share in the legislature.[165] In response, and even after the number of asylum seekers arriving to Germany had fallen precipitously, the CSU shifted right to try to compete with the AfD.[166] This marked a break in the CDU-CSU coalition, as the CDU continued to maintain relatively moderate positions, even as it stepped back from the more liberal positions of 2015.[167] One interviewee noted the interparty dynamic driving the legislative agenda, explaining, 'some of it was in reaction to the fact that the far right of course had entered the parliament, and especially, the Christian Democrats…wanted to set themselves apart from the right wing, and yet, at the same time, there were strong tendencies within the party to reinforce their conservative, somewhat right-leaning values, in order to be a competitor or not be out-competed, I'd say, by the AfD.'[168]

The rapid-fire amendments also sent a message to asylum seekers, demonstrating that Germany was no longer the most welcoming or attractive destination in the EU.[169] Rather, Germany was telling asylum seekers, '[w]e are tough' and '[w]e are a government to be

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[163] Interview 1, 2 June 2022, former NGO staff/academic
[164] Interview 9, 30 October 2022, UN staff
[165] Mader and Schoen, 'The European refugee crisis, party competition, and voters' responses in Germany', 69
[166] Zaun and Ripoll Servent, 'One step forward, two steps back: the ambiguous role of Germany in EU Asylum policies', 162; Interview 10, 31 August 2022, asylum expert/advisor
[167] Ibid., 162
[168] Interview 10, 31 August 2022, asylum expert/advisor
[169] Interview 9, 30 October 2022, UN staff

reckoned with.'[170] This was particularly the case in the amendments aimed at limiting family reunification for beneficiaries of subsidiary protection, which imposed a two-year wait period as well as setting a cap of 1,000 individuals per month.[171] More broadly, one interviewee suggested that the government was seeking to dispel rumors among asylum seekers that Germany was the best country in which to apply for asylum, explaining, 'you go for the lowest protection standard and that you're not the most attractive [destination].'[172]

Despite these intentions, in practice, the rate of legislative changes and their piecemeal nature 'led to a significant incoherence and fragmentation of the legal framework.'[173] Legislators effectively created a feedback loop in which every new event required a legislative response, whether it appropriately addressed the perceived problem or not.[174] This aspect of the reforms never really became part of the public debate, however: an interviewee explained, 'that's the thing about legislative changes, right, once they're in place very often the discussion dies off….'[175] Ultimately, public concerns were assuaged by new laws, regardless of their effectiveness, and even despite the fact that, in some cases, they gave rise to new challenges.

3.2 Fading effects of the crisis

Notwithstanding the above analysis, the political reaction in Germany initially seemed to have been less enduring than in other parts of the EU. With the incoming government coalition statement in November 2021, a strong signal was sent regarding the country's return to the pre-crisis status quo. These changes included removing restrictions on family reunification for beneficiaries of subsidiary status, enabling people with tolerated status to access residence permits, allowing access to integration courses immediately upon arrival, and providing funding for courses that facilitate integration into the labor market.[176] At the same time, the focus on

[170] Ibid.
[171] Hruschka and Rohmann, 'Excluded by crisis management? Legislative hyperactivity in post-2015 Germany', 7
[172] Interview 7, 26 August 2022, immigration attorney/academic
[173] Hruschka and Rohmann, 'Excluded by crisis management? Legislative hyperactivity in post-2015 Germany', 2
[174] *See* Interview 2, 30 June 2022, NGO staff
[175] Interview 4, 11 August 2022, former regional government staff/academic
[176] ECRE, *Germany: Incoming Coalition Agreement Signals Significant Change in Asylum and Integration Policy*, 2021, 2

return continued, with additional support from the federal government to the Länder, though the government indicated a preference for voluntary departures as opposed to deportation.[177]

In addition, the incoming government signaled that it would not continue to work through the AnkER Centres.[178] Although the original concept had been rooted in the idea of cooperation between federal and Länder authorities, facilitating greater efficiency across all stages of the asylum procedure,[179] the centers had come to be closely associated with delayed integration and facilitation of returns in the public debate, and provoked strong reactions among civil society. In practice, moreover, obstacles to return persisted and return rates were not significantly improved in the AnkER Centres.[180] Nonetheless, the move away from AnkER was arguably less about the centers' lack of progress in facilitating return and more about sending a message: the incoming coalition was not planning to continue restrictive post-crisis asylum policies and practices.[181]

The government also signaled a renewed interest in cooperation at the EU level.[182] This included a commitment to 'fundamental reform of the European asylum system with the goal of fair distribution of responsibility for reception between member states.'[183] Recognizing the continuing challenges in achieving such a reform across EU member states, the statement was tied to the idea of formation of a 'coalition of willing member states.'[184] During one interview, the potential for such a sub-regional approach to lead to fragmented policies and practices at the regional level was highlighted.[185] At the same time, however, this statement recognized past challenges in finding consensus at the EU level and proposed a pragmatic alternative that had the potential to move the solidarity agenda forward by establishing a basis for collective action among some, if not all, EU member states.

[177] Ibid.
[178] Ibid.
[179] Interview 5, 12 August 2022, government official
[180] ECRE and AIDA, *The AnkER centres: Implications for asylum procedures, reception and return*, 13
[181] Interview 5, 12 August 2022, government official
[182] *See* Interview 3, 3 August 2022, former UN staff/academic
[183] ECRE, *Germany: Incoming Coalition Agreement Signals Significant Change in Asylum and Integration Policy*, 2
[184] Ibid.
[185] Interview 10, 31 August 2022, asylum expert/advisor

3.3 New inflows and the shadow of 2015

When a new refugee crisis emerged in 2022 with the escalation of the war in Ukraine, the question of how Germany would contribute to regional efforts to provide refugee protection was again at issue. This time, the EU approached the challenge collectively, by activating the long-dormant Temporary Protection Directive (TPD). Once again, Germany came under significant pressure, with more than one million refugees from Ukraine arriving between February and November 2022.[186] This time, however, the common approach taken by EU member states meant that Germany did not find itself acting alone, even as it assumed a leading role in providing refugee protection.[187]

As one interviewee explained, by doing its part to respond to the Ukraine crisis, Germany was seeking to help both the refugees from Ukraine and Poland as the frontline state receiving the highest number of refugees.[188] The fact that the TPD was activated, moreover, set the baseline for a common EU response, and removed any potential concern that the EU would not or could not provide for a unified approach in crisis. Notwithstanding a generally positive outlook toward regional cooperation, however, asylum and migration continued to loom large within the domestic political sphere in Germany. The AfD again saw an uptick in support, with anti-foreigner and anti-migration rhetoric figuring prominently in their platform.[189] Despite, or perhaps in part because of, Germany's acceptance of more than one million refugees from Ukraine as part of the regional effort to respond to the Ukraine crisis in 2022 and 2023, the government reinstated border controls and indicated its intent to reduce 'irregular migration.'[190]

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[186] Herbert Brucker et al., *Ukrainian refugees in Germany: Escape, arrival and everyday life* BAMF Brief Analysis, 2022

[187] UNHCR, *Global Trends: Forced Displacement in 2022*, 2023(noting that Germany received the second-highest number of asylum-seekers globally, after the United States, in 2022, and hosted 2.1 million refugees overall)

[188] Interview 3, 3 August 2022, former UN staff/ academic

[189] Erika Solomon, 'As German Anxieties About Future Rise, Far Right Party Profits' *The New York Times* (20 July 2023) <https://www.nytimes.com/2023/06/20/world/europe/germany-far-right-afd-comeback.html>

[190] Federal Ministry of the Interior and Community, *Checks at all German land borders start on Monday* (2024)

This tightening of refugee policy occurred in a year in which Germany received 329,100 asylum applications.[191] In October 2023, Germany introduced border controls with Poland, Austria, the Czech Republic, and Switzerland,[192] after also halting the relocation of refugees and migrants from Italy as part of a regional solidarity plan.[193] Chancellor Scholz, under pressure from the right, announced that his government would 'limit[] irregular migration' because 'too many people are coming.'[194] Migration and asylum remained in focus in 2024, as the AfD made further gains in regional elections, and the federal government extended controls to all of its borders in September, with the aim 'to limit irregular migration further and to protect Germany's internal security.'[195] The coalition agreement between the CDU/CSU and Social Democrats (SPD) in 2025 included announcement of further restrictive measures, including rejection of asylum applications at the border, suspension of family reunification for holders of subsidiary status, and return of Syrians and Afghans.[196]

One may read these events as similar to the post-2015 reaction in Germany – part of a cyclical response to periods of intense pressure on Germany's asylum systems and integration capacity. They also indicate, however, the central role of domestic political events in determining the country's positioning to regional cooperation and willingness to accept refugees. They demonstrate that Germany's approach to regional cooperation is not static – it inevitably reflects internal political dynamics and the strength of the ruling coalition. It is significant that, in contrast to 2015, the post-COVID economic situation in Germany presented serious challenges to the government in power and reduced its ability to implement what appeared to be, in 2021, a very ambitious agenda on asylum. To remain in power, the government saw the necessity of signaling to voters its intention to reduce pressure on the

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[191] UNHCR, *Global Trends: Forced Displacement in 2023*, 2024. It should be noted that this figure does not include Ukrainians, who received temporary protection under the TPD.

[192] Federal Ministry of the Interior and Community, *Checks at all German land borders start on Monday*

[193] Inke Kappeler and Martin Goillandeau, 'Germany ramps up border control with Poland an Czech Republic to 'limit human trafficking'' CNN <https://edition.cnn.com/2023/09/27/europe/germany-border-controls-migration-debate-intl/index.html>

[194] Giulia Carbonaro, 'Willkommenskultur: Has Germany turned its back on a welcoming approach to migrants?' Euronews <https://www.euronews.com/2023/11/06/willkommenskultur-has-germany-turned-its-back-on-a-welcoming-approach-to-migrants>

[195] Federal Ministry of the Interior and Community, *Checks at all German land borders start on Monday*

[196] Reuters, 'Germany's incoming government agrees to get tougher on illegal migration' *Reuters* (9 April 2025) <https://www.aljazeera.com/news/2025/7/18/germany-and-eu-allies-push-for-tougher-stricter-asylum-rules>

municipalities that were receiving the highest numbers of asylum seekers, while also insisting that other EU member states better protect the bloc's external borders.[197]

The recurrent politicization of refugee protection

The restrictions described above illustrate the renewed salience of asylum in the national political debate in Germany: although the country had reverted to a more liberal approach to asylum following the 2015 crisis, subsequent events prompted a sharp rightward turn from 2023 onward. In order to respond to the challenge from the AfD, the government instituted temporary controls along all of Germany's borders, effectively implementing the restrictive measures that Merkel's government rejected in September 2015. The (potential) impact of the EU Pact on the national conversation is difficult to gauge at present, given that the new legislative package was finalized but goes into effect only in 2026. In this moment, asylum and migration continue to have a powerful effect on sub-national and national political conversations in Germany, highlighting the interplay between national and regional political conversations, and the importance of asylum policy to the continued viability of national governments.

Going forward, this dynamic is unlikely to change, particularly as far-right parties continue to hold power across the region and, inevitably, to center concerns about migration in the political debate. Governments will face pressure to ensure that their voters do not feel they are doing more than their share within the Union, which again points to the need for strong responsibility-sharing mechanisms, as a kind of political cover for states, including Germany, to continue to participate in regional efforts and avoid unilateral deterrence mechanisms (such as border controls or reducing reception standards). If the implementation of the EU Pact addresses this concern in a sustainable way, future governments may have more space to push back against rhetoric from the right and ensure a consistent approach to regional cooperation on asylum and migration.

[197] Kappeler and Goillandeau, 'Germany ramps up border control with Poland an Czech Republic to 'limit human trafficking''

4 Conclusion

Germany entered the refugee crisis with a pragmatic, self-interested orientation toward regional cooperation to address the collective action problem presented by refugee protection. While Germany had been supportive of the CEAS during its early development, this support was largely informed by an intention to upload its preferences to the regional level and use regional cooperation as a means of ensuring that Germany would not be perceived as having higher standards than other EU member states. Generally speaking, this approach reflected confidence in Germany's own asylum standards as well as a lack of genuine interest in expanding refugee protection in the region, especially if doing so required compromising decision-making authority at the national level. At the same time, Germany supported the application of the Dublin Regulation as a means of incentivizing protection of the EU's borders and showed little interest in supporting greater solidarity with front-line states before the crisis began.

Commentators and interviewees attributed a range of different motives and intentions to Germany's decision to keep its borders open to asylum seekers and accept a higher number of refugees during the early stages of the crisis. While it is very difficult to parse the possible humanitarian and economic motivations, Germany was swiftly perceived as leading by example. Its efforts to encourage similar measures by other member states were largely unsuccessful, however, arguably because Germany's historical orientation toward the CEAS made it difficult for it to be seen as a credible leader and because the uneven distribution of asylum seekers across the region meant that states did not share a common motivation (or more precisely, did not face similar pressure) to find a fair approach to responsibility-sharing. During the crisis, German policy makers and citizens did not see an effective regional response emerge but rather saw a situation in which Germany accepted the largest share of asylum applications[198] and again led the way in finding a politically negotiated solution.

Nonetheless, in the mid-term, the refugee crisis had an impact on asylum perspectives in Germany in the sense of building lasting support for regional cooperation. Previously strict

[198] As observed elsewhere, the number of asylum seekers received by Sweden was larger as a proportion of its population, but this perspective was not reflected in much of what was written about the crisis from a German perspective nor in the interviews conducted as part of this research.

enforcement of the Dublin Regulation gave way to arguments in favor of reform to ensure solidarity and equitable responsibility sharing across EU member states. Five years and myriad legislative changes after the events of 2015-2016, Germany again called for solidarity in the form of EU-level reform of the Dublin Regulation to ensure a fair distribution of asylum applications across member states in a statement by the incoming coalition government.[199] Other coalition proposals included further expansion of resettlement efforts, in cooperation with UNHCR[200] – arguably also a means of reducing pressure on front-line states along main migration routes by creating safe pathways to protection.

4.1 A changed perspective on solidarity

As noted above, Freudlsperger and Jachtenfuchs observed Germany's longstanding tendency to prefer regulation of national systems over creation of supranational authorities, with exceptions to this general rule tending to occur only during moments of acute crisis.[201] This position reflects a fundamentally conservative view of regional integration, seeking to avoid transfer of authority from the national to supranational level. In contrast to this general pattern, however, Germany seemingly experienced an enduring shift in perspective regarding regional integration in the area of asylum during the refugee crisis, calling for greater solidarity within the EU, including a new system to ensure more equitable distribution of asylum applications among member states. This perspective was clearly in view six years after the crisis, when Germany's new government emphasized the importance of responsibility sharing among EU member states and even signaled that, in the absence of consensus, progress toward collective action might be sought by a smaller group of like-minded states.[202] Zaun and Servent, similarly, observed that public support for a common asylum policy remained above 80%, even several years after the refugee crisis had ended.[203]

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[199] ECRE, *Germany: Incoming Coalition Agreement Signals Significant Change in Asylum and Integration Policy*
[200] Ibid.
[201] Freudlsperger and Jachtenfuchs, 'A member state like any other? Germany and the European integration of core state powers', 118-19
[202] ECRE, *Germany: Incoming Coalition Agreement Signals Significant Change in Asylum and Integration Policy*
[203] Zaun and Ripoll Servent, 'One step forward, two steps back: the ambiguous role of Germany in EU Asylum policies', 162-63

Germany's emphasis on solidarity was significant in the sense that, like Sweden, Germany had previously pursued an asylum policy in line with its national interests, with little attention to the situation faced by other states aside from an interest in creating comparable standards that would ensure Germany was not an outlier. During the crisis, however, Germany became a de facto frontline state: like the EU member states sitting along the bloc's boundaries, Germany faced a situation, in the absence of effective border controls, in which it was expected to provide protection to a high number of arrivals, with little ability to control the flow of people toward its territory. While Germany could have immediately reinstated border controls, there was, initially, a high level of support for receiving refugees among the German population, which weighed against a restrictive response. Accordingly, during the summer and fall of 2015, Germany found itself in a position to better understand the position of the countries that had been on the frontline since regional cooperation to provide refugee protection began – and, in line with this perspective, propose both ad hoc and permanent measures for solidarity.

While the relocation of asylum seekers from Italy and Greece between 2015 and 2017 had limited impact on responsibility sharing, some of the lessons learned from the refugee crisis nonetheless made their way into the Pact. It is notable, however, that rather than a similar mechanism focused on sharing the total number of asylum applicants among EU member states, the Pact's provisions envision flexibility – in other words, a system in which member states may substitute financial contributions or expertise for acceptance of asylum seekers. On balance, such a system allows more space for the autonomy or sovereignty of member states, arguably at the expense of predictable responsibility sharing.

4.2 Shifting cost-benefit analysis

As in Sweden, Germany's assessment of the costs and benefits of being a provider of refugee protection shifted as the crisis progressed. At the outset of the crisis, the altruistic benefits of providing protection predominated – the chance to 'do something good,' as described in one interview, outweighed any perceived costs. Over time, the sense that the government had lost control of the situation, alongside alarm at the number of refugees who would potentially arrive as a result of family reunification, began to change this equilibrium. From an initial stance of welcoming refugees, the German public progressively became more concerned about the number of refugees arriving to the country. Over time, polls shifted from indicating a clear majority of Germans agreeing with Merkl's sentiment 'we can do this' to a majority expressing disagreement or uncertainty about the idea of Germany accepting more refugees.[204]

One might argue that the shift in preferences also reflected, at least in part, some of the challenges around solidarity, as discussed above. In other words, the sense that Germany was doing more than its neighbors gave additional weight to the perceived costs of being the provider of refugee protection. Had other EU member states contributed similarly, as would happen in the context of the Ukraine crisis seven years later, the costs might have been perceived differently, and Germany might have been willing to continue to receive refugees at a higher rate.

It must be noted, moreover, that the changing views of the public on the refugee crisis did not exist in a vacuum – they had clear political implications. These concerns prompted voters, in some cases, to shift rightward, supporting political parties (including the AfD) with more restrictive perspectives on asylum and migration. The costs and benefits of providing refugee protection, in this sense, accrued to the government, with waning support for the policies pursued by the Merkl administration translating to gains by opposition parties. Ultimately, changing views among the public, combined with the continued salience of asylum and migration issues in the context of national political debates, produced change at the policy level: Germany pursued an outside agreement to limit the number of asylum seekers arriving to the EU and relieve pressure on the system.

[204] Ibid., 161-62

4.3 Government actions to address the crisis

Commentators have observed that Germany's crisis response was marked by a significant number of legislative changes.[205] Hruschka and Roman characterize this period as one of 'legislative hyperactivity,' during which legislators sought to demonstrate that they were taking action to respond to the crisis.[206] The speed and volume of these changes, in many cases, served to fragment the asylum system, as they were not formulated in a deliberate or systematic manner. Their impact, moreover, was limited, as the EU-Turkey agreement was already in place by the time many of the legislative changes took effect.

It is possible to argue that the direct impact of the legislative changes was not really the issue, however. On some level, the changes were part of a dialogue with voters, and the number of changes was precisely the point: the idea was to provide reassurances that the government had heard their concerns and was responsive to them. As in Sweden, the message, both to voters and prospective asylum seekers, was that the state was taking action to prevent a recurrence of the 2015 crisis. Given that asylum and migration remained prominent in the public discourse, the perception that the government was able to effectively address migration-related issues was important for its continued viability.

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[205] Volker, 'A hyperactive legislator', 1-2;Hruschka and Schader, *We Managed - And We Changed in the Process*, 29
[206] Hruschka and Rohmann, 'Excluded by crisis management? Legislative hyperactivity in post-2015 Germany', 15

Chapter 6 Hungary: Evading Responsibility

Widely viewed as an example of non-compliance or free riding, during the crisis Hungary utilized a variety of tools to avoid contributing to efforts to provide refugee protection, including a 'wave-through' policy that encouraged asylum seekers to move on to Austria, construction of fences along its borders, and legislative amendments that barred the majority of asylum seekers from accessing asylum procedures in Hungary. The text below explores the road to these restrictive policies and practices, which parallels Hungary's increasing practical and political divergence from the EU in the context of asylum and migration law. Finally, the chapter looks at EU attempts to, at first, mitigate the impact of Hungary's actions, and, later, influence Hungary to comply with regional collective action efforts.

As the below chronology demonstrates, as the refugee crisis advanced, Hungary progressively shifted to more restrictive asylum policies and practices, a trend that was not meaningfully impacted by the EU's enforcement efforts. Section 1 begins with the pre-crisis period, detailing Hungary's initial good-faith compliance with EU collective action efforts, followed by a discussion of how that approach changed, with security framing of immigration and asylum-related issues and careful shaping of the political discourse around asylum more broadly characterizing the country's gradual shift towards a more restrictive asylum policy. In Section 2, the focus is Hungary's crisis response, beginning with the government's deliberate 'unwelcome' as refugees and migrants began arriving before progressing to new restrictions on access to territory and asylum procedures. The government's very vocal opposition to the EU's proposed quota system is addressed, alongside EU efforts to challenge Hungary's increasingly restrictive practices. Section 3 provides a brief summary of the post-crisis landscape in Hungary and prospects for future participation in collective efforts toward refugee protection.

Ultimately, both commentary and the interviews conducted with key actors in the asylum and migration sphere in Hungary point to the increasing distancing of Hungary from the

EU's collective efforts to provide refugee protection. Hungary has, since shortly before the onset of the 2015 refugee 'crisis,' consistently sought to free ride on the in this area of regional cooperation. Further, no course correction appears in the post-crisis period: rather, Hungary's current government appears determined to chart a path in direct conflict with the EU, and efforts to respond to non-cooperation by the EU have not proven impactful to date. On balance, Hungary's example calls into question the preference transforming effects of governance methods and, indeed, even the potential of the EU to enforce minimum standards legislation resulting from the Community Method.

1 Before the refugee crisis: compliance and limited salience of the CEAS

While Hungary has largely distinguished itself in recent years through non-compliance in asylum matters, it is important to note that this was not always the case. Prior to the 2010 election cycle, asylum was not a particularly contentious topic in Hungary – though it was also not a particularly relevant one, given that Hungary was not receiving significant numbers of asylum seekers. This was, rather, one of many areas where Hungary moved toward EU standards as part of the accession process. Over time, that baseline began to change, however, as described in further detail below.

1.1 The accession period: commitment to cooperation

Prior to the crisis, Hungary seemed to demonstrate a genuine intention to participate in collective action efforts toward refugee protection. Hungary had joined the EU in 2004 and, as part of the process, transposed the CEAS instruments into its domestic legal framework.[1] A former government official explained that before and immediately after Hungary's accession to the EU, there was 'a strong commitment to fully implement the EU acquis' and to 'change the

[1] Elżbieta M. Goździak, 'Using Fear of the "Other," Orbán Reshapes Migration Policy in a Hungary built on Cultural Diversity' (2019) Migration Information Source

laws, to create a regulatory and policy environment which fits…with whatever comes from Brussels.'[2] Another former government official agreed, noting that the first few years post-accession 'was a very positive period when the enthusiasm was relatively high' to 'build up' asylum and reception systems and train government staff.[3] An academic similarly characterized the period as one in which 'there was a very serious intention throughout that time to be conformed with the EU,' though he noted that detention and integration remained problematic areas in which Hungary did not fully meet EU standards.[4]

One interviewee situated the first misgivings about the CEAS in Hungary in the realization that the newest EU member states were now forming a front line of sorts in protecting the EU's external boundaries,[5] a practical reality that was reinforced by the application of the Dublin Regulation. More specifically, there appears to have been growing concern that older EU Member States were, in effect, free riding on the efforts of newer members: 'we could see the western countries' efforts to push the applicants to the newborn democratic countries, saying, as a buffer zone or using the readmission agreements or instruments…'[6] And Hungary took this lesson to heart. As explained by this former government official: '[T]hat was a teaching period for us, how to behave in an elegant way and use the same terminology, which means that in practice we want to look for other buffer zone.'[7] Hungary would later see the possibility to use safe third country concepts to push this 'buffer zone' out to Serbia, as described in detail below.

At the same time, notwithstanding its unease about its front-line status and what it perceived as free riding or opportunistic behavior within the bloc, Hungary clearly saw that most asylum seekers wanted to move on to other EU member states.[8] One interviewee highlighted the circular dilemma posed by integration, explaining that the government could not see the necessity of investing in or expanding programs for protection and integration when

[2] Interview 6, 10 August 2023, former government official
[3] Interview 10, 2 November 2023, former government official
[4] Interview 4, 19 July 2023, academic
[5] Interview 10, 2 November 2023, former government official
[6] Ibid.
[7] Ibid.
[8] Interview 7, 30 August 2023, former government official

the majority of asylum seekers would seek to move on to western/northern Europe, which in turn made it difficult for asylum seekers to see a potential future in Hungary.[9] Another interviewee explained simply, '[w]e treated the people as transitory so they became transitory…they moved on.'[10] This dynamic would continue to be reflected in the government's decision making in 2015 and beyond.

1.2 The Fidesz government: a security-focused approach

Following the election of the populist Fidesz party in 2010, the spirit of compliance began to change in line with the government's intention, telegraphed during the election cycle, to produce a security-driven migration and asylum law.[11] According to one interviewee, there was, at first, 'a gentle push towards the change of policy and legislation' in which 'the message was clear that we were not going to continue what the socialists did.'[12] Still, the changes came about slowly and, when they were implemented, the actions taken by the government were nonetheless still in compliance with EU standards.[13] Hungary did, however, reduce its legislation 'to the bare minimum, still allowed under EU law.'[14]

The new government's vision continued to evolve with the publication of the Strategy on Migration in 2013. The stated aim of this strategy was to 'strengthen user-friendly public administration for the entry and residence of foreigners, to ensure high-level protection for those who have left their homes to flee persecution and to improve the integration of foreigners in Hungary, while at the same time to adequately covering all safety aspects.'[15] Despite this prominent mention of safety, in line with a securitization frame, the strategy nonetheless elaborated the intention to 'ensure[] the protection required by international and national norms for asylum seekers and facilitate[] the social integration of legal migrants and the

[9] Interview 5, 31 July 2023, NGO staff
[10] Interview 4, 19 July 2023, academic
[11] Interviews 5, 6
[12] Interview 6, 10 August 2023, former government official
[13] Interviews 5, 6
[14] Interview 6, 10 August 2023, former government official
[15] Hungarian Ministry of Interior, *New Migration Strategy published* (2013)

beneficiaries of international protection in Hungary.'[16] With this language, Hungary was still clearly signaling its intent to act in accordance with its international legal obligations. Interestingly, considering subsequent events, the strategy also specifically mentioned solidarity and Hungary's support to countries coming 'under the pressures of extraordinary migration.'[17]

The first rumblings of a decisive change in course began in late 2014, as the number of asylum seekers from Kosovo increased sharply. As one interviewee recalled, 'the first political voices started to sort of frame the issue of the steeply rising number of asylum seekers from Kosovo.'[18] The issue of immigration did not gain much traction at this point, however – as another interviewee recalled, 'it didn't gain any attention from neither the government nor the media' and 'was just not in the public discourse.'[19] As long as migration was just a matter of numbers, it remained of limited salience. But several factors came together in early 2015 that would begin to change that trajectory.

1.3 Securitization in conflict with protection

The Charlie Hebdo attack in January 2015 marked a turning point in the public discourse around migration and asylum and, more generally, in Hungary's willingness to participate in collective action efforts toward refugee protection.[20] Recently re-elected Prime Minister Viktor Orbán gave a speech on the day of the commemoration of the attack in which he argued that '[e]conomic immigration is a bad thing in Europe' that 'only brings trouble and dangers to the European people.'[21] He continued to say that 'we do not want to have significant minorities with different cultural traits and backgrounds; we'd like to retain Hungary as Hungary.'[22] Multiple interviewees identified this moment as the onset of the securitization dialogue around

[16] Ibid.
[17] Krisztina Juhász, 'Assessing Hungary's Stance on Migration and Asylum in Light of the European and Hungarian Migration Strategies' (2017) 13 Politics in Central Europe
[18] Interview 5, 6
[19] Interview 8, 2 September 2023, UN staff
[20] Akos Bocskor, 'Anti-Immigration Discourses in Hungary during the 'Crisis' Year: The Orbán Government's 'National Consultation' Campaign of 2015' (2018) 52 Sociology 551, 557; Interviews 1, 5, 6
[21] Boldizsár Nagy, *Hungary's hypocritical migration policy* (Heinrich Böll Stiftung 2015), 3
[22] Ibid.

asylum in Hungary,[23] with one observing that this 'was the first time when the Prime Minister really firmly started to build up the argument against immigration as a threat.'[24]

From the start, Orbán blurred the lines between economic migrants and people in need of international protection. In the quote above, he begins by mentioning economic immigration and situates his opposition in security considerations but then concludes that the presence of any minorities in Hungary poses a threat, transitioning to a culture-based narrative that includes all foreigners in its exclusionary rhetoric. This blurring of the boundaries between economic migration and international protection, as well as between security threats and so-called threats to culture and identity, would also factor in the political dialogue in the coming months. It is noteworthy that, in both the security and identity lines of argumentation, Orbán was building the specter of an external threat to Hungary that included refugees.

Although the government had previously telegraphed its security focus around asylum and migration, these topics had not been a prominent aspect of the political dialogue prior to 2015. Bender situates the government's new focus on migration amid 'mounting dissatisfaction with government policies,' in particular, 'a hugely unpopular tax on internet use.'[25] One interviewee, in line with this argument, explained that

> [I]t really started as a domestic political tactic to divert attention from other issues and yes, this very basic rudimentary logic of scapegoating people and showing the Hungarian government as a strong defender of Hungarians and Christianity and national sovereignty. It started out with vilifying migrants, but then because it came together almost as a package, then also turning against Brussels…[26]

Another interviewee, in a similar vein, noted that with the issue of post-economic crisis assistance becoming less relevant, the Fidesz government needed a wedge issue, a conflict, on which to focus at this moment, because

> [T]he very basic let's say logic of the government, of this government is to be confrontational, to look for conflict, never consolidate. It's like a shark. If the shark doesn't swim, it just sinks to the bottom of the ocean. So this kind of

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[23] Interview 1, 5, 6

[24] Interview 5, 31 July 2023, NGO staff

[25] Felix Bender, 'Abolishing asylum and violating the human rights of refugees. Why is it tolerated? The case of Hungary in the EU' in Elżbieta M. Goździak, Izabella Main and Brigitte Suter (eds), *Europe and the Refugee Response: A Crisis of Values?* (Routledge 2020), 61

[26] Interview 1, 19 June 2023, former NGO staff/volunteer

> constant fighting mode, confrontation, conflict, no pause for a minute, this is the gasoline of this government, especially this is the way PM Orbán works.[27]

According to this line of argumentation, migration was the next issue around which Fidesz sought to inflame the public, in hopes that a focus on an external enemy would divert attention from internal opposition.

Hungary's centering of its domestic political dialogue around migration and asylum coincided with a regional shift: the European Agenda on Migration was announced in the spring of 2015. In response to the continuing high number of deaths at sea in the Mediterranean, the European Commission indicated that '[b]y the end of May, the Commission will propose a temporary distribution mechanism for persons in clear need of international protection within the EU' as well as 'a permanent EU system for relocation in emergency situations of mass influxes [to] follow by the end of 2015.'[28] A former government official interviewed noted, 'from May 2015 when the European Commission adopted its agenda on migration…the Hungarian government also started rolling up the sleeves and changing the legal and policy landscape as well.'[29] It is at this point that the government's agenda began to clearly take shape, as longer-term policy trends intersected with a spike in arrivals and a broader political crisis in the region.

1.4 Setting the stage: the role of political discourse in the pre-crisis period

One of the most striking aspects of the refugee crisis in Hungary is the extent to which the government sought to consolidate support among voters for its legislative and policy positions. Even prior to the sharp increase in the number of asylum seekers arriving to Hungary in the summer of 2015, the government had launched a national consultation and initiated a billboard campaign intended to influence opinions within the Hungarian public regarding immigration. As described below, the government maintained an extremely disciplined tone and narrative throughout the crisis, tying together messaging around security, identity, migration,

[27] Interview 6, 10 August 2023, former government official
[28] European Commission, *Managing migration better in all aspects: A European Agenda on Migration*
[29] Interview 6, 10 August 2023, former government official

and regional political dynamics. From a political non-issue, asylum and migration would grow to become one of the most critical political topics in the country: by late 2016, the number of Hungarians citing migration as the most important issue facing the country would grow more than tenfold, to 30%, while 67% of respondents would cite migration as the most important issue facing the EU.[30] At the same time, the Hungarian government would increasingly situate itself in direct opposition to regional collective action proposals on asylum, presenting the issue as one of sovereignty, independence and national identity, as opposed to solidarity and responsibility sharing.

1.4.1 Driving the Political Dialogue

The messaging from the Orbán government on issues around migration and asylum focused on portraying 'migrants' as an economic, security, and cultural threat to Hungarian citizens.[31] A billboard campaign launched in May 2015 purported to warn migrants not to take the jobs of Hungarian citizens or break Hungarian laws: 'If you come to Hungary, don't take the jobs of Hungarians'; 'If you come to Hungary, you have to keep our laws.'[32] Given that these billboards were written only in Hungarian, however, they seemed poorly designed to speak to a newly-arrived, non-Hungarian audience.[33] Rather, the government was positioning itself to Hungarian voters as a defender of their economic well-being and security, while also planting the seeds of suspicion and laying the groundwork for immigration to become a major lynchpin of the political dialogue in Hungary.

At the same time, the government had also raised issues around refugees and migration in its 'National Consultation on Immigration and Terrorism,' which ran from 24 April to 27 July

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[30] Dionysios Stivas, 'The art of securitising. Orbán's handling of the European refugee crisis' (2023) 31 Journal of contemporary European studies 184, 191-92
[31] Bocskor, 'Anti-Immigration Discourses in Hungary during the 'Crisis' Year: The Orbán Government's 'National Consultation' Campaign of 2015', 558;Stivas, 'The art of securitising. Orbán's handling of the European refugee crisis', 188
[32] Céline Cantat and Prem Kumar Rajaram, 'The Politics of the Refugee Crisis in Hungary: Bordering and Ordering the Nation and Its Others' in Cecilia Menjivar et al. (ed), *The Oxford Handbook of Migration Crises* (Oxford Handbooks, Oxford University Press 2019), 185
[33] *See* ibid.; Stivas, 'The art of securitising. Orbán's handling of the European refugee crisis', 190; Interview 7, 30 August 2023, former government official

2015.[34] Already with the title of the consultation, the Orbán government sought to link concerns about terrorism to the arrival of migrants, implicitly suggesting that EU collective action efforts had failed to adequately address this issue from a security perspective. The twelve questions that comprised the consultation began with questions about terrorism before drawing a direct link to migration, noting, 'There are some who think that mismanagement of the immigration question by Brussels may have something to do with increased terrorism.'[35] Respondents were then asked to agree or disagree with this statement. The introduction to a subsequent question was similarly leading, noting, 'There are some who believe that Brussels' policy on immigration and terrorism has failed, and that we therefore need a new approach to these questions.'[36]

A group of 45 social scientists wrote an open letter objecting to the format of the consultation, arguing that it was not an opinion poll at all, but rather a form of political advocacy.[37] Ultimately only 13% of the questionnaires were returned, with 90% of those supporting the position taken by Fidesz.[38] Notwithstanding this low overall response rate, the government proceeded to interpret this as an endorsement of its position and a justification for future restrictive actions.[39] Zoltan Kovács, speaking for Fidesz, argued that Hungarians 'concurred that the threat of terrorism was on the rise and that Brussels's immigration policy had failed,' while also believing that 'instead of immigrants, Hungarian families should receive funding.'[40] These outcomes were then also incorporated into the billboard campaign, with new posters indicating, 'The people have decided. The country must be defended.'[41]

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[34] Bocskor, 'Anti-Immigration Discourses in Hungary during the 'Crisis' Year: The Orbán Government's 'National Consultation' Campaign of 2015', 559
[35] Ibid., 562
[36] Ibid.
[37] Juhász, 'Assessing Hungary's Stance on Migration and Asylum in Light of the European and Hungarian Migration Strategies', 40
[38] Stivas, 'The art of securitising. Orbán's handling of the European refugee crisis', 190
[39] Juhász, 'Assessing Hungary's Stance on Migration and Asylum in Light of the European and Hungarian Migration Strategies', 40; Bocskor, 'Anti-Immigration Discourses in Hungary during the 'Crisis' Year: The Orbán Government's 'National Consultation' Campaign of 2015', 552
[40] Juhász, 'Assessing Hungary's Stance on Migration and Asylum in Light of the European and Hungarian Migration Strategies'
[41] Boldizsár Nagy, 'Hungarian Asylum Law and Policy in 2015–2016: Securitization Instead of Loyal Cooperation' (2016) 17 German Law Journal 1033, 1054

A key aspect of these campaigns was to make a rhetorical shift away from refugee language in favor of speaking about 'migrants' or 'immigrants.'[42] Orbán had used 'economic immigration' in his speech following the Charlie Hebdo attacks, and this discursive framing was echoed in the National Consultation on Immigration and Terrorism, where the introduction by Orbán described the consultation as treating 'the issue of economic migration.'[43] One might see the government's use of migration language as a means of avoiding positioning itself in direct opposition to international and regional law, as well as its regional collective action obligations. In the context of the National Consultation, however, Bocskor saw an attempt to blur the line between these distinct groups:

> '[E]conomic migrants' are further merged with illegal border crossers and asylum seekers, thus creating the single image of 'the migrant' as an exclusively illegal and welfare-dependent person disguised as an asylum seeker who is additionally a potential terrorist.[44]

Others saw a slightly more nuanced picture, in which support for asylum seekers and refugees remained high within the Hungarian population, notwithstanding growing concerns about migration. As one interviewee explained, referencing the standard annual survey, 'when you ask people about the importance of receiving refugees and protecting refugees, that hasn't changed much and that was a pretty puzzling survey result, because when people were asked whether they would receive people who are fleeing war or are fleeing persecution then roughly two thirds of the population said yes of course this is our duty it is our obligation to protect these people.'[45] Leading into the crisis, there was then an open question in terms of the sentiments of the nearly 90% of the population who had not returned the National Consultation survey, as well as, potentially, space to shape opinions based on whether the people arriving to Hungary were deemed to be refugees in need of international protection or migrants seeking economic opportunities.

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[42] *See* ibid., 1057; Bocskor, 'Anti-Immigration Discourses in Hungary during the 'Crisis' Year: The Orbán Government's 'National Consultation' Campaign of 2015', 559; Interviews 1, 3, 4, 5, 7

[43] Bocskor, 'Anti-Immigration Discourses in Hungary during the 'Crisis' Year: The Orbán Government's 'National Consultation' Campaign of 2015', 560

[44] Ibid., 559

[45] Interview 5, 31 July 2023, NGO staff (referencing Anikó Bernát, Endre Sik, Bori Simonovits and Blanka Szeitl, *Attitudes towards Refugees, Asylum Seekers and Migrants*, 2015)

1.4.2 Taking Aim at Brussels

As seen in the above messaging, Brussels, and by extension, the EU's collective action efforts related to refugee protection, were key targets in the government's discourse around migration and asylum. Orbán tied domestic policy initiatives on asylum and migration first to the Charlie Hebdo attack in France, then also to a broader increase in terrorism resulting from 'Brussels' policy' in the National Consultation. Initially, this positioning was somewhat surprising, given the relative popularity of the EU in Hungary: as two interviewees explained, Hungarians were clear on the economic benefits of EU membership, especially in rural areas.[46] As one interviewee noted, however, migration presented a useful entry point for criticisms of the EU:

> [O]f course migration policy is very closely intertwined with the state sovereignty, this is an area…which is emotionally quite loaded. So, you can create fear, you can just play with people's perception. So politically, you can gain a lot if you use migration policy as your main area of clash with the EU and questioning the EU integration and the way European project is developing into wider migration and linking it to broader issues of sovereignty and population…especially in a country where locals have hardly seen foreigners.[47]

At the same time, interviewees highlighted the importance to the government of positioning itself on the international stage – besides creating the specter of an external enemy, the government was arguably seeking to cast itself as a prominent actor in regional politics.[48] This approach would continue throughout the crisis and would become particularly important in the context of discussions about relocation, as described further below.

In addition, according to the narrative expressed in a number of interviews, the government's messaging built on historical precedents: the debate around migration in 2015 occurred at the intersection of 'complex historical grievances, emergent forms of right-populist politics, and expressed tensions with EU mandates concerning EU member states' responsibility

[46] Interviews 1, 3
[47] Interview 6, 10 August 2023, former government official
[48] Interviews 2, 5, 7

towards migrants.'[49] One interviewee explained of the historical orientation of the framing, saying,

> [I]t boils down to our tradition, Hungarians providing x, y, z enemies throughout the past 1,000 years…we have always been oppressed by the Tatars and then the Turks and then the Habsburgs and then the Russians and then the Soviets. Now it's Brussels. So, whenever you have an external player who is quite sizeable and important, no matter you have joined this club voluntarily and so forth, you can just of course put the blame externally…[50]

Another interviewee used very similar language, noting, that 'the Hungarian population is, in general, very much susceptible to this type of [] war-like narrative that there always has to be an enemy…Hungary has been occupied since the 16th century by various different nations, by the Ottomans, by the Austrians, by the Russians and the Soviet Union and…creating an image of an enemy here in Hungary is not very difficult.'[51] A third interviewee situated this tendency within 'victim culture,' noting that in Hungary there is a perception that 'we are the victims in European history.'[52]

Certain aspects of this narrative may have been reinforced by the nature of the accession process, and specifically from the fact that there was little room for negotiation or participation in the process of determining standards for Hungary and other post-socialist states who joined in 2004.[53] These states were obligated to adopt specific legislative and policy provisions as part of the accession process in order to secure their inclusion in the Schengen zone and for the receipt of structural funds. This process may not have produced real belief in or support for those second-level programs – in effect, Hungary may have felt as though collective action efforts in this area were imposed on them. The fact that the states who have most openly challenged the EU's refugee quota system were among those who joined the EU in 2004, alongside Hungary, lends some support to the hypothesis that the accession process may not have produced genuine consensus on some issues.

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[49] Eszter Krasznai Kovács, Kavita Ramakrishnan and Tatiana Thieme, 'Provincializing European responses to the refugee 'crisis' through a Hungarian lens' (2022) 98 Political Geography 102708, 1
[50] Interview 6, 10 August 2023, former government official
[51] Interview 9, 18 September 2023, government official
[52] Interview 10, 2 November 2023, former government official/academic
[53] Kovács, Ramakrishnan and Thieme, 'Provincializing European responses to the refugee 'crisis' through a Hungarian lens', 3

The pre-crisis status quo

As indicated above, the Fidesz government had initiated changes in the country's approach to asylum and migration separately from the increase in arrivals to Hungary's borders, which really became evident in June 2015.[54] The government launched a campaign to shape attitudes around migration in the wake of the Charlie Hebdo attack, in an apparent effort to cast migration as a major challenge for the country with Brussels as the main opposing force. This framing was then followed by a rapid increase in the arrival rate of asylum seekers that was widely seen as overwhelming systems[55] and occurred against a backdrop of record-high levels of xenophobia among Hungarians. [56] As one commentator looking at the securitization of migration in Hungary would subsequently note, 'the securitizing rhetoric of Orbán had found "fertile soil."'[57]

At the same time, as noted above, attitudes toward both the EU and refugees remained generally positive. It was clear that the majority of the Hungarian population valued EU membership and supported complying with Hungary's international obligations towards persons in need of international protection. This did not, then, seem to be a situation in which the government had carte blanche from voters to act in defiance of EU coordination on issues around asylum and refugee protection. Yet there were specific themes around security, identity, and victimhood that resonated with the public, and the government had invested in a National Consultation that, despite low participation levels, could be cited as reflecting voters' wishes. These themes and methodologies would be carried through the crisis period that followed.

Overall, this pre-crisis period reflects the government's consistent efforts to reframe the collective provision of refugee protection as, instead, an issue of security and anti-terrorism or as an economic/social welfare issue. The government also sought to cast itself in opposition to Brussels, an external enemy against whom the ruling party was standing up on behalf of Hungarian citizens. These alternative frames served to shift the focus from refugees and whether the government was complying with its obligations to participate in the collective

[54] *See* IOM, *The European Migration Crisis and Hungary*
[55] Interviews 4, 7, 8
[56] Bocskor, 'Anti-Immigration Discourses in Hungary during the 'Crisis' Year: The Orbán Government's 'National Consultation' Campaign of 2015', 558
[57] Stivas, 'The art of securitising. Orbán's handling of the European refugee crisis', 193

efforts of the EU to provide refugee protection, topics that one might expect to be positively received by the Hungarian public. As the discussion below illustrates, these alternative frames became increasingly resonant as arrival rates increased and the refugee crisis in Europe took shape.

2 The refugee crisis in Hungary

In 2015, most refugees arriving to Europe traveled from Türkiye to Greece, then onward through North Macedonia to Serbia before entering the EU through either Hungary or Croatia. Other refugees travelled overland from Türkiye to Bulgaria and on to Serbia before joining the flows toward Hungary or Croatia. Hungary, then, was a key location along the route, though not generally a destination for most asylum seekers. Notwithstanding the fact that most asylum seekers did not remain in Hungary, the rise in the number of people arriving to its territory triggered a strong response by the government, as described in detail below.

2.1 Refugees unwelcome

The start of the refugee crisis in Hungary was marked by a deliberate lack of action by the government. In June, July, and August 2015, the number of asylum seekers arriving to Hungary increased dramatically, from 247 in the first months of 2015 to 1,500 daily.[58] In stark contrast to the scenes in other EU member states, however, commentators noted that there 'was a deliberate expression of *un*welcome in response to refugees, leaving people's most basic needs unmet, with little concern for modes of survival let alone a measure of dignity.'[59] Bocskor observed an attempt by the government to 'project[] images of congested public spaces in Budapest, lacking in basic amenities' in order to support its cultural- and security-driven

[58] IOM, *The European Migration Crisis and Hungary*
[59] Kovács, Ramakrishnan and Thieme, 'Provincializing European responses to the refugee 'crisis' through a Hungarian lens', 6

narratives, as well as to create the image of an ongoing crisis.[60] This crisis narrative would become an enduring element of the political discourse, also underpinning and justifying future actions by the government.

In this vacuum of assistance, 'a migrant solidarity movement emerged from scratch fueled by volunteer grassroots to counterbalance the lack of official and charity solidarity and organized an effective network of volunteers via social media to provide immediate relief for transit migrants by providing medical assistance, food, clothes and information.'[61] As one interviewee described the situation in Budapest,

> [T]hat was an amazing scene, how fast citizens from Budapest...came to the railway stations and organized every single aspect of the assistance that was needed, from food to playing with the kids, having day care, medical assistance, everything, without any kind of support for weeks…[62]

Other interviewees described 'a lot of forms of solidarity of ordinary people,' who donated food, clothing, and medical services,[63] as well as offering refugees a place to stay until the government-coordinated reception program began functioning in subsequent weeks.[64]

This response was seen by many participants as a direct repudiation of the government's position and policies. The spirit of volunteerism in Budapest echoed that in Berlin – situating (some) Hungarian citizens alongside their counterparts across the region, and in opposition to their government. One interviewee who spoke to a number of volunteers found a spirit of defiance, with many seeing their actions as a rejection of official government policies and a type of political protest.[65] Another interviewee similarly stated, '[i]t was an overwhelming feeling that the people who were helping at the station they were opposing the government's harsh policies and the legal and policy changes.'[66]

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[60] Bocskor, 'Anti-Immigration Discourses in Hungary during the 'Crisis' Year: The Orbán Government's 'National Consultation' Campaign of 2015', 565

[61] Judit Tóth and Anikó Bernát, 'The Different Shades of Solidarity in Asylum Policy and Practice in Hungary', *Populism and Migration* (L'Harmattan 2022), 128; *see also* Boldizsár Nagy, About-face or camouflage? Hungary and the refugees from Ukraine (2022), 4

[62] Interview 1, 19 June 2023, former NGO staff/volunteer

[63] Interview 7, 30 August 2023, former government official

[64] Interview 9, 18 September 2023, government official

[65] Interview 5, 31 July 2023, NGO staff

[66] Interview 1, 19 June 2023, former NGO staff/volunteer

Recognizing the critical role of civil society organizations in this context, the European Commission funded some of them directly, effectively sidelining the Hungarian government.[67] This could be seen as an attempt to encourage Hungary to align itself more closely with EU collective action efforts. This focus at the local level proved controversial, however: the Hungarian government alleged that these actions constituted regional interference in domestic politics and undermined democratic principles and accountability.[68] This reaction would, later, be reflected in 2017 legislation targeting NGOs receiving funding from outside of the country (subsequently found incompatible with EU law by the CJEU).[69]

Throughout this period, the trends in political rhetoric observed before the crisis largely continued. Commentators noted the government's continuing portrayal of cross-border movements 'as a threat to Hungarian society, to the country's security and homogeneity,' with the group identities of refugees, migrants, and criminals deliberately blurred.[70] Government media, moreover, amplified these messages, including depictions of asylum seekers and refugees as criminals, terrorists, and economically opportunistic.[71] Some reports indicate that government media may have been instructed to avoid using images of refugee children in their stories, for fear of increasing sympathy for refugees.[72] The link to the EU was likewise maintained, with the government suggesting that other EU member states and the EU itself were too open in terms of their admission standards, and even that they were in breach of the Schengen agreement.[73]

A political protest party, the Two-Tailed Dog Party, sought to use satire to challenge the government's messages, presenting questions intended to mirror the format of the government's messaging, such as, 'Did you know that the average Hungarian sees more UFOs

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[67] *See* Kovács, Ramakrishnan and Thieme, 'Provincializing European responses to the refugee 'crisis' through a Hungarian lens', 7, 18

[68] Ibid.

[69] Court of Justice of the European Union, *The restrictions imposed by Hungary on the financing of civil organisations by persons established outside that Member State do not comply with EU law* (2020)

[70] Withold Klaus, 'Closing Gates to Refugees: The Causes and Effects of the 2015 "Migration Crisis" on Border Management in Hungary and Poland' (2017) 15 Yearbook of the Institute of East-Central Europe 11, 18

[71] Lydia Gall, 'Hungary's War on Refugees'(Human Rights Watch 16 September 2016) <https://www.hrw.org/news/2016/09/16/hungarys-war-refugees >, 2

[72] Goździak, 'Using Fear of the "Other," Orbán Reshapes Migration Policy in a Hungary built on Cultural Diversity', 9

[73] Klaus, 'Closing Gates to Refugees: The Causes and Effects of the 2015 "Migration Crisis" on Border Management in Hungary and Poland', 18

than refugees in a lifetime?'[74] These and other messages in conflict with the government narrative, including those from NGOs and UNHCR, struggled to gain real traction given the position of government-supported media, however.[75] The consistent messaging from the government was simply too pervasive and too broadly amplified.

Arguably more persuasive were the real-life encounters of Hungarian citizens in urban centers with refugees. The government's messaging about the threats posed by migration was seemingly contradicted by scenes of refugee families arriving and children playing at train stations.[76] One interviewee argued that witnessing these scenes changed perceptions among some segments of the population, explaining,

> [W]hen the big cities' inhabitants come face to face, see these young kids or young mothers sitting in the grass in the parks, that absolutely contributed to stronger solidarity. So that was counterproductive from the government's side because they wanted to frighten the population. What happened was just the opposite.[77]

Another interviewee characterized this as an 'idyllic short period' during which 'civil society encountered the people and realized that these are poor people no matter whether they are in need of international protection or not' and provided help accordingly.[78]

The limited reaction to the increasing rates of arrival of refugees to Budapest may also have reflected the realization that Hungary was a transit country and that the people arriving to Hungary generally intended to move on very quickly. As a result, questions about the long-term impact on Hungary's security, economy or identity were not particularly relevant or resonant. One interviewee noted that most of the asylum seekers arriving to Hungary had western European countries as their target destinations, and that Hungary was willing to, somewhat cynically, facilitate their onward movement.[79] Another interviewee took a slightly different view, arguing that it 'made sense in a way that no one really wanted to stay in Hungary' and that ultimately 'Hungary ha[d] just given up registering asylum seekers because no one was willing to stay anyway

[74] Gall, 'Hungary's War on Refugees', 2
[75] Stivas, 'The art of securitising. Orbán's handling of the European refugee crisis', 188
[76] Interview 10, 2 November 2023, former government official/academic
[77] Ibid.
[78] Interview 4, 19 July 2023, academic
[79] Interview 10, 2 November 2023, former government official/academic

and they absconded.'[80] In this view, it was logical for Hungary to allow asylum seekers who wanted to travel to Germany and whom Germany was willing to receive to transit the country.[81] This practice would change as the summer drew to a close, however.

2.2 Limiting access to territory and asylum procedures

On June 17, 2015, very shortly after the number of refugees arriving to Hungary began to increase, the government announced construction of a razor wire fence at its border with Serbia, where the vast majority of refugees were arriving via the Western Balkans migratory route.[82] In addition to the rising number of arrivals, the National Consultation on Immigration and Terrorism was used to justify the construction of the fence, though the consultation was not yet complete at the time of the announcement of the initiative.[83] The head of the Prime Minister's office was quoted as justifying the construction of the fence by saying, 'we are conservative people; we insist that if you want to enter someone's house, you must knock first, rather than break down the wall.'[84]

In parallel, the government began the process of amending its asylum legislation to restrict access to international protection. In July 2015, the Asylum Act was amended to declare Serbia a safe third country, provide for accelerated processing of asylum claims, and allow judicial review of negative decisions without halting the deportation process, among other amendments.[85] The classification of Serbia as a safe third country meant that the overwhelming majority of people arriving to Hungary would not be able to have their asylum claims considered on their merits, given that nearly all of the asylum seekers arriving to Hungary came

[80] Interview 8, 2 September 2023, UN staff
[81] Ibid.
[82] 'Hungary closes border with Serbia and starts building fence to bar migrants'
[83] *See* Bocskor, 'Anti-Immigration Discourses in Hungary during the 'Crisis' Year: The Orbán Government's 'National Consultation' Campaign of 2015', 552; Juhász, 'Assessing Hungary's Stance on Migration and Asylum in Light of the European and Hungarian Migration Strategies', 40
[84] Bender, 'Abolishing asylum and violating the human rights of refugees. Why is it tolerated? The case of Hungary in the EU', 61
[85] Juhász, 'Assessing Hungary's Stance on Migration and Asylum in Light of the European and Hungarian Migration Strategies', 42

through Serbia.[86] Under the new legislation, these individuals would be compelled to first apply for asylum there or demonstrate that they were unable to do so.[87]

Many activists and commentators objected to this legal classification, given that Serbia was not considered to be a safe third country by other EU member states or by UNHCR, nor even by the standards previously set out by the Hungarian judiciary.[88] Advocates argued that finding an asylum seeker's claim to be inadmissible and returning that individual to Serbia could present a risk of refoulement.[89] Objections were also raised to the accelerated timelines established in the July amendments, which required that a decision under accelerated procedures and for admissibility procedures be decided within 15 days, with just three days allowed for the rejected asylum seeker to file an appeal and eight days for the decision of the appeal.[90] These short timelines, it was argued, presented serious obstacles in terms of affording asylum seekers a meaningful opportunity to present their claim and enhanced the risk, due also to the lack of suspensive effect of judicial review, of asylum seekers being returned despite having a real fear of persecution in their country of origin.[91]

Both the construction of the fence and the amendment of Hungarian asylum legislation presented challenges to regional collective action efforts, seeking to directly or indirectly divert asylum seekers from Hungary to other EU member states. Hungary has argued, as noted, that they were protecting EU external borders, but would have known it was unlikely that asylum seekers would remain in Serbia. By deviating from regional standards in terms of territorial

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[86] Bender, 'Abolishing asylum and violating the human rights of refugees. Why is it tolerated? The case of Hungary in the EU', 63

[87] Hungarian Helsinki Committee, *Building a legal fence - Changes to Hungarian asylum law jeopardise access to protection in Hungary*, 2015, 1-2 (noting as well that the standard of proof for establishing inability to apply for asylum in a safe third country, 'prove' rather than the generally applicable standard of 'substantiate', was 'unrealistically high')

[88] *See* Juhász, 'Assessing Hungary's Stance on Migration and Asylum in Light of the European and Hungarian Migration Strategies', 46; Hungarian Helsinki Committee, *Building a legal fence - Changes to Hungarian asylum law jeopardise access to protection in Hungary*, 1-2; *see also* Boldizsár Nagy, Parallel realities: refugees seeking asylum in Europe and Hungary's reaction (Odysseus Network 2015), 3 (noting that Hungarian legislators 'assumed in bad faith that Serbia as a safe third country should process the applications of hundreds of thousands of persons reaching the EU via the Western Balkans route')

[89] Hungarian Helsinki Committee, *Building a legal fence - Changes to Hungarian asylum law jeopardise access to protection in Hungary*, 2

[90] Nagy, *Parallel realities: refugees seeking asylum in Europe and Hungary's reaction*, 3

[91] *See* Hungarian Helsinki Committee, Building a legal fence - Changes to Hungarian asylum law jeopardise access to protection in Hungary, 3-4; Nagy, *Parallel realities: refugees seeking asylum in Europe and Hungary's reaction*, 3

asylum and safe third country designations, Hungary was setting a lower standard that would make it still more likely that asylum seekers, already reluctant to remain in Hungary, would apply elsewhere. The government was also sending a message to its citizens that it was taking action on migration and asylum, irrespective of the regional position.

2.3 Rising tensions and regional action

Pending completion of the fence at the Serbian border and even as consecutive, restrictive legislative changes were altering the legal nature of asylum in Hungary, the government sought to advance its narrative on asylum and migration. At the end of August, the government suspended trains that had been transporting refugees and migrants from Budapest to Austria, giving rise to protests.[92] Some refugees boarded trains they believed would take them to Austria, only to be taken to reception centers managed by the Hungarian authorities outside of Budapest.[93]

One interviewee saw the confusion and disorder that followed as precisely the point of the government's action, explaining '[t]here was clearly an interest in escalating the situation as far as possible' as a means to 'scare Hungarians with immigrants.'[94] Another interviewee agreed, noting, 'I think that was partly a provocation of the government…[a]nd it was very clear that the government artificially maintained for this certain period of time.'[95] A third interviewee explained,

> [T]he government didn't really want to resolve this. They wanted people to see people crowding around railway stations in Budapest and in Szeged being the two main cities. And to see that, you know, this is really a danger…But that didn't really work, I would say, because people saw the families…They started going to these places and assisting.[96]

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[92]Klaus, 'Closing Gates to Refugees: The Causes and Effects of the 2015 "Migration Crisis" on Border Management in Hungary and Poland', 18

[93] Emma Graham-Harrison, Patrick Kingsley, Kevin Rawlinson and Warren Murray, 'First refugees arrive from Hungary after Austria and Germany open borders' *The Guardian* (5 September 2015) <https://www.theguardian.com/world/2015/sep/05/refugees-travelling-from-hungary-can-enter-germany-and-austria>

[94] Interview 7, 30 August 2023, former government official

[95] Interview 10, 2 November 2023, former government official/academic

[96] Interview 3, 13 July 2023, NGO staff

Nonetheless, even if the situation in Budapest was not a tipping point at the domestic level, the protests captured attention with the international media. When refugees left Keleti railway station and began walking toward the Austrian border, Orbán's regional counterparts took notice and, subsequently, action.

As related in Chapter 5, Austria and Germany admitted the asylum seekers intent on leaving Hungary, and Hungary provided buses to facilitate transportation to the Austrian border. Merkel, at the time, noted Hungary's efforts to protect the external border but suggested that they had not done enough to help vulnerable refugees, as required of EU member states under the CEAS.[97] Although the actions taken by Austria and Germany in regional solidarity provided a solution to the manufactured crisis in Budapest, this event was still instrumentalized to further the anti-refugee narrative of the government. Speaking at a UN side event on 'Strengthening cooperation on migration and refugee movements in the perspective of the new development agenda' on 30 September 2015, Orbán questioned the refugee character of movements to and through Europe, while highlighting the lack of a coordinated response:

> This is not a refugee crisis. This is a mass migratory movement composed of economic migrants, refugees, asylum seekers and also foreign fighters. This is an uncontrolled and unregulated process.[98]

In making this statement, Orbán continued to cast the crisis as one that fell outside the scope of regional collective action to provide refugee protection. It followed, then, that if these challenges represented not the arrival of refugees seeking asylum within the framework of international and regional refugee law, but rather a 'mass migratory movement,' the CEAS was not the relevant authority, and Hungary was not bound to cooperate with EU initiatives (which he also suggested were ineffective).

In later statements, Orbán focused on the fact that refugees had not wanted to remain in Hungary, arguing that 'the decision of thousands of migrants to journey to richer western European countries like Germany while passing through less wealthy "but stable" countries like Hungary was proof that they could not be classed as refugees, but rather "economic migrants in

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[97] Euractiv.de with agencies, 'Merkel responds to Orbán's criticisms' *Euractiv* (4 September 2015) <https://www.euractiv.com/section/economy-jobs/news/merkel-responds-to-orban-s-criticisms/>
[98] Viktor Orbán, *Statement by H.E. Mr. Viktor Orbán, Prime Minister of Hungary* (United Nations 2015)

search of a better life."'[99] He did not recognize the lack of assistance provided or the anti-immigration campaign by the government as potential factors in asylum seekers' decision making, and specifically cited Syrians, who in 2015 were recognized as refugees or as eligible for subsidiary protection in the EU at a rate of 97%,[100] as being migrants.[101]

Interviewees were not surprised that asylum seekers did not see Hungary as a potential destination, however. Several pointed to the fact that systems in Hungary, separately from the situation of people stranded at Keleti station, were simply overwhelmed.[102] One interviewee explained that

> [I]t sort of made sense in a way that no one really wanted to stay in Hungary. And, in that sense, when Germany was willing to receive the asylum seekers…it kind of like shifted…it was logical for countries to let people just go through the country. They couldn't really stop it anyway.[103]

Another interviewee explained that Hungary had not sought to create the conditions for refugees to receive protection and integrate:

> [Y]ou see that people are just so desperate to leave this place…I think that shows that we basically never wanted to provide this genuine protection because we couldn't afford that, you know. We weren't reaching out to people. We didn't give the impression that there is the prospect of a new life here for those who seek protection.[104]

In a sense, the events of these weeks showed a government caught between competing objectives. In principle, they wanted to blame the EU's collective action efforts for creating a crisis and to utilize the evidence of the crisis to justify further action to restrict access to Hungarian territory and to asylum. At the same time, they were quick to take advantage of the opportunity to swiftly move refugees and migrants onward to Austria, thus benefitting from the solidarity shown by other EU member states seeking to contribute to collective efforts. At no point,

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[99] Rebecca Staudenmaier, 'Orban to Germany: 'You wanted the migrants, we didn't'' *DW* (01/08/2018) <https://www.dw.com/en/hungarys-orban-tells-germany-you-wanted-the-migrants-we-didnt/a-42065012>
[100] European Asylum Support Office, 'Latest asylum trends - 2015 overview' (2015)
[101] Staudenmaier, 'Orban to Germany: 'You wanted the migrants, we didn't''
[102] Interviews 4, 7, 8
[103] Interview 8, 2 September 2023, UN staff
[104] Interview 3, 13 July 2023, NGO staff

however, was there a genuine commitment by Hungary to either facilitate integration of refugees or work in concert with other EU member states to address the 'crisis.'

2.4 The fence, the criminalization of asylum, and the creation of a 'mass migration crisis'

The fence at Hungary's border with Serbia took the logic of deterrence and diversion a step further.[105] Following completion of the fence on 15 September, transit zones were established at two official entry points in the fence, at Horgos and Röszke, allegedly in no-man's land, where asylum seekers were permitted to present their claims and subsequently compelled to wait for a decision in detention conditions.[106] The number of individuals permitted to enter the transit zones on a daily basis never exceeded 100,[107] and was gradually reduced, over time, to two: one per transit zone.[108] This arrival rate represented a dramatic decrease from the 2,000 persons per day who were arriving through the southern border during the first half of September, and many refugees immediately diverted to the Croatian-Hungarian border until Hungary completed a barbed wire fence closing off entry there as well, on 16 October.[109] Others waited outside the fence for their opportunity to enter the transit zones in extremely difficult conditions and with little assistance.[110]

For those refugees and migrants who did arrive to Hungary from Croatia, the government continued the practice of providing transportation to the Austrian border.[111] While

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[105] *See* Bender, 'Abolishing asylum and violating the human rights of refugees. Why is it tolerated? The case of Hungary in the EU', 61; Goździak, 'Using Fear of the "Other," Orbán Reshapes Migration Policy in a Hungary built on Cultural Diversity', 1; Nagy, 'Hungarian Asylum Law and Policy in 2015–2016: Securitization Instead of Loyal Cooperation', 1068

[106] *See* Goździak, 'Using Fear of the "Other," Orbán Reshapes Migration Policy in a Hungary built on Cultural Diversity', 1; Hungarian Helsinki Committee, *No country for refugees - New asylum rules deny protection to refugees and lead to unprecedented human rights violations in Hungary*, 2015, 6

[107] Hungarian Helsinki Committee, *No country for refugees - New asylum rules deny protection to refugees and lead to unprecedented human rights violations in Hungary*, 3

[108] Bender, 'Abolishing asylum and violating the human rights of refugees. Why is it tolerated? The case of Hungary in the EU', 62

[109] Nagy, *Parallel realities: refugees seeking asylum in Europe and Hungary's reaction*, 1-2

[110] Human Rights Watch, *Hungary: Migrants Abused at the Border*, 2016, 1

[111] Klaus, 'Closing Gates to Refugees: The Causes and Effects of the 2015 "Migration Crisis" on Border Management in Hungary and Poland', 18

the government claimed these persons would be registered, the actual intention, according to observers, was to facilitate their onward movement.[112] As one interviewee explained, this action amounted to more than standing by as refugees and migrants self-relocated; the government rather 'collected everyone and transferred them to the other side of the country, so that they can move on.'[113] With the number of arrivals surging to as many as 6,000 per day,[114] the number of people assisted to move onward by the government was estimated at up to 200,000.[115] Once the fence was completed, however, the arrival rate reduced precipitously, to approximately 12 per day.[116]

In tandem, another round of legislative changes followed in September, establishing the legal framework for border procedures to determine admissibility and the requirements for declaration of a 'mass migration crisis.'[117] The border procedures were intended to be carried out in the transit zones, in accordance with the reasoning that this was admissibility screening conducted in no-man's-land prior to arrival to Hungary.[118] The legislation set even shorter deadlines for each stage of the procedure than the July amendments, including a maximum of eight days for a determination of an asylum seeker's admissibility (and in practice decisions were often delivered much more quickly, sometimes in as little as one hour).[119] In principle, asylum seekers with specific needs, such as unaccompanied children, elderly or disabled persons, and victims of torture were exempted from the border procedure, though advocates questioned whether these safeguards would be effective in practice without clear procedures for prompt identification and channeling into a regular asylum procedure.[120] Following receipt

[112] Nagy, *Parallel realities: refugees seeking asylum in Europe and Hungary's reaction*, 2
[113] Interview 8, 2 September 2023, UN staff
[114] Nagy, *Parallel realities: refugees seeking asylum in Europe and Hungary's reaction*
[115] Ibid.; Klaus, 'Closing Gates to Refugees: The Causes and Effects of the 2015 "Migration Crisis" on Border Management in Hungary and Poland', 18
[116] Nagy, *Parallel realities: refugees seeking asylum in Europe and Hungary's reaction*, 2
[117] European Migration Network, *Country Factsheet: Hungary 2015*, 2015; Juhász, 'Assessing Hungary's Stance on Migration and Asylum in Light of the European and Hungarian Migration Strategies', 43
[118] *See* Hungarian Helsinki Committee, *No country for refugees - New asylum rules deny protection to refugees and lead to unprecedented human rights violations in Hungary*, 3 (noting as well that the concept of 'no-man's-land' does not exist under international law)
[119] Ibid.
[120] Ibid., 4

of a negative decision, asylum seekers would be returned to the Serbian side of the fence and given a Schengen-wide entry ban of one or two years.[121]

Amendments were also made to Hungary's Criminal Code to create offenses associated with crossing into Hungary at locations other than the two designated transit zones. Citing instances of refugees having broken through the fence or refused to be fingerprinted and registered, the Government of Hungary argued that 'refugee behaviour' was interfering with the effective application of the Schengen rules.[122] In response, the Criminal Code amendments included the creation of crimes of 'crossing a closed border,' carrying a sentence of up to three years in prison; 'causing damage to a closed border,' carrying a sentence of up to five years in prison; and 'obstructing construction of a border fence,' carrying a penalty of up to one year in prison.[123] Advocates noted the conflict between these crimes and Article 31 of the 1951 Refugee Convention and EU law, which provide protection against criminal penalties for refugees' unlawful entry or presence in a country of asylum.[124] The judiciary dismissed objections to criminal prosecutions based in these provisions 'on the grounds that "eligibility for international protection was not a relevant issue to criminal liability."'[125]

The September legislative amendments further provided that a 'mass migration crisis' could be declared at any point when the average number of asylum applications per day reached 500 for one month, 750 for two consecutive weeks, or 800 in one week, or, alternatively, if the number of persons in the transit zones reached above 1,000 per day for a month, 1,500 for two weeks or 1,600 for one week.[126] On 15 September 2015, notwithstanding

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[121] Ibid. This process was also problematic from Serbia's perspective, as their bilateral readmission agreement with Hungary provided only for the return of Serbians and Kosovars, a technicality that the government sought to avoid by returning asylum seekers directly through the transit zone gates, which were 2-3 meters behind the Hungarian/Serbian border on Hungarian territory. *See* Human Rights Watch, *Hungary: Migrants Abused at the Border*, 2; Hungarian Helsinki Committee, *No country for refugees - New asylum rules deny protection to refugees and lead to unprecedented human rights violations in Hungary*, 2

[122] Kovács, Ramakrishnan and Thieme, 'Provincializing European responses to the refugee 'crisis' through a Hungarian lens', 8

[123] Juhász, 'Assessing Hungary's Stance on Migration and Asylum in Light of the European and Hungarian Migration Strategies', 45

[124] Hungarian Helsinki Committee, *No country for refugees - New asylum rules deny protection to refugees and lead to unprecedented human rights violations in Hungary*, 7

[125] Goździak, 'Using Fear of the "Other," Orbán Reshapes Migration Policy in a Hungary built on Cultural Diversity', 6

[126] Nagy, *Parallel realities: refugees seeking asylum in Europe and Hungary's reaction*, 4

the fact that these newly established standards were not met,[127] the Hungarian government declared a state of emergency 'due to the "crisis situation" at its border with Serbia "caused by mass immigration."'[128] As one interviewee explained, the government used the emergency declaration to argue that 'if there is an extraordinary situation, we are entitled to use extraordinary solutions.'[129] This meant, concretely, that the government believed that it could argue that it had reason to ignore otherwise binding legislation, including EU regulations – notwithstanding the lack of such exceptions in the CEAS.[130]

On 15 September, applying the newly enacted legislation, Hungary announced that it had reached decisions on 16 asylum requests, all of which had been rejected.[131] The government also indicated that they had arrested and charged 174 people trying to cross into Hungary irregularly.[132] Human Rights Watch would later characterize the government's practice as 'breaking all the rules for asylum seekers transiting through Serbia, summarily dismissing claims and sending them back across the border.'[133]

One commentator argued that, even as Hungary constructed the fence and passed increasingly extreme legislation, Orbán was 'confident that politicians like Cameron and Merkel [would] not ultimately oppose him.'[134] In fact, Orbán would argue that the fence was a necessary measure in the defense of the EU/Schengen borders against a mass migration crisis.[135] Following these events, an interviewee described the government as 'declaring victory' and claiming 'this is what needed to be done.'[136] Subsequently, Hungary would cite construction

[127] Boldizsár Nagy, 'Renegade in the Club - Hungary's Resistance to EU Efforts in the Asylum Field' (2017) 63 Osteuropa Recht 413, 419
[128] Liz Fekete, 'Hungary: power, punishment and the 'Christian-national idea'' (2016) 57 Race & Class 39, 40
[129] Interview 10, 2 November 2023, former government official/academic
[130] *See* Ibid.
[131] Matthew Weaver and Haroon Siddique, 'Refugee crisis: Hungary rejects all asylum requests made at border - as it happened' *The Guardian* (15 September 2015) <https://www.theguardian.com/world/live/2015/sep/15/refugee-crisis-hungary-launches-border-crackdown-live-updates>
[132] Ibid.
[133] Human Rights Watch, *Hungary: Migrants Abused at the Border*, 1
[134] Fekete, 'Hungary: power, punishment and the 'Christian-national idea'', 50
[135] Ian Traynor, 'Migration crisis: Hungary PM says Europe in grip of madness' *The Guardian* (3 September 2015) <https://www.theguardian.com/world/2015/sep/03/migration-crisis-hungary-pm-victor-orban-europe-response-madness>
[136] Interview 1, 19 June 2023, former NGO staff/volunteer

of the fence and stationing of police along the border as a form of solidarity, which served to protect Hungary and the EU 'against the flood of illegal immigrants.'[137]

Looking at these events retrospectively, interviewees saw this progression of legislative changes, in parallel with the construction of fences and denial of the refugee character of arrivals to Hungary, as part of a systematic attack on international protection in the country. As one interviewee explained, 'it was a manifest denial of access to the procedure, when they started to limit the numbers of people.'[138] Another interviewee described these legislative changes as the first steps of 'the dismantling of the asylum system in Hungary.'[139] And these measures had an impact: particularly following the construction of the fence, the objective situation in Hungary changed, as the flow of refugees virtually halted. Yet, as with all fences, holes emerged. From February 2016, the number of arrivals again began to climb, averaging more than 4,000 monthly for the period from February to June 2016, which is roughly the same number as in late 2014 and early 2015, in the period leading up to the 'summer of migration.'[140] Although still falling short of crisis levels, the government would use this increase to justify further legislative action.

2.5 Non-compliance with the CEAS and rejection of the quota system

Throughout this period, as noted above, Hungary continued to chart its own course, often in direct contravention of regional collective action efforts. The attitude of the Hungarian government grew increasingly bold in terms of disregarding EU legislation and norms, as they both criticized the regional response to the crisis and took the opportunity to engage in free riding by facilitating onward movements toward countries that were contributing to collective action to provide refugee protection. One interviewee explained that 'in May or June [the government] started to sort of tap into the possibilities of pulling out of the common system as

[137] Nagy, 'Renegade in the Club - Hungary's Resistance to EU Efforts in the Asylum Field', 425
[138] Interview 4, 19 July 2023, academic
[139] Interview 8, 2 September 2023, UN staff
[140] Nagy, 'Hungarian Asylum Law and Policy in 2015–2016: Securitization Instead of Loyal Cooperation', 1040

much as they could.'[141] In line with this observation, the government announced in June that it would suspend re-admission of asylum seekers upon request by other EU member states – effectively announcing its intent to disregard the applicability of the Dublin regulation.[142] This position was subsequently walked back, however, as it was seen as going too far in terms of disregarding the legal framework Hungary had accepted in joining the EU.[143] As one interviewee described, however, the realization that Hungary could not openly defy the EU did not stop it from continuing to undermine the CEAS.[144] Rather, Hungary sought to play an 'awkward game' to avoid complying with the spirit of the CEAS while still maintaining its participation in Schengen.[145]

This attitude toward the CEAS manifested itself in what may be described as a shift from genuine to nominal compliance. One interviewee observed of the measures taken at the border,

> [W]ith the CEAS, it was, I cannot say actually that there was no willingness from the authorities to meet the requirements…interpreting was provided, yes, medical support was provided and reception conditions…If I read only the list of the facilities and services provided, everything was in place, more or less, but in real life, you could see what is the attitude and also the qualifications of the staff members who were carrying out the border procedures.[146]

Another interviewee saw even this superficial effort fading over time, noting that 'a lot of things changed in 2015,' when 'Hungary made it pretty clear that we don't want to apply the asylum system like we used to before.'[147] Within the government, where 'before that the main reason or main purpose was always to achieve some kind of understanding and some kind of consensus within these negotiations with the European Commission,' it was observed that 'from a certain point the risks that, you know, the Hungarian law would infringe European law, was not a factor on the decision making level anymore.'[148] The message within the government was clear that 'we should follow Hungarian interests and not Brussels interests.'[149]

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[141] Interview 5, 31 July 2023, NGO staff
[142] Nagy, 'Hungarian Asylum Law and Policy in 2015–2016: Securitization Instead of Loyal Cooperation', 1068-69
[143] *See* ibid.
[144] Interview 5, 31 July 2023, NGO staff
[145] Ibid.
[146] Interview 2, 5 July 2023, UN staff
[147] Interview 9, 18 September 2023, government official
[148] Interview 7, 30 August 2023, former government official
[149] Ibid.

This shift in attitude toward the CEAS may have been rooted in, and was certainly justified by, the idea that EU policies were driving the refugee 'crisis.' In early September, writing for a German newspaper, Orbán stated explicitly that Europe 'must acknowledge that the European Union's misguided immigration policy is responsible for this situation.'[150] Orbán specifically targeted 'welcome' policies in Europe, arguing, '[i]t is irresponsible for any European politician to give migrants hope of a better life and encourage them to leave everything behind and risk their lives en route to Europe.'[151] Given that Hungary had not sent such signals, and in fact had specifically sought to dissuade refugees, the Orbán government denied all responsibility and dismissed suggestions of showing solidarity with the countries receiving the highest numbers of asylum seekers – Orbán was clear that '[t]his is not a European problem, it's a German problem.'[152]

Within the broader context of Hungary's attacks on Brussels, the introduction of the emergency or Hotspot Relocation Scheme became a particular focus for populist ire. Following the introduction of the concept in the European Agenda on Migration, the government had already begun issuing statements to the effect that they would not accept the relocation of any refugees to Hungary.[153] These intensified after the announcement in July of a quota of 40,000 relocations from Italy and Greece to other EU member states, which was followed by an additional 120,000 places in September.

Once again, the government sought to rely on public opinion, circulating a petition to voters on the issue, which it later claimed demonstrated that 85 to 90 percent of Hungarians opposed the relocation scheme.[154] Speaking to Parliament, Orbán framed the quotas, again, as a sovereignty issue, arguing:

> 'It is still the case that, from somewhere outside Hungary, people want to tell us Hungarians who we should live alongside. This is what the quotas are about. I

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[150] Traynor, 'Migration crisis: Hungary PM says Europe in grip of madness'
[151] Matthew Karnitschnig, 'Orbán says migrants threaten 'Christian' Europe' *Politico* (3 September 2015) <https://www.politico.eu/article/orban-migrants-threaten-christian-europe-identity-refugees-asylum-crisis/>
[152] Traynor, 'Migration crisis: Hungary PM says Europe in grip of madness'
[153] *See* European Commission, *Managing migration better in all aspects: A European Agenda on Migration*; Interview 1, 19 June 2023, former NGO staff/volunteer
[154] Juhász, 'Assessing Hungary's Stance on Migration and Asylum in Light of the European and Hungarian Migration Strategies', 49. It should be noted that the results of this petition were again non-representative, with 900,000 voters out of 8 million having signed.

> propose to the Honourable House that we continue to reject the quotas, and continue to insist that we ourselves should decide whom we want to let in and whom we want to live together with.'[155]

After receiving approval from the Hungarian Parliament, the Orbán government announced its intention to seek review of the relocation decision before the European Court of Justice (CJEU) in December 2015.[156]

Initially, there was a suggestion that people might be relocated *from* Hungary as part of the second tranche of relocations – in other words that, along with Greece and Italy, Hungary would be assisted by other EU member states willing to accept the relocation of asylum seekers initially registered in Hungary.[157] Hungary refused this suggestion, however. One interviewee suggested that this rejection was due to the fact that Hungary knew that the vast majority of the 174,000 asylum seekers who had arrived in Hungary had already moved onward toward other EU member states.[158] Another interviewee agreed that Hungary's status as a transit country played a role in this decision, explaining,

> I think it just made sense in that political narrative to keep refusing and rejecting these mechanisms. And I think the government very well knew that people could anyway just leave Hungary and go to Germany…[O]n paper the mechanism actually would have benefitted Hungary based on the number of people who arrived. But I think in practice, it never would have benefitted Hungary in the way it was supposed to. I think the government was very much aware of that.[159]

Hungary's refusal of this apparently beneficial scheme, in effect, allowed it to remain logically consistent without any practical downside.

Hungary's opposition to the relocation scheme went considerably further, however, at times seeming disproportionate to the 'burden' on Hungary. The quota assigned to Hungary was 1,294 refugees, for which it stood to receive 6,000 euros per individual relocated.[160] In practice,

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[155] Transcript, 'Viktor Orbán on defending Europeans and "the invasion of the outsiders"' *Hungarian Free Press* (18 November 2015) <https://hungarianfreepress.com/2015/11/18/viktor-orban-on-defending-europeans-and-the-invasion-of-the-outsiders/>
[156] Juhász, 'Assessing Hungary's Stance on Migration and Asylum in Light of the European and Hungarian Migration Strategies', 48-49
[157] Senanda Šelo Šabić, *The Relocation of Refugees in the European Union: Implementation of Solidarity and Fear*, 2017, 5
[158] Interview 4, 19 July 2023, academic
[159] Interview 8, 2 September 2023, UN staff
[160] Šabić, *The Relocation of Refugees in the European Union: Implementation of Solidarity and Fear*, 5-6

given that fewer than 30,000 refugees were relocated in total,[161] it seems unlikely that Hungary would have been required to meet even this modest target. Yet, even after the slow pace of relocation was clear, Hungary initiated a public referendum to seek further justification for its opposition to any relocation of refugees to Hungary. The October 2016 referendum asked voters the question, 'Do you want the European Union to prescribe the mandatory settlement of non-Hungarian citizens in Hungary without the consent of the national Assembly?'[162] Several interviewees highlighted the misleading nature of the survey, in particular that it never specified the number of refugees to be relocated and cast the relocation scheme as a migratory rather than refugee protection measure.[163] Further, the referendum did not reach the threshold for validity, as the response rate fell below the 50%, perhaps in part due to the active campaigning of civil society organizations encouraging Hungarian voters to abstain from participating.[164] This did not stop the government from citing the referendum as supportive of its stance on the relocation issue, however, which remained unchanged for the duration of the program.[165]

2.6 The EU's response and further legislative changes

Given the direct conflicts with EU law and collective action efforts posed by some of the amendments to Hungary's asylum law, the EU sought to initiate infringement procedures. In December 2015, the Commission opened an infringement procedure with a formal letter based on changes to Hungary's asylum procedures that were in conflict with the CEAS, including the impossibility to present new facts or circumstances on appeal, the lack of suspensive effect of appeals, the lack of translation/interpretation in criminal proceedings for irregular border crossings, and the fact that judicial decisions were being taken by court secretaries.[166] In May

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[161] Ibid., 6
[162] Goździak, 'Using Fear of the "Other," Orbán Reshapes Migration Policy in a Hungary built on Cultural Diversity', 6
[163] Interviews 1, 3, 4
[164] *See* Goździak, 'Using Fear of the "Other," Orbán Reshapes Migration Policy in a Hungary built on Cultural Diversity', 6; Juhász, 'Assessing Hungary's Stance on Migration and Asylum in Light of the European and Hungarian Migration Strategies', 50
[165] Šabić, *The Relocation of Refugees in the European Union: Implementation of Solidarity and Fear*, 8
[166] European Commission, *Commission opens infringement procedure against Hungary concerning its asylum law* (2015)

2017, the Commission followed up on this procedure with a second letter of formal notice, outlining the issues that remained unresolved as well as new issues, which included: failure to provide effective access to asylum procedures on Hungarian territory, lack of guarantees for vulnerable applicants, reduced timeline for appeals in violation of the right to an effective remedy, returns effected without regard to procedural requirements, and systematic use of detention in the transit zones.[167] At the end of 2017, the Commission decided to proceed with a reasoned opinion against Hungary.[168] In July 2018, the infringement procedures moved on to the final stage, with referral of Hungary to the CJEU on the basis of the incompatibility of its legislation with the Asylum Procedures Directive, Reception Conditions Directive, and the Returns Directive.[169]

Even as this challenge to Hungary's 2015 legislation wound its way through the enforcement process, the Hungarian Parliament passed new restrictive legislation, in parallel with ongoing efforts to avoid compliance with the relocation scheme. As of 5 July 2016, amendments to the Asylum Act allowed Hungarian police to 'push back' asylum seekers found anywhere within 8 kilometers of the border, with no exceptions for persons who expressed their wish to apply for asylum and irrespective of any vulnerabilities.[170] Advocates argued that this measure 'denie[d] asylum-seekers the right to seek international protection, in breach of relevant obligations emanating from international and EU law.'[171]

The returns that were effected in accordance with this law, moreover, raised serious concerns in terms of human rights abuses: Human Rights Watch registered reports of refugees and migrants being hit, kicked, tied with plastic handcuffs, and sprayed with substances that caused their eyes to burn.[172] Later, Hungary would take this rule still further, arguing that

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[167] European Commission, *Commission follows up on infringement procedure against Hungary concerning its asylum law* (2017)
[168] European Commission, *Migration: Commission steps up infringement against Hungary concerning its asylum law* (2017)
[169] European Commission, *Migration and Asylum: Commission takes further steps in infringement procedures against Hungary* (2018)
[170] Hungarian Helsinki Committee, *Hungary: Latest amendments "legalise" extrajudicial push-back of asylum-seekers, in violation of EU and international law*, 2016
[171] Ibid.
[172] Human Rights Watch, *Hungary: Migrants Abused at the Border*, 7

pushbacks could be effected from anywhere within Hungary.[173] One interviewee described the implementation of this measure, along with the limitation on the number of people admitted to the transit zones, as a turning point, in that '[i]t was clearly contrary to the EU law,' such that the Hungarian government could no longer claim to be in compliance with the CEAS.[174]

Interviewees described the Hungarian government as being acutely aware of the time and procedural steps required to bring an infringement action.[175] As one interviewee explained,

> [T]here's no genuine commitment, law is just an instrument, and they just want to provoke the EU institutions by enacting more and more far-reaching and prima facie incompatible legislation with the EU laws. It takes time. For them, if you gain time, of course you gain political space and you can win elections. If an issue to be resolved takes three or four years, fair enough, it's almost one term.[176]

Another interviewee stated, in a similar line, that 'they know that time is on their side because whatever they do, the repercussions take so much time that this is worth introducing…it will be roughly a four or five-year period, maybe three years but not shorter.'[177]

While the Commission's 2015 infringement action ultimately resulted in a favorable ruling by the CJEU,[178] the fact that the decision was only handed down in 2020 meant that the crisis period had long passed by the time the EU was able to effectively respond to Hungary's breaches of CEAS instruments. Hungary had succeeded in avoiding compliance with its CEAS obligations for five years. In effect, Hungary demonstrated the possibility for one member state, acting in bad faith, to free ride for an extended period.

Even after 2020, Hungary did not meaningfully move toward compliance: several interviewees noted that the government 'never retreated' or sought to comply with the CEAS in

[173] Nagy, 'Renegade in the Club - Hungary's Resistance to EU Efforts in the Asylum Field', 418
[174] Interview 4, 19 July 2023, academic
[175] Interviews 1, 5, 6, 8
[176] Interview 6, 10 August 2023, former government official
[177] Interview 5, 31 July 2023, NGO staff
[178] *Commission v Hungary (Accueil des demandeurs de protection internationale) C-808/18*, ECLI:EU:C:2020:1029, European Union: Court of Justice of the European Union, 17 December 2020, https://www.refworld.org/jurisprudence/caselaw/ecj/2020/en/123405 (finding that Hungary's transit zone procedure failed to comply with the Asylum Procedures Directive by sharply limiting access to asylum procedures and disregarding safeguards for vulnerable groups, as well as failing to implement the safeguards contained in the Reception Conditions Directive for the use of detention, among other violations)

the face of the negative decision by the CJEU.[179] Following the 2020 CJEU decision, the Hungarian government closed the transit zones and put in place a new procedure that required asylum seekers to first approach the Hungarian embassy in Serbia or Ukraine before entering Hungary. The complete denial of access to asylum procedures on Hungarian territory triggered another infringement action and, ultimately, a negative CJEU decision in June 2023.[180] In effect, a finding that one restrictive practice conflicted with the CEAS prompted implementation of another, equally inconsistent practice. Citing this example, an interviewee explained that 'even the EU mechanisms cannot have an effect' if the government is intent upon 'making a very bad faith interpretation of that judgment.'[181] Only four years after the CJEU's initial ruling did the European Court of Justice (ECJ) impose a penalty, fining Hungary 200 million euros plus an additional 1 million euros per day for its failure to comply with the court's 2020 ruling.[182]

In parallel, the CJEU had in 2017 ruled against Hungary, Poland, and Slovakia in the case they had brought to challenge the validity of the EU relocation scheme.[183] Again, however, the decision was only handed down as the relocation program was expiring, such that there was no practical effect to the adverse ruling.[184] Reviewing the Hungarian opposition to the relocation scheme, Nagy described it as 'the most conspicuous manifestation of Hungary's freeriding' and 'an attack against the CEAS, unparalleled in gravity by any other member state's action.'[185] An

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[179] Interviews 3, 5, 8, 10

[180] *Commission v. Hungary (Declaration d'intention prealable a une demande d'asile) C-823/21*, ECLI:EU:C:2023:504, European Union: Court of Justice of the European Union, 22 June 2023, https://www.refworld.org/jurisprudence/caselaw/ecj/2023/en/147960 (finding that the so-called embassy procedure constituted a violation of the Asylum Procedure Directive's requirement to 'ensure effective, easy and rapid access to the procedure for granting international protection')

[181] Interview 8, 2 September 2023, UN staff

[182] Court of Justice of the European Union, *Asylum policy: Hungary is ordered to pay a lump sum of 200 million euros and a penalty payment of 1 million euros per day for failure to comply with a judgment of the Court of Justice* (2024). When Hungary failed to pay this fine, the European Commission indicated that it would withhold the amount from subsequent payments to Hungary. EU to withhold 200 million from Hungary over asylum fine, *DW* (18 September 2024) <https://www.dw.com/en/eu-to-withhold-200-million-from-hungary-over-asylum-fine/a-70260506>

[183] *Commission v Poland (Mécanisme temporaire de relocalisation de demandeurs de protection internationale), C-715/17, C-718/17 and C-719/17*, ECLI:EU:C:2020:257, European Union: Court of Justice of the European Union, 2 April 2020; https://www.refworld.org/jurisprudence/caselaw/ecj/2020/en/123180

[184] Matina Stevis Gridneff and Monika Pronczuk, 'E.U. Court Rules 3 Countries Violated Deal on Refugee Quotas' *The New York Times* (2 April 2020) <https://www.nytimes.com/2020/04/02/world/europe/european-court-refugees-hungary-poland-czech-republic.html>

[185] Nagy, 'Hungarian Asylum Law and Policy in 2015–2016: Securitization Instead of Loyal Cooperation', 1069, 1034

interviewee, similarly, described Hungary's defiance of the EU's proposal as 'a new level' and 'clearly a sign of, you know, we don't care.'[186]

Opting out of regional action

With both its restrictive legislation and its refusal to participate in the relocation scheme, Hungary had, in effect, rejected its legal obligations under the CEAS and engaged in free riding. While one might argue that the relocation scheme was novel and, therefore, that the nature of the obligation was debatable, this was not the case where Hungary's 2015 legal amendments were concerned. The infringement procedure put Hungary on notice as of the end of 2015, providing ample opportunity to make changes prior to reaching a final adverse judgment. Based on this sequence of events, one might conclude that the infringement procedure is not designed in a manner that allows it to effectively deal with bad faith breaches, as Hungary's actions demonstrated the potential reward to a defecting party in terms of avoiding its obligations for a considerable period. The length and complexity of the process, in effect, hinders the ability of the EU to promptly react to free riding, which poses considerable obstacles in the context of a fast-evolving crisis.

3 After the crisis: a changed landscape

Hungary's crisis response has reached beyond the temporal bounds of the 2015-2016 'crisis,' leaving a lasting imprint on the national political dialogue around asylum as well as the legal framework. Notwithstanding the dramatic reduction in the rate of refugee and migrant arrivals to Hungary, the state of crisis due to mass migration remains in place more than eight years after its initial declaration.[187] The securitization narrative presented by the Orbán government, which was further advanced following the Paris attacks in 2015, resonated with the public, and has remained an important feature in political campaigns.[188] Perhaps most significantly, the framing of the refugee crisis of 2015 as being, in fact, a migration crisis, has

[186] Interview 7, 30 August 2023, former government official
[187] Hungarian Helsinki Committee, *Overview of the main changes since the previous report update: Hungary* Asylum in Europe, 2023
[188] Stivas, 'The art of securitising. Orbán's handling of the European refugee crisis', 193; Interview 1, 19 June 2023, former NGO staff/volunteer

continued to be emphasized, with the government drawing a clear contrast in its response to the Ukrainian arrivals it deems 'genuine' refugees.[189]

3.1 Popular views and support for the government's stance

A public opinion poll conducted in Hungary in 2016 showed the extent to which the public ultimately aligned with the government's positioning. Hungarians were significantly more concerned about the economic and security impact of receiving refugees than other Europeans, with roughly 75% indicating that 'refugees will increase the likelihood of terrorism in Hungary.'[190] Hungarians also were more likely than other Europeans to view minority groups negatively and to place an emphasis on national identity.[191] Critically, respondents were much more likely to approve of Orbán's response to the refugee crisis than that of the EU, at a rate of 71% compared to 25%.[192]

Interviewees viewed the shift in public opinion as durable: one interviewee explained that 'these few months have irreversibly changed the discourse and also the mentality' while driving xenophobia to 'unseen heights.'[193] Another interviewee described the political views of the population as generally consistent with the populist and security-focused messaging of the government, concluding 'it was definitely easy to sell these ideas that the government was selling.'[194] Encouraged by this success, the government has maintained a focus on migration, which one interviewee noted was Orbán's 'most successful campaign theme.'[195]

Conflict with Brussels has, similarly, become a defining characteristic of the Hungarian government's platform. And, like the government's anti-migration stance, it is popular: one interviewee noted, 'so far the political support is enormous…people really appreciate this sort

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[189] Interview 5, 31 July 2023, NGO staff
[190] Dorothy Manevich, *Hungarians share Europe's embrace of democratic principles but are less tolerant of refugees, minorities* (Pew Research Center 2016), 2
[191] Ibid., 3
[192] Ibid., 5
[193] Interview 4, 19 July 2023, academic
[194] Interview 8, 2 September 2023, UN staff
[195] Interview 1, 19 June 2023, former NGO staff/volunteer

of freedom fight and what the government does with Brussels.'[196] With the introduction of the EU Pact, solidarity once again became an issue for debate. As one interviewee described,

> [T]hey just say that we don't want other people to tell us what to do. And they again want to oppress us to accept refugees whereby we don't want this. So, I don't think their discourse has changed much.[197]

Given these positions taken by the government, as well as their apparent popularity, interviewees saw little potential for a meaningful shift toward the common European position.[198] One interviewee noted, 'domestically it works out pretty well and so far the price the government have had to pay for it is worth the gains internally, the political support, the cohesion, the identity building…'[199] It remains to be seen, however, if this will continue to be the case if the Commission continues to collect against the fine imposed on Hungary by the ECJ.

3.2 Stalled progress toward collective action

During the two decades since Hungary joined the EU, little progress can be observed in terms of the country's willingness to contribute to collective action at the regional level to ensure provision of refugee protection. In Hungary's case, governance methods have demonstrably failed to instill or give rise to common values, as anticipated by Fletcher.[200] In fact, during the period immediately preceding, during, and following the refugee crisis in Europe, Hungary retreated from its earlier good faith efforts toward collective action. In this case, the 'shared goals' built into Rosenau's definition of governance were seemingly absent from the start of the tenure of the Fidesz government, though decisive action followed only in 2015. Indeed, Fidesz scored political points with its base precisely by virtue of flouting the EU's refugee framework and targeting 'Brussels' – a situation incompatible with effective cooperation toward provision of a collective good at the regional level.

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[196] Interview 5, 31 July 2023, NGO staff
[197] Interview 3, 13 July 2023, NGO staff
[198] Interviews 3, 5, 6
[199] Interview 5, 31 July 2023, NGO staff
[200] *See* Fletcher, 'EU Governance Techniques in the Creation of a Common European Policy on Immigration and Asylum', 554

An additional factor in the case of Hungary was the government's ability to drive the political dialogue around asylum and migration, and, at least in the eyes of its domestic constituency, distinguish the current 'migration crisis' from refugee contexts in which the CEAS would be applicable. To the extent that Hungary had moved toward the broader EU position on asylum, which in fact enjoyed popular support, the government needed to formulate a narrative for why those standards were not relevant. By casting refugees arriving on its territory as economic migrants and, moreover, a security threat, the government was able to avoid the appearance of disregarding applicable law and instead present its conflict with Brussels as a policy-based disagreement. In doing so, it was able to change the costs and benefits associated with defection: it avoided domestic disapproval from a population that was generally favorably inclined toward EU membership, while also scoring points for standing up to supposedly anti-democratic forces in the west. Vis-à-vis Brussels, the government focused on 'the will of the people' and democratic values, a position that is tied to sovereignty but also highlights the accountability of the government not only to the EU but also to its voters.

An uneasy relationship with regional action

Hungary's trajectory during the crisis deepened tensions between national and regional perspectives on asylum and migration, with the rift continuing to be evident even after the crisis ceased. The Fidesz government was able to steer public opinion toward a security-dominated framing of the crisis response, while avoiding engaging with the (more sympathetic) narrative around refugee protection that would have supported contribution toward collective action. Public opinion in Hungary was more supportive of the domestic than the regional response, a situation that gave the government few reasons to reconsider its stance. Nearly a decade after the crisis, Hungary has maintained the declared state of emergency to justify exceptional measures regarding asylum: from the initial 2015 crisis justification, the basis has shifted to COVID and subsequently the war in Ukraine, but with the same result – the unavailability of asylum on Hungarian territory.[201] Despite the clear breach of CEAS standards, enforcement actions have had limited success in changing the course charted by the Hungarian government.

[201] European Union Asylum Agency, 'Asylum Report 2025: Annual Report on the Situation of Asylum in the European Union' (2025)

4 Conclusion

The narrative above traces the actions of a government often at odds with its regional counterparts, demonstrating a consistent attempt to free ride on the collective actions of other member states, with varying justifications. Given Hungary's early compliance and the general agreement of the population with the provision of refugee protection in principle, it is possible to imagine a different outcome in this sequence of events. In practice, however, Hungary was not willing to contribute to collective action to provide refugee protection during or after the crisis, and existing enforcement mechanisms have proved insufficient to address Hungary's free riding behavior. The potential for social learning and adaptation, as detailed in governance literature, also proved to be limited in the face of strong domestic political currents – many of them created or directed by the government in power.

4.1 Free riding

One can, arguably, find the roots of Hungary's free riding in its unwillingness to serve as a front-line state. As described by a former government official, there was a realization in Hungary that full application of the CEAS would put Hungary in the position of providing protection to a significant number of asylum seekers while EU member states located at a distance from the bloc's borders would be under much less pressure – effectively able to free ride in situations in which the CEAS, and particularly the Dublin Regulation, functioned as intended. This led Hungary to seek to designate Serbia as a safe third country, thereby moving the front line outward, and later to seek, through restrictive legislation, to strictly limit access to Hungarian territory and asylum procedures, effectively nullifying territorial asylum in the country.

In exploring these measures to deter and deflect asylum seekers, Hungary was free riding on the efforts of other EU member states and failing to meet the minimum standards established by the CEAS. Somewhat problematically, however, the process of reaching a legal conclusion on this point was time consuming: the CJEU verdict invalidating Hungary's 2015 legislative amendments, which established the transit zones, among other restrictions, was handed down only in 2020, long after the number of asylum seekers arriving to the EU had reduced. The decision on Hungary's challenge to the Hotspot Relocation Scheme was faster but still came down only in 2017, after the expiry of the scheme's requirements. The decision on Hungary's 2020 'embassy procedure' came only in 2023, again allowing Hungary to continue to violate the CEAS for three additional years.

There are indications that the EU may have found a means of addressing Hungary's ongoing attempts to free ride, however. When Hungary still made no move to remedy its legislation after the CJEU's 2023 ruling, the ECJ imposed a fine in 2024 that involved daily penalties for continuing breach. When Hungary refused to pay the fines, the Commission withheld them from payments intended for Hungary, effectively indicating that Hungary's defiance of the CEAS would no longer be tolerated. Whether these measures will ultimately cause Hungary to change course or simply result in Hungarian citizens' loss of benefits remains to be seen.

4.2 Political will and political narratives

Hungary illustrates the potential for a government to proactively place asylum and migration in front of voters in a manner designed to shape the national conversation and to muster support for restrictive, ultimately illegal (free riding) policies. In Sweden and Germany, the importance of the dominant narrative regarding asylum and migration in shaping policy changes was also evident, but in contrast to Hungary, it was generally far right parties seeking to expand their vote share who sought to influence political debates on asylum and migration. Extreme rhetoric was countered by mainstream parties, including those in power, even if they eventually resulted in some rightward movement at the national level. In Hungary, however, the dynamic was reversed: the government in power pursued restrictive policies and voiced extreme views about the risks posed by refugees and migrants, and it was left to the opposition to seek to moderate these messages – a near impossible task.

The Fidesz government's objectives in directing the national conversation about asylum and migration were two-fold. First, a restrictive asylum policy was in line with their platform and, more broadly, their nationalist perspective. This position had been part of their election messaging and has constituted a consistent theme for the past fifteen years. In addition, however, focusing on asylum and migration served to redirect the public to external opponents (Brussels, refugees and migrants) rather than allowing the public dialogue to revolve around economic challenges or unpopular actions by the government. Relatedly, this action raised the profile of Hungary at the regional level, where its positions stood in stark contrast to those taken by Germany, France, and other EU member states.

Ultimately, the Fidesz government instrumentalized its responsibility to its voters in opposition to its obligations at the regional level. Despite approaching the collection of public opinion in an opaque manner, the government sought to make the case to the EU that it was following democratic principles in disregarding its responsibilities under the CEAS. Playing this two-way game, while clearly not in compliance with the CEAS, yielded positive electoral results at the domestic level and allowed the government to achieve its near-term goals, in contrast to the governments in Sweden and Germany.

4.3 Good faith in implementation

The history of the CEAS in Hungary also highlights the role of good faith or belief in the objectives of a collective effort in the success of new governance. As set out by commentators, new governance may work to overcome obstacles to cooperation gradually and over time, but only where members are in agreement about the goals of cooperation.[202] In the case of Hungary, this prerequisite was not in place. Even prior to the ascension of Fidesz, Hungary harbored doubts about the CEAS and the disproportionate burden placed on front-line states. Over time these doubts crystallized and were reinforced by the Fidesz government's shaping of the political dialogue around asylum and migration, and particularly the government's positioning of itself in opposition to Brussels.

[202] Rosenau, 'Governance, order, and change in world politics', 4

Under these conditions, a hybrid system such as the CEAS cannot serve to guide or increase contributions to collective action. The legislative component, as described above, was intended to lock in compliance at an agreed level, while informal cooperation among states was intended to bring states closer together and ultimately enable greater integration of asylum systems. Hungary demonstrated weaknesses in the CEAS hybrid model at both levels. First, as stated above, the reconciliation procedures in place were designed to resolve differences prior to litigation – they clearly did not contemplate deliberate defiance of agreed standards. This dynamic even more thoroughly frustrated any potential progress related to new governance: Hungary was not going to make use of EUAA guidance or replicate the good practices of other EU member states when its objectives were expressly in opposition to ensuring quality asylum procedures. Hungary's positive response to the Ukraine crisis in 2022 demonstrated the potential for cooperation and contribution to a collective response when the broader objectives of the bloc aligned with Hungary's own views and intentions. When this was not the case, as in 2015, however, the CEAS had limited potential to alter Hungary's preferred course of action – what it would have done in the absence of a collective framework – and facilitate contributions toward collective action to provide refugee protection.

Chapter 7 Conclusion

This chapter synthesizes insights from the three empirical chapters and situates them within the collective action and new governance frameworks. Section 1 presents an overview of the response to the 2015 refugee crisis in Sweden, Germany and Hungary, drawing out common themes as well as considering the unique or distinct attributes of each country context. Section 2 builds on this analysis by suggesting the key elements that emerge from this review in terms of essential elements for hybrid mechanisms like the CEAS to effectively coordinate collective action. Section 3 considers how this research may contribute to both the collective action and new governance literature, while Section 4 sets out possible areas for further research suggested by this project.

1 State-level responses to the 2015 refugee crisis

This research highlighted three separate responses to the 2015 crisis, in Sweden, Germany, and Hungary. Each country sought to manage its domestic political dynamics related to the crisis, as well as regional expectations of compliance with the CEAS, in the extraordinary situation of the arrival of more than one million refugees to the continent. More than 16 years after the beginning of the implementation of the CEAS, this response was halting, fragmented, and uneven, with countries seeking to align with their neighbors' responses and avoid being the preferred destination of asylum seekers arriving to the region.

Through examination of this series of events, this research engages with several distinct questions, focused around a central theme: ***what does the response to the 2015 refugee crisis indicate about the potential for hybrid structures to facilitate interstate cooperation in 'hard cases'?*** In other words, recognizing the challenges inherent in creating structures that support states to work together at the regional level, how can we meaningfully evaluate the performance of the CEAS? What type of structure is it, and what aspects of this structure helped or hindered cooperation in the context of the refugee crisis? What does this tell us about the potential for cooperation in 'hard cases' of collective action more broadly?

Each of the three states examined entered the 2015 crisis period with its own historical and political orientation toward the provision of refugee protection. Due to geographic and practical factors, moreover, each was impacted by the crisis in a different manner. This research looked carefully at the orientation of each country to the CEAS before, during, and after the crisis, assessing the importance and role of the regional framework in the country's crisis response.

The Swedish example speaks to the magnitude of the impact a crisis event can have on a country with a long and consistent history of refugee protection. As a self-described 'humanitarian superpower,' Sweden had long taken pride in exceeding the minimum standards that existed at the regional level, with the aim of setting an example for the region. The altruistic and prestige benefits associated with being a provider of refugee protection held significant value in the country, which saw itself as small in the context of the EU, but playing an outsized role in advancing humanitarian goals. In the context of the crisis, however, the perceived failure of the CEAS to facilitate an effective joint response among EU member states facing a rapidly increasing number of asylum applications led Sweden to lose confidence in the system and seek to ensure its engagement would be more strategic. As Sweden's reception capacity was quickly exhausted, the country began to examine options for directing asylum seekers away from its territory, including reduction of its asylum standards to the minimum level permitted under EU law. The crisis effectively changed Sweden's valuation of the costs and benefits of being a provider of refugee protection, seemingly in an enduring manner, as the country sought to align its practice regarding refugee protection with that of other EU member states, meeting but not exceeding the CEAS's minimum standards.

The German response to the crisis demonstrates an evolution informed by a lack of unified action across the region, from an initial openness to the arrival of higher numbers of asylum seekers to more restrictive measures. Despite an initial 'willkommenskultur,' evident with the arrival of large numbers of asylum seekers to Germany in early September 2015 to cheering crowds, the sense that Germany was alone in responding to the crisis as others avoided their responsibilities subsequently gave rise to concerns about the number of refugees who might settle in Germany. These concerns prompted a series of changes to Germany's asylum law, characterized by some commentators as 'legislative hyperactivity,' though the impact of these changes was limited, given that they were principally implemented in the wake of the EU-Turkey agreement. Like Sweden, Germany emphasized the need for greater solidarity among EU member states, both during and after the crisis period. Unlike Sweden, however, Germany has, in the longer term, shown willingness to re-engage and once again led the EU in receiving refugees from Ukraine. As demonstrated by recent events, however, the continued salience of asylum and migration in national politics exerts a strong influence on Germany's contributions to collective action, with the country again taking a sharp turn towards restrictive policies in 2024-2025.

Hungary stands out in the 2015 crisis response as openly questioning the efficacy and relevance of the CEAS. The restrictive measures implemented by Hungary in response to the crisis, furthermore, highlight fundamental weaknesses in the regional system stemming from its inability to check free riding as well as the disproportionate impact of the pressure it places on frontline states. From the early stages of the refugee crisis, Prime Minister Viktor Orbán openly denied the applicability of the regional framework, both because he claimed that refugees arriving to Europe were economic migrants to whom the CEAS did not apply[1] and because he believed that the crisis was 'a German problem,' created by the expectations set by Prime Minister Angela Merkel's public statements of welcome.[2] As the crisis progressed, Hungary consistently sought to identify ways to control access to its territory, employing fences, transit zones, criminal penalties for irregular arrivals, and pushbacks to keep the number of refugees in Hungary at a low level. At the same time, Hungary also resisted regional initiatives to respond to the crisis, especially the Hotspot Relocation Scheme. While the Court of Justice for the European Union and the European Court of Human Rights subsequently issued rulings against

[1] Orbán, *Statement by H.E. Mr. Viktor Orbán, Prime Minister of Hungary*
[2] Traynor, 'Migration crisis: Hungary PM says Europe in grip of madness'

Hungary, its efforts nonetheless 'paid off' in the sense of allowing the country to avoid being a provider of refugee protection for the duration of the crisis. Its example raises fundamental questions about how actors taking steps in direct opposition to collective action initiatives can be brought into compliance to ensure consistency across the region.

Several important themes emerged from the examination of each country's trajectory through the crisis. Some of these themes echo observations about the CEAS made before the crisis, in particular the unequal distribution of asylum applications across EU member states and the lack of consistency across member states in terms of their response to increasing arrival rates. At the same time, however, new themes or variations emerged in the crisis context, including the potential for disparate responses to cross over into non-compliance and the changing preferences of states. While some of these trends are referenced in discussions regarding the failure of the CEAS, there is limited analysis of the extent to which they stem from the nature and structure of the CEAS itself, and the need for reconsideration of these elements if a different outcome is to be achieved in the future.

My research, based on the cases presented by Sweden, Germany, and Hungary, identified three key factors that contributed to the weakness of the collective response to the crisis. These are examined in turn below.

1.1 A lack of solidarity among member states

As the number of asylum seekers arriving to the EU dramatically increased, a few states sat squarely in the most common routes for asylum seekers arriving to Europe – from Turkey through Greece and along the Western Balkans to Germany, France, Sweden, and other destination states. The crisis period marked a departure from the usual practice, as many states did not register asylum seekers but rather allowed them to pass through on their way to their destination state. Notwithstanding the unique circumstances of the crisis, it was still the case that a small sub-set of EU member states continued to receive the majority of applications for international protection, while others remained effectively insulated against the increased pressure associated with the crisis. Just six member states – Germany, Hungary, Sweden, Austria, Italy, and France – received more than 80% of the total number of applications presented in 2015.[3] While this inequality in terms of responsibility was not a new phenomenon, the fact that the numbers were so much higher during the crisis period brought additional scrutiny and, ultimately, pushed states that were willing to cooperate initially to restrict their provision of refugee protection over time. The change in the way states responded to the unequal distribution of responsibility highlighted the inability of the CEAS's system (as represented by the Dublin Regulation) to function under pressure.

Both Sweden and Germany, despite initially showing willingness to accept higher numbers of asylum seekers, ultimately scaled back their contributions to collective action to provide refugee protection. As the Swedish Prime Minister announced more restrictive measures, he explained, '[w]e have taken by far the largest number of asylum-seekers' and that '[t]he mistake here is – the fault is – that other countries did not take their responsibility, and that is why we end up in this situation.'[4] In Germany, too, there was a sense that the country was largely on its own, and that other states were not carrying a similar burden or otherwise contributing to the crisis response. Germany's efforts to lead other states to take a similar approach to its own were not ultimately successful, however – which helped to lead to the conclusion that an external means of addressing the crisis needed to be found.

What is notable in the approaches taken by Sweden and Germany is the importance of what other countries were (or were not) doing. Although Sweden clearly pointed to its exhausted reception capacity in arguing for a need to limit the number of asylum seekers arriving to its territory,[5] there was simultaneously a very strong focus on the failure of other countries to contribute.[6] In Germany, similarly, the failure of other states to follow Germany's lead was an important factor in the shift toward emphasizing an external means of addressing the crisis.[7] In other words, while Sweden and Germany may have had the potential to accept

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[3] Eurostat, *Record number of over 1.2 million first time asylum seekers registered in 2015*. It is noteworthy that this list of six states did not include Greece. This was due to the fact that Greece was not registering all the asylum seekers arriving to its territory, many of whom moved on very quickly after arriving.
[4] Sirota, 'Europe Refugee Crisis: Sweden Says EU Can "Easily" Accept Millions of Refugees'
[5] Government Council, *The government is proposing measures to create room for Swedish refugee reception (translated from Swedish)*
[6] Sirota, 'Europe Refugee Crisis: Sweden Says EU Can "Easily" Accept Millions of Refugees'
[7] *See* Schramm, 'Solidarity – from the Heart or by Force? The Failed German Leadership in the EU's Refugee and Migrant Crisis', 11

more refugees from a practical standpoint, it was not *politically* feasible for these two member states to assume dramatically more responsibility than their neighbors. This point underscores the political nature of the crisis: as observed by Sweden's Minister of Justice, the EU 'could easily handle this task if we cooperated, if we met this as a union and not as individual member states.'[8]

The structure of the CEAS also contributed to challenges around responsibility sharing. Prior to the crisis, the 'hard law' elements related to responsibility sharing emphasized the border control aspect – the Dublin Regulation, by assigning responsibility to the first state an asylum seeker reached, was intended to incentivize frontline states to maintain strong borders. The European Commission, moreover, had not indicated the unequal distribution of asylum applications as a particular concern prior to the crisis - it was only in 2016 that the Commission acknowledged that Dublin tended to place a disproportionate burden on frontline states.[9]

The Hotspot Relocation Scheme attempted to respond in an ad hoc manner to the increased and unevenly distributed pressure created by the crisis.[10] This pressure had, by then, led to a situation in which overwhelmed frontline states did not conduct registration and rather waved asylum seekers through, leaving them free to move on to a country of their choosing without the risk of the Dublin Regulation being applied to return them to the country of first entry. The initiative was not ultimately successful in reaching the targeted 160,000 relocations, with only a fraction of this number transferred after the program's two-year implementation period had ceased.[11] While it is possible to cite a number of different contributing factors to the failure of this initiative, it should be underscored that responsibility sharing was not one of the objectives of the CEAS as it was developed through its first and second phases – so in a sense it can hardly be surprising that this goal was not achieved through its application in the context of a crisis. Rather, the prioritization of responsibility sharing as an objective was identified as a

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[8] Sirota, 'Europe Refugee Crisis: Sweden Says EU Can "Easily" Accept Millions of Refugees'

[9] European Commission, *'Towards a Reform of the Common European Asylum System and Enhancing Legal Avenues to Europe,' COM(2016) 197 final, 6 April 2016*, 2

[10] European Commission, *European Commission makes progress on Agenda on Migration*; European Commission, *Refugee Crisis: European Commission takes decisive action*

[11] *See* Gotev, 'Schulz admits mandatory relocation of refugees has failed'

necessary element to effective collective action during the crisis, and steps toward this goal were initiated after the crisis – in particular as part of the EU Pact discussions.

1.2 Deterrence, free riding and a fragmented response

The decision by many EU Member States to approach the response to the refugee crisis in 2015 individually rather than as a collective came through clearly across this research. The CEAS had been designed to accommodate states' desire to retain a measure of sovereignty in this area, which proved a distinct disadvantage when a crisis arose. Each state had an incentive, heightened by the crisis, to find ways to encourage asylum seekers to choose another state as their destination. Ultimately, both direct (fences, border controls, ID checks) and indirect (lowered standards of accommodation, restricted access to rights) means of deterrence were implemented by EU member states who sought to free ride on the efforts of others rather than contribute to the provision of refugee protection. In the aggregate, this tendency moved the region toward the race-to-the-bottom mentality that had not been meaningfully observed in the implementation of the CEAS previously.

Sweden and Germany, as discussed above, began as enthusiastic contributors to collective action to provide refugee protection and proponents of regional collective action initiatives. Faced with the prospect of hosting and integrating a disproportionate share of refugees, however, both subsequently sought to restrict access to their territory while also amending their legislation to reduce any potential 'pull factor' from the perspective of refugees. Sweden very explicitly reduced their legislation to be consistent with the CEAS minimum standards, fearing that maintaining higher standards could again result in a situation in which Sweden found itself carrying a disproportionate burden. This was, in the public dialogue, part of an attempt to be 'a normal European country.' Germany's changes were less explicitly focused on minimum standards but sought to provide a less attractive assistance package (in-kind rather than cash), facilitate prompt return for persons not in need of international protection, and limit access to family reunification. All of these steps were taken with the goal to send a message to refugees that Germany was no longer the best country in which to seek asylum.

Hungary, where the determination to avoid contributing to regional refugee protection efforts was evident from the outset of the crisis, presented a more extreme scenario. While Sweden and Germany sought to reduce the number of asylum seekers on their territory within the bounds of the CEAS, Hungary opted for more drastic measures. A range of different tools, including non-provision of assistance, construction of the border fence, establishment of the transit zones, refusal of its relocation quota, and implementation of the eight-kilometer rule, served to ensure that Hungary's frontline status did not result in the country hosting a disproportionate number of asylum seekers.[12] Ultimately, Hungary's amended legislation and actions during the crisis were found to be in violation of the CEAS and relevant human rights protections on several points, including the use of detention in the transit zones, rejection of the Hotspot Relocation Scheme, and pushbacks conducted pursuant to the eight-kilometer rule.[13]

These examples illustrate two distinct challenges that arose in the application of the CEAS during a crisis period. First, the reduction of standards in Sweden and Germany illustrate *the practical difficulty of using minimum standards legislation combined with new governance methods to coordinate and align state practice without creating incentives for reducing protection to the lowest permissible level*. This can be avoided, where the intention is to ultimately move toward more protective standards, through use of a standstill clause, but this was not done in the case of the CEAS (perhaps reflecting the idea that the CEAS was more concerned with harmonization than with establishing more protective standards). In the absence of such a clause, however, the crisis illustrates the tendency of states to align with the least common denominator, in accord with the idea of a race-to-the-bottom. Particularly when

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[12] *See* Bender, 'Abolishing asylum and violating the human rights of refugees. Why is it tolerated? The case of Hungary in the EU', 61-62; Juhász, 'Assessing Hungary's Stance on Migration and Asylum in Light of the European and Hungarian Migration Strategies', 48-49; Hungarian Helsinki Committee, *Hungary: Latest amendments "legalise" extrajudicial push-back of asylum-seekers, in violation of EU and international law*

[13] *Commission v Hungary (Accueil des demandeurs de protection internationale) C-808/18*, ECLI:EU:C:2020:1029, European Union: Court of Justice of the European Union, 17 December 2020, https://www.refworld.org/jurisprudence/caselaw/ecj/2020/en/123405; *Commission v Poland (Mécanisme temporaire de relocalisation de demandeurs de protection internationale), C-715/17, C-718/17 and C-719/17*, ECLI:EU:C:2020:257, European Union: Court of Justice of the European Union, 2 April 2020, https://www.refworld.org/jurisprudence/caselaw/ecj/2020/en/123180; *Shahzad v. Hungary*, Council of Europe: European Court of Human Rights, 8 July 2021, https://www.refworld.org/jurisprudence/caselaw/echr/2021/en/123903

systems are under pressure, states may be concerned that more generous standards will 'pull' asylum seekers, despite the well-documented absence of indications that this occurs in practice (with other factors, such as social/linguistic networks and employment opportunities generally being more important in this decision-making process).

The fact that such a trend was not observed earlier may have reflected, as Zaun has suggested, a tendency to adhere to previously established standards accepted at the country level.[14] One may interpret the shift during the 2015 crisis as a change in circumstances significant enough to overcome this inertia. During the crisis, states under pressure (which, as mentioned in the previous section, was not uniform across the region) compared their situation to that of their neighbors, and saw lowering standards as one way to potentially achieve the same outcome – reduced pressure on asylum systems. The public dialogue around asylum in Sweden, with its emphasis on being a 'normal' state, clearly reflected this line of thinking. Even in the event that lowering standards proved ineffective in redirecting asylum seekers, lowering standards could nonetheless send a signal to voters that the government was taking action to address the crisis.

The second challenge, demonstrated by Hungary, is that of *promptly censoring free riding or defection from agreed standards*. Unlike Sweden, which aligned its legislation with minimum standards, Hungary pushed beyond the limits set by the CEAS, seeking to capitalize on the lengthy infringement procedure to avoid complying with the requirements of the CEAS. These procedures require multiple steps involving notification, the opportunity for response by the state, formalization of the complaint from the side of the Commission, and finally referral to the CJEU – a series of steps that will, in general, require several years to complete.[15]

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[14] Zaun, 'Why EU asylum standards exceed the lowest common denominator: the role of regulatory expertise in EU decision-making'

[15] In case of a report or suspected violation of EU law (including through failure to transpose a directive into EU law), the European Commission may initiate the infringement procedure by sending a letter of formal notice requesting more information from the member state concerned. If the Commission is not satisfied with the response from the member state, this may be followed with the issuance of a reasoned opinion. Only when this process of reconciliation fails is the case referred to the Court of Justice of the European Union (CJEU), at which point the process of litigating the dispute formally begins. European Commission, 'Infringement procedure' <https://commission.europa.eu/law/application-eu-law/implementing-eu-law/infringement-procedure_en> accessed 17 November 2024

Hungary's case demonstrates the difficulty of utilizing a complicated enforcement or infringement process that requires considerable time to reach a conclusion to sanction free riding behavior. The Commission initiated the infringement procedure with a letter sent in December 2015, which was followed by a second letter in May 2017, a reasoned opinion in December 2017, and finally referral to the CJEU in July 2018.[16] The CJEU ruled against Hungary in December 2020, but Hungary continued to defy the imperative to fully apply the CEAS, and a subsequent infringement procedure followed.[17] Only after this practice, too, resulted in a negative ruling in 2023 were particular penalties pursued in Hungary's case: in 2024 the European Court of Justice fined Hungary 200 million euros, with an additional 1 million euro penalty for each day it remained unpaid.[18] This 200 million euro fine was ultimately withheld from payments to Hungary by the Commission.[19]

This sequence of events illustrates that the infringement process is, at a high level, designed to address true misunderstandings or differing interpretations through negotiation - the intention behind the process seems to be to find common ground, not to bring rogue members into compliance. As demonstrated in the case of Hungary, however, this system may fail to address deliberate free riding or defection within a reasonable timeframe. In this case, Hungary was able to ignore the CEAS for a period of nine years, sending a very mixed message about the importance of regional asylum regulations and allowing Hungary to free ride for a period that extended far beyond the crisis.

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[16] *See* Chapter 6, Section 2.6 for a more comprehensive discussion of the infringement process

[17] While the first procedure focused on Hungary's restriction of asylum procedures to the transit zones located at the border with Serbia, the second revolved around the new requirement that asylum seekers obtain visas in either Kyiv or Belgrade prior to entering Hungary. *Commission v Hungary (Accueil des demandeurs de protection internationale) C-808/18*, ECLI:EU:C:2020:1029, European Union: Court of Justice of the European Union, 17 December 2020, https://www.refworld.org/jurisprudence/caselaw/ecj/2020/en/123405; *Commission v. Hungary (Declaration d'intention prealable a une demande d'asile) C-823/21*, ECLI:EU:C:2023:504, European Union: Court of Justice of the European Union, 22 June 2023, https://www.refworld.org/jurisprudence/caselaw/ecj/2023/en/147960

[18] Court of Justice of the European Union, *Asylum policy: Hungary is ordered to pay a lump sum of 200 million euros and a penalty payment of 1 million euros per day for failure to comply with a judgment of the Court of Justice*

[19] EU to withhold 200 million from Hungary over asylum fine, '

1.3 Dynamic preferences and public opinion

Emerging strongly from this research is the idea that state preferences with regard to providing refugee protection are not fixed over time, and are, in many cases, formed, re-formed or elaborated through public dialogue. In much of the literature around collective action, actors' preferences are treated as static and constant – a set of stable, enduring values that will be responsive to particular incentives, even if these may vary across different states. In the course of this research, however, it was evident that states' cost-benefit analyses around being a provider of refugee protection are dynamic, and that these may dictate different actions at different points in time. This may be observed, in particular, as governments' accountability to their voters gives rise to public dialogues in which aggregate preferences are explored, with state level actions following from voters' perspectives on issues around the hosting and integration of asylum seekers.

The existence of a public debate around the provision of refugee protection often leads to a description of this issue as 'political' or 'politicized.' What does this mean in practice? In short, it signals the shift of the issue from the purview of experts, often in the administrative sphere, to mainstream political debate. The conversation may similarly shift from specific points of policy to broad questions about the feasibility and desirability of providing refugee protection, particularly in view of the economic and security considerations associated with doing so. This, in turn, may lead to legislative and policy changes meant to result in shifts in the direction of public preferences – for example, changes intended to limit the number of asylum applications received in a given state.

During the 2015 crisis, it was clear that the political salience of refugee protection rose dramatically, with asylum and migration identified as key challenges by voters in many EU member states.[20] Asylum policy became a key issue at the electoral level in both Sweden and Germany, with far right parties mounting challenges to sitting governments based on popular skepticism regarding the current approach to asylum and migration. In response to this threat, these governments sought to shift toward voters' perceived preferences, which generally meant

[20] *See, e.g.,* Mader and Schoen, 'The European refugee crisis, party competition, and voters' responses in Germany', 69; Stivas, 'The art of securitising. Orbán's handling of the European refugee crisis', 191-92

adopting more restrictive policies as the crisis progressed. In other words, the 'costs' of being a provider of refugee protection rose for sitting governments as the possibility that voters would shift to far-right parties presented itself – and in response, the government changed their approach to providing refugee protection.

Hungary presents an interesting case, which is related to but distinct from Sweden and Germany. In Hungary, the government sought to shape rather than respond to public opinion. Through the national consultation, the billboard campaign, and the referendum on the hotspot relocation scheme, the government sought to stoke fear among the population regarding the potential security and economic threats posed by the arrival of asylum seekers, and, in so doing, drive public opinion away from supporting refugees.[21] While the assessment of the government's success may be somewhat mixed, with the response to the national consultation and referendum representing only a small fraction of Hungarian voters, those who did respond tended to align with the government's perspective, arguably providing a level of democratic legitimacy to the actions the government took subsequently in the context of the crisis.[22] In a sense, one might characterize this series of actions as lowering the costs of breaking with the EU and defecting from expected standards in terms of providing refugee protection, even as this defection ultimately resulted in fines and withholding of EU funding.

2 Key elements for hybrid mechanisms like the CEAS

The CEAS was conceived as a system of cooperation around a challenging issue – refugee protection. With the creation of the Schengen zone, it was necessary for EU member states to work collectively, as asylum seekers registered in one state would have the possibility to move within the border-free area. Lacking the consensus necessary for a comprehensive regulatory structure and with cooperation among EU member states moving ahead on other fronts, the CEAS began as a combination of legislative instruments produced through the community method alongside less formal cooperation mechanisms, with the intention of moving toward a

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[21] *See* Chapter 6, Sections 1.4.1 and 2.5

[22] *See* Stivas, 'The art of securitising. Orbán's handling of the European refugee crisis', 190

fully integrated system over time. While this system functioned relatively effectively prior to the crisis, there were nonetheless known weaknesses that were amplified in the (political) emergency context of 2015. In this section, drawing on the three case studies, I offer insights regarding the necessary elements of a hybrid system utilizing governance techniques to improve the likelihood of successful facilitation of collective action.

2.1 Cooperation baseline – shared goals

The need for shared goals as a starting point for new governance methods came up numerous times in this research. Without this common baseline, the ability of soft law methods to facilitate cooperation is limited – non-coercive mechanisms cannot ensure cooperation if participating states are determined to free ride. Even with respect to the hard law elements of the CEAS, enforcement actions proved time-consuming, and, in the context of a time-bound crisis response, ultimately ineffective. The idea that cooperation would cultivate common values over time, in such a way to create a bridge to a fully regulated system, similarly was not borne out in practice. The context of the crisis, in particular, seemed to set back efforts to cooperate more effectively, as each state wanted to avoid being perceived as an outlier with a more generous asylum system.

In the case of the CEAS, one of the key flaws was arguably the lack of shared goals related to refugee protection specifically. As noted above, cooperation in this area was necessitated by broader economic cooperation within the region, but EU member states did not necessarily have the same attitudes or objectives with respect to asylum and migration. Rather, states needed to cooperate in order to join the EU as an initial matter and then to access EU funds, but this seemed, in the case of Hungary, for example, to lead to nominal rather than good faith efforts to comply with EU legislation.

Without shared goals, more comprehensive regulation becomes necessary to facilitate collective action among member states with divergent priorities and distinct positions with regard to the provision of the public or collective good. If states are not already moving in the same direction, the scope for action must be narrowed in order to facilitate cooperation and promptly and effectively punish defection. With the EU Pact, the region seems to be shifting toward expanded regulation. It should be noted, however, that the impetus for this shift seems to have been less a product of greater consensus arising from informal cooperation (as initially foreseen when the CEAS began) than acknowledgment of the need for more structured mechanisms to be able to address future crises.

2.2 Effective solidarity

An effective mechanism for allocating responsibility is generally important to cooperation toward collective action because it helps to address one of the core issues that leads to underproduction of public or collective goods: the knowledge that contributors' efforts will be distributed across the group and that any direct benefit to themselves will be limited. Without an assurance that others will contribute similarly, an actor faces the situation of continuing to feed into a system that primarily benefits others. In the context of the refugee crisis, the need for effective responsibility sharing was still more acute. States that may have been willing to tolerate a disproportionate burden prior to the crisis were less willing to do so when the number of arrivals reached a level that threatened to exhaust reception facilities, overwhelm asylum procedures, and stretch integration services.

This element of cooperation is inherently comparative: states will be willing to contribute at a higher level if they are satisfied that their neighbors are doing the same. The Ukraine crisis highlighted this dynamic strongly – since 2022, more than 6 million refugees have fled Ukraine and sought temporary protection in Europe, a figure that dramatically eclipses the one million refugees who sought protection in the EU in 2015. And while there have been some disagreements among EU member states, overall, the response has been well-coordinated and free of the crisis mentality that drove the regional conversation in 2015.

Finally, it is important to acknowledge the political or electoral aspect of solidarity. Particularly in the context of a crisis that puts refugee protection at the center of the public debate, voters in one state may have concerns about the suggestion that they are responsible for accepting more asylum seekers than their neighbors and, in effect, 'solving' a regional problem or challenge. Notwithstanding mention of the economic impact in some dialogues, particularly in Sweden and Hungary, it is clear that the 'costs' from a state perspective are broader, and encompass public concerns about security, integration, and competition for jobs, among other considerations, and regardless of whether these concerns among the public are well-founded. These concerns may rise to the level of threatening the political party in power.

In both Sweden and Germany, a clear tipping point was reached after which increasing numbers of asylum seekers met with decreasing support among the public, to the point that the issue of asylum became prominent in domestic political contests. While the precise nature of this correlation merits further examination, it tends to highlight the importance of responsibility sharing or distributive considerations in the context of cooperation to provide refugee protection, with a particular emphasis on the number of asylum applications received by each member state. The fact that the perceived costs are not purely economic, from this perspective, also calls into question the relevance of alternative forms of solidarity (which could include financial contributions or resources for capacity development, in addition to accepting transfer of asylum seekers).

2.3 Adaptability and incentives

An important conclusion of my empirical analysis is that the dynamics of cooperation to provide refugee protection are not static – states may approach collective action in this area from different vantage points depending on the total number of refugees hosted; the practical challenges that arise, including crises; the actions of their neighbors; the broader political context, including the government in power; and public opinion, among other factors. To be effective, a coordination mechanism in this context must be adaptable in the sense that it can respond to both non-emergency and emergency situations, as well as providing a range of public and private benefits to cooperators. It is well established that different actors may respond to different benefits following from collective action, but it is also the case that the same actor may be motivated by different benefits over time. Both of these observations weigh in favor of linking contributions to collective action to multiple, varied benefits, including some which are private and accrue only to contributors.

This research suggests that it is also necessary to differentiate between participants who are genuinely in agreement with the broader goals of the collective activity and those who may comply only out of necessity or in pursuit of a related objective. In this context, that requires identifying and ensuring that an effective enforcement strategy is in place for states who would have preferred to retain complete autonomy in the area of asylum and migration but opted in to the CEAS because doing so is a prerequisite to EU membership. Understanding the motivations of the latter group and the potential need for prompt enforcement actions may serve to tilt the balance between hard and soft law in a hybrid system towards the former. This is based on the understanding that new governance methods will not be effective in facilitating compliance without shared goals, as noted above. Alternatively, as Germany suggested, it might be possible to create a division between states willing to pursue greater cooperation and those who will remain at a baseline level, consistent with EU minimum standards. This could allow, for example, for more effective solidarity mechanisms within a smaller group, while the larger group would adhere to the CEAS (or, in the future, EU Pact) baseline.

2.4 Enforceability

Linked to the above argument, effective monitoring and enforcement mechanisms are critical. This idea has been emphasized in the collective action literature,[23] which sets out a number of different models for enforcement.[24] While traditionally focused on models that foresee policing activities by the state or a firm, some of the literature also explores the potential for self-government by participants in the collective.[25] In all of these scenarios, however, it is essential that free riding is promptly and effectively addressed.

This is not to say that hybrid structures cannot succeed in facilitating collective action. Inherent in the concept of a hybrid structure is the existence of certain areas of cooperation that are pursued through means other than traditional legislation and provisions regarding these issues are, by definition, non-enforceable. This does not exclude, however, the potential to have an agreed baseline with enforcement elements. This was the idea of the hybrid structure established through the CEAS: ‘hard law’ cooperation established at the agreed,

[23] *See, e.g.,* Thielemann, 'Why Refugee Burden- Sharing Initiatives Fail: Public Goods, Free-Riding and Symbolic Solidarity in the EU', 79-80
[24] Ostrom, *Governing the commons : the evolution of institutions for collective action*, 27-29
[25] Ibid.

minimum standards level, with additional elements intended to advance this baseline over time.

This research highlighted the necessity of minimum standards that are promptly enforceable and send a clear message about the level of compliance that is, at a minimum, required. It must be clear that participants cannot act in a way that is at odds with the objective of the collective effort. Lengthy periods of free riding have a ripple effect, with other participants noting the actions taken by the rogue actor and in turn reducing their contributions to the provision of a public or collective good. In other words, a lack of compliance with the required elements by some actors can seriously impact the willingness of others to contribute at a higher level, thereby eroding the potential for a hybrid mechanism to facilitate cooperation and, in the longer term, enable greater harmonization. A prompt response to free riding, focused on sending a message to the non-cooperator and others, is essential to support confidence in the system and create an environment in which the foreseen progression of a hybrid system like the CEAS is possible.

3 Contributions to collective action and governance theory

The empirical study of the 2015 refugee crisis as a 'hard case' for collective action provides a number of insights into the potential for a hybrid system to facilitate collective action. The extraordinary nature of the crisis tested systems that had previously functioned relatively effectively, even if not fully in line with the aspirations of the European Commission. The 2015 crisis also prompted some states that had previously been enthusiastic contributors to collective action to provide refugee protection to reconsider their approach. These events point to certain respects in which cooperation between states may be distinct from collective action involving individuals or interest groups and, in turn, merit changes to the way that facilitation of collective action in this specific context is approached.

3.1 Collective action theory

3.1.1 The state as a complex actor

This research indicates that interstate collective action presents a more complex scenario than other collective action contexts due, in part, to the challenges related to defining the preferences of the state. Niemann and Zaun previously observed a gap in collective action approaches in terms of the frequent lack of emphasis on 'domestic preference formation and EU negotiation processes to show how they interlink and how power differentials between Member States impact on EU legislative output.'[26] This research, similarly, suggests that viewing state actors as if they were individuals or defined interest groups, without reference to the manner in which state preferences are formed through political dialogue at the domestic level, may tend to reduce the predictive and explanatory value of collective action theory in the context of interstate cooperation.

In this context, each voter will have a perspective on refugee protection, which, in turn, is translated through their exercise of political participation into representation at the sub-national and national levels (often with regional differences or different preferences between urban and rural areas). The extent to which this issue translates to the election of politicians who share the voter's views on this issue, additionally, depends on the salience of refugee protection at a particular moment in time. Public opinion polls may offer insight into the current state of voter preferences, but again, these are not always clear – much may depend on what is asked and how questions are posed. In Hungary, for example, public views about the refugee crisis were strongly influenced by a rhetorical shift from speaking about refugees to economic migrants.[27] As a result, trying to determine 'state preferences,' when a state is composed of its voters and reflects these preferences in its political structure to varying degrees, is by its nature an imprecise endeavor.

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[26] Niemann and Zaun, 'EU Refugee Policies and Politics in Times of Crisis: Theoretical and Empirical Perspectives', 16

[27] Bocskor, 'Anti-Immigration Discourses in Hungary during the 'Crisis' Year: The Orbán Government's 'National Consultation' Campaign of 2015', 559; Alexander Pearson, 'Victor Orban's most controversial migration comments' *DW* (1 September 2018) <https://www.dw.com/en/viktor-orbans-most-controversial-migration-comments/g-42086054>, 1

On some level, it may be more accurate to speak about government preferences. That is, accepting that governments do not always represent the collective will of their constituents but that they have an electorally motivated interest in taking decisions that will maintain their access to power may offer the best perspective toward assessing the likelihood of a state engaging in collective action. From this perspective, issue salience, the proximity of elections, and the existence of an opposition party taking a contrary position on asylum are relevant in assessing the relationship between voter preferences and government action on asylum-related issues. An additional variable is presented by the government's ability to shape the political dialogue and potentially influence voters' views of the issue and the actions the government has taken.

Taking this perspective, state behavior in support of collective action to provide refugee protection is inherently difficult to predict and may reflect the actual preferences of the voters in a state to a greater or lesser extent. This lack of predictability, in turn, makes it difficult to design stable and enduring institutions that will incentivize collective action: without clear information about how a state/government views refugee protection, it is difficult to design systems that alter the cost-benefit analysis in a manner that favors participation. At the same time, however, the complex nature of preference formation offers opportunities. Because much may depend on how information is presented and how voters understand the issue, information campaigns and public debate can play an important role in building support for cooperation in support of collective action.

3.1.2 Cooperation and Solidarity

This project also provides empirical support to the idea of solidarity or fairness as a critical element in facilitating collective action. This idea is generally in accord with Ostrom's argument that belief in the fair distribution of costs and benefits makes participation in collective action more likely.[28] The reaction by Sweden and Germany in opting to reduce their contributions to collective action in reaction to the limited or nonexistent contributions from

[28] Ostrom, 'Analyzing collective action', 161

other EU member states effectively demonstrated the consequences of the absence of a fair distribution and is, additionally, in line with Olson's prediction regarding the sub-optimal provision of public goods.[29]

Going beyond this general observation, this research suggests an additional layer of complexity arising from the fact that voters, as taxpayers, are directly carrying the costs of the decisions taken by their governments in relation to refugee protection. From this perspective, one way in which solidarity is important in the context of regional cooperation is that it is tied to the way in which voters may view the performance of their government officials – through comparison to their neighbors. In Sweden, there was a perception that Swedish voters were bearing a disproportionate share of the 'costs' of providing refugee protection across the region, and this contributed to a shift in policy. The outcome might have been quite different had there been a sense that voters in other EU member states were carrying similar costs – as was the case across much of the EU in the context of the Ukraine crisis.

At the same time, moreover, this project pointed to one key insight of collective action theory linked to solidarity that was only partially supported: the advantage created by heterogeneity among participants, as explained by Olson and other scholars.[30] While heterogeneity in terms of the size and motivation of participants may indeed offer an advantage, as suggested by the contributions made by Germany and Sweden historically and in the early stages of the refugee crisis, geographic heterogeneity seems to weigh in the opposite direction. The fact that some states are often shielded from refugee flows due to their geographic position within the bloc means that these actors tend to have greater control over the arrival of asylum seekers to their territory, a situation that means that they may not share the same motivations as others from an insurance perspective. The crisis highlighted this structural divide by temporarily altering this status quo, as significant numbers of asylum seekers were able to self-relocate due to absent border controls and a 'wave through' policy, meaning that countries like Sweden and Germany found themselves in a position more similar to that of frontline states – with the same desire for solidarity. Nonetheless, as border controls

[29] Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups*, 27-28
[30] Ibid., 28-29 Ahn, Ostrom and Walker, 'Heterogeneous Preferences and Collective Action', 295

were introduced, the EU-Turkey agreement took effect, and the crisis drew to a close, the situation was once again one in which the EU contains two groups of states with consistently distinct incentive structures, namely front-line states and states located at a distance from the frontline.[31]

3.1.3 Changing cost-benefit analyses

As noted above, one of the main insights of this research from the perspective of collective action theory underscores the complex and changing nature of state preferences. Treating states as having defined well-defined and stable preferences regarding provision of refugee protection may understate the extent to which state preferences may tend in a particular direction but remain variable and subject to change over time and in response to specific circumstances or situations. This insight is in agreement with the argument made by Betts that the costs and benefits perceived at the state level are 'changeable,' potentially through both top-down and bottom-up norm diffusion.[32] The implications of this research for structures that support collective action are broader, however, as the insights suggested by this project go beyond norms, which were at the center of Betts' argument.[33] In contrast, the examples of Sweden and Germany demonstrate that state preferences are dynamic, fragile, and may change rapidly, in response not only to broad changes in norms or values but rather also current events, the actions of other states, and the evolution of the domestic political dialogue.

A key contributing factor to states' changing perspectives on contributing to collective action was the scale of the crisis, pointing to the importance of the current situation and the practical consequences of acting in accord with particular norms. The number of arrivals, in combination with the sense in some countries that the situation was 'out of control' or that

[31] Hierro, Mazza, and Villaverde pointed to the bipolarization, within the EU, between states regularly under extreme pressure from the arrival of asylum seekers and those with little or no such pressure. Hierro, Maza and Villaverde, 'Asylum burden-sharing within the EU revisited: are we moving on the right track?', 135
[32] Betts, 'Public Goods Theory and the Provision of Refugee Protection: The Role of the Joint-Product Model in Burden-Sharing Theory', 293-4
[33] Ibid., 275 (emphasizing that 'different levels of pervasion of norms of solidarity, responsibility and human rights within different states, which lead to differential inter-subjective interpretations of 'costs' and benefits').

government officials were not able to manage access to their territory, gradually shifted opinion away from supporting provision of refugee protection. This dynamic highlights the complex nature of the considerations that go into forming an opinion about the policy that should be pursued in response to the refugee crisis. As demonstrated in all three countries studied, this goes significantly beyond the question of whether refugees, in general, should receive protection, or even whether EU member states should cooperate to provide that protection. Rather, in a specific situation, the question of whether to contribute to collective action may also take into consideration how many refugees the state has already accepted; whether voters view acceptance of more refugees favorably; whether a particular group of refugees is believed to be likely to find work and integrate in the country of asylum; whether the responsibility to provide them with protection belongs to this state or another; and whether, notwithstanding the general imperative to protect refugees, security or economic concerns weigh against doing so.

Shifts in state preferences, in turn, were further amplified by states' observation of their neighbors' actions. In other words, seeing some states set caps on the total number of asylum seekers who could be accepted or lower standards for reception triggered fears of being an outlier, and led states to lower their own standards in turn. It was by this mechanism that a race-to-the-bottom in terms of refugee protection could be observed, with an initial wave of restrictive practices giving rise to a second-level response, with the ultimate outcome being less willingness across the region to contribute to refugee protection. It could be argued that the crisis constituted an external event that shifted many states' preferences in the same direction at the same time, reducing motivational heterogeneity among actors and rendering more difficult the provision of refugee protection.

At the same time, these observations about state preferences tend to underscore the importance of the political dialogue at the state level. The fact that state preferences can change rapidly in response to many different factors again emphasizes the importance of understanding domestic political dynamics to assess how a state evaluates the costs and benefits of being a provider of refugee protection at any point in time. The Hungarian government's use of messaging, polls, and a referendum to contextualize the refugee crisis illustrate the framing potential of political dialogue, and the way in which public opinion can be influenced (and state preferences shaped) even without real changes to values. Rather, what may be important is the manner and extent to which these values are seen as applying under the current circumstances.

Under these conditions, institutions and arrangements designed to facilitate collective action should be dynamic and adaptable, in order to respond to changing state preferences. Events that are likely to disrupt collective action by altering states' cost-benefit analyses should trigger a shift or at least reexamination of the normal system of cooperation, to ensure that the arrangements in place remain fit for purpose and that actors are not tempted to leave the system or free ride. Even in the absence of crisis events, systems should seek to accommodate the possibility of changes at the domestic level, such as in the party in power or economic condition of the state, for example. From this perspective, institutions and arrangements supporting collective action should ideally provide a range of benefits, so that even as circumstances within a state may change, they continue to have incentives to continue contributing.

3.2 New Governance Theory

3.2.1 Shared Goals

The primary insights from this research related to new governance theory are tied to the question of whether new governance methods can be effective in the absence of shared goals. As articulated in Chapter 3, there is, arguably, a divide in the new governance literature between commentators who suggest that new governance methods serve to aggregate preferences and facilitate cooperation toward agreed goals and those who see the potential for new governance methods to transform preferences.[34] This research provides empirical support to the idea of shared preferences and goals as a prerequisite to cooperation through new governance methods. The case of Hungary clearly illustrates the challenge in securing cooperation from an actor who does not support the broader goals of the collective. In effect,

[34] Rosenau, 'Governance, order, and change in world politics', 4; Fletcher, 'EU Governance Techniques in the Creation of a Common European Policy on Immigration and Asylum', 554

this example demonstrates the importance of good faith implementation of both hard and soft law elements of the CEAS, given the potential for actors to work against the goals of this hybrid mechanism and 'free ride' for an extended period before enforcement mechanisms can take effect.

This general proposition, in turn, can be further broken down into three related propositions in the context of cooperation to provide refugee protection in the EU. The first is tied to the necessity of cooperation on the provision of refugee protection as a result of membership in the EU. In other words, states have little choice but to join in the CEAS, which helps to explain their participation despite not sharing, in some cases, the broader goals of the collective. The second looks to the assumption that new governance methods will produce gradual change over time and considers instead the potential for rapid change at key inflection points, such as the refugee crisis. Finally, the third corollary relates to the potential for new governance methods to produce negative progress toward collective action goals and advance a race-to-the-bottom.

3.2.2 Interlinked preferences and broader cooperation

This research highlights the importance of precisely understanding the goals of each participant in the context of their participation in new governance structures. One unique element of the CEAS that should be taken into account in considering the impact of new governance methods in this context is the fact that assessing states preferences is complex due to the interrelated nature of cooperation among EU member states. That is, because the Schengen zone means that EU member states must cooperate on issues related to asylum, they are not specifically opting in to this cooperation on account of shared goals *related to refugee protection.* Rather, to access the advantages of EU membership, states are obligated to be part of the CEAS, and as such may only share the goal of being a member state within the EU. Accordingly, one state may indeed seek to provide refugee protection at an optimal level, while another state's goal in relation to refugee protection is to contribute as little as possible without jeopardizing its membership in the bloc. Accordingly, it is impossible to assume the existence of shared goals based on participation in the CEAS.

Contrasting the performance of the CEAS in terms of facilitating collective action during the 2015 refugee crisis with the Ukraine crisis helps to illustrate this point. The fact that the Temporary Protection Directive was activated in the latter case demonstrated the shared intentions of EU member states to extend refugee protection to refugees from Ukraine. There was agreement, from the outset of the full-scale invasion in 2022, on the importance of providing refugee protection and the most effective means of doing so (through temporary protection and without individual refugee status determination processes). From this perspective of shared goals, the mechanism for extending refugee protection to this group followed without significant obstacles, despite the fact that this marked the first application of the Temporary Protection Directive and the necessity for many states to adapt their domestic legislation to ensure its effective application and guarantee of rights due to refugees from Ukraine. In effect, this example illustrates that where political will to move in a particular direction exists ('shared goals'), the mechanism to do so collectively will follow. Conversely, a lack of political will triggers attempts to free ride that new governance methods, in particular, are ill-equipped to address.

3.2.3 Incremental vs. rapid change

The potential for a different theory of change than that described in the Open Method of Coordination and the new governance literature more broadly is suggested by this research. Rather than incremental movement toward a common perspective, the experience of the 2015 crisis seemed to weigh in favor of a sudden shift in viewpoint. This was particularly evident in the cases of both Germany and Sweden, where the experience of being in a position similar to that of frontline states served to trigger calls for solidarity, despite the lack of priority given to this concept previously. In other words, long-term cooperation with other EU member states did not necessarily produce greater understanding of other states' perspectives and convergence of views. The crisis, however, precipitated changed circumstances and put both Sweden and Germany in the position of receiving unchecked flows of asylum seekers – which did produce change.

Stepping back from the states included in this research, it is also possible to observe greater support for reform of the CEAS across the region after the refugee crisis, which ultimately resulted in the EU Pact and its revised position on solidarity.[35] In this case, again, the shift was not necessarily related to the cooperation between states through new governance or soft law instruments. Rather, the challenges encountered in the context of the crisis produced calls for a new approach to solidarity, as seen in the Commission's post-crisis statements highlighting the need for more effective responsibility sharing.[36] New governance methods had not had a similar impact, after 16 years, on state perspectives on the distribution of responsibility across the bloc. This may suggest that change on particularly contentious substantive issues or 'hard cases' for cooperation is not likely to proceed incrementally or as a result of policy learning (in the manner anticipated by some new governance proponents), though further research on this point would be required.

3.2.4 Race-to-the-bottom/negative learning

This research raises the possibility that the policy learning that takes place in the context of new governance methods may not be in the direction of advancing collective action. Instead, actors may 'learn' from one another how to free ride or align their practice to the minimum permissible level to avoid sanction. This potential shift was observed, in particular, in the case of Sweden with its aim to 'be a normal EU country.' In the absence of a hard law backstop to prevent this type of retreat from contributing to collective action, new governance methods run the risk of amplifying and potentially encouraging lower levels of contribution to the public or collective good.

One might argue that this is, nonetheless, a 'success' for new governance, in that there is greater consistency across EU member states. This is true from the vantage point of uniformity, since convergence at a minimum level represents progress toward common

[35] While it is certainly possible to argue that the EU Pact does not go far enough to address the concerns of frontline states in terms of responsibility sharing, the inclusion of mandatory solidarity provisions nonetheless marks the first significant shift in the way that the distributive aspect of refugee protection is addressed at the regional level since the inception of the CEAS in 1999.

[36] European Commission, 'Towards a Reform of the Common European Asylum System and Enhancing Legal Avenues to Europe,' COM(2016) 197 final, 6 April 2016, 3-4

standards. The perspective of this research, however, has examined refugee protection as a public good, meaning that the overall goal is not just to establish uniform standards but to ensure that international protection is provided to those in need of it. If lower standards are a strategy to contribute less, they do not advance this goal from a collective action perspective.[37] This suggests a potential risk of new governance methods: the potential for states to 'learn' from their neighbors who are engaging in free riding or contributing at a lower level. New governance, in this view, may serve to amplify practices that run contrary to provision of a public or collective good as well as those that support it.

4 Further research

While this research focused on the 2015 crisis period, subsequent events related to both the Ukraine crisis and the EU Pact negotiations have been referred to briefly to the extent that they offer insights into particular aspects of the crisis – generally as a counter-example or demonstration of the potential for cooperation to function more effectively under different conditions. Both would merit further exploration regarding their implications for the efficacy of the CEAS as a hybrid system, particularly once the EU Pact implementation begins. A comparison of the 2015 crisis and the Ukraine crisis could also offer additional insights, despite differences in the political environment and the legislative instruments utilized to provide protection.

[37] It can be argued that the underlying logic of the CEAS implies a similar perspective, since upward departures from minimum standards were, from the beginning, permitted.

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