ΕΥΡΩΠΑΪΚΟ ΚΕΝΤΡΟ ΑΡΙΣΤΕΙΑΣ JEAN MONNET
ΕΘΝΙΚΟ ΚΑΙ ΚΑΠΟΔΙΣΤΡΙΑΚΟ ΠΑΝΕΠΙΣΤΗΜΙΟ ΑΘΗΝΩΝ

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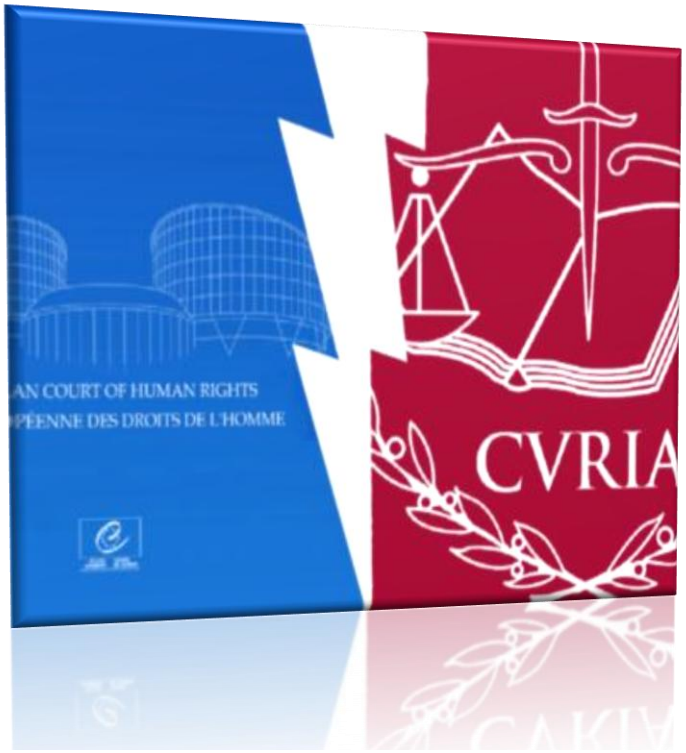
CJEU's judgment in the case *European Commission against Hungary* (C-808/18, 17 December 2020): The Court faces the challenge of taking a leading role in interpreting the European Asylum Law

Christina Zarogianni

LLM Public International Law and Fundamental Rights



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Μαρασλή 21-23, 106 76 Αθήνα
Τηλ. 210 7220508
Email: jmcenter-athens@pspa.uoa.gr, www.jmce.gr

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SCOPE AND METHODOLOGY

The present research work has been carried out under the auspices of the Jean Monnet European Centre of Excellence of the National and Kapodistrian University of Athens in the framework of the educational webinar titled "*European Management of Migration in the Eastern Mediterranean. The EU, Turkey and Greece*". The webinar took place between November and December 2020, under the scientific coordination of Professor Yannis Valinakis.

The *scope* of this research is limited to determining whether the Court of Justice of the European Union in its judgment in the case of *European Commission against Hungary* (C-808/18, 17 December 2020) took decisive steps towards the strengthening of the rights of asylum seekers, while interpreting the Common European Asylum System. It focuses specifically on Hungary's gradual derogation from its obligations as a European Union Member State as well as, on the juxtaposition of the case-law of the Court of Justice of the European Union and the European Court of Human Rights regarding the rights of the applicants for international protection.

The paper employs doctrinal and normative research methods, in terms of *methodology*, drawing on academic papers and reports, and primary sources, such as the decisions of the European Courts. It shall be noted that the present paper does not cover exhaustively the jurisprudence of the two European Courts, as the research and drafting time frame was limited.

EXECUTIVE SUMMARY

Since 2015, Hungary is deemed to dissolute the EU asylum acquis by adopting policies that contravene the rule of law and breach the fundamental rights of asylum seekers. In the Case C-808/18, *European Commission v Hungary*, 17 December 2020, ECLI:EU:C:2020:1029, the Court of Justice of the European Union upheld almost all the Commission's claims, by condemning Hungary's practices.

Even though the past two years the Court of Justice of the European Union has condemned several times Hungary and its domestic laws, our focus on the latest judgment in Case-808/18, *European Commission v Hungary*, is because it was rendered as an infringement procedure and thus, the need to adjust the national legislation to the Court's ruling deems to be urgent and pressing for Hungary this time. Otherwise, the Commission will most probably take further action under art. 260 TFEU. On this basis, if the Court finds that the Member State concerned has not complied with its judgment it may impose a lump sum or penalty payment on it.

In this context, this paper analyses the evolution of the case-law of the Court of Justice of the European Union, and the European Court of Human Rights, *vis-à-vis* the protection of the fundamental rights of asylum seekers and third-country nationals irregularly staying in the territory of a Member State, aiming at highlighting the progress made by the former in its latest judgment, in comparison with the progressive retreat from the protection of the rights of asylum seekers in the jurisprudence of the latter.

I. Introduction:

As Hungary has been gradually and effectively moving away from its legal obligations as a European Union (*hereinafter EU*) Member State, since the summer of 2015, making seeking asylum almost unfeasible[1], the legal barriers the State has adopted, compromise the implementation of the Common European Asylum System (*hereinafter CEAS*) more than the erection of the fence, which was completed on September 15, 2015[2]. The new legal framework introduced *inter alia* a specific regime characterized by "push-backs" for asylum-seekers coming across the fenced external border, designated two transit zones on the border with Serbia, allowing one applicant per zone per workday to enter and stay in the zone exclusively while his application is processed. To justify the recourse to these laws and policies, on September 15, 2015, Hungary declared a "crisis situation due to mass immigration"[3].

This study does not aim at giving a comprehensive overview of the Hungarian asylum law in force. Instead, this article has two major goals. First, it will demonstrate how the Court of Justice of the European Union (*hereinafter CJEU)*, in its most recent jurisprudence, deemed existing national asylum law to contravene Union law and second, it will juxtapose the recent developments of the case-law of the European Court of Human Rights (*hereinafter ECtHR*) with the case-law of the CJEU, by reiterating the interplay between the two Courts.

Moreover, our study ascertains whether the CJEU has taken the lead in safeguarding the human rights of asylum seekers while promoting the fair sharing of protection responsibilities in the EU's asylum policy. As Professor Tsourdi argues in her article 'Solidarity at Work? The Prevalence of Emergency-Driven Solidarity in the Administrative Governance of the Common European Asylum System' (Tsourdi, 2017), "*The lack of effective solidarity and*

[1] Armstrong, Ashley Binetti, *Chutes and Ladders: Nonrefoulement and the Sisyphean Challenge of Seeking Asylum in Hungary* (August 1, 2018). Columbia Human Rights Law Review, 50.2 (2019), Available at SSRN: https://ssrn.com/abstract=3242321.

[2] HUMAN RIGHTS WATCH, *Hungary: New Border Regime Threatens Asylum Seekers*, (Sept. 19, 2015, 2:00 AM), https://www.hrw.org/news/2015/09/19/hungary-new-border-regime-threatens-asylum-seekers [https://perma.cc/QBW6-RV7G].

[3] *See* 269/2015. (IX. 15.) Korm. r. a tömeges bevándorlás okozta válsághelyzet kihirdetéséről, valamint a válsághelyzet elrendelésével, fennállásával és megszüntetésével összefüggő szabályokról (Government Decree No. 269/2015 (IX. 15.) on the announcement of the crisis situation caused by mass immigration and the rules related to the ordering, existence, and termination of the crisis) (Hung.), https://bit.ly/2JRmoq6 [https://perma.cc/S8VH-NN2A].

fair sharing of responsibility does not absolve Member States from their responsibilities. It does not constitute a valid excuse for violating asylum seekers' human rights or dignity".[4] In the era of COVID-19 among other things, what is needed, aiming at coherence is the activation of intra-EU solidarity measures[5] and the respect for human rights, which are under threat[6].

Taking into consideration the abovementioned, the following questions arise inevitably: How long will the Visegrád States continue to undermine the rule of law in the EU, to the detriment of their partners and the detriment of the protection of the basic human rights of the third-country nationals? Does this conviction during an infringement procedure constitute a first positive sign for the future? What is the contribution of the CJEU to the European Union's goal of a Common European Asylum Policy, based on common interpretations of harmonized criteria? Did the CJEU engage in a more robust interpretation of the asylum *acquis* in the present case?

II. The European Commission against Hungary in front of the CJEU: The Case C-808/18

A. THE (D)EVOLUTION[7] OF HUNGARY'S ASYLUM LAW: TOWARDS SECURITIZATION

Since 2015 Hungary has been adopting asylum laws, essentially introducing a specific regime for asylum-seekers arriving at the external borders, while depriving them, as it is broadly argued, of their fundamental human rights. Legal norms relevant to immigration-related

[4] E Tsourdi, 'Solidarity at Work? The Prevalence of Emergency-Driven Solidarity in the Administrative Governance of the Common European Asylum System' (2017) 24 Maastricht Journal of European and Comparative Law 667, 675.

[5] Evangelia (Lilian) Tsourdi, COVID-19, Asylum in the EU, and the Great Expectations of Solidarity, *International Journal of Refugee Law*, Volume 32, Issue 2, June 2020, Pages 374–380, https://doi.org/10.1093/ijrl/eeaa023.

[6] *See* European Commission, '*COVID-19: Guidance on the implementation of relevant EU provisions in the area of asylum and return procedures and on resettlement'* (2020/C 126/02) OJ C126/12; European Parliament, '*MEPs Call for Solidarity and Measures to Prevent Covid19 Crisis in Refugee Camps'* (*News European Parliament*, 3 April 2020) https://www.europarl.europa.eu/news/en/headlines/world/20200402STO76413/meps-call-for-measures-to-prevent-covid19-crisis-in-refugee-camps; FRA, '*Relocation of Unaccompanied Children from Greece'* (17 March 2020) <https://fra.europa.eu/en/publication/2020/relocation-unaccompanied-children-greece.

[7] See Armstrong, Ashley Binetti, supra note 1, at 52.

detention and procedures are provided in several internal sources, long before the immigration crisis of 2015. Hungarian asylum law constitutes of the following legal texts: The Act II of 2007 on the Admission and Right of Residence of Third-Country Nationals (Third-Country Nationals Act or TCN Act) (2007. évi II. törvény a harmadik országbeli állampolgárok beutazásáról és tartózkodásáról) and its accompanying Government Decree 114/2007 on the Implementation of Third-Country Nationals Act (TCN) constitute the main pieces of immigration legislation in Hungary. The Act LXXX of 2007 on Asylum (Asylum Act) (2007. évi LXXX Törvény a menedékjogról), which has been amended several times—most recently in January 2019—as well as in the accompanying Government Decree 301/2007 (Asylum Decree) on the Implementation of the Asylum Act regulate asylum proceedings. Amended several times, both the Third-Country Nationals Act and the Asylum Act provide for the detention of non-citizens. On July 5, 2016, the Asylum Act and the State Border Act were amended to legalize the push-back of any irregular migrant apprehended within eight kilometers of the Hungarian border with Croatia or Serbia. In March 2017, Act XX of 2017 was enforced, toughening regulations regarding border procedures (2017. *évi XX. törvény a határőrizeti területen lefolytatott eljárás szigorításával kapcsolatos egyes törvények módosításáról*)[8].

A new round of legislation was enforced on September 4, 2015, creating a formidable stumbling-block to access to international protection. The amendments authorized the government to declare a "crisis situation caused by mass immigration*"* that may cover parts or the entirety of the country[9]. The notion of "transit zones" had been brought to the forefront and constitutes since then, the keystone in claiming asylum in Hungary. Last but not least, a border procedure was introduced in Hungary, which is only applicable in the transit zone, combined with horizontally imposed detention to all, the compatibility of which with the *habeas corpus* principle, is contested.

In order to be able to implement the amended legal scheme without violating EU Law, Hungary resorted to a legal construct, claiming that the transit zones and its territory on the

[8] Global Detention Project: *COUNTRY REPORT IMMIGRATION DETENTION IN HUNGARY: TRANSIT ZONE OR TWILIGHT ZONE?*, JUNE 2020, https://www.globaldetentionproject.org/wp-content/uploads/2020/06/GDP-Immigration-Detention-in-Hungary-2020-Update.pdf.

[9] Nagy, B. (2016). Hungarian Asylum Law and Policy in 2015–2016: Securitization Instead of Loyal Cooperation. *German Law Journal, 17*(6), 1033-1082. doi:10.1017/S2071832200021581.

other side of the fence as were "no man's land," and not part of Hungary[10]. This argument is naturally, non-compatible with the jurisprudence of ECtHR as seen in the case *Amuur v France*[11], which established that the transit zones are part of the relevant State's territory.

(Not) surprisingly, Hungary continued derogating from existing EU Law. The electoral success that installed Fidesz three times into power in Hungary strengthened his brand of nationalism often envisions a zero-sum game between the human rights of migrants, and national identity and security[12]. Immediately after Fidesz's 2018 electoral victory, on June 20, 2018, Act VI of 2018 (known as the "Stop Soros" package) was adopted, introducing the concept of "inadmissibility" concerning asylum applications. Under those laws, any "unpatriotic" assistance to asylum seekers, under the umbrella of an NGO or not, was criminalized[13]. According to the Helsinki Committee, the rate of admission of applications has declined from roughly 10 people per working day in 2016 to at most one per day in 2018[14]. In effect, Hungary instantly denied access to the territory together with the possibility to claim asylum to individuals who have crossed, during their journey, a country in *which they were not exposed to persecution or serious harm, or if an adequate level of protection was available*[15]. In our case, Serbia was designated as a "safe third country" or "safe transit country". As a result, since asylum can only be sought in one of the two transit zones in Hungary, where entry is only possible from Serbia, almost all applicants were rejected without an individual examination of their application on the merits.

Under these circumstances, the judgment of the CJEU that was delivered on May 14, 2020, in the Case C-924/19 and C 925/19 concerning the obligatory confinement of - almost - all the asylum seekers in the transit zone on the border between Hungary and Serbia, constitutes the precursor of the current case. The Court ruled that forcing applicants to remain in one of the

[10] ANDRÁS ALFÖLDI, ET AL., *HUNGARIAN HELSINKI COMM., COUNTRY REPORT: HUNGARY*, 2017 UPDATE 15 (2018), sites/default/files/report-download/aida_hu_2017update.pdf, at 17.

[11] ECtHR, *Amuur v. France*, Application no 19776/92, 25 June 1996, https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22002-9140%22]} .

[12] Byrne, R., Noll, G., & Vedsted-Hansen, J. (2020). Understanding the crisis of refugee law: Legal scholarship and the EU asylum system. *Leiden Journal of International Law, 33*(4), 871-892. doi:10.1017/S0922156520000382

[13] *Criminal Code* [Hungary], Act C of 2012, S353/A 2012, available at www.refworld.or/oci/c358dd22.html.

[14] Balkan Insight, Todor Gardos, *Lost in Transit: How Hungary Scrapped Asylum*, November 10, 2020, https://balkaninsight.com/2020/11/10/lost-in-transit-how-hungary-scrapped-asylum/.

[15] Hungarian Helsinki Committee, "*Asylum Seekers Arriving Through Serbia Cannot be Rejected Automatically*," 24 March 2020, https://www.helsinki.hu/en/asylum-seekers-arriving-through-serbia-cannot-be-rejected-automatically.

transit zones for the whole duration of the procedure amounts to detention[16]. We will investigate this case more closely in the relevant Chapter. Shortly after, the Hungarian authorities moved 300 people to semi-open facilities and declared that the practice of transit zones will be abandoned[17]. The CJEU was called upon to scrutinize the Hungarian asylum system in place, in five different cases the past two years[18]. What sets the judgment in Case-808/18 apart is the fact that it was an infringement procedure, whereas the previous four judgments were rendered in preliminary ruling procedures. Therefore, Hungary shall adjust the national legislation to the Court's ruling otherwise, the Commission may impose a lump sum or penalty payment on the Member State under art. 260 TFEU[19].

The global backlash over the past years against Hungary's asylum policies has been strong. UN High Commissioner for Human Rights, Zeid Ra ad Al Hussein, reprimanded Hungary for the deviation from its international obligations *vis- à-vis* the response to the influx of asylum seekers in 2015[20]. The European Commission also criticized Hungary[21] for its denial to act as an equal Member State of the Union, respecting the legally binding principle of solidarity and fair sharing of responsibility provided in article 80 on the Functioning of the European Union (TFEU)[22].

[16] CJEU, Case C-924/19 and C 925/19, PPU, FMS, FNS SA, SA junior *Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság,* Országos Idegenrendészeti Főigazgatóság, May 2020 ECLI:EU:C:2020:367.

[17] Zoltán Kovács, About Hungary, *Gergely Gulyás on the European Court of Justice's new ruling on immigration: It's dangerous for all of Europe,* May 21, 2020, http://abouthungary.hu/blog/gergely-gulyas-on-the-european-court-of-justices-new-ruling-on-immigration-its-dangerous-for-all-of-europe/.

[18] CJEU, Case C-556/17 *Torubarov*, 29 July 2019, ECLI:EU:C:2019:626; CJEU, Case C-564/18, *LH v Bevándorlási és Menekültügyi Hivatal (Tompa),* 19 March 2020, ECLI:EU:C:2020:218*;* CJEU, Case C-924/19 and C 925/19, PPU, FMS, FNS SA, SA junior *Országos Idegenrendeszeti Főigazgatóság Dél-alföldi Regionális Igazgatóság,* supra note 16*;* CJEU, Case C-808/18, *European Commission v Hungary*, 17 December 2020, ECLI:EU:C:2020:1029.

[19] Sarah Progin-Theuerkauf, *Defining the Boundaries of the Future Common European Asylum System with the Help of Hungary?*, *European Papers*, Vol. 6, 2021, No 1, *European Forum, Insight* of 29 March 2021, pp. 7-15 ISSN 2499-8249 - doi: 10.15166/2499-8249/446.

[20] U.N. Office of the High Comm'r for Human Rights, *Hungary Violating International Law in Response to Migration Crisis: Zeid,* (Sept. 17, 2015), http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16449 .

[21] European Commission Press Release IP/15/6228, Commission Opens Infringement Procedure Against Hungary Concerning its Asylum Law (Dec. 10, 2015), http://europa.eu/rapid/press-release_IP-15-6228_en.htm.

[22] See E Tsourdi, 'Solidarity at Work? The Prevalence of Emergency-Driven Solidarity in the Administrative Governance of the Common European Asylum System', supra note 4.

None of these actions succeeded in changing Hungary's law and policy. Thus, the European Commission declared with a press release on July 19, 2018[23], that has decided to refer Hungary to the Court of Justice of the European Union for "*non-compliance of its asylum and return legislation with EU law*".

B. PRESENTATION OF THE SPECIFIC FEATURES OF THE CASE

The significance of the case at hand of the CJEU must first be clarified before a deeper analysis of the decision is made. The Court is accorded with the power to shape the implementation, not only of the CEAS but also, of the international refugee law, given that it is one of the few regional courts with an indirect mandate to interpret the 1951 Convention on the Status of Refugees and its 1967 Protocol. It has become indeed the first international court interpreting the 1951 Convention and the 1967 Protocol[24]. After the adoption of the CEAS, expectations that the CJEU would take the lead in shaping a more holistic approach to international asylum policies and safeguards, through the interpretation of the EU's legal framework for international protection, were rising high. Therefore, there is a need for an expanded lens of inquiry on how the Court has been dealing with the role that has been accorded with: that of the significant contributor to International and European Refugee Law.

In the present case, the CJEU was required to rule on several questions relating to the interpretation of Directives 2008/115 ('the "Return" Directive')[25], 2013/32 ('the "Procedures" Directive')[26] and Directive 2013/33 ('the "Reception" Directive')[27], concerning the Hungarian legislation on the right to access to international protection, on the detention of asylum seekers, on the removal of illegally staying third-country nationals, and finally, on the right to remain in the territory of the Member State concerned.

[23] European Commission Press Release IP/18/4522, Migration and Asylum: Commission Takes Further Steps in Infringement Procedures Against Hungary (July 19, 2018), https://ec.europa.eu/commission/presscorner/detail/en/IP_18_4522.

[24] Roland Bank, The Potential and Limitations of the Court of Justice of the European Union in Shaping International Refugee Law, *International Journal of Refugee Law*, Volume 27, Issue 2, June 2015, Pages 213–244, https://doi.org/10.1093/ijrl/eev020. See also CJEU, C-71/11 and C-99/11, *Germany v Y and Z*, 5 September 2012, ECLI:EU:C:2012:518 and CJEU, C-199/12, C-200/12 and C-201/12, *Minister voor Immigratie en Asiel v X, Y and Z*, 7 November 2013, ECLI:EU:C:2013:720.

[25] Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in the Member States for returning illegally staying third-country nationals (OJ2008 L348, p.98.

[26] 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 (OJ 2013 L180, p.60).

[27] Directive 2013/33/EU of the European Parliament and the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (OJ 2013 L180, p.96).

Regarding the timing and the relevance of the Court's Decision, it must be noted that the publication of the judgment of the *Case C-808/18*[28] on December 17, 2020, took place after the closure of the transit-zones. Hence, Hungarian Justice Minister Judit Varga argued that the ruling is "*devoid of purpose, as the circumstances at issue in the present proceedings no longer exist*[29]." However, the Court in its judgment, rejected this claim of the defendant arguing that "*the closure of those two transit zones following the judgment of 14 May 2020, Országos Idegenrendézeti Főigazgatóság Dél-alföldi Regionális Igazgatóság (C-924/19 PPU and C-925/19 PPU, EU:C:2020:367), is irrelevant to the assessment of the present action.* According to the Court, the critical time to examine whether a State fulfills its obligations under EU law is associated with the end of the period laid down in the reasoned opinion issued by the Commission, namely, in the present case, February 8, 2018 (judgment of 17 December 2020*, European Commission v Hungary, Case C-808/18,* ECLI:EU:C:2020:1029, paragraph 156).

1. Access to the international protection procedure: a Sisyphean task for asylum seekers in Hungary

The first complaint of the Commission refers to the access to the international protection procedure (judgment of 17 December 2020, European Commission v Hungary, Case C-808/18, ECLI:EU:C:2020:1029, paragraph 71). The Commission argued that Hungary has infringed Articles 3 and 6 of Directive 2013/32 in establishing practical and legal impediments to the lodge of an asylum application. The abovementioned articles have been widely interpreted by the CJEU. In the case at hand, first and foremost, the Court reiterated its case-law[30], according to which, the Member States are obliged to register, within 3-6 days, any application for international protection made by a third-country national or a stateless person to the national authorities. Second, the Court underpins that according to Article 7 of Directive 2013/32, Member States are required to guarantee the right for any third-country national or stateless person to make an application for international protection on his or her behalf or through a third party.

Third, according to the literal and teleological (purposive) interpretation, the Directive confers the right to make an application for international protection, including at the borders

[28] See, CJEU, Case C-808/18, *European Commission v Hungary*, supra note 18.

[29] Alice Tidey, Euronews., *Hungary asylum policies 'failed' to fulfill EU obligations, ECJ rules, 17/12/2020,* https://www.euronews.com/2020/12/17/hungary-asylum-policies-failed-to-fulfill-eu-obligations-ecj-rules .

[30] CJEU, Case C-360/16, *Hasan*, 25 January 2018, EU:C:2018:35, paragraph 76.

of a Member State or in its transit zones. Member States should ensure effective, easy, and rapid access to the procedure. Pursuant to Article 6(3) of that Directive, Member States enjoy a margin of appreciation in imposing a designated place for the lodge of these applications, as Hungary argues. However, the Court concludes in paragraph 96 that no provision of that Directive establishes a similar rule regarding the making of applications for international protection. In any case, the acquisition of the status of the applicant for international protection begins as soon as, the person concerned has declared, to one of the authorities referred to in Article 6(1) of Directive 2013/32, his or her wish to receive international protection, without the declaration of that wish being subject to any administrative formality whatsoever (see judgment of 25 June 2020, *Ministerio Fiscal,* C 36/20 PPU, EU:C:2020:495, paragraphs 93 and 94).

Bearing in mind the above mentioned, an asylum seeker faces the following obstacles whilst endeavoring to apply for asylum in Hungary according to the Commission: the domestic legislation allows only the lodge of an application for international protection in person and exclusively in the transit zones of Röszke and Tompa (both in Hungary's territory), authorizing only a very small number of persons to access daily (one applicant per transit zone per day) where there is no infrastructure available. Therefore, the respect for the right to registration conferred by article 6 of Directive 2013/32 depends on the ability or the luck of the asylum seeker in overcoming the obstacles, set out in the domestic Hungarian law. Finally, even if a third-country national manages to lodge his application for international protection, he faces an extra obstacle, since his application will be examined under the *admissibility* procedure under the scope of *the safe transit country.* More precisely, the Commission has claimed that the right to access to asylum procedures, prescribed by the law (Primary[31] and Secondary European Law), is violated, given that it should be protected irrespective of the third country through whose territory the applicant reaches the border of a Member State (judgment of 17 December 2020, *European Commission v Hungary,* Case C-808/18, ECLI:EU:C:2020:1029, paragraph 75).

Hungary argued at this point that the majority of the persons entering Hungary illegally would attempt to cross the Serbian-Hungarian border in the vicinity of those transit zones, so it could reasonably be expected that those persons would lodge their application within those

[31] Charter of Fundamental Rights of the European Union OJ C 326, 26.10.2012, p. 391–407.

transit zones (judgment of 17 December 2020, European Commission v Hungary, Case C-808/18, ECLI:EU:C:2020:1029, paragraph 80). After all, since there is an exception provided by the Law for the persons staying in Hungarian territory legally, who can lodge their application at any place in that territory, Hungary claimed that it has transposed the asylum *acquis* successfully.

The Court concluded that "*the consistent and generalized administrative practice of the Hungarian authorities aimed at limiting access to the transit zones of Röszke and Tompa so systematically and drastically that third-country nationals or stateless persons who, arriving from Serbia, wished to access, in Hungary, the international protection procedure, in practice were confronted with the virtual impossibility of making an application for international protection in Hungary" (paragraph 128).* Regarding the *admissibility* procedure and the *Safe Transit Country* concept, the Court reinstated its past ruling on the *LH* case[32]. In effect, the Court found that this practice infringes Article 33 of the EU Directive 2013/32/EU**.** In the present case, the Court reiterated that the "*safe transit country*" inadmissibility clause flatly contravenes EU Law and cannot be applied (judgment of 17 December 2020, *European Commission v Hungary*, Case C-808/18, ECLI:EU:C:2020:1029). In the next chapters, we will analyze in-depth the concept of the Safe Transit Country and the relevant jurisprudence of the CJEU and the ECtHR.

2. The detention of – almost all - asylum seekers in Hungary

As mentioned above, since 2018, a policy of sealed transit zones was adopted by the Hungarian government. For years, Hungary refused to acknowledge the glaringly salient: that the confinement in these facilities equals to detention, going so far as to refuse the UN Working Group on Arbitrary Detention entry during its visit to the country in 2018[33].

Before entering the analysis of the case at hand, we should refer briefly to the precedent case-law. On May 14, 2020, the CJEU gave an important ruling regarding the obligation, imposed by Hungary, to all asylum seekers and third-country nationals whose asylum applications have been rejected, to stay for several months in the Röszke transit zone. The CJEU declared the confinement in the transit zones unlawful, since it was a disproportionate measure that

[32] CJEU, Case C-564/18, *LH v Bevándorlási és Menekültügyi Hivatal (Tompa),* 19 March 2020, ECLI:EU:C:2020:218, paragraph 48.

[33] Global Detention Program, *Immigration Detention in Hungary: Transit Zone or Twilight Zone?* June 2020, https://reliefweb.int/report/hungary/immigration-detention-hungary-transit-zone-or-twilight-zone-june-2020.

exceeded maximum time limits provided in EU law and it could not be challenged in court. More specifically, as provided in Article 43, the detention of applicants for international protection who present themselves at a Member State's borders, may not under any circumstances exceed four weeks from the date on which the application was lodged. Moreover, the Court referred to the settled case-law[34], regarding the exhaustive listing of the various grounds that may justify the detention of an asylum seeker, set out in Article 8(3) of Directive 2013/33 (judgment of 14 May 2020, *Országos Idegenrendézeti Főigazgatóság Dél-alföldi Regionális Igazgatóság*, C-924/19 PPU and C-925/19 PPU, EU:C:2020:367, paragraph 250). In terms of duration of detention, the Court clarified that international protection applicants are not subject to a maximum duration of detention under Article 9 of the Reception Conditions Directive. However, detention under national law should be limited to the exhaustively listed grounds and proportionate. The comparison with the provision of Article 15 of the Returns Directive is inevitable, since it provides for a maximum period of 18 months of detention.

In the second place, the Court held that the lawfulness of a detention measure, such as the detention of a person in a transit zone, must be amenable to judicial review under Article 9 of the 'Reception' Directive and Article 15 of the 'Return' Directive[35]. In the third place, the Court examined the ground of *inadmissibility* laid down in the Hungarian legislation used to justify the rejection of the asylum applications. The Court stated that such a ground is contrary to Article 33 of the 'Procedures' Directive. The Court, therefore, concluded that the obligatory confinement in the closed transit zones during the whole procedure for international protection constitutes unlawful detention.

In the present case, the Commission argued that there is an infringement of Articles 24(3) and 43 of Directive 2013/32, in conjunction with Article 26 of Directive 2013/32 and with Article 8(2) and (3), Article 9 and Article 11(2) of Directive 2013/33. Hence, on the one hand, the Court had to examine whether the compulsory prolonged stay, without a time limit, that may last in some cases more than 14 months, while the case is still pending, constitutes a violation of the respective Directives. We need to clarify at this point that the transit zones are closed places, where no external contacts are allowed, and the only way out leads to Serbia. In that

[34] See CJEU judgments of 15 February 2016, *N.*, C-601/15 PPU, EU:C:2016:84, paragraph 59, and of 14 September 2017, *K.*, C-18/16, EU:C:2017:680, paragraph 42.

[35] Court of Justice of the European Union, PRESS RELEASE No60/20, 14 May 2020, Judgment in Joined Cases C-924/19 PPU and C-925/19PPU, https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-05/cp200060en.pdf.

case, the competent asylum authority can discontinue the procedure if the applicant leaves the transit zone. On the other hand, the Commission also rebuked the exclusion of the provision of special procedural guarantees at the borders' procedure, due to the declaration of "a crisis situation caused by mass immigration".

Hungary argued that those transit zones are not detention facilities, but, essentially, reception centres, situated in its territory at the external border of the Schengen area, which are designated as the place where the asylum procedure is conducted in accordance with EU law. In any case, in order to safeguard the law and order and its internal security, Hungary declared a 'crisis situation caused by mass immigration', according to the domestic legislation's requirements. *It claims that, in the case at hand, more than 17 000 offenses related to illegal immigration were committed in Hungary in 2018. The obligation to lodge applications for international protection in the transit zones thus enhances the effectiveness of the fight against human trafficking and satisfies the requirement of protecting the borders of the Schengen area* (paragraph 82).

The Court was called upon to resolve the disagreement. Recalling its recent case-law, the Court underpinned that the two transit zones constitute, in the light of the above, detention facilities. In addition, regarding the declaration of the crisis situation, the Court ruled that the derogation provided for in Article 72 TFEU must be interpreted strictly. Consequently, Article 72 does not allow Member States to depart from the provisions of the European Union law, by invoking, in a general manner, the maintenance of law and order and the safeguarding of internal security. Under Article 72 TFEU, in conjunction with point (e) of the first subparagraph of Article 8(3) of Directive 2013/33, the detention of applicants of international protection *entails establishing that the individual conduct of the applicant represents a genuine, present, and sufficiently serious threat, affecting a fundamental interest of society or the internal or external security of the Member State concerned (paragraph 221).*

Our view is that Hungary's policy towards securitization results from a belief that third-country nationals residing illegally or temporarily in the country are solely responsible for criminal offenses committed in the State. Consequently, the term *crimmigration* has emerged as a trend describing *inter alia* Hungary's policy. In any case, the imposition of the exceptional regime is a prolonged and not in any case temporary situation. Only there is no crisis in Hungary, according to Felipe Gonzalez Morales, the United Nations special

rapporteur on the human rights of migrants[36]. More precisely, in 2015, according to Hungary's immigration authority, 146 people received refugee status and 362 benefitted from other forms of protection. In 2016, the numbers were 154 and 278 respectively, and have declined ever since[37].

3. The removal of all illegally staying third-country nationals to the Hungarian borders: compatibility with the "Return Directive"

By its third complaint, the Commission criticizes Hungary, in essence, for having failed to fulfill its obligations under Article 5, Article 6(1), Article 12(1), and Article 13(1) of Directive 2008/115, known as the "Return Directive". Since Hungary challenged the scope of that Directive, the Court should first clarify whether the Directive was applicable in the present case. The Court referred to its previous case-law and the *Affum* case[38]. According to paragraph 48: "[…] *any third-country national who is present on the territory of a Member State without fulfilling the conditions for entry, stay or residence there is, under that fact alone, staying there illegally, without such presence being subject to a condition requiring a minimum duration or an intention to remain on that territory".* The Court, therefore, established the relevance of the Return Directive.

The Commission stated that Hungary violates the Directive by allowing, under "the crisis situation due to mass migration", all illegally staying third-country nationals who are apprehended in Hungarian territory to be forcibly moved to a strip of Hungarian border territory, where there is no infrastructure. Instead of waiting in line to be able to apply to one of the two transit zones, the most appealing choice for them is to enter Serbia to cover their essential needs. The previous practice amounts to removal of illegally staying third-country nationals, without, however, safeguarding the procedural guarantees provided by the Return Directive, as the Commission argued. In fact, the removal is carried out without the issue of a return decision, without observing the principle of non-refoulement, without a written justification and access to a legal remedy.

Hungary argued in return, that the generalized removal of third-country nationals aims at enabling them to lodge an application for international protection in the transit zones, as soon as possible. Moreover, Hungary's main argument is that the principle of non-refoulement is

[36] United Nations, Human Rights Council, A/HRC/44/42/Add.1, 11 May 2020, https://reliefweb.int/sites/reliefweb.int/files/resources/A_HRC_44_42_Add.1_E.pdf .
[37] Balkan Insight, supra note 14.
[38] CJEU, Case C-47/15, *Affum*, 7 June 2016, EU:C:2016:408.

not relevant in the case at hand since the national law enforcement agencies escort the illegally staying people only to the border fence, which is situated in Hungary, at a short distance from that border, even if there is no infrastructure on the strip of land separating that fence from the border properly. Third-country nationals are therefore not removed to Serbia. In the absence of any actual return, the application of the rules of Directive 2008/115 is by definition excluded, since a Member State cannot enforce a removal measure in its territory (paragraph 236).

In response, the Court noted that while it is true that, according to Article 3(5) of Directive 2008/115, removal means the *physical transportation out of the Member State*, the fact remains that the safeguards surrounding the return and removal procedures provided for in that directive would be deprived of their effectiveness if a Member State, could use a legal construct to justify their removal to the borders, where in order to survive the only choice they have is to move forward to Serbia. Finally, the Court recalled its case-law (judgment of 5 November 2014, *Mukarubega*, C-166/13, EU:C:2014:2336, paragraph 40) where the procedural guarantees of a return decision are laid down. The Court concluded that Hungary has violated Article 5, Article 6(1), Article 12(1), and Article 13(1) of Directive 2008/115 (paragraph 256).

4. The right to remain in the territory of the Member State concerned while the application is pending

By its fourth complaint, the Commission rebuked Hungary for violating Article 46(5) and (6) of Directive 2013/32, by not providing a suspensory effect of the appeal against the administrative decision at the first degree and infringing, therefore, the right of applicants for international protection to remain in its territory, pending the outcome of the proceedings.

Hungary insisted that, although the relevant article of the Directive has not been transposed into “its national law verbatim", the guarantees set out in the legislation ensure compliance with Article 46 of Directive 2013/32.

The Court dismissed Hungary’s claims and upheld the Commission’s arguments. The fact that the rejected applicants for international protection at first instance remain in Hungary’s territory only on the condition that they are placed in detention, contravenes the relevant “Reception” and “Procedures” Directives, as the CJEU ruled (paragraph 302).

Before entering the next Chapter, a preliminary point should be made. In July 2020, the ECtHR delivered an important ruling *vis-à-vis* the right to remain in a Member State's territory while the asylum application is pending. Indeed, it seems that the CJEU went hand in hand with the ECtHR's jurisprudence. The case of *M.K. and Others v. Poland* concerned the repeated refusal of Polish border guards on the border with Belarus to admit the applicants, who had come from Chechnya and had asked for international protection[39]. The ECtHR held that Poland had violated the rights of the asylum seekers by "*failing to allow them to remain on Polish territory pending the examination of their applications*" despite knowing it was exposing them to serious risk. The ECtHR found that the applicants had repeatedly arrived at the border crossing between Poland and Belarus and had made clear their wish to seek international protection. Instead, they were returned consistently to Belarus. The ECtHR upheld, - among others - a violation of article 4 of Protocol No. 4 (prohibition of collective expulsion of aliens) to the ECHR, as well as a violation of Article 13 (right to an effective remedy). The ruling of the ECtHR undermined the very foundation of Poland's policy, which like Orban's Hungary, has repeatedly breached EU's rule of law. Thus, the question arises: How far can an EU Member State go in restricting access to asylum, before the CJEU intervenes, condemning such tactics by imposing sanctions? Will CJEU keep up with the ECtHR jurisprudence? Can we even hope that it will take the lead in shaping the EU's Common Asylum Policy, a role that is designed to fulfill?

III. A comparative analysis of the two European Courts' case-law

A. THE RELATION BETWEEN THE TWO LEGAL REGIMES

The European Legal Framework regarding refugee law consists of two distinct legal regimes: the EU's asylum *acquis* contained in the CEAS and the European Convention of Human Rights. CJEU and ECtHR are respectively responsible for ensuring the compliance of the Member States with the rules enshrined in the legal texts. The CJEU's case law is clear on the relationship between the two legal regimes. In the case *J.N.*[40] on February 15, 2016, the Court

[39] ECtHR, *M.K. and Others v. Poland*, Application nos. 40503/17, 42902/17 and 43643/17, 23 July 2020.
[40] CJEU, Case C-601/15 PPU, *J.N.*, 15 February 2016, EU:C:2016:85.

reaffirmed that the ECHR is not binding for the CJEU[41]. However, the 27 Member States of the EU must ensure the compliance with the provisions of the two legal regimes cumulatively[42].

We should clarify at this point, that the legal regimes of the Reception Directive and the Return Directive are also distinct, since the last one is not applicable in cases of applicants for international protection according to the CJEU judgments *Achughbabian*, *Celaj et Arslan*[43]. The essential difference between the two Directives is the *raison d'être* of the existence of the different regimes. According to paragraph 52 of the *Kadzoev* judgment[44], the EU asylum policy provides for asylum seekers the right to stay within the territory of a State until the publication of the decision on their application for international protection, as the Court reiterated and clarified in the most recent case against Hungary. Whereas the Return Directive states that irregular migrants should be expelled as soon as possible. The relationship between the two regimes was clarified in the *Arslan* judgment: an irregular migrant, who is detained under the Return Directive, cannot escape detention simply because of the lodge of an application for international protection[45].

B. THE POINTS OF CONVERGENCE AND DIVERGENCE BETWEEN THE CASE-LAW OF THE CJEU AND THE ECtHR

1. Access to international protection: a convergence between the case-law of the two Courts

According to a general principle of law, Council of Europe (CoE) Contracting States and EU Member States have an undeniable sovereign right to control the entry of non-nationals into their territory[46]. Under EU law, this includes providing access to asylum procedures[47], whereas under the ECHR, a right to asylum as such, is not provided. Turning away an

[41] Steve PEERS, *Detention of asylum-seekers: the first CJEU judgment*, EU Law Analysis, 9 March 2016, http://eulawanalysis.blogspot.ch/2016/03/detention-of-asylum-seekers-first-cjeu.html.

[42] FRA, *Handbook on European law relating to asylum, borders and immigration*, Edition 2020, https://echr.coe.int/Documents/Handbook_asylum_ENG.pdf, p. 20.

[43] CJEU, Case C-329/11, *Alexandre Achughbabian*, 6 December 2011, EU:C:2011:807; Case C-290/14, *Skerdjan Celaj*, 1 October 2015, EU:C:2015:640; Case C-534/11, *Mehmet Arslan*, 30 May 2013, EU:C:2013:343, paragraph 45.

[44] CJUE, Case C-357/09 PPU, *Said Shamilovich Kadzoev* (Huchbarov), 30 November 2009, EU:C:2009:741

[45] *See* CJEU, *Mehmet Arslan,* supra note 43, paragraph 63.

[46] See also the consolidated jurisprudence of the ECtHR in *Amuur v. France*, supra note 11.

[47] Charter of Fundamental Rights of the European Union OJ C 326, 26.10.2012, article 18.

individual, however, whether at the border or elsewhere within a State's jurisdiction, may result in a violation of the non-derogable prohibition of torture or inhuman or degrading treatment or punishment, under Article 3 of the ECHR[48] and under Article 19 of the Charter of Fundamental Rights of the European Union.

In the Case 808/18, *Commission v. Hungary,* the CJEU addressed several issues at the heart of the asylum procedures, as discussed in Chapter II, including the right to access to asylum. In interpreting the relevant provisions of the Procedure Directive, the CJEU pointed out that the Member States shall ensure an effective access to procedures for international protection (paragraph 106), concurring with the recent judgment of the ECtHR in the case of *N.D. and N.T. v. Spain*[49] in which the ECtHR underpinned that " […] *the effectiveness of Convention rights requires that these States make available genuine and effective access to means of legal entry, in particular border procedures for those who have arrived at the border. Those means should allow all persons who face persecution to submit an application for protection, based in particular on Article 3 of the Convention, under conditions which ensure that the application is processed in a manner consistent with the international norms, including the Convention. […]"* (paragraphs 209-210). The case-law of both Courts concur in considering that the acquisition of the status of the applicant for international protection begins as soon as, the person concerned has declared his or her wish to receive international protection, without the declaration of that wish being subject to any administrative formality whatsoever (see judgment of December, 17 2020, CJEU, C-808/18, *European Commission v Hungary*, paragraphs 96-97 and judgment of February, 13 2020, ECtHR, *N.D. and N.T. v. Spain*, Applications nos. 8675/15 and 8697/15, paragraph 180)[50].

Against this kind of conclusion, however, is the reasoning of the most recent judgment of the ECtHR in the case *Asady and others v. Slovakia*[51]. Here, the slim majority argued that the ten-minute interviews, some of which conducted concurrently with the same interpreter and the fact that the applicants signed untranslated documents and then were expelled from the territory, did not constitute mass expulsion. The question as to whether this practice

[48] FRA, *Handbook on European law relating to asylum, borders and immigration*, supra note 42.
[49] ECtHR, *N.D. and N.T. v. Spain*, Applications nos. 8675/15 and 8697/15, 13 February 2020.
[50] Prof. Dr. iur. Johan Callewaert, *Effective access to international protection – detention of asylum seekers: judgment of the CJEU in the case of Commission v. Hungary*, 26/12/2020, at https://johan-callewaert.eu/effective-access-to-international-protection-detention-of-asylum-seekers-judgment-of-the-cjeu-in-the-case-of-commission-v-hungary/.
[51] ECtHR, *Asady and Others v. Slovakia*, Application no. 24917/15, 12 October 2020.

constitutes a "genuine and effective access" to the protection enshrined in ECHR and the Geneva Convention, is bound to arise in such a situation. Interestingly, the three dissenting judges pointed out that this situation was distinguished from the facts of the case *N.D. and N.T.*, whereas, given the absence of an alternative mechanism for the lodge of applications for international protection in place, Slovakia had "*not provided sufficient access to means of legal entry*". The dissenting judges conclude: "*It is vital that the limited scope of the Grand Chamber's judgment in N.D. and N.T. v. Spain be respected. […]*"[52].

In parallel, regarding the notion of the Safe Transit Country, introduced by the Hungarian authorities, as described in the previous Chapter, it is found to be violating not only the Procedures Directive, but also the Reception Directive in the case at hand. In that direction, the advocate general for the CJEU, Athanasios Rantos, on his Opinion in Case C-821/19 in February 2021, mirrored the present case, suggesting that the 2018 amendments to Hungary's asylum laws, prohibiting asylum-seekers who passed through safe countries - such as Serbia - before lodging an application for international protection in Hungary, contravenes the CEAS[53]. The Hungarian human rights organization, Hungarian Helsinki Committee, endorses the advocate general's opinion and acknowledges its potential towards the abolishment of the infamous "'Stop Soros' Act", as we will further argue in Chapter IV.

Previously, the CJEU gave important rulings on the abovementioned legal construct, restating that the mere transit through a country does not constitute a "*connection between the applicant and the third country concerned on the basis of which it would be reasonable for that person to go to that country*" (see the judgment of May 2020, CJEU, C-924/19 and C 925/19, PPU, FMS, FNS SA, SA junior *Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság, Országos Idegenrendészeti Főigazgatóság,* paragraph 159 and judgment of March 2020, CJEU, C-564/18, *LH v Bevándorlási és Menekültügyi Hivatal* (Tompa), paragraph 50). Finally, in both cases, the CJEU reiterates that the notion of the Safe Transit Country must be distinguished from the first country of asylum notion in article 35 of the Procedures Directive (see the judgment of May 2020, CJEU, C-924/19 and C 925/19, PPU, FMS, FNS SA, SA junior *Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság, Országos Idegenrendészeti Főigazgatóság,* paragraph 161-163 and

[52] Nora Markard, EU Migration Law Blogspot, *A Hole of Unclear Dimensions: Reading ND and NT v. Spain*, 1 April 2020, at https://eumigrationlawblog.eu/a-hole-of-unclear-dimensions-reading-nd-and-nt-v-spain/.
[53] Court of Justice of the European Union, PRESS RELEASE No27/21, Luxembourg, 25 February 2021, at https://curia.europa.eu/jcms/upload/docs/application/pdf/2021-02/cp210027en.pdf..

judgment of March 2020, CJEU, C-564/18, *LH v Bevándorlási és Menekültügyi Hivatal* (Tompa), paragraphs 52-54).

On the other hand, the compatibility of the Safe Transit Country notion with the ECHR, shall be examined under the scope of the principle of non-refoulement. The two Courts are in agreement in examining that legal aspect. In July 2020, the ECtHR in the case of *M.K. and Others v. Poland*[54] did not examine the asylum applications *per se* but assessed the existence of effective guarantees to protect applicants from arbitrary refoulement. The Contracting State to the Convention must review in any case whether the person, whose application for asylum was found inadmissible, would have access to an adequate asylum system in the Safe Transit country. Hence, the ECtHR ruled that there has been a violation of Article 3, reaffirming its recent case-law. In fact, prior to that judgment, the ECtHR in the case *Ilias v. Hungary*[55] a judgment that will take up a great deal of our attention in the next Chapters, found that the Hungarian authorities did not provide effective guarantees against the risk of refoulement when deciding to return asylum seekers to Serbia. Thus, it upheld that the expulsion to Serbia violated Article 3 of the ECHR.

2. The CJEU denounced the expansion of the European migratory detention policies, making the ECtHR's jurisprudence not relevant

The tendency of the contemporary migration governance towards the containment at external borders and the *de facto* detention becomes evident in the new Pact on Migration and Asylum[56]. Screening and border procedures equals to the refusal of entry and the restriction of movement. The most pertinent question that raises here concerns the blurred lines between the detention and the lawful restriction of movement. As discussed above, the CJEU is

[54] See ECtHR, *M.K. and Others v. Poland*, supra note 39.

[55] ECtHR, *Ilias and Ahmed v. Hungary*, Application no. 47287/15, 21 November 2019.

[56] Galina Cornelisse, EU Migration Law Blog, *The Pact and Detention: An Empty Promise of 'certainty, clarity and decent conditions',* 6 January 2021, at http://eumigrationlawblog.eu/the-pact-and-detention-an-empty-promise-of-certainty-clarity-and-decent-conditions/?fbclid=IwAR2mCwgObSVPHKNYmudhqVGDhBtBWLu4Lz9MDRCzVYLM4jUE2Lt1cGQMdG4. and COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS on a New Pact on Migration and Asylum, COM/2020/609 final.

accorded with the power to shape the implementation not only of the CEAS, but also of the international Refugee law, by interpreting the provisions of the 1951 Geneva Convention[57].

Hence, the CJEU's ruling on the practice of the prolonged administrative detention in transit zones was long awaited. As abovementioned, the imposition of the legal construction of the "crisis situation caused by mass immigration" to the whole territory of the country in 2017, urged everyone who intends to apply for asylum to approach the two transit zones, lodge the application and instantly be put in detention that may last several hundred days, until the final judgment[58]. On May 14, 2020, the Grand Chamber of the CJEU delivered its judgment in the case *FMS and Others, C-924/19 PPU and C-925/19 PPU* [59], regarding the obligatory confinement of the applicants in the transit zone of Röszke in Hungary. In the present Case 808/18, *Commission v Hungary* the CJEU reiterated its conclusions. The Court firmly and boldly concluded that this practice amounts to detention.

However, the Court has not accepted that under Article 9 of the Reception Conditions Directive there is an absolute time limit to detention of asylum seekers, in contrast to the maximum 18 months under article 15 of the Return Directive[60]. According to the CJEU's case-law[61], the following conditions deem to exist for a lawful detention: there must be an individual assessment of the proportionality and the necessity of the imposed detention, that is based on an administrative or judicial decision, which is susceptible to a court review. Moreover, there must be in place effective procedural guarantees for the termination of detention when it is no longer necessary or proportionate.

[57] Roland Bank, The Potential and Limitations of the Court of Justice of the European Union in Shaping International Refugee Law, *International Journal of Refugee Law*, supra note 24. See also CJEU, C-71/11 and C-99/11, *Germany v Y and Z*, supra note 24 and CJEU, C-199/12, C-200/12 and C-201/12, *Minister voor Immigratie en Asiel v X, Y and Z*, supra note 24.

[58] Boldizsár Nagy, EU Migration Law Blog, *A – pyrrhic? – victory concerning detention in transit zones and procedural rights: FMS & FMZ and the legislation adopted by Hungary in its wake*, 15 June 2020, at https://eumigrationlawblog.eu/a-pyrrhic-victory-concerning-detention-in-transit-zones-and-procedural-rights-fms-fmz-and-the-legislation-adopted-by-hungary-in-its-wake/.

[59] See CJEU, Case C-924/19 and C 925/19, PPU, FMS, FNS SA, SA junior *Országos Idegenrendeszeti Főigazgatóság Dél-alföldi Regionális Igazgatóság*, supra note 16.

[60] EU Law Live, *Asylum seekers in Röszke transit zone are in 'detention' according to Court of Justice and review of and release for unjustified detention must be effected*, 14 May 2020, at https://eulawlive.com/asylum-seekers-in-roszke-transit-zone-are-in-detention-according-to-court-of-justice-and-review-of-and-release-for-unjustified-detention-must-be-effected/ and CJEU, Case C-36/20 *PPU, Ministerio Fiscal*, supra note 16, paragraph 263.

[61] See CJEU, Case C-61/11 PPU, *Hassen El Dridi, alias Karim Soufi*, 28 April 2011, EU:C:2011:268; CJEU, Case C-329/11, *Alexandre Achughbabian*, supra note 43, paragraph 50.

On the other hand, in juxtaposition of the qualitative criteria set out by the CJEU, ECtHR's latest jurisprudence stands its ground regarding the fact that Article 5 para. 1 (f) ECHR does not demand that detention be reasonably considered necessary, according to the Guide on Article 5 produced by the ECtHR and published in December 2020[62]. Although, Hungary has been convicted by the ECtHR several times the past decade for the placement in detention of all asylum seekers in the transit zones, the latest case-law has taken a 180-degree turn. In the 2015 judgment in the case of *Nabil and Others v. Hungary*[63], the ECtHR found that immigration detention violated Article 5 (1) of the ECHR. In that case the alternatives to detention were not explored, and the impact of the asylum procedure was not assessed. In 2012-2013 the ECtHR had also found Hungary's immigration detention practices incompatible with Article 5 (1) of the ECHR in cases such as *Lokpo and Touré v. Hungary, Abdelhakim v. Hungary, and Said v. Hungary*[64]. In the 2019 judgment in the case of *Ilias and Ahmed v. Hungary,* the ECtHR (Chamber) held that the placement of the applicants in Röszke transit zone amounted to de facto detention, which was unlawful because of the lack of possibilities to challenge such a decision[65].

However, there is a slight shift of the ECtHR nowadays towards a more tolerant approach *vis-à-vis* the practices that amount to deprivation of liberty. The ECtHR has been criticized for its approach to immigration detention that differs from the generally applicable principles to deprivation of liberty in other contexts. A procedural turn was noted, starting with the ECtHR's (Grand Chamber) overruling of the judgment of the Chamber in the case *Ilias and Ahmed v. Hungary*. There, the ECtHR failed to deliver the protection it promises. Others criticized the Court for misapplying its own case-law[66]. In fact, the Grand Chamber[67] overruled the unanimously adopted Chamber judgment that found that the holding of asylum-seekers in the 'transit zone' between Hungary and Serbia actually amounts to deprivation of

[62] ECtHR, Guide on Article 5of the European Convention on Human Rights, Right to liberty and security, 31 December 2020, at https://www.echr.coe.int/Documents/Guide_Art_5_ENG.pdf, p. 12.
[63] ECtHR, *Nabil and Others v. Hungary*, Application no. 62116/12, 22 September 2015.
[64] ECtHR, *Lokpo and Touré v. Hungary*, Application No. 10816/10, 8 March 2012, ECtHR, *Al-Tayyar Abdelhakim v. Hungary* Application no. 13058/11, 23 October 2012, ECtHR, *Hendrin Ali Said and Aras Ali Said v Hungary,* Application no. 13457/11, 23 October 2012.
[65] M. Fraser, *The Detention of Asylum Seekers in Hungary: Exploring the Impact of Three Judgments of the European Court of Human Rights,* European Database on Asylum Law (EDAL), 2014, https://bit.ly/3hfQrtJ.
[66] Vladislava Stoyanova, Strasbourg Observers, *The Grand Chamber Judgment in Ilias and Ahmed v Hungary: Immigration Detention and how the Ground beneath our Feet Continues to Erode, 23* December 2019 , at https://strasbourgobservers.com/2019/12/23/the-grand-chamber-judgment-in-ilias-and-ahmed-v-hungary-immigration-detention-and-how-the-ground-beneath-our-feet-continues-to-erode/.
[67] ECtHR, *Ilias and Ahmed v. Hungary*, supra note 55.

liberty. Since the transit zones are closed places, the only way out leads to Serbia, whereas the competent asylum authority can discontinue the procedure if the applicant leaves the transit zone. The fundamental question is whether this obligatory "stay" constitutes deprivation of liberty under article 5(1)(f) of the ECHR. The Chamber in the first place, adopted in *Ilias and Ahmed* the reasoning of the *Amuur v France*[68] judgment and thus, found that "*the applicants could not have left the transit zone in the direction of Serbia without unwanted and grave consequences*".

Nevertheless, the applicability of Article 5 of the ECHR is decoupled from Article 3 of the Convention according to the Grand Chamber's reasoning, by adopting a more practical and realistic approach (of the judgment of 21 November 2019, ECtHR, *Ilias and Ahmed v. Hungary*, Application no. 47287/15, paragraph 213) and by reaffirming that the Contracting States have the sovereign right to control their borders. The reasoning even confirms a situation that resembles "crisis" in Hungary due to the influx of migrants (of the judgment of 21 November 2019, ECtHR, *Ilias and Ahmed v. Hungary*, Application no. 47287/15, paragraph 228). In addition, the ECtHR carried out an analysis of the distinction between the stay in airport transit zones and in hotspots on the islands on one hand and the stay in a transit zone located on the land border between two Council of Europe Member States on the other hand. The conclusion that the ECtHR was bound to draw was that the applicants could realistically leave in the direction of Serbia, which is another CoE Contracting State.

The comparison between the judgments of the ECtHR and the CJEU concerning Hungary, is chaotic. As seen above, according to the CJEU the reentry into Serbia with the realistic threat of sanctions make it impossible de facto to leave the Röszke transit zone. Overall, the protection of Article 5 of the ECHR deems to be weakened, while the *Ilias and Ahmed* case seems to be irrelevant after the CJEU's December 2020 ruling.

The new development in the jurisprudence of the ECtHR in March 2021, in the case *R.R. and others v Hungary*[69] concerning the confinement of an Iranian Afghan family, including three minor children, to the Röszke transit zone, constitute a shining exception to the newly introduced practice of the ECtHR. In fact, the ECtHR distinguished the facts of the case from that of *Ilias and Ahmed* by highlighting the particular vulnerability of the applicants and found that there has been a violation of Article 5 ECHR.

[68] See ECtHR, *Amuur v France*, supra note 11, paragraph 55.
[69] ECtHR, *R.R. and others v Hungary,* Application no. 36037/17, 2 March 2021.

3. The removal of all applicants from the territory of the State, the principle of non-refoulement and the prohibition of mass expulsion: a bold approach

According to the Handbook on European law relating to asylum, borders, and immigration (Edition 2020),[70] under EU law and ECHR law, collective expulsions are prohibited, since they contravene Article 78 of the TFEU in conjunction with Article 19 of the EU Charter and Article 4 of Protocol No. 4 ECHR, respectively. Regarding the scope of the prohibition, according to the case-law [71], it extends to the practices of non-admission in the territory and the rejection at the border. Whereas, the ECtHR has ruled that the term "expulsion" refers to "*any forcible removal of a foreigner from the territory, irrespective of the lawfulness and length of stay, the location of apprehension, and the person's status or conduct"*[72]. An expulsion shall be characterized as 'collective' in the case of absence of an individual assessment of the applications for international protection as well as, in the absence of an examination of the exposure to potential risks that violate the non-derogable obligation that derives from Article 3 ECHR.

As mentioned in the previous Chapter, the CJEU upheld in the Case 808/18 *Commission v Hungary*, while examining the implementation of the Return Directive regarding all illegally staying third-country nationals in the territory of Hungary, that the safeguards surrounding the return and removal procedures shall include the issue of a return decision, the examination of the principle of non-refoulement (Article 2 para. 2 Directive 2008/115), a written justification and access to a legal remedy. The CEAS compels all Member States to ensure a real opportunity to claim protection, with effective access to a procedure (Articles 6 and 9 para. 1 and Art. 46 para. 5 APD) and therefore, the practice of "push-backs" or the collective expulsion is not compatible with the EU asylum *acquis*. In fact, the CJEU went on to characterize the forced removal of all illegally - staying aliens to a strip of Hungarian border territory, where there is no infrastructure, as a violation of the procedural guarantees set out in the Return Directive. However, if we take our line of thinking a little further, we could argue that the CJEU threw light upon the issue of mass expulsions.

[70] See FRA, *Handbook on European law relating to asylum, borders and immigration*, supra note 42.
[71] See ECtHR, *N.D. and N.T. v. Spain*, supra note 49, paras. 185 and 187; ECtHR, *M.K. and Others v. Poland*, supra note 39, paras. 200 and 204.
[72] See, ECtHR, *N.D. and N.T. v. Spain*, supra note 49, para. 185. See also ECtHR, *Asady and Others v. Slovakia*, supra note 51, para. 60.

Regrettably, the ECtHR once again shifted in 2020 from its established case-law[73], pursuant to collective expulsions. In *N.D. and N.T. v. Spain*, the ECtHR put the applicant's conduct and the option of legal entry into the equation. According to the reasoning, since the applicants did not apply for asylum, seeking legal entry into Spain, even though that relevant procedures were in place, it was their own conduct that caused the lack of individual removal decisions. Therefore, the ECtHR concluded that there was no violation of Article 4 of Protocol No. 4 to the ECHR. The novelty of this approach extends to the fact that the States seem to cast off the weight of individual decisions, while the applicants has not access to a legal remedy to challenge the vague legal concept of "culpable conduct"[74]. Nevertheless, it shall be pointed out that this case should be interpreted restrictively, since it concerns the land border collective expulsions. The ECtHR reaffirmed the *Hirsi* principles regarding the pushbacks at sea and did not reduce the scope of Article 3 ECHR, since it did not find sufficient risks that could amount to degrading treatment. The scope of the ECtHR Grand Chamber's reasoning in *N.D. and N.T.* was addressed in a recent ECtHR judgment in the case of *Asady and others v. Slovakia*, as mentioned in the previous Chapter.

A few months later, in July 2020, the ECtHR ruled in the case of *M.K. and Others v. Poland*, that there had been a violation of Article 3 and Article 4 of Protocol No. 4 of the Convention. In that case, the review of the individual applications, deemed to be automated, without a proper examination of their individual situations and reflected a wider policy adopted by Poland[75].

The indications of a dismantling of the protection at the European borders by the ECtHR are deemed to be increasingly strong. The ECtHR, therefore, has been criticized for being prone to political pressures[76].

4. The right to remain in the territory in conjunction with the right to an effective remedy: a judicial dialogue

In the previous Chapter, we demonstrated the steps that the CJEU followed in the case *EU Commission v. Hungary*, before ruling that Hungary had violated the right to remain in the

[73] ECtHR, *Hirsi Jamaa and Others v. Italy*, Application no. 27765/09, 23 February 2012. See also, ECtHR, *Čonka v. Belgium*, No. 51564/99, 5 February 2002.
[74] See Nora Markard, *A Hole of Unclear Dimensions: Reading ND and NT v. Spain,* supra note 52.
[75] ECtHR, *M.K. and Others v. Poland*, supra note 39.
[76] See Nora Markard, *A Hole of Unclear Dimensions: Reading ND and NT v. Spain,* supra note 52.

territory, while the procedure for international protection is pending. Article 46 (5) and (6) of Directive 2013/32, provides for a suspensory effect of the appeal against the administrative decision at the first degree and Hungary's Asylum Legislation deemed to breach the relevant Directives. Nevertheless, according to the Handbook on European law relating to asylum, borders and immigration (Edition 2020),[77] under EU Law there is no automatic right to stay for certain types of unfounded and inadmissible applications during the time required to review the appeal.

The ECtHR, interplays with the CJEU concerning that aspect, since there is an abundant jurisprudence of the ECtHR setting out the guarantees in order to ensure the protection of the right to remain in territory of a CoE Member State. Asylum seekers cannot be returned before the existence of a risk of refoulement is assessed[78]. Pursuant to the right to an effective remedy, we will refer to the most recent ruling of the ECtHR in the case of *M.K. and Others v. Poland,* where the ECtHR found a violation of article 13 ECHR in conjunction with Articles 3 and 4 of Protocol No. 4 ECHR. The ECtHR noted that an appeal against a refusal to admit them to Poland which had no automatic suspensive effect, and which could not have prevented them being returned to Belarus, could not be regarded as an effective remedy.

The case-law of the two European Courts on this aspect is in convergence. Unfortunately, despite the increasing number of convictions of Hungary, in January 2021, the EU's border control agency, Frontex, suspended operations in Hungary as the government has so far failed to comply with the December ruling, in preventing pushbacks of asylum-seekers to Serbia[79].

[77] See FRA, *Handbook on European law relating to asylum, borders and immigration*, supra note 42.

[78] ECtHR, *M.A. and Others v. Lithuania*, Application No. 59793/17, 11 December 2018. See also, ECtHR, *De Souza Ribeiro v. France*, Application No. 22689/07, 13 December 2012.

[79] Nikolaj Nielsen, EU Observer, *Frontex suspends operations in Hungary*, 27 January 2021, at https://euobserver.com/migration/150744.

IV. Critical examination of the evolution of the case-law of the European Courts: A Pyrrhic victory of the rights of the applicants for international protection?

The tendency of the EU asylum policies, after the launch of the New Pact on Migration and Asylum[80] towards the fortification of the EU's borders, by focusing on public security and national sovereignty, with an evident gap in terms of solidarity among Member States[81], is deemed to be glaringly salient. Push back, returns and detention seems to become now the rule, rather than the exception.

Under those developments, as Hanaa Hakiki claimed a year ago in her article "*N.D. and N.T. v. Spain: defining Strasbourg's position on push backs at land borders?"*[82], René Cassin's *plaidoyer* for the inclusion of the right to be recognized as a person before the law into the Universal Declaration of Human Rights, is more topical than ever[83].

We argue that the CJEU in the latest five judgments against Hungary, threw light upon several issues in the core of the asylum law and policy that are misinterpreted or misimplemented by the Member States. Its judgments serve as clear guidance to the rest of the EU[84]. It should be emphasized that we differ from Professors' Tsourdi and Costello position in their article entitled *The Evolution of EU Law on Refugees and Asylum* (October

[80] COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS on a New Pact on Migration and Asylum, COM/2020/609 final.

[81] Article 80 TFEU: "The policies of the Union set out in this Chapter and their implementation shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States. Whenever necessary, the acts of the Union adopted pursuant to this Chapter shall contain appropriate measures to give effect to this principle.

[82] Hanaa Hakiki, Strasbourg Observers, *N.D. and N.T. v. Spain: defining Strasbourg's position on push backs at land borders?*, 26 March 2020, at: https://strasbourgobservers.com/2020/03/26/n-d-and-n-t-v-spain-defining-strasbourgs-position-on-push-backs-at-land-borders/.

[83] René Cassin noted: "*In the present state of the world it [is] inevitable that States should distinguish between their own nationals and foreigners… [B]ut there [are] degrees between absolute equality and the denial of all rights, and it [is] the United Nations' duty to ensure not only that human beings [have] juridical personality, but also that they should be guaranteed certain elementary rights indispensable to their wellbeing and to their dignity. The recognition of everyone as a person before the law [is] the first and most important step*" (UDHR Travaux Préparatoires).

[84] See Boldizsár Nagy, EU Migration Law Blog, *A – pyrrhic? – victory concerning detention in transit zones and procedural rights: FMS & FMZ and the legislation adopted by Hungary in its wake*, supra note 58.

6, 2020)[85] slightly here. While they argue in their article that the CJEU remains in the shadow of the ECtHR regarding asylum, we distance ourselves from this position, arguing that, considering the juxtaposition of the evolution of the case-law of the two Courts in the previous Chapter, the CJEU took bold steps towards a legal novelty, by condemning Hungary's asylum law. In that regard, all EU Member States should abstain from implementing practices such as the obligatory confinement in transit zones, the denial of access to the right to asylum by resorting to legal *manoeuvres* such as the concept of Safe Transit Country or by declaring a state of emergency due to immigration crisis. This last aspect of the judgment, regarding the declaration of an emergency situation will occupy not only the academics in the near future, but also the policy makers since the proposed Asylum Procedures Regulation in the New Pact introduces derogations from the procedural guarantees in a case of "a mass influx of irregular arrivals" by the Member States[86]. Thus, CJEU's judgment is deemed to be more relevant than ever before.

A. DID THE CJEU'S JUDGMENT TOOK OVER THE REINS FROM THE ECtHR REGARDING REFUGEE LAW?

In this subchapter we will analyze the individual rights that were assessed in the present case of the *Commission against Hungary* by the CJEU, in order to conclude whether the CJEU has taken the lead in interpreting the European Refugee Law.

Pursuant to access to asylum and the prohibition of mass expulsions, the policies of non-entry have been debated, while they have been widely implemented on an ad hoc basis by individual Member States. As discussed above, the CJEU took -at last- advantage of the opportunity to consider the scope of effective legal access to asylum and of the right to stay in a Member State's territory as long as the application for international protection is still pending. Hence, the Court condemned Hungary's controversial 'safe transit country' practices, that were responsible for the admissibility border procedures in place. Indeed, in the past, the Court declined jurisdiction regarding the examination of the legality of the EU-Turkey Statement[87], with far-reaching implications concerning the inadmissibility border procedures overall. Nevertheless, we argue that with its recent rulings the CJEU largely

[85] Tsourdi, Lilian and Costello, Cathryn, *The Evolution of EU Law on Refugees and Asylum* (October 6, 2020). Forthcoming in Paul Craig and Gráinne de Búrca (eds.), The Evolution of EU Law (Forth. OUP, 2021), Available at SSRN: https://ssrn.com/abstract=3735345.

[86] See Galina Cornelisse, EU Migration Law Blog, *The Pact and Detention: An Empty Promise of 'certainty, clarity and decent conditions',* supra note 56.

[87] CJEU, cases T-192/16, T-193/16 and T-257/16NF, *NG and NM v European Council* EU:T:2017:129[73].

upheld the Commission's complaint and thus, succeeded in delivering the protection it promises[88].

On the other hand, in 2019 the ECtHR Judge Pinto de Albuquerque wrote in his concurring Opinion in the case *M.A v Lithuania*[89]: "*To allow people to be rejected at land borders and returned without assessing their individual claims amounts to treating them like animals. Migrants are not cattle that can be driven away like this*", quoting in fact René Cassin's opinion. Disappointingly, the ECtHR in its judgment seems to confirm that in the European system the undocumented migrants are not considered as legal subjects with rights and responsibilities. In denying their legal personality, the ECtHR breached the founding principle of human rights law[90]. Therefore, this article shares the view that the bold interpretation that carried out the CJEU in the fundamental aspect of the access to asylum, can function as a beacon for the implementation of the New Pact on Migration and Asylum.

Concerning detention**,** even though the CJEU did not overcome its own case-law in ruling that the CEAS lays down a maximum period for administrative detention of applicants for international protection, it however, set as a prerequisite that the detention shall be necessary and proportional. Slowly but surely, the CJEU takes steps in the direction of preserving the core values of the EU, such as human dignity, as enshrined in Article 2 TEU[91].

As Professor Galina Cornelisse, argues in her article entitled *The Pact and Detention: An Empty Promise of 'certainty, clarity and decent conditions',* the past years more and more questions on the compatibility of the policies of non-entry at the Member States' external borders with the EU *asylum acquis* depend on "*which Court in Europe answers them*"[92]. As we discussed in the previous Chapter, the CJEU's ruling over the nature of the containment in the transit zones, made a break with the ECtHR's judgment the in the case of *Ilias and Ahmed.* Under the same circumstances, regarding Hungary's laws in place, the CJEU found that the confinement of almost all applicants for asylum in the transit zones constitute

[88] William Adkins, Politico, *EU top court rules Hungary's asylum policies unlawful*, 17 December 2020, at https://www.politico.eu/article/hungary-failed-eu-obligations-for-asylum-seekers-cjeu/ .

[89] See ECtHR, *M.A. and Others v. Lithuania,* supra note 78, paragraph 54.

[90] See Hanaa Hakiki, Strasbourg Observers, *N.D. and N.T. v. Spain: defining Strasbourg's position on push backs at land borders?,* supra note 82.

[91] See Boldizsár Nagy, EU Migration Law Blog, *A – pyrrhic? – victory concerning detention in transit zones and procedural rights: FMS & FMZ and the legislation adopted by Hungary in its wake,* supra note 58.

[92] See Galina Cornelisse, EU Migration Law Blog, *The Pact and Detention: An Empty Promise of 'certainty, clarity and decent conditions',* supra note 56.

unlawful detention, whereas the ECtHR ruled that this practice cannot be qualified as unlawful deprivation of liberty.

B. CONCLUSIONS

As a conclusion of this paper, we would like to highlight that thus far, our account of the evolution of the case-law of the two European Courts reveals of the part of CJEU, a progressively robust interpretation of the CEAS and of the part of the ECtHR a clear retrograde step in relation to the safeguard of the rights of migrants and asylum seekers.

Even though Professors Tsourdi and Costello, as well as Professors Leboeuf and Foblets[93] argued in 2020 that overall, there is a stagnation of the jurisprudence of the CJEU or in a more favorable approach, the Court "*appears keen to 'catch up' with the ECtHR, but no more than that*"[94], there are limits of the powers attributed to the Court, that we shall bear in mind. Most fundamentally, the CJEU has the power only to interpret the minimum standards set out in the Directives, not to revise them. Furthermore, the acquisition of its jurisdiction depends on a reference action from a court in one of the Member States, as well as on an individual application[95]. Finally, one cannot disregard the fact that the Courts are subject to political pressure, and regrettably, sometimes they deem to be responsive to it.

Regarding Hungary's gradual and effective moving away from its fundamental responsibilities under EU law, as Professor Tsourdi argues "*given the nature of asylum provision as a regional public good*"[96], we argue that the CJEU with the ruling in the case at hand has strengthened and expanded its position regarding the standards of the international protection and has addressed all the important aspects of the right to asylum. In 2016, Goodwin-Gill argued that "*the European Union's laudable goal of a Common European*

[93] L. Leboeuf and M-C Foblets, 'Humanitarian Admission to Europe: From Policy Developments to Legal Controversies and Litigation' in Luc Leboeuf and Marie-Claire Foblets (eds.), Humanitarian Admission to Europe: The Law Between Promises and Constraints (Hart/Nomos,2020) 11, 36.

[94] See Tsourdi, Lilian and Costello, Cathryn, *The Evolution of EU Law on Refugees and Asylum* (October 6, 2020), supra note 85.

[95] J. Hathaway 'E.U. Accountability to International Law: The Case of Asylum' (2011) 33 Michigan Journal of International Law 1.

[96] See Tsourdi, Lilian and Costello, Cathryn, *The Evolution of EU Law on Refugees and Asylum* (October 6, 2020), supra note 85.

Asylum Policy, premised on common interpretations of harmonized criteria, is still to be achieved"[97]. In 2021, we argue that CJEU's case-law makes some headway in that direction.

[97] Goodwin-Gill, Guy. (2016). The Mediterranean Papers: Athens, Naples, and Istanbul. International Journal of Refugee Law. 28. 276-309. 10.1093/ijrl/eew030.

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