The EU, Migration and Crisis: A Critical Redescription

by

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Abstract

This thesis develops a counter-analysis of emergence and development of the European Union (EU) immigration and asylum law system using Third World Approaches to International Law (TWAIL). It sheds an alternative perspective on the EU's positioning as a global actor in these fields and the role of using a 'crisis' frame in 2015 for the most recent developments of this policy area.

This thesis argues that, although migration to the EU in 2015 was framed by policy actors, non-governmental actors and scholars as a 'crisis' due to high numbers of migrants arriving or applying for international protection, and migrants' deaths at sea, it did not constitute a genuine crisis. Rather what we observe in 2015 is the use of a crisis frame to characterise Third World migration to Europe as a situation of humanitarian and security emergency. The crisis frame used in 2015 has enabled the EU to activate a crisis decision-making mode, which typically includes the use of exceptional and security-driven measures, the othering of causes and responsibilities, the exclusion of migrants considered as a danger or in danger, and the adoption of emergency measures bypassing normal procedures and with little consideration for human rights guarantees. Yet, analysing the EU migration and asylum policy before 2015, this thesis reveals that many of the features associated to the moment of rupture brought by a crisis frame actually existed prior to the 'crisis'. Since the early days of the common migration and asylum policy, key tendencies appeared including the use of informal cooperation, the constant association of migration and asylum matters with criminal and security considerations, the focus on controlling and excluding unwanted migrants with little consideration for their human rights and the progressive development of externalisation policies. The analysis of policy agenda and legal

developments from 2015 onwards shows the continuity and furtherance of existing patterns. Rather than any discontinuity suggested by the crisis frame, the EU asylum and migration law system after 2015 focused on furthering Third World migrants' othering and exclusion, expanding its influence and domination over third countries to increase their role in controlling unwanted migration and intensifying the use of informal cooperation frameworks. Analysing EU migration and asylum law and policy from a crisis-driven perspective appears therefore limited as it does not enable to fully seize the underpinnings of this policy area. That is why, this thesis argues that a critical reading is needed. Using Third World Approaches to International Law (TWAIL), this thesis offers a redescription of the EU asylum and migration law system which reveals the EU's racialised conception of Third World migrants justifying its focus on returns and containment measures. A TWAIL reading of EU cooperation with third countries shows that by allocating responsibility to deal with migrants and migration to others, the EU maintains its supremacy over its Third World partners. Finally, taking a TWAIL lens to analyse the EU's approach to Third World migrants and countries replicates a form of civilising mission.

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List of abbreviations

ACP: African, Caribbean and Pacific countries

AFSJ: Area of Freedom, Security and Justice

CAPD: Cooperation Agreement on Partnership and Development

CEAS: Common European Asylum System

CJEU: Court of Justice of the European Union

EC: European Community

ECHR: European Convention on Human Rights

ECtHR: European Court of Human Rights

ECJ: European Court of Justice

ECRE: European Council on Refugees and Exiles

EEC: European Economic Community

EP: European Parliament

EU: European Union

EUCFR: Charter of Fundamental Rights of the European Union

GAM: Global Approach to Migration

GAMM: Global Approach to Migration and Mobility

OHCHR: Office of the United Nations High Commissioner for Human Rights

IMF: International Monetary Fund

IOM: International Organisation for Migration

JAP: Joint Action Plan

JWF: Joint Way Forward

MoU: Memorandum of Understanding

MPs: Mobility Partnerships

NGO: Non-Governmental Organisation

SIS: Schengen Information System

TFEU: Treaty on the Functioning of the European Union

TWAIL: Third World Approaches to International Law

UNHCR: United Nations High Commissioner for Refugees

Introduction

In March 2016, the adoption of the European Union (EU)-Turkey Statement,[1] rapidly referred to as the EU-Turkey 'deal', was characterised as an 'effective' solution to the so-called 'crisis' by EU institutions,[2] and as 'a step in the right direction' by some scholars.[3] Adopted on 18th March,[4] the agreement entered into force two days later and was presented as the best option for the EU to deal with arrivals of so-called 'irregular' migrants since 2015.[5] 'The days of irregular migration to the European Union are over', declared Donald Tusk,[6] President of the European Council, after a meeting between EU heads of states and government with Turkish Prime Minister Ahmet Davutoğlu to discuss the possible adoption of the 'deal' in early March 2016. EU officials insisted that the so-called 'deal' was the most appropriate way to prevent migrants from attempting perilous crossings while abiding by European and international legal obligations.[7] This view contrasted sharply with the reception of this news by non-governmental organisations (NGOs) and academics who rapidly formulated strong criticisms against this cooperation agreement stressing its high

[1] Council of the European Union, 'EU-Turkey Statement' (18 March 2016) Press Release 144/16.
[2] See for instance EU Commission's reports on the implementation of the Statement: Commission, 'First Report on the Progress Made in the Implementation of the EU-Turkey Statement' COM(2016) 231 final 12; Commission, 'Second Report on the Progress Made in the Implementation of the EU-Turkey Statement' COM(2016) 349 final 2; Commission, 'Sixth Report on the Progress Made in the Implementation of the EU-Turkey Statement' COM(2017) 323 final 2.
[3] Daniel Thym, 'Why the EU-Turkey Deal Can be Legal and a Step in the Right Direction' (EU Immigration and Asylum Law and Policy Blog, 11 March 2016) <https://eumigrationlawblog.eu/why-the-eu-turkey-deal-can-be-legal-and-a-step-in-the-right-direction/> accessed 18 October 2021.
[4] Council of the European Union, 'EU-Turkey Statement' (18 March 2016) Press Release 144/16.
[5] See section 6 of this chapter on the use of terminology to refer to migrants.
[6] Donald Tusk, 'Remarks by President Donald Tusk After the Meeting of the EU Heads of State or Government with Turkey' (*European Council*, 7 March 2016) <https://www.consilium.europa.eu/en/press/press-releases/2016/03/07/tusk-remarks-eu-turkey-meeting/> accessed 2 August 2021.
[7] Donald Tusk, 'Remarks by President Donald Tusk After the Meeting of the EU Heads of State or Government with Turkey' (*European Council,* 18 March 2016) <https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/tusk-remarks-after-euco-turkey/> accessed 2 August 2021.

potential for infringements of migrants' human rights, especially refugee law. Reports of abuses at the Turkish-Greek border confirmed the impact of this agreement on migrants' fundamental rights,[8] therefore indicating the EU's hypocritical position when presenting the EU-Turkey Statement as a humanitarian measure. The Janus-faced discourse of the EU towards migration also results from the characterisation of the situation as a 'crisis', bringing expectations of humanitarian action and exceptional measures disrupting existing policy. Contrary to what one might expect in such a scenario, the so-called 'crisis' did not disrupt the EU's approach to and focus on migration: despite the insistence on humanitarianism in official discourses,[9] measures taken to respond to the so-called 'crisis' contained few humanitarian considerations and exhibited notable continuity with the EU's pre-'crisis' approach.

Observing this phenomenon led me not to question what measures the EU could or should have taken but rather why the so-called 'crisis' did not lead to legal or policy disruption. To put it differently, the EU's response to the so-called 'crisis' suggests a misunderstanding of the issue on their part. The basic contention of this thesis is that the so-called 'crisis' is not the problem, but rather consolidates the pre-existing paradigm through which the EU has approached migration and migrants, including asylum-seekers and asylum-seeking. The issue at the core of this thesis is essentially the EU's conception of Third World migration.

[8] See for instance: Human Rights Watch, 'EU/Greece: First Turkey Deportations Riddled With Abuse' (*Human Rights Watch,* 19 April 2016) <https://www.hrw.org/news/2016/04/19/eu/greece-first-turkey-deportations-riddled-abuse> accessed on 2 August 2021; Kondylia Gogou, 'The EU-Turkey Deal: Europe's Year of Shame' (*Amnesty International,* 20 March 2017) <https://www.amnesty.org/en/latest/news/2017/03/the-eu-turkey-deal-europes-year-of-shame/> accessed 2 August 2021; Sevda Tunaboylu and Jill Alpes, 'The EU-Turkey Deal: What Happens to People who Return to Turkey?' (2017) (54) Forced Migration Review 9.

[9] Donald Tusk, 'Remarks by President Donald Tusk After the Meeting of the EU Heads of State or Government with Turkey' (*European Council,* 18 March 2016) <https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/tusk-remarks-after-euco-turkey/> accessed 2 August 2021.

1. Research questions

The core aim of this thesis is to analyse the role of 'crisis' framing in shaping EU migration and asylum law. It investigates the implications of the so-called European migration or refugee 'crisis' of 2015 for the development of EU migration and asylum law. More specifically, it explores how the EU's use of a 'crisis' frame shaped the internal aspects of EU migration and asylum law. In other words, it questions the implications of the 'crisis' framing for the institutional and procedural elements of this policy area, and the fundamental rights guarantees for Third World migrants. Moreover, this investigation engages with the shaping of the external dimensions of EU asylum and migration policy through 'crisis' framing as it researches the role of the so-called 'crisis' in cooperation frameworks the EU developed with third countries on asylum and migration matters.

Given that the notion of 'crisis' is usually associated with disruption,[10] this thesis seeks to question whether the use of a 'crisis' framing regarding Third World migration in 2015 constituted, created or reflected a rupture within the existing EU migration and asylum law system. That is why this thesis also analyses the evolution of EU migration and asylum law since its origins and investigates the continuities and discontinuities of this policy area. In particular, I question the dynamics/tendencies that have led to the communitarisation of migration and asylum – key areas of states' sovereign powers. Doing so inevitably leads to engaging with the EU's core conception of Third World migration and migrants in order to determine how this policy's further integration at the EU level was framed. Analysing the dynamics leading the EU to become a key

[10] Jessica C Lawrence, 'The EU in Crisis: Crisis Discourse as a Technique of Government' (2014) 44 Netherlands Yearbook of International Law 187, 189.

actor in migration and asylum is necessary to seize the full implications of the EU's use of 'crisis' framing.

This thesis also challenges the dominant narratives regarding the conceptions of Third World migrants and migration, which guided and pushed the further development of the EU migration and asylum law system. It investigates critical legal theories and engages with their potential contributions to provide alternative understandings of the EU migration and asylum law system, and the role of the 'crisis' framing in shaping that system.

Therefore, these are the research questions guiding this thesis:

- What are the implications of the use of 'crisis' framing by the EU to characterise Third World migration for the development of EU migration and asylum law?
- What does the evolution of the EU migration and asylum law system tell us about the role of the 'crisis' frame for its development and the EU's conception of migration originating from the Third World[11]?
- How could Third World Approaches to International Law (TWAIL)[12] contribute to developing a re-description of the EU migration and asylum law? How would a counter-narrative of the EU migration and asylum law system look like?

2. Main arguments of the thesis

This thesis argues that dynamics of Third World migration from 2015 onwards are not a crisis but have been framed as one by the EU. This does not mean that no aspects

[11] See section 6 of this chapter for definition of 'Third World'.
[12] See section 4 of this chapter for my discussion on the use of TWAIL in this thesis.

or experiences of migration in 2015 could be, to some extent, considered a 'crisis' or crisis-like situation. In particular, I acknowledge the lived experiences of individual migrants and asylum seekers as well as the reception conditions and infrastructures in Southern and Eastern European states, which for migrants, local residents or workers were perceived as a 'crisis'.[13] However, my research does not address these perspectives but rather focuses on the framing used by the EU when engaging with Third World migration. Policy frames forge policy making and choices by shaping the understanding of the issue it will address. The characterisation of 2015 as a 'crisis' suggests a disruption of the existing system.[14] However, as my analysis in this thesis shows, the 2015 so-called 'crisis' did not lead to the disruption of EU migration and asylum law. Rather, I argue that using a 'crisis' frame consolidated and furthered pre-existing tendencies.[15] Looking back at the origins and early developments of the common migration and asylum policy reveals the long-lasting legacies of EU's approach to migration and migrants, which was mainly security- and control-focused.[16] The 'crisis' frame used in 2015, thus, exacerbated these aspects of the EU's approach to Third World migrants because 'crisis' framing stresses the situation's supposedly dangerous and emergency nature and supports the introduction of stricter measures.[17] That is why this thesis endorses the need to contextualise the use of 'crisis' framing within the broader evolution of the EU migration and asylum law system.

My analysis of this evolution reveals the EU's long-lasting focus on controlling and excluding some migrants and migration movements considered as 'unwanted'. In 2015, high numbers of migrants' arrivals, asylum applications and deaths in the

[13] See for instance: Vicki Squire and others, *Reclaiming Migration: Voices from Europe's 'Migrant Crisis'* (Manchester University Press 2021) 39-44.
[14] See chapter 1 section 3 for further discussion on the use of policy and crisis frames.
[15] See chapter 3.
[16] See chapter 2.
[17] See chapter 1 section 2.

Mediterranean were characterised as a 'crisis', with strong connotations of uncontrolled/uncontrollable migration and loss of control over borders.[18] This 'crisis' framing supported the need for stricter control over Third World migrants and external borders, and for increasing measures to exclude or keep the 'unwanted' at distance. Yet the EU's and its member states' will to control some migration movements are not the result of the so-called 'crisis' but have long existed and remained a core element of the developing EU migration and asylum law system. That is why I call for the development of a broader perspective on the EU's approach to migration in order to offer an alternative to the dominant 'crisis'-driven understanding of the EU's approach to migration in and after 2015. It should be noted that in this thesis, I support an open-border policy.[19]

To deepen the understanding of the EU's approach to migration and asylum, I argue for the use of critical approaches to international law, especially TWAIL. As my analysis demonstrates, using TWAIL as a theoretical framework to develop a re-description of the EU migration and asylum law system proves to contribute actively to cultivating alternatives.[20] In this thesis, I claim that using TWAIL and other critical perspectives to analyse EU migration and asylum policy is necessary to fully challenge the dominant doctrinal narrative. A TWAIL reading of EU migration and asylum law system reveals the colonial and neo-colonial origins of this policy. It shows that despite the 'crisis' frame and its calls for exceptional measures or humanitarian considerations from 2015 onwards, the EU's approach to Third World migration and countries remains embedded in racialised and imperialist conceptions. The use of a 'crisis' frame

[18] See chapter 1 section 1.
[19] For some discussion on this, see for instance: Theresa Hayter, *Open Borders: The Case Against Immigration Controls* (2nd edn, Pluto Press 2004); Christopher H Wellman and Phillip Cole, *The Ethics of Immigration: Is There a Right to Exclude?* (Oxford University Press 2011) Part Two; François Gemenne, 'Ouvrir les Frontières, une Question de Souveraineté' (2016) 68(4) Cités 49, 52-56.
[20] See chapter 4.

therefore enabled the EU to reassert its dominant position on Third World migration and in cooperation frameworks with third countries.

3. The rationale behind this thesis

Since the creation of the European Coal and Steel Community in 1951 and the European Economic Community in 1957,[21] what is now the EU has become a key actor on migration and asylum matters. Firstly, it is an example of a free movement area for its own citizens[22] and of the development of a migration and asylum policy common to all its member states.[23] Moreover, the development of EU external migration and asylum policy and the EU's increasing role internationally mean that the EU has also become a key international actor dealing with international migration and refugee movements.[24] The EU's role in migration policy was strengthened by the use of the 'crisis' framing in 2015. Indeed, it was presented as a 'crisis' for the EU or Europe,[25] rather than (some) individual member states only, even though it was putting more 'pressure' on some member states than others.[26] It is therefore important to engage with the EU's role in areas of migration and asylum as its EU-wide coordination power and its global significance will most likely remain. It is necessary to develop a

[21] Treaty Establishing the European Coal and Steal Community [1951]; Treaty Establishing the European Economic Community [1957].
[22] Nadine El-Enany, 'On Pragmatism and Legal Idolatry: Fortress Europe and the Desertion of the Refuge' (2015) 22(1) International Journal on Minority and Group Rights 7, 32.
[23] Kees Groenendijk, 'Introduction: Migration and Law in Europe' in Elspeth Guild and Paul Minderhoud (eds), *The First Decade of EU Migration and Asylum Law* (Brill 2011) 8.
[24] Katharina Eisele, *The External Dimension of the EU's Migration Policy: Different Legal Positions of Third-Country Nationals in the EU: A Comparative Perspective* (Brill 2014) 127.
[25] Gurminder K Bhambra, 'The Current Crisis of Europe: Refugees, Colonialism, and the Limits of Cosmopolitanism' (2017) 23(5) European Law Journal 395.
[26] Florian Trauner, 'Asylum Policy: The EU's "Crises" and the Looming Policy Regime Failure' (2016) 38(3) Journal of European Integration 311, 314.

broad and critical understanding of the evolution of the EU's role and power in migration and asylum policy as it will enable the development of future studies and research.

Migration and asylum law is a legal area that primarily concerns third-country nationals and where human rights considerations are considered central. However, migration and asylum are also both deeply connected to nation states' sovereignty.[27] In this way, studying migration and asylum law constitutes an analysis of the relationship between human rights and humanitarian principles on one side, and states' prerogatives to limit fundamental rights based on considerations of nationality on the other. That is why it constitutes an area of study that particularly reveals the limits of the humanitarian and human rights' discourse. Migration and asylum law provides an opportunity to reflect on humanitarian considerations and their position within legal systems, even more so considering the growing positioning of the EU as a human rights' actor on the international scene.[28] Reflecting on the EU's humanitarian discourse towards Third World migrants is relevant to address the EU's role as a human rights actor more broadly. Third-country nationals constitute an exemplification of the EU's 'other' and are among the most excludable communities. Discussing the EU's approach to Third World migrants amounts to discussing the conception of its 'others' and access to its human rights system. It is important to address the EU's 'others' as it enables us to engage with and question the founding conception of the EU's humanitarian and human rights system. Analysing the EU's approach to its 'others' will provide a clearer insight into its humanitarian role by revealing the limitations of its human rights system.

[27] Cathryn Costello, *The Human Rights of Migrants and Refugees in European Law* (Oxford University Press 2015) 10-11.
[28] Consolidated Version of the Treaty on European Union [2008] OJ C115/13 art 21(1); Costello, *The Human Rights of Migrants and Refugees* (n 27) 4.

Furthermore, the EU's increasing role on the international scene is not limited to migration- and asylum-related agenda. Rather the EU has now become a major actor internationally,[29] developing its own agenda and cooperation on diverse policy areas.[30] Studying the EU's role in international cooperation related to migration will also contribute to the broader research on EU external action.

This thesis is motivated by a need to provide alternative perspectives on EU migration and asylum law and the use of the 'crisis' frame. Despite the criticisms raised regarding the characterisation of the so-called 'crisis',[31] none have fully developed a counter-analysis to the dominant narrative on EU migration and asylum law, and the control-focused measures adopted in response to the said 'crisis'. By focusing on the so-called 'crisis' or on measures taken in response to that 'crisis',[32] the existing scholarship fails to put these phenomena into their proper historical, legal, policy and critical contexts. This overly-narrow focus limits the type of solutions that may be developed, and succumbs to the framing imposed by the EU's institutions and policy-makers themselves. The frames used to characterise a policy area shape the understanding of this domain and characterise the policy choices and measures to be taken,[33] even more so when it is a 'crisis' frame suggesting a certain emergency or immediacy of

[29] Eisele, *The External Dimension of the EU's Migration Policy* (n 24) 13.
[30] Consolidated Version of the Treaty on European Union [2008] OJ C115/13 art 21(2).
[31] See for instance: Bhambra, 'The Current Crisis of Europe' (n 25); Barbara Lüthi, 'Agitated Times: Why Historians Need to Question the Rhetoric of the "Refugee Crisis"' (2017) 31(1) Histoire@Politique 55; Arne Niemann and Natascha Zaun, 'EU Refugee Policies and Politics in Times of Crisis: Theoretical and Empirical Perspectives' (2018) 56(1) Journal of Common Market Studies 3; Sergio Carrera, Juan Santos Vara and Tineke Strik, 'The External Dimensions of EU Migration and Asylum Policies in Times of Crisis' in Sergio Carrera, Juan Santos Vara and Tineke Strik (eds), *Constitutionalising the External Dimensions of the EU Migration Policies in Times of Crisis* (Edward Elgar 2019) 1.
[32] See for instance: Editorial, 'From Eurocrisis to Asylum and Migration Crisis: Some Legal and Institutional Considerations about the EU's Current Struggles' (2015) 52(6) Common Market Law Review 1437; Daniel Thym, 'The "Refugee Crisis" as a Challenge of Legal Design and Institutional Legitimacy' (2016) 53(6) Common Market Law Review 1545; Sergio Carrera, Juan Santos Vara and Tineke Strik, *Constitutionalising the External Dimensions of EU Migration Policies in Times of Crisis: Legality, Rule of Law and Fundamental Rights Reconsidered* (Edward Elgar 2019); Peter Slominski and Florian Trauner, 'Reforming me Softly - How Soft Law has Changed EU Return Policy Since the Migration Crisis' (2021) 44(1) West European Politics 93.
[33] Falk Daviter, 'Policy Framing in the European Union' (2007) 14(4) Journal of European Public Policy 654.

action.[34] That is why there is a crucial need to address the frames the EU uses when dealing with migration in order to understand how they influence its measures.

Given the limited alternatives to the dominant approach, it is necessary to provide a broader perspective on the role of the 'crisis' framing within the development of EU migration and asylum policy as well as offer a re-description of the EU's approach to migration and asylum. This does not mean that no critical study has been conducted; as Mayblin and Turner showed, migration studies benefit from a wide-ranging contribution of postcolonial and decolonial perspectives.[35] Migration and asylum law has also been studied from a critical perspective, although such critical work remains somewhat marginal and tends to focus on either international law or global aspects,[36] or on specific national immigration and asylum legal systems such as Mayblin or El-Enany's analyses of the British system.[37] The doctrinal approach, which, so far, dominates the scholarship on EU migration and asylum law, fosters the EU's approach as it perpetuates a specific conception of migration, especially Third World migration, and of how to deal with migration from the Third World. The absence of any genuine alternative perspective or counter-analysis preserves the EU's approach to Third World migrants as 'the' only one. The dominant position held by the EU's approach to Third World migrants contributes to characterising restrictive and control-focused measures as the obvious and only sensible response while open borders are

[34] Mark Rhinard, 'The Crisisification of Policy-Making in the European Union' (2019) 57(3) Journal of Common Market Studies 616, 617.
[35] Lucy Mayblin and Joe Turner, *Migration Studies and Colonialism* (Polity Press 2020) 3.
[36] See for instance: BS Chimni, 'The Geopolitics of Refugee Studies: A View from the South' (1998) 11(4) Journal of Refugee Studies 350; BS Chimni, 'Global Compact on Refugees: One Step Forward, Two Steps Back' (2018) 30(4) International Journal of Refugee Law 630; Ulrike Krause, 'Colonial Roots of the 1951 Refugee Convention and its Effects on the Global Refugee Regime' (2021) 24(1) Journal of International Relations and Development <https://doi.org/10.1057/s41268-020-00205-9> accessed 20 July 2021.
[37] Lucy Mayblin, *Asylum After Empire: Colonial Legacies in the Politics of Asylum Seeking (*Rowman and Littlefield International 2017); Nadine El-Enany, *Bordering Britain: Law, Race and Empire* (Manchester University Press 2020).

considered as utopic, impossible or dangerous.[38] By failing to question the rationale behind border controls and the understanding of Third World migration as a phenomenon that can and/or should be controlled, the dominant scholarship narratives restrain the development of potential alternative measures.

Therefore, it is particularly timely to advance critical perspectives on the EU migration and asylum law system and the implications of using a 'crisis' frame. Doing so will enable a broader and clearer insight into the considerations guiding the development of EU measures on migration and asylum. Also, offering a re-description of this policy area will foster the emergence of alternative perspectives. Indeed, a critical re-description of the EU migration and asylum law system is crucial to reveal the colonial legacies driving the EU's approach to Third World migration. It will also foster more critical analyses of the EU's action in these areas and potentially lead to further alternative studies of EU migration and asylum law.

4. Methodology

The theoretical framework used throughout this thesis derives from critical approaches to international law. Indeed, critical scholars have developed counter-analysis on international law, especially international human rights law and international refugee law, which are particularly relevant to this doctoral research. Although critical approaches to international law are diverse,[39] based on various theories, they share

[38] Gemenne, 'Ouvrir les Frontières' (n 19) 53 and 56.
[39] Frédéric Mégret, 'Where does the Critique of International Human Rights Stand? An Exploration in 18 Vignettes' in José María Beneyto and others (eds), *New Approaches to International Law: The European and the American Experiences* (TMC Asser Press 2013) 6.

one common goal: to challenge the orthodox scholarship on the international legal system and to diverge from the conception that 'there is only one world, or one way of seeing'.[40] They question the traditional view that international law is a form of progress and thus reveal the use of international law to ascertain the domination of some states over others.[41] Among the various critical theories feeding discussions on the international law system, Third World Approaches to International Law (TWAIL) are particularly relevant to this thesis.

The TWAIL movement broadly originates in the decolonisation movements following World War II and the 1955 Bandung Conference is often considered its birthplace.[42] Bringing 29 African and Asian states together, the conference led to the emergence of the Non-Aligned Movement and the Third World.[43] In this conference, leaders of recently independent states gathered and aimed at using the collective power of Third World states to address issues central to recently decolonised countries, such as sovereignty, non-aggression or non-interference in internal affairs, by pushing for the inclusion of these issues on the international scene and for a change to the international order.[44] TWAIL is, therefore, a strand of scholarship which characterises itself as 'both a political and intellectual movement'.[45] TWAIL scholarship is diverse and gathers a variety of approaches, content and strategies.[46] Indeed, although

[40] Andrea Bianchi, *International Law Theories: An Inquiry Into Different Ways of Thinking* (Oxford University Press 2017) 18.
[41] Emmanuelle Tourme-Jouannet, 'Des origines Coloniales du Droit International: A Propos du Droit des Gens Moderne au 18ème Siècle' in Pierre-Marie Dupuy and Vincent Chetail (eds), *The Roots of International Law* (Martinus Nijhoff 2014) 641, 670.
[42] Makau Mutua, 'What is TWAIL?' (2000) American Society of International Law: Proceedings of the Annual Meeting 31.
[43] Vik Kanwar, 'Not a Place, But a Project: Bandung, TWAIL, and the Aesthetics of Thirdness' in Luis Eslava, Michael Fakhri and Vasuki Nesiah (eds) *Bandung, Global History and International Law: Critical Pasts and Pending Futures* (Cambridge University Press 2017) 140.
[44] M Sornarajah, 'On Fighting for Global Justice: The Role of a Third World International Lawyer' (2016) 37(11) Third World Quarterly 1972, 1974.
[45] Mutua, 'What is TWAIL?' (n 42) 36.
[46] Bianchi (n 40) 205; Mutua, 'What is TWAIL?' (n 42) 36; Obiora Chinedu Okafor, 'Critical Third World Approaches to International Law (TWAIL): Theory, Methodology, or Both?' (2008) 10(4) International

TWAIL can be characterised as a dynamic of resistance, where some TWAILers adopt a radical approach others take a more reformist perspective,[47] holding onto the hope that the international legal system could be transformed into 'a space in which claims of justice can effectively be expressed'.[48] Within this spectrum, my thesis lies in the resistance developed by TWAILers. Here, I am using TWAIL as a theoretical framework to incite a radical approach to the EU migration and asylum law system.

Similarly, TWAIL's diversity is noticeable in the variety of studies and research focuses it has led to. Spanning from the historical origins of international law[49] to some of its most recent developments,[50] TWAILers engage with various areas of international law such as human rights,[51] international economic and trade law or development,[52] or international refugee and migration law,[53] to name but a few. TWAIL discusses both global aspects of international law and more specific elements related to a geographical area or historical event or period.[54] Still, within this diversity, the aim of

Community Law Review 371, 375-376.

[47] Luis Eslava and Sundhya Pahuja, 'Between Resistance and Reform: TWAIL and the Universality of International Law' (2011) 3(1) Trade, Law and Development 103, 110; Mutua, 'What is TWAIL?' (n 42) 32.

[48] Eslava and Pahuja, 'Between Resistance and Reform' (n 47) 110.

[49] See for instance: Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2005); Mohammad Shahabuddin, *Ethnicity and International Law: Histories, Politics and Practices* (Cambridge University Press 2016).

[50] See for instance Chimni on the Global Compact on Refugees adopted in 2018: Chimni, 'Global Compact on Refugees' (n 36) 630.

[51] See for instance: Makau Mutua, *Human Rights: A Political and Cultural Critique* (University of Pennsylvania Press 2002); Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements, and Third World Resistance* (Cambridge University Press 2003); José-Manuel Barreto (ed), *Human Rights from a Third World Perspective: Critique, History and International Law* (Cambridge Scholars Publisher 2013).

[52] See for instance: Mohammed Bedjaoui, *Pour un Nouvel Ordre Économique Mondial* (Unesco 1979); Sundhya Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (Cambridge University Press 2011); Umut Özsu, '"In the Interests of Mankind as a Whole": Mohammed Bedjaoui's New International Economic Order' (2015) 6(1) Humanity 129.

[53] See for instance: Chimni, 'The Geopolitics of Refugee Studies' (n 36) 350; BS Chimni, *International Refugee Law: A Reader* (Sage 2000); BS Chimni, 'From Resettlement to Involuntary Repatriation: Towards a Critical History of Durable Solutions to Refugee Problems' (2004) 23(3) Refugee Survey Quarterly 55; BS Chimni, 'The Birth of a "Discipline": From Refugee to Forced Migration Studies' (2009) 22(1) Journal of Refugee Studies 11; E Tendayi Achiume, 'Migration as Decolonization' (2019) 71(6) Stanford Law Review 1509.

[54] For TWAIL discussions focussed on geographical areas, see for instance Gathii on African contributions to the formation of international law: James Thuo Gathii, 'A Critical Appraisal of the International Legal Tradition of Taslim Olawale Elias' (2008) 21(2) Leiden Journal of International Law 317; Shahabuddin on the making of Postcolonial States, especially India, Myanmar and Bangladesh: Mohammad Shahabuddin, *Minorities and the Making of Postcolonial States in International Law* (Cambridge University Press 2021); Shahabuddin on how

the TWAIL project, Mutua explains, is '[to advocate for] the full representivity of all voices'.[55] TWAIL scholars are, indeed, united by common values and concerns directly resulting from the decolonisation movements and the Bandung Conference, namely resistance to hegemony and hierarchical systems. In pursuit of their objectives, TWAIL scholars aim at providing an understanding of 'the history, structure and process of international law from the perspective of third world states'.[56] Therefore, what brings TWAILers under the same coalition is unpacking the role of the contemporary international law system in maintaining racialised hierarchies.[57] Through this lens, TWAIL scholars have provided counter-narratives of international law that are antihierarchical and counterhegemonic.

Relying on TWAILers' scepticism will emancipate this research from the traditional narratives and legalistic approaches to migration and asylum in EU law. The use of TWAIL's framework will provide an opportunity to decentre the approach to migration and asylum that dominates EU law scholarship by developing a re-description of the EU migration and asylum law system and the role of the 'crisis' framing for the development of that system.[58] Given TWAIL's embeddedness in resistance and critical redescription, this methodology is essential to this thesis as it will enable it to engage critically with the 'crisis'-driven approach and to question its role and (dis)continuities

international law shaped Bangladesh' state practice: Mohammad Shahabuddin (ed), *Bangladesh and International Law* (Taylor and Francis Group 2021).
For TWAIL discussions of historical events, see for instance Özsu on the 1922-1934 Greek-Turkish population transfer: Umut Özsu, *Formalizing Displacement: International Law and Population Transfers* (Oxford University Press 2015); Anghie on the Bandung Conference: Antony Anghie, 'Bandung and the Origins of Third World Sovereignty' in Luis Eslava, Michael Fakhri and Vasuki Nesiah (eds), *Bandung, Global History, and International Law: Critical Pasts and Pending Futures* (Cambridge University Press 2017) 535; Greenman and others on the legacies of the 1917 October Revolution: Kathryn Greenman and others (eds), *Revolutions in International Law: The Legacies of 1917* (Cambridge University Press 2021).

[55] Mutua, 'What is TWAIL?' (n 42) 37.

[56] BS Chimni, 'The Past, Present and Future of International Law: A Critical Third World Approach' (2007) 8(2) Melbourne Journal of International Law 499.

[57] Antony Anghie, 'What is TWAIL: Comment' (2000) American Society of International Law: Proceedings of the Annual Meeting 39.

[58] See chapter 4.

with and within the control- and security-based focus of the EU's understanding of Third World migration. Using a TWAIL framework in this research is also appropriate due to its constant focus on addressing colonial legacies, especially racialised hierarchies, and on re-centring peripheries in international law.

European states' long history as colonial powers also supports using a TWAIL perspective to engage with the colonial legacies of the EU migration and asylum law system. Even though the EU itself was not involved in colonisation, some of its member states were dominant imperial powers during the colonisation era; a history rarely acknowledged as an aspect of the EU's origins and identity.[59] Among the six signatory states to the 1957 Treaty of Rome, only Luxemburg was never involved in colonisation. At the time of the signature of the treaty creating the predecessor of the EU, some of the contracting states were still colonial powers. Although the Federal Republic of Germany and the Italian Republic no longer had colonies by 1957, the decolonisation processes of French, Belgian and Dutch colonies were still ongoing. Indeed, most French colonies in Africa remained under its control, and the Algerian independence war continued until 1962. Likewise, in 1957, Belgium was still ruling over Belgian Congo and administering Ruanda-Urundi, and Dutch control over Suriname continued until its independence in 1975. In this way, the newly created European Communities had 'more than three-fourths of its land area outside of continental Europe'.[60] Nowadays, many EU member states still have 'overseas colonial territories'.[61] For instance, the Spanish enclaves of Ceuta and Melilla, French Guyana, Réunion, Martinique and Guadeloupe, are fully integrated into the EU,[62] while

[59] El-Enany, *Bordering Britain* (n 37) 184.
[60] Peo Hansen and Stefan Jonsson, 'Eurafrica Incognita: The Colonial Origins of the European Union' (2017) 7(1) History of the Present 1, 11-12 <https://doi.org/10.5406/historypresent.7.1.0001> accessed 20 August 2021.
[61] El-Enany, *Bordering Britain* (n 37) 188.
[62] Peo Hansen, 'European Integration, European Identity and the Colonial Connection' (2002) 5(4) European Journal of Social Theory 483, 488.

other oversea colonial territories, such as French Polynesia, Netherlands Antilles or Greenland to name a few, come under the EU framework for 'Overseas countries and territories'.[63] The EU, although not a colonial power itself, was created by and for colonial powers and although often omitted when mapping or defining the EU's identity, the Union still benefits nowadays from its member states' territorial expansion in Africa, America, Indian and Pacific Oceans.[64] Considering TWAIL's impetus to unveil the roots of the international legal system within the European colonial project,[65] it appears appropriate to use a TWAIL methodology to engage with colonial legacies in contemporary EU law.

What is more, this thesis engages with EU migration and asylum law, i.e. with an area of law whose essence is to deal with non-European nationals, especially nationals originating from the Third World. Whether they are on EU territory or trying to reach it, Third World migrants constitute the EU's 'others'. The development of the external dimensions of EU migration and asylum law also means the EU increasingly engages with Third World countries and constitutes a relationship between the North and the South aimed at dealing with citizens of the latter. EU migration and asylum law thus embodies a setting capable of reproducing colonial patterns.

The EU migration and asylum law system, due to its application to Third World citizens and increasing involvement with Third World states, embodies key aspects of TWAIL's focus, namely hierarchies and inequalities. Using TWAIL as a methodology to challenge the orthodox understandings of migration and EU migration and asylum law appears appropriate as it will contribute to the deconstruction of the colonial legacies

[63] Consolidated version of the Treaty on the Functioning of the European Union [2008] OJ C115/47 annex II.
[64] Hansen, 'European Integration, European Identity' (n 62) 489.
[65] John Reynolds, *Empire, Emergency and International Law* (Cambridge University Press 2017) 24.

underpinning this area of law. Moreover, by using a TWAIL perspective to suggest a redescription of the EU migration and asylum law system, this doctoral research aims at initiating a discussion on alternative conceptions of Third World migration.

Even though TWAIL's primary focus is international law, it is still relevant to study the EU law system. The EU's constitutional nature is often debated and has been characterised by scholars through a variety of labels such as 'international organisation', 'supranational organisation' or 'association of sovereign states' to name a few.[66] The ECJ's *Van Gend en Loos* doctrine exemplifies the ambiguity surrounding the EU legal system by describing European Communities as 'a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals',[67] thus acknowledging the EU legal system as 'a new legal order', yet still 'of international law'.[68] Discussing the nature of the EU falls beyond the scope of this PhD. However characterised, the EU has now become a key actor within the international legal system, playing an increasing role in international topics such as migration.[69] TWAIL appears therefore as a relevant methodology. It is even more so considering that the EU, as an institution within the system of EU law, holds a dominant position comparable to any other international institution within the international law system.

Based on a TWAIL theoretical framework, this thesis adopts an iterative process to engage with EU asylum and migration law. Using a similar approach to that used by

[66] Allan Rosas and Lorna Armati, *EU Constitutional Law; An Introduction* (2nd edn, Hart Publishing 2012) 8-9.
[67] Case 26/62 *N.V. Algemene Transport en Expeditie Onderneming van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1.
[68] Jan Klabbers, 'Straddling the Fence: The EU and international law' in Damian Chalmers and Anthony Arnull (eds), *The Oxford Handbook of European Union Law* (Oxford University Press 2015) 59.
[69] Eisele, *The External Dimension of the EU's Migration Policy* (n 24) 127.

Anghie when developing a counter-narrative to the origins of international law,[70] this thesis does not aim to provide an exhaustive overview of all instruments of EU migration and asylum law and policy. Instead, much like Anghie,[71] this thesis focuses on providing a genealogy of EU asylum and migration law by selecting exemplifications of its most orthodox elements and exposing its underpinning assumptions. Although European courts – such as the European Court of Human Rights and the Court of Justice of the EU – have played and still play a role in the development of the EU migration and asylum law system, my research focuses on the political and bureaucratic institutions of the EU's approach to Third World migrants due to these institutions' significant role in the framing of Third World migration as 'crisis' or a problem. This research therefore engages mainly with legal and policy instruments issued by EU political and bureaucratic institutions,[72] with some exceptions when it appeared relevant to address judicial developments on EU immigration and asylum law.[73] This thesis thus delves into key legal and policy

[70] Anghie, *Imperialism* (n 49).
[71] ibid.
[72] Here by 'political and bureaucratic institutions of the EU' I refer mainly to the European Commission, the Council of the European Union, the European Parliament and the European Council.
[73] See for instance chapter 2 section 1.3.3. for some discussion of judicial developments on EU asylum law. For further discussion on the role of courts in the development of EU migration and asylum law, see for instance: Violeta Moreno-Lax, 'Dismantling the Dublin System: *M.S.S. v Belgium and Greece*' (2012) 14(1) European Journal of Migration and Law 1; Thomas Spijkerboer, 'Analysing European Case Law on Migration: Options for Critical Lawyers' in Loïc Azoulai and Karin de Vries (eds), *EU Migration Law: Legal Complexities and Political Rationales* (Oxford University Press 2014); Steve Peers, *EU Justice and Home Affairs Law: Volume I: EU immigration and Asylum Law* (4th edn, Oxford University Press 2016); Costello, *The Human Rights of Migrants and Refugees* (n 27); Violeta Moreno Lax, *Accessing Asylum in Europe: Extraterritorial Border Controls and Refugee Rights Under EU Law* (Oxford University Press 2017); Thomas Spijkerboer, 'Bifurcation of People, Bifurcation of Law: Externalization of Migration Policy Before the EU Court of Justice' (2017) 31(2) Journal of Refugee Studies 216; Benedita Menezes Queiroz, *Illegally Staying in the EU: An Analysis of Illegality in EU Migration Law* (Hart Publishing 2018); Moritz Baumgärtel, *Demanding Rights: Europe's Supranational Courts and the Dilemna of Migrant Vulnerability* (Cambridge University Press 2019); Madalina Moraru, Galina Cornelisse and Philippe de Bruycker (eds), *Law and Judicial Dialogue on the Return of Irregular Migrants from the European Union* (Hart Publishing 2020); Thomas Spijkerboer, 'Coloniality and Recent European Migration Case Law' in Vladislava Stoyanova and Stijn Smet (eds), *Migrants' Rights, Populism and Legal Resilience in Europe* (Cambridge University Press 2022).

instruments that are representative of the EU's approach to Third World migration and the role of the 'crisis' framing for the development of this policy area.

To provide a counter-analysis of the traditional history of EU integration, especially the communitarisation of migration and asylum, this thesis chooses not to focus only on post-2015 developments but instead to engage with some pre-2015 milestones of EU migration and asylum policy. This includes institutional and procedural norms such as primary EU law provisions related to asylum and migration competences and their evolution over time with the adoption and revisions of more recent treaties.[74] Doing so enables the fuller revelation of the longevity of some assumptions which still underpin today's EU migration and asylum law system.

As the realm of EU migration and asylum law covers both internal and external aspects, it appears necessary for this thesis to engage with instruments related to both. This means that, in addition to instruments related to institutional and procedural norms as previously mentioned, this thesis also analyses substantive EU law on migration and asylum, including some directives and regulations. The instruments included in this research are thus selected considering the representation they offer of the orthodox understanding of Third World migration within internal EU migration and asylum law.[75] It will contribute to providing an overview of the EU's assumptions and their implications for migrants, asylum seekers and refugees within the EU territory, and to exposing and dismantling those assumptions.

Given the external dimension of EU migration and asylum law, and particularly its role in response to the so-called 'crisis', I also engage with this aspect of the EU asylum

[74] See chapter 2 section 1.
[75] See chapter 2 section 1 for pre-2015 common migration and asylum law and policy developments and chapter 3 section 1 for post-2015 common migration and asylum law and policy developments.

and migration system as it contributes to the understanding of the use of 'crisis' framing in this policy area. This thesis, therefore, analyses some primary EU law and policy documents adopted before 2015, which contributed to the development of EU competences to enter into international agreements related to migration and asylum.[76] Of notable relevance are, for instance, some European Council meetings as they provided the impetus to develop EU external action on migration and asylum.[77] My research also included some early examples of EU-led cooperation agreements, such as readmission agreements,[78] as it gives a broader analysis and understanding of the EU's aim when developing its cooperation with third countries.

What is more, as the focus of this research is on the implications of the 'crisis' frame for the EU migration and asylum law system, specific attention is drawn to the developments resulting from the so-called 'crisis'.[79] A key development of EU migration policy to answer the so-called 'crisis' is the increasing use of soft law provisions for both internal and external aspects. That is why my analysis is not limited to strictly defined legal instruments. On the contrary, it specifically includes policy instruments and informal or soft law instruments, as doing so provides a broader understanding of the implications of the 'crisis' framing. The informalisation of EU migration and asylum policy being particularly noticeable in relation to EU cooperation with third countries, I include a focus on cooperation frameworks developed by the EU and its member states.[80] Among the various cooperation that exist, three received particular attention in this thesis for the cooperation frameworks developed after 2015: the EU-Turkey, the EU-Afghanistan and the Italy-Libya frameworks. It should be

[76] See chapter 2 section 2.
[77] See chapter 2 section 2.1.
[78] See chapter 2 section 2.2.1.
[79] See chapter 3.
[80] See chapter 3 sections 2 and 3.

acknowledged that, although reasons to choose these three cases are varied, the availability and accessibility of the cooperation frameworks themselves were essential considerations. Indeed, informal agreements and soft law instruments in this research are not always publicly available. Those featured in this thesis corresponds to the most easily accessible ones based on my research on the EU documents register.

Due to its geographical position along the Eastern-Mediterranean migration route, which was first characterised as in 'crisis',[81] Turkey was considered a key partner for the EU's post-'crisis' action. The development of EU-Turkey cooperation following 2015 comprises the EU-Turkey Joint Action Plan (JAP) adopted in October 2015,[82] and the EU-Turkey Statement from March 2016.[83] Although the Statement received the most interest from the existing scholarship, both cooperation agreements complement each other and are of an informal nature. The EU-Turkey cooperation, therefore, constitutes an exemplification of the informalisation of EU relations with third countries following the 'crisis' framing. Turkey is also a significant example of cooperation with countries of transit when dealing with migration.[84]

The cooperation framework with Afghanistan is also included in this research for three main reasons. Firstly, Afghanistan is an example of the EU's increasing use of informal agreements, through the adoption of the Afghanistan-EU Joint Way Forward (JWF) in October 2016,[85] based on the EU-Turkey Statement and followed by the Joint Declaration on Migration Cooperation between Afghanistan and the EU from 2021.[86]

[81] See chapter 1 for further discussion of the 'crisis' frame.
[82] Commission, 'EU-Turkey Joint Action Plan' (Brussels, 15 October 2015) MEMO 15/5860.
[83] Council of the European Union, 'EU-Turkey Statement' (18 March 2016) Press Release 144/16.
[84] See section 6 of this chapter on Terminology for a discussion of the term 'country of transit'.
[85] Joint Way Forward on Migration Issues Between Afghanistan and the EU (Kabul, 2 October 2016) <https://eeas.europa.eu/sites/eeas/files/eu_afghanistan_joint_way_forward_on_migration_issues.pdf> accessed 17 July 2020.
[86] Council of the European Union, 'Joint Declaration on Migration Cooperation Between Afghanistan and the EU' (Brussels, 13 January 2021) 5223/21; European Union External Action Service, 'Migration: The EU Signs a Joint Declaration on Cooperation with Afghanistan' (26 April 2021) <https://eeas.europa.eu/delegations/un-

This case will contribute to my analysis by offering a perspective on the generalisation of informal cooperation frameworks. Secondly, Afghanistan provides a distinctive perspective from the Turkish case because its cooperation with the EU was also furthered following the so-called 'crisis' through the adoption of a formal agreement in February 2017, the Cooperation Agreement on Partnership and Development between Afghanistan and the EU (CAPD).[87] The combination of various types of cooperation frameworks makes Afghanistan an interesting case to analyse in this research as it provides perspectives on the EU's use of both formal and informal agreements when shaping its cooperation with third countries. Thirdly, Afghanistan's situation as a country of origin broadens the understanding of the EU's interests when developing partnerships with Third World countries.

The final framework included in this thesis is the Italy-Libya Memorandum of Understanding (MoU),[88] tacitly renewed in 2020.[89] Although this is a bilateral cooperation, this framework is included in this research because it provides a specific insight on the expansion of cooperation on migration. Indeed, it was not adopted by the EU itself, but by one of its member state, Italy and is part of the long-lasting cooperation on migration control between Italy and Libya. Bilateral cooperation on migration control originated in the 2000s with the Treaty on Friendship, Partnership and Cooperation between Italy and Libya.[90] This cooperation was brought to a halt

geneva/97251/migration-eu-signs-joint-declaration-cooperation-afghanistan_en> accessed 9 September 2021.

[87] Cooperation Agreement on Partnership and Development between the European Union and its Member States, of the One Part, and the Islamic Republic of Afghanistan, of the Other Part [2017] OJ L 67/3.

[88] Memorandum of Understanding on Cooperation in Development, Action against Illegal Immigration, Human Trafficking and Smuggling and Strengthening of Border Security Between the State of Libya and the Republic of Italy (Rome, 2 February 2017).

[89] Yasha Maccanico, 'Analysis: Italy Renews Memorandum with Libya, as Evidence of a Secret Malta-Libya Deal Surfaces' (*Statewatch*, March 2020) <https://www.statewatch.org/media/documents/analyses/no-357-renewal-italy-libya-memorandum.pdf> accessed on 9 September 2021.

[90] Treaty of Friendship, Partnership and Cooperation Between the Italian Republic and the Great Socialist People's Libyan Arab Jamahiriya (adopted 30 August 2008, entered into force 2 March 2009).

following the fall of Gaddafi's regime in 2011 and the European Court of Human Rights' *Hirsi Jamaa* judgment condemning Italy for breach of art 3 European Convention of Human Rights and art 4 Protocol 4.[91] Yet in the wake of the so-called 'crisis', Libya received further interest from the EU and its member states as migrants crossing the Mediterranean Sea from Libya to Europe increased.[92] It resulted in the adoption of the Italy-Libya MoU, which although a bilateral agreement, is telling of the development of EU action and is therefore included in this research. Firstly, Libya due to its geographical position provides another exemplification of cooperation with transit countries and especially the transfer of responsibility to the EU's neighbours and African states. Secondly, its historical relations with Europe as a former Italian colony appears relevant to the TWAIL theoretical framework used in this thesis since it will enable to engage further with colonial legacies in today's migration cooperation. Additionally, even though the EU is not signatory to the 2017 cooperation, it is involved significantly in this partnership by providing financial support and impetus for the adoption and implementation of the agreement.[93] Therefore, even though the EU is not directly and officially part of this cooperation, this Memorandum plays a key role in the development of the external dimension of EU migration and asylum policy. Analysing this framework shows not only the growing externalisation of EU border controls to third countries but also the EU's use of its member states to develop

[91] *Hirsi Jamaa and Others v Italy* (2012) 55 EHRR 21; Anja Palm, 'The Italy-Libya Memorandum of Understanding: The Baseline of a Policy Approach Aimed at Closing All Doors to Europe?' (*EU Immigration and Asylum Law and Policy Blog,* 2 October 2017) <https://eumigrationlawblog.eu/the-italy-libya-memorandum-of-understanding-the-baseline-of-a-policy-approach-aimed-at-closing-all-doors-to-europe/> accessed 11 August 2020.

[92] European Council, 'Malta Declaration by the Members of the European Council on the External Aspects of Migration: Addressing the Central Mediterranean Route' (Press Release, 3 February 2017) para 3 <https://www.consilium.europa.eu/en/press/press-releases/2017/02/03/malta-declaration/> accessed 13 June 2022.

[93] European Council, 'Malta Declaration by the Members of the European Council on the External Aspects of Migration: Addressing the Central Mediterranean Route' (Press Release, 3 February 2017) para 6(i) <https://www.consilium.europa.eu/en/press/press-releases/2017/02/03/malta-declaration/> accessed 13 June 2022.

externalised migration controls. Also, contrary to the earlier Italian-Libyan cooperation which took the form of a formal treaty in 2008,[94] the 2017 framework is non-binding.[95] It is therefore relevant to include it in the scope of this thesis' case studies as it demonstrates the expansion of informal cooperation.

It should be noted that the original languages of the 2017 agreement being Italian and Arabic, the English version used for this thesis was translated from the original Italian version of the MoU as published by the Italian Ministry of Foreign Affairs and International Cooperation on its Archive of international treaties online.[96]

Overall, Afghanistan, Libya and Turkey are three different partners of the EU, contributing to its migration and asylum policy through various frameworks – whether direct or indirect, formal and/or informal. Their distinct geographical locations, diverse linkages to migration and emigration, and singular internal political situation all provide an overview of what EU cooperation with third countries looks like. Using them as case studies for the close reading of such frameworks that is undertaken in this thesis, offers insight into the characterisation of the EU's approach to third countries and Third World migration.

5. Contribution of this research

[94] Treaty of Friendship, Partnership and Cooperation Between the Italian Republic and the Great Socialist People's Libyan Arab Jamahiriya (adopted 30 August 2008, entered into force 2 March 2009).
[95] Elena Borsacchi, 'The Malta Declaration and the Italy-Libya Memorandum: A Troubled Relationship with External Partners in Migration' (*International Law Blog*, 14 March 2017) <https://internationallaw.blog/2017/03/14/the-malta-declaration-and-the-italy-libya-memorandum-a-troubled-relationship-with-external-partners-in-migration/> accessed 13 June 2022.
[96] Original version of the MoU in Italian accessible here: <http://itra.esteri.it/vwPdf/wfrmRenderPdf.aspx?ID=50975> (accessed 10 August 2021).

Given its broad spectrum, this thesis contributes to various aspects of the scholarship related to EU law and policy and, in particular, to migration and asylum law.

Firstly, my analysis addresses the so-called 'crisis' and provides a broad perspective on the role of the 'crisis' frame and its implications for the development of EU migration and asylum law as it recontextualises the 'crisis' within the evolution of EU migration and asylum law. The existing literature on EU migration and asylum law has provided some studies of the overall development of this area of law. For instance, Guild and Minderhoud's volume discusses the first decade of EU migration and asylum law.[97] Some contributions on the evolution of EU migration and asylum law discussed the emergence of this area of law, especially the institutional, legal and policy aspects leading to the communitarisation of migration and asylum,[98] as well as some of the issues related to the post-Lisbon developments of this policy.[99] Others, such as Peers, focus on providing an overview of the existing substantive law on migration and asylum adopted at the EU level.[100] These contributions offer valuable insights into the emergence of a common migration and asylum law and policy and its further development. However, most of these contributions do not reflect on the EU's use of 'crisis' frames when dealing with migration. Recent analyses of the so-called 'crisis' have engaged with the EU's characterisation of immigration in 2015 as a 'crisis', raising numerous criticisms against this characterisation.[101] Yet, these contributions

[97] Elspeth Guild and Paul Minderhoud, *The First Decade of EU Migration and Asylum Law* (Martinus Nijhoff Publishers 2012).
[98] Georgia Papagianni, *Institutional and Policy Dynamics of EU Migration Law* (Brill 2006).
[99] Loïc Azoulai and Karin de Vries (eds), *EU Migration Law: Legal Complexities and Political Rationales* (Oxford University Press 2014).
[100] Steve Peers, *EU Justice and Home Affairs Law: Volume I: EU immigration and Asylum Law* (4th edn, Oxford University Press 2016).
[101] See for instance: Bhambra, 'The Current Crisis of Europe' (n 25) 395; Carrera, Santos Vara and Strik, 'The External Dimensions of EU Migration and Asylum Policies in Times of Crisis' (n 31) 1; Gemenne, 'Ouvrir les Frontières' (n 19) 49; Lüthi, 'Agitated Times' (n 31) 55; Niemann and Zaun, 'EU Refugee Policies and Politics' (n 31) 3.

remained focused on the 'crisis' itself and did not contextualise the EU's use of such a frame within the development of this policy area. This thesis, therefore, contributes to the analysis of the so-called 'crisis' by putting it into conversation within the overall evolution of EU migration and asylum law. Doing so offers a broader understanding of the implications of using a 'crisis' frame for both internal and external dimensions of the EU migration and asylum law system. The perspective taken in this thesis will contribute to the scholarship on the overall evolution of EU migration and asylum law, and the scholarship related to the so-called 2015 'crisis' as it also contributes to the better understanding of 'crisis' framing as part of EU policy making.

Moreover, this thesis contributes to the analysis of informal cooperation agreements related to migration and asylum. EU cooperation with third countries on migration and asylum has been analysed by scholarship thoroughly discussing the emergence of EU readmission agreements and their continuous use since the Treaty of Amsterdam.[102] However interesting, these discussions have a significant limitation due to the practical difficulties of enforcing readmission agreements limiting their impact. More recent developments of EU cooperation frameworks have led to the development of informal cooperation agreements. Few of those cooperation frameworks have been discussed so far. Whereas the 2016 EU-Turkey Statement has received rather extensive attention from both scholars and human rights and refugee organisations,[103] others

[102] See for instance: Nils Coleman, *European Readmission Policy: Third Country Interests and Refugee Rights* (Martinus Nijhoff 2009); Sergio Carrera, *Implementation of EU Readmission Agreements: Identity Determination Dilemmas and the Blurring of Rights* (Springer 2016).

[103] See for instance: Tunaboylu and Alpes, 'The EU-Turkey Deal' (n 8); Gogou, 'The EU-Turkey Deal' (n 8); Maybritt Jill Alpes and others, 'Post-Deportation Risks under the EU-Turkey Statement: What Happens After Readmission to Turkey?' (Policy Brief 2017/30, European University Institute – Migration Policy Centre, November 2017); Sergio Carrera, Leonhard den Hertog and Marco Stefan, 'The EU-Turkey Deal: Reversing Lisbonisation in EU Migration and Asylum Policies' in Sergio Carrera, Juan Santos Vara and Tineke Strik (eds), *Constitutionalising the External Dimensions of EU Migration Policies in Times of Crisis. Legality, Rule of Law and Fundamental Rights Reconsidered* (Edward Elgar 2019); Mauro Gatti and Andrea Ott, 'The EU-Turkey Statement: Legal Nature and Compatibility with EU Institutional Law' in Sergio Carrera, Juan Santos Vara and Tineke Strik (eds), *Constitutionalising the External Dimensions of EU Migration Policies in Times of Crisis. Legality, Rule of Law and Fundamental Rights Reconsidered* (Edward Elgar 2019); Human Rights Watch,

have received little attention. For instance, although similar in nature, the Afghanistan-EU JWF has been mainly discussed by Warin and Zhekova alone.[104] This is partly due to their informal nature, making accessing information regarding their adoption and implementation difficult. Overall, the existing discussions of some of the informal agreements developed by the EU fail to contextualise them within the EU migration and asylum law system. For instance, discussions related to the EU-Turkey Statement tend to focus on this agreement's impact on asylum seekers' rights, implications for EU institutional law, or its precise legal nature.[105] Although these perspectives are important, by focusing on practical and legal considerations they do not provide an insight into the role of these agreements within the development of EU migration and asylum law *per se*. Similarly, there is some literature on the external dimensions of EU migration and asylum policy. One of the most recent contributions is a volume edited by Carrera, Santos Vara and Strik, providing insightful reflections on the development of the external dimensions of EU migration policies in response to the so-called 'crisis'.[106] It contributed to the understanding of the EU external migration policy by analysing the development in response to the so-called 'crisis' of both informal frameworks, such as the EU-Turkey Statement and more traditional forms of cooperation, such as readmission agreements or mobility partnerships.[107] This volume

'EU/Greece: First Turkey Deportations' (n 8).

[104] Catherine Warin and Zheni Zhekova, 'The Joint Way Forward on Migration Issues Between Afghanistan and the EU: EU External Policy and the Recourse to Non-Binding Law' (2017) 6(2) Cambridge International Law Journal 143.

[105] Gloria Fernández Arribas, 'The EU-Turkey Statement, the Treaty-Making Process and Competent Organs: Is the Statement an International Agreement?' (2017) 2017 2(1) European Papers 303; Thomas Spijkerboer, 'Bifurcation of People, Bifurcation of Law: Externalization of Migration Policy Before the EU Court of Justice' (2017) 31(2) Journal of Refugee Studies 216, 220-221; Gatti and Ott, 'The EU-Turkey Statement: Legal Nature and Compatibility' (n 103).

[106] Carrera, Santos Vara and Strik, *Constitutionalising the External Dimensions of EU Migration Policies* (n 32).

[107] Carrera, den Hertog and Stefan, 'The EU-Turkey Deal: Reversing Lisbonisation' (n 103); Katharina Eisele, 'The EU's Readmission Policy: Of Agreements and Arrangements' in Sergio Carrera, Juan Santos Vara and Tineke Strik (eds), *Constitutionalising the External Dimensions of EU Migration Policies in Times of Crisis. Legality, Rule of Law and Fundamental Rights Reconsidered* (Edward Elgar 2019) 135; Gatti and Ott, 'The EU-Turkey Statement: Legal Nature and Compatibility' (n 103); Fanny Tittel-Mosser, 'Mobility Partnerships: A Tool for the Externalisation of EU Migration Policy? A Comparative Study of Morocco and Cape Verde' in Sergio Carrera,

offered an analysis of the role of the so-called 'crisis' in furthering the externalisation of EU borders, but did not address the role of informal cooperation agreements in the development of the EU migration and asylum law system, or their origins as part of the communitarisation of asylum and migration matters. This thesis aims to address this significant limitation by contextualising the EU's increasing use of informal cooperation within the EU migration and asylum law system. This will enable a broader understanding not only of the implications for migrants and asylum seekers but of the institutional implications as well. Instead of focusing on practical and legalistic elements, this thesis will contribute to the scholarship by highlighting the more political implications of this recent development.

The main objective of this thesis is to initiate critical perspectives by challenging conventional narratives on the so-called 'crisis' and the use of informal agreements as part of the evolution of EU migration and asylum law. This area of law is heavily influenced by human rights, humane and humanitarian considerations and discourses,[108] as observed in most of the critiques raised against the EU's migration and asylum law system and addressed by numerous scholars, such as Costello.[109] In her book, Costello develops a panorama of EU and European Convention on Human Rights (ECHR) migration and asylum law by integrating doctrinal elements, as well as empirical and theoretical materials. While this book provides some relevant reflections on the EU's role in constructing illegality and in determining who is entitled to stay, its conventional human rights' focus means that this contribution does not offer a deep analysis of the underpinnings leading to violation of migrants' human rights and

Juan Santos Vara and Tineke Strik (eds), *Constitutionalising the External Dimensions of EU Migration Policies in Times of Crisis. Legality, Rule of Law and Fundamental Rights Reconsidered* (Edward Elgar 2019).

[108] Dallal Stevens, 'The Humaneness of EU Asylum Law and Policy' in Nuno Ferreira and Dora Kostakopoulou (eds), *The Human Face of the European Union; Are EU Law and Policy Humane Enough?* (Cambridge University Press 2016).

[109] Costello, *The Human Rights of Migrants and Refugees* (n 27).

illegalisation. That is why my analysis proposes to further the reflection on the evolution of the EU migration and asylum law system, and on the implications of the 'crisis' framing and informal agreements using a critical perspective.

Bearing all of this in mind, the core contribution of this thesis lies in its critical redescription of the EU migration and asylum law system, pursued by using a TWAIL perspective. Certainly, TWAIL and critical scholars have engaged with migration and asylum related topics. This includes the long-standing critical perspectives developed by Chimni on the international refugee law system in general,[110] and more specific aspects such as refugee resettlement[111] or the global compact on refugees.[112] Other critical contributions include discussions on the colonial legacies of the 1951 Refugee Convention, with the analysis developed by Krause or Fiddian-Qasmiyeh, for instance.[113] Critical scholarship has also provided useful insight into refugee law at the national level, such as El-Enany's and Mayblin's engagement with the colonial origins of UK immigration and asylum law.[114] These analyses contribute to the development of TWAIL and other critical perspectives on migration and asylum related matters. They, therefore, fit within the broader TWAIL project, which offers redescriptions of the international legal system. Yet, so far, most critical perspectives on migration and asylum matters have focused either on the international system of refugee law or on national immigration and asylum policies, and there is little scholarship available discussing the colonial legacies of migration and asylum in the EU. One of the few exceptions is Lemberg-Pedersen's 'Manufacturing Displacement', which discusses EU externalisation of border controls using a postcolonial approach to reveal the

[110] Chimni, 'The Geopolitics of Refugee Studies' (n 36) 350; Chimni, 'The Birth of a "Discipline"' (n 53) 11.
[111] Chimni, 'From Resettlement to Involuntary Repatriation' (n 53) 55.
[112] Chimni, 'Global Compact on Refugees' (n 36) 630.
[113] Elena Fiddian-Qasmiyeh, 'The Right and Role of Critiquing the Contemporary Patchwork of Protection' (2021) 59(4) International Migration 261; Krause, 'Colonial Roots of the 1951 Refugee Convention' (n 36).
[114] El-Enany, *Bordering Britain* (n 37); Mayblin, *Asylum After Empire* (n 37).

parallels between this practice and colonial practices throughout the transatlantic slave trade.[115] Gutiérrez Rodríguez's contribution also provides insightful critical reflections on European migration and asylum law systems by putting them into perspective with transatlantic white European settler colonialism.[116] El-Enany develops a critical perspective analysing discourses on migration and migration control.[117] Finally, Squire and others used migrants' testimonies to develop a postcolonial perspective on the EU preventative migration policy and initiate the unmaking of Europe's postcolonial present in *Reclaiming Migration*.[118]

These contributions, however, remain limited in the development of a re-description of EU migration and asylum law from a TWAIL perspective. Gutiérrez Rodríguez discusses the EU migration and asylum system only briefly, firstly giving an overview of some key European states' migration policies from the 1950s to the 1970s before engaging with EU discourses on the so-called 'crisis' of 2015.[119] Although this article develops an interesting parallel with transatlantic settler colonialism, it does not offer a complete re-description of the EU migration and asylum law system as it touches only upon the EU's discourses on the so-called 'crisis'. This PhD thesis thus considerably deepens existing analysis of EU migration and asylum law from a critical point of view as it reviews the overall evolution of this policy area since the inception of a common migration and asylum policy. Lemberg-Pedersen's article goes further in the postcolonial critique of the EU migration and asylum system as it relies on field work and research on/in colonial archives to deepen the analysis of colonial slave

[115] Martin Lemberg-Pedersen, 'Manufacturing Displacement: Externalization and Postcoloniality in European Migration Control' (2019) 5(3) Global Affairs 247.
[116] Encarnacion Gutiérrez Rodríguez, 'The Coloniality of Migration and the "Refugee Crisis": On the Asylum-Migration Nexus, the Transatlantic White European Settler Colonialism-Migration and Racial Capitalism' (2018) 34(1) Refuge 16.
[117] El-Enany, 'On Pragmatism and Legal Idolatry' (n 22) 7.
[118] Squire and others, *Reclaiming Migration* (n 13).
[119] Gutiérrez Rodríguez (n 116) 23-24.

trade systems.[120] Although it discusses the evolution of EU externalisation of border controls between 2006 and 2018, which this thesis also does, its main focus is on providing an historical analysis. In contrast, this thesis does not provide a profound analysis of colonial archives or historical elements of colonisation times. Rather, it aims to contextualise the EU migration and asylum law system by reflection and exposition of the colonial legacies of hierarchies that pertains to the international legal system.

El-Enany argues that the understanding of migration and the migration policy system needs to rely on the grasping of 'imperialist, capitalist and racialized structures of dominations' that underpin them,[121] which in many ways concurs with the main arguments of this thesis. El-Enany's main argument is that scholarly and political discourses on migration '[prevent] the emergence of any alternative to restriction'.[122] Her analysis therefore mainly focuses on academic literature on migration and on political discourses on migration in European states.[123] This PhD thesis diverges as it provides a broader analysis of EU migration law and policies. It provides a critical analysis, which El-Enany calls for,[124] of the overall evolution of the EU migration and asylum law system. In this way, it complements El-Enany's analysis by developing a counter-narrative and does so with a specific focus on the EU.

Squire and others take an 'anti-crisis approach' to EU preventative policies in 2015-2016 and in doing so, reveal 'elements of continuity'.[125] In particular, they discuss the long-standing legacies of violence in EU migration policy and argue for the need to

[120] Lemberg-Pedersen (n 115) 249-250.
[121] El-Enany, 'On Pragmatism and Legal Idolatry' (n 22) 38.
[122] ibid 9.
[123] ibid.
[124] ibid 37-38.
[125] Squire and others, *Reclaiming Migration* (n 13) 190.

engage with migrants' perspectives in order to unbuild and reject the EU's 'postcolonial present'.[126] In various ways, this corresponds to some key claims of this thesis, such as rejecting a crisis-driven approach to migration policy and demonstrating the continuity of control and exclusion – i.e. a form of violence – in the EU migration and asylum law system before 2015.[127] My thesis also fits within the claim of developing alternative perspectives on EU asylum and migration policy and the need to engage with postcolonial legacies. However, the methodology used to reach such conclusion diverges. Indeed, in *Reclaiming Migration*, Squire and others based their analysis on testimonies of 'people on the move across the Mediterranean in 2015-2016',[128] i.e. either before or after reaching Europe, while my thesis relies on the study of legal and policy documents issued from the 1970s-1980s, when intergovernmental cooperation started on migration and asylum, until post-2015 legal and policy developments,[129] including recent policy documents such as the New Pact on Migration and Asylum.[130]

Generally speaking, existing critical scholarship related to EU migration policy or Europe and migration more broadly focuses on the relation between the EU or its member states and migrants or migration, as, for instance, Bhambra's article.[131] On this point, this thesis also distinguishes itself from the few existing critical analyses as it combines an analysis of the EU's approach to migrants and migration from the Third World, and of the EU's approach to Third World countries with regards to migration. The critical perspective developed in my analysis thus encompasses more aspects of

[126] ibid 184-185.
[127] See chapters 1 and 2.
[128] Squire and others, *Reclaiming Migration* (n 13) 47.
[129] See chapters 2 and 3.
[130] Commission, '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.
[131] Bhambra, 'The Current Crisis of Europe' (n 25) 395.

the EU migration and asylum law system by engaging with the external dimensions as well.

This thesis furthers the analysis of EU migration and asylum policy developments from a TWAIL perspective. The contribution of this research does not lie in the further development of TWAIL as a mode of scholarship and reflection. Rather it takes up Chimni's call, as part of his TWAIL manifesto, for 'a sustained critique' of restrictive practices used to restrain the arrivals of refugees from the Third World to the First.[132] This thesis responds to that call by using some of the classical TWAIL scholars to shed new light on EU migration and asylum law. Its contribution, then, is to EU law and scholarship.

By using TWAIL to challenge the dominant narrative on the so-called 'crisis' and its implications, and the doctrinal tradition that prevails in the understanding of the EU migration and asylum law system, this thesis hopes to initiate a broader critical reflection on the EU migration and asylum law system and, in particular, to initiate further alternative reflections on the conception of migrants and migration in general, and on the EU's role when dealing with migration.

6. Terminology

Before discussing the overall structure of this thesis, it appears necessary to clarify some key terminology that will be used throughout.

[132] BS Chimni, 'Third World Approaches to International Law: A Manifesto' (2006) 8 International Community Law Review 3, 26.

Firstly, the terminology 'Third World' and 'First World' will be used in this dissertation. The notion of Third World is often used alternatively with other concepts such as developing, less developed or underdeveloped, 'Global South' or the South.[133] Given the TWAIL theoretical framework used in this research, the first option referring to the idea of development is excluded. As Anghie explains, the notion of development was used after the decolonisation era to distinguish between First and Third World states. It followed the distinction between 'civilised' and 'uncivilised' - which originally justified colonisation - yet now the differentiation was based on countries' levels of economic development.[134] The terminology of developing or developed states therefore replicates a form of hierarchy,[135] which TWAIL scholars oppose. Moreover, the terminology of Global South and Global North has been increasingly used in social sciences since the 1990s. The end of the cold war and the emergence of newly industrialised states suggested the term 'Third World' was no longer appropriate,[136] whereas 'Global South' and 'Global North' were considered less hierarchical and more encompassing of the variety of situations faced by Third World states. However, the notions of Global South and North do not provide more precision than Third and First Worlds in terms of which countries are referred to. Stressing on the concepts of South and North can also be said to be misleading as it suggests a geographical boundary line, which the terms of Third and First Worlds do not indicate.[137] Additionally, the terminology Third and First Worlds remains the most commonly used by key authors of the TWAIL movement essentially because it encapsulates its original meaning as

[133] Karin Mickelson, 'Rhetoric and Rage: Third World Voices in International Legal Discourse' (1998) 16(2) Wisconsin International Law Journal 353, 356.
[134] Anghie, *Imperialism* (n 49) 204.
[135] Balakrishnan Rajagopal, 'Counter-Hegemonic International Law: Rethinking Human Rights and Development as a Third World Strategy' (2006) 27(5) Third World Quarterly 767, 775.
[136] Chimni, 'Third World Approaches to International Law: A Manifesto' (n 132) 5; Marcin Wojciech Solarz, '"Third World": The 60th Anniversary of a Concept that Changed History' (2012) 33(9) Third World Quarterly 1561, 1568.
[137] Solarz, '"Third World": The 60th Anniversary of a Concept' (n 136) 1570-1571.

an anti-imperial project.[138] The terms Third and First World also reflect the structural constraints which are still imposed on some countries and not on others.[139] For these reasons, this thesis will be using TWAILers' common terminology of Third and First Worlds.

Still, it needs to be acknowledged that this terminology has been the subject of various critiques. First used by Alfred Sauvy in 1952,[140] Third World is a term that can be criticised for being anachronistic or obsolete.[141] The concept of Third World emerged in the context of the Cold War and was framed in opposition to the First World comprising Western industrialised countries and to the Second World covering communist industrialised states.[142] Since the end of the Cold War, its very relevance to the contemporary system can be questioned.[143] Critics notably stress the failure of this concept to account for former Soviet countries in today's system.[144] Moreover, it is also argued that the First and Third Worlds categorisations do not consider indigenous people.[145] These contestations and concerns are legitimate. However, rather than being obsolete, the notions of Third and First Worlds remain highly relevant to contemporary discussions considering the 'growing North-South divide', as Chimni explains.[146] International law today ignores the inequalities existing between countries and sets a uniform set of rules covering the structural constraints it imposes on some

[138] Reynolds (n 65) 21.
[139] Chimni, 'Third World Approaches to International Law: A Manifesto' (n 132) 6.
[140] Alfred Sauvy, 'Document: Trois Mondes, Une Planète' (1986) (12) Vingtième Siècle. Revue d'Histoire 81 <https://doi.org/10.2307/3768593> accessed 20 August 2021.
[141] Chimni, 'Third World Approaches to International Law: A Manifesto' (n 132) 4; Sundhya Pahuja, 'Appendix - A Note on the Use of "Third World"' in Sundhya Pahuja, *Decolonising International Law: Development, Economic Growth and The Politics of Universality* (Cambridge University Press 2011) 261; Reynolds (n 48) 21.
[142] Arturo Escobar, *Encountering Development: The Making and Unmaking of the Third World* (Princeton University Press 1995) 31.
[143] Mickelson (n 133) 356.
[144] Reynolds (n 65) 22.
[145] ibid.
[146] Chimni, 'Third World Approaches to International Law: A Manifesto' (n 132) 5.

states.[147] The notion of 'Third World' is therefore highly relevant given that it 'opposes the global hegemony of the West'.[148] Critics should also be dismissed considering that since its very origins, the concept of Third World was not geographically bound or understood as a fixed demographic.[149] Rather, as Prashad put it simply, 'it was a project'.[150] The origin of the concept of Third World as a political project comes from its people's resistance to colonisation.[151] It means the Third World was not, and is not, a uniform group. The differences between and within Third World states – both historically during the decolonisation era and in current times – should be acknowledged.[152] This enables a plurality of groupings and identities to coexist within the concept of Third World.[153] It is thus a concept that can bring together a wide range of countries and peoples through their common denominator of resistance to subordination. It is precisely due to its ability to 'correctly [capture] the oppositional dialectic between the European and the non-European'[154] that the terminology of Third and First Worlds appears the most appropriate terminology for this thesis.

Additionally, the term 'transit' country will be used at times in this thesis. As Dimitriadi explains, the notion of transit can be used to refer to three aspects: 'the process itself […], the political position of states in the migratory journey […], and the individual'.[155] When used in this thesis, the notion of transit shall be used only in relation to the second aspect Dimitriadi describes, that is the position of a state on migrants' journey

[147] ibid.
[148] Mutua, 'What is TWAIL?' (n 42) 37.
[149] Reynolds (n 65) 21.
[150] Vijay Prashad, *The Darker Nations: A People's History of the Third World* (The New Press 2007) xv.
[151] M Sornarajah, 'On Fighting for Global Justice: The Role of a Third World International Lawyer' (2016) 37(11) Third World Quarterly 1972, 1973.
[152] Mickelson (n 133) 360.
[153] Chimni, 'Third World Approaches to International Law: A Manifesto' (n 132) 5.
[154] Mutua, 'What is TWAIL?' (n 42) 35.
[155] Angeliki Dimitriadi, 'Transit Migration: A Contested Concept' in Anna Triandafyllidou (ed), *Routledge Handbook of Immigration and Refugee Studies* (Routledge 2016) 340, 341.

to the EU. It is a terminology which is widely used in the European context in reference to states 'in the broader vicinity of Europe, to the east, south-east and south'.[156] However, although commonly used to refer to EU neighbouring states such as Libya,[157] or some EU member states such as a Greece,[158] this terminology is questionable. As Stevens explains, as much as labelling people on the move is debatable, so is labelling a state's status.[159] Indeed, such concept characterise migration and states through a 'static' perception, such as the traditional dichotomy 'sending' and 'receiving' states. Such concepts do not acknowledge that 'migration is a process with multiple variables in terms of place, time, means and motivation'.[160] Therefore a country may well fit within different categories at the same time; both country of transit and of destination, for instance. Likewise, migrants' decisions in migratory journeys are influenced by a number of factors, including individual circumstances and states' restrictive migration policies, and a migrant's destination may or may not become final depending on these various factors.[161] Also, even though transiting through a country can be done legally, the concept of 'transit' migration or country is usually used in literature and policy to refer to 'irregular' migration.[162] It is therefore necessary to acknowledge the contested nature of this terminology. However, it still appears relevant to use it at times in this research as this concept also reflects the idea of a country 'at the crossroads',[163] and in this way provides some

[156] Michael Collyer and others, 'Transit Migrations and European Spaces' in Franck Düvell, Irina Molodikova and Michael Collyer (eds), *Transit Migration in Europe* (Amsterdam University Press 2014) 13.
[157] Angeliki Dimitriadi, 'Transit Migration: A Contested Concept' in Anna Triandafyllidou (ed), *Routledge Handbook of Immigration and Refugee Studies* (Routledge 2016) 340, 341.
[158] Dallal Stevens, 'Greece as a "Transit Country": The Role of Law and Policy' (2018) University of Warwick Working Paper < https://ssrn.com/abstract=3287879> accessed 16 June 2022.
[159] ibid, 4.
[160] Aspasia Papadopoulou-Kourkoula, *Transit Migration: The Missing Link Between Emigration and Settlement* (Palgrave Macmillan 2008) 2.
[161] ibid.
[162] Angeliki Dimitriadi, 'Transit Migration: A Contested Concept' in Anna Triandafyllidou (ed), *Routledge Handbook of Immigration and Refugee Studies* (Routledge 2016) 340.
[163] Ann Kimball, 'The Transit State: A Comparative Analysis of Mexican and Moroccan Immigration Policies'

guidance on the political position of some countries – especially two of the case studies included in this thesis, Turkey and Libya – when it comes to dealing with migration. It reflects some of the power relations and imbalances between these countries and the EU, and these countries and other Third World countries considered as countries of origin. Given this thesis' focus on engaging with power imbalances, it seemed appropriate to use this terminology despite its pitfalls.

Given the use of First and Third Word terminology, the target group of this study is broadly understood as any Third World migrant, that is to say any person on the move from a Third World state to the EU or any person originating from a Third World country staying in the EU. Unless stated otherwise, this thesis shall not refer to any existing legal or policy categories such as refugee, asylum seeker, migrant worker, or long-term resident due to the highly questionable categorisation of people they imply. Legal definitions of migrants generally rely on the binary distinction between so-called 'economic migrants' and refugees or asylum seekers, or between 'forced' and 'voluntary' migrants.[164] This distinction implies that there are 'genuine refugees' and that it is possible to identify them.[165] However, determining and distinguishing among people's main reasons to migrate is only theoretical. In practice, most migrants 'are fleeing complex root causes in which persecution and socio-economic exclusion are combined'.[166] Using such a distinction would mean relying on a very dubious

(2007) University of California San Diego Working Paper 150, 1 <https://escholarship.org/uc/item/28v694n0> accessed 16 June 2022.

[164] Stephan Scheel and Vicki Squire, 'Forced Migrants as "Illegal" Migrants' in Elena Fiddian-Qasmiyeh and others (eds), *The Oxford Handbook of Refugee and Forced Migration Studies* (Oxford University Press 2014) 192; Oliver Bakewell, 'Unsettling the Boundaries Between Forced and Voluntary Migration' in Emma Carmel, Katharina Lenner and Regine Paul (eds), *Handbook on the Governance and Politics of Migration* (Edward Elgar 2021) 124.

[165] Heaven Crawley and Dimitris Skleparis, 'Refugees, Migrants, Neither, Both: Categorical Fetishism and the Politics of Bounding in Europe's "Migration Crisis"' (2018) 44(1) Journal of Ethnic and Migration Studies 48, 50-51.

[166] Roger Zetter, 'More Labels, Fewer Refugees: Remaking the Refugee Label in an Era of Globalization' (2007) 20(2) Journal of Refugee Studies 172, 183.

categorisation of people migrating, which is also the basis of the current migration law system that this thesis aims to question. A critical analysis of EU migration law would not be conceivable if relying on the existing discriminatory categorisation, as doing so would impede to understand the system's complex implications. It, therefore, requires distancing itself from it.

Another policy concept used to refer to migration is that of 'mixed migration'. Broadly speaking, this term refers both to migrants' individual incentive to migrate, stressing their mixed motives, and to the 'mixed nature of population movements'.[167] However, as Sharpe argues, this terminology does not have a generally accepted understanding and tends to have unclear focus.[168] Using this terminology would thus not provide any additional precision to the focus of this thesis. Additionally, by presenting migration motives as mixed and including socio-economic considerations, this concept sometimes contributes to discourses on so-called 'bogus asylum seekers'.[169] Given the critical approach taken in this research, using a concept with such connotations does not seem appropriate.

When referring to migration flows, a distinction is also often made between 'legal' and 'illegal' migration, people included in the latter group being also referred to using varied terminologies, such as 'undocumented', 'irregular', 'unauthorised', '*sans papiers*' or 'clandestine'. This terminology defines people 'in [their] relationship with the law';[170] for instance, the term 'illegal migrant' implies the commission of a crime. Moreover,

[167] Johannes van der Klaauw, 'Refugee Rights in Times of Mixed Migration: Evolving Status and Protection Issues' (2010) 28(4) Refugee Survey Quarterly 59, 60-61; Marina Sharpe, 'Mixed Up: International Law and the Meaning(s) of "Mixed Migration"' (2018) 37 Refugee Survey Quarterly 116, 119.
[168] Marina Sharpe, 'Mixed Up: International Law and the Meaning(s) of "Mixed Migration"' (2018) 37 Refugee Survey Quarterly 116, 120.
[169] ibid 121.
[170] Catherine Dauvergne, *Making People Illegal: What Globalization Means for Migration and Law* (Cambridge University Press 2008) 16.

just as with the distinction between 'forced' and 'voluntary' migration discussed above, these categories are blurred in practice. Someone's legal or illegal status may change over time,[171] for instance, or their personal situation may include legal and illegal aspects.[172] Other terms focus on the absence of something, such as the lack of documents for 'undocumented' migrants or '*sans papiers*', or the lack of visibility for 'clandestine immigrants'.[173] From a methodological point of view, using one of these notions rather than the other would not be very helpful in defining precisely the target group of this study. Indeed, none of these notions offers a clear-cut definition.[174] For instance, illegal stay is defined by the Return Directive as the presence of 'a third-country national who does not fulfil, or no longer fulfils the conditions of entry as set out in Article 5 of the Schengen Borders Code or other conditions for entry stay or residence in that Member State',[175] and refers to various statuses in each member state depending on their national immigration laws.[176] Overall, this terminology is highly political and refers to an imaginary of marginality or dishonesty,[177] contributing to the representation of migration as a threat.[178] Considering that these terminologies contribute to the criminalisation and exclusion of migrants, this research shall also distance itself from them.

Therefore, the generic terminology of 'migrant' or 'Third World migrant' will be preferred throughout this PhD thesis. In some cases, the terms 'refugee' and 'asylum

[171] Costello, *The Human Rights of Migrants and Refugees* (n 27) 64.
[172] Franck Düvell, 'Paths into Irregularity: The Legal and Political Construction of Irregular Migration' (2011) 13 European Journal of Migration and Law 275, 292.
[173] Harald Bauder, 'Why We Should Use the Term "Illegalized" Refugee or Immigrant: A Commentary' (2014) 26(3) International Journal of Refugee Law 327, 329.
[174] Dauvergne, *Making People Illegal* (n 170) 186.
[175] Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on Common Standards and Procedures in Member States for Returning Illegally Staying Third-Country Nationals [2008] OJ L348/98 (Return Directive) art 3(2).
[176] Düvell, 'Paths into Irregularity' (172) 284-285.
[177] Zetter, 'More Labels, Fewer Refugees' (n 166) 184.
[178] Anastassia Tsoukala, 'Looking at Migrants as Enemies' in Didier Bigo and Elspeth Guild (eds), *Controlling Frontiers* (Ashgate 2005) 163.

seekers' may be used when the research focuses on legal instruments targeting these specific legal categories. In this case, the term 'refugee' is understood as defined by the Qualification Directive, namely as

> a third-country national who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country, or a stateless person, who, being outside of the country of former habitual residence for the same reasons as mentioned above, is unable or, owing to such fear, unwilling to return to it, and to whom Article 12 does not apply.[179]

As this definition is derived from the definition set by the Refugee Convention,[180] its narrowness needs to be acknowledged,[181] especially considering the limited list of reasons for persecution that are included. Another of these limitations comes from the requirement of having crossed a border to be able to ask for international protection,[182] which in the context of externalisation of EU border controls precludes the application of the Refugee Convention.[183] Despite such limitations, the term 'refugee' will be

[179] 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 Guaranteed (recast) [2011] OJ L337/9 (Qualification Directive) art 2(d).
[180] Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 art 1(A)(2) as amended by art 1(2) 1967 Protocol Relating to the Status of Refugees: '[…] the term "refugee" shall apply to any person who […]owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it'.
[181] Scheel and Squire, 'Forced Migrants as "Illegal" Migrants' (n 164) 190-191.
[182] J Olaf Kleist, 'The History of Refugee Protection: Conceptual and Methodological Challenges' (2017) 30(2) Journal of Refugee Studies 161, 164.
[183] Costello, *The Human Rights of Migrants and Refugees* (n 27) 239.

understood as per its legal definition as the legal instruments included in this research that target this group of migrants rely on this understanding.

7. Overall structure of the thesis

The argument developed in this thesis is structured in four main chapters.

My analysis firstly engages with the use of the notion of ‘crisis’ in 2015 by the EU. In chapter 1, I examine the elements which led to Third World migration to the EU being characterised as a crisis from 2015 onwards. I then put them into perspective by contextualising them with past migration movements to and within Europe and other regions of the world. This shows that although at first immigration in 2015 may appear as numerically significant, most aspects of the ‘crisis’, such as the use of ‘irregular’ means of migration or deaths at sea for instance, constitute a continuity in EU migration and asylum policy, thus questioning the genuineness of the purported ‘crisis’ situation. In this chapter, my analysis also engages with the constancy of ‘crisis’ discourses within EU affairs and re-contextualises the so-called 2015 ‘crisis’ in light of other ‘crisis’-like situations faced by the EU since its creation. That is why I argue that Third World migration to the EU in 2015 did not constitute a genuine crisis. Rather what my analysis reveals is the EU’s use of a ‘crisis’ frame. The constant use of ‘crisis’ framing within EU affairs serves a purpose. Policy frames provide specific understandings of circumstances, which shape the answer that will be developed. ‘Crisis’ frames, in addition, bear strong connotations of emergency and danger which activate a ‘crisis’ decision-making mode supporting the use of security-focused

measures, circumventing normal procedures and processes deemed lengthy and othering key players considered responsible for the said ‘crisis’.

In the second chapter, my analysis focuses on EU migration and asylum law and policy prior to the so-called ‘crisis’, that is to say, from the origins of the common migration policy until 2014. It discusses the development of EU competences in order to engage with the political objectives underpinning the progressive communitarisation of this field. This leads me to analysing some of the key myths surrounding the communitarisation of migration and asylum. It notably engages with the consideration that the common migration and asylum policy constitutes a constraint on member states’ sovereignty, and the idea that the common migration and asylum policy emerged from the establishment of the common market and, therefore, is a result of economic and liberal considerations. Instead, this chapter argues that member states maintained a heavy influence in this policy area, despite its communitarisation, and pushed forward some of their key priorities regarding Third World migration, namely the establishment of a security-focused approach, which then informed EU-level law and policy. This includes restrictive substantive EU law that shows little consideration for human rights and a commitment to outsourcing migration and border controls. These features are often associated with crisis frames as I discuss in chapter 1. Yet my analysis in chapter 2 reveals that in the case of the EU migration and asylum law system these elements pre-dated 2015 and therefore constitute long-lasting legacies of early developments at EU level.

The core of the third chapter deals with the development of the EU migration and asylum law system within the ‘crisis’ framing that dominated in 2015. As chapter 1 suggests, using a ‘crisis’ frame shaped the policy response developed by policy makers. In the case of EU migration and asylum policy, my analysis in chapter 3

reveals that the 'crisis' frame has impacted some structural elements. By shedding light on the disparities of member states' compliance and hindering the progression of reforms, the 'crisis' framing justified the use of solutions located outside of the existing EU institutional framework. Moreover, a significant aspect of the EU's action in migration and asylum matters following the so-called 'crisis' was the expansion of cooperation with third countries. This element is explored in chapter 3 with the analysis of the three case study frameworks, namely the EU cooperation frameworks with Turkey and Afghanistan, and the Italy-Libya cooperation. Here my analysis reveals the implications of using atypical instruments for the EU institutional framework and migrants' human rights. My close-reading of the three case studies also reveals that the conceptions underpinning the EU migration and asylum law system exhibit remarkably continuity with what preceded the so-called crisis. Indeed, in post-2015 developments Third World migrants are mainly considered through a security-oriented approach which supports their control and exclusion. My close-reading analysis also shows the role of the EU's managerial approach to migration[184] in furthering the use of control-focused measures and informal instruments. In this chapter, my analysis therefore, identifies the role of the 'crisis' framing not as a disruption to the existing system but as a frame that enabled the further consolidation and manifestation of pre-existing tendencies within EU law and policy.

The final chapter then asks how we can understand the EU migration and asylum law system if we recognise (a) its long-standing preferences and features (chapter 2), and (b) their persistence and consolidation through the deployment of the crisis frame

[184] Here by managerial approach to migration, I refer to the use of an economic- and management-driven understanding of migration. The act of migrating is conceived through the lens of economic and social benefits for the country of destination, the country of origin and the migrant her/himself. Such an approach characterises migration policies as tools to maximise states' economic and social benefits and advantages considered to result from the migration process. See also chapter 3 section 3.2.2.
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(chapter 1 and 3). In doing so, it deploys the insights from TWAIL to develop a re-description of the EU's approach to migration and migrants originating from the Third World. This chapter offers a new reading of the evolution of EU migration and asylum law showing the colonial origins of the EU's approach to Third World migrants, migration and countries. My analysis shows the persistence of the 'myth of difference' between European and Third World migrants in the EU migration and asylum law system. It argues that by allocating responsibility to deal with migration to third countries, the EU maintains its supremacy over them. A TWAIL perspective also demonstrates that the EU asylum and migration policy replicates a civilising mission towards Third World migrants and states. Overall, this chapter demonstrates how critical approaches can further the understanding of the EU's approach to migration and provide alternatives.

Chapter 1 – Framing Third World migration as a ‘crisis’

Introduction

By the end of 2015, the EU migration and asylum law system was considered to be at a turning point. It is estimated that over a million people arrived in Europe by sea in 2015, of which 3,735 went missing during their perilous crossings.[1] This led to the characterisation of the now famous so-called refugee or migration ‘crisis’.

Yet, characterising an occurrence as a ‘crisis’ is not a neutral act. Facts characterised as ‘crisis’ are assumed to be undisputed or uncontroversial when actually accounts of crisis situation are partial, as Charlesworth explains.[2] The notion of ‘crisis’ does not have a clear-cut definition but framing something as a ‘crisis’ emphasizes specific elements or events, and portrays a situation as unique.[3] It restricts the understanding of an issue and has significant implications for policy making. Therefore, before engaging with the EU’s policy response to the 2015 ‘crisis’ and its implications for the further development of EU migration and asylum law in the following chapters, this thesis firstly needs to engage with the characterisation of the so-called ‘crisis’ itself.

In this chapter, I argue that although Third World migration to the EU was represented as a ‘crisis’ in 2015, as an empirical matter, this ‘crisis’ classification is highly dubious. Instead, what I observe in this chapter is the use by the EU of a ‘crisis’ frame. By activating a ‘crisis’ decision mode, ‘crisis’ framing facilitates the exceptionalisation of

[1] Jonathan Clayton and Hereward Holland, ‘Over One Million Sea Arrivals Reach Europe in 2015’ (UNHCR, 30 December 2015) <https://www.unhcr.org/news/latest/2015/12/5683d0b56/million-sea-arrivals-reach-europe-2015.html> accessed 11 December 2021.
[2] Hilary Charlesworth, ‘International Law: A Discipline of Crisis’ (2002) 65(3) Modern Law Review 377, 382-383.
[3] ibid 384.

a situation or set of events, enables the othering of actors and causes, as well as permits the EU to circumvent normal procedures and take so-called 'emergency' decisions.

My analysis thus discusses and critically questions the characterisation of the so-called 'crisis' in 2015. I analyse the implications of crisis-frames for EU policy-making, asking what led to the characterisation of Third World migration to the EU in 2015 as a 'crisis', and what were the implications of that 'crisis' frame for EU law and policy.

A 'frame' is understood here as the selection and emphasis put on some elements of a situation in a way that shapes its understanding and conception.[4] A 'crisis' frame is, thus, the social phenomenon through which a society perceives something as a 'crisis'. The notion of 'framing' generally refers to the process through which a specific frame is constituted.[5] Engaging with these concepts is a crucial step towards developing a broader understanding of the implications of the EU's use of a 'crisis' frame in 2015 for the EU migration and asylum law system.

Overall, my analysis in this chapter shows how 'crisis' rhetoric is deeply rooted in EU policy-making. It has been frequently used throughout the evolution of the EU, leading some scholars, such as Lawrence, to argue that 'crises' dominate the EU political arena.[6] I contextualise the so-called migration crisis of 2015 within the longer history of crisis framing at EU level, as well as within the broader EU approach to migration, and thus highlight the ambiguities among the elements considered as characteristics of the so-called migration 'crisis'. Given that what can be observed in the unfolding of

[4] Rainer Eising, Daniel Rasch and Patrycja Rozbicka, 'Institutions, Policies, and Arguments: Context and Strategy in EU Policy Framing' (2015) 22(4) Journal of European Public Policy 516.
[5] Merlijn van Hulst and Dvora Yanow, 'From Policy "Frames" to "Framing": Theorizing a More Dynamic, Political Approach' (2016) 46(1) American Review of Public Administration 92, 93.
[6] Jessica C Lawrence, 'The EU in Crisis: Crisis Discourse as a Technique of Government' (2014) 44 Netherlands Yearbook of International Law 187, 193.

2015 is the deployment of a 'crisis' frame, I turn to analysing the use of framing in policy-making to analyse the role of 'crisis' frames in shaping law and policy. I thus engage with the rationale behind the activation of a 'crisis' mode in 2015.

1. The so-called 'refugee crisis' in 2015

In 2015, migration became a dominant topic in European social and political discourses based on reports of high numbers of people taking extremely dangerous routes to reach the EU. Policy-makers and scholars quickly characterised the situation faced by the EU as a 'crisis' or 'emergency' situation.[7] This characterisation is firstly due to an increase in arrivals of asylum seekers to the EU: 1, 216, 860 asylum applications were lodged by first-time applicants in 2015, compared to 530, 560 in 2014.[8] The rise in applications coincided with an increase in Syrian nationals fleeing the civil war and seeking asylum in the EU,[9] with one-third of asylum applicants in the EU in 2015 being Syrian. Generally speaking, most asylum applicants in the EU in 2015 were from the Middle East, primarily Syria, Afghanistan and Iraq.[10]

Some scholars have characterised this increase in asylum applications as 'the largest inflow of asylum seekers since World War II',[11] or as 'the greatest number of displaced persons as a result of violent conflict […] since the dissolution of the former

[7] Esther Greussing and Hajo G Boomgaarden, 'Shifting the Refugee Narrative? An Automated Frame Analysis of Europe's 2015 Refugee Crisis' (2017) 43(11) Journal of Ethnic and Migration Studies 1749.
[8] Eurostat, 'Asylum Statistics' <https://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum_statistics> accessed 18 November 2020.
[9] Arne Niemann and Natascha Zaun, 'EU Refugee Policies and Politics in Times of Crisis: Theoretical and Empirical Perspectives' (2018) 56(1) Journal of Common Market Studies 3.
[10] Eurostat, 'News Release: Record Number of Over 1.2 Million First Time Asylum Seekers Registered in 2015' 44/2016 (4 March 2016) <https://ec.europa.eu/eurostat/documents/2995521/7203832/3-04032016-AP-EN.pdf/790eba01-381c-4163-bcd2-a54959b99ed6> accessed 18 November 2020.
[11] Niemann and Zaun, 'EU Refugee Policies and Politics in Times of Crisis' (n 9).

Yugoslavia'.[12] EU Agencies, such as Frontex, used similar comparisons, notably when presenting the Eastern Mediterranean migratory route as having been the scene of 'the continent's biggest migratory wave since Second World War'.[13] The 2015 situation was thus frequently compared to and contextualised within major historical events that led to large migratory movements. Other sources, such as the EU in its cooperation framework with Turkey or the United Nations High Commissioner for Refugees (UNHCR) described it as an 'unprecedented' crisis.[14] Both the comparison with major historical events and the framing of 2015 migration numbers as 'unprecedented' contribute to characterising the situation as an exceptional occurrence; a 'crisis'.

The increase of asylum applications throughout the EU in 2015 led to fears that some member states' asylum systems would be overwhelmed. Indeed, although the overall EU asylum application numbers show a sharp change in comparison to previous years, the increase in applications was not equally spread throughout the EU and some member states saw a sharper increase than others. South-Eastern and Southern EU member states, in particular, experienced a significant rise in asylum applications. This is partly due to their geographical situation at the EU's external borders and partly a product of the Dublin Regulation, which declares a member state responsible for handling asylum applications for asylum seekers who entered 'irregularly' through their external border into the EU.[15] The increase of migrants

[12] Adrian Little and Nick Vaughan-Williams, 'Stopping Boats, Saving Lives, Securing Subjects: Humanitarian Borders in Europe and Australia' (2016) 23(3) European Journal of International Relations 533, 534.
[13] Frontex, 'Migratory Routes - Eastern Mediterranean Routes' <https://frontex.europa.eu/we-know/migratory-routes/eastern-mediterranean-route/> accessed 18 November 2020.
[14] Commission, 'EU-Turkey Joint Action Plan' (Brussels, 15 October 2015) MEMO 15/5860 Introduction; UNHCR, 'UNHCR Global Report 2015 - Every Life Matters' (2015) 1, 82 <https://reporting.unhcr.org/sites/default/files/GR_2015_Eng.pdf> accessed 18 November 2020.
[15] 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) [2013] OJ L 180/31 (Dublin Regulation) art 13(1).

arriving to some member states combined with already malfunctioning asylum and immigration systems in member states such as Greece, Bulgaria, Italy and Hungary[16] contributed to the representation of this situation as constituting the 'saturation' of the common migration and asylum system. Reports and images of inhumane living conditions in refugee camps, especially in Greece, fed this idea of 'saturation' and suggested that Third World migration to the EU in 2015 was a 'humanitarian crisis', if not a refugee or migration one.[17]

However, analysis of the number of applicants in each EU member state shows that Germany is by far the country that received the most asylum applications in the EU in 2015, followed by Hungary and Sweden.[18] The increase in asylum applications in Northern EU member states resulted from so-called 'secondary movements',[19] that is to say migrants moving onwards from the Southern member states where they initially entered the EU territory. Although the movement of asylum seekers towards Northern member states was facilitated by Germany's decision to suspend the application of the Dublin regulation for Syrians,[20] Southern and South-Eastern member states were still presented as being responsible for the 'crisis' situation due to their constituting—and thus in principle controlling—the EU's external borders.

The representation of some member states as being 'saturated' came also from the number of migrants arriving and the reception conditions they then experienced. For

[16] Florian Trauner, 'Asylum Policy: The EU's "Crises" and the Looming Policy Regime Failure' (2016) 38(3) Journal of European Integration 311, 314.
[17] Human Rights Watch, 'Greece: Humanitarian Crisis on the Islands' (2015) <https://www.hrw.org/news/2015/07/11/greece-humanitarian-crisis-islands> accessed 18 November 2020.
[18] Eurostat, 'News Release: Record Number of Over 1.2 Million First Time Asylum Seekers Registered in 2015' 44/2016 (4 March 2016) <https://ec.europa.eu/eurostat/documents/2995521/7203832/3-04032016-AP-EN.pdf/790eba01-381c-4163-bcd2-a54959b99ed6> accessed 18 November 2020.
[19] Niemann and Zaun, 'EU Refugee Policies and Politics in Times of Crisis' (n 9) 4.
[20] Euractiv, 'Germany Suspends Dublin Agreement for Syrian Refugees' (26 August 2015) <https://www.euractiv.com/section/economy-jobs/news/germany-suspends-dublin-agreement-for-syrian-refugees/> accessed 12 August 2021.

example, Frontex counted 885,386 migrants entering the EU 'illegally' through the so-called Eastern Mediterranean route – i.e. through the Aegean Sea to Greece – in 2015 and estimated this number was 17 times higher than the previous year.[21] The number of arrivals to Greece also constituted the majority of all arrivals to the EU in 2015.[22] This supports the representation of some member states – Greece in particular – as being overwhelmed with so-called 'irregular' migrants and of the EU more broadly as being 'under pressure' from Third World migration.[23] This added to the sense of 'crisis' by stressing the EU's supposed 'loss of control' of its external borders.[24]

However, the 'crisis' was not attributed to the number of arrivals alone. Rather, the means of travel used by migrants was presented as a key concern, with Gomez and McArdle for example noting that the 'recent influx […] has been characterised by the substantial use of irregular means of travel'.[25] There was a strong focus on 'irregular' migrants' arrivals at EU borders, rather than the number attributable to other means of 'irregular' immigration such as visa-overstay, for instance. Reports suggested that 1.25 million people had arrived in this way in 2015.[26] In particular, the focus on migrants arriving to the EU was on arrivals by sea, be it the Aegean or the Mediterranean Sea.[27] This focus on modes of travel and entry into the EU contributed to the characterisation of 'crisis' in two ways; first by evoking notions of invasion and threats to the EU's security and stability, and second by stressing the dangers faced

[21] Frontex, 'Migratory Routes - Eastern Mediterranean Routes' < https://frontex.europa.eu/we-know/migratory-routes/eastern-mediterranean-route/> accessed 18 November 2020.
[22] UNHCR, 'UNHCR Global Report 2015' (n 14) 82.
[23] Vicki Squire and others, *Reclaiming Migration: Voices from Europe's 'Migrant Crisis'* (Manchester University Press 2021) 4.
[24] ibid 24.
[25] Arantza Gomez Arana and Scarlett McArdle, 'The EU and the Migration Crisis: Reinforcing a Security-Based Approach to Migration?' in Sergio Carrera, Juan Santos Vara and Tineke Strik (eds), *Constitutionalising the External Dimensions of EU Migration Policies in Times of Crisis* (Edward Elgar 2019) 272.
[26] Greussing and Boomgaarden, 'Shifting the Refugee Narrative?' (n 7).
[27] European Council, 'Special Meeting of the European Council – Statement' (23 April 2015) <https://www.consilium.europa.eu/en/press/press-releases/2015/04/23/special-euco-statement/> accessed 12 August 2021.

by migrants when trying to reach the EU by such means.[28] Although large scale boats drownings occurred earlier in 2010s, the beginning of the year 2015 saw a series of migrant boat drownings occurring consecutively,[29] which some scholars such as Gomez Arana and McArdle retrospectively argued, pushed for the EU's 'crisis' response.[30] On 18th April 2015, a shipwreck off the Italian island of Lampedusa led to an estimated 700 to 800 deaths.[31] Considered 'the largest refugee shipwreck on record' by some international organisations such as the UNHCR,[32] it drew media's and policy actors' attention on the deaths of migrants attempting to enter the EU by sea. Indeed, on 19th April the European Commission declared being 'deeply chagrined by the tragic developments in the Mediterranean',[33] while EU High Representative and Migration, Home Affairs and Citizenship Commissioner talked of a 'dire situation'.[34] A special meeting of the European Council took place on 23rd April 2015 and included 'a minute of silence for the victims of the Mediterranean shipwreck',[35] followed by a resolution of the European Parliament adopted on 29th April 2015 regarding 'the latest tragedies in the Mediterranean and EU migration and asylum policies'.[36] All these reactions were the basis for the development of the European Agenda on Migration in May 2015,[37] setting up the EU's response to the so-called 'crisis'. Other events, such

[28] Squire and others, *Reclaiming Migration* (n 23) 23-24.
[29] Trauner, 'Asylum Policy: The EU's "Crises" and the Looming Policy Regime Failure' (n 16) 319.
[30] Gomez Arana and McArdle, 'The EU and the Migration Crisis: Reinforcing a Security-Based Approach' (n 25) 275.
[31] Patrick Kingsley and Stephanie Kirchgaessner, '700 Migrants Feared Dead in Mediterranean Shipwreck' *The Guardian* (19 April 2015) <https://www.theguardian.com/world/2015/apr/19/700-migrants-feared-dead-mediterranean-shipwreck-worst-yet> accessed 18 November 2020.
[32] UNHCR, 'The Sea Route to Europe: The Mediterranean Passage in the Age of Refugees' (1 July 2015) 2 <https://www.unhcr.org/5592bd059.pdf> accessed 14 June 2022.
[33] Commission, 'European Commission Statement on Developments in the Mediterranean' (Brussels, 19 April 2015).
[34] Commission, 'Joint Foreign and Home Affairs Council: Ten Point Action Plan on Migration (Press Release)' (Luxembourg, 20 April 2015).
[35] European Council, 'Special Meeting of the European Council' (23 April 2015) <https://www.consilium.europa.eu/en/meetings/european-council/2015/04/23/> accessed 18 November 2020.
[36] European Parliament Resolution of 29 April 2015 on the Latest Tragedies in the Mediterranean and EU Migration and Asylum Policies [2015] (2015/2660(RSP)).
[37] Commission, 'A European Agenda on Migration' (Communication) COM(2015) 240 final 3.

as the encounter of 71 dead migrants in a truck that was stopped on an Austrian motorway in late August 2015, or the discovery of Aylan Kurdi's lifeless body on a Turkish beach in early September 2015, constituted shocking news and contributed to making migrants' deaths at the EU borders global news and an urgent issue in need of the Union's attention.[38]

It was, then, not really the high number of asylum applications in 2015 that resulted in the characterisation of Third World migration in 2015 as a 'crisis', but rather the prevalence of so-called 'irregular' migration, especially 'irregular migration' by sea, and associated dangers. Media and political interest in migrants arriving by sea and in migrants' boats incidents contributed to the representation of the situation as exceptional;[39] as a crisis. Yet, as my analysis now goes on to show, this characterisation resulted from an obsession with a series of events such as increases in migrants' arrivals, asylum applications or deaths at sea; when put into perspective within the broader picture, characterising migration to the EU in 2015 as a 'crisis' appears highly questionable.

2. Questioning the veracity of the 'crisis' faced by the EU in 2015

In this section, I put into perspective the distinctive features that justified the characterisation of Third World migration to the EU in 2015 as a 'crisis'. By revealing the variety of discussions around the nature of this 'crisis' and comparing its features

[38] Reece Jones, *Violent Borders: Refugees and the Right to Move* (Verso 2016) 18-19.
[39] Elspeth Guild, 'The Dark Side of Globalisation: Do EU Border Controls Contribute to Deaths in the Mediterranean?' in Thomas Gammelthoft-Hansen and Jens Vedsted-Hansen (eds), *Human Rights and the Dark Side of Globalisation: Transnational Law Enforcement and Migration Control* (Taylor & Francis Group 2016) 314.

with other geographical or historical examples of migration, I critically question the claim that Third World migration in 2015 constituted a 'crisis'. Although I acknowledge that migrants' individual experiences or reception infrastructures in some EU member states can be amounted to a certain extent to a situation of 'crisis',[40] the parallels drawn between the situation in 2015 and the overall evolution of migrant deaths at EU borders or so-called 'irregular entries', as well as with previous 'crises' faced by the EU, support the claim that 2015 did not constitute a genuine 'crisis'.

Despite the factual picture presented earlier,[41] there were numerous debates among scholars, institutions and human rights defenders about the nature and reality of this purported 'crisis'. Heller et al outline how the situation faced by the EU and its member states has been alternatively referred to as a 'refugee crisis', 'migrant crisis', 'humanitarian crisis', 'crisis of the asylum system', '"crisis" of Europe's borders' or a 'crisis of the Schengen zone'.[42] Numerous scholars have also questioned the association of the notion of 'crisis' with migration or refugees. For instance, Carrera, Santos Vara and Strik refer to the situation as a 'political and legitimation crisis'.[43] Bhambra further argues that 'if there is a crisis in Europe, it is a moral crisis associated with Europe's failure […] to act in a manner consistent with what is claimed as European values'.[44] These critiques challenge the characterisation of migrants and

[40] See for instance: Squire and others, *Reclaiming Migration* (n 23) 39-44.
[41] See section 1 of this chapter.
[42] Charles Heller and others, 'Europe/Crisis: New Keywords of the "Crisis" in and of "Europe": "Crisis"' (2016) (1) Near Futures Online 7 <http://nearfuturesonline.org/europecrisis-new-keywords-of-crisis-in-and-of-europe-part-2/> accessed 4 December 2020.
[43] Sergio Carrera, Juan Santos Vara and Tineke Strik, 'The External Dimensions of EU Migration and Asylum Policies in Times of Crisis' in Sergio Carrera, Juan Santos Vara and Tineke Strik (eds), *Constitutionalising the External Dimensions of the EU Migration Policies in Times of Crisis* (Edward Elgar 2019) 1.
[44] Gurminder K Bhambra, 'The Current Crisis of Europe: Refugees, Colonialism, and the Limits of Cosmopolitanism' (2017) 23(5) European Law Journal 395.

asylum seekers as the cause of this so-called 'crisis' by contending that this 'crisis' results from the EU and EU migration and asylum policies themselves.[45]

Although these positions shift the focus and alter the understanding of the so-called 'crisis' causes, they still maintain a focus on the notion of 'crisis'.[46] In other words, they cultivate the qualification of this situation as a 'crisis', whose characterisation contributes to justifying the adoption of emergency measures, as further discussed below. Such a position is questionable, notably due to the paradoxical notion of 'crisis' itself. Indeed, 'crisis' is a term that is often considered 'self-explanatory'[47] despite remaining a vague concept.[48] Given the variety of circumstances qualified as a 'crisis', it is difficult to provide a clear-cut definition or example of the term. The numerous crises faced by the EU over the last decade exemplify this diversity,[49] ranging from economic or political crises to institutional or foreign policy-related ones, to mention a few. Still, this notion bears significant connotations. 'Crisis' suggests 'a situation of disruption within a prior situation of stability';[50] it is an unexpected event that occurs and disrupts what was considered normality.[51] It is also a notion often associated with 'emergency', which denotes the occurrence of unusual circumstances.[52] Likewise, a 'crisis' can be seen in the form of a 'threatening' situation that endangers safety and

[45] Arne Niemann and Natascha Zaun, 'EU Refugee Policies and Politics in Times of Crisis: Theoretical and Empirical Perspectives' (2018) 56(1) Journal of Common Market Studies 3.
[46] Squire and others, *Reclaiming Migration* (n 23) 28.
[47] Barbara Lüthi, 'Agitated Times: Why Historians Need to Question the Rhetoric of the "Refugee Crisis"' (2017) 31(1) Histoire@Politique 55, 61.
[48] Benedatta Voltolini, Misha Natorski and Colin Hay, 'Introduction: The Politicisation of Permanent Crisis in Europe' (2020) 42(5) Journal of European Integration 611.
[49] Lawrence, 'The EU in Crisis' (n 6) 193; Voltolini, Natorski and Hay, 'Introduction: The Politicisation of Permanent Crisis' (n 48) 610.
[50] Heller and others, 'Europe/Crisis: New Keywords of the "Crisis" in and of "Europe"' (n 42) 10.
[51] Leila Hadj Abdou, '"Push or Pull"? Framing Immigration in Times of Crisis in the European Union and the United States' (2020) 42(5) Journal of European Integration 643, 644; Voltolini, Natorski and Hay, 'Introduction: The Politicisation of Permanent Crisis' (n 48) 615.
[52] Jonathan White, 'Emergency Europe' (2013) 63(2) Political Studies 300, 312.

security.[53] Thus, 'crisis' is generally considered a critical juncture,[54] referring to an unexpected or unusual occurrence, and associated with the disruption of 'normal' circumstances.

Moreover, as an unusual disruption of normality, a 'crisis' is sometimes associated with difficult times. Due to its close relation with 'instability', the notion of 'crisis', Lawrence explains, suggests 'a time apart',[55] as it implies the emergence of sudden danger or intense adversity. In a crisis, this sense of instability linked to the threat of an immediate danger supports the need for urgent action to face uncertain and/or threatening times.[56]

The notion of 'crisis' is sometimes also understood as the paroxysm of a malfunctioning system. Rather than being the disrupting occurrence that destabilises the existing system, a crisis, Lawrence argues, can correspond to the demonstration of a system's failure.[57] In such a case, the accumulation of incidents or dysfunctions of a specific system leads to the emergence of a crisis. Regardless of whether 'crisis' is the result of an unusual and disrupting occurrence or the result of a faulty system accumulating dysfunctions, the notion suggests the need for immediate action.[58] When the crisis results from a failing system, it still implies a critical point was reached, following which action is necessary to fix the said dysfunctions.[59]

'Crisis' is therefore both a vague notion which lacks a clear-cut definition and a terminology perceived as being widely understood due to its distinctive and compelling connotations. As I analyse below, both main understandings of the notion of 'crisis'

[53] Heller and others, 'Europe/Crisis: New Keywords of the "Crisis" in and of "Europe"' (n 42) 9.
[54] Voltolini, Natorski and Hay, 'Introduction: The Politicisation of Permanent Crisis' (n 48) 611.
[55] Lawrence, 'The EU in Crisis' (n 6) 189.
[56] Lüthi, 'Agitated Times' (n 47) 57.
[57] Lawrence, 'The EU in Crisis' (n 6) 188.
[58] Hadj Abdou, '"Push or Pull"? Framing Immigration in Times of Crisis' (n 51) 646.
[59] Lawrence, 'The EU in Crisis' (n 6) 188.

should be questioned when applied to the situation faced by the EU in 2015. Firstly, the EU and its member states were not necessarily in a stable situation with regards to migration from the Third World prior to 2015, which casts a doubt when defining 2015 as disrupting the pre-existing stability. Secondly, characterising 2015 as a paroxysm of dysfunction is dubious as well. Human migration exists since time immemorial,[60] and as I discuss below, has a long-lasting history in Europe. Therefore, using such terminology – even when aimed to shift the blame away from migrants – to characterise Third World migration to the EU in 2015 needs to be put into perspective and discussed more broadly.

The first basis on which to question the characterisation of Third World migration in 2015 as a crisis is numerical. Taking into account the global migration flows that are associated with the civil war in Syria, a focus on the EU reflects a narrow perspective. Indeed, as Bhambra rightly pointed out, the European continent receives only a small proportion of the world's refugee population. For Bhambra, if any receiving country faced a 'crisis' because of the Syrian civil war, it was Lebanon due to the large refugee population it welcomes in comparison with its own small population and geography as well as its weaker economic situation.[61] Furthermore, from a historical perspective qualifying the numbers of Third World migrants coming to Europe in 2015 as a crisis is 'hypocritical',[62] as Lüthi puts it, given Europe's history of migration. Many EU member states have past experiences of forced displacements,[63] given that they witnessed numerous voluntary and forced migration throughout the 19th and 20th centuries. Among the most recent examples, displacements from former Yugoslavia

[60] Theresa Hayter, *Open Borders: The Case Against Immigration Controls* (2nd edn, Pluto Press 2004) 1.
[61] Bhambra, 'The Current Crisis of Europe' (n 44) 396.
[62] Lüthi, 'Agitated Times' (n 47) 55.
[63] Dallal Stevens, 'Asylum, Refugee Protection and the European Response to Syrian Migration' (2017) 9 Journal of Human Rights 184, 186.

were considered as crises in the 1990s, when numbers of asylum seekers from Bosnia and Kosovo increased in EU member states respectively in 1992-1994 and 1999.[64] Additionally, more recently, 'a perceptible rise' in asylum applications in the EU was already noticeable in 2011,[65] particularly as a result of the Arab Spring and the arrivals of Libyan and Tunisian asylum seekers to Italy and Malta.[66] My point here is not to deny an increase in migrants arrivals or asylum applications in the EU in 2015, given the existing statistics corroborate this consideration.[67] Yet, representing the most recent immigration movements as a crisis appear highly dubious considering that migration to and within the European continent is a constant phenomenon throughout European history.

Moreover, the focus of the so-called 'crisis' on 'irregular' migration entering the EU through its external borders raises scepticism. The nature of so-called 'irregular' migration makes it extremely complex to obtain reliable data and estimations,[68] thus making it highly complicated and controversial to compare estimates of the so-called 'crisis' with past experiences at the EU's external borders. What the available data and scholarship show, however, is that the phenomenon of 'irregular' border crossings is by no way recent.[69] Without denying the high proportion of 'irregular' border crossings in 2015-2016, the representation of the 2015-2016 situation as a crisis resulting from the numbers of 'irregular' migrants entering the EU through its external Southern

[64] Khalid Koser and Richard Black, 'Limits to Harmonization: The "Temporary Protection" of Refugees in the European Union' (1999) 37(3) International Migration 521, 525-526; Sandra Lavenex, 'The Europeanisation of Refugee Policies: Normative Challenges and Institutional Legacies' (2001) 39(5) Journal of Common Market Studies 851, 856.
[65] Dallal Stevens and Angeliki Dimitriadi, 'Crossing the Eastern Mediterranean Sea in Search of Protection' (2019) 17 (3) Journal of Immigrant and Refugee Studies 261.
[66] Bruno Nascimbene and Alessia di Pascale, 'The "Arab Spring" and the Extraordinary Influx of People who Arrived to Italy from North Africa' (2011) 13 European Journal of Migration and Law 341, 347.
[67] Squire and others, *Reclaiming Migration* (n 23) 4.
[68] Guild, 'The Dark Side of Globalisation' (n 39) 317.
[69] Franck Düvell, 'Irregular Migration: A Global, Historical and Economic Perspective' in Franck Düvell (ed), *Illegal Immigration in Europe: Beyond Control?* (Palgrave Macmillan 2006) 20-21.

borders is not convincing considering the data available on so-called 'irregular' migration. Despite the lack of precise data on 'visa overstayers' in the EU, estimations suggest that 'irregular' stays after visa expiration are of a substantial number.[70] Analysing so-called 'illegal' migration to Australia, Dauvergne similarly observed that this mainly occurs through visa-overstaying.[71] There are no reasons to believe this would differ in other Western world countries. In his analysis of 'irregular' migration in the EU, Düvell explains that most so-called 'irregular' migrants either entered legally and stayed after their visa expired or entered legally and worked in breach of immigration rules.[72] Although there are no recent data on 'irregular' migrants resulting visa-overstay in the EU as the category of 'visa-overstayers' is usually not distinguished in statistics on so-called 'irregular' migrants,[73] there is no reason to believe that the numbers have radically changed. In 2022, the European Commission still considers that 'most irregular migrants originally enter the EU legally on short-stay visas'.[74] I do not deny that the proportion of 'irregular' border crossings increased in 2015-2016. Still, this was only temporary and there is no clear data indicating that this was or has since then become the main channel for 'irregular' migration to Europe. It is therefore relevant to put the 2015 'crisis' framing in the broader context of so-called 'irregular' migration to the EU since despite the obsessive focus on so-called 'illegal' border crossings and disinterest in visa-overstays,[75] 'irregular' migration operated

[70] Frida Hansen and Johanna Pettersson, 'Contradictory Migration Management? Differentiated Security Approaches to Visa Overstay and Irregular Border Crossings in the European Union' (2021) European Security 117, 120.
[71] Catherine Dauvergne, *Making People Illegal: What Globalization Means for Migration and Law* (Cambridge University Press 2008) 16.
[72] Franck Düvell, 'Paths into Irregularity: The Legal and Political Construction of Irregular Migration' (2011) 13(3) European Journal of Migration and Law 275, 288.
[73] Hansen and Pettersson, 'Contradictory Migration Management?' (n 70) 119-120.
[74] European Commission, 'Irregular Migration and Return' <https://ec.europa.eu/home-affairs/irregular-migration-return_en> accessed 14 June 2022.
[75] Hansen and Pettersson, 'Contradictory Migration Management?' (n 70) 118.

through ‘clandestine’ entry is generally ‘the least frequent path’.[76] Going further, Guild compared the numbers of ‘irregular’ and regular migrants to the EU in 2013. Analysing migrants’ admission at EU sea borders, Guild concluded that so-called ‘irregular’ entries by sea are marginal in comparison to legal migration.[77] Indeed, most Third World migrants move to and reside in the EU in respect of immigration law rules.[78] Although Guild’s argument is not related to the 2015 crisis, this shows how the so-called ‘crisis’ characterisation relies on a misrepresentation of ‘irregular’ migration as a major migration channel for Third World citizens. Considering that most ‘irregular’ migration does not result from ‘irregular’ border crossings and that most migrations are legal, the genuineness of the so-called ‘crisis’ in 2015 must be questioned. These perspectives indeed challenge the representation of Europe as being threatened by a sudden growth of uncontrolled migration, as Squire and others described.[79]

Likewise, if the crisis faced by the EU is due to humanitarian considerations of migrants’ deaths while trying to reach the EU territory or of the danger they face while doing so, it is also questionable that it should be characterised as a crisis. Migrants’ drownings and migrants’ boats incidents have been recurring elements of European media and political focus since long before 2015. As Guild explains, ‘concerns about the safety of people travelling in the Mediterranean Sea in small boats has grown since the 1990s’.[80] Not only have discourses on the dangers encountered by migrants crossing the Mediterranean Sea been an ongoing focus of EU migration and asylum policies for at least the past two decades,[81] but migrants’ deaths and co-called

[76] Düvell, ‘Paths into Irregularity’ (n 72) 288.
[77] Guild, ‘The Dark Side of Globalisation’ (n 39) 318.
[78] Düvell, ‘Paths into Irregularity’ (n 72) 276.
[79] Squire and others, *Reclaiming Migration* (n 23) 24.
[80] Guild, ‘The Dark Side of Globalisation’ (n 39) 314.
[81] Council of the European Union, ‘The Stockholm Programme - An Open and Secure Europe Serving and Protecting the Citizens’ (2009) 17024/09, Part 6.

'tragedies' in the Mediterranean are also frequently considered by scholars. This includes, for instance, Jones qualifying the EU as 'the world's deadliest border'.[82] Estimations of migrants' deaths while crossing to the EU are difficult to establish due to the lack of comprehensive data. A research group at the VU University of Amsterdam, for instance, found that between 1990 and 2013, 3,188 migrants were found dead by Southern EU member states' authorities.[83] The blog Fortress Europe counted 19,144 migrant deaths between 1988 and 2009.[84] Another study conducted by a Dutch NGO, 'UNITED for intercultural action', found that over the period 1993-2018, 34,361 migrants were reported dead as they tried to reach Europe.[85] The large difference between these three sets of data is due to the fact that the first one relies on migrants' death certificates issued by Southern member states' authorities only,[86] and thus excludes missing migrants whose bodies were never found as well as those who were found or brought to non-EU countries, suggesting that the numbers of migrants' deaths at EU borders over this period were far higher than this data suggests. The second and third sets of data mentioned here include migrants' deaths at sea and all deaths occurring during the immigration process, thus including those occurring in detention centres, prisons or camps.[87] The data contained in the third study comes from news releases, Non-Governmental Organisations (NGOs), and coastguards reports,[88] while the second study conducted by the Fortress Europe blog

[82] Jones (n 38) 12.
[83] Tamara Last and others, 'Deaths at the Borders Database: Evidence of Deceased Migrants' Bodies Found Along the Southern External Borders of the European Union' (2017) 43(5) Journal of Ethnic and Migration Studies 693, 701.
[84] Fortress Europe Blog, 'Death at the Border: Press Review 1988-2009' (14 January 2010) <http://fortresseurope.blogspot.com/2006/02/immigrants-dead-at-frontiers-of-europe_16.html> accessed 19 November 2020.
[85] Niamh McIntyre and Mark Rice-Oxley, 'It's 34,361 and Counting: How the List Tallies Europe's Migrant Body Count' *The Guardian* (20 June 2018) <https://www.theguardian.com/world/2018/jun/20/the-list-europe-migrant-bodycount> accessed 19 November 2020.
[86] Last and others, 'Deaths at the Borders Database' (n 83) 694-695.
[87] McIntyre and Rice-Oxley, 'It's 34,361 and Counting' (n 85).
[88] ibid.

is based on press releases only,[89] both of which can be considered as unreliable sources as not all migrants' deaths are subject to newspaper articles and some deaths might be counted multiple times if it leads to various news releases and reports.[90] Although there are major disparities between these studies, they all show a trend of high numbers of migrant deaths over the past three decades, which Guild has also noted.[91]

For 2015, the International Organisation for Migration (IOM) estimated that 3,771 migrants died while crossing the Mediterranean,[92] a number higher than the results found by the VU University of Amsterdam research group for the 1990-2013 period, thus suggesting a significant increase in the years 2015-2016. These findings, however, need to be put into the context of the overall number of deaths at EU borders outlined above. Doing so shows that, as Spijkerboer argues, the increase in migrants' deaths at EU borders has been constant over the past three decades.[93] The characterisation of recent migrants' drownings while trying to reach the EU territory as a 'crisis' or 'emergency' situation is thus questionable since a 'crisis' is generally understood as an event or succession of events that unexpectedly disrupted normality and stability.[94] Here, previous observations show that rather than 'unexpectedly disrupting' the existing situation of migrants' arrivals to the EU, these deaths reflected it. Migrants' deaths at sea appear to be a constant element of EU migration policy. It is, therefore, difficult to justify the characterisation of most recent boat drownings as a

[89] Fortress Europe Blog, 'Death at the Border' (n 84).
[90] Last and others, 'Deaths at the borders Database' (n 83) 694.
[91] Guild, 'The Dark Side of Globalisation' (n 39) 317.
[92] IOM, 'IOM Counts 3,771 Migrants Fatalities in Mediterranean in 2015' (1 May 2016) <https://www.iom.int/news/iom-counts-3771-migrant-fatalities-mediterranean-2015> accessed 19 November 2020.
[93] McIntyre and Rice-Oxley, 'It's 34,361 and Counting' (n 85).
[94] Heller and others, 'Europe/Crisis: New Keywords of the "Crisis" in and of "Europe"' (n 42) 10; Voltolini, Natorski and Hay, 'Introduction: The Politicisation of Permanent Crisis' (n 48) 615.

'crisis' or 'emergency' situation when those that preceded it were not. That is why, instead of a crisis, the situation faced by the EU in 2015 regarding migrants' deaths while attempting to reach the EU territory constitutes a continuation of long-lasting occurrences.

Finally, the prevalence of crises in EU politics and law in general suggests that using some caution in accepting the veracity of a 'crisis' claim is advisable. Lawrence has explained that crises have been a constant feature in the EU context.[95] Writing in 2012, Lawrence listed the instances in which a 'crisis' discourse was used with regards to the EU since 2000 and came up with a non-exhaustive list of eight instances, including the 'mad-cow' crisis, the EU 'legitimacy' crisis, and the financial crisis.[96] The frequency of EU crises continues as in 2020, Voltolini and others listed crises faced by the EU over the past decade and included, in addition to the Eurozone crisis and the 'refugee crisis', external crises such as the situation in Ukraine, identity and culture crises linked to Brexit and the rise of far-right political parties among EU member states.[97] Thus, the so-called 'refugee crisis' of 2015 is just one more addition to the long list of EU crises and adds to the perception of the EU as being in a 'permanent crisis'.[98] In other words, as a general matter crises can be considered unexceptional elements of the EU's state of affairs,[99] and the perpetual characterisation by and within the EU of occurrences as crises calls into question the very deployment of the term. Seeing the so-called 'refugee crisis' as part of an ongoing crisis discourse at EU level supports what was previously suggested: that instead of a genuine crisis, the so-called 'refugee

[95] Lawrence, 'The EU in Crisis' (n 6) 193.
[96] ibid.
[97] Voltolini, Natorski and Hay, 'Introduction: The Politicisation of Permanent Crisis' (n 48) 610.
[98] ibid 611.
[99] Lawrence, 'The EU in Crisis' (n 6) 194.

crisis' constitutes a crisis frame, with consequences for policy making to which my analysis now turns.

3. The use of 'crisis' framing in EU policy-making

Given the constancy of 'crisis' within EU affairs, a question about the purpose or usefulness of 'crisis' arises. In this section, I show that it is the crisis *frame* that we ought to attend to, rather than the purported 'crisis' per se, when seeking to critically understand the EU's response to migration in 2015. To provide a better understanding of why migration in 2015 became predominantly characterised as a crisis, despite 2015 not being a genuine crisis as explained above,[100] I analyse the use of policy frames as a way to provide an understanding of a situation and engages with the implications of using a 'crisis' frame for policy-making. Particularly, it notes that a 'crisis' frame contributes to exceptionalising a situation, as well as to othering some key actors involved in these circumstances, thus constituting 'a political intervention that actively […] shape[s]' a set of events.[101] By exceptionalising and othering an occurrence, 'crisis' frames also create flexibility in respect of what measures might be introduced to seek to address it. Indeed, characterising a situation as an emergency and/or of extraordinary nature justifies the use of exceptional measures circumventing ordinary procedural norms.

[100] See section 2 of this chapter.
[101] Squire and others, *Reclaiming Migration* (n 23) 20.

3.1. Policy frames: Giving meaning to a situation

Policy framing corresponds to 'an understanding of the situation', as van Hurst and Yanow explain.[102] A frame provides a diagnostic for a specific situation as it identifies the issue faced.[103] In other words, it is the selection, organisation and emphasis on particular aspects of an issue[104] (i.e., the frame), which eventually shapes the manner in which a reality is perceived and represented.[105]

The framing of a specific issue is an essential step prior to developing a particular policy since it is the pre-condition to taking action and measures.[106] The selection and emphasis on some elements of reality affect policy-making,[107] as it shapes a consensus regarding the relevant aspects of a situation and their interpretation. [108] In this way, policy framing helps policy-makers to justify some measures as being more acceptable than others.[109] In other words, by selecting, naming and categorising some elements of a situation and ignoring others considered less relevant,[110] policy framing constructs a model for future action.[111] It is precisely because a measure will be regarded as justified and accepted based on how the 'issue' it addresses has been

[102] van Hulst and Yanow, 'From Policy "Frames" to "Framing"' (n 5) 94.
[103] Voltolini, Natorski and Hay, 'Introduction: The Politicisation of Permanent Crisis' (n 48) 614.
[104] Falk Daviter, 'Policy Framing in the European Union' (2007) 14(4) Journal of European Public Policy 654; Eising, Rasch and Rozbicka, 'Institutions, Policies, and Arguments' (n 4) 516.
[105] Heike Klüver, Christine Mahoney and Marc Opper, 'Framing in Context: How Interest Groups Employ Framing to Lobby the European Commission' (2015) 22(4) Journal of European Public Policy 481, 483; van Hulst and Yanow, 'From Policy "Frames" to "Framing"' (n 5) 94.
[106] van Hulst and Yanow, 'From Policy "Frames" to "Framing"' (n 5) 100.
[107] Klüver, Mahoney and Opper, 'Framing in Context' (n 105) 483.
[108] Daviter, 'Policy Framing in the European Union' (n 104) 656.
[109] Daniel Béland, 'Ideas and Social Policy: An Institutionalist Perspective' (2005) 39(1) Social Policy & Administration 1, 13; Klüver, Mahoney and Opper, 'Framing in Context' (n 105) 483.
[110] van Hulst and Yanow, 'From Policy "Frames" to "Framing"' (n 5) 99.
[111] ibid 98.

approached and characterised, that frames have a decisive impact on the direction and outcome of policy-making.[112]

As considered above, migration to the EU in 2015 was characterised as a crisis although this is a questionable characterisation. 'Crisis' became a widespread dominant understanding of the situation through to the selection and emphasis on specific elements related to Third World migration to the EU in 2015. The increase of so-called 'irregular' migration by sea or the rise of migrants' drownings, for instance, are all elements that contributed to the representation of an emergency situation. These elements were carefully selected and categorised by policymakers. In contrast, others, such as the long history of migrants' deaths at EU borders or the existence of other types of 'irregular' immigration such as visa-overstays were ignored. The focus on specific elements and the emphasis on their 'sudden' or 'exceptional' character are essential to represent Third World migration in 2015 as a crisis. Likewise, the scholarly debates around the nature of the crisis overall maintain this general understanding of 2015 as a situation of 'crisis'.[113] Despite these debates, scholarly and political discourses did not question the existence of *a* 'crisis'. Without denying rising numbers in migrants' arrivals or drownings in 2015, my previous analysis shows the careful selection and highlighting put on some aspects of Third World migration to the EU. It also reveals a deliberate omission or disregard of other aspects of the very same set of events, especially broader or long-lasting perspectives, which could question the characterisation of this situation as a 'crisis'. As Voltolini and others explained, although crises are based on material elements, it is the 'perception, interpretation and discursive construction' of specific elements which result in events being recognised

[112] Klüver, Mahoney and Opper, 'Framing in Context' (n 105) 481-482.
[113] Squire and others, *Reclaiming Migration* (n 23) 27-28.

as a ‘crisis’.[114] Here, emphasis on some worrisome elements occurring in 2015, such as the number of migrants’ drownings, and the representation of some occurrences as problematic or even threatening, such as so-called ‘irregular’ migrants’ arrivals, contributed to identifying Third World migration to the EU using so-called ‘irregular’ routes as alarming. The characterisation of migration in 2015 as a ‘crisis’ that we observed here corresponds to the conceptualisation of policy framing as it gives a meaning to a specific situation, in this case Third World migration to the EU.

As Snow and Benford cited by Voltolini and others explained, policy frames not only identify problems but also provide solutions and actions to resolve the issues and justify such measures.[115] Framing 2015 as ‘crisis’ had potentially significant consequences on the development of policy and legislative outcomes by the EU. This calls for the need to engage further with the implications of using a ‘crisis’ frame and its meaning for policy-making. Doing so will contribute to the understanding of the 2015 ‘crisis’ framing’s role in the evolution of EU migration and asylum law. As I further develop below, crisis frames notably contribute to the exceptionalisation of the situation and measures taken.

3.2. ‘Crisis’ framing: Exceptionalising a situation

If, as I have already argued, Third World migration in 2015 was not, actually, a crisis in the proper sense of the word, why was it characterised as such? In this subsection I offer an explanation in the form of the ‘crisis’ frame and the work such a frame does

[114] Voltolini, Natorski and Hay, ‘Introduction: The Politicisation of Permanent Crisis’ (n 48) 615.
[115] ibid 614.

in exceptionalising a situation and shaping and enabling policy responses to the purported 'crisis'. I do so by discussing aspects of the so-called 2015 'crisis' and drawing parallels with other crises. My analysis shows how the emphasis on supposedly 'extraordinary' elements or the system's failure frames 'crises' as exceptional circumstances requiring extraordinary measures.

As explained previously,[116] the notion of 'crisis' is one which bears strong connotations: it suggests that an unexpected event occurred, disrupting what is understood as ordinary functioning.[117] Framing an occurrence as a 'crisis' implies that the previous situation was stable and that this event or series of events interrupted the said stability.[118] As Rhinard explains, a crisis acts as an 'external shock or a precipitating event'.[119] A 'crisis' situation is thus characterised as being the result of an unforeseen event and 'a moment of intense difficulty or danger'.[120] The 'unanticipated' and 'disrupting' aspects of a crisis are decisive elements participating in framing a situation as exceptional.[121] The association between 'crisis' and a 'disruption to normality', indeed, suggests that the circumstances faced are of an exceptional nature since 'normal' circumstances would not cause such disruptions. Likewise, the fact that a crisis' is linked to a situation of 'disruption' or 'intense difficulty' and often to the threat of an immediate danger suggests that the occurrence faced was and/or could not be anticipated. In this way, the notion of 'crisis' relies on characterising an event or a series of occurrences as 'critical junctures'.[122] The exceptionalisation of a circumstance often results from an emphasis and focus on a specific occurrence or

[116] See section 2 of this chapter.
[117] Voltolini, Natorski and Hay, 'Introduction: The Politicisation of Permanent Crisis' (n 48) 615.
[118] Heller and others, 'Europe/Crisis: New Keywords of the "Crisis" in and of "Europe"' (n 42) 10.
[119] Mark Rhinard, 'The Crisisification of Policy-Making in the European Union' (2019) 57(3) Journal of Common Market Studies 616, 620.
[120] Lawrence, 'The EU in Crisis' (n 6) 189.
[121] Lüthi, 'Agitated Times' (n 47) 61.
[122] Voltolini, Natorski and Hay, 'Introduction: The Politicisation of Permanent Crisis' (n 48) 611.

some elements considered as extraordinary. For instance, the 'Eurozone crisis' was qualified as 'exceptional times' by Barroso, president of the European Commission,[123] and is generally considered the result of the 2008 global financial crisis that emerged following the collapse of Lehman Brothers.[124] In the case of the 2015 EU 'migration crisis' and the 2014 US 'migration crisis', increasing numbers of asylum seekers were characterised as 'exceptional' and justified their representation as 'crises', Hadj Abdou explains.[125] Focusing on EU external borders, scholars, such as Trauner, qualified the situation of migrants attempting to enter the EU in 2015 as 'extraordinary events'.[126] The EU itself stressed the supposedly 'exceptional' character of the situation in its informal cooperation agreement with Afghanistan by emphasising the 'unprecedented refugees and migration challenges' faced.[127] The focus on these specific events or elements as triggers of a said 'crisis' is part of a situation's exceptionalisation. It is their conception as 'exceptional' or 'threatening' circumstances that constitute the characterisation of the 'crisis'.

Another understanding of 'crisis' relies on considering crises as 'failures' of the existing system,[128] or as 'spectacularization[s] of failure'.[129] In this case, a 'crisis' is considered the outcome of long-lasting dysfunctions of a system. As previously developed, it is the accumulation of failures and/or difficulties whose culmination led to the said 'crisis' situation.[130] Failures are thus perceived as 'symptomatic of a wider problem'.[131] The

[123] White (n 52) 304.
[124] Trauner, 'Asylum Policy: The EU's "Crises" and the Looming Policy Regime Failure' (n 16) 311.
[125] Hadj Abdou, '"Push or Pull"? Framing Immigration in Times of Crisis' (n 51) 644.
[126] Trauner, 'Asylum Policy: The EU's "Crises" and the Looming Policy Regime Failure' (n 16) 311.
[127] Joint Way Forward on Migration Issues Between Afghanistan and the EU (Kabul, 2 October 2016) Introduction <https://eeas.europa.eu/sites/eeas/files/eu_afghanistan_joint_way_forward_on_migration_issues.pdf> accessed 17 July 2020.
[128] Lawrence, 'The EU in Crisis' (n 6) 188.
[129] Voltolini, Natorski and Hay, 'Introduction: The Politicisation of Permanent Crisis' (n 48) 616.
[130] See section 2 of this chapter.
[131] Voltolini, Natorski and Hay, 'Introduction: The Politicisation of Permanent Crisis' (n 48) 616.

case of the ‘Eurozone crisis’, particularly the ‘Greek crisis’, can be understood through this perspective. Indeed, Greece’s financial situation in 2009 has been generally understood as resulting from ‘the accumulation of poor economic policy, corruption, and overall “backwardness”’, Moreira Ramalho explains.[132] It then characterised the Eurozone’s failure given the lack of mechanisms to prevent or counter-balance such a situation from occurring. In the case of the 2015 so-called ‘migration crisis’, increasing asylum applications ‘revealed structural deficiencies at the heart of the EU’s asylum policy’, according to some scholars such as Thym.[133] Here, the crisis is considered as resulting from the malfunctioning European asylum system, with images of migrants stranded in Greek hotspots or at EU external borders as representations of the system’s failure. These shortcomings of the EU asylum system were considered as an existential threat for the EU.[134] Framed in this way, ‘crises’ also contribute to the exceptionalisation of circumstances since a policy’s dysfunctions and failures are generally considered abnormal occurrences. From this perspective, the Eurozone or the European asylum system aim at functioning efficiently. The former aims to achieve ‘a single and stable currency’[135] and the latter to ensure the ‘absolute respect of the right to seek asylum’ on the other,[136] while the 2009 Greek government debt crisis or the living conditions in Greek hotspots in 2015 are the exception. Failures and ‘crises’ thus constitute ‘exceptions’ to the functioning of any system.

Moreover, the emergency element of ‘crisis’ situations also contributes to the exceptionalisation process, as observed in the characterisation of ‘crises’ with

[132] Tiago Moreira Ramalho, ‘The Troika in its Own Words: Responding to the Politicisation of the Southern European Crises’ (2020) 42(5) Journal of European Integration 677, 680.
[133] Daniel Thym, ‘The “Refugee Crisis” as a Challenge of Legal Design and Institutional Legitimacy’ (2016) 53(6) Common Market Law Review 1545, 1546.
[134] Editorial, ‘From Eurocrisis to Asylum and Migration Crisis: Some Legal and Institutional Considerations About the EU's Current Struggles’ (2015) 52(6) Common Market Law Review 1437, 1441.
[135] Treaty on European Union (Maastricht Treaty) [1992] Foreword.
[136] European Council, ‘Tampere European Council - Presidency Conclusions’ (15-16 October 1999) para 13.

references to past states of 'emergency' or adversity. As my earlier analysis identified,[137] the 2015 so-called 'crisis' was regularly compared to historical landmarks such as the Second World War or the dissolution of the former Yugoslavia and the refugee movements they engendered. Similar comparisons can be observed in the case of the 2008 'financial crisis', which was paralleled to the Great Depression in the 1930s.[138] Parallels with major historical events exemplify how occurrences are exceptionalised when framed as 'crises'.

The exceptionalisation effect of 'crisis' framing is not only noticeable in terms of how events or series of occurrences are represented and understood; it also impacts the measures taken in response to the said 'crisis'. In other words, a 'crisis' is also considered a 'critical juncture' for policy-making. 'Crisis'-type situations are understood as the cause of 'specific policy and institutional innovations'.[139] Whether understood as being the result of 'exceptional' circumstances disrupting normal functioning or as the result of consistent dysfunctions, a crisis is generally responded to with policy changes,[140] particularly 'exceptional measures' considered unacceptable in normal circumstances, as Squire and others point out.[141] Indeed, if a crisis is a failure of the existing system, measures need to be taken to correct these dysfunctions, as Lawrence explains.[142] In the same way, when a 'crisis' is considered a disruption to the system's normal functioning, it calls for action too.[143] Similar reasoning applies when facing a 'crisis' threatening the existing stability or security. For instance, the so-

[137] See section 1 of this chapter.
[138] Servaas Storm and CWM Naastepad, 'Myths, Mix-ups, and Mishandlings: Understanding the Eurozone Crisis' (2016) 45(1) International Journal of Political Economy 46, 47.
[139] Voltolini, Natorski and Hay, 'Introduction: The Politicisation of Permanent Crisis' (n 48) 611.
[140] ibid.
[141] Squire and others, *Reclaiming Migration* (n 23) 31.
[142] Lawrence, 'The EU in Crisis' (n 6) 188.
[143] Hadj Abdou, '"Push or Pull"? Framing Immigration in Times of Crisis' (n 51) 646.

called ‘Eurocrisis’ led to the adoption of measures deemed ‘exceptional’[144] and ‘innovative’ due to their nature and the changes of economic and budgetary policies that they implied.[145] This included the creation of a European Semester coordinating member states’ economic policies, the enactment of new directives on fiscal policy and the expansion of EU credit facilities.[146] With regards to migration, the ‘crisis’ framing led to the adoption of supposedly ‘extraordinary’ measures. As Davitti argues, in 2015 the EU considered migration ‘as an emergency that, by definition, can only be addressed through the adoption of exceptional measures’.[147] To put it differently, if migration were considered ‘a normal expression of life or of human movement’, as d’Aspremont explains, there would be no calls for ‘limitations, containment, repression, etc.’[148] Although most measures adopted in response to the so-called crisis in 2015 could hardly be said to be ‘innovative’ – due to their reflecting the long-lasting history of security-focused policy developed by the EU towards immigration –[149] they have been framed as ‘exceptional’ in a specific way. The ‘humanitarian’ element of the so-called ‘crisis’, in particular, contributed to the presentation of restrictive measures as ‘life-saving’ devices for migrants,[150] as I will further discuss later.[151] Here the ‘exceptional’ aspect of the measures comes from their ability to ‘save’ migrants’ lives by preventing them from attempting hazardous migration. The use of ‘crisis’ framing thus contributes to exceptionalising measures and policies, including when it comes

[144] White, ‘Emergency Europe' (n 52) 304.
[145] Editorial, ‘From Eurocrisis to Asylum and Migration Crisis’ (n 134) 1447.
[146] Moreira Ramalho, ‘The Troika in its Own Words’ (n 132) 677.
[147] Daria Davitti, ‘Biopolitical Borders and the State of Exception in the European Migration “Crisis”’ (2018) 29(4) European Journal of International Law 1173.
[148] Jean d'Aspremont, ‘International Law as a Crisis Discourse: The Peril of Wordlessness’ in Makane Mbengue and Jean d'Aspremont (eds), *Crisis Narratives in International Law* (Brill 2021) 5.
[149] See chapter 2 section 1.2.2.
[150] Violeta Moreno-Lax, ‘The EU Humanitarian Border and the Securitization of Human Rights: The “Rescue-Through-Interdiction/Rescue-Without-Protection” Paradigm’ (2018) 56(1) Journal of Common Market Studies 119, 120.
[151] See chapter 3 section 3.3.1.

to furthering pre-existing policies. Through exceptionalisation, 'crisis' framing provides policy-makers with a justification for shaping ordinary measures as 'exceptional'.

In conclusion, due to its strong connotations of extraordinary occurrences and of dysfunctional systems, as well as its association with previous times of adversity, using a 'crisis' frame to characterise Third World migration in 2015 contributed directly to exceptionalising the situation. This subsection also highlighted that the exceptionalisation resulting from 'crisis' framing impacts the emergent measures. Indeed, given that framing processes outline the representation of a specific situation and provide for a particular model of action,[152] this is even more the case when using 'crisis' frames as it implies the exceptional character of the situation and thus suggests that exceptional measures are required in response. When it comes to the approach developed towards actors of so-called 'crises', the exceptionalisation process has an additional consequence: framing a situation as 'exceptional' leads to the othering of persons, groups and institutional actors caught up in it.

3.3. 'Crisis' framing as a form of othering

In this subsection, I discuss the othering process resulting from the use of 'crisis' frames. I argue that 'crisis' framing and the othering it produces justify the further exclusion of some key players presented as causing, exacerbating, or perpetuating the so-called 'crisis', in this case those undertaking migration, their country of origin or transit, as well as smugglers and human traffickers, for instance. My analysis demonstrates that the othering process also applies to the understanding of causes

[152] van Hulst and Yanow, 'From Policy "Frames" to "Framing"' (n 5) 98.

and responsibilities. This explains the EU's use of a 'crisis' frame in 2015 as it contributed to a narrative in which the EU could circumvent its responsibilities.

The exceptionalisation of a situation takes a more specific form when it comes to key players of a said 'crisis'. The othering paradigm is, indeed, a form of exceptionalising as it relies essentially on emphasising differences. Othering can be defined as a differentiation process between two groups of individuals, 'us' and 'them', relying on distinctive elements such as race, religion or ethnicity.[153] Although othering processes are also observed in 'non-crisis' circumstances regarding the shaping of one's identity, as I will discuss later,[154] it is particularly noticeable in instances of so-called 'crisis'. Given that a crisis is often considered to be a situation that disrupts existing stability, such a disruption has particular consequences when it comes to one's identity, that is to say, related to a player's self-perception or their understanding of their own place.[155] In this case, a 'crisis' situation is likely to lead to instability in terms of identity construction if the disruption it produces influences how a key player perceives themselves or their role. Both the 2008 financial 'crisis' and the 2015 migration 'crisis' are generally considered exemplifications of challenges and threats to the EU's sense of self.[156] The othering process of 'crisis' framing is driven in two ways. Firstly, given the disruption created by a 'crisis', ideas of identity become more salient.[157] This is particularly the case when the said 'crisis' impacts core state powers, such as

[153] Derek MD Silva, 'The Othering of Muslims: Discourses of Radicalization in the New York Times, 1969-2014' (2017) 32(1) Sociological Forum 138, 140.
[154] See chapter 2 section 1.3.
[155] Maria Leek and Viacheslav Morozov, 'Identity Beyond Othering: Crisis and the Politics of Decision in the EU's Involvement in Libya' (2018) 10(1) International Theory 122, 125.
[156] Francesca Romana Ammaturo, 'Europe and Whiteness: Challenges to European Identity and European Citizenship in Light of Brexit and the "Refugees/Migrants Crisis"' (2019) 22(4) European Journal of Social Theory 548, 551.
[157] Felix Karstens, 'Let Us Europeans Move: How Collective Identities Drive Public Support for Border Regimes inside the EU' 58(1) Journal of Common Market Studies 116, 117.

determining who belongs or is entitled to join a national community,[158] thus supporting the need to re-articulate or re-emphasise identities. To put it another way, the instability generally associated with a 'crisis' situation may lead to refocusing on more stable and constitutive elements of a polity, which leads to an emphasis being put on identification patterns to further distinguish 'us' against 'them'. Secondly, the instability generated by the 'crisis' may frame a sense of threat to one's identity. By disrupting the existing, supposedly stable system, a crisis indeed constitutes a threat to identification patterns if the system it is disrupting is an element that contributes to shaping one's identity. This justifies the use of discriminatory and security measures framed as 'protection' from the said 'threat' by re-asserting the othering process. This othering process is observed in 'crisis' framings within the EU. The so-called migration 'crisis' is an example of 'reactionary features of "Europeanness"', including measures aimed at protecting Europeans and rejecting its 'others',[159] as I further analyse later.[160] A similar pattern can also be observed in the framing of the 2008 financial 'crisis'. In this case, the differentiation between the so-called 'core' EU member states and its periphery was based on some member states' financial and economic reliability, such as Germany, as opposed to 'others' deficiency, such as Greece.[161] As these examples suggest, framing 'crisis' as a 'threat' to identity patterns is particularly noticeable in situations where some of the players involved can be differentiated. In this way, 'crisis' framing furthers or re-emphasises the line drawn between 'us' and 'them' because 'they' constitute a danger for 'us'.

[158] ibid 131.
[159] Ammaturo, 'Europe and Whiteness' (n 156) 551.
[160] See chapter 3 section 3.1.
[161] Moreira Ramalho, 'The Troika in its Own Words' (n 132) 680.

In the case of migration, including with regards to refugees and asylum seekers, the othering process is established through different portrayal patterns. As Greussing and Boomgaarden explain, migrants, especially refugees, tended to be portrayed by newspapers in 2015-2016 within three different groupings. They were either represented as innocent victims (be it of unscrupulous smugglers or traffickers or of persecution in their countries of origin), as a 'threat to the culture, security and welfare of the host country' (through their frequent association with terrorism, criminality or irregularity), or as a dehumanised group (through the use of water metaphors such as 'flows' or 'waves',[162] for example, suggesting receiving countries' helplessness when facing migrants' arrivals).[163] Each of these characterisations constitutes a form of othering. The victimisation of migrants is part of migrants' othering process by representing them as passive victims and the host community as a generous provider. This shapes a distinction between 'us', the supporter, and 'them', the needy. The 'threat' frame operates similarly by distinguishing the dangerous 'them' from the endangered 'us', in which case the 'crisis' constitutes the disruption of the previously 'peaceful', 'safe' and 'secure' stability. Finally, through the dehumanisation frame, othering operates due to the association between uncontrollable masses and a certain 'backwardness', which contrasts with the 'civilised' and individualised 'us'. These forms of othering are observed in the EU's approach to Third World migrants as will be further analysed later.[164]

The othering process is noticeable when it comes to identifying and distinguishing key players in a 'crisis' but it also frames causes and responsibilities for the said 'critical'

[162] Lesley J Pruitt, 'Closed due to "Flooding"? UK Media Representations of Refugees and Migrants in 2015-2016 – Creating a Crisis of Borders' (2019) 21(2) The British Journal of Politics and International Relations 383.
[163] Greussing and Boomgaarden, 'Shifting the Refugee Narrative?' (n 7) 1751.
[164] See chapter 2 section 1.3.4. and chapter 3 sections 3.1.2. and 3.3.1.

situation. As Lawrence explains, a 'crisis' framing requires us to act and to find solutions, but it also calls for the allocation of responsibility.[165] Through the diagnostic that a 'crisis' framing provides, not only is a problem identified and defined but so are its causes.[166] The disruption created by a 'crisis' situation, indeed, needs to be explained and justified. Disruptions to a system's normal functioning will generally lead to identifying causes and the key players responsible for it. Here, the othering process mentioned earlier is essential to fully seize the identification of liabilities and responsible actors.

The blaming process is noticeable in cases of 'crisis' framing related to migration since responsibility can easily be attributed to othered migrants, especially those characterised as 'threatening others'. However, migrants are not the only key players considered responsible. Indeed, in cases of so-called migration 'crises', the blame often targets other actors too, depending on the elements used to explain the emergence of the said 'exceptional' circumstances. When migration is described as resulting from so-called 'pull factors', it suggests migration is the consequence of a state's image of openness. Responsibility is thus attributed to key players considered favourable to liberal policies, such as liberal institutions or NGOs, or to smugglers seen as spreading the 'myth' of a country's openness.[167] When 'push factors' are used to identify responsibility for migration, the blame focuses more on external elements. In this perspective, it is due to the country of origin or transit's situation that migrants decided to move, as Hadj Abdou explains.[168] The arrival of migrants, especially so-called 'irregulars', to the EU is therefore considered as resulting from the 'putative

[165] Lawrence, 'The EU in Crisis' (n 6) 189.
[166] Voltolini, Natorski and Hay, 'Introduction: The Politicisation of Permanent Crisis' (n 48) 614.
[167] Hadj Abdou, '"Push or Pull"? Framing Immigration in Times of Crisis' (n 51) 647.
[168] ibid 648.

"failure" of multiple states to prevent the exit or entry of migrants'.[169] In this case, migration is due to countries of origin, blamed for their wars, instability or lack of economic opportunities, with the so-called 2015 'crisis' being 'represented as a by-product of the "crisis in the Middle East"'.[170] It is also the result of transit countries' inability to provide protection or opportunities to migrants, or to control their own borders, as exemplified in the portrayal of Turkey's borders with the EU as the birthplace of the 'refugee crisis'.[171] From this angle, the EU almost appears as a victim of Third World countries' disorganised and unstable systems.[172] Likewise, the focus on human trafficking and smuggling as causes of so-called 'irregular migration' also represents the EU and its asylum and migration law system as vulnerable to another group of 'others': unscrupulous criminal actors. Therefore, the othering contributes to externalising the 'blame' for migrants' arrivals, not only to migrants themselves but also to Third World countries and individuals involved in the migration process. In other words, the 'crisis' was not conceived as the result of EU migration policy but was seen mainly as resulting from sources external to the EU and its institutions.[173] Overall, it also justifies the EU's growing use of externalisation measures to 'address' the supposed 'causes' of the 'crisis', as I will further analyse later on.[174]

Similar attributions of responsibility can be noticed within other crises. In the case of the Eurozone 'crisis', for instance, the blame has been more often than not targeted at Greece. In their analysis, Kutter describes how the issues faced by the Eurozone

[169] Lüthi, 'Agitated Times' (n 47) 57.
[170] Heller and others, 'Europe/Crisis: New Keywords of the "Crisis" in and of "Europe"' (n 50) 8.
[171] Can Yildiz and others, '(The Crisis of) "European Values"' (2016) (1) Near Futures Online 34, 40 <http://nearfuturesonline.org/wp-content/uploads/2016/01/New-Keywords-Collective_11.pdf> accessed 4 December 2020.
[172] Heller and others, 'Europe/Crisis: New Keywords of the "Crisis" in and of "Europe"' (n 50) 12.
[173] Squire and others, *Reclaiming Migration* (n 23) 27.
[174] See chapter 3 section 3.

were framed as a Greek problem, instead of a Eurozone or EU-wide one.[175] Although the conventional narrative of this 'crisis' emphasises the financial pressure resulting from the 2008 worldwide financial 'crisis', it also points out the 2009 Greek government's announcement of misreported statistics concealing a higher debt than previously declared as a critical trigger of the Eurozone 'crisis'.[176] Doing so directly points to the responsibility of the deficient Greek government. This notably contrasts with narratives regarding other EU member states' administration of public finances and fiscal matters.[177] Therefore, it draws a line between the economically reasonable EU member states and the deficient, corrupt and 'backwards' 'other(s)'.[178] Such a distinction and emphasis on differences correspond to an othering process among EU member states themselves. This shows that 'crisis' framing leads to various forms of othering, depending on the type of 'crisis' faced and the players involved in the said 'crisis'.

The previous analysis highlighted how the exceptionalisation effect of 'crisis' framing goes further by constituting a form of othering. The othering process that 'crisis' frames enable is particularly exemplified in two ways. Indeed, disruptions created by a 'crisis' often trigger the need to re-emphasise identities and the distinction between 'us' and the 'other'. This differentiation plays a central role in the diagnostic of the 'crisis' since it provides a target to blame for initiating or facilitating the emergence of disruptive circumstances. However, as briefly mentioned, using a 'crisis' frame not only explains

[175] Amelie Kutter, 'Construction of the Eurozone Crisis: Re- and Depoliticising European Economic Integration' (2020) 42(5) Journal of European Integration 659.
[176] ibid 661; Moreira Ramalho, 'The Troika in its Own Words' (n 132) 680.
[177] Amelie Kutter, 'A Catalytic Moment: The Greek Crisis in the German Financial Press' (2014) 25(4) Discourse & Society 446.
[178] Moreira Ramalho, 'The Troika in its Own Words' (n 132) 680.

the type and causes of the ‘exceptional’ situation. It also supports the need for urgent action, thus justifying the circumvention of normal procedures and processes.

3.4. ‘Crisis’ framing as a justification for bypassing normal procedures and processes

As explained above, framing something as a ‘crisis’ suggests it is an ‘exceptional’ occurrence, of threatening and/or unexpected nature, disrupting the system’s regular functioning,[179] and sets parameters in terms of the type of measures that might be required to respond to it.[180] Given that unexpectedness and disruption are generally associated with notions of ‘threat’ or ‘danger’,[181] ‘crisis’ framings support calls for restoring the previously existing ‘normality’ and/or providing protection from the said ‘threat’ through urgent action or emergency measures,[182] as well as security-focused policies. The exceptionalisation effect of a ‘crisis’ frame thus impacts not only the measures taken in response, but also the manner in which measures are decided upon, adopted, and implemented. The exceptional character that a ‘crisis’ frame denotes shapes an occurrence as a situation ‘in which decisions must be made’, as Lawrence explains.[183] In other words, a ‘crisis’ contains inherent requirements for decisions and actions to be taken as soon as possible. When faced with an occurrence disrupting and/or creating an immediate need, the instinctive and logical reaction is to rapidly take measures that re-establish normality and/or safety. In the context of the

[179] Voltolini, Natorski and Hay, ‘Introduction: The Politicisation of Permanent Crisis’ (n 48) 615.
[180] van Hulst and Yanow, ‘From Policy “Frames” to “Framing”’ (n 5) 98; Voltolini, Natorski and Hay, ‘Introduction: The Politicisation of Permanent Crisis’ (n 48) 616.
[181] Lüthi, ‘Agitated Times’ (n 47) 57.
[182] Heller and others, ‘Europe/Crisis: New Keywords of the “Crisis” in and of “Europe”’ (n 50) 10; Carrera, Santos Vara and Strik, ‘The External Dimensions of EU Migration and Asylum Policies in Times of Crisis’ (n 43) 7.
[183] Lawrence, ‘The EU in Crisis’ (n 6) 190.

so-called EU sovereign debt 'crisis', Kilpatrick argues, invocations of emergency emphasise 'the speed and timing of policy responses'.[184] Given the difficulties experienced by some member states in fulfilling their sovereign debt obligations under 'normal' circumstances, the Eurozone 'crisis' in 2009-2010 fuelled fears of destabilisation for these member states' public sector and economies. Additionally, it was feared that their destabilisation would consecutively jeopardise the Eurozone and internal market themselves.[185] This looming threat led to the adoption of so-called 'emergency rescue operations' aimed at stabilising the Eurozone.[186] Therefore, framing the difficulties faced by some EU member states in 2009-2010 as a 'crisis' for the Eurozone and the EU, justified the EU's adoption of emergency provisions. This illustrates how 'crisis' framing shapes the process of adopting policy measures to respond and resolve the 'exceptional' situation faced.

In many 'crisis' situations, procedural norms tend to be considered as undesirable brakes to rapid policy changes and emergency measures. Procedural requirements, such as regular legislative procedures, are regarded as an unduly lengthy process. For instance, in the case of the EU, the ordinary legislative procedure, as specified by article 294 Treaty on the Functioning of the EU (TFEU),[187] lasted on average 20 months during the 2014-2019 legislature period.[188] Therefore, in 'crisis' circumstances, Rhinard argues, pleas for urgent measures tend to justify the circumvention of ordinary decision procedures and their replacement with 'crisis'-

[184] Claire Kilpatrick, 'On the Rule of Law and Economic Emergency: The Degradation of Basic Legal Values in Europe's Bailouts' (2015) 35(2) Oxford Journal of Legal Studies 325, 328.
[185] Editorial, 'From Eurocrisis to Asylum and Migration Crisis' (n 134) 1441.
[186] ibid 1442.
[187] Consolidated version of the Treaty on the Functioning of the European Union [2008] OJ C115/47 art 294.
[188] European Parliament, 'Handbook on the Ordinary Legislative Procedure – A Guide to How the European Parliament Co-Legislates' (November 2019) 1, 51 <http://www.epgencms.europarl.europa.eu/cmsdata/upload/a3463454-10e5-4a8c-b205-ba942af7bb55/1189208EN.pdf> accessed 17 August 2021.

specific, faster – and often informal – decision processes.[189] The adoption of the EU Directive on Combating Terrorism is an illustrative example of this.[190] Designed following the Paris terror attacks in 2015, this directive was adopted without full adherence to the EU ordinary legislative procedure. Since 2001 new instruments of EU counter-terrorism law are generally not adopted strictly following the ordinary legislative procedure but through 'an abridged and accelerated process'.[191] This includes the Directive on Combating Terrorism, which was adopted without fully considering its adherence to the principle of proportionality.[192] This principle constitutes a general principle of EU law since *Internationale Handelsgesellschaft,*[193] and is a mode of assessing the acceptability of EU measures restricting human rights by testing their proportionality to the objective they aim to achieve.[194] The considerable limitation of the proportionality test before the adoption of the Directive on Combating Terrorism shows the extent to which the use of 'crisis' framing – in this case with regards to supposed 'terrorist' or 'security threats' – provides flexibility for EU policy-makers to curtail procedural requirements.

Moreover, framing an event as a 'crisis', Carrera and others explain, also creates the need for exceptional measures to be taken.[195] Reslow goes further and argues that 'crisis' framing directly challenges existing policies since the 'exceptional' circumstances triggered by a 'crisis' suggest the existing policy is unable to provide

[189] Rhinard, 'The Crisisification of Policy-Making' (n 119) 622.
[190] Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on Combating Terrorism and Replacing Council Framework Decision 2002/475/JHA and Amending Council Decision 2005/671/JHA [2017] OJ L88/6.
[191] Fiona de Londras and Jasmin Tregidga, 'Rights, Proportionality, and Process in EU Counterterrorism Law Making' (2021) 19(2) International Journal of Constitutional Law 665, 684.
[192] ibid 667.
[193] Case 11-70 *International Handelsgesellschaft mbH v Einfuhr- und Vorratstelle für Getreide und Futtermittel* [1970].
[194] de Londras and Tregidga (n 191) 668.
[195] Carrera, Santos Vara and Strik, 'The External Dimensions of EU Migration and Asylum Policies in Times of Crisis' (n 43) 7.

appropriate solutions.[196] Indeed, given that a crisis denotes the disruption of a pre-existing stable system,[197] an occurrence is considered a 'crisis' when the existing policy is seen as unable to facilitate the actions necessary in that situation. In this way, a 'crisis' frame is 'likely to lead to profound changes' in a policy.[198] Just as in the case of urgent measures previously mentioned, procedural and fundamental rights safeguards tend to be considered obstacles to the adoption of profound reform in response to an 'exceptional' situation. Using 'crisis' framing facilitates the bypassing of safeguards because 'exceptional' circumstances call for so-called 'innovative', 'exceptional' policy measures in response.[199] In the case of the Eurozone 'crisis', for example, the Treaty on Stability, Coordination and Governance of the Economic and Monetary Union signed in March 2012 set the European Commission and the European Council as monitors of member states' respect of the 'balanced budget rule', as specified by article 5 of the Fiscal Compact.[200] For White, this measure constitutes a bypassing of parliamentary oversight of national budgets.[201] Here, the need for immediate action in case of excessive deficit allows the use of 'exceptional procedures' that circumvent the democratic and procedural principle requiring national budgets to be evaluated and debated in parliaments. This measure is thus justified by the need for rapid procedures to avoid a Eurozone debt 'crisis' from happening again, for which executive institutions are supposedly more adapted as they do not require lengthy parliamentary debates. Such bypassing of fundamental rights and principles

[196] Natasja Reslow, 'Transformation or Continuity? EU External Migration Policy in the Aftermath of the Migration Crisis' in Sergio Carrera, Juan Santos Vara and Tineke Strik (eds), *Constitutionalising the External Dimensions of EU Migration Policies in Times of Crisis* (Edward Elgar 2019) 97.
[197] Heller and others, 'Europe/Crisis: New Keywords of the "Crisis" in and of "Europe"' (n 50) 10.
[198] Reslow, 'Transformation or Continuity?' (n 196) 97.
[199] Voltolini, Natorski and Hay, 'Introduction: The Politicisation of Permanent Crisis' (n 48) 611.
[200] Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (entered into force 1 January 2013) (European Fiscal Compact) art 5.
[201] White (n 52) 304.

is a frequent consequence of 'crisis' framing and will be further discussed with regards to the 2015 migration 'crisis'.[202]

Moreover, the measures set by the Fiscal Compact to monitor national budgets show how technocratic bodies are sometimes privileged, due to their expertise, as the mode of dealing with EU economic and budgetary governance rather than parliamentarians, associated with political challenges and associated delay.[203] Experts' increasing role following a 'crisis' framing has been acknowledged by various scholars such as Lawrence and White.[204] Indeed, the supposed complexity of a situation framed as a 'crisis' justifies the transfer of competences to technical authorities, which are considered more knowledgeable and consequently more able to take the necessary measures. The reinforcement of expert authorities, however, means that the powers of democratic and judicial authorities ensuring the democratic adoption and oversight of legislations are more limited. With regards to migration, the increasing use of technical authorities is noticeable in the growing role of Frontex, the European Border and Coast Guard Agency, in EU migration policy. Although Frontex's role was already expanding before 2015, its role was reinforced in response to the so-called 'crisis' through the coordination of joint operations, its cooperation in the establishment of so-called 'hotspots' and its provision of risk analysis.[205] The expansion of Frontex's capacity is also noticeable in the constant increase of its budget and human resources.[206] In this way, the so-called 'crisis' and its emergency rhetoric supported the further growth of EU agencies such as Frontex.

[202] See chapter 3 sections 2.2. and 2.3.
[203] Kutter, 'Construction of the Eurozone Crisis' (n 175) 663.
[204] White (n 52) 305; Lawrence, 'The EU in Crisis' (n 6) 191.
[205] Sarah Léonard and Christian Kaunert, 'The Securitisation of Migration in the European Union: Frontex and its Evolving Security Practices' (2020) Journal of Ethnic and Migration Studies 1, 8 <https://doi-org.ezproxyd.bham.ac.uk/10.1080/1369183X.2020.1851469> accessed 18 August 2021.
[206] Peter Slominski and Florian Trauner, 'How do Member States Return Unwanted Migrants? The Strategic (Non-

In conclusion, the situation of disruption and exception derived from 'crisis' framing enables authorities to circumvent ordinary processes for formulating, adopting, and implementing policy solutions, including through law. As previously explained, the need for urgent action and profound changes to address supposedly 'exceptional' circumstances tends to clash with regular procedural requirements, generally considered as obstacles to immediate action and innovation. Accordingly, using a 'crisis' frame leads to procedural safeguards or fundamental rights being bypassed in the making of 'urgent', ad-hoc, and purportedly-temporary measures. It also influences the development of policies post-'crisis' since long-lasting measures should prevent a 'crisis' situation from re-emerging. In such cases too, procedural requirements and fundamental safeguards are considered obstacles to the necessary policy 'innovation', which an exceptional situation calls for. Finally, my analysis highlighted that 'crisis' framing, through the rising role of experts and technocratic institutions, particularly impacted parliamentary and judiciary scrutiny, which will be further analysed later with regards to the EU's policy response to the migration 'crisis'.[207]

Conclusions

Discussing the 2015 so-called refugee or migration 'crisis' in the EU, my analysis in this chapter brought critical views on the very characterisation of Third World migration to the EU in 2015 as *a* 'crisis'.

)Use of "Europe" During the Migration Crisis' (2018) 56(1) Journal of Common Market Studies 101, 107.
[207] See chapter 3 section 2.

In the first section, my analysis delved into the established understanding of the 'crisis'. Namely, it studied how increasing numbers of asylum applications, arrivals of so-called 'irregular' migrants using perilous routes and leading to the spectacularisation of migrants' deaths at EU external borders, all contributed to characterising the 'crisis'.

Yet, as I demonstrated in section 2, the conventional narrative around the so-called 2015 'crisis' bears numerous flaws. Numerically, the 'exceptional' character of migration flows in 2015 is questionable. Whether compared to other migration and refugee movements across the world at the same period, or compared to past migration to and within Europe, large scale population movements do not constitute an unusual phenomenon. Considering 2015 Third World migration as 'exceptional' constitutes a narrow understanding of migration. Likewise, despite the unusually significant number of migrants 'irregularly' crossing EU external borders in 2015-2016, the focus on 'irregular' border crossings, especially 'irregular' arrivals by sea, appears unjustified when compared with other ways in which migrants become 'irregular' in the EU and when put into the broader context of 'irregular' migration to the EU. Even more so when compared to legal immigration, 'irregular' entries through EU external borders constitute a limited immigration channel. In the second section, I also showed that migrants' deaths at EU borders have been occurring since at least the 1990s, which suggests that 2015 constitutes a perpetuation of EU borders' deadly history. Additionally, the lack of accurate data available makes it highly complex to determine a specific timeframe as exceptionally deadly. That is why, I argue that instead of a 'crisis' situation, what can be observed in 2015 is a 'crisis' frame.

From this perspective, I bring insights into the EU's rationale when framing Third World migration as a 'crisis' in the final section. Discussing the role of policy frames in giving meaning to situations faced by policy-makers, I argue that 'crisis' frames are key

shaping tools for law and policies. In particular, 'crisis' framing exceptionalises situations or aspects of a situation, and thus supports the need for an 'exceptional' response. With regards to migrants this includes securitisation, externalisation or informal measures, as chapter 3 will further discuss. When it comes to determining parties and causes, 'crisis' framing leads to an othering process. By shifting the blame on the EU's 'others', in this case migrants, smugglers and human traffickers or third countries, 'crisis' framing clears the EU from responsibility, as I will further explore in the growing role of EU external migration policy post 2015,[208] for instance. Overall, the exceptionalisation and othering processes of 'crisis' frames justify the bypassing of ordinary regulations and fundamental rights safeguards. 'Crisis' frames legitimate 'emergency' procedures, security-focused and control-oriented measures, and experts' increasing role, thus circumventing the EU institutional framework, as I discuss further below.[209]

Although the role of 'crisis' frames for policy making provides some insights into the development of EU migration and asylum law post 2015, the following chapter shows that some of the patterns traditionally understood as resulting from 'crisis' framing actually predated the so-called refugee 'crisis'. Delving into the evolution of EU migration and asylum law and policy since its origins until 2014, my analysis reveals long-lasting tendencies in the EU's approach to Third World migration.

[208] See chapter 3.
[209] See chapter 3 section 2.2.

Chapter 2: The EU migration and asylum policy before the so-called 'crisis'

Introduction

The EU's concerns about migration have a long pedigree, as the previous chapter suggested by pointing at the longstanding history of so-called 'irregular' migration and migrants' deaths at EU external borders. Yet, the EU has not always been the central actor on asylum and migration affairs it now appears to be. Between the creation of its ancestors, the European Coal and Steal Community in 1951[1] and the European Economic Community (EEC) in 1957,[2] and the 2015 so-called 'crisis', the EU's role in these fields has grown exponentially. While migration and asylum matters were not initially considered a Community matter, but rather part of member states' own competences, this statist conception of migration policy progressively gave way to an EU-level approach. Not only were competences to act in these fields transferred to the EU level, but now migration control is increasingly transferred to external actors, particularly non-EU countries.

This chapter engages with the evolution of EU action in migration and asylum law and policy since its inception until 2014, before the so-called 'crisis' emerged as discussed previously.[3] I analyse legal and policy developments both internally and externally. This enables me to identify the long-lasting tendencies that triggered and underpinned

[1] Treaty Establishing the European Coal and Steal Community [1951].
[2] Treaty Establishing the European Economic Community [1957].
[3] See chapter 1 section 1.

the emergence of EU action in this field. Establishing the pre-'crisis' trends is essential to properly grasp the role of 'crisis' framing in shaping the EU migration and asylum law developments post-2015, which chapter 3 will analyse.

Here, my analysis particularly focuses on the EU's approach to Third World migrants and migration. In this chapter, I engage with the EU's early conceptions of Third World migrants and migration and reflect on their implications for the emergence and early developments of EU migration and asylum policy. In doing so, my analysis outlines the political and legal dynamics that have long framed the EU migration and asylum law and policy, and considers in particular how Third World migrants and migration have been framed throughout the evolution of the common migration and asylum law and policy.

I argue that some long-lasting tendencies predated the 2015 'crisis' framing analysed previously. Particularly, my analysis reveals the central role of informal cooperation in early developments of the EU migration and asylum law system. It also highlights the early concerns towards Third World migration that shaped the common migration and asylum policy, namely a focus on Third World migrants' illegality and security-related considerations. This framed internal EU policy with a control-oriented approach at its core, thus suggesting such concerns and measures did not result from the 'crisis' frame described in chapter 1. With the later developments in the external dimension of the asylum and migration policy, the EU adopts a similar approach aimed at expelling and keeping unwanted migrants at distance. This also suggests that some of post-2015 externalisation measures framed as 'innovative solutions' to the 'crisis' as described in chapter 1 and further analysed in chapter 3, constitute legacies of earlier frameworks.

1. The internal dimensions of EU migration and asylum law

In this section, my analysis focuses on the emergence and development of an EU migration and asylum law system. Here, I review the progressive development of a common approach to migration and asylum matters at EU level since early intergovernmental cooperation. It reveals, firstly, the central and long-lasting role of informal cooperation for the common asylum and migration policy. Additionally, the EU's focus on security-driven measures and its obsession with so-called 'illegal' migration can be observed since the very inception of member states' cooperation in these fields. Informal decision-making processes, security-focused measures and fear of uncontrolled 'illegal' migrants are all elements of the 'crisis' framing as I discussed previously.[4] My analysis below therefore shows that the common migration and asylum policy is driven by some long-lasting tendencies, which predated the so-called 'crisis' in 2015.

1.1. The role of informal cooperation in shaping the common asylum and migration policy

Early cooperation on migration and asylum among member states was limited and developed informally only through intergovernmental collaboration. This practice set a precedent by developing norms on asylum and migration through informal and opaque

[4] See chapter 1.

processes, but also because it circumvented democratic or judicial scrutiny. Although the Treaties of Amsterdam and Lisbon initiated important changes in terms of competences and procedures and led to the communitarisation of asylum and migration matters, the legacies of intergovernmentalism remained. Indeed, policy developments from the intergovernmental era were progressively integrated into EU law and remain important elements of recent EU migration and asylum law. The intergovernmental period had therefore a long-lasting impact on the common migration and asylum law system.

Overall, the analysis developed below shows that some tendencies associated with 'crisis' frames, namely the use of informal decision-making processes,[5] emerged early on in EU migration and asylum policy and thus predated the so-called 2015 'crisis'. Early developments on asylum and migration at EU level suggest not only that migration and asylum policy can be developed through opaque processes but that despite the progressive communitarisation, member states maintained a strong influence on these policy areas.

1.1.1. From Rome to Maastricht: Developing asylum and migration policy outside the European Economic Community framework

The Treaty of Rome, which established the European Economic Community (EEC), contained little consideration for migration matters. Its main objective was the establishment of the common market and some provisions from Title III on the free movement of workers are sometimes considered the first provisions related to

[5] See chapter 1 section 3.4.

migration in the EEC's history.[6] Given that provisions related to migration remained 'hidden' in this treaty, their scope is highly contested.[7] Still, Guild argues, its provisions declaring the establishment of the free movement of persons carrying out economic activities contributed to the foundation of a common approach to migration matters.[8]

The Single European Act followed the Treaty of Rome in 1986. It contained few developments related to migration and asylum derived from the objective to establish the common market by the end of 1992.[9] This period is, however, key in the development of a common and harmonised policy on migration and asylum.[10] Indeed, it became clear to member states that in order to achieve the creation of a common market 'without internal frontiers',[11] the abolition of border controls between member states could not be limited to citizens of EEC countries and should therefore apply to everyone. Member states also started considering the need for common stricter standards for external border controls to achieve the common market objective.[12] Meeting in Brussels in April 1987, Justice and Interior Ministers of the European Community declared that reducing and abolishing internal border controls 'must be accompanied by, and depends on, a strengthening of controls at the external borders'.[13]

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[6] Treaty Establishing the European Economic Community [1957] art 48.
[7] Georgia Papagianni, *Institutional and Policy Dynamics of EU Migration Law* (Martinus Nijhoff 2006) 4.
[8] Elspeth Guild, 'Discretion, Competence and Migration in the European Union' (1999) 1(1) European Journal of Migration and Law 61.
[9] Single European Act [1987] OJ L169/1 art 13.
[10] Dallal Stevens, 'The Humaneness of EU Asylum Law and Policy' in Nuno Ferreira and Dora Kostakopoulou (eds), *The Human Face of the European Union; Are EU Law and Policy Humane Enough?* (Cambridge University Press 2016) 242.
[11] Single European Act [1987] OJ L169/1 art 13.
[12] Papagianni, *Institutional and Policy Dynamics* (n 7) 13; Stevens, 'The Humaneness of EU Asylum Law and Policy' (n 10) 242.
[13] Declaration of the Belgian Presidency: Meeting of Justice and Interior Ministers of the European Community in Brussels, on 28 April 1987 in Tony Bunyan, *Key Texts on Justice and Home Affairs in the European Union, 1976-1993* (Statewatch, 1997) 10.

Similar arguments were used for the creation of the Schengen Area, another example of intergovernmental cooperation. The 1985 Schengen Agreement emerged outside the EEC structure,[14] and initially involved the Benelux countries, France and Germany only.[15] Yet it acted in complement to the EEC's aim of establishing the free movement of persons,[16] as it foresaw, for instance, that member states should 'approximate their visa policies as soon as possible in order to avoid the adverse consequences in the field of immigration and security that may result from easing checks at the common borders'.[17] It also emphasised that abolishing checks at internal borders and transferring them to external ones required states 'to harmonise […] the laws, regulations and administrative provisions concerning the prohibitions and restrictions on which the checks are based and to take complementary measures to safeguard internal security and prevent illegal immigration'.[18] The Schengen Agreement was later specified by the Convention Implementing the Schengen Agreement, which contained outlines of the visa policy, particularly short-stay visas.[19]

Thus, although asylum and migration were not initially considered an EEC competence, cooperation in these domains was soon recognised as essential to create the common market and was developed in parallel to the construction of the European Communities.

[14] James Hampshire, 'European Migration Governance Since the Lisbon Treaty: Introduction to the Special Issue' (2016) 42(4) Journal of Ethnic and Migration Studies 537, 538.
[15] Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders [2000] OJ L239/13.
[16] Papagianni, *Institutional and Policy Dynamics* (n 7) 14.
[17] Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the Gradual Abolition of Checks at their Common Borders [2000] OJ L239/13 art 7.
[18] ibid art 17.
[19] Convention Implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the Gradual Abolition of Checks at their Common Borders [2000] OJ L239/19 art 9-17.

The lack of a legal framework for the EEC to act in this domain means member states' interior ministers started cooperating on an ad hoc basis at the intergovernmental level.[20] Discussions on migration-related cooperation began in the 1980s within the Trevi Group. This ad hoc group, initiated by the 1975 European Council in Rome[21] and lasting until 1988,[22] initially focused on developing member states' cooperation on the fight against terrorism before its scope was extended to asylum and immigration in 1980.[23] Alongside, an ad hoc group on immigration was created in 1986 and worked on relevant areas such as asylum, external borders, admission, or deportation, among others.[24] The original intergovernmental cooperation thus remained opaque and informal. This cooperation led to the adoption of a certain number of 'soft law' measures in the area of immigration and asylum, such as the Palma Document fixing for the first time a coordinated programme on immigration and asylum.[25] Other acts taken by interior ministers during this period include the Dublin Convention and acts about its implementation,[26] conclusions concerning countries where there is generally no serious risk of persecution,[27] a resolution on a harmonised approach to host third countries,[28] a resolution on manifestly unfounded asylum applications,[29] and a

[20] Nadine El-Enany, 'EU Asylum and Immigration Law under the Area of Freedom, Security, and Justice' in Anthony Arnull and Damian Chalmers (eds), *The Oxford Handbook of European Union Law* (Oxford University Press 2015) 870; Hampshire, 'European Migration Governance Since the Lisbon Treaty' (n 14) 537.
[21] European Council, 'Rome, 1-2 December 1975' (Bull. EC 11-1975) 9.
[22] Tony Bunyan, 'Trevi, Europol and the European State' in Tony Bunyan (ed), *Statewatching the New Europe: A Handbook on the European State* (Statewatch 1993) 1.
[23] Elspeth Guild, 'Competence, Discretion and Third Country Nationals: The European Union's Legal Struggle with Migration' (1998) 24(4) Journal of Ethnic and Migration Studies 613, 622.
[24] ibid, 622.
[25] 'The Palma Document' Free Movement of Persons. A Report to the European Council by the Coordinators' Group (Madrid, June 1989) in Tony Bunyan, *Key Texts on Justice and Home Affairs in the European Union, 1976-1993* (Statewatch, 1997) 12-16.
[26] Convention Determining the State Responsible for Examining Applications for Asylum Lodged in one of the Member States of the European Communities [1997] OJ C254/1;
[27] Conclusions on Countries in Which There is Generally No Serious Risk of Persecution (London Resolution), 30 November 1992 <https://www.refworld.org/docid/3f86c6ee4.html> accessed 3 September 2021.
[28] 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/docid/3f86c3094.html> accessed 3 September 2021.
[29] Council Resolution of 30 November 1992 on Manifestly Unfounded Applications for Asylum (London Resolution) 30 November 1992 <https://www.refworld.org/docid/3f86bbcc4.html> accessed 3 September 2021.

recommendation on member states' removal practices.[30] The Maastricht Treaty later formalised the informal cooperation developed within the Trevi Group and the ad hoc group on immigration and asylum in 1993 by integrating 'asylum policy' and 'immigration policy' as 'matters of common interest'.[31] The so-called 'Trevi acquis' was thus directly incorporated into the *acquis communautaire*.[32] Moreover, it had a long-lasting impact on the EU migration and asylum law system, since the Dublin system for instance remains a key element allocating asylum applications within the EU today,[33] as I will further discuss in chapter 3.

Following the Maastricht Treaty in 1992, the European Community's (EC) activity in migration and asylum increased. For the first time, the Maastricht Treaty formalised intergovernmental cooperation, which member states previously developed independently,[34] by setting cooperation in Justice and Home Affairs under the Third Pillar.[35] This provided clarity with regards to the EC's competence and its institutional framework. Creating a legal basis for the development of the common asylum and migration policy set a more formal institutional structure for member states to negotiate with each other.[36] However, except for Schengen visas dealt with as Community competence under the First Pillar,[37] asylum and migration remained essentially driven

[30] Draft Recommendation Regarding Practices Followed by Member States on Expulsion, Adopted in London, 30 November and 1 December 1992 <https://www.statewatch.org/media/documents/e-library/trevi-asylum-19immres.pdf> accessed 6 September 2021.
[31] Treaty on European Union (Maastricht Treaty) [1992] art K.1(1) and (3).
[32] Tony Bunyan, *Key Texts on Justice and Home Affairs in the European Union: 1976-1993* (Statewatch 1997) 25.
[33] 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) [2013] OJ L180/31.
[34] Ryszard Cholewinski, 'The EU Acquis on Irregular Migration Ten Years On: Still Reinforcing Security at the Expense of Rights?' in Elspeth Guild and Paul Minderhoud (eds), *The First Decade of EU Migration and Asylum Law* (Martinus Nijhoff Publishers 2011) 131.
[35] Sergio Carrera, 'The 20 Years Anniversary of the Tampere Programme: Securitization, Intergovernmentalism and Informalization' (2020) 27(1) Maastricht Journal of European and Comparative Law 3, 4.
[36] Guild, 'Discretion, Competence and Migration' (n 8) 83.
[37] Treaty on European Union (Maastricht Treaty) [1992] art G(23).

by intergovernmentalism and nationalism,[38] thus maintaining the domination of member states' discretion in the post-Maastricht cooperation.[39] Although harmonisation of asylum and migration started developing among member states,[40] it remained marked by a lack of democratic and judicial control by the European Parliament and the European Court of Justice (ECJ) due to its intergovernmental nature.[41] This furthered the precedent of informal cooperation on migration and asylum matters.

Thus, the Maastricht Treaty started to formalise member states' cooperation but the harmonised migration and asylum policy remained excluded from democratic scrutiny. The informal decision process and lack of democratic scrutiny in migration and asylum affairs do not appear to have emerged as a result of the 'crisis' framing used in 2015 and its associated need for rapid decision-making, as suggested previously.[42] Rather, opaque collaboration was a central element of early cooperation in this field.

1.1.2. The Treaty of Amsterdam: Integrating the legacies from the intergovernmental era

The Treaty of Amsterdam is often considered a turning point in the evolution of the EC asylum and migration policy. Adopted in 1997, it changed the EC's competence when dealing with Third World migrants[43] by moving aspects of EC asylum and migration policy from the Third Pillar – based on intergovernmental cooperation – to the First

[38] Carrera, 'The 20 Years Anniversary of the Tampere Programme' (n 35) 4.
[39] Guild, 'Discretion, Competence and Migration' (n 8) 62.
[40] Joanne van Selm-Thorburn, 'Asylum in the Amsterdam Treaty: A Harmonious Future?' (1998) 24(4) Journal of Ethnic and Migration Studies 627, 630.
[41] Carrera, 'The 20 Years Anniversary of the Tampere Programme' (n 35) 4.
[42] See chapter 1 section 3.4.
[43] Guild, 'Competence, Discretion and Third Country Nationals' (n 23) 614.

Pillar, part of EC competences.[44] This change concerned all areas related to the free movement of persons, especially visas, asylum and migration policies.[45] Within the newly created Title IV, the main mandate of the EC was to establish the Area of Freedom, Security and Justice (AFSJ),[46] which included matters related to migration and asylum. This enabled the EC to be more active and increase its norms in this domain,[47] and led to the creation of the Common European Asylum System (CEAS) under the impetus of the Tampere European Council held in 1999.[48] For this reason, the post-Amsterdam period has considerably increased harmonisation among member states.[49] The Treaty of Amsterdam, for instance, required the adoption of standards and procedures for external border controls, asylum applications and asylum seekers' reception conditions.[50] However, as it did not set any minimum as to what these standards should be, its impact remained limited regarding the rights guaranteed to migrants and asylum seekers,[51] as I will further discuss below.[52] Likewise, the transfer of competences from member states to the intergovernmental level was limited from the beginning, with member states retaining full competence to act on some key aspects, such as long-term visas which expressly remained within member states' prerogatives.[53] This also constitutes a significant legacy from early intergovernmental developments, which my analysis will further discuss below.

[44] Kay Hailbronner, 'The Treaty of Amsterdam and Migration Law' (1999) 1(1) European Journal of Migration and Law 9.
[45] Consolidated Version of The Treaty Establishing the European Community [1997] OJ C340/173 Title IV.
[46] ibid art 61; Alan Desmond, 'The Development of a Common EU Migration Policy and the Rights of Irregular Migrants: A Progress Narrative?' (2016) 16(2) Human Rights Law Review 247, 250.
[47] Seline Trevisanut, 'Which Borders for the EU Immigration Policy? Yardsticks of International Protection for EU Joint Borders Management' in Loïc Azoulai and Karin de Vries (eds), *EU Migration Law: Legal Complexities and Political Rationales* (Oxford University Press 2014) 110.
[48] European Council, 'Tampere European Council - Presidency Conclusions' (15-16 October 1999) para 10; Stevens, 'The Humaneness of EU Asylum Law and Policy' (n 10) 245.
[49] Guild, 'Competence, Discretion and Third Country Nationals' (n 23) 617.
[50] Consolidated Version of The Treaty Establishing The European Community [1997] OJ C340/173 art 62 and 63.
[51] Guild, 'Competence, Discretion and Third Country Nationals' (n 23) 617.
[52] See section 1.3. of this chapter.
[53] Convention Implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of

Still, the Treaty of Amsterdam significantly influenced EU migration law due to its protocol integrating the Schengen *acquis* into Community law.[54] The creation of the Schengen Area, discussed earlier,[55] constitutes a key development for the common migration and asylum policy. By the Treaty of Amsterdam's entry into force 'almost all aspects of visa policy had been harmonised',[56] the integration of the Schengen *acquis* into EC law therefore constituted a significant development towards a common migration and asylum policy. This demonstrates Schengen's, and more broadly, intergovernmental cooperation's significant influence on the development of EU migration and asylum policy. After being integrated into community law by Amsterdam, the Schengen *acquis* led to the adoption of the Schengen Borders Code in 2006, later modified in 2016.[57] The legacy of the intergovernmental Schengen Agreement from 1985 remains extremely significant for current EU migration law and constitutes an exemplification of the long-lasting influence of initial intergovernmental cooperation on migration and asylum. It shows that informal decision-making in asylum and migration do not result from a 'crisis' frame, as previously suggested.[58] As my analysis suggests, the Treaty of Amsterdam set a precedent in the EU asylum and migration law system by which norms adopted through opaque procedures can be formalised into EU law.

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the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders [2000] OJ L239/19 art 18.

[54] Protocol Integrating the Schengen *Acquis* Into the Framework of the European Union [1997] OJ C340/93; Desmond, 'The Development of a Common EU Migration Policy' (n 46) 249.

[55] See section 1.1.1. of this chapter.

[56] Bernd Martenczuk, 'Migration Policy and EU External Relations' in Loïc Azoulai and Karin de Vries (eds), *EU Migration Law: Legal Complexities and Political Rationales* (Oxford University Press 2014) 71.

[57] Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the Rules Governing the Movement of Persons Across Borders (Schengen Borders Code) (codification) [2016] OJ L77/1.

[58] See chapter 1 section 3.4.

1.1.3. The Lisbon Treaty: Deepening the democratic scrutiny on EU migration and asylum policy?

The 2008 Lisbon Treaty is the most recent development in terms of EU institutions' competences and procedures. It brought significant changes in institutional and legislative procedures of particular importance for EU migration and asylum policy-making.[59] Indeed, migration and asylum policies are now entirely subject to the ordinary legislative procedure.[60] This means that the European Parliament (EP) is a full co-legislator with the Council,[61] and reaches decisions on these matters by qualified-majority voting rather than the previous unanimity voting rule.[62] By modifying the decision-making procedure, the Lisbon Treaty has profoundly changed the institutional dimension of EU migration and asylum policy.[63] It gave more power to the EP and limited member states' power compared with member states' veto power under the previous Council unanimity decisions.[64] In addition to changing legislative powers related to migration and asylum, Lisbon also extended the Court of Justice of the European Union's (CJEU) power in the area by enabling the court to give preliminary rulings on the validity of acts in the AFSJ.[65] This allowed national courts and tribunals to engage directly with the CJEU on urgent matters related to migration and asylum.[66] This made the CJEU the 'first supranational court deciding on matters

[59] Desmond, 'The Development of a Common EU Migration Policy' (n 46) 260.
[60] Consolidated Version of the Treaty on the Functioning of the European Union [2008] OJ C115/47 art 77(2).
[61] Desmond, 'The Development of a Common EU Migration Policy' (n 46) 260.
[62] Hampshire, 'European Migration Governance Since the Lisbon Treaty' (n 14) 537.
[63] Steve Peers, 'Legislative Update: EU Immigration and Asylum Competence and Decision-Making in the Treaty of Lisbon' (2008) 10(2) European Journal of Migration and Law 219; Hampshire, 'European Migration Governance Since the Lisbon Treaty' (n 14) 543.
[64] Helen Toner, 'The Lisbon Treaty and the Future of European Immigration and Asylum Law' in Loïc Azoulai and Karin de Vries (eds), *EU Migration Law: Legal Complexities and Political Rationales* (Oxford University Press 2014) 15.
[65] Desmond, 'The Development of a Common EU Migration Policy' (n 46) 260.
[66] Koen Lenaerts, 'The Contribution of the European Court of Justice to the Area of Freedom, Security and Justice' (2010) 59(2) International and Comparative Law Quarterly 255, 265.

of asylum and refugee law'.[67] By giving the CJEU full jurisdiction over the AFSJ, the Lisbon Treaty aimed at fully applying EU democratic standards to migration and asylum matters.[68] This, in itself, is a significant move towards more certainty and consistency among member states in the application of legal principles related to migration and asylum, as Stevens argues.[69] Finally, the Lisbon Treaty made the Charter of Fundamental Rights of the European Union (EUCFR) legally binding and gave it the 'same legal value as the Treaties'.[70] Therefore, secondary legislation must now comply with the Charter.[71] This development provided more guarantees for migrants' human rights because the Charter recognised a number of immigration-related rights which were not recognised before[72] - such as the right to asylum[73] or the right to social security for instance[74] – and most of the rights it contains apply to so-called 'irregular' migrants as well.[75] For these reasons, the Lisbon Treaty was seen as a positive step in the evolution of EU migration and asylum law due to the assumption that more integration at the EU level would lead to more liberal and favourable policies for migrants.[76] That is why the Lisbon Treaty was expected to develop human rights considerations in the EU's approach to migration and asylum.

Yet, it is essential to note here that competence in the AFSJ remains shared with member states.[77] The Lisbon Treaty has thus not completely deprived member states

[67] Stevens, 'The Humaneness of EU Asylum Law and Policy' (n 10) 255.
[68] Carrera, 'The 20 Years Anniversary of the Tampere Programme' (n 35) 4.
[69] Stevens, 'The Humaneness of EU Asylum Law and Policy' (n 10) 255.
[70] Consolidated Version of the Treaty on the European Union [2008] OJ C115/13 art 6(1).
[71] Maria-Teresa Gil-Bazo, 'The Charter of Fundamental Rights of the European Union and the Right to be Granted Asylum in the Union's Law' (2008) 27(3) Refugee Survey Quarterly 33, 34.
[72] Steve Peers, 'Immigration, Asylum and the European Union Charter of Fundamental Rights' in Elspeth Guild and Paul Minderhoud (eds), *The First Decade of EU Migration and Asylum Law* (Brill 2011) 437, 468.
[73] Charter of Fundamental Rights of the European Union [2012] OJ C326/391 art 18.
[74] ibid art 34.
[75] Desmond, 'The Development of a Common EU Migration Policy' (n 46) 256.
[76] Hampshire, 'European Migration Governance Since the Lisbon Treaty' (n 14) 543.
[77] Consolidated Version of the Treaty on the Functioning of the European Union [2008] OJ C115/47 art 4(2)(j).

of the power to act in this area.[78] And their role persisted since then, as some of the most recent developments analysed in chapter 3 indicate. Moreover, as suggested earlier, member states' influence on migration and asylum remains heavy due to the integration of norms developed during the intergovernmental era into common migration and asylum law.[79] Of particular significance for the developing common asylum and migration policy were member states' own approaches to Third World migration and borders. As explored below, their influence shaped the nascent EU migration and asylum law system with a control-oriented and security-focused line.

1.2. The EU's security-driven approach to developing a common migration and asylum policy

The original EEC objective of achieving the common market derived from the Treaty of Rome[80] – and with it the abolition of obstacles to the free movement of persons –[81] is generally considered the primary driver for further integration of asylum and migration policies at the community level. This is a crucial element of traditional EU and migration law scholarship, often referring to this objective as a 'catalyst' or a 'trigger' of cooperation on asylum and migration.[82]

Discussing the conventional narrative on the spill-over effect of the common market for the development of a common migration and asylum policy, I argue that this perspective needs to be questioned. Going further, my analysis demonstrates that

[78] Martenczuk, 'Migration Policy and EU External Relations' (n 56) 83.
[79] See section 1.1.2. of this chapter.
[80] Treaty Establishing the European Economic Community [1957] art 2.
[81] ibid art 3(c).
[82] Papagianni, *Institutional and Policy Dynamics* (n 7) 265; Loïc Azoulai and Karin de Vries (eds), *EU Migration Law: Legal Complexities and Political Rationales* (Oxford University Press 2014) 2.

rather than the achievement of the common market, what led to the emergence of a common migration and asylum policy is a strong focus on security considerations and control over Third World migration. I, thus, suggest that such focus is a central element of the EU's approach to Third World migration, regardless of whether it is framed as a 'crisis' or not.

1.2.1. Questioning the common market's spill-over effect

EU and migration law scholars generally present the development of EU competences in the field of migration and asylum as resulting mainly from the creation of the common market and of the Schengen Area.[83] They view member states as having been reluctant to transfer competences to the EU in migration and asylum because these domains are traditionally considered part of their sovereign powers and it is generally assumed that the development of free circulation would undermine member states' ability to govern from a classical point of view.[84]

Nonetheless, states' will to create the common market is presented as an incentive to transfer some of these powers to the Community.[85] From this point of view, the abolition of internal borders pushed member states to initiate a common approach towards external borders.[86] As Papagianni explains with regards to the institutional framework of EU migration law before Amsterdam, 'it soon became clear that the

[83] Trevisanut, 'Which Borders for the EU Immigration Policy?' (n 47) 109.
[84] Didier Bigo, 'Criminalisation of "Migrants": The Side Effect of the Will to Control the Frontiers and the Sovereign Illusion' in Barbara Bogusz and others (eds), *Irregular Migration and Human Rights: Theoretical, European and International Perspectives* (Brill 2004) 68.
[85] Virginie Guiraudon, 'European Integration and Migration Policy: Vertical Policy-Making as Venue Shopping' (2000) 38(2) Journal of Common Market Studies 251, 254; Papagianni, *Institutional and Policy Dynamics* (n 7) 13.
[86] Trevisanut, 'Which Borders for the EU Immigration Policy?' (n 47) 109.

privilege of moving freely within the "area without internal frontiers" could not be limited to Community citizens, but should be extended to *all* persons.'[87] This quote summarises well the conventional narrative surrounding the common market which sees the development of the common migration and asylum policy as the result of the so-called 'spill-over' of the common market.[88] From this perspective, the absence of internal border controls and the creation of a free movement area required member states to further deepen the harmonisation of their legislation to facilitate exchanges between them and avoid major discrepancies within the market. This was, for instance, discussed by the Coordinators' Group on the Free Movement of Persons set up informally after the Rhodes European Council in 1988 and composed of a representative per member state responsible for the coordination.[89] In the Palma Document reporting to the European Council in 1989, the Coordinators recommended that to abolish internal border controls 'a set of legal, administrative and technical instruments should be established, as criteria will need to be harmonised on treatment of non-Community citizens'.[90] The Coordinators thus draw attention to harmonising 'the criteria for granting visas', creating 'a common list of persons to be refused entry' and mentioned 'a European visa',[91] among other measures. Similarly, the Schengen Convention, mentioned earlier,[92] contained common conditions of entry into and movement within the Schengen Area for citizens of non-member states,[93] but also included measures targeting so-called 'illegal' migration which were presented by the

[87] Papagianni, *Institutional and Policy Dynamics* (n 7) 13.
[88] Hampshire, 'European Migration Governance Since the Lisbon Treaty' (n 14) 541.
[89] European Council, 'Conclusions of the Presidency Rhodes' (2-3 December 1988) 4.
[90] 'The Palma Document' Free Movement of Persons. A Report to the European Council by the Coordinators' Group (Madrid, June 1989) in Tony Bunyan, *Key Texts on Justice and Home Affairs in the European Union, 1976-1993* (Statewatch, 1997) 13.
[91] ibid.
[92] See section 1.1.2. of this chapter.
[93] Convention Implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the Gradual Abolition of Checks at their Common Borders [2000] OJ L239/19 ch 3 and 4.

Convention itself as ‘accompanying measures’ to the abolition of internal borders.[94] Their conception as ‘accompanying’ signifies that the original intentions were not to include non-EU citizens in the free movement area. In this way, Schengen countries initially conceived of the free movement of persons as primarily aimed at their own nationals.

This contradicts some of the classical understandings of the creation of the common market. Firstly, the consideration of migration and asylum policy as resulting from a ‘spill-over’ from the common market suggests it constituted an unintended consequence which was not originally planned/wished by member states.[95] Secondly, it also suggests a somewhat positive evolution, from which non-EU migrants benefited, something that is also suggested by Papagianni’s quote above, presenting free movement as a ‘privilege […] extended to *all*’.[96] Yet the notion of ‘accompanying’ measures does not necessarily suggest that these were not originally planned and constitute an unintended ‘spill-over’. Indeed, it can be understood as being part of the project from the beginning. The particularly restrictive approach taken in measures related to non-EU migrants also suggests that EU migration and asylum policy is not the result of the common market project’s ‘spill-over’ from which non-EU citizens benefited. Indeed, originally the Schengen Agreement and Convention contained few provisions related to legal migration and rather focused on controlling so-called ‘irregular’ migrants as previously explained. EU law common rules on legal migration channels developed much later, under the impetus of the Treaties of Amsterdam and Lisbon. But these provisions were limited to specific statuses such as students and

[94] ibid ch 6; Papagianni, *Institutional and Policy Dynamics* (n 7) 117.
[95] Guiraudon, ‘European Integration and Migration Policy’ (n 85) 254.
[96] ibid.

researchers,[97] seasonal workers,[98] intra-corporate transfers,[99] or highly skilled migrants.[100] Likewise early cooperation on asylum did not focus on facilitating access to protection but rather on controlling asylum seekers' movement within the free movement area by determining member states' responsibility for the asylum process,[101] as will be further discussed below.[102] The common market being based on free movement, its spilling-over would imply a more liberal approach towards non-EU migrants, rather than a restrictive one. Moreover, the inclusion of a common migration and asylum policy within the common market project would require a certain level of harmonisation. Given its original economic objective, the common market project would presumably lead to more harmonisation on so-called 'economic migration'.[103] Yet, except for some jurisprudential developments from the CJEU guaranteeing more human rights protection for non-EU nationals,[104] most substantial EU migration and asylum law developments have been restrictive. In addition, developments concerning so-called 'economic migrants' are among the most limited ones and constitute an area of EU migration and asylum law where member states retained most power.[105] Thus, the assumption that establishing the common market would lead to more

[97] Directive (EU) 2016/801 of the European Parliament and of the Council of 11 May 2016 on the Conditions of Entry and Residence of Third-Country Nationals for the Purposes of Research, Studies, Training, Voluntary Service, Pupil Exchange Schemes or Educational Projects and Au Pairing [2016] OJ L132/21.
[98] Directive 2014/36/EU of the European Parliament and of the Council of 26 February 2014 on the Conditions of Entry and Stay of Third-Country Nationals for the Purpose of Employment as Seasonal Workers [2014] OJ L94/375.
[99] Directive 2014/66/EU of the European Parliament and of the Council of 15 May 2014 on the Conditions of Entry and Residence of Third-Country Nationals in the Framework of an Intra-Corporate Transfer [2014] OJ L157/1.
[100] Council Directive 2009/50/EC of 25 May 2009 on the Conditions of Entry and Residence of Third-Country Nationals for the Purposes of Highly Qualified Employment [2009] OJ L155/17.
[101] Convention Determining the State Responsible for Examining Applications for Asylum Lodged in one of the Member States of the European Communities [1997] OJ C254/1.
[102] See section 1.3.3. of this chapter.
[103] Hampshire, 'European Migration Governance Since the Lisbon Treaty' (n 14) 541.
[104] See for instance: Case C-127/08 *Metock v Minister for Justice, Equality and Law Reform* [2008] ECR I-6257; see also section 1.3.2. of this chapter.
[105] Elspeth Guild, 'The Legal Framework: Who is Entitled to Move?' in Didier Bigo and Elspeth Guild (eds), *Controlling Frontiers: Free Movement Into and Within Europe* (Ashgate 2005) 22.

harmonisation benefiting Third World 'economic migrants' did not materialise.[106] I suggest that contrary to the general understanding of the evolution of the EU's action in migration and asylum matters, the creation of the common market included the exclusion of non-EU migrants from the beginning. This is confirmed in some early legal provisions related to free movement, as the 1968 Council Regulation set a clear distinction for the free movement of workers between nationals of member states, who benefit from such freedom, and non-nationals who are excluded.[107] This exclusion constituted a basis for the shaping of a security-focused and control-driven approach to Third World migration,[108] which as I discuss below, was an essential driver of asylum and migration law's communitarisation.

1.2.2. The EU's security-driven approach to Third World migration

Although the association between security and asylum or migration is often associated with post 9/11 terror attacks' developments,[109] or with the 2015 so-called 'crisis' as mentioned earlier,[110] the 'migration-security intertwining' emerged long before.[111] With regards to the EU migration and asylum law system, political discourses on the dangers of migration and the need to develop more security measures in response to this 'threat' existed first at national member states' levels before becoming a growing concern at the EU level. The rhetoric of invasion was, for instance, specifically present

[106] Hampshire, 'European Migration Governance Since the Lisbon Treaty' (n 14) 541.
[107] Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on Freedom of Movement for Workers Within the Community [1968] OJ L257/2.
[108] Jef Huysmans, *The Politics of Insecurity: Fear, Migration and Asylum in the EU* (Routledge 2006) 66.
[109] ibid 63.
[110] See chapter 1 section 1.
[111] Catherine Dauvergne, *Making People Illegal: What Globalization Means for Migration and Law* (Cambridge University Press 2008) 95.

in Western European countries following the end of the Cold War and developed the fear that the dislocation of the Eastern Block would lead to important immigration from Eastern European countries.[112] Security concerns were later used to refer to the risk of invasion for First World countries facing the arrival of poor migrants from the Third World.[113] Thus, as Moreno-Lax explains, the EU's focus on security throughout the development of its asylum and migration policy is a result of the prevailing vision of Justice and Home Affairs ministers during the intergovernmental period up to the Treaty of Amsterdam.[114]

A security approach towards immigration is evident in its frequent association with criminal activities. Although much research has proven the absence of any causal link between immigration status or poverty and criminal activities,[115] political discourses frequently link migration with crime rates to justify the need to reinforce control and adopt stricter policies towards migrants.[116]

In the EU policy sphere, such security-oriented approach and association with criminal activities is noticeable in the early days of the common migration policy. Let us go back to some developments of the intergovernmental period mentioned earlier.[117] The Trevi Group, for instance, was discussing 'how to further intensify cooperation on the fight against terrorism, illegal immigration and drug trafficking'.[118] This shows how early cooperation linked migration with criminal activities. The creation of the Schengen

[112] Didier Bigo, 'Sécurité et Immigration: Vers une Gouvernementalité par L'Inquiétude ?' (1998) (31-32) Cultures & Conflits 13.
[113] Marc Bernardot, 'Invasions, Subversions, Contaminations' (2011) 84(4) Cultures & Conflits 45, 48.
[114] Violeta Moreno Lax, *Accessing Asylum in Europe: Extraterritorial Border Controls and Refugee Rights Under EU Law* (Oxford University Press 2017) 19.
[115] Bigo, 'Sécurité et Immigration' (n 112) 13.
[116] Anastassia Tsoukala, 'Looking at Migrants as Enemies' in Didier Bigo and Elspeth Guild (eds), *Controlling Frontiers: Free Movement Into and Within Europe* (Ashgate 2005) 170.
[117] See section 1.1.1. of this chapter.
[118] Declaration of the Belgian Presidency: Meeting of Justice and Interior Ministers of the European Community in Brussels, on 28 April 1987 in Tony Bunyan, *Key Texts on Justice and Home Affairs in the European Union, 1976-1993* (Statewatch, 1997) 10.

Area is also a particular example of the role of security considerations when developing a common approach to migration. The abolition of internal border controls rapidly supported calls for so-called 'flanking' measures given the 'security deficit' that resulted from the free movement of persons between member states.[119] As Bigo explains, removing border controls led to the fear of 'a *sieve* Europe' enabling criminals and immigrants to move freely.[120] Indeed, the absence of internal borders and the facilitation of goods', capitals', services' and people's movement was seen as a threat to 'public order and the rule of law'.[121] More specifically, the free movement of persons was considered the most problematic,[122] since it was expected this would 'facilitate illegal and criminal activities'.[123] This linkage between the abolition of border controls and growing security threats was so successful that it 'obtained the status of common sense', Huysmans argues.[124] In this way, central to the development of the Schengen Area was a vision of migration as a 'security issue'.[125] Indeed, the Schengen Agreement stresses the need to 'ensure the protection of the entire territory of the five States against illegal immigration and activities which could jeopardise security'[126] and requires member states' to take measures to maintain internal security by restricting so-called 'irregular' migration,[127] as explained earlier. Going further, the 1990 Convention implementing the Schengen Agreement included the creation of the

[119] Papagianni, *Institutional and Policy Dynamics* (n 7) 13; Azoulai and de Vries (eds), *EU Migration Law* (n 82) 2.
[120] Bigo, 'Criminalisation of "Migrants": The Side Effect' (n 84) 74.
[121] Huysmans, *The Politics of Insecurity* (n 108) 69.
[122] Desmond Dinan, *Ever Closer Union: An Introduction to European Integration* (4th edn, Palgrave Macmillian 2010) 530.
[123] Huysmans, *The Politics of Insecurity* (n 108) 70-71.
[124] ibid 69.
[125] Papagianni, *Institutional and Policy Dynamics* (n 7) 16.
[126] Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the Gradual Abolition of Checks at their Common Borders [2000] OJ L239/13 art 7.
[127] ibid art 17.

Schengen Information System (SIS),[128] a joint information system aimed at providing contracting parties with alerts on persons and property.[129] In practice, this database is used by EU member states to conduct migration and border controls.[130] But it also gathers data on migrants who were refused entry into the EU and on 'persons summoned to appear before the judicial authorities in connection with criminal proceedings in order to account for acts for which they are being prosecuted'.[131] Further, the SIS provides for the exchange of 'data on aliens for whom an alert has been issued',[132] which can be due to the Third World migrant having committed or being suspected of having committed a criminal offence, or being subject to deportation or refusal of entry or removal.[133] These two examples show that the SIS conflates two particularly distinct elements into one system and associates migration with criminal activities. As Papagianni explains, the SIS is a 'special database on undesirable persons'.[134] In this way, the developing EU migration and asylum law was heavily influenced by the rhetorical representation of Third World migrants as threats to security and public order.[135] Following the creation of the Schengen Area and the Treaty of Amsterdam, the Schengen *acquis* was fully integrated into EU law as explained earlier.[136] The European Council held in Tampere in 1999 further stressed that candidates to join the EC 'must accept in full [the Schengen *acquis*]'.[137] The

[128] Convention Implementing the Schengen Agreement of 14 June 1985 Between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the Gradual Abolition of Checks at their Common Borders [2000] OJ L239/19 art 92.
[129] ibid art 92(1).
[130] Joanna Parkin, 'The Difficult Road to the Schengen Information System II: The Legacy of "Laboratoires" and the Cost for Fundamental Rights and the Rule of Law' (CEPS Paper in Liberty and Security in Europe, April 2011).
[131] Convention Implementing the Schengen Agreement of 14 June 1985 Between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the Gradual Abolition of Checks at their Common Borders [2000] OJ L239/19 art 96(1) and 98(1).
[132] ibid art 96.
[133] ibid art 96(2) and 96(3).
[134] Papagianni, *Institutional and Policy Dynamics* (n 7) 118.
[135] Tsoukala, 'Looking at Migrants as Enemies' (n 116) 162.
[136] See section 1.1.2. of this chapter.
[137] European Council, 'Tampere European Council - Presidency Conclusions' (15-16 October 1999) para 25.

security-oriented approach to migration originally developed by Schengen states, has thus been formalised and fully integrated into the EU asylum and migration law system and expanded to new EU member states.

Another element reflecting the security-oriented nature of the EU's approach towards Third World migrants derives from the conception of Third World migrants as threatening the EU's socio-economic environment. This rhetoric comes from the supposed link between immigration and increasing unemployment levels or welfare state issues in Western Europe.[138] The emergence of such a position towards migration at the EU level results from the early influence of member states' priorities. Although following the second world war Western Europe's migration policies were marked by their 'permissive or even promotional' nature,[139] rising unemployment levels in the 1970s meant immigrants were increasingly seen as competitors to nationals on the job market and as illegitimate recipients of increasingly scarce welfare provisions.[140] Since the 1970s, Western European states therefore took a restrictive approach towards so-called 'economic migration' by tightening labour immigration rules.[141] This conception of migration was transferred to the EU level during the intergovernmental period and retained its influence on the following developments in the common policy. Here the origins of the common market were also relevant for the conceptualisation of Third World migrants. As Moreno-Lax argues, due to their movement to and within the internal market and the potential security threats they are considered to cause, they were conceived as liabilities for the abolition of internal borders.[142] The economic origins of the free movement area, in particular, are

[138] ibid 163.
[139] Huysmans, *The Politics of Insecurity* (n 108) 65.
[140] ibid 77.
[141] Christina Boswell, 'The Politics of Irregular Migration' in Loïc Azoulai and Karin de Vries (eds), *EU Migration Law: Legal Complexities and Political Rationales* (Oxford University Press 2014) 43.
[142] Moreno Lax, *Accessing Asylum in Europe* (n 114) 19.

significant in the EU's framing of undesirable migrants, as non-EU migrants' possibility to enter the EU territory depends heavily on their economic situation.[143] Security-driven considerations regarding the impact of Third World migration on the EU's socio-economic situation are directly reflected in the limited legal channels developed in the common migration and asylum law system.[144] Member states were keen to retain their competences on legal immigration, therefore there is not 'a coherent and comprehensive EU immigration law' but rather common rules related to specific categories of migrants.[145] As mentioned earlier, post-Lisbon directives target particular social classes among Third World immigrants focusing on highly-skilled migrants,[146] on immigration taking place within intra-corporate transfers,[147] or on students and researchers,[148] for instance. By selecting only 'the most qualified' migrants, EU migration law aims to exclude migrants who are less socio-economically fortunate. Reflecting this conception that migrants are linked to socio-economic problems in their host states, the developing EU migration and asylum law system was framed in such a way as to exclude the potentially most 'problematic' migrants from reaching legally its territory.

Overall, the development of common asylum and migration law reflects the EU's focus on migration as a security issue.[149] Whether due to its supposed link with criminal activities or to its supposed connection to socio-economic problems, Third World

[143] Bigo, 'Criminalisation of "Migrants": The Side Effect' (n 84) 61, 63; Guild, 'The Legal Framework' (n 105) 41.
[144] See sections 1.3.2. and 1.3.3. of this chapter for further discussion on limited legal migration channels.
[145] El-Enany, 'EU Asylum and Immigration Law' (n 20) 880.
[146] Council Directive 2009/50/EC of 25 May 2009 on the Conditions of Entry and Residence of Third-Country Nationals for the Purposes of Highly Qualified Employment [2009] OJ L155/17.
[147] Directive 2014/66/EU of the European Parliament and of the Council of 15 May 2014 on the Conditions of Entry and Residence of Third-Country Nationals in the Framework of an Intra-Corporate Transfer [2014] OJ L157/1.
[148] Directive (EU) 2016/801 of the European Parliament and of the Council of 11 May 2016 on the Conditions of Entry and Residence of Third-Country Nationals for the Purposes of Research, Studies, Training, Voluntary Service, Pupil Exchange Schemes or Educational Projects and Au Pairing [2016] OJ L132/21.
[149] Desmond, 'The Development of a Common EU Migration Policy' (n 46) 248.

migration is conceived by EU law as needing to be controlled. The role of the notion of security in shaping the common migration and asylum policy suggests that the primary objective might not be purely to achieve the common market but that the common policy on asylum and migration was instead developed to enhance the control over Third World migrants. In this way, the EU's security concerns related to migration do not appear to result from 2015's supposedly 'exceptional' situation, despite what the 'crisis' frame suggests.[150] Rather my analysis shows that at a time when numbers of so-called 'irregular' arrivals of Third World migrants were far below those of 2015, immigration from outside Europe was already considered as a threat to member states' and the EU's public security and socio-economic stability and justified restrictive measures. Contrary to what chapter 1 suggested, a 'crisis' frame therefore does not seem appropriate to provide a full understanding of the EU's security-driven and control-focused approach to Third World migration.

1.3. The EU's focus on Third World migrants' 'illegality'

Analysing the EU's approach to Third World migrants shows a constant focus on their 'illegal' status. Although concerns regarding so-called 'irregular' migrants initially emerged at member states' level, they soon became a focal point of the emerging common migration and asylum law system to such an extent that Third World migrants are mainly conceived through the lens of 'illegality'. The illegalisation of Third World migrants observed in asylum and migration policies constitutes a form of othering, in the sense discussed in chapter 1.[151] It maintains a differentiation between 'us',

[150] See chapter 1 section 3.2.
[151] See chapter 1 section 3.3.

European citizens who are able and encouraged to move within the EU, and 'them', the Third World migrants and asylum seekers whose access to the EU is heavily restricted. This suggests that Third World migrants' othering does not result from the 2015 'crisis' framing but is a long-lasting legacy in the EU.

1.3.1. Third World migrants' 'illegality': A member states' concern transferred to the intergovernmental level

As discussed previously, the establishment of the Schengen Area and the abolition of internal borders in early 1990s created the fear of a 'sieve' Europe and of member states losing control over migration. In other words, the free movement area was framed as enabling further 'illegal' migration to the continent.

Yet, this conception of 'illegal' migration as 'newly' emerging from or being furthered by the creation of the free movement area contrasts with Western European countries' long-lasting concerns towards this type of migration. Emerging anxiety towards so-called 'illegal' migration predates the emergence of the common policy. The notion of 'illegal' immigration and related concepts such as 'clandestine' migration emerged within nation states in the 1920s-1930s.[152] National concerns regarding 'illegal' immigrants later became much more present in the 1970s, as European countries started limiting legal labour migration routes following the oil crisis.[153] These concerns were then transferred to the supranational level by interior ministers during the

[152] Franck Düvell, 'Clandestine Migration in Europe' (2008) 47(4) Social Science Information 479, 480; Franck Düvell, 'Paths into Irregularity: The Legal and Political Construction of Irregular Migration' (2011) 13(3) European Journal of Migration and Law 275, 278.
[153] Ryszard Cholewinski, 'European Union Policy on Irregular Migration: Human Rights Lost?' in Barbara Bogusz and others (eds), *Irregular Migration and Human Rights: Theoretical, European, and International Perspectives* (Martinus Nijhoff 2004) 160; Boswell, 'The Politics of Irregular Migration' (n 141) 43.

intergovernmental period and furthered from the 1990s as the EC formalised its action in the field of migration. When discussing the establishment of the internal market, the Coordinators' Group on the Free Movement on Persons declared measures 'combating illegal immigration networks' as essential.[154] Now, EU policy on so-called 'illegal' migration is seen by some scholars such as Boswell as 'one of the most developed areas of cooperation'.[155] So-called 'irregular' border crossings were also central in the characterisation of the 2015 'crisis' as I discussed previously.[156] Still, it would be inaccurate to argue, as some authors such as Cholewinski do, that so-called 'irregular' migration was 'once again […] high on the political agenda of EU policy makers and Member States governments' in the early 2000s,[157] nor was it the case in 2015. Rather, it was and remained a consistent, central concern of the political agenda at the EU level since the inception of the common migration and asylum policy.

Although highly influential,[158] the creation of the Schengen Area in the early 1990s is not the only trigger of the EU agenda's focus on 'illegal' immigration.[159] The Commission issued proposals targeting 'illegal' migration already in the 1970s,[160] including, for instance, the proposed Action Programme in favour of migrant workers in 1974[161] and the proposal Directive on the harmonisation of member states' laws fighting 'illegal' migration in 1976.[162] The following intergovernmental period is marked by the adoption of soft law measures, which in the case of so-called 'illegal' migration

[154] 'The Palma Document' Free Movement of Persons. A Report to the European Council by the Coordinators' Group (Madrid, June 1989) in Tony Bunyan, *Key Texts on Justice and Home Affairs in the European Union, 1976-1993* (Statewatch 1997) 12.
[155] Boswell, 'The Politics of Irregular Migration' (n 141) 59.
[156] See chapter 1 section 1.
[157] Cholewinski, 'European Union Policy on Irregular Migration' (n 153) 160.
[158] Papagianni, *Institutional and Policy Dynamics* (n 7) 13.
[159] See section 1.2.2. of this chapter.
[160] Cholewinski, 'European Union Policy on Irregular Migration' (n 153) 164.
[161] Commission, 'Action Programme in Favour of Migrant Workers and their Families' COM(74) 2250 <http://aei.pitt.edu/1278/1/action_migrant_workers_COM_74_2250.pdf> accessed 25 August 2021.
[162] Commission Proposal for a Council Directive on the Harmonisation of Laws in the Member States to Combat Illegal Migration and Illegal Employment [1976] OJ C277/2.

focused on carrier sanctions and the facilitation of irregular entry and residence.[163] As mentioned earlier, the Schengen countries stressed the necessity to take measures to combat so-called 'illegal' migration,[164] and included carriers' sanction to prevent so-called 'irregular' migrants from reaching their territory by imposing fines on transporters who carry migrants without authorisation to enter the EU,[165] and provisions to facilitate 'irregular' migrants' removal to third countries.[166] The Treaty of Amsterdam later led to the development of a more formal legal arsenal against 'illegal' migration. Indeed, the Vienna Action Plan on the implementation of the Treaty of Amsterdam's provisions in the AFSJ pointed the reliance on 'soft law' measures related to migration as one of the weaknesses of the pre-Amsterdam era due to their lack of binding effects and limited monitoring.[167] The Action Plan stressed the need to use community instruments to address these shortcomings, in priority with regards to so-called 'illegal' migrants.[168] To structure the so-called Schengen *acquis*, post-Amsterdam developments included the directives on carrier sanctions,[169] the facilitation of unauthorised entry, transit and residence,[170] return[171] and employers' sanctions.[172] By doing so, the EC formalised the intergovernmental developments and

[163] Benedita Menezes Queiroz, *Illegally Staying in the EU: An Analysis of Illegality in EU Migration Law* (Hart Publishing 2018) 26.
[164] Agreement Between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the Gradual Abolition of Checks at their Common Borders [2000] OJ L239/13 art 17.
[165] Convention Implementing the Schengen Agreement of 14 June 1985 Between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the Gradual Abolition of Checks at their Common Borders [2000] OJ L239/19 art 26(1) and (2).
[166] ibid art 23(3).
[167] Action Plan of the Council and the Commission on how Best to Implement the Provisions of the Treaty of Amsterdam on an Area of Freedom, Security and Justice [1999] OJ C19/1 para 8.
[168] ibid.
[169] Council Directive 2001/51/EC of 28 June 2001 Supplementing the Provisions of Article 26 of the Convention Implementing the Schengen Agreement of 14 June 1985 [2001] OJ L187/45.
[170] Council Directive 2002/90/EC of 28 November 2002 Defining the Facilitation of Unauthorised Entry, Transit and Residence [2002] OJ L328/17.
[171] Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on Common Standards and Procedures in Member States for Returning Illegally Staying Third-Country Nationals [2008] OJ L348/98.
[172] Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 Providing for Minimum Standards on Sanctions and Measures Against Employers of Illegally Staying Third-Country Nationals [2009] OJ

therefore fully integrated member states' early concerns towards 'irregular' migration into the EU migration and asylum law arsenal.

Following Lisbon, the focus on the so-called 'fight against illegal immigration' remained central in the EU's approach to migration. The Stockholm Programme setting the agenda on migration for 2010-2014 for instance specified that 'the European Council is convinced that effective action against illegal immigration remains essential when developing a common immigration policy'.[173] Overall, concerns about 'illegal' migration have been part of the EU's approach to Third World migrants since the inception of the common policy on migration and asylum under the influence of member states' concerns. It constitutes, therefore, a powerful element shaping the EU's policy on migration towards restricting legal migration channels for Third World migrants.

1.3.2. EU migration law developments: Limiting legal opportunities for Third World immigrants

Following the communitarisation initiated by the Treaty of Amsterdam, the EU progressively developed standards on the entry and residence of non-EU migrants, which later composed the EU migration *acquis*. Despite these newly developed standards, legal immigration opportunities for Third World migrants remained limited. In this section, I specifically analyse the establishment of the EU Blue Card and the developments on family reunification for non-EU family members of EU citizens. Both constitute illustrations of post-Amsterdam significant developments providing legal

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[173] Council of the European Union, 'The Stockholm Programme - An Open and Secure Europe Serving and Protecting the Citizens' (2009) 17024/09 para 6.1.6.

immigration opportunities for Third World migrants. However, I argue that such developments are intrinsically limited and show that the establishment of common standards on entry and residence of Third World migrant was conceived in a restricted manner.

Although the authorisation of entry and residence for non-EU citizens remained essentially within member states' competences, some legal provisions developed by the EU post-Amsterdam provided rights to enter or reside for third country nationals. This results from the previously mentioned directives on students and researchers,[174] seasonal workers,[175] or migrant workers in the context of intra-corporate transfers,[176] and from the CJEU jurisprudence proclaiming that member states' authorities must accord a right to enter where EU law lists clear admission criteria exhaustively.[177]

Additionally, EU migration law particularly targeted highly skilled migrants with the creation of an EU Blue Card.[178] Although member states retain their discretion when issuing a Blue Card, holders of this status receive more guarantees than with other migration statuses. For instance, this Directive provides rather extensive rights to equal treatment with nationals, as a Blue Card holder may progressively access the labour market of that member state.[179] Similarly, Blue Card holders benefit from fewer restrictions in terms of family reunification than the Family Reunification Directive

[174] Directive (EU) 2016/801 of the European Parliament and of the Council of 11 May 2016 on the Conditions of Entry and Residence of Third-Country Nationals for the Purposes of Research, Studies, Training, Voluntary Service, Pupil Exchange Schemes or Educational Projects and Au Pairing [2016] OJ L132/21.
[175] Directive 2014/36/EU of the European Parliament and of the Council of 26 February 2014 on the Conditions of Entry and Stay of Third-Country Nationals for the Purpose of Employment as Seasonal Workers [2014] OJ L94/375.
[176] Directive 2014/66/EU of the European Parliament and of the Council of 15 May 2014 on the Conditions of Entry and Residence of Third-Country Nationals in the Framework of an Intra-Corporate Transfer [2014] OJ L157/1.
[177] Case C-491/13 *Ben Alaya* [2014] OJ C344/82; see also: Cathryn Costello, *The Human Rights of Migrants and Refugees in European Law* (Oxford University Press 2015) 87.
[178] Council Directive 2009/50/EC of 25 May 2009 on the Conditions of Entry and Residence of Third-Country Nationals for the Purposes of Highly Qualified Employment [2009] OJ L155/17.
[179] Costello, *The Human Rights of Migrants and Refugees* (n 177) 87.

would normally require: for instance, they are not required to show they have 'reasonable prospects of obtaining the right of permanent residency' nor that they have reached 'a minimum period of residency' to obtain family reunification.[180] This privileged status contrasts with other statuses, such as seasonal workers, which does not include specific family reunification provisions.[181] This directive thus provides a secure migration status, but only to a particular category of migrants.

Family members benefit from a special status under EU migration law as well. In EU law, family reunification of EU citizens' non-EU family members has a relatively long history and has progressively developed into a right. This evolution derived from the Citizenship Directive and the CJEU's interpretation of the latter.[182] Indeed, family reunification was initially conceived through the spectrum of free movement of EU citizens. When EU migrant workers exercised their right to move to another EU country for work purposes, non-EU family members were allowed to follow them.[183] According to the CJEU, refusing family reunification in these cross-border circumstances would prevent EU citizens from leading a normal family life in their host member state and thus would constitute a barrier to EU citizens' right to free movement as guaranteed by EU treaties.[184] In this way, the CJEU created a right to enter the EU territory for non-EU family members, derived from its interpretation of the Citizenship Directive. In *Metock*, the CJEU went further and recognised member states' obligation to allow

[180] Council Directive 2009/50/EC of 25 May 2009 on the Conditions of Entry and Residence of Third-Country Nationals for the Purposes of Highly Qualified Employment [2009] OJ L155/17 art 15.
[181] Costello, *The Human Rights of Migrants and Refugees* (n 177) 131.
[182] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the Right of Citizens of the Union and Their Family Members to Move and Reside Freely Within the Territory of the Member States Amending Regulation (EEC) No 1612/68 and Repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC 2004 OJ L158/77 (Citizenship Directive); Case C-370-90 *Surinder Singh* [1992] ECR I-4288; Case C-127/08 *Metock v Minister for Justice, Equality and Law Reform* [2008] ECR I-6257; C-456/12 *O & B* [2014] OJ C-135/6.
[183] Case C-370-90 *Surinder Singh* [1992] ECR I-4288 para 25.
[184] Case C-127/08 *Metock v Minister for Justice, Equality and Law Reform* [2008] ECR I-6257 para 68.

family members of EU citizens to reside legally, even if the third country nationals concerned were so-called 'illegal migrants'.[185] The 2014 *O & B* case confirmed that the directive's provisions also benefit EU citizens and their non-EU family members when moving back to their country of nationality.[186] As observed here, these migrants' rights developments are closely linked to developing and protecting the internal market.[187] In parallel to the previously mentioned jurisprudential developments related to EU citizens' family members, the family reunification directive created the right to family reunification for third-country nationals residing in the Union.[188] This, in Costello's words, constituted a 'significant legal innovation'.[189]

Although family reunification suggests some positive developments at EU level for Third World migrants' rights, the overall evolution of EU law on legal migration appears slow and complex. In comparison, developments on so-called 'illegal' migration shows the EU's restrictive approach in a manifest way. While the EU was setting a few standards for legal migration, a notable effort can be observed in adopting measures that target so-called 'illegal' migrants.[190] In addition to the carrier sanctions and mutual recognition of expulsion decisions mentioned earlier,[191] the EU adopted a directive on the facilitation of unauthorised entry, transit and residence,[192] the return directive and the employers' sanctions directive,[193] which substantially impacted so-called 'illegal'

[185] ibid para 70.
[186] C-456/12 *O & B* [2014] OJ C-135/6 para 61.
[187] Costello, *The Human Rights of Migrants and Refugees* (n 177) 133.
[188] Council Directive 2003/86/EC of 22 September 2003 on the Right to Family Reunification [2003] OJ L251/12.
[189] Costello, *The Human Rights of Migrants and Refugees* (n 177) 139.
[190] Menezes Queiroz, *Illegally Staying* (n 163) 28.
[191] Council Directive 2001/40/EC of 28 May 2001 on the Mutual Recognition of Decisions on the Expulsion of Third-Country Nationals [2001] OJ L149/34; Council Directive 2001/51/EC of 28 June 2001 Supplementing the Provisions of Article 26 of the Convention Implementing the Schengen Agreement of 14 June 1985 [2001] OJ L187/45.
[192] Council Directive 2002/90/EC of 28 November 2002 Defining the Facilitation of Unauthorised Entry, Transit and Residence [2002] OJ L328/17.
[193] Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on Common Standards and Procedures in Member States for Returning Illegally Staying Third-Country Nationals [2008] OJ L348/98; Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 Providing for

migrants.[194] Furthermore, the regularisation of non-EU citizens staying 'illegally' remained subject to member states' discretion but they were encouraged by the EU to avoid mass regularisation programmes, considered 'pull factors' for 'illegal' migrants.[195] This further demonstrates that EU legal developments on migration focused on so-called 'illegal' migration and took an essentially restrictive approach. Similar tendencies can be observed with regards to asylum.

1.3.3. EU asylum law: Restricting access to protection

Although member states started cooperating on migration in the 1980s, developments related to refugee protection and asylum remained particularly limited at first. The intergovernmental period's main achievement related to asylum was the adoption of the Dublin Convention by the ad hoc group on migration in 1990.[196] The project to abolish internal border controls between member states created the need to also deal with internal movements of asylum seekers.[197] That is why this convention created a mechanism determining the state responsible for the examination of asylum applications.[198] Dublin set a number of criteria to decide on member states' responsibility which shall be applied according to the following hierarchy: having family member(s) in a member state,[199] possessing a visa or residence permit in a member

Minimum Standards on Sanctions and Measures Against Employers of Illegally Staying Third-Country Nationals [2009] OJ L168/24.

[194] Menezes Queiroz, *Illegally Staying* (n 163) 28.

[195] ibid 168.

[196] Convention Determining the State Responsible for Examining Applications for Asylum Lodged in one of the Member States of the European Communities [1997] OJ C254/1.

[197] Cathryn Costello, 'The Asylum Procedures Directive and the Proliferation of Safe Country Practices: Deterrence, Deflection and the Dismantling of International Protection?' (2005) 7(1) European Journal of Migration and Law 35, 37.

[198] Convention Determining the State Responsible for Examining Applications for Asylum Lodged in one of the Member States of the European Communities [1997] OJ C254/1 art 3(2).

[199] ibid art 4.

state,[200] irregular entry onto the EU territory through a member state unless the applicant has been living for more than six months in the member state where the application is lodged,[201] the member state in charge of controlling the applicant's entry into the EU except in case the applicant's visa is waived in the member state of first entry and the state where the application is lodged,[202] the member state where the application is made if it's done in transit in an airport,[203] or in case no other criteria applies the member state where the application is lodged shall be responsible.[204] Where a member state fulfils one of the criteria, it is considered responsible for the asylum application and is obliged to take the asylum seeker back and process their claim.[205] Although criticised on various occasions for its lack of efficiency and the burden it imposes on Southern member states,[206] this system remains in use. Indeed, the Dublin III Regulation maintains the primary principle of states' responsibility,[207] and post- 'crisis' attempts to reform the system of allocation turned to a stalemate as I will discuss later.[208] The major addition provided for by revisions to the Dublin system was the creation in 2000 of the Eurodac system:[209] a centralised database collecting fingerprints 'of every applicant for international protection' within EU member states[210]

[200] ibid art 5.
[201] ibid art 6.
[202] ibid art 7(1).
[203] ibid art7(3).
[204] ibid art 8.
[205] ibid art 4-8.
[206] See for instance: Steve Peers, *EU Justice and Home Affairs Law: Volume I, EU Immigration and Asylum Law* (4th edn, Oxford University Press 2016) 300; Francesco Maiani, 'The Reform of the Dublin System and the Dystopia of "Sharing People"' (2017) 24(5) Maastricht Journal of European and Comparative Law 622, 625-628; Domenica Dreyer-Plum, 'Dublin Revisited: Geographic Asymmetry and Corrective Allocation Mechanisms' (2020) 22(3) European Journal of Migration and Law 386, 389.
[207] Regulation (EU) 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) [2013] OJ L180/31.
[208] See chapter 3 section 1.2.
[209] 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 Convention [2000] OJ L316/1.
[210] 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

and ‘of every third-country national or stateless person […] apprehended […] in connection with the irregular crossing [of an EU external border]’.[211] By sharing data, Eurodac helps to identify the state responsible by facilitating the identification of asylum seekers who already applied for protection in another EU state or who were apprehended in relation to ‘irregular’ entry through EU external borders. Eurodac therefore facilitates Dublin transfers between member states and aims at improving the Dublin system’s efficiency.[212]

The Dublin Convention is sometimes argued to be the first step towards a common asylum policy.[213] This is a questionable perspective considering that this Convention provided few guarantees for asylum seekers. Except for some provisions affirming member states’ commitment to the Geneva Convention or providing the examination of each asylum application in accordance with international law,[214] the Convention contained few human rights guarantees for asylum seekers, such as the right to request one’s application to be processed by a member state where the applicant has family members.[215] Rather, it focused on procedural elements to allocate asylum seekers to member states. This shows that the Dublin system is mainly about distributing asylum applications among member states. Thus, if Dublin constitutes a first step towards a common asylum system, then such a system is not one enabling

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 [2013] OJ L180/1 art 9(1).

[211] ibid art 14(1).

[212] Costello, ‘The Asylum Procedures Directive’ (n 197) 46.

[213] Trevisanut, ‘Which Borders for the EU Immigration Policy?’ (n 47) 109.

[214] Convention Determining the State Responsible for Examining Applications for Asylum Lodged in one of the Member States of the European Communities [1997] OJ C254/1 art 2 and 3(3).

[215] ibid art 4.

people to seek international protection but one aimed at managing member states' burdens and responsibilities towards asylum seekers.

Moreover, this system relied on the presumption that member states have comparable protection standards, procedures, recognition rates and reception conditions.[216] Yet, recognition rates among member states for asylum seekers of the same nationality are sometimes highly variable and therefore referred to as an 'asylum lottery'.[217] For instance, in the case of Afghan asylum seekers in 2019, first instance recognition rates varied from 93.8% in Italy to 4.1% in Bulgaria.[218] That is why, some scholars such as Costello argued that the Dublin system determines both member states' responsibilities and in which country an asylum seeker will have 'to make [their] home'.[219]

Although in many cases the Dublin criteria are ignored and responsibility remains with the member state where the asylum seeker first lodged her or his application,[220] the discrepancies of protection standards and reception conditions among member states also mean that a few asylum seekers may be detained or returned to a Dublin state which infringes their human rights.[221] The *MSS v Belgium* case provides an example of such situation, where an asylum seeker faced detention and dire living conditions in extreme poverty in Greece after being transferred from Belgium under the Dublin procedure which the European Court of Human Rights (ECtHR) declared amounted to degrading treatment under art 3 ECHR.[222] Additionally, given that the regulation

[216] Costello, *The Human Rights of Migrants and Refugees* (n 177) 258.
[217] European Council on Refugees and Exiles (ECRE), 'Asylum Statistics in Europe: Factsheet' <https://ecre.org/wp-content/uploads/2020/06/Statistics-Briefing-ECRE.pdf> accessed 17 June 2022.
[218] ibid.
[219] Costello, *The Human Rights of Migrants and Refugees* (n 177) 258.
[220] Francesco Maiani and Vigdis Vevstad, 'Reflection Note on the Evaluation of the Dublin System and on the Dublin III Proposal' (2009) European Parliament PE410.690, 2.
[221] Costello, *The Human Rights of Migrants and Refugees* (n 177) 256.
[222] *M.S.S. v Belgium and Greece* (2011) 53 EHRR 2, paras 231 and 264.

allows member states to return asylum seekers to third countries,[223] it enables member states to remove asylum seekers further away from the EU territory.[224] Given the discrepancies of asylum procedures among member states, the regulation itself was not protect migrants from 'chain expulsion' or risks of *refoulement* without genuine examination of their application for protection when member states' asylum procedures are deficient, as exemplified in the facts of the *MSS v Belgium* case.[225]

The ECtHR and CJEU case law increased asylum seekers' human rights protection by prohibiting Dublin transfers in case the member state 'cannot be unaware that systematic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in [the member state responsible] amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment'.[226] In this way, the CJEU and ECtHR case law insisted on member states' duties to protect asylum seekers' rights when considering a Dublin transfer.[227] This contributed to limit the risks for asylum seekers to be returned to a member state where their human rights may be infringed.

In addition, the system created by the Dublin Convention relies on the assumption that member states can pool their responsibility for asylum seekers. When a member state is considered responsible for an asylum seeker's procedure, other member states are relieved from any responsibility. Given that the Dublin system tends to transfer responsibility for asylum seekers to only a small number of states – essentially

[223] Regulation (EU) 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) [2013] OJ L180/31 art 3(5).
[224] Costello, 'The Asylum Procedures Directive' (n 197) 41.
[225] *M.S.S. v Belgium and Greece* (2011) 53 EHRR 2, para 321.
[226] Joined Cases C-411/10 and C-493/10 *N.S. v Secretary of State for the Home Department and M.E. and Others v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform* [2011] ECLI:EU:C:2011:865, para 94.
[227] Costello, *The Human Rights of Migrants and Refugees* (n 177) 277.

Southern EU countries –[228] rather than providing a fairer allocation of asylum seekers across the EU, it creates an important precedent. Indeed, it contributes to the acceptance that the 'old Europe' can discharge itself from its responsibilities towards asylum seekers and that transit countries bear a responsibility to 'manage' migration flows.

The intergovernmental period brought another development that contributed to limiting the EU's responsibility towards asylum seekers by transferring responsibility to third countries: the adoption of the three 'London Resolutions' related to the notions of safe country of origin,[229] safe third country,[230] and manifestly unfounded asylum applications.[231] Those three notions are highly controversial.[232] They determine which applications for international protection should be considered 'manifestly unfounded'.[233] This includes when a claim is considered 'an abuse of asylum procedures' or 'has clearly no substance',[234] and when the applicant originates from a country considered 'not to generate refugees'.[235] When dealing with such applications, member states are able to use an 'accelerated procedure' and are not required to fully examine the claim at every stage of the procedure.[236] Moreover, according to the 'London Resolutions', a 'host third country' is a country where the applicant would not

[228] Dreyer-Plum, 'Dublin Revisited' (n 206) 389.
[229] Conclusions on Countries in Which There is Generally No Serious Risk of Persecution (London Resolution) 30 November 1992 <https://www.refworld.org/docid/3f86c6ee4.html> accessed 3 September 2021.
[230] 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/docid/3f86c3094.html> accessed 3 September 2021.
[231] Council Resolution of 30 November 1992 on Manifestly Unfounded Applications for Asylum (London Resolution) 30 November 1992 <https://www.refworld.org/docid/3f86bbcc4.html> accessed 3 September 2021.
[232] Peers, *EU Justice and Home Affairs* (n 206) 235.
[233] Council Resolution of 30 November 1992 on Manifestly Unfounded Applications for Asylum (London Resolution) 30 November 1992 art 1(a) <https://www.refworld.org/docid/3f86bbcc4.html> accessed 3 September 2021.
[234] ibid.
[235] Conclusions on Countries in Which There is Generally No Serious Risk of Persecution (London Resolution) 30 November 1992 art 1 <https://www.refworld.org/docid/3f86c6ee4.html> accessed 3 September 2021.
[236] Council Resolution of 30 November 1992 on Manifestly Unfounded Applications for Asylum (London Resolution) 30 November 1992 art 2 <https://www.refworld.org/docid/3f86bbcc4.html> accessed 3 September 2021.

be exposed to risks for their life and freedom or to torture or degrading treatment, and where the applicant was granted protection or had the opportunity to seek protection.[237] In such a case, member states are not required to examine the asylum application and may expel the applicant to the third country qualified as host.[238] Despite their non-binding nature, the 'London Resolutions' have had a profound impact on EU asylum law by developing restrictive policies towards asylum seekers and by generalising the use of these controversial notions at the EU level.[239] Notions of 'safe country of origin' and 'safe third country' are, for instance, included in the Asylum Procedures Directive.[240] This shows that the earlier developments of the common asylum policy did not focus on providing guarantees to asylum seekers. Instead, they focused on limiting the EU's responsibility towards asylum seekers and therefore restricting access to international protection in the EU. Overall, these developments also generalised the assumption that only some countries bear responsibility for asylum seekers.

Following the Treaty of Amsterdam, the EC started defining objectives related to asylum and instructed the Council to adopt measures related to asylum within five years of its entry into force.[241] The Action Plan implementing the Treaty's provisions related to the AFSJ foresaw the adoption of measures on the 'effectiveness of the Dublin Convention', Eurodac and the limitation of asylum seekers' so-called 'secondary movements', among others, within two years.[242] The adoption of common

[237] Council Resolution of 30 November 1992 on a Harmonized Approach to Questions Concerning Host Third Countries (London Resolution) 30 November 1992 art 2 <https://www.refworld.org/docid/3f86c3094.html> accessed 3 September 2021.
[238] ibid art 1(c).
[239] Costello, 'The Asylum Procedures Directive' (n 197) 40.
[240] 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) [2013] OJ L180/60 art 36 and 38.
[241] Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts [1997] OJ C340/1 art 73(k).
[242] Action Plan of the Council and the Commission on how best to Implement the Provisions of the Treaty of

standards on 'the qualification […] as refugee' and 'subsidiary protection' was to be completed within five years.[243] Thus, despite the Tampere European Council's call for the establishment of a common asylum policy,[244] the EC's primary goals remained focused on controlling asylum seekers' mobility in the free movement area and sharing responsibilities among member states. This confirms the previous observation that the EC's primary aim when developing its common asylum law system was not to ensure access to protection.

Still, the Treaty of Amsterdam led to the adoption of some common standards on asylum for member states. Displacements from former Yugoslavia in the 1990s also pushed EC member states to develop a common approach to asylum. Indeed, when Bosnian asylum seekers came to seek protection in Western European states in 1992-1993 or Kosovar asylum seekers in 1999,[245] the answer was mainly developed independently by member states. Western European states responded with a number of ad hoc measures focused on providing 'temporary protection' and no coordinated approach existed at EC-level.[246] Reasons used to justify the establishment of temporary protection rather than refugee statuses included the number of arrivals requiring urgent action – over 500,000 Bosnians were displaced to EC member states in 1992-1993 – and the understanding of Bosnians' reasons for displacement as not

Amsterdam on an Area of Freedom, Security and Justice [1999] OJ C19/1 para 36(b).
[243] ibid para 38(b).
[244] European Council, 'Tampere European Council - Presidency Conclusions' (15-16 October 1999) paras 3 and 4.
[245] Khalid Koser and Richard Black, 'Limits to Harmonization: The "Temporary Protection" of Refugees in the European Union' (1999) 37(3) International Migration 521, 525-526; Sandra Lavenex, 'The Europeanisation of Refugee Policies: Normative Challenges and Institutional Legacies' (2001) 39(5) Journal of Common Market Studies 851, 856.
[246] Sandra Lavenex, 'The Europeanisation of Refugee Policies: Normative Challenges and Institutional Legacies' (2001) 39(5) Journal of Common Market Studies 851, 856; Olga Mitrovic, 'Used During the Balkan Crises, the EU's Temporary Protection Directive May Now be a Solution to Europe's Refugee Emergency' (*LSE EUROPP Blog*, 22 December 2015) <https://blogs.lse.ac.uk/europpblog/2015/12/22/the-eus-temporary-protection-directive-as-a-solution-to-europes-refugee-crisis/> accessed 21 June 2022.

fitting with the refugee definition and the requirement of individual persecution.[247] Therefore the answer from EC member states to refugees from ex-Yugoslavia focused on maintaining restrictions to access the refugee status and instead developed a provisional protection status.[248] Although eventually most Bosnian protection seekers who received a temporary protection status in Western Europe in early 1990s were able to stay in the long-term, this suggests that they were not originally considered as 'genuine' refugees. Additionally it contributed to the formalisation of a temporary protection status at EU as I discuss further below.

Following the minimal response to Kosovo refugees from the EC, the European Council meeting in Tampere stressed the need to establish a common asylum system committed to humanitarian values.[249] This includes the directives on minimum standards for giving temporary protection in case of mass influx,[250] on minimum standards of reception for asylum seekers,[251] on minimum standards for the qualification and status of refugees or persons in need of international protection,[252] and on minimum standards on procedures for granting and withdrawing of the refugee status.[253] The creation of a common legislation on asylum can be seen as an improvement in itself since it permitted more harmonisation among member states and for a few EU countries improved their law and practices with regards to asylum

[247] Khalid Koser and Richard Black, 'Limits to Harmonization: The "Temporary Protection" of Refugees in the European Union' (1999) 37(3) International Migration 521, 525.
[248] Ibid 526.
[249] Sandra Lavenex, 'The Europeanisation of Refugee Policies: Normative Challenges and Institutional Legacies' (2001) 39(5) Journal of Common Market Studies 851, 856.
[250] 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 [2001] OJ L212/12.
[251] Council Directive 2003/9/EC of 27 January 2003 Laying Down Minimum Standards for the Reception of Asylum Seekers [2003] OJ L31/18.
[252] Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third-Country Nationals or Stateless Persons as Refugees or as Persons who Otherwise Need International Protection and the Content of the Protection Granted [2004] OJ L304/12.
[253] Council Directive 2005/85/EC of 1 December 2005 on Minimum Standards on Procedure in Member States for Granting and Withdrawing Refugee Status [2005] OJ L326/13.

seekers.[254] Especially, the Treaty of Amsterdam, through the communitarisation of asylum matters, enabled some harmonisation among member states with regards to the creation of a temporary protection scheme in 2001, a project which had been discussed since the 1990s and the arrivals of asylum seekers from ex-Yugoslavia.[255] In this way, the Directive constituted a progressive development as it aims at 'establish[ing] minimum standards for giving temporary protection in the event of a mass influx of displaced persons form third countries' and at 'promot[ing] a balance of effort between Member States'.[256] However, in order to be activated by the Council upon proposal from the Commission,[257] two elements are required: there must be a mass influx and it must be linked to a specific group of displaced people.[258] Despite being defined in art 2(d) in reference to 'large number of displaced persons',[259] the notion of 'mass influx' remained extremely vague.[260] Therefore although the establishment of such a scheme constituted a progress in itself resulting from the Treaty of Amsterdam, its practical impact remained for long non-existent. Following its adoption in 2001, the Temporary Protection Directive was not activated until 2022 in response to the war in Ukraine.[261] Until then, there has been calls to activate it

[254] Stevens, 'The Humaneness of EU Asylum Law and Policy' (n 10) 244.
[255] Karoline Kerber, 'The Temporary Protection Directive' (2002) 4(2) European Journal of Migration and Law 193, 194; Nuria Arenas, 'The Concept of "Mass Influx of Displaced Persons" in the European Directive Establishing the Temporary Protection System' (2005) 7(4) European Journal of Migration and Law 435, 435-436.
[256] 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 [2001] OJ L212/12, art 1.
[257] ibid art 5(1).
[258] ibid; Danielle Gluns and Janna Wessels, 'Waste of Paper or Useful Tool? The Potential of the Temporary Protection Directive in the Current "Refugee Crisis"' (2017) 36 Refugee Survey Quarterly 57, 62.
[259] 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 [2001] OJ L212/12, art 2(d).
[260] Nuria Arenas, 'The Concept of "Mass Influx of Displaced Persons" in the European Directive Establishing the Temporary Protection System' (2005) 7(4) European Journal of Migration and Law 435, 438; Danielle Gluns and Janna Wessels, 'Waste of Paper or Useful Tool? The Potential of the Temporary Protection Directive in the Current "Refugee Crisis"' (2017) 36 Refugee Survey Quarterly 57, 62.
[261] Council Implementing Decision (EU) 2022/382 of 4 March 2022 Establishing the Existence of a Mass Influx of Displaced Persons from Ukraine Within the Meaning of Article 5 of Directive 2001/55/EC, and Having the

following arrivals of asylum seekers from North Africa to Europe in the wake of the Arab Spring in 2011.[262] Italy and Malta especially asked the Commission to submit a proposal to activate it to the Council, yet the latter refused arguing that the conditions were not fulfilled.[263] The increase in asylum applications that unfolded from the Arab Spring showed the limits of this EU framework, which was designed to handle 'applications for international protection to an "out of ordinary" number of people'.[264] Discussions on whether this directive should be activated re-emerged following the 'crisis' framing in 2015, as I further discuss below.[265]

Additionally, the Treaty of Amsterdam's requirement to adopt 'minimum standards' constituted a significant limit to asylum seekers' human rights' guarantees. A particular example of the lowering of guarantees is the adoption of the Procedure Directive.[266] During the drafting process, the lack of political agreement led to the expansion of exceptions, especially the list of applications considered 'inadmissible'.[267] The directive included the notions of first country of asylum, safe third country and safe country of origin,[268] all of which contribute to restricting asylum seekers' chances of accessing protection by regarding their applications as inadmissible,[269] as explained earlier. For Costello, this directive lowered standards and guarantees for asylum

Effect of Introducing Temporary Protection [2022] OJ L71/1.

[262] Bruno Nascimbene and Alessia di Pascale, 'The "Arab Spring" and the Extraordinary Influx of People who Arrived to Italy from North Africa' (2011) 13 European Journal of Migration and Law 341, 347.

[263] Metlem Ineli-Ciger, '5 Reasons Why: Understanding the Reasons Behind the Activation of the Temporary Protection Directive in 2022' (*EU Immigration and Asylum Law and Policy Blog*, 7 March 2022) <https://eumigrationlawblog.eu/5-reasons-why-understanding-the-reasons-behind-the-activation-of-the-temporary-protection-directive-in-2022/> accessed 21 June 2022.

[264] Nascimbene and di Pascale, 'The "Arab Spring" and the Extraordinary Influx of People' (n 262) 359.

[265] Metlem Ineli-Ciger, 'Time to Activate the Temporary Protection Directive: Why the Directive Can Play a Key Role in Solving the Migration Crisis in Europe' (2016) 18 European Journal of Migration and Law 1; Danielle Gluns and Janna Wessels, 'Waste of Paper or Useful Tool? The Potential of the Temporary Protection Directive in the Current "Refugee Crisis"' (2017) 36 Refugee Survey Quarterly 57; see also chapter 3 section 1.2.

[266] Council Directive 2005/85/EC of 1 December 2005 on Minimum Standards on Procedure in Member States for Granting and Withdrawing Refugee Status [2005] OJ L326/13.

[267] ibid art 25(2).

[268] ibid art 26, 27 and 29.

[269] ibid art 25(1).

seekers by normalising exceptional procedures.[270] The growing use of these notions thus considerably limited the potential positive developments of the Amsterdam *acquis* by undermining access to asylum determination procedure.[271]

The Lisbon Treaty contrasts with the Treaty of Amsterdam as it provided the EU with new competences on asylum not limited to minimum standards,[272] and aimed at establishing a Common European Asylum System (CEAS).[273] The TFEU requires the EU to develop 'a common policy on asylum, subsidiary protection and temporary protection' and EU institutions to ensure compliance with the principle of *non-refoulement*,[274] thus integrating principles of international refugee law into EU treaties.[275] Moreover, as mentioned previously,[276] the EUCFR, now legally binding for member states, included a right to asylum and referred to the principle of *non-refoulement*.[277] Given the EUCFR's primary legislation status, secondary EU law, such as directives and regulations, must also comply with its principles.[278] Building on Lisbon, the Stockholm Programme determined three aspects of the common asylum system to work on for 2010-2014. Firstly, it aimed at establishing a common area of protection with greater harmonisation among member states, notably to discourage secondary movements of asylum seekers.[279] Secondly, it promoted responsibility-sharing and solidarity between member states and insisted that 'the Dublin System

[270] Costello, 'The Asylum Procedures Directive' (n 197) 52.
[271] ibid 36.
[272] Christian Kaunert and Sarah Léonard, 'The European Union Asylum Policy after the Treaty of Lisbon and the Stockholm Programme: Towards Supranational Governance in a Common Area of Protection?' (2012) 31(4) Refugee Survey Quarterly 1, 15.
[273] Consolidated Version of the Treaty on the Functioning of the European Union [2008] OJ C115/47 art 78(2).
[274] ibid 78.
[275] Trevisanut, 'Which Borders for the EU Immigration Policy?' (n 47) 143.
[276] See section 1.1.3. of this chapter.
[277] Charter of Fundamental Rights of the European Union [2012] OJ C326/391 art 18 and 19.
[278] Gil-Bazo, 'The Charter of Fundamental Rights' (n 71) 34.
[279] Council of the European Union, 'The Stockholm Programme - An Open and Secure Europe Serving and Protecting the Citizens' (2009) 17024/09 para 6.2.1.

remains a cornerstone in building the CEAS'.[280] Finally, it engaged with the external dimension of the common asylum policy and encouraged cooperation with third countries hosting refugees.[281] Therefore, despite insisting that the CEAS should 'be based on high protection standards',[282] the Stockholm Programme suggested a rather distinct direction to what the TFEU provisions originally suggested. Indeed, rather than ensuring greater human rights guarantees to protection seekers, the Stockholm Programme seems to maintain a common asylum system aimed purely at sharing burdens among member states and Third World states and controlling asylum seekers.

After Lisbon, the EU initiated several substantial reforms, particularly regarding the Dublin system and the Asylum Directives.[283] The directive on a uniform status modified the 2004 Qualification directive by improving rules' clarity and modifying the content of the refugee status, which now contains fewer distinctions between the refugee and subsidiary protection statuses. These constituted welcome steps; particularly given the previous directive contained only minimum standards. Moreover, a regulation on social security for third country nationals,[284] which also applied to refugees, and a

[280] ibid.
[281] ibid para 6.2.3.
[282] ibid para 6.2.
[283] 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 and for Persons Eligible for Subsidiary Protection, and for the Content of the Protection Granted (recast) [2011] OJ L337/9; Regulation (EU) 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) [2013] OJ L180/1; Regulation (EU) 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) [2013] OJ L180/31; 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) [2013] OJ L180/96.
[284] Regulation (EU) 1231/2010 of the European Parliament and of the Council of 24 November 2010 Extending

directive on the extension of long-term residence status to refugees and beneficiaries of subsidiary protection were also adopted in 2010 and 2011.[285] This suggests, as Trevisanut argues, that 'the Lisbon Treaty strengthen[ed] the asylum *acquis*' developed under Amsterdam.[286]

Yet these progressive developments for asylum seekers did not alter the core elements of the common asylum system highlighted previously. Indeed, the EU asylum law system still relies on the assumption that asylum seekers decide to move between member states and choose their destination country rationally, depending on the policies deemed most attractive,[287] and that they need to be controlled by pooling member states' responsibility. Despite the EU stressing its will to abide by international refugee law and representing itself as an area of protection, my analysis suggests the EU asylum policy is mainly aimed at restricting access to protection. When put in perspective with broader developments of EU migration policy, the growth in external border controls preventing asylum seekers from reaching the EU territory,[288] suggests that the development of a protective EU asylum system has limited relevance as few may be able to access it.[289] The common asylum policy is therefore conceived in such a way as to limit Third World migrants' access to a legal status.

Regulation (EC) No 883/2004 and Regulation (EC) No 987/2009 to Nationals of Third-Countries Who are not Already Covered by these Regulations Solely on the Grounds of their Nationality [2010] OJ L344/1.

[285] Directive 2011/51/EU of the European Parliament and of the Council of 11 May 2011 Amending Council Directive 2003/109/EC to Extend its Scope to Beneficiaries of International Protection [2011] OJ L132/1.

[286] Trevisanut, 'Which Borders for the EU Immigration Policy?' (n 47) 143.

[287] El-Enany, 'EU Asylum and Immigration Law' (n 20) 873.

[288] See section 2 of this chapter for further analysis of externalised border controls.

[289] Nadine El-Enany, 'The EU Asylum, Immigration and Border Control Regimes: Including and Excluding the "Deserving Migrant"' (2013) 15(2) European Journal of Social Security 171, 183.

1.3.4. The othering of Third World migrants through illegalisation

What my previous analysis shows is that while the EU is obsessed with 'fighting' so-called 'illegal' immigration and frames mainly its migration and asylum policy through this lens, it is also constantly restricting Third World migrants' access to a legal status, whether by limiting legal migration channels or by restraining access to the refugee or other protection statuses.

This overall demonstrates that the EU's obsession with so-called 'illegal' immigration fails to consider that it is 'a product of the laws that seek to combat it'.[290] The notion of migrants' 'illegality' can only be understood in relation to migration law; in other words, is considered 'illegal' whoever contravenes migration rules. Therefore, if migration laws and policies make the possibility for non-nationals to migrate or reside in respect of migration rules more difficult, it increases the category of people considered as 'outside the law'.[291] In this way, any attempt at regulating migration, in the sense of restricting access to legal migration channels, leads to increasing so-called 'illegal' migrants.[292] This linkage between restricted access to legal migration and illegalisation, i.e. the process that makes migrants 'illegal',[293] has been demonstrated by numerous migration scholars.[294] To put it simply, migrants' illegalisation is a

[290] Costello, *The Human Rights of Migrants and Refugees* (n 177) 67.
[291] Dauvergne, *Making People Illegal* (n 111) 15.
[292] Costello, *The Human Rights of Migrants and Refugees* (n 177) 67
[293] Dauvergne, *Making People Illegal* (n 111) 4; Jean McDonald, 'Migrant Illegality, Nation-Building, and the Politics of Regularization in Canada' (2009) 26(2) Refuge 65; Harald Bauder, 'Why We Should Use the Term "Illegalized" Refugee or Immigrant: A Commentary' (2014) 26(3) International Journal of Refugee Law 327, 330.
[294] See for instance: Dauvergne, *Making People Illegal* (n 111) 4; Düvell, 'Paths into Irregularity' (n 152) 295; Stephan Scheel and Vicky Squire, 'Forced Migrants as "Illegal" Migrants' in Elena Fiddian-Qasmiyeh and others (eds), *The Oxford Handbook of Refugee and Forced Migration Studies* (Oxford University Press 2014) 191; Boswell, 'The Politics of Irregular Migration' (n 141) 41; Costello, *The Human Rights of Migrants and Refugees* (n 177) 67.

socially, politically and legally constructed phenomenon resulting from states' immigration laws and policies.[295]

Therefore, the EU's obsession with so-called 'illegal' migration since the inception of the common migration policy can only be fully understood in relation to the restrictive approach taken towards migration. As observed earlier, EU migration and asylum law has constantly focused on restricting access for Third World migrants to a legal status.[296] This process is not only the EU's action but it is rather part of a more global process among Western states since at least the 1990s, which Dauvergne refers to as the 'crackdown on illegal migration'.[297] In other words, by developing its action in migration and asylum, the EU furthered the illegalisation process of migrants.

This has significant implications for the EU migration and asylum law system. Indeed, Dauvergne argues that by illegalising migrants, states characterise them as transgressing rules and criminals, as such implications directly derive from the very notion of 'illegal'.[298] Overall this facilitates the acceptance within policymakers and public opinion of stricter measures, especially policies 'stripping individuals of procedural and substantive rights'.[299] In the EU, this means that despite the Lisbon Treaty's increasing commitment to human rights and the EU's policy developments on asylum since Amsterdam discussed earlier,[300] the EU migration and asylum law system remains focused on excluding Third World migrants. As I observed earlier, migrants' 'illegality' has been a central element of EU migration policy since its very

[295] Franck Düvell, 'Irregular Migration: A Global, Historical and Economic Perspective' in Franck Düvell (ed), *Illegal Immigration in Europe: Beyond Control?* (Palgrave Macmillan 2006) 29; Menezes Queiroz, *Illegally Staying* (n 163) 13-14.
[296] See sections 1.3.2 and 1.3.3. of this chapter.
[297] Dauvergne, *Making People Illegal* (n 111) 14.
[298] ibid 16.
[299] ibid 17.
[300] See sections 1.1.2. and 1.1.3 of this chapter.

inception.[301] To put it differently, the common approach to asylum and migration emerged with the aim of 'fighting illegal migration', which justified further restrictions imposed upon Third World migrants to access a migration status. Therefore, any commitment to guarantee human or refugee rights from the EU will necessarily fall short and remain essentially performative, as by characterising some Third World migrants as 'illegal' the EU excludes them from being able to prevail themselves of such guarantees. Although the EU appears even more committed to human rights since Lisbon, the practical effect of its migration and asylum policy for those classified as 'illegal' is their further exclusion. As Dauvergne argues, illegalisation excludes 'unwanted' migrants when borders and border controls alone cannot exclude them physically.[302]

The 'othering' process, which chapter 1 suggested was a result of the 'crisis' framing,[303] appears to have emerged before 2015. Indeed, the notion of 'illegality' constitutes an important element to differentiate between tolerated and unwanted migrants, as migrants labelled as 'illegal' or any related terminology, are distinctively characterised as different from other migrants or persons. It draws the line between us, European citizens whose migration is tolerated or even encouraged, and them, who have no claim to enter or remain on the EU territory due to their lack of legal status. By emphasising such identification patterns the EU migration and asylum law system therefore contributed to the othering of Third World migrants even before the 'crisis' framing, which as my later analysis will demonstrate intensified the distinction between 'us' and the 'others'.[304] The othering of Third World migrants is central in the

[301] See section 1.3.1. of this chapter.
[302] Dauvergne, *Making People Illegal* (n 111) 17.
[303] See chapter 1 section 3.3.
[304] See chapter 3 section 3.1.2.

growing externalisation of EU migration and asylum law. As I now turn to, it is migrants' otherness which justifies containing them outside the EU's territory.

2. The external dimension of EU asylum and migration policy: border externalisation and cooperation with third countries

The EU's obsession in controlling Third World migration constantly expanded in its internal policies, as my analysis previously demonstrated, and also spread to its external affairs. Within the common migration and asylum policy, border externalisation and cooperation with third countries have now become key tools, as my analysis of post-2015 developments will show.[305] Yet, contrary to what chapter 1 suggested, border externalisation measures did not result from 'crisis' framing and the need for 'innovation'.[306] Rather their use corresponds to earlier developments of EU migration and asylum policy's external dimensions.

Analysing the externalisation process at the EU level shows the rationale underpinning the development and continuation of these practices. Externalising its borders enables the EU to comply on paper with the principle of *non-refoulement* while avoiding the burden of fulfilling its obligations towards refugees. The EU's commitment to asylum, therefore, appears only performative. Moreover, the early developments of EU cooperation with third countries show a clear focus on returning unwanted migrants. Since then, the EU has deepened its cooperation with Third World countries by

[305] See chapter 3.
[306] See chapter 1 section 3.2.

diversifying its cooperation agreements, but the primary objective of controlling Third World migrants' mobility remained central.

2.1. The emergence of externalised border controls at the EU level

Externalisation of border controls is a comprehensive process, sometimes also referred to as remote control,[307] non-arrival, non-admission or *non-entrée* policies as well as deterrence policies,[308] aimed at controlling migration 'up-stream'.[309] It takes various forms as Moreno-Lax explains: covering both the off-shoring and the outsourcing processes of border controls.[310] The former refers to the externalisation of checks, that is to say the physical delocalisation of controls to areas outside of the EU territory. This includes, for instance, the use of Schengen visas,[311] which transfer border controls to member states' consulates as they decide who gets permission to enter the EU territory.[312] Later developments also include the deployment of immigration officers from EU member states in third countries' airports or border crossings.[313] The latter relates to the delegation of controls to third actors, particularly private actors or other authorities located in non-EU countries. This form of externalisation includes, for instance, carrier sanctions first set by the 1990 Convention

[307] Sandra Lavenex, 'Shifting Up and Out: The Foreign Policy of European Immigration Control' (2006) 29(2) West European Politics 329, 334.
[308] Thomas Gammeltoft-Hansen, 'International Refugee Law and Refugee Policy: The Case of Deterrence Policies' (2014) 27(4) Journal of Refugee Studies 574, 576.
[309] Annick Pijnenburg, Thomas Gammeltoft-Hansen and Conny Rijken, 'Controlling Migration Through International Cooperation' (2018) 20(4) European Journal of Migration and Law 365.
[310] Moreno Lax, *Accessing Asylum in Europe* (n 114) 39.
[311] Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the Rules Governing the Movement of Persons Across Borders (Schengen Borders Code) (codification) [2016] OJ L77/1.
[312] Didier Bigo and Elspeth Guild, 'Le Visa: Instrument de la Mise à Distance des "Indésirables"' (2003) 49(1) Cultures & Conflits 82.
[313] Lavenex, 'Shifting Up and Out' (n 307) 34.

implementing the Schengen Agreement before being integrated into EU law and further developed as part of the Schengen *acquis*.[314] They enable member states to put penalties on carriers transporting non-EU citizens without the appropriate travel documents.[315] This led to the transfer of passport and visa checks to transport companies, thus making private companies act as the EU's enforcement agents.[316] Another example is the growing use of Frontex, the European Agency for the Management of Operational Co-operation at the External Borders of the member states of the European Union created in 2004.[317] It constituted a significant development for the management of EU external borders as it aimed to improve coordination of external border controls between member states.[318] To do so, the Agency was made responsible by the 2004 and 2011 Regulations for coordinating member states' operational cooperation, helping member states with 'increased technical and operational assistance at the external borders', and coordinating joint return operations,[319] among other tasks such as facilitating collaboration with third countries.[320] As observed in its growing duties, Frontex has become an 'umbrella

[314] Convention Implementing the Schengen Agreement of 14 June 1985 Between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the Gradual Abolition of Checks at their Common Borders [2000] OJ L239/19 art 26; Council Directive 2001/51/EC of 28 June 2001 Supplementing the Provisions of Article 26 of the Convention Implementing the Schengen Agreement of 14 June 1985 [2001] OJ L187/45.

[315] Convention Implementing the Schengen Agreement of 14 June 1985 Between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the Gradual Abolition of Checks at their Common Borders [2000] OJ L239/19 art 26(2); El-Enany, 'The EU Asylum, Immigration and Border Control Regimes' (n 289) 180.

[316] Thomas Spijkerboer, 'Bifurcation of People, Bifurcation of Law: Externalization of Migration Policy Before the EU Court of Justice' (2018) 31(2) Journal of Refugee Studies 216, 231.

[317] Council Regulation (EC) No 2007/2004 of 26 October 2004 Establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union [2004] OJ L349/1.

[318] ibid art 1(1).

[319] ibid art 2(1); Regulation (EU) No 1168/2011 of the European Parliament and of the Council of 25 October 2011 Amending Council Regulation (EC) No 2007/2004 Establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union OJ L304/1 art 1(3).

[320] Council Regulation (EC) No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union [2004] OJ L349/1 art 14.

organisation'.[321] However, given that Frontex's role lies mainly in coordinating member states' actions rather than conducting border control operations itself,[322] the agency is generally considered as a 'legally unaccountable entity', [323] as Gammeltoft-Hansen and Hathaway explain. This constitutes one of the sharpest examples of outsourcing of EU border controls. Some other developments are not as clear-cut, but also imply the transfer of border controls to a partner country, including through the provision of materials or training by the EU to third countries, such as Libya.[324] Naturally, these two broad categories of externalisation processes are not sealed from each other, and a significant part of *non-entrée* based on cooperation with third countries include a mix of outsourcing and off-shoring, as will be further discussed below.

As is suggested by arguments outlined above, the externalisation of EU border controls is not *per se* a recent development but rather constitutes the continuation of the intergovernmental period.[325] Indeed, the development of a common migration and asylum policy included the rapid proliferation of externalisation measures, Spijkerboer explains.[326] As previously observed,[327] the Schengen developments – including externalisation measures – were heavily influenced by the intergovernmental cooperation method and, especially, by Western European countries' concerns towards Third World migration.

Here, traditional conceptions of nation states were highly influential. Since the late 19th century, a close connection between citizens and their state was progressively

[321] Thomas Gammeltoft-Hansen and James C Hathaway, 'Non-Refoulement in a World of Cooperative Deterrence' (2015) 53(2) Columbia Journal of Transnational Law 235, 255.
[322] Council Regulation (EC) No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union [2004] OJ L349/1 art 1(2).
[323] Gammeltoft-Hansen and Hathaway, 'Non-Refoulement' (n 321) 255.
[324] ibid 252.
[325] Lavenex, 'Shifting Up and Out' (n 307) 346.
[326] Spijkerboer, 'Bifurcation of People' (n 316) 217.
[327] See section 1.1. of this chapter.

developed, given that population became a state's constitutive element.[328] Based on this conception, determining who is a member of a state and who is not became essential, and the consideration that states should and can decide whom to award or deny membership to became dominant.[329] At the EU level, these considerations led to the perceived need to keep Third World migrants as remote as possible from European territory. This meant for EU migration policy that Third World migrants' characterisation as 'threats' was used extensively to justify their exclusion. The migrant populations targeted by these measures are also specific as they do not concern all Third World migrants. Indeed, nationalities targeted by externalisation are essentially from countries considered as immigration-producing. Naturally, they do not include states whose nationals are not subject to the Visa Code and thus not required to hold a Schengen visa.[330] Thus, migrants targeted by externalisation measures are essentially originating from Africa and Asia (with the exception of far-East Asia), as the map of the Schengen visa clearly shows.[331] It, therefore, appears that the justification of exclusion for security reasons is not only abused by the EU but hides more discriminatory forms of exclusion. As Carens argues, exclusion based on citizenship criteria is by no means less arbitrary than exclusion relying on considerations of people's skin colour or gender.[332] Characterising externalisation as central to the EU migration and asylum policy thus fails to acknowledge that the origins of border

[328] Didier Bigo, 'Frontier Controls in the European Union: Who is in Control?' in Didier Bigo and Elspeth Guild (eds), *Controlling Frontiers: Free Movement Into and Within Europe* (Ashgate 2005) 49.
[329] John C Torpey, *The Invention of Passport: Surveillance, Citizenship and the State* (Cambridge University Press 2000) 121.
[330] Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 Establishing a Community Code on Visas (Visa Code) [2009] OJ L243/1.
[331] Didier Bigo and Elspeth Guild, 'La Carte du Visa Schengen' (2003) 49 Cultures & Conflits <http://journals.openedition.org/conflits/919> accessed 2 June 2020.
[332] Seyla Benhabib, *The Rights of Others: Aliens, Residents and Citizens* (Cambridge University Press 2004) 94.

controls, and of their externalisation, is not immigration's effects on crime rates or social issues, but racism.[333]

Additionally, the development of remote border controls also results from a very classical and statist conception of borders. This conception relies on the idea that borders constitute a protection for the state, which results from the consideration of frontiers as military zones aimed at shielding one state against its enemy.[334] Moreover, such a conception considers nation states to have the monopoly to control their borders and regulate people's movement.[335] This leads to the supposition that if a state wants, it can close its borders or control who is allowed to enter its territory.[336] With the creation of a common migration policy, this conception of borders has been transferred to the EU level, as observed in early developments of the common policy. This includes, for instance, the adoption of 'accompanying measures' to the creation of the common market to overcome the so-called 'security deficit'.[337] Later on, when visas and carrier sanctions appeared insufficient to keep so-called 'illegal' migrants away, remote controls evolved by involving more and more origin and transit countries in the control processes. The further externalisation of borders occurred despite most 'irregular' migrants on the EU territory overstaying visas rather than entering through 'illegal' routes.[338] This choice of direction reflects the rationale and priorities that EU member states raised during the intergovernmental era. Using externalised border controls comes from the conception that borders and migration *can* be controlled at all, and that border controls are the solution to the EU's supposed migration issue.[339]

[333] Christopher H Wellman and Phillip Cole, *The Ethics of Immigration: Is There a Right to Exclude?* (Oxford University Press 2011) 218.
[334] Bigo, 'Frontier Controls' (n 328) 55.
[335] Torpey, *The Invention of Passport* (n 329) 167.
[336] Bigo, 'Frontier Controls' (n 328) 75; Stevens, 'The Humaneness of EU Asylum Law and Policy' (n 10) 237.
[337] Bigo, 'Criminalisation of "Migrants": The Side Effect' (n 84) 72; see also section 1.2. of this chapter.
[338] Spijkerboer, 'Bifurcation of People' (n 316) 227.
[339] Bigo, 'Frontier Controls' (n 328) 62.

As the difficulties to hermetically close EU external borders to unwanted Third World migrants became clear, the externalisation of controls appeared the appropriate solution for policymakers to be able to claim that they are bringing migration under control.[340]

The common objective shared by the various forms of externalisation is to prevent migrants, including potential asylum seekers, from reaching the EU territory. International refugee law and, in particular, its cornerstone principle of *non-refoulement,*[341] imposes on states the obligation not to return refugees to a country where they would be at risk of persecution.[342] By establishing checks before migrants reach the EU territory, at which point they would be able to claim protection, the externalisation of borders enables the EU and its member states to comply on paper with the principle of *non-refoulement*.[343] The use of non-entry policies allows First World countries to insist on the importance of the international refugee law system while avoiding the burden of fulfilling their own legal obligations. As Gammeltoft-Hansen and Hathaway argue, First World countries want to appear committed to international refugee law to encourage Third World countries, which host the vast majority of the world's refugees, to do the same and thus avoid receiving more asylum seekers.[344]

In the case of the EU, this is noticeable by looking at how the externalisation of border and migration controls was mostly developed simultaneously with the creation of a

[340] Spijkerboer, 'Bifurcation of People' (n 316) 230.
[341] Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention) art 33.
[342] Thomas Gammeltoft-Hansen, 'The Externalisation of European Migration Control and the Reach of International Refugee Law' in Elspeth Guild and Paul Minderhoud (eds), *The First Decade of EU Migration and Asylum Law* (Martinus Nijhoff 2011) 274.
[343] Gammeltoft-Hansen and Hathaway, 'Non-Refoulement' (n 321) 242.
[344] ibid 283.

common asylum policy. Indeed, the late 1990s are generally considered the official beginning of the EU migration policy's external dimension. By transferring asylum and immigration from the Third Pillar to the First Pillar,[345] the Treaty of Amsterdam expressly gave power to the EC to address so-called 'illegal' immigration and therefore provided the EU with 'a stronger international role' in this area.[346] But Amsterdam also played a significant role in the emergence of a common asylum policy through the adoption of 'minimum standards',[347] as explored earlier. The European Council held in Tampere in October 1999 marked an important stage as well by setting a comprehensive and multi-annual programme for the EU to progressively create the AFSJ.[348] This included the development of the EU's capacity to act on the international scene in the AFSJ, as the European Council declared cooperation with third countries as essential.[349] Yet the Tampere Council was also significant for asylum: stressing the need for a common asylum policy and that the EU is 'fully committed to the obligations of the Geneva Refugee Convention and other relevant human rights instruments'.[350] Both the Treaty of Amsterdam's and the Tampere Council conclusions' provisions on externalisation and asylum show distinctly the EU's nonsensical position towards asylum law: emphasising its commitment to principles of international refugee law while restricting access to protection.

Furthermore, this observation is confirmed by my previous analysis of the evolution of EU asylum law. As outlined above, despite the increased considerations for asylum seekers' rights achieved by Lisbon, the EU's approach towards asylum remains

[345] Consolidated Version of the Treaty Establishing the European Community 1997 OJ C340/173 ch IV.
[346] Christina Boswell, 'The "External Dimension" of EU Immigration and Asylum Policy' (2003) 79(3) International Affairs 619, 627.
[347] Consolidated Version of the Treaty Establishing the European Community 1997 OJ C340/173 art 63; see also section 1.3.3. of this chapter.
[348] Carrera, 'The 20 Years Anniversary of the Tampere Programme' (n 35) 4.
[349] European Council, 'Tampere European Council - Presidency Conclusions' (15-16 October 1999) para 8.
[350] ibid para 4.

restrictive. This clearly contrasts with the rapid expansion of EU non-entry policies observed earlier and suggests that the EU's commitment to asylum and refugee rights is more performative than genuine. The EU and its member states do not resign from their obligations under international refugee law but rather stress the EU's commitment to these values, thus representing the EU as a human rights defender and protector.

What is more, the EU's use of externalisation is also a way to further circumvent its legal obligations towards refugees by avoiding judicial and democratic scrutiny. Indeed, externalised migration controls also aim to keep unwanted migrants 'in places where they are not in a position to trigger the jurisdiction of the European Union or its member states'.[351] This objective can be deduced from both aspects of externalisation: off-shoring and outsourcing. In the case of offshoring, measures implemented and activities conducted under a non-EU country's jurisdiction are generally considered as 'legally risk-free' for the EU and its member states.[352] For outsourcing measures, the aim is to delegate migration controls to third actors. For instance, transport companies act as enforcement agents for the EU.[353] Likewise, although Frontex activities have been frequently challenged for infringing human rights and refugee law, and even if the European border agency is not clear from any legal responsibility, the implementation of such responsibility is complex.[354] Most importantly, transferring control tasks to third actors allows the EU and its member states to avoid seeing their responsibility engaged. As Lavenex explained, following the Treaty of Amsterdam and

[351] Spijkerboer, 'Bifurcation of People' (n 316) 230.
[352] Gammeltoft-Hansen and Hathaway, 'Non-Refoulement' (n 321) 249.
[353] Convention Implementing the Schengen Agreement of 14 June 1985 Between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the Gradual Abolition of Checks at their Common Borders [2000] OJ L239/19 art 26(2); Spijkerboer, 'Bifurcation of People' (n 316) 231.
[354] Melanie Fink, 'A "Blind Spot" in the Framework of International Responsibility? Third-Party Responsibility for Human Rights Violations: The Case of Frontex' in Thomas Gammeltoft-Hansen and Jens Vedsted-Hansen (eds), *Human Rights and the Dark Side of globalisation: Transnational Law Enforcement and Migration Control* (Routledge 2016) 273.

the further communitarisation of migration and asylum matters, it became harder for member states to avoid judicial and democratic scrutiny.[355] This remark is even more accurate following the Lisbon Treaty's developments for human rights protection analysed earlier.[356] In this way, externalising migration controls to non-EU countries and using third actors as enforcement agents for EU border controls is a way for member states to avoid such scrutiny that they can now hardly avoid at the EU level.

2.2. The development of EU cooperation with third countries

Among the myriad of *non-entrée* policies, cooperation with third countries aimed at 'managing' so-called 'illegal' migration received particular attention from the EU. The EU initially focused on cooperation with third countries aimed at facilitating third country nationals' return and readmission. The emergence of cooperation frameworks enabling Third World migrants' removal, shows firstly the EU's will of transferring the responsibility of dealing with unwanted migrants to non-EU countries and secondly, the EU's focus on ensuring Third World migrants' temporariness on EU territory. This suggests that transfers of responsibility to non-EU countries did not result from the othering effect of 'crisis' framing in 2015, contrary to what chapter 1 suggested.[357] Since the Treaty of Amsterdam, the EU has constantly asserted its role as a global actor in the field of migration by expanding its external action on migration to a plethora of cooperation frameworks, as my analysis shows. Overall, through the diversification of cooperation instruments it uses, the EU has increased third countries' participation

[355] Lavenex, 'Shifting Up and Out' (n 307) 329; Boswell, 'The Politics of Irregular Migration' (n 141) 60.
[356] See section 1.1.3. of this chapter.
[357] See chapter 1 section 3.3.

in its so-called 'fight against illegal migration' in Europe well before the so-called 'crisis'.

2.2.1. The origins of the EU cooperation related to so-called 'illegal' migration: Migrants' return as the main solution

The emergence of a common policy on Third World migrants' readmission shows the EU's growing interest in cooperating with third countries on matters related to migration. A common approach to readmission began in the early 1990s,[358] with the Council's adoption of a recommendation on a template readmission agreement to be used by member states in 1994,[359] which influenced member states' policies by standardising their readmission procedures.[360] Although EU cooperation with third countries on readmission remained feeble in the post-Maastricht era, readmission agreements are part of a long tradition at member state level.[361]

Readmission agreements aim at facilitating third country nationals' expulsion between the contracting states.[362] Although the EU frequently stresses that states are compelled to readmit their own nationals under international law,[363] it does not specify

[358] Steve Peers, 'Irregular Immigration and EU External Relations' in Barbara Bogusz and others (eds), *Irregular Migration and Human Rights: Theoretical, European and International Perspectives* (Martinus Nijhoff 2004) 194; Nils Coleman, *European Readmission Policy: Third Country Interests and Refugee Rights* (Martinus Nijhoff 2009) 21.
[359] Council Recommendation of 30 November 1994 Concerning a Specimen Bilateral Readmission Agreement Between a Member State and a Third Country [1996] C274/20.
[360] Daphné Bouteillet-Paquet, 'Passing the Buck: A Critical Analysis of the Readmission Policy Implemented by the European Union and Its Member States' (2003) 5(3) European Journal of Migration and Law 359, 363; Mariagiulia Giuffré, 'Readmission Agreements and Refugee Rights: From a Critique to a Proposal' (2013) 32(3) Refugee Survey Quarterly 79, 82.
[361] Coleman, *European Readmission Policy* (n 358) 11.
[362] ibid 1.
[363] See for instance: European Council, 'Tampere European Council - Presidency Conclusions' (15-16 October 1999) para 26; Council of the European Union, 'Draft Council Conclusions on Intensified Cooperation on the Management of Migration Flows with Third Countries' 14 November 2002, 13894/02 para 8.

which source it is referring to.[364] Conventional scholarship, such as Hailbronner or Coleman, argue this obligation derives from the right to return.[365] The fundamental right to return is declared in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights,[366] among others, and guarantees to any national the right to return to their country of nationality. That is why it is often seen as imposing responsibility on states to readmit their nationals. It is beyond the scope of this thesis to discuss further whether international law does include an obligation on states to readmit their citizens or not.[367] Also, readmission of nationals does not generally generate difficulties in practice, except when nationality is contested or insufficiently proved, and when countries of readmission are supposedly 'uncooperative'.[368] Readmission of non-nationals, however, is more contentious as scholarship overall agrees that international law does not contain any obligation to readmit third-country nationals, including asylum seekers.[369] Achieving this thus relies even more on countries' willingness to cooperate. The difficulty of expelling unwanted migrants comes mainly from the state of return's reluctance to readmit them.[370] That is why readmission agreements were progressively developed and considered a key

[364] Coleman, *European Readmission Policy* (n 358) 27.
[365] Kay Hailbronner, 'Readmission Agreements and the Obligation on States under Public International Law to Readmit their Own and Foreign Nationals' (1997) 57 Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht 1, 1-2; Coleman, *European Readmission Policy* (n 358) 28-29.
[366] Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR) art 13(2); International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 12(4).
[367] See for instance: Guy S Goodwin-Gill, *International Law and the Movement of Persons Between States* (Oxford University Press 1978); Paul Weis, *Nationality and Statelessness in International Law* (Brill 1979); Hailbronner, 'Readmission Agreements' (n 365) 1; Coleman, *European Readmission Policy* (n 358) 28-29; Marion Panizzon, 'Readmission Agreements of EU Member States: A Case for EU Subsidiarity or Dualism?' (2012) 31(4) Refugee Survey Quarterly 101, 107-108; Mariagiulia Giuffré, 'Obligation to Readmit? The Relationship Between Interstate and the EU Readmission Agreements' in Francesca Ippolito and Seline Trevisanut (eds), *Migration in the Mediterranean: Mechanisms of International Cooperation* (Cambridge University Press 2015) 263-287.
[368] Coleman, *European Readmission Policy* (n 358) 33.
[369] ibid 49; Giuffré, 'Obligation to Readmit?' (n 367) 270.
[370] Peers, 'Irregular Immigration' (n 358) 193.

solution to the EU's so-called 'fight against illegal migration'.[371] Indeed, they formalise states' obligation to readmit their own nationals and sometimes also include the readmission of third country nationals.[372] Origins of European states' use of readmission agreements are traced back to the 19th century,[373] but states increased their use sharply in the 1950s-1960s and again after the fall of the Iron Curtain.[374] Their use at the EU level, therefore, shows member states' influence on the framing of a common migration and asylum policy.

The Treaty of Amsterdam officially initiated the common policy on third country nationals' return and readmission, as part of the EU's growing role internationally within the AFSJ explained earlier. In its article 63(3)(b), the EC Treaty specifies that the EC's action against so-called 'illegal' immigration includes the 'repatriation of illegal residents'.[375] Although this competence is deduced from a broad understanding of the term 'repatriation',[376] the Treaty of Amsterdam constituted a first step in the development of EC cooperation with third countries on migration matters. Indeed, article 63(3)(b) gave a legal basis to the Community to negotiate and sign readmission agreements in its own name.[377] Still, the EC's external action in the fields of migration and asylum remained limited due to the lack of Treaty provisions on the extent and nature of the EC's competences in external relations.[378]

The 1999 European Council held in Tampere, discussed previously, also characterises the emergence of EU cooperation with third countries in migration and

[371] Coleman, *European Readmission Policy* (n 358) 57-58; Giuffré, 'Obligation to Readmit?' (n 367) 282.
[372] Bouteillet-Paquet, 'Passing the Buck' (n 360) 361-362; Peers, 'Irregular Immigration' (n 358) 193.
[373] Coleman, *European Readmission Policy* (n 358) 11.
[374] Bouteillet-Paquet, 'Passing the Buck' (n 360) 359; Coleman, *European Readmission Policy* (n 358) 16.
[375] Consolidated Version of the Treaty Establishing the European Community 1997 OJ C340/173.
[376] Mariagiulia Giuffré, 'The European Union Readmission Policy After Lisbon' (2011) 1 Inter-Disciplinary Political Studies Journal 7, 11.
[377] ibid 8; Consolidated Version of the Treaty Establishing the European Community [1997] OJ C340/173.
[378] Martenczuk, 'Migration Policy and EU External Relations' (n 56) 80.

asylum matters by declaring 'cooperation with third countries concerned [as a] key element' of the common EU asylum and migration policy.[379] This expressly suggests that cooperation with third countries would become a cornerstone element of EU migration policy. The European Council also stressed the EU's need to '[address] political, human rights and development issues in countries and regions of origin and transit'.[380] This shows the expansion of EU cooperation on migration and asylum to other areas of international cooperation, considered as causes of migration, as will be further discussed below. Broad calls for EU external relations policy to include migration and asylum matters was reiterated in 2001 and 2002,[381] respectively, at the Laeken European Council and the Seville European Council.[382] In Laeken, the European Council declared that 'a true common asylum and migration policy implies […] the integration of the policy on migratory flows into the European Union's foreign policy'.[383] Similarly, in Seville, the European Council reaffirmed it was crucial for the EU to manage migration flows in cooperation with countries of origin and transit.[384] Seville Council conclusions also stressed 'the importance of ensuring the cooperation of countries of origin and transit in joint management and in border control as well as on readmission'.[385] It appears evidently that the logic of border and migration control dominated the agendas of these two European Councils,[386] and thus the emergence of EU cooperation with third countries.

[379] European Council, 'Tampere European Council - Presidency Conclusions' (15-16 October 1999) para 11.
[380] ibid.
[381] James Hampshire, 'Speaking With One Voice? The European Union's Global Approach to Migration and Mobility and the Limits of International Migration Cooperation' (2016) 42(4) Journal of Ethnic and Migration Studies 571, 578.
[382] European Council, 'Meeting in Laeken - Presidency Conclusions' (14-15 December 2001); European Council, 'Seville European Council - Presidency Conclusions' (21-22 June 2002).
[383] European Council, 'Meeting in Laeken - Presidency Conclusions' (14-15 December 2001) para 40.
[384] European Council, 'Seville European Council - Presidency Conclusions' (21-22 June 2002) para 27.
[385] ibid para 34.
[386] Boswell, 'The "External Dimension"' (n 346) 636.

The EU's approach towards cooperation with third countries in asylum and migration matters evolved over time, with growing calls for a more 'comprehensive approach' since Tampere.[387] According to the 2005 Hague Programme, 'a comprehensive approach' included cooperation in 'all stages of migration', that is in addressing the 'root causes of migration, entry and admission policies and integration and return policies'.[388] The Hague Programme goes further in developing the EU's 'comprehensive approach' by specifying guidelines reinforcing the external dimension of the common migration and asylum policy. It stated, for example, that:

> The EU policy should aim at assisting third countries […] in their efforts to improve their capacity for migration management and refugee protection, prevent and combat illegal immigration, inform on legal channels for migration, resolve refugee situations by providing better access to durable solutions, build border-control capacity, enhance document security and tackle the problem of return.[389]

Therefore, the Hague Programme started pointing towards the evolution of the EU's approach to cooperation with third countries, especially to the growing use of diverse tools, as I will further discuss below.[390]

Despite this prelude to a more 'comprehensive approach', the Hague Programme maintained a clear focus on return and readmission. Indeed, the European Council set specific goals for this policy, including closer cooperation and technical assistance, developing a European return fund, common return programmes, and the completion

[387] European Council, 'Tampere European Council - Presidency Conclusions' (15-16 October 1999) para 11.
[388] The Hague Programme: Strengthening Freedom, Security and Justice in the European Union [2005] OJ C53/1 3.
[389] ibid 5.
[390] See section 2.2.2. of this chapter.

and implementation of readmission agreements.[391] The Programme's most detailed guidelines for the development of the EU migration and asylum policy's external dimension were contained in the section on return and readmission, which shows the EC's primary objective of increasing unwanted migrants' removal. To achieve this aim, readmission agreements remained considered as leading tools.

Although seen as central by the EU for its so-called 'fight against irregular migration',[392] readmission agreements are strongly criticised for their lack of efficiency.[393] Their effects on the actual return practices remain controversial,[394] as existing statistics do not show increased return rates following their entry into force.[395] Their impact as a dissuasive signal sent to would-be migrants is even less certain.[396] Regardless of their minimal significance for return practices, their development is telling of the EU's approach to migration and its partner states. They show that, from its origins, the cooperation set up between the EU and third countries in migration matters focused on a restrictive or control-oriented approach rather than a more human rights-based approach. Despite declarations that the EU's action in the area of migration must be done in accordance with the Geneva Convention,[397] that the EU is committed to the Geneva Convention or that the Tampere Programme relies on values such as human rights or rule of law,[398] the focus on developing readmission agreements reveals that the EU's main focus was 'fighting illegal immigration' and

[391] The Hague Programme: Strengthening Freedom, Security and Justice in the European Union [2005] OJ C53/1 6.
[392] Bouteillet-Paquet, 'Passing the Buck' (n 360) 361.
[393] Georgia Papagianni, 'Forging an External EU Migration Policy: From Externalisation of Border Management to a Comprehensive Policy?' (2013) 15(3) European Journal of Migration and Law 283, 295.
[394] ibid.
[395] Sergio Carrera, *Implementation of EU Readmission Agreements: Identity Determination Dilemmas and the Blurring of Rights* (Springer 2016) 38.
[396] Coleman, *European Readmission Policy* (n 358) 58.
[397] European Council, 'Seville European Council - Presidency Conclusions' (21-22 June 2002) para 29.
[398] European Council, 'Tampere European Council - Presidency Conclusions' (15-16 October 1999) paras 1 and 13; Carrera, 'The 20 Years Anniversary of the Tampere Programme' (n 35) 4.

keeping unwanted migrants at distance. The hypocrisy of these declarations becomes evident when considering the absence of human rights guarantees in readmission agreements for migrants returned,[399] especially migrants returned to transit countries where the EU has no oversight over potential chain-expulsion infringing the principle of *non-refoulement*.[400] This is even more so given the combination of readmission agreements with the concepts of 'safe third country' or 'first country of asylum',[401] which facilitate the return of asylum seekers to third countries. Notions of international protection or migrants' human rights were therefore not absent from the EU's approach to cooperation on readmission, but they remained essentially rhetorical.[402]

Rather than the coercive function of readmission agreements, it is the regulatory and disciplinary functions of developing a readmission system that contributed to making it a priority for EU migration policy. Particularly, Cassarino argues, readmission agreements participate in the normalisation of migrants' temporariness.[403] Although the argument he developed regarded foreign and national workers' rights, it is still an insightful perspective. As this section pointed out, the function of EU readmission agreements cannot be solely understood through the increased returns of so-called 'illegal migrants', as research already suggested they have a limited impact.[404] Quite the opposite; the focus of the external dimension of the EU migration and asylum policy has led to the progressive acceptance of the temporariness of *most* migrants. More than increasing return rates, developing readmission agreements implies that migrants are not meant to stay in the EU. It also normalises the potential infringement

[399] Papagianni, 'Forging an External EU Migration Policy' (n 393) 295.
[400] Mehdi Rais, 'European Union Readmission Agreements' (2016) (51) Forced Migration Review 45, 45-46.
[401] Bouteillet-Paquet, 'Passing the Buck' (n 360) 359.
[402] Elizabeth Collett, 'EU Cooperation with Third Countries: Rethinking Concepts and Investments' (2016) (51) Forced Migration Review 40.
[403] Jean-Pierre Cassarino, 'A Reappraisal of the EU's Expanding Readmission System' (2014) 49(4) The International Spectator 130, 139.
[404] Papagianni, 'Forging an External EU Migration Policy' (n 393) 295.

of migrants and asylum seekers' rights. Thus, whether these agreements are implemented or not, and whether they increase the readmission of third country nationals or infringe international law is not the point. Their essential function is to reassert the EU's and its member states' power to decide who can stay, how long and which rights they are given. The progressive acceptance of readmission agreements as primary tools of EU migration and asylum law shaped the EU's approach to migrants and made possible the emergence of more diverse tools to 'control' migration, as I further develop below.[405]

Moreover, the EU's control-oriented approach not only targeted migrants but also included 'the assessment of relations with third countries which do not cooperate in combating illegal immigration'.[406] This is a significant element considering that one objective of developing a common readmission policy was to establish a '"buffer-zone" of countries assuming responsibility for transit migration around the EU'.[407] Indeed through the negotiation or signature of such agreements, the EU initiated talks and discussions on migration with potential partner states. Readmission agreements built up cooperation frameworks broadly-speaking, and in the case of agreements that include the readmission of non-nationals to the partner state, they participate in the transfer of responsibility for migration control from the EU and its member states to third countries. Although EU cooperation with third countries was initially mainly considered through the very restrictive lens of forced return,[408] it constitutes a first step towards developing the control of migrants in third countries, including transit countries.

[405] See section 2.2.2. of this chapter.
[406] European Council, 'Seville European Council - Presidency Conclusions' (21-22 June 2002) para 35.
[407] Coleman, *European Readmission Policy* (n 358) 61.
[408] Papagianni, *Institutional and Policy Dynamics* (n 7) 181.

2.2.2. The diversification of EU cooperation in migration matters

Adopted in 2008, the Lisbon Treaty clarified and reinforced the EU's competence to act as an international actor.[409] According to article 216(1) TFEU, the EU can enter into agreements in areas provided by the Treaties or where considered necessary.[410] With regards to migration and asylum, only article 79(3) TFEU provides the EU with express competence for external action.[411] This article refers directly to the negotiation of readmission agreements with third countries;[412] yet this does not mean that the EU's external action on migration is limited to readmission agreements. If anything, it reflects the fact that the conclusion of readmission agreements remained one of the EU's primary goals as part of its policy on so-called 'illegal' migration.[413] But it is generally accepted that the EU can now enter into international agreements other than readmission agreements to fulfil different objectives of the EU migration and asylum policy.[414] Moreover, based on the Lisbon Treaty, migration may also be included in other areas of EU external action. [415] For instance, articles 208 and 212 TFEU enable the EU to enter into partnerships with third countries in areas of development, economic, financial and technical cooperation.[416] This further expands the type of EU cooperation agreements which can include migration-related provisions.

[409] Papagianni, 'Forging an External EU Migration Policy' (n 393) 285.
[410] Consolidated Version of the Treaty on the Functioning of the European Union [2008] OJ C115/47 art 216(1).
[411] ibid art 79(3).
[412] Martenczuk, 'Migration Policy and EU External Relations' (n 56) 80.
[413] Papagianni, 'Forging an External EU Migration Policy' (n 393) 291; Martenczuk, 'Migration Policy and EU External Relations' (n 56) 97.
[414] Martenczuk, 'Migration Policy and EU External Relations' (n 56) 81.
[415] ibid 103.
[416] Consolidated Version of the Treaty on the Functioning of the European Union [2008] OJ C115/47 art 208 and 212.

The inclusion of migration-related provisions in agreements other than readmission agreements is argued to result from the EU's difficulty when negotiating readmission agreements independently. As the previous section pointed out, readmission agreements were developed because of the complexity to convince countries to readmit their nationals or foreign nationals without an existing arrangement. Yet, readmission agreements' negotiations with third countries are also complex as they tend to be lengthy and unfruitful at times.[417] As Hampshire explains, there is little incentive for Third World countries to cooperate in containing migration or readmitting unwanted migrants from the EU.[418] It, therefore, appeared necessary for the EU and its member states to include incentives to encourage third countries to enter into negotiation and agree to cooperate on migration control.[419]

This evolution did not result from the Lisbon Treaty, which formalised and expanded a pre-existing practice. Indeed, Peers claims that the Cotonou Agreement, which entered into force in 2003, is the first example of the EU including readmission clauses in a development cooperation agreement.[420] This agreement between the EU and states of the African, Caribbean and Pacific regions (ACP) aimed primarily to promote the economic, social and human development of the ACP countries,[421] but also directly associated migration and its control with development objectives. Indeed, article 13 stressed that migration 'shall be the subject of in-depth dialogue' before declaring that reducing poverty, improving living and working conditions, creating employment and developing training will 'contribute in the long term to normalising migratory flows'.[422]

[417] Coleman, *European Readmission Policy* (n 358) 182-183.
[418] Hampshire, 'Speaking with One Voice?' (n 381) 574.
[419] ibid 581.
[420] Peers, 'Irregular Immigration' (n 358) 202.
[421] Partnership Agreement Between the Members of the African, Caribbean and Pacific Group of States of the One Part, and the European Community and its Member States, of the Other Part, Signed in Cotonou on 23 June 2000 [2000] OJ L317/3 art 1.
[422] ibid art 13.

Here, the Cotonou Agreement seems to take quite a different approach to cooperation on migration with third countries from the previous focus on control and coercion. The EU takes more of a 'long term' approach and considers so-called 'root causes' of migration to develop its cooperation. The Cotonou Agreement also emphasised so-called 'illegal' migrants and their return since article 13(5) included readmission clauses.[423] This suggests that although the 'comprehensive approach' takes an apparent different approach focusing on long-term measures and taking into account migrants' conditions in countries of transit and origin, the cooperation between the EU and third countries retained a control- and security-oriented approach. Even when including development-related measures, their use is aimed at reducing immigration to the EU.

Based on the ACP-EU cooperation developed by the Cotonou Agreement, the EU set an overarching framework to develop cooperation on migration with third countries in 2005: the Global Approach to Migration (GAM), which later became the Global Approach to Migration and Mobility (GAMM) in 2011.[424] Broadly speaking, the GAMM aimed to provide a more comprehensive approach to the external dimension of the migration policy.[425] It took an approach to Third World migration which seemed apparently more open, notably by including the notion of 'mobility' in its title and the facilitation of legal migration as one of its four pillars.[426] Yet the possibility for the EU to provide more legal migration channels was made conditional upon 'well-functioning border controls, lower levels of irregular migration and an effective return policy'.[427]

[423] ibid art 13(5).
[424] Council of the European Union, 'Brussels European Council – Presidency Conclusions', 17 December 2005, 15914/05; Commission, 'The Global Approach to Migration and Mobility' (Communication) COM (2011) 743 final 5.
[425] Papagianni, 'Forging an External EU Migration Policy' (n 393) 284.
[426] Commission, 'The Global Approach to Migration and Mobility' (Communication) COM (2011) 743 final 7.
[427] ibid 5.

Additionally, according to the Commission, the GAMM 'should be firmly embedded in the EU's foreign policy framework, including development cooperation'.[428] However, the EU's overall approach to development in the GAMM stressed the need to 'maximis[e] the development impact of migration'[429] and insisted on 'taking the downsides to migration seriously'.[430] Perhaps even more revealing of the EU's understanding of migration-related development cooperation with third countries, the GAMM's four pillars included 'preventing and reducing irregular migration' second, while development comes fourth.[431] This suggests that the 'preventive approach' initiated by the Cotonou Agreement was progressively generalised as development cooperation was increasingly tied to migration, especially so-called 'irregular' migration management.

The GAMM's primary tool was Mobility Partnerships (MPs), which the European Commission argued should be 'promoted as the principal framework for cooperation in the area of migration and mobility between the EU and its partners'.[432] MPs are not legally binding and merely constitute political declarations.[433] Moreover, they include a wide range of themes and measures,[434] thus giving significant flexibility to conduct the cooperation and the areas it covers. The aim is to provide 'tailor-made' agreements which cover the shared interests and concerns of the EU and its partners.[435] These partnerships are not aimed at all third countries. Rather, they are limited to third countries, which showed their commitment to cooperate actively with the EU regarding

[428] ibid 5.
[429] ibid 18.
[430] ibid 19.
[431] ibid 7.
[432] ibid 10.
[433] Natasja Reslow, 'The Role of Third Countries in EU Migration Policy: The Mobility Partnerships' (2012) 14(4) European Journal of Migration and Law 393, 394.
[434] Papagianni, 'Forging an External EU Migration Policy' (n 393) 289.
[435] Commission, 'The Global Approach to Migration and Mobility' (Communication) COM (2011) 743 final 11.

migration management. Despite their apparent flexibility and profitable nature for EU partners,[436] third countries are expected to comply with specific commitments, particularly regarding the return and readmission of their own and third country nationals.[437] In exchange for such commitments, the EU and its member states commit to negotiating legal migration instruments such as visa facilitation.[438] This shows how the EU presents MPs as 'mutually beneficial',[439] which contrasts sharply with the traditional consideration of readmission agreements as mainly imposing obligations on partner countries.

The use of MPs by the EU is indicative of the EU's approach and conception of third countries. MPs maintain the imbalance between the EU and its partners since, despite the GAMM's claims that MPs are 'tailor-made',[440] the EU gave its partner states little room for manoeuvre when negotiating.[441] For instance, Reslow explains, the approach towards Senegal and Cape Verde during the negotiations was very much a 'take it or leave it' one.[442] For van Selm, the EU's dialogue with third countries focused on how the partner will implement the EU's plans rather than negotiating the MP plans per se.[443] In this way, MPs did not achieve the objective of developing more flexible and equal negotiations and agreements on migration that would benefit both partners. Rather, the EU remained in control of the negotiation process and of what is negotiated, and MPs thus maintained the EU's domination over negotiations related to migration.

[436] ibid.
[437] Reslow, 'The Role of Third Countries' (n 433) 394.
[438] Commission, 'The Global Approach to Migration and Mobility' (Communication) COM (2011) 743 final 11.
[439] ibid 10.
[440] ibid 11.
[441] Reslow, 'The Role of Third Countries' (n 433) 395.
[442] ibid.
[443] Joanne van Selm, 'Immigration and Asylum or Foreign Policy' in Sandra Lavenex and Emek M Uçarer (eds), *Migration and the Externalities of European Integration* (Lexington 2002) 154.

Moreover, the development of EU cooperation with third countries normalised the outsourcing of responsibility to deal with migrants and migration to non-EU countries.[444] Contrary to readmission agreements which put mainly obligations on partners to readmit their own or third country nationals,[445] partnerships using a 'comprehensive approach' extended third countries' roles in the EU's so-called 'fight against illegal migration'. Stressing the role of development in the 'normalisation' of migratory flows, the Cotonou Agreement indeed deepened the involvement of non-EU countries in controlling migration as it foresaw the economic and social development of regions of origin.[446] The EU considerably expanded its outsourcing of migration control by involving Third World countries in other aspects supposedly linked to migration, such as development or eradication of poverty.

Additionally, the diversification of instruments was combined with the increasing use of non-binding or political agreements. The GAMM's framing of MPs as primary tools shows the EU's shift towards non-binding agreements when dealing with migration. Using informal arrangements poses a particular threat to migrants' human rights as they offer few guarantees and are not clearly amenable to oversight, including judicial oversight, due to their political nature. The EU's increasing use of informal partnerships thus gestures towards the view on a policy level that Third World migrants' human rights do not require the same guarantees as others.

MPs are also indicative of the EU's evolving approach to migration. As Cassarino argues, the development of MPs shows the importance of the regulatory function of the EU readmission policy. He explains that the link between third country nationals'

[444] Desmond, 'The Development of a Common EU Migration Policy' (n 46) 251.
[445] Peers, 'Irregular Immigration' (n 358) 197.
[446] Partnership Agreement Between the Members of the African, Caribbean and Pacific Group of States of the One Part, and the European Community and its Member States, of the Other Part, Signed in Cotonou on 23 June 2000 [2000] OJ L317/3 art 13(4).

readmission and MPs ensures the temporality of foreign workers on the EU territory.[447] Indeed, MPs include the possibility of visa facilitations for the partner states' citizens based on the negotiation of readmission obligations.[448] These agreements thus confirm and strengthen the temporality of Third World migrants on EU territory, which readmission agreements already suggested.[449] However, contrary to the dominant control-focused approach in the early years of EU external migration and asylum policy, the plethora of initiatives and frameworks developed in the lead-up and following Lisbon rely more heavily on a preventive logic. These different forms of cooperation focused on the factors encouraging or forcing migrants to migrate,[450] and therefore, contributed to reinforcing the supposed need to address so-called 'root causes' to control migration to the EU. Although addressing 'root causes' was already underlying the EU's external action before the Lisbon Treaty, it gained much more relevance and significance as EU migration and asylum policies were increasingly associated with other external policies such as development or trade.

What this section overall reveals is that externalisation of border controls and the use of informal cooperation mechanisms by the EU emerged at later stages of the common migration and asylum policy but rapidly became integral elements of the EU approach to Third World migration. It becomes clear from my previous analysis that they constituted long-lasting tendencies of the EU migration and asylum policy prior to the so-called 'crisis'. Their growing use post-2015 can therefore not be understood through a 'crisis' lens suggested in chapter 1. Engaging with the development of the EU externalisation and readmission policies prior to the so-called 'crisis' reveals some

[447] Cassarino, 'A Reappraisal' (n 403) 138.
[448] Commission, 'The Global Approach to Migration and Mobility' (Communication) COM (2011) 743 final 11.
[449] See section 2.2.1. of this chapter.
[450] Boswell, 'The "External Dimension"' (n 346) 624.

of the EU's central considerations when dealing with Third World migrants and countries, namely the EU's focus on removing unwanted migrants and furthering Third World migrants' temporariness in the EU while maintaining a performative commitment to refugee rights. By diversifying its cooperation with third countries, the EU has deepened its influence over Third World countries and increasingly transferred them responsibility to deal with migration.

Conclusions

In this chapter, I reviewed the emergence and development of EU policy on migration and asylum. Discussing internal and external dimensions of the common asylum and migration system my analysis reveals long-lasting tendencies in the EU's approach to Third World migrants, which pre-dated the 'crisis' framing.

This includes, firstly, the use of informal cooperation. Contrary to what chapter 1 suggested,[451] circumventing normal procedures and processes did not emerge from the 'crisis' frame. As my analysis shows, this practice emerged at the very inception of EU migration and asylum policy through intergovernmental cooperation. Likewise, the EU's security-driven approach pre-dated the so-called 'crisis'. My previous analysis, indeed, showed that the EU's concerns towards Third World migrants being security threats was central in the EU migration and asylum policy since the intergovernmental period. The othering of migrants, which chapter 1 suggested results from 'crisis' frames,[452] also appears to be a long-lasting tendency in the EU migration

[451] See chapter 1 section 3.4.
[452] See chapter 1 section 3.3.

and asylum law system. The EU's obsession with so-called 'illegal' migration was a key driver to develop a common policy towards asylum and migration. The rhetoric of 'fight against illegal migration' justified further restriction of access to legal migration channels or protection statuses, which participates in illegalising migrants and in this way, in excluding the unwanted 'others' either physically from the EU territory – through the development of return policies – or by excluding them from accessing substantive and procedural rights due to their lack of any status. Finally, it is the very focus on Third World migrants' 'illegality' and links to security threats that supports the externalisation of border controls to keep migrants at a distance. As I observed, externalisation, including cooperation with third countries, is a legacy of member states' practices which was progressively transferred to the EU through the use of carrier sanctions, EU readmission agreements or the inclusion of readmission or migration-related clauses in development agreements. These practices enforce Third World migrants' temporariness in the EU and transfer responsibility to deal with migration to third countries.

As I will now turn to in the following chapter, the tendencies observed in early common migration policy persisted after 2015. My analysis of recent policy developments suggests that the 'crisis' framing boosted and generalised some of those long-lasting practices.

Chapter 3 – The EU migration and asylum law system post-crisis

Introduction

Almost two decades had passed since the communitarisation of asylum and migration initiated by the Treaty of Amsterdam,[1] when the 'situation in the Mediterranean' was first declared as a 'crisis' by High Representative/Vice President of the Commission Mogherini and Commissioner Avramopoulos in April 2015.[2]

Building on chapter 1, I aim at deepening the understanding of 'crisis' framing by analysing its implications for the development of EU migration and asylum policy. It impacted the structural elements of EU migration and asylum law by emphasising the situation as an 'emergency'. Its need for urgent and humanitarian action also influenced the external aspects of the EU migration policy, especially cooperation with third countries. Overall, studying the implications of 'crisis' framing for EU migration and asylum policy provides an opportunity to further engage with the EU's approach to Third World migration.

In this chapter, I argue that the use of 'crisis' framing enables the furthering of some pre-existing tendencies within the EU migration and asylum law system. Although the Lisbon Treaty deepened EU competences in the fields of migration and asylum, the 'crisis' frame generated a slowdown in formal policy-making at the EU level and a return to informal cooperation. Notably, it led to normalising atypical arrangements

[1] See chapter 2 section 1.1.2.
[2] Commission, 'Joint Foreign and Home Affairs Council: Ten Point Action Plan on Migration (Press Release)' (Luxembourg, 20 April 2015).

with third countries, which chapter 2 suggested emerged before 2015.[3] Overall, the 'crisis' framing, by excluding migration and asylum policy from Lisbon's institutional guarantees and furthering atypical measures, contributes to legitimising the EU's repressive approach to Third World migration. In other words, due to the 'crisis' frame and its security focus, control-oriented measures towards Third World migrants, which the EU developed since the inception of the common migration policy, were progressively designed as the most desirable course of action.

This chapter is structured in three parts. In the first part, I engage with the implications of the 'crisis' frame for the communitarisation of migration and asylum law, showing the role of the emergency rhetoric in justifying a return to solutions outside the institutional framework set up by Lisbon. I then turn to the role of the 'crisis' frame for the development of EU cooperation with third countries, especially for the normalisation of informal cooperation frameworks. In section 3, this chapter deals with the implications of the 'crisis' frame for the EU's approach to Third World migration and argues it legitimated a control-focused migration and asylum policy.

1. 'Crisis' framing: A brake on the communitarisation of asylum and migration

In this section, I analyse the 'crisis' framing's impact on structural aspects of EU asylum and migration law after 2015. As I explained previously, using a 'crisis' frame suggests the occurrence of a disruption or the paroxysm of disfunction, thus calling for urgent measures or reforms to address the supposed structural deficiencies or

[3] See chapter 2 section 2.2.1.

exceptional circumstances.[4] Yet contrary to what chapter 1 implied, the so-called 'crisis' did not prompt reforms of the EU migration and asylum law system – at least not formally. Rather, it revealed the implementation struggles of common migration and asylum law and furthered existing disparities among member states. That being said, the 'crisis' frame triggered attempts to reform the Common European Asylum System (CEAS). Taking the reform proposal of the Dublin Regulation as an illustration, I argue that formal EU cooperation on asylum has reached a stalemate. Instead of reforms, the 'crisis' framing contributed to the use of measures outside the EU institutional framework for internal aspects of EU migration and asylum policy. Therefore, rather than being an accelerator or reform-driver,[5] the use of 'crisis' framing in 2015 constituted more of a brake on the communitarisation of migration and asylum matters which the Treaties of Amsterdam and Lisbon pushed for.[6]

1.1. The continuous disparities between member states

Disparities among member states when dealing with Third World migration are considered by EU policymakers to result from a variety of factors, such as their geographical situation - Southern EU states are generally the first point of entry for so-called 'irregular' migrants - and their attractiveness for migrants operating so-called 'secondary movements'.[7] Yet, these factors inherent to migration are furthered by EU migration and asylum law. Notably, the Dublin III Regulation particularly strengthens

[4] See chapter 1 sections 2 and 3.2.
[5] See chapter 1 section 3.
[6] See chapter 2 sections 1.1.2. and 1.1.3.
[7] Commission, 'Communication from the Commission to the European Parliament and the Council Towards a Reform of the Common European Asylum System and Enhancing Legal Avenues to Europe' COM(2016) 197 final 4.

inequalities in law among member states regarding responsibility for asylum seekers.[8] As demonstrated previously, this regulation is a legacy from one of the oldest instruments of the common migration and asylum policy,[9] the 1990 Dublin Convention,[10] and aims at allocating asylum applications among EU states. The main criterion in determining the relevant state tends to be the country of first entry in the EU,[11] which corresponds mostly to Southern EU countries, thus, placing heavier responsibility – at least in law – on the so-called 'frontline states'.[12]

In practice, however, the Dublin Regulation leads to very few returns, Maiani explains, since net transfers resulting from the Regulation – comparing the incoming and outgoing transfer requests of member states – amount to almost zero.[13] That is why Peers argued that the Dublin system was 'an expensive waste of time, ultimately still applying to only a small percentage of asylum seekers and imposing an extra cost on top of the cost of considering each asylum application'.[14] His analysis related to the Dublin II Regulation,[15] but the same could be said of Dublin III as it maintained the same system of allocation. Because the Dublin Regulation and its criteria do not take into account asylum seekers' circumstances and choices of destination, there is a lack

[8] Regulation (EU) 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) [2013] OJ L180/31.
[9] See chapter 2 section 1.3.3.
[10] Convention Determining the State Responsible for Examining Applications for Asylum Lodged in one of the Member States of the European Communities [1997] OJ C254/1.
[11] Regulation (EU) 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) [2013] OJ L180/31 art 13.
[12] Dallal Stevens and Angeliki Dimitriadi, 'Crossing the Eastern Mediterranean Sea in Search of "Protection"' (2019) 17(3) Journal of Immigrant and Refugee Studies 261, 268.
[13] Francesco Maiani, 'The Reform of the Dublin System and the Dystopia of "Sharing People"' (2017) 24(5) Maastricht Journal of European and Comparative Law 622, 626.
[14] Steve Peers, *EU Justice and Home Affairs Law: Volume II: EU Criminal Law, Policing, and Civil Law* (4th edn, Oxford University Press 2016) 300.
[15] 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 [2003] OJ L50.

of compliance from migrants who either avoid registration upon entry in the EU, operate secondary movements, or return to their desired country of destination after a Dublin return.[16] Additionally, the Dublin system entices member states to operate lax border controls due to their fear of being overwhelmed by asylum applicants.[17] For instance, during the so-called 'crisis', Southern EU countries were said to be 'overtly ignoring Dublin's "first-country-of-entry" principle'.[18] At the same time, Germany unilaterally decided to stop applying the Dublin III Regulation to asylum seekers coming from Syria.[19] The relevance and significance of the Dublin system for the EU migration and asylum policy are thus questionable.

Despite the Dublin system's well-known deficiencies, the Dublin III Regulation and its objective of responsibility-sharing, as chapter 2 explained,[20] remain a cornerstone element of the CEAS. Indeed, the EU's response to the so-called 'crisis' with regards to asylum firstly focused on adding another layer to the Dublin system, as Trauner puts it, instead of reforming or replacing it.[21] The 2015 European Agenda on Migration set the EU's response to the 'migration crisis' frame, and its main internal measure was the establishment of a relocation scheme, that is to say 'a temporary distribution scheme for persons in clear need of international protection to ensure a fair and balanced participation of all member states to this common effect'.[22] The Commission proposed these measures, despite member states' limited inclination towards binding relocation schemes, before the emergence of the so-called 'crisis'.[23] Ultimately, 'a

[16] Maiani, 'The Reform of the Dublin System' (n 13) 626.
[17] ibid.
[18] Florian Trauner, 'Asylum Policy: The EU's "Crises" and the Looming Policy Regime Failure' (2016) 38(3) Journal of European Integration 311, 319.
[19] Daniel Thym, 'The "Refugee Crisis" as a Challenge of Legal Design and Institutional Legitimacy' (2016) 53(6) Common Market Law Review 1545, 1549.
[20] See chapter 2 section 1.3.3.
[21] Trauner, 'Asylum Policy: The EU's "Crises"' (n 18) 322.
[22] Commission, 'A European Agenda on Migration' (Communication) COM(2015) 240 final 4.
[23] Trauner, 'Asylum Policy: The EU's "Crises"' (n 18) 38(3) 318.

temporary and exceptional relocation mechanism over two years from […] Italy and Greece to other member states' was agreed by the Council in July 2015.[24] This was intended to lead first to the relocation of '40 000 persons in clear need of international protection' followed by the relocation of 120 000 applicants for international protection.[25] This decision was reached without a consensus among member states – as is usually the case in Justice and Home Affairs matters – due to Eastern member states' opposition.[26] Indeed, for the relocation scheme to work, member states where applicants are relocated from, are required to 'identify the individual applicants who could be relocated'.[27] Eastern European countries, especially Hungary which was originally meant to be included in the scheme, rejected this idea arguing it would amount to hosting a refugee camp on its territory while the relocations are processed.[28] The adoption of measures without reaching a consensus among all member states suggests some influence of the 'crisis' framing on EU policy making. The Council Decision was based on the actioning of article 78(3) TFEU, which enables the Council to adopt 'provisional measures' when one or several member states are 'confronted by an emergency situation characterised by a sudden inflow of nationals of third countries'.[29] The 'crisis' frame and its related need for urgent action, therefore, enabled EU institutions to omit the informal rule of consensual decision-making in Justice and

[24] Council of the European Union, 'Outcome of the Council Meeting 3405th Council Meeting Justice and Home Affairs' (Brussels, 20 July 2015) 11097/15.
[25] Council Decision (EU) 2015/1523 of 14 September 2015 Establishing Provisional Measures in the Area of International Protection for the Benefit of Greece and Italy [2015] OJ L239/146 art 4; Council Decision (EU) 2015/1601 of 22 September 2015 Establishing Provisional Measures in the Area of International Protection for the Benefit of Italy and Greece [2015] OJ L248/80 art 4(1).
[26] Trauner, 'Asylum Policy: The EU's "Crises"' (n 18) 319.
[27] Council Decision (EU) 2015/1523 of 14 September 2015 Establishing Provisional Measures in the Area of International Protection for the Benefit of Greece and Italy [2015] OJ L239/146 art 5(3).
[28] Trauner, 'Asylum Policy: The EU's "Crises"' (n 18) 320.
[29] Consolidated Version of the Treaty on the Functioning of the European Union [2008] OJ C115/47 art 78(3).

Home Affairs.[30] This confirms some hypothesis formulated by chapter 1, namely that 'crisis' framing is used to circumvent normal procedures and processes.[31]

Given that the 'crisis' frame suggests a turning-point or unprecedented situation in EU migration and asylum policy, and considering the Dublin system's deficiencies, one would expect that in response to the 'crisis' these approaches would be revised or alternatives proposed in recognition that they had failed in preventing the emergence of the said 'crisis', as discussions on policy framing suggested.[32] Instead the 'crisis' led to little evolution in the immediate aftermath, but rather caused a doubling down of the pre-existing approach. A reform of the Dublin system was proposed in March 2016,[33] but reforming the allocation system remained unsuccessful,[34] as I demonstrate below.[35] Most importantly, measures from the European Agenda on Migration analysed earlier led to few changes. Indeed, the numbers of asylum seekers foreseen to be relocated through the emergency relocation scheme were considerably limited compared to migrants arriving to the EU in 2015-2016,[36] thus suggesting the Agenda's impact on reducing disparities among member states is poor. This is even more so considering other developments of the European Agenda on Migration. In addition to relocation, the Agenda introduced the EU's so-called 'hotspot' approach.[37] This measure aimed at assisting Southern member states dealing with migrants' arrivals

[30] Trauner, 'Asylum Policy: The EU's "Crises"' (n 18) 320.
[31] See chapter 1 section 3.4.
[32] See chapter 1 section 3.
[33] Commission, 'Proposal for a Regulation of the European Parliament and of the Council Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Application for International Protection Lodged in one of the Member States by a Third-Country National or a Stateless Person (recast)' COM(2016) 270 final.
[34] Luisa Marin, 'Waiting (and Paying) for Godot: Analyzing the Systemic Consequences of the Solidarity Crisis in EU Asylum Law' (2020) 22(1) European Journal of Migration and Law 60, 63.
[35] See section 1.2. of this chapter.
[36] Evangelina (Lilian) Tsourdi, 'Solidarity at Work? The Prevalence of Emergency-Driven Solidarity in the Administrative Governance of the Common European Asylum System' (2017) 24(5) Maastricht Journal of European and Comparative Law 667, 679-680.
[37] Commission, 'A European Agenda on Migration' (Communication) COM(2015) 240 final 6.

through the participation of EU agencies in 'identify[ing], register[ing] and fingerprint[ing] incoming migrants'.[38] After the opening of the first hotspots in the Italian island of Lampedusa in September 2015, others were opened in Greek islands, notably in Chios, Kos, Lesvos, Leros, and Samos, and in other locations in Italy.[39] Thus, despite being supposedly aimed at facilitating the relocation scheme, hotspots have furthered the role of Southern EU countries, especially Greece and Italy, in containing unwanted migrants.[40] This suggests that the 'crisis' framing, especially of a 'humanitarian' or 'refugee crisis', did not lead to increased solidarity among member states or to improved human rights protection for migrants. Instead, 'mistrust rather than mutual trust triumphed'.[41] Indeed, provisions related to the attribution of asylum seekers among EU countries are imbued with containment measures falling on Southern EU countries. In other words, hotspots participate in containing migrants at Europe's edges by slowing and disrupting their migratory journey,[42] if not detaining them, and thus perpetuate the EU's control-focused approach to Third World migrants.[43]

Released in 2020, the New Pact on Migration and Asylum seemed to emphasise a humane approach to migration and stressed that 'no Member State should shoulder a disproportionate responsibility'.[44] Yet, the proposed Asylum and Migration Management Regulation, intended to replace the 2016 Dublin Reform Proposal,[45]

[38] ibid.
[39] Martina Tazzioli, 'Containment Through Mobility: Migrants' Spatial Disobediences and the Reshaping of Control Through the Hotspot System' (2018) 44(16) Journal of Ethnic and Migration Studies 2764, 2765.
[40] Dallal Stevens, 'Asylum, Refugee Protection and the European Response to Syrian Migration' (2017) 9 Journal of Human Rights Practice 184, 187; Tazzioli, 'Containment Through Mobility' (n 39) 2765; Stevens and Dimitriadi, 'Crossing the Eastern Mediterranean Sea' (n 12) 274.
[41] Stevens, 'Asylum, Refugee Protection and the European Response to Syrian Migration' (n 40) 187.
[42] Tazzioli, 'Containment Through Mobility' (n 39) 2774.
[43] See chapter 2 section 1.2.2.
[44] Commission, '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 1-2.
[45] ibid, 5; Commission, 'Proposal for a Regulation of the European Parliament and of the Council on Asylum and

offered little change regarding member states' responsibility. Indeed, despite the EU's emphasis on member states' solidarity to deal with migration and asylum[46] and the proposed streamlining of the Dublin criteria,[47] the main criteria to determine member states' responsibility for asylum seekers remained,[48] especially the country of first entry criterion.[49] In this way, the New Pact is likely to maintain disputes between Northern and Southern states regarding responsibility to deal with asylum applications,[50] as it overall relied on the 'continuation of older ideas'.[51] In particular, it continued the rationale of 'burden-sharing' among member states, which was a central element of the EU's approach to asylum seekers before 2015, as I argued previously.[52] By keeping the Dublin criteria to determine member states' responsibilities, it will maintain the pre-existing disparities within EU countries.

Overall, the 'crisis' frame acted as a strong reminder of the common migration and asylum policy's role in furthering inequal responsibilities among member states. The common migration and asylum law system contributes to representing some member states as having more responsibility when dealing with migration. Due to their geographical location, and most importantly the Dublin system and hotspot approach, some member states, especially Southern EU countries, are presented as responsible

Migration Management and Amending Council Directive (EC) 2003/109 and the Proposed Regulation (EU) XXX/XXX [Asylum and Migration Fund]' COM(2020) 610 final 23.

[46] Commission, 'Proposal for a Regulation of the European Parliament and of the Council on Asylum and Migration Management and Amending Council Directive (EC) 2003/109 and the Proposed Regulation (EU) XXX/XXX [Asylum and Migration Fund]' COM(2020) 610 final 1.

[47] ibid 23.

[48] Nadia Petroni, 'The EU's Pact on Migration and Asylum Will Do Little to Ease the Pressure on Southern Member States' (*LSE EUROPP Blog*, 6 January 2021) <https://blogs.lse.ac.uk/europpblog/2021/01/06/the-eus-pact-on-migration-and-asylum-will-do-little-to-ease-the-pressure-on-southern-member-states> accessed 20 September 2021.

[49] Commission, 'Proposal for a Regulation of the European Parliament and of the Council on Asylum and Migration Management and Amending Council Directive (EC) 2003/109 and the Proposed Regulation (EU) XXX/XXX [Asylum and Migration Fund]' COM(2020) 610 final art 21(1).

[50] Daniel Thym, 'Secondary Movements: Overcoming the Lack of Trust Among the Member States?' (*EU Immigration and Asylum Law and Policy*, 29 October 2020) <https://eumigrationlawblog.eu/secondary-movements-overcoming-the-lack-of-trust-among-the-member-states> accessed 20 September 2021.

[51] Petroni, 'The EU's Pact on Migration and Asylum' (n 48)

[52] See chapter 2 section 1.3.3.

for mismanaging EU external borders. These were key considerations in the characterisation of the so-called 'crisis', as I discussed in chapter 1.[53] Even though a 'crisis' is sometimes understood as a system's failure,[54] and supports calls to reform such a malfunctioning system, the use of 'crisis' framing in 2015 did not lead to any change in terms of responsibility-sharing among member states.

These observations further question the traditional understanding of the development of the common migration and asylum policy. As I argued previously, representing this policy as an almost incidental consequence of establishing the common market needs to be questioned.[55] The orthodox narrative on the establishment of the EU asylum system represents it as a necessary step towards the common market and emphasizes the idea of establishing a common and equal migration and asylum system among member states. As the previous discussion showed, this is far from the reality, considering that disparities among member states increased following the purported 'crisis'. My earlier observations in this section revealed major disparities among member states in terms of implementation, especially regarding the pressure on Southern member states, but also showed divergent approaches among member states when developing cooperation. This difficulty in collaborating and developing a functioning response to the 'crisis' frame casts further doubt on the supposed causal link between the establishment of the common market and the development of a common migration and asylum policy. It confirms that member states' cooperation on migration and asylum matters was not due to the creation of a free movement area.

[53] See chapter 1 section 1.
[54] Jessica C Lawrence, 'The EU in Crisis: Crisis Discourse as a Technique of Government' (2014) 44 Netherlands Yearbook of International Law 187, 188.
[55] See chapter 2 section 1.2.1.

My previous observations also cast a doubt on the traditional understanding of the communitarisation of migration and asylum policy as a positive development for migrants, especially the conception of EU institutions as 'progressive' and pro-migrant.[56] Such representations of the EU were particularly present following the Lisbon Treaty, which, as I explained in chapter 2, was expected to improve migrants' human rights protection by reinforcing EU institutions' role in this area.[57] As this section suggests, the development of EU norms on migration and asylum has not improved migrants' rights protection during the so-called 'crisis'.[58] The difficulties faced by the EU and its member states in setting up alternative measures to address the supposed 'crisis' are particularly flagrant. Notably, the minimal impact of the EU emergency relocation scheme can be linked to the origins of the common migration and asylum policy. As I argued previously,[59] EU migration and asylum policy was developed with a security-focused and control-based approach, rather than aimed to ensure access to protection. The EU's restrictive approach to migrants and asylum seekers remained significant in the wake of the so-called 'crisis'. Even when developing the EU relocation scheme to enhance solidarity and responsibility-sharing among member states, the scheme has such a narrow impact that it is almost negligible. Likewise, the 2020 New Pact maintains a security-focused approach to migration,[60] by focusing on developing an effective return system,[61] creating an upgraded version of Eurodac to expand its control over so-called 'irregular' migrants,[62] or stepping-up cooperation in external

[56] Saskia Bonjour, Ariadna Ripoll Servent and Eiko Thielemann, 'Beyond Venue Shopping and Liberal Constraint: A New Research Agenda for EU Migration Policies and Politics' (2018) 25(3) Journal of European Public Policy 409, 412.
[57] See chapter 2 section 1.1.3.
[58] See also section 2.3. of this chapter for further discussion.
[59] See chapter 2 section 1.3.3.
[60] Petroni, 'The EU's Pact on Migration and Asylum' (n 48).
[61] Commission, '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 7-8.
[62] ibid 9.

border control,[63] for instance. Therefore, the 'crisis' framing did not disrupt the EU's control-oriented approach to Third World migration, which chapter 2 observed prior to 2015. Instead, the emergency rhetoric entrenched in 'crisis' framing has enabled the EU to further contain unwanted migrants.

1.2. EU asylum law in a stalemate

Following the so-called 'crisis', the EU asylum law system appeared unable to respond to the arrivals of asylum seekers based on pre-existing provisions, such as the Temporary Protection Directive as I further discuss below. Equally, although the Commission issued various proposals to reform the CEAS – including proposals to reform the Dublin system,[64] the Eurodac Regulation,[65] the Qualification Regulation[66] and the Reception Condition Directive,[67] as well as proposals for the establishment of a Union Resettlement Framework,[68] for an Asylum Procedures Regulations and,[69] for

[63] ibid 11.
[64] Commission, 'Proposal for a Regulation of the European Parliament and of the Council Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Application for International Protection Lodged in one of the Member States by a Third-Country National or a Stateless Person (recast)' COM(2016) 270 final.
[65] Commission, 'Proposal for a Regulation of the European Parliament and of the Council 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], for Identifying an Illegally Staying Third-Country National or Stateless Person and on Requests for the Comparison with Eurodac Data by Member States' Law Enforcement Authorities and Europol for Law Enforcement Purposes (recast)' COM(2016) 272 final.
[66] Commission, 'Proposal for a Regulation of the European Parliament and of the Council 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 and Amending Council Directive 2003/109/EC of 25 November 2003 Concerning the Status of Third-Country Nationals who are Long-Term Residents' COM(2016) 466 final.
[67] Commission, 'Proposal for a Directive of the European Parliament and of the Council Laying Down Standards for the Reception of Applicants for International Protection (recast)' COM(2016) 465 final.
[68] Commission, 'Proposal for a Regulation of the European Parliament and of the Council Establishing a Union Resettlement Framework and Amending Regulation (EU) No 516/2014 of the European Parliament and the Council' COM(2016) 468 final.
[69] Commission, 'Proposal for a Regulation of the European Parliament and of the Council Establishing a Common Procedure for International Protection in the Union and Repealing Directive 2013/32/EU' COM(2016) 467 final.

the creation of an EU agency in charge of asylum –[70] reforms of the common asylum system appeared in a stalemate. Focusing on the proposal to reform the Dublin system, I engage with the difficulties encountered by the EU and its member states in agreeing to modify the existing system and argue that the 'crisis' frame, instead of boosting emergency action and reforms as chapter 1 suggested, has led to the stagnation of the EU asylum law system.

As I discussed previously, the Temporary Protection Directive was created to address situations of 'mass influx'.[71] To be activated, the Commission – on its own or upon a member state's request – shall bring a proposal forward to the Council which then decide by qualified majority on the existence or not of a 'mass influx'.[72] In such case, member states shall provide temporary protection to displaced persons from a same country or region for a year or unless the Council decides to extend the scheme.[73] Although the notion of 'mass influx' remained vague,[74] numerous scholars called for the Temporary Protection Directive to be activated in 2015-2016[75] and members of the European Parliament questioned the Commission for (not) activating the Directive.[76] Yet, despite the number of asylum seekers arriving to the EU being

[70] Commission, 'Proposal for a regulation of the European Parliament and of the Council on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010' COM(2016) 271 final.
[71] See chapter 2 section 1.3.3.
[72] 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 [2001] OJ L212/12, art 5(1).
[73] ibid, chap 3 and art 4.
[74] See discussion in chapter 2 section 1.3.3.
[75] See for instance: Olga Mitrovic, 'Used During the Balkan Crises, the EU's Temporary Protection Directive May Now be a Solution to Europe's Refugee Emergency' (*LSE EUROPP Blog*, 22 December 2015) <https://blogs.lse.ac.uk/europpblog/2015/12/22/the-eus-temporary-protection-directive-as-a-solution-to-europes-refugee-crisis/> accessed 21 June 2022; Metlem Ineli-Ciger, 'Time to Activate the Temporary Protection Directive: Why the Directive Can Play a Key Role in Solving the Migration Crisis in Europe' (2016) 18 European Journal of Migration and Law 1; Danielle Gluns and Janna Wessels, 'Waste of Paper or Useful Tool? The Potential of the Temporary Protection Directive in the Current "Refugee Crisis"' (2017) 36 Refugee Survey Quarterly 57.
[76] Commission, 'Study on the Temporary Protection Directive: Final Report' (January 2016) 19 <https://ec.europa.eu/home-affairs/system/files/2020-09/final_report_evaluation_tpd_en.pdf> accessed 21 June 2022.

qualified as a 'crisis',[77] the Temporary Protection Directive was not activated in 2015-2016. As Ineli-Ciger pointed out, the 2015 European Agenda on Migration did not mention the possibility of activating the Temporary Protection scheme.[78] A number of reasons were given by scholars to explain the EU's non-use of the directive in 2015-2016. In particular the difficulty to define and therefore apply the notion of 'mass influx' was seen as a major obstacle to implementing the directive.[79] Additionally, scholars such as Ineli-Ciger considered it would be difficult to secure a qualified majority vote in the Council when the situation of 'mass influx' was seen as only affecting a minority of member states.[80] In 2020, the Commission released a Communication entitled 'New Pact on Migration and Asylum', which contained a set of legislative proposals and included a 'robust crisis preparedness and response system'.[81] In order for the EU 'to be ready for the unexpected',[82] the New Pact foresaw for the Commission to issue a Migration Preparedness and Crisis Blueprint as well as to repeal the Temporary Protection Directive and propose a regulation to address situations of crisis and force majeure in the field of migration and asylum.[83] This suggested the end of the Temporary Protection Directive. However, in March 2022, the Council agreed to activate the Temporary Protection Directive by establishing 'the existence of a mass influx into the Union of displaced persons who have had to leave Ukraine as a result

[77] See previous discussion in chapter 1 section 1.
[78] Metlem Ineli-Ciger, 'Time to Activate the Temporary Protection Directive: Why the Directive Can Play a Key Role in Solving the Migration Crisis in Europe' (2016) 18 European Journal of Migration and Law 1, 12.
[79] Danielle Gluns and Janna Wessels, 'Waste of Paper or Useful Tool? The Potential of the Temporary Protection Directive in the Current "Refugee Crisis"' (2017) 36 Refugee Survey Quarterly 57, 63-64; Meltem Ineli-Ciger, *Temporary Protection in Law and Practice* (Brill 2018) 159.
[80] Meltem Ineli-Ciger, *Temporary Protection in Law and Practice* (Brill 2018) 160.
[81] Commission, '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, 10.
[82] ibid.
[83] ibid, 11; Commission Recommendation (EU) 2020/1366 of 23 September 2020 on an EU Mechanism for Preparedness and Management of Crises Related to Migration (Migration Preparedness and Crisis Blueprint) [2020] OJ L317/26; Commission, 'Proposal for a Regulation of the European Parliament and of the Council Addressing Situations of Crisis and Force Majeure in the Field of Migration and Asylum' COM(2020) 613 final.

of an armed conflict'.[84] The rapid activation of the Temporary Protection Directive in 2022 suggests that the main reason for not activating the directive in 2015-2016 was more due the lack of political will of the Commission and the Council than deficiency or length of the procedure.[85] Here, the EU's 'double standards' when dealing with asylum seekers from the Third World appears rather strikingly when compared to the directive's rapid activation in response to the war in Ukraine in 2022.[86]

In addition, given the 'crisis' framing and its connotation for reforms, the Commission made a number of proposals to reform the CEAS, including the Dublin system. Although the latest reform of the Dublin system was fairly recent when the so-called 'crisis' started – the Dublin III Regulation dates back to 2013 –[87] the EU rapidly considered that the system allocating asylum seekers among member states was not providing sufficient responsibility-sharing, as the European Agenda on Migration highlighted in 2015.[88] As we discussed earlier, fears that some member states' asylum system would be overwhelmed were central in characterising 2015 migration as a 'crisis'.[89] The Commission, therefore, released a proposal to reform the Dublin system in May 2016.[90] The proposal aimed at simplifying the Dublin procedure, ensuring

[84] Council Implementing Decision (EU) 2022/382 of 4 March 2022 Establishing the Existence of a Mass Influx of Displaced Persons from Ukraine Within the Meaning of Article 5 of Directive 2001/55/EC, and Having the Effect of Introducing Temporary Protection [2022] OJ L71/1 art 1.
[85] Metlem Ineli-Ciger, '5 Reasons Why: Understanding the Reasons Behind the Activation of the Temporary Protection Directive in 2022' (*EU Immigration and Asylum Law and Policy Blog*, 7 March 2022) <https://eumigrationlawblog.eu/5-reasons-why-understanding-the-reasons-behind-the-activation-of-the-temporary-protection-directive-in-2022/> accessed 21 June 2022.
[86] Steve Peers, 'Temporary Protection for Ukrainians in the EU? Q and A' (*EU Law Analysis Blog*, 27 February 2022) <http://eulawanalysis.blogspot.com/2022/02/temporary-protection-for-ukrainians-in.html> accessed 21 June 2022.
[87] 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) [2013] OJ L180/31.
[88] Commission, 'A European Agenda on Migration' (Communication) COM(2015) 240 final 13.
[89] See chapter 1 section 1.
[90] Commission, 'Proposal for a Regulation of the European Parliament and of the Council Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Application for International Protection Lodged in one of the Member States by a Third-Country National or a Stateless person (recast)' COM(2016) 270 final.

access to asylum procedures and preventing secondary movements. The proposed changes included simpler criteria to determine member states' responsibility: with regards to the 'irregular' entry or stay, the Commission proposed to delete the clause related to 'irregular' stay, which enabled applicants to apply for international protection after staying five months 'irregularly' on a member state's territory, and to delete the transfer of responsibility between member states which would take place after twelve months of the 'irregular' entry.[91] By doing so, the Commission aimed at imposing an obligation on protection seekers to apply in the country of first 'irregular' entry or legal stay and at maintaining the responsibility with one member state once it has been determined.[92] Overall, this should have reduced so-called 'secondary' movements of asylum seekers, which has been a long-lasting fear for EU policymakers since the establishment of the free-movement area.[93] However, this proposal offered little change to the existing allocation system, as the asylum seekers' attribution criteria 'remain[ed] unchanged in their general outline',[94] Maiani explains.

Moreover, the proposal planned to complement the Dublin system with a corrective allocation mechanism to be used 'in situations when a Member State is confronted with a disproportionate number of applications for international protection for which it is the Member State responsible under the Regulation'.[95] In practice, it would include an automated system to register and monitor asylum applications in all member states. Whenever the system identifies that a member state exceeds the reference key (calculated on member states' population size and total Gross Domestic Product), the

[91] ibid art 15.
[92] ibid 15.
[93] See chapter 2 section 1.3.3.
[94] Maiani, 'The Reform of the Dublin System' (n 13) 629.
[95] Commission, 'Proposal for a Regulation of the European Parliament and of the Council Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Application for International Protection Lodged in one of the Member States by a Third-Country National or a Stateless person (recast)' COM(2016) 270 final 18.

corrective allocation mechanism is activated to allocate all new asylum applications from that member state to other member states which are below the reference key.[96] This corrective mechanism was based on the emergency relocation scheme set up in 2015 discussed earlier. Therefore, it was similar to these measures in many ways,[97] except that it would be a permanent and automatic scheme instead of a set of ad hoc and temporary measures.

The Dublin reform proposal received detailed attention and has been extensively criticised by scholars, such as Maiani, who considered it as 'unfit to solve the problems that have beset the Dublin system' and in contraction with fundamental rights.[98] Others, such as Hruschka, argued that it was 'bound to fail' because most proposed amendments were already unsuccessful earlier.[99] Non-governmental organisations also expressed concerns about the Dublin IV proposal on various occasions, with the European Council on Refugees and Exiles (ECRE), for instance, stating that it 'runs a high risk of perpetuating inefficient and unworkable mechanisms'.[100]

The reform proposal of the Dublin Regulation resulted in a 'stalemate' in 2019.[101] The Council and the European Parliament were unable to reach an agreement on the corrective mechanism proposal. Contrary to the relocation schemes set in 2015, which were voluntary, the corrective mechanism was intended to be binding on all member states.[102] This proposal was controversial among member states and strongly

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[96] ibid.
[97] Maiani, 'The Reform of the Dublin System' (n 13) 630.
[98] ibid 631.
[99] Constantin Hruschka, 'Dublin is Dead! Long Live Dublin! The 4 May 2016 Proposal of the European Commission' (*EU Immigration and Asylum Law and Policy Blog*, 17 May 2016) <http://eumigrationlawblog.eu/dublin-is-dead-long-live-dublin-the-4-may-2016-proposal-of-the-european-commission/> accessed 10 October 2020.
[100] ECRE, *ECRE Comments on the Commission Proposal for a Dublin IV Regulation COM(2016) 270* (October 2016) <https://www.ecre.org/wp-content/uploads/2016/10/ECRE-Comments-Dublin-IV.pdf> accessed 14 October 2020.
[101] Marin, 'Waiting (and Paying) for Godot' (n 34) 63.
[102] Commission, 'Proposal for a Regulation of the European Parliament and of the Council Establishing the

opposed by Visegrad countries: Czech Republic, Hungary, Poland and Slovakia.[103] The latter rejected the idea of a binding mechanism, and rather advocated in favour of a flexible solidarity system.[104] Given member states' reluctance, the prospect of reaching a compromise on the Dublin IV proposal was very low right from the start.[105] Moreover, although these proposals were first issued in 2016, some aspects of the asylum package, notably the Dublin Regulation reform proposal and the Asylum Procedures Regulation proposal, had still not reached the phase of trilogue negotiations in 2019.[106] The European Parliament elections took place in 2019 before any of the CEAS reform proposals could progress sufficiently, thus bringing the asylum package negotiations to a final halt.[107]

In 2020, the Commission presented its 'New Pact on Migration and Asylum' as 'shaped by the lessons of the inter-institutional debates since the Commission proposals of 2016 to reform the Common European Asylum System'.[108] In the New Pact, the Commission relies on the progress achieved on previous proposals, such as the compromise on the Qualification Regulation and the Reception Conditions Directive.[109] Regarding the highly contested Dublin IV proposal, the Commission

Criteria and Mechanisms for Determining the Member State Responsible for Examining an Application for International Protection Lodged in one of the Member States by a Third-Country National or a Stateless Person (recast)' COM(2016) 270 final 18-19.

[103] Natascha Zaun, 'Why is the EU Unable to Adopt a Binding Solidarity Mechanism for the Distribution of Asylum Seekers?' (*EUROPP LSE Blog*, 8 February 2019) <https://blogs.lse.ac.uk/europpblog/2019/02/08/why-is-the-eu-unable-to-adopt-a-binding-solidarity-mechanism-for-the-distribution-of-asylum-seekers/> accessed 13 October 2020; Kris Pollet, 'All in Vain? The Role of EP Positions on Asylum Reform after the European Elections' (*EU Immigration and Asylum Law and Policy Blog*, 23 May 2019) <http://eumigrationlawblog.eu/all-in-vain-the-faith-of-ep-positions-on-asylum-reform-after-the-european-elections/> accessed 13 October 2020.

[104] Natascha Zaun, 'States as Gatekeepers in EU Asylum Politics: Explaining the Non-Adoption of a Refugee Quota System' (2018) 56(1) Journal of Common Market Studies 44.

[105] Steve Peers, 'First Analysis of the EU's New Asylum Proposals' (*EU Law Analysis*, 25 September 2020) <http://eulawanalysis.blogspot.com/2020/09/first-analysis-of-eus-new-asylum.html> accessed 15 October 2020.

[106] Pollet, 'All in Vain?' (n 103).

[107] ibid.

[108] Commission, '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, 2.

[109] ibid 3.

decided to withdraw its reform proposal and replace it with an Asylum and Migration Management Regulation Proposal.[110] Yet, this new proposal essentially preserves the Dublin status quo,[111] by maintaining the existing criteria to determine member states' responsibility to deal with asylum applications,[112] such as the rule of first entry.[113] Overall, despite its use of a somewhat 'newer' rhetoric stressing a 'human and humane approach', solidarity or recognising migration as 'a constant feature of human history',[114] it maintained a similar approach. Moreover, the Pact already received opposition from some member states; Crisp explains that Hungary, Poland, Slovakia and Czech Republic rapidly disagreed with the proposed framework to share responsibility among EU countries.[115] NGOs and human rights advocates have also already expressed their scepticism with regards to this proposal.[116] It can thus already be anticipated that the negotiations of some of the proposals seeming from the New Pact will be rather controversial.

In this way, despite being overtly recognised as flawed and widely criticised, the Dublin system remained a core element of the common migration and asylum policy. Because of its dysfunctions, the EU asylum system appeared stranded in the midst of

[110] ibid 5; Commission, 'Proposal for a Regulation of the European Parliament and of the Council on Asylum and Migration Management and Amending Council Directive (EC) 2003/109 and the Proposed Regulation (EU) XXX/XXX [Asylum and Migration Fund]' COM(2020) 610 final.
[111] Daniel Thym, 'European Realpolitik: Legislative Uncertainties and Operational Pitfalls of the "New" Pact on Migration and Asylum' (*EU Immigration and Asylum Law and Policy*, 28 September 2020) <http://eumigrationlawblog.eu/european-realpolitik-legislative-uncertainties-und-operational-pitfalls-of-the-new-pact-on-migration-and-asylum/> accessed 15 October 2020.
[112] Commission, 'Proposal for a Regulation of the European Parliament and of the Council on Asylum and Migration Management and Amending Council Directive (EC) 2003/109 and the Proposed Regulation (EU) XXX/XXX [Asylum and Migration Fund]' COM(2020) 610 final 17.
[113] ibid 21.
[114] Commission, '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 1.
[115] Jeff Crisp, 'Disingenuous, Dishonest and Dangerous: The EU Pact on Migration and Asylum' (*RLI Blog on Refugee Law and Forced Migration*, 1 October 2020) <https://rli.blogs.sas.ac.uk/2020/10/01/disingenuous-dishonest-and-dangerous-the-eu-pact-on-migration-and-asylum/> accessed 15 October 2020.
[116] Eric Reidy, '"No more Morias": New EU Migration Policy met with Scepticism' *The New Humanitarian* (23 September 2020) <https://www.thenewhumanitarian.org/news/2020/09/23/EU-new-pact-migration-asylum-policy> accessed 15 October 2020.

the ‘crisis’ frame, as the EU and its member states were unable to develop a system which would ensure access to protection for all asylum seekers. When looking back to the origins of the common migration and asylum law system it becomes clear that EU law was not intended to guarantee access to protection; rather it was designed to limit it.[117] The communitarisation of migration and asylum has failed to offer more protection to all asylum seekers, not because it falls short of a pro-migrant, progressive European approach to migration, but because it reflects a security-oriented approach that seeks to restrict Third World migration to the extent possible.

Despite various attempts at reforming the EU asylum law system following the ‘crisis’ framing, the EU appears in stagnation. Reform proposals contain little change to the former status quo and still struggle to get approved. Because the common asylum system was originally developed with the aim to restrict access to protection on the EU territory and focused on sharing the ‘burden’ of dealing with asylum seekers to EU border countries or Third World partners, any attempt to reform the system and introduce more solidarity among member states seems to fail, as previously observed. In other words, the communitarisation of migration and asylum is reaching a halt. Rather than leading to reform, as chapter 1 had suggested, the ‘crisis’ frame further strengthened solutions outside the EU legal framework.

1.3. Finding solutions to the so-called ‘crisis’ outside the EU framework

Given the difficulties of reforming the existing EU legal framework on asylum and migration, we can observe a change in the format of measures taken by the EU. At

[117] See chapter 2 section 1.3.3.

the beginning of summer 2015, the European Agenda on Migration stressed the need for member states to apply the Return Directive to increase return rates. Most importantly, it also mentioned the creation of a Return Handbook to 'support Member states with common guidelines, best practice and recommendations'.[118] A first version of this Handbook was released in October 2015,[119] then revised in 2017 with 'additional guidance to national authorities on how the rules of the Return Directive be used to improve the effectiveness of the return systems'.[120] According to the Commission, the aim of the Handbook was to 'ensure that [the] common standards and procedures [of the Return Directive] are implemented in a uniform way in all Member States'.[121] The Commission also stressed that the Handbook should be the 'main tool' of interpretation used by national agencies when carrying out returns or other related duties.[122] It therefore provides meticulous guidance on how standards and procedures on returns should be interpreted: it ranges from clarifications of the meaning of 'third-country nationals' under the Return Directive to detailed considerations for apprehension practices when carrying out a return procedure.[123] However, the Handbook specifies that it 'does not create any legally binding obligations upon Member States and it does not establish new rights and duties'.[124] The Return Handbook thus constitutes one of the growing soft law provisions aimed at increasing unwanted migrants' returns.[125] In addition to the Return Handbook, the

[118] Commission, 'A European Agenda on Migration' (Communication) COM(2015) 240 final 10.
[119] Commission, 'Commission Recommendation of 1.10.2015 Establishing a Common "Return Handbook" to be used by Member States' Competent Authorities when Carrying out Return Related Tasks' C(2015) 6250 final.
[120] Commission Recommendation (EU) 2017/2338 of 16 November 2017 establishing a common 'Return Handbook' to be used by Member States' competent authorities when carrying out return-related tasks [2017] OJ L 339/83 Annex, Foreword.
[121] Commission, 'Commission Recommendation of 1.10.2015 Establishing a Common "Return Handbook" to be used by Member States' Competent Authorities when Carrying out Return Related Tasks' C(2015) 6250 final 2.
[122] ibid.
[123] ibid, Annex, 6-7 and 22-36.
[124] ibid, Foreword.
[125] Peter Slominski and Florian Trauner, 'Reforming me Softly - How Soft Law has Changed EU Return Policy Since the Migration Crisis' (2021) 44(1) West European Politics 93, 94.

Return Directive has been supplemented by the 2017 Commission Recommendation on making returns more effective, which provides member states with 'guidance on how the provisions of the Directive 2008/115/EC should be used'.[126] To increase the effectiveness of member states' return practices, the Commission recommends a systematic issuance of return decisions,[127] to 'use detention as needed and appropriate',[128] or to 'provide for the shortest possible deadline for lodging appeals against return decisions',[129] to name a few.

The Directive was also supplemented by the 2015 EU Action Plan on Return, setting 'immediate and mid-term measures that will be taken to enhance the effectiveness of the EU return system',[130] and by the 2017 Renewed Action Plan on Return, providing for 'additional focused actions to be implemented in parallel to […] the existing Action Plan'.[131] This reveals the accumulation of soft law related to the Return Directive since 2015. For Slominski and Trauner, the 2017 revised Return Handbook constitutes a signal from the Commission of its will to foster a more repressive implementation of the Return Directive.[132] The adoption of numerous non-binding instruments regarding the Return Directive's implementation in 2015-2017 also confirms this interpretation.

So far, the EU's move towards non-binding instruments was mostly part of its external migration policy, as chapter 2 suggested for EU law before 2015. This is confirmed by scholars' discussions such as Carrera or Molinari,[133] and the post-'crisis' adoption of

[126] Commission, 'Commission Recommendation of 7.3.2017 on Making Returns More Effective When Implementing the Directive 2088/115/EC of the European Parliament and of the Council' C(2017) 1600 final 3.
[127] Commission Recommendation (EU) 2017/432 on Making Returns More Effective When Implementing the Directive 2008/115/EC of the European Parliament and the Council [2017] OJ L66/15 paras 5-6.
[128] ibid, para 10(a).
[129] ibid, para 12(b).
[130] Commission, 'Communication from the Commission to European Parliament and to the Council - EU Action Plan on Return' COM(2015) 453 final 2.
[131] Commission, 'Communication from the Commission to the European Parliament and the Council on a More Effective Return Policy in the European Union - A Renewed Action Plan' COM(2017) 200 final 3.
[132] Slominski and Trauner, 'Reforming me Softly' (n 125) 101.
[133] Sergio Carrera, Juan Santos Vara and Tineke Strik, 'The External Dimensions of EU Migration and Asylum

the EU-Turkey Statement and Afghanistan-EU Joint Way Forward (JWF) as key examples of atypical cooperation instruments.[134] The increasing use of informal instruments in EU return policy suggests that the informalisation process noticeable in external migration policy is also thriving in internal migration policy. Interestingly, both at the internal and external levels, non-binding instruments are mostly related to the return of migrants, be it the implementation of the Return Directive by EU member states or the development of cooperation on readmission between the EU and third countries. This confirms that the EU's focus on returning and distancing unwanted migrants from its territory remains central.

The growing use of soft law in internal EU migration law is part of the evolution of EU law on migration and asylum. Although in EU and international law scholarship the term 'soft law' is sometimes argued to have various meanings,[135] here I use the terminology to stress the non-binding nature of acts;[136] yet acknowledging that they may contain various levels of obligation and/enforcement mechanism.[137] In other words, soft law refers to 'rules of conduct which, in principle, have no legally binding force but which nevertheless may have practical effect'.[138] As I already explained, cooperation on migration and asylum began at the intergovernmental level.[139] The communitarisation of migration and asylum following the Treaty of Amsterdam did not

Policies in Times of Crisis' in Sergio Carrera, Juan Santos Vara and Tineke Strik (eds), *Constitutionalising the External Dimensions of the EU Migration Policies in Times of Crisis* (Edward Elgar 2019) 11; Caterina Molinari, 'The EU and its Perilous Journey Through the Migration Crisis: Informalisation of the EU Return Policy and Rule of Law Concerns' (2019) 44(6) European Law Review 824, 826.

[134] Catherine Warin and Zheni Zhekova, 'The Joint Way Forward on Migration Issues Between Afghanistan and the EU: EU External Policy and the Recourse to Non-Binding Law' (2017) 6(2) Cambridge International Law Journal 143, 152.

[135] Fabien Terpan, 'Soft Law in the European Union – The Changing Nature of EU Law' (2015) 21(1) European Law Journal 68, 70.

[136] Lynda Senden and Colin Harvey, *Soft Law in European Community Law* (Bloomsbury 2004) 109.

[137] Terpan, 'Soft Law in the European Union' (n 135) 76.

[138] Francis Snyder, 'Soft Law and Institutional Practice in the European Community' in Stephen Martin (ed), *The Construction of Europe: Essays in Honour of Emile Noël* (Springer 1994) 198.

[139] See chapter 2 section 1.1.

end cooperation outside the EU framework since soft law remains used for cooperation with non-EU countries.[140] The evolution of internal aspects of EU migration and asylum law shows that non-binding instruments became an attractive solution to difficulties in reforming or adopting new legally binding provisions.[141] Although the EU is facing a deadlock in reforming its common asylum policy as previously argued,[142] difficulties in reforming the Return Directive might not be the only reason for the EU's resort to informal instruments, contrary to what Trauner and Slominski argue.[143] Using a 'crisis' frame, which usually implies the need for emergency measures,[144] further supports the use of non-binding measures. The need to take 'urgent' action in response to the so-called 'crisis' associated with 'crisis' frames, as chapter 1 exposed, combined with the length of EU legislative procedure, makes soft law particularly attractive. Indeed, the normal legislative procedure usually lasts two years at the EU level.[145] In comparison, soft law has a rather 'low legislative cost',[146] making it a rapid and straightforward solution. The 'crisis' framing thus participates in justifying the increasing use of informal instruments, which circumvent the EU ordinary legislative procedure.

What is more, using informal instruments impacts migrants' human rights. Indeed, human rights defenders criticised the 2017 Commission Recommendation on making returns more effective as it 'encourag[es] Member states to interpret the directive in a way that would allow for the lowest possible safeguards to be applied',[147] by

[140] See chapter 2 section 2.2.2.
[141] Slominski and Trauner, 'Reforming me Softly' (n 125) 95-96.
[142] See section 1.2. of this chapter.
[143] Slominski and Trauner, 'Reforming me Softly' (n 125) 95.
[144] See chapter 1 sections 2 and 3.2.
[145] Mark Rhinard, 'The Crisisification of Policy-Making in the European Union' (2019) 57(3) Journal of Common Market Studies 616, 622.
[146] Slominski and Trauner, 'Reforming me Softly' (n 125) 96.
[147] EuroMed Rights, 'Civil Society Organisations: New EU Commission Plans on Returns and Detention will Create More Harm and Suffering' (3 March 2017) <https://euromedrights.org/publication/civil-society-

recommending member states' legislation to provide 'for a maximum initial period of detention of six months' or to provide the shortest delay for appeals,[148] for instance. This is a direct consequence of both the content and nature of this instrument. By taking measures outside ordinary procedures, informal instruments are also more complex to assess in terms of their implementation.[149] The uncertainty surrounding the implementation works potentially to migrants' disadvantage considering that, as Slominski and Trauner observed, the Handbook 'exploited gaps and ambiguities in existing hard law'.[150] This challenges the conventional image of EU institutions as protective of migrants' rights against member states.[151] This is even more so considering that non-binding instruments issued between 2015 and 2017 related to the Return Directive's interpretation have been used as the basis to draft the recast of the Return Directive in 2018.[152] The proposed recast Directive continues the tendency initiated by the informal instruments on return as it tends to limit migrants' human rights protection while focussing on increasing return rate.[153] For this reason, human rights organisations were concerned about the proposed recast directive, as the ECRE considered it was taking 'a particularly punitive approach to individuals'.[154] In this way, EU soft law on returns directly influences hard law. It has a significant impact on the

organisations-new-eu-commission-plans-returns-detention-will-create-harm-suffering/> accessed on 19 October 2020.

[148] Commission Recommendation (EU) 2017/432 on Making Returns More Effective When Implementing the Directive 2008/115/EC of the European Parliament and the Council [2017] OJ L66/15 paras 10(b) and 12(b).

[149] Slominski and Trauner, 'Reforming me Softly' (n 125) 103.

[150] ibid.

[151] Saskia Bonjour, Ariadna Ripoll Servent and Eiko Thielemann, 'Beyond Venue Shopping and Liberal Constraint: A New Research Agenda for EU Migration Policies and Politics' (2018) 25(3) Journal of European Public Policy 409, 412.

[152] Commission, 'Proposal for a Directive of the European Parliament and of the Council on Common Standards and Procedures in Member States for Returning Illegally Staying Third-Country Nationals (recast)' COM(2018) 634 final, 3.

[153] Izabella Majcher, 'The Recast of the EU Returns Directive: Human Rights Lost Again?' (*RLI Blog on Refugee Law and Forced Migration*, 29 May 2019) <https://rli.blogs.sas.ac.uk/2019/05/29/the-recast-of-the-eu-returns-directive-human-rights-lost-again/> accessed 20 October 2020.

[154] European Council on Refugees and Exiles (ECRE), 'Return Policy: Desperately Seeking Evidence and Balance' (Policy Note #19, 2019) <https://www.ecre.org/wp-content/uploads/2019/07/Policy-Note-19.pdf> accessed 20 October 2020.

Return Directive – a cornerstone of the EU migration and asylum law – as it lowers standards of human rights protection for migrants. It also contributes to making it an acceptable standard and ensuring that return rates' increase remain the central objective of EU law. Soft law standards are built upon or complemented by the proposed recast directive,[155] and thus progressively integrated into hard law.

Although there are other readings of these previous observations,[156] taking a critical approach suggests that the EU made use of the 'crisis' frame to increasingly resort to non-binding instruments in internal migration and asylum policy. The emergency connotation of the 'crisis', combined with continuous inequalities among member states and increasing difficulties in finding a consensus among them, made measures outside the ordinary procedural rules set by Lisbon particularly attractive to EU policymakers. This process challenges traditional narratives surrounding EU institutions and the communitarisation of migration and asylum law as progressive and more protective of human rights.[157] As previously argued, the EU's use of informal instruments participates in the long-lasting trend to lower human rights standards for Third World migrants. In addition to its significant role in shaping the internal aspects of EU asylum and migration policy after 2015, the 'crisis' framing also impacted the external dimension of EU migration and asylum policy by enabling the normalisation of informal cooperation with third countries.

[155] Commission, 'Proposal for a Directive of the European Parliament and of the Council on Common Standards and Procedures in Member States for Returning Illegally Staying Third-Country Nationals (recast)' COM(2018) 634 final 3.
[156] For instance, Slominski and Trauner explain the EU's growing use of non-binding instruments for internal migration and asylum policy as resulting from the difficulty to reform the Return Directive, see Slominski and Trauner, 'Reforming me Softly' (n 125) 95.
[157] See chapter 2 section 1.1.3.

2. ‘Crisis’ framing: Normalising informal cooperation with third countries

Although the EU’s use of informal cooperation agreements on migration is nothing recent, as I discussed earlier,[158] the ‘crisis’ framing, by ‘exceptionalising’ the situation,[159] enabled the EU to further shape its external migration policy outside the existing legal framework on EU migration and asylum law. The different and often controversial statuses of cooperation frameworks set up after 2015 and analysed below show how the ‘crisis’ framing contributed to the normalisation of informal arrangements as key tools for EU external action on asylum and migration. Moreover, given that atypical instruments are generalised in the EU external migration policy, bypassing the EU institutional framework set up by Lisbon has also been normalised. Using informal arrangements also has implications for migrants’ human rights protection: EU commitments to human rights standards appear performative, and violations of migrants’ rights are normal.

2.1. The normalised use of informal agreements to deal with migration

As I discussed in the previous chapter, cooperation agreements aimed at controlling migration are not recent in the EU’s practice. In addition to member states’ long-lasting use of bilateral agreements, readmission agreements constituted a central tool of early common external action regarding migration and asylum.[160] This was demonstrated by the EU’s focus on negotiating readmission agreements previously discussed and

[158] See chapter 2 section 2.2.2.
[159] See chapter 1 section 3.2.
[160] See chapter 2 section 2.2.1.

the number of agreements concluded. By the end of 2014, the EU had concluded 17 readmission agreements,[161] while following the 2015 'crisis', only one EU readmission agreement was concluded with Belarus in 2020.[162]

In the meantime, the number and variety of atypical agreements developed by the EU rapidly increased: the EU directly entered into informal arrangements with seven countries since 2015. We can observe this shift in the three case studies of this research. EU cooperation with Afghanistan, Turkey, and indirectly with Libya since 2015 essentially relies on informal agreements: the Afghanistan-EU Joint Way Forward (JWF) adopted in 2016[163] followed by the Joint Declaration on Migration Cooperation between Afghanistan and the EU from 2021,[164] the 2015 EU-Turkey Joint Action Plan (JAP) combined with the 2016 EU-Turkey Statement,[165] as well as the Italy-Libya Memorandum of Understanding (MoU) of 2017,[166] tacitly renewed in 2020.[167] These developments occurred in parallel to other non-binding EU readmission arrangements with Bangladesh,[168] Ethiopia – although not officially

[161] Molinari, 'The EU and its Perilous Journey' (n 133) 832.
[162] Agreement Between the European Union and the Republic of Belarus on the Readmission of Persons Residing Without Authorisation [2020] OJ L181/3.
[163] Joint Way Forward on Migration Issues Between Afghanistan and the EU (Kabul, 2 October 2016) <https://eeas.europa.eu/sites/eeas/files/eu_afghanistan_joint_way_forward_on_migration_issues.pdf> accessed 17 July 2020.
[164] Council of the European Union, 'Joint Declaration on Migration Cooperation Between Afghanistan and the EU' (Brussels, 13 January 2021) 5223/21; European Union External Action Service, 'Migration: The EU Signs a Joint Declaration on Cooperation with Afghanistan' (26 April 2021) <https://eeas.europa.eu/delegations/un-geneva/97251/migration-eu-signs-joint-declaration-cooperation-afghanistan_en> accessed 9 September 2021.
[165] Commission, 'EU-Turkey Joint Action Plan' (Brussels, 15 October 2015) MEMO 15/5860; Council of the European Union, 'EU-Turkey Statement' (18 March 2016) Press Release 144/16.
[166] Memorandum of Understanding on Cooperation in Development, Action against Illegal Immigration, Human Trafficking and Smuggling and Strengthening of Border Security Between the State of Libya and the Republic of Italy (Rome, 2 February 2017).
[167] Yasha Maccanico, 'Analysis: Italy Renews Memorandum with Libya, as Evidence of a Secret Malta-Libya Deal Surfaces' (*Statewatch*, March 2020) <https://www.statewatch.org/media/documents/analyses/no-357-renewal-italy-libya-memorandum.pdf> accessed on 9 September 2021.
[168] Commission, 'Annex to the Commission Decision on the Signature of the EU-Bangladesh Standard Operating Procedures for the Identification and Return of Persons Without an Authorisation to Stay' C(2017) 6137 final Annex 1.

published –,[169] as well as Guinea, Gambia and Ivory Coast – although unpublished.[170] It appears evident that formal readmission agreements are no longer the EU's preferred method to develop cooperation on migration and asylum with third countries.[171]

Although the continuing use of formal and legally binding cooperation agreements mitigates the rapidly growing use of informal instruments, traditional cooperation agreements appear rather sporadic. As mentioned earlier, only one formal readmission agreement has been adopted by the EU since 2015.[172] Additionally, within the case studies of this research, we observe only one example of a formal agreement on development which also includes some provisions on migration, namely the Cooperation Agreement on Partnership and Development between the EU and Afghanistan (CAPD).[173] It was adopted in 2017, a few months after the adoption of the informal Afghanistan-EU JWF in October 2016, although negotiation had started in 2011.

Despite the remaining use of traditional and legally binding documents such as the CAPD, the case studies show a certain evolution of the EU external approach to migration and asylum as the EU progressively uses more informal agreements and frameworks to develop its cooperation with third countries. A shift in the focus of the EU return policy is noticeable. It moved from concentrating on formal readmission

[169] Council of the European Union, 'Admission Procedures for the Return of Ethiopians from European Union Member States' (Brussels, 18 December 2017) 15762/17 <https://www.statewatch.org/media/documents/news/2018/jan/eu-council-regugees-return-ethiopians-15762-17.pdf> accessed 9 September 2021.
[170] Commission, 'Return and Readmission' <https://ec.europa.eu/home-affairs/policies/migration-and-asylum/irregular-migration-and-return/return-and-readmission_en> accessed 9 September 2021.
[171] Molinari, 'The EU and its Perilous Journey' (n 133) 833.
[172] Agreement Between the European Union and the Republic of Belarus on the Readmission of Persons Residing Without Authorisation [2020] OJ L181/3.
[173] Cooperation Agreement on Partnership and Development between the European Union and its Member States, of the One Part, and the Islamic Republic of Afghanistan, of the Other Part [2017] OJ L 67/3.

agreements as the default cooperation tool to using various informal tools,[174] as previously highlighted in the EU's developing cooperation with Turkey and Afghanistan. But developments observed in the three case studies are not sporadic; they take place within the overarching framework of the 2011 Global Approach to Migration and Mobility (GAMM).[175] As I argued in chapter 2, the GAMM led to the development of a variety of non-binding instruments such as Mobility Partnerships, Common Agendas on Migration and Mobility or Joint Declaration on migration.[176] The 2015 European Agenda on Migration set the overall priorities of EU external migration policy to respond to the so-called 'crisis' and strengthened the tendencies set by the GAMM. It shares many of the GAMM's objectives, but the balance has shifted between these two instruments.[177] While the GAMM included extensive provisions related to mobility,[178] the European Agenda on Migration focused primarily on the fight against smuggling and trafficking of migrants, the return of so-called 'irregular' migrants and capacity building in countries of transit and origin.[179] Among the immediate actions to tackle the said 'crisis', the Commission planned to '[work] in partnership with third countries to tackle migration up upstream'.[180] Enriching the already existing 'bilateral and regional cooperation frameworks on migration' is also among the first elements mentioned as part of the first pillar on better managing migration.[181] Thus, the Commission planned to build upon existing regional initiatives such as the Rabat and Khartoum Processes, respectively, initiated in 2006 and 2014.[182] The former focuses

[174] Molinari, 'The EU and its Perilous Journey' (n 133) 833.
[175] Commission, 'The Global Approach to Migration and Mobility' (Communication) COM(2011) 743 final.
[176] ibid 10-11; Warin and Zhekova, 'The Joint Way Forward' (n 134) 151; see also chapter 2 section 2.2.2.
[177] Natasja Reslow, 'Transformation or Continuity? EU External Migration Policy in the Aftermath of the Migration Crisis' in Sergio Carrera, Juan Santos Vara and Tineke Strik (eds), *Constitutionalising the External Dimensions of EU Migration Policies in Times of Crisis* (Edward Elgar 2019) 101.
[178] Commission, 'The Global Approach to Migration and Mobility' (Communication) COM(2011) 743 final 3.
[179] Commission, 'A European Agenda on Migration' (Communication) COM(2015) 240 final 6-7.
[180] ibid 5.
[181] ibid 7.
[182] Euro-African Partnership for Migration and Development; Rabat Declaration (Rabat, 11 July 2006)

on 58 African countries while the latter targets countries of the Horn of Africa, but both constitute political cooperation bringing together the EU and its member states with states from the region and the African Union.[183] Building on these two mechanisms, the Valletta Summit led to the adoption of the Valletta Action Plan in November 2015,[184] which is an international dialogue process, and therefore not a European integration one.[185] Still, the Valletta Action Plan participates in informalising cooperation on migration as it contains various initiatives in the domains of development and migration, legal migration, asylum and refugees, the prevention of and fight against 'irregular' migration and trafficking and smuggling of human beings, as well as in return and readmissions.[186] This Action Plan thus sets actions to be taken in a large variety of domains related to migration while remaining a political agreement. The Valetta Summit is considered the basis of the Commission's 2016 New Partnership Framework.[187] After highlighting how the 'EU-Turkey Statement established new ways to bring order into migration flows and save lives',[188] the Commission called for a 'more coordinated, systematic and structured approach' to the EU's cooperation with third countries by reaching so-called 'compacts'.[189] Concretely, the New Partnership Framework led to the negotiation and adoption of

<https://www.rabat-process.org/images/documents/Rabat-Declaration-EN.pdf> accessed 9 September 2021; Declaration of the Ministerial Conference of the Khartoum Process (EU-Horn of Africa Migration Route Initiative) (Rome, 28 November 2014) <file://adf/storage/C/H/CXH778/Downloads/rome-declaration-2014-khartoum-process.pdf> accessed 9 September 2021.

[183] Lutz Oette and Mohammed Abdelslam Babiker, 'Migration Control à la Khartoum: EU External Engagement and Human Rights Protection in the Horn of Africa' (2017) 36(4) Refugee Survey Quarterly 64, 65.

[184] Valletta Summit, 'Action Plan' (Valletta, 11-12 November 2015) <https://www.consilium.europa.eu/media/21839/action_plan_en.pdf> accessed 17 July 2020.

[185] Reslow, 'Transformation or Continuity?' (n 177) 104.

[186] Valletta Summit, 'Action Plan' (Valletta, 11-12 November 2015) <https://www.consilium.europa.eu/media/21839/action_plan_en.pdf> accessed 17 July 2020.

[187] Commission, 'Communication from the Commission to the European Parliament, the European Council, the Council and the European Investment Bank on Establishing a new Partnership Framework with Third Countries under the European Agenda on Migration' (Communication) COM(2016) 385 final.

[188] ibid 2.

[189] ibid 5-6.

various arrangements, such as Standard Operating Procedures with Bangladesh,[190] or Joint Migration Declaration with Niger and Ghana, as Cassarino mentioned.[191] In this way, the use of informal cooperation frameworks, whether at bilateral or regional level, was progressively generalised in the EU migration and asylum policy following the use of 'crisis' framing. As previously discussed, this tendency existed before 2015 both at member state and EU level.[192] Thus, as Reslow argues, there is no overall change in EU external migration policy following the 'crisis'.[193] Instead, the 'crisis' framing enabled the EU to generalise these existing – and arguably already widespread – practices. The 2020 New Pact on Migration and Asylum confirmed this continuity. Although the Commission characterises the Pact as 'a change of paradigm in cooperation with third countries',[194] the 'revolutionary character of [the EU's] approach is extremely doubtful',[195] as García Andrade explains. Indeed, despite the creation of Talent Partnerships[196] – which, according to García Andrade will most likely be informal –[197] and Counter Migrant Smuggling Partnerships,[198] the EU emphasises the implementation of its existing tools. In particular, the Pact requires 'the full and effective implementation of the […] existing EU agreements and arrangements on

[190] Commission, 'Annex to the Commission Decision on the Signature of the EU-Bangladesh Standard Operating Procedures for the Identification and Return of Persons Without an Authorisation to Stay' C(2017) 6137 final Annex 1

[191] Jean-Pierre Cassarino, 'Informalising EU Readmission Policy' in Adriadna Ripoll Servent and Florian Trauner (eds), *The Routledge Handbook of Justice and Home Affairs Research* (Routledge 2018) 90-91.

[192] See chapter 2 section 2.2.2.

[193] Reslow, 'Transformation or continuity' (n 177) 110.

[194] Commission, 'A Fresh Start on Migration: Building Confidence and Striking a New Balance Between Responsibility and Solidarity' (23 September 2020) <https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1706> accessed on 20 September 2021.

[195] Paula García Andrade, 'EU Cooperation on Migration with Partner Countries Within the New Pact: New Instruments for a New Paradigm?' (*EU Immigration and Asylum Law and Policy*, 8 December 2020) <https://eumigrationlawblog.eu/eu-cooperation-on-migration-with-partner-countries-within-the-new-pact-new-instruments-for-a-new-paradigm> accessed 20 September 2021.

[196] Commission, '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 23.

[197] García Andrade, 'EU Cooperation on Migration with Partner Countries' (n 195).

[198] Commission, '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 16.

readmission'.[199] The direct reference to informal cooperation in the Pact shows that atypical instruments are still present.

'Crisis' frames bear strong connotations of 'emergency'.[200] An emergency rhetoric was therefore omnipresent in EU migration policy documents and EU cooperation agreements with third countries after 2015. We can, for instance, observe it in the European Agenda on Migration: the Commission set 'immediate action' and presented its measures as a 'blueprint for the EU's reaction to future crises'.[201] The New Partnership Framework also referred to the 'unprecedented migratory flows' to the EU qualified as a 'global challenge' but which, the Commission argued, could be managed thanks to EU external action.[202] 'Crisis' framing can also be noticed in the case studies of this research. The EU-Turkey JAP, for instance, stated that '[it] identifie[d] a series of collaborative actions to be implemented as a matter of urgency by the European Union (EU) and the Republic of Turkey with the objective to supplement Turkey's efforts in managing the situation of massive influx' or that it 'trie[d] to address the current crisis situation'.[203] Likewise, in the 2017 MoU, Italy and Libya 'reassert[ed] their firm determination to co-operate to identify urgent solutions to the issue of clandestine migrants'.[204] Therefore, the 'crisis' frame was used to justify the need to rapidly adopt new measures to face the supposed 'unprecedented circumstances'.

The omnipresence of the 'crisis' frame and the need for urgent action was combined with considerations of the difficulties encountered by the EU when developing its

[199] ibid 21.
[200] See chapter 1 section 2.
[201] Commission, 'A European Agenda on Migration' (Communication) COM(2015) 240 final 3.
[202] Commission, 'Communication from the Commission to the European Parliament, the European Council, the Council and the European Investment Bank on Establishing a new Partnership Framework with Third Countries Under the European Agenda on Migration' (Communication) COM(2016) 385 final 2.
[203] Commission, 'EU-Turkey Joint Action Plan' (Brussels, 15 October 2015) MEMO 15/5860.
[204] Memorandum of Understanding on Cooperation in Development, Action against Illegal Immigration, Human Trafficking and Smuggling and Strengthening of Border Security Between the State of Libya and the Republic of Italy (Rome, 2 February 2017) Preamble.

external migration policy before 2015. The EU's focus on signing readmission agreements with key third countries already had significant weaknesses leading to the emergence of a dominant discourse on the effectiveness of the EU migration policy.[205] The difficulties and length of negotiations as well as partners' lack of implementation of readmission agreements, were frequently raised by the EU as obstacles to efficient non-entry and return policies.[206]

In contrast, informal arrangements are straightforward to adopt. Compared to the TFEU procedure to adopt international agreements,[207] non-binding agreements constitute an attractive alternative to the EU and its member states to respond to the 'crisis' frame. The duration of negotiations for most readmission agreements and the failures of some negotiation processes corroborate the attractiveness of informal cooperation. The case of the EU-Turkey readmission agreement is a representative example: negotiations started in 2004 before being frozen from 2006 to 2010 and being finally agreed on in December 2013.[208] In comparison, negotiations with Turkey for an informal cooperation framework started in November 2015 before an agreement was reached on the EU-Turkey Statement on 18th March 2016.[209] The difference in duration is therefore five months for the latter against nearly 10 years for the former. Consequently, only a limited number of readmission agreements have entered into

[205] Peter Slominski and Florian Trauner, 'How do Member States Return Unwanted Migrants? The Strategic (Non-)Use of "Europe" During the Migration Crisis' (2018) 56(1) Journal of Common Market Studies 101, 106.
[206] Commission, 'A European Agenda on Migration' (Communication) COM(2015) 240 final 9-10; Commission, 'Communication from the Commission to European Parliament and to the Council - EU Action Plan on Return' COM(2015) 453 final 10; Commission, 'Communication from the Commission to the European Parliament, the European Council, the Council and the European Investment Bank on Establishing a New Partnership Framework with Third Countries Under the European Agenda on Migration' (Communication) COM(2016) 385 final 7; Commission, 'Communication from the Commission to the European Parliament and the Council on a More Effective Return Policy in the European Union - A Renewed Action Plan' COM(2017) 200 final 12.
[207] Consolidated Version of the Treaty on the Functioning of the European Union [2008] OJ C115/47 art 218.
[208] Çiğdem Akın Yavuz, 'Analysis of the EU-Turkey Readmission Agreement: A Unique Case' (2019) 21(4) European Journal of Migration and Law 486, 498.
[209] European Parliament, 'Legislative Train – Towards a New Policy on Migration – EU-Turkey Statement and Action Plan' (November 2019) <https://www.europarl.europa.eu/legislative-train/theme-towards-a-new-policy-on-migration/file-eu-turkey-statement-action-plan> accessed 27 January 2022.

force since the beginning of the common readmission policy. As of 2020, the EU had entered into 18 readmission agreements, none with any of the Middle-Eastern, Northern African or Sub-Saharan countries considered major countries of origin for Third World migrants to the EU.[210] Similarly, the CAPD between the EU and Afghanistan exemplifies the length of negotiating traditional cooperation agreements. Although this agreement did not concern only migration and readmission, and included a variety of domains of cooperation related to development, it took six years of negotiations from 2011 to 2017 to reach an agreement.[211] On the other hand, the Afghanistan-EU JWF was agreed on 2nd October 2016, that is to say about six months after the EU launched its negotiations in April that year.[212] Thus, informal cooperation appears considerably faster and easier to adopt for the EU, as agreements are reached following much quicker internal decision-making.[213]

These informal agreements are also attractive to third countries. Indeed, third countries' lack of cooperation is often pointed to as one of the main weaknesses of the EU return and readmission policy.[214] The non-binding character of informal agreements and the secretive nature of their negotiations mean they tend to remain unknown to the public opinion in partner countries.[215] EU policymakers consider this lack of publicity an advantage to reach an agreement with their partners. They find it difficult to convince third countries into negotiating formal readmission agreements due

[210] Slominski and Trauner, 'Reforming Me Softly' (n 125) 100.
[211] Cooperation Agreement on Partnership and Development Between the European Union and its Member States, of the One Part, and the Islamic Republic of Afghanistan, of the Other Part [2017] OJ L 67/3.
[212] Council of the European Union, 'Draft Joint Way Forward on Migration Issues Between Afghanistan and the EU – Adoption' (Brussels, 22 September 2016) 12191/16 para 2.
[213] Slominski and Trauner, 'Reforming Me Softly' (n 125) 105.
[214] Commission, 'Communication from the Commission to the European Parliament, the European Council, the Council and the European Investment Bank on Establishing a New Partnership Framework With Third Countries Under the European Agenda on Migration' (Communication) COM(2016) 385 final 7; Commission, 'Communication from the Commission to the European Parliament and the Council on a More Effective Return Policy in the European Union - A Renewed Action Plan' COM(2017) 200 final 12.
[215] Slominski and Trauner, 'Reforming Me Softly' (n 125) 105.

to 'internal political considerations',[216] namely EU views such agreements as subject to low popularity among third countries' population[217] or 'public hostility'.[218] The Afghanistan-EU JWF is a key example of the EU's use of secretive negotiations and incentives to convince its partners.[219] Similarly, the EU-Turkey Statement is also representative of informal agreements' consideration as more efficient than traditional readmission agreements. When the EU and Turkey agreed on the March 2016 Statement, they were already obliged under the EU-Turkey readmission agreement. The latter, indeed, entered into force in 2014 but contained a limit to its implementation, which postponed the readmission of third country nationals to Turkey to three years after it entered into force.[220] The EU-Turkey Statement was, therefore, a manner for the EU to speed up the readmission of third country nationals, without having to renegotiate formally.

It must be noted, however, that the case of Turkey is quite an exception. Indeed, it is undeniable that informal agreements are easier to negotiate and enter into in terms of the procedure, but their implementation is much more questionable. Using soft law makes the implementation and the extent of the implementation less certain when compared to formal agreements.[221]

Many scholars and practitioners have already challenged informal agreements, highlighting their impact on human rights and procedural guarantees,[222] as I will further

[216] Commission, 'EU Readmission Developments – State of Play October 2017' (Letter to Mr. Claude Moraes, MEP Chair of the Committee on Civil Liberties, Justice and Home Affairs).
[217] Sergio Carrera, *Implementation of EU Readmission Agreements: Identity Determination Dilemmas and the Blurring of Rights* (Springer 2016) 46.
[218] Commission, 'EU Readmission Developments – State of Play October 2017' (Letter to Mr. Claude Moraes, MEP Chair of the Committee on Civil Liberties, Justice and Home Affairs).
[219] Warin and Zhekova, 'The Joint Way Forward' (n 134) 149.
[220] Agreement between the European Union and the Republic of Turkey on the Readmission of Persons Residing Without Authorisation [2014] L134/3, art 24(3).
[221] Slominski and Trauner, 'Reforming Me Softly' (n 125) 98.
[222] See for instance: Global Legal Action Network, 'Legal Action Against Italy Over Coordination of Libyan Coast Guard Pull-Backs Resulting in Migrants' <https://www.glanlaw.org/single-post/2018/05/08/legal-action-against-

discuss below.[223] But the normalisation of such practices needs to be additionally called into question. Indeed, rapid and efficient decision-making due to the 'crisis' frame are not the only explanations for this recent shift. Rather, I contend that the use of informal cooperation, especially of control-focused measures aimed at further externalising border and migration controls adopted through fast and often blurry procedures, is also the result of the EU's conception of migrants and migration from the Third World. As well as resulting from the difficulty of negotiating and adopting traditional formal agreements, the normalisation of informal agreements results from the long-lasting control-focused approach developed by the EU and its member states towards migration, as analysed previously.[224] The link between the securitisation of migration and the normalisation of informal agreements needs to be acknowledged, considering that a security-focused approach leads to the adoption of faster and supposedly 'more efficient' measures. The 'crisis' framing used in 2015 became an excellent justification to further use informal agreements due to its connotation of emergency.[225] Overall, the normalisation of informal agreements is linked to what Santos Vara refers to as the 'widespread understanding that the EU is more likely to succeed in managing migration cooperation with third countries with informal migration arrangements'.[226]

This consideration has far-reaching implications. The 'crisis' framing combined with the securitisation of migration policy and the effectiveness discourse led to informal agreements – including their adverse consequences for democratic and human rights

italy-over-its-coordination-of-libyan-coast-guard-pull-backs-resulti> accessed on 13 September 2021.

[223] See section 2.3. of this chapter.

[224] See chapter 2 section 2.2.1.

[225] See chapter 1 section 3.2. for further discussion on 'crisis' framing and emergency.

[226] Juan Santos Vara, 'Soft International Agreements on Migration Cooperation with Third Countries: A Challenge to Democratic and Judicial Controls in the EU' in Sergio Carrera, Juan Santos Vara and Tineke Strik (eds), *Constitutionalising the External Dimensions of EU Migration Policies in Times of Crisis* (Edward Elgar 2019) 36.

protection – to be considered ‘normal’ or ‘natural’. In other words, normalising informal agreements on migration also normalises the bypassing of democratic scrutiny, especially the EU institutional framework.

2.2. The normalised bypassing of EU institutional framework

As chapter 2 demonstrated, the Lisbon Treaty reshaped the EU institutional framework on migration and asylum law by increasing the role of the European Parliament (EP) and of the Court of Justice of the EU (CJEU).[227] Yet, increased use of informal cooperation agreements during and following the ‘crisis’ framing diverges radically from the post-Lisbon framework. In this section, I firstly analyse the difficulty with identifying agreements’ authors,[228] which demonstrates that informal agreements contributed to normalising the bypassing of the EU institutional framework. Additionally, normalising the use of informal arrangements led to generalising opaque negotiations. Derived from this is the progressive acceptance that information can be withheld from democratic institutions and civil society and that EU’s action in the field of migration has little accountability.

Most agreements considered in depth in this thesis were the subject of important debates regarding their legal statuses, as I previously highlighted.[229] Following the ‘crisis’ framing, the most debated cooperation framework is probably the 2016 EU-Turkey Statement,[230] as this agreement led to considerable controversies among

[227] See chapter 2 section 1.1.3.
[228] Here by ‘auhors’, I refer to the EU institution(s) involved in the negotiation or signatory to the agreement.
[229] See section 2.1. of this chapter.
[230] Council of the European Union, ‘EU-Turkey Statement’ (18 March 2016) Press Release 144/16.

academics and practitioners.[231] The communication of the Statement on the European Council and Council of the European Union's website in the form of a Press Release raised questions about its legal nature.[232] Although article 218 TFEU declares that agreements concluded between the EU and third countries involve the Council, the Commission and the European Parliament,[233] the Statement's informal nature means that no decision to authorise its negotiation was taken beforehand,[234] nor was the agreement submitted to the EP for approval.[235] Likewise, although this is not mandatory, the CJEU was not consulted on the compatibility of the agreement with EU law.[236] To put it simply, the Statement's adoption appears in complete disregard of EU constitutional law.[237] A similar lack of democratic scrutiny can be expected for other informal cooperation agreements. Indeed, the Afghanistan-EU JWF and other unpublished arrangements, such as the informal readmission agreement with Ethiopia,[238] have received little to no scrutiny.[239]

Moreover, the use of a Press Release to announce the Statement means that no signature appears on the document, making it difficult to identify its authors.[240] Similarly, formulations used within the Statement leave its authorship unclear. The beginning of the preamble and paragraph 2 refer to 'members of the European

[231] Mauro Gatti and Andrea Ott, 'The EU-Turkey Statement: Legal Nature and Compatibility with EU Institutional Law' in Sergio Carrera, Juan Santos Vara and Tineke Strik (eds), *Constitutionalising the External Dimensions of EU Migration Policies in Times of Crisis* (Edward Elgar 2019) 176.
[232] ibid 177.
[233] Consolidated Version of the Treaty on the Functioning of the European Union [2008] OJ C115/47 art 218.
[234] ibid art 218(2).
[235] ibid art 218(6).
[236] ibid art 218(10).
[237] Thomas Spijkerboer, 'Bifurcation of People, Bifurcation of Law: Externalization of Migration Policy Before the EU Court of Justice' (2017) 31(2) Journal of Refugee Studies 216, 221.
[238] Council of the European Union, 'Admission Procedures for the Return of Ethiopians from European Union Member States' (Brussels, 18 December 2017) 15762/17 <https://www.statewatch.org/media/documents/news/2018/jan/eu-council-regugees-return-ethiopians-15762-17.pdf> accessed 9 September 2021.
[239] Warin and Zhekova, 'The Joint Way Forward' (n 134) 154; Slominski and Trauner, 'Reforming Me Softly' (n 125) 96.
[240] Molinari, 'The EU and its Perilous Journey' (n 133) 838.

Council';[241] while most of the body of the Statement mentions the 'European Union',[242] yet the Statement also includes some references to 'EU Member States'.[243] From reading the Statement, it is difficult to determine who agreed to it: although the deal mostly refers to the EU or EU institutions – strongly suggesting the EU signed it –, references to member states create confusion.

The difficulty to identify the authors of informal agreements is combined with opacity in the adoption procedure. Although according to the TFEU,[244] the EP shall be fully informed at all stages of the negotiation procedure for legally binding agreements, in the case of informal agreements, the Parliament is not 'granted access to information as regards the negotiation process'.[245] For instance, for the Afghanistan-EU JWF, the Parliament regretted in its resolution from 5th April 2017 the lack of consultation and transparency throughout the adoption process.[246] The opacity of negotiation is even more flagrant with informal agreements not officially published, such as the EU-Ethiopia cooperation,[247] thus suggesting a generalisation of opacity within EU migration and asylum policy.

The lack of transparency in the negotiation and adoption procedure of these agreements restrains the democratic and information role of the EP, which was strengthened by Lisbon,[248] and thus also restricts the information available to civil

[241] Council of the European Union, 'EU-Turkey Statement' (18 March 2016) Press Release 144/16 Preamble and para 2.
[242] ibid Preamble, paras 2-4, 6-9 and ending sentence.
[243] ibid paras 4, 5, 8 and 9.
[244] Consolidated Version of the Treaty on the Functioning of the European Union [2008] OJ C115/47 art 218(10).
[245] Santos Vara, 'Soft International Agreements' (n 226) 31.
[246] European Parliament Resolution of 5 April 2017 on Addressing Refugee and Migrant Movements: The Role of EU External Action (P8 TA(2017)0124) point 69.
[247] Council of the European Union, 'Admission Procedures for the Return of Ethiopians from European Union Member States' (Brussels, 18 December 2017) 15762/17 <https://www.statewatch.org/media/documents/news/2018/jan/eu-council-regugees-return-ethiopians-15762-17.pdf> accessed 9 September 2021.
[248] See chapter 2 section 1.1.3.

society and human rights defenders. It hinders potential legal action against these agreements. Indeed, in the case of the EU-Turkey Statement, its publication in the form of a Press Release 'circumvent[ed] the democratic, judicial and fundamental rights safeguards' from Lisbon.[249] The overall lack of transparency, Molinari argues, substantially weakens judicial accountability given the difficulty to determine the authorship of these agreements.[250] In other words, difficulties to identify these agreements' authors further complicate judicial remedies as the accountable authority is unclear.

Deciding upon the EU-Turkey Statement, the CJEU confirmed the EU's lack of accountability for informal agreements. Despite the presence of several elements suggesting that this document was authored by the EU itself, which most of the existing literature also argues,[251] the General Court found in its 2017 *NF, NG and NM* cases that 'the expression "Members of the European Council" and the term "EU", contained in the EU-Turkey Statement as published by means of Press Release No 144/16, must be understood as references to the Heads of State or Government of the European Union' and that 'the European Council, as an institution, did not adopt a decision to conclude an agreement with the Turkish Government in the name of the European Union'.[252] For these reasons, the General Court declared itself incompetent to

[249] Sergio Carrera, Leonhard den Hertog and Marco Stefan, 'The EU-Turkey Deal: Reversing "Lisbonisation" in EU Migration and Asylum Policies' in Sergio Carrera, Juan Santos Vara and Tineke Strik (eds), *Constitutionalising the External Dimensions of EU Migration Policies in Times of Crisis* (Edward Elgar 2019) 156.
[250] Molinari, 'The EU and its Perilous Journey' (n 133) 839.
[251] See for instance: Carmelo Danisi, 'Taking the "Union" Out of "EU": The EU-Turkey Statement on the Syrian Refugee Crisis as an Agreement Between States Under International Law' (*EJIL: Talk!* 20 April 2017) <https://www.ejiltalk.org/taking-the-union-out-of-eu-the-eu-turkey-statement-on-the-syrian-refugee-crisis-as-an-agreement-between-states-under-international-law/> accessed 10 September 2021; Carrera, den Hertog and Stefan, 'The EU-Turkey Deal: Reversing "Lisbonisation"' (n 249) 160-161; Gatti and Ott, 'The EU-Turkey Statement: Legal Nature and Compatibility' (n 231) 179.
[252] Case T-192/16 *NF v European Council* [2017] ECLI:EU:T:2017:128 paras 69 and 70; Case T-193/16 *NG v European Council* [2017] ECLI:EU:T:2017:129 paras 70 and 71; Case T-257/16 *NM v European Council* [2017] ECLI:EU:T:2017:130 paras 68 and 69.

examine the lawfulness of this agreement, in accordance with article 263 TFEU.[253] This is a particularly questionable decision considering that the EU has played a key role in cooperation on migration with Turkey and especially in negotiating an agreement with Turkey regarding Syrian refugees.[254] Looking at the agreement itself, Danisi points out that it was called 'EU-Turkey statement', released on the website of the European council and expressly declared that the EU and Turkey confirmed their commitment at stopping migration.[255] The content of the statement therefore strongly suggests that this was an agreement entered into by the European Union, contrary to what the CJEU decided. By doing so the General Court not only acknowledges the possibility to circumvent judicial safeguards but 'blurs the legal responsibility for its implementation and human rights consequences'.[256]

Informal agreements, such as the EU-Turkey Statement, directly challenge EU institutions' role set by the Lisbon Treaty. The *NF Case* implicitly recognised that the adoption procedure of the EU-Turkey Statement 'rightly' excluded the CJEU from its scrutiny role and the EP from the adoption procedure. The *NF case*,[257] Santos Vara explains, 'confirmed a key trend in several EU responses to the refugee crisis, which consists of the increasing use of instruments falling completely outside the legal acts and decision-making procedures envisaged by the Treaties'.[258] Indeed, this decision contributes to the sense that some EU institutions and the Treaty of Lisbon's

[253] Case T-192/16 *NF v European Council* [2017] ECLI:EU:T:2017:128 para 73.
[254] Carmelo Danisi, 'Taking the "Union" Out of "EU": The EU-Turkey Statement on the Syrian Refugee Crisis as an Agreement Between States Under International Law' (*EJIL: Talk!* 20 April 2017) <https://www.ejiltalk.org/taking-the-union-out-of-eu-the-eu-turkey-statement-on-the-syrian-refugee-crisis-as-an-agreement-between-states-under-international-law/> accessed 10 September 2021.
[255] Council of the European Union, 'EU-Turkey Statement' (18 March 2016) Press Release 144/16; Carmelo Danisi, 'Taking the "Union" Out of "EU": The EU-Turkey Statement on the Syrian Refugee Crisis as an Agreement Between States Under International Law' (*EJIL: Talk!* 20 April 2017) <https://www.ejiltalk.org/taking-the-union-out-of-eu-the-eu-turkey-statement-on-the-syrian-refugee-crisis-as-an-agreement-between-states-under-international-law/> accessed 10 September 2021.
[256] Carrera, den Hertog and Stefan, 'The EU-Turkey Deal: Reversing "Lisbonisation"' (n 249) 156.
[257] Case T-192/16 *NF v European Council* [2017] ECLI:EU:T:2017:128.
[258] Santos Vara, 'Soft International Agreements on Migration' (n 226) 29.

institutional framework can be bypassed, especially the democratic and judicial scrutiny of the EP and CJEU. The CJEU decisions were received with strong opposition from academics,[259] and from the EP itself, which regretted that 'the EU and its Member States have opted for the conclusion of agreements with third countries, which avoid the parliamentary scrutiny attached to the Community method'.[260] Although the *NF case* concerns the EU-Turkey Statement, it has broader implications for the development of EU external migration policy. The CJEU decisions, combined with the EU's constant development of informal agreements, normalised the bypassing of substantive and procedural provisions as provided for by Lisbon.[261]

In conclusion, the 'crisis' framing, by increasing the EU's use of informal agreements to cooperate on migration with third countries and by normalising such arrangements, participated in tolerating the bypassing of the Lisbon Treaty's framework aimed at improving EU democratic safeguards. What we observed in the previous analysis contrasts with the evolution of the common migration and asylum policy, which as I pointed out previously, developed from intergovernmentalism to progressive communitarisation, with the aim of becoming more transparent and accessible.[262] Although the Lisbon Treaty increased the EU's legitimacy in migration policy by ensuring stronger democratic accountability,[263] recent developments in EU external migration policy go towards an increasing opacity, and correspond, as Carrera, den

[259] See for instance: Narin Idriz, 'Taking the EU-Turkey Deal to Court?' (*Verfassungsblog* 20 December 2017) <https://verfassungsblog.de/taking-the-eu-turkey-deal-to-court/> accessed 10 September 2021; Spijkerboer, 'Bifurcation of People, Bifurcation of Law' (n 237) 224; Paula García Andrade, 'External Competence and Representation of the EU and its Member States in the Area of Migration and Asylum' (*EU Immigration and Asylum Law and Policy* 17 January 2018) <https://eumigrationlawblog.eu/external-competence-and-representation-of-the-eu-and-its-member-states-in-the-area-of-migration-and-asylum/> accessed 10 September 2021; Gatti and Ott, 'The EU-Turkey Statement: Legal Nature and Compatibility' (n 231) 176.

[260] European Parliament Resolution of 5 April 2017 on Addressing Refugee and Migrant Movements: The Role of EU External Action (P8 TA(2017)0124) point 70.

[261] Molinari, 'The EU and its Perilous Journey' (n 133) 826.

[262] See chapter 2 section 1.

[263] Carrera, Santos Vara and Strik, 'The External Dimensions' (n 133) 3.

Hertog and Stefan rightly put it, to 'a form of "reverse Lisbonisation" and a step backwards to intergovernmentalism'.[264] The use of a 'crisis' frame, with its implied need for emergency measures,[265] combined with the EU's control-focused approach towards Third World migrants, led to accepting the bypassing of EU founding principles and values, particularly democratic values. The normalisation of informal arrangements and its approval by the CJEU also led to generalising a return to opaque cooperation. In other words, 'crisis' framing not only led to the progressive normalisation of informal agreements but also to the acceptance that civil society and the EP do not need to be informed of developments in EU external migration policy.

2.3. The implications for human rights' protection of migrants

This subsection analyses the implications of the use of informal agreements for migrants' human rights protection. As the previous subsection suggested, the use of informal agreements impacts migrants' access to judicial review and remedies when faced with human rights violations. Analysing the references to international and European human rights law contained in informal arrangements, I argue that the EU's acknowledgements within these agreements of human rights and refugee law are merely performative. As my analysis demonstrates below, the normalised use of atypical cooperation instruments weakens migrants' human rights guarantees and contributes to the acceptance of Third World migrants' human rights violations.

[264] Carrera, den Hertog and Stefan, 'The EU-Turkey Deal: Reversing "Lisbonisation"' (n 249) 161.
[265] See chapter 1 section 3.4.

Some agreements of this case study contain references to international and European human rights and refugee law. The EU-Turkey Statement, for instance, specifies that 'all migrants will be protected in accordance with the relevant international standards and in respect of the principle of non-refoulement'.[266] It also refers to the Asylum Procedure Directive when processing asylum applications.[267] The Afghanistan-EU JWF includes similar acknowledgements in its preamble, for instance, referring to the 1951 Convention Related to the Status of Refugees and its 1967 Protocol, to the International Covenant on Civil and Political Rights and the EU Charter on Fundamental Rights, as well as the Universal Declaration on Human Rights.[268] In comparison, the Italy-Libya MoU's references to human rights law are more limited as it only refers once to 'international obligations and human rights agreements ratified by both countries'.[269] Still, such references convey a significant rhetoric. Using references to international and European human rights and refugee law as well as acknowledging that informal arrangements' implementation will follow such legal provisions might suggest that these agreements are fully respectful of migrants' human rights. Even if references are limited in some agreements, their inclusion might suggest that the said agreement is abiding by human rights norms. Yet, the references to human rights and refugee law contained in these cooperation agreements are formulated in very generic terms. For instance, when mentioning that migrants should be protected, the EU-Turkey Statement does not specify which 'international standards' it is referring to.[270] Neither the Afghanistan-EU JWF nor the Italy-Libya MoU

[266] Council of the European Union, 'EU-Turkey Statement' (18 March 2016) Press Release 144/16 para 1.
[267] ibid.
[268] Joint Way Forward on Migration Issues Between Afghanistan and the EU (Kabul, 2 October 2016) Introduction <https://eeas.europa.eu/sites/eeas/files/eu_afghanistan_joint_way_forward_on_migration_issues.pdf> accessed 17 July 2020.
[269] Memorandum of Understanding on Cooperation in Development, Action against Illegal Immigration, Human Trafficking and Smuggling and Strengthening of Border Security Between the State of Libya and the Republic of Italy (Rome, 2 February 2017) art 5.
[270] Council of the European Union, 'EU-Turkey Statement' (18 March 2016) Press Release 144/16 para 1.

provide any more specification of which human rights guarantees they are referring to and how those should be implemented. It is, indeed, striking that in contrast to the detailed guidance on the return or containment operations that these arrangements provide, no equivalent is to be found regarding the protection of migrants' human rights. This suggests that human and refugee rights' guarantees are not taken seriously by the EU and are merely symbolically mentioned in its cooperation agreements. This is even more so considering that some provisions contained in these arrangements appear strongly incompatible with human rights protection. The EU-Turkey Statement, for instance, declares that 'all new irregular migrants crossing from Turkey into Greek islands as from March 2016 will be returned to Turkey'.[271] It immediately stresses that these returns will occur 'in accordance with EU and international law' and 'in respect of the principle of non-refoulement'.[272] Yet, if *all* migrants arriving from Turkey are sent back, how can the principle of *non-refoulement* not be infringed? This shows that the EU's consideration of human and refugee rights of Third World migrants is merely performative. Discussing Security Council resolutions on counter-terrorism, de Londras observed a similar pattern.[273] Indeed, the Security Council includes frequent rhetorical references to human rights in its resolutions. This leaves no room to question whether such measures are compliant with fundamental rights or whether they can be compatible at all,[274] de Londras argues. We can apply a similar reasoning to the EU cooperation with third countries. Here, the rhetorical references to refugee and human rights make it difficult to question whether the return or containment measures these agreements include are compliant

[271] ibid.
[272] ibid.
[273] Fiona de Londras, 'The Transnational Counter-Terrorism Order: A Problématique' (2019) 72(1) *Current Legal Problems* 203.
[274] ibid 217.

with migrants' rights or whether any alternative measure could be more proportionate and respectful of such rights.

Despite references to human rights and refugee law, these informal agreements generated infringements to migrants' human and asylum rights. The EU-Turkey cooperation raised numerous criticisms from scholars, NGOs and international organisations regarding human rights' violations. Many concerns relate to migrants' living conditions in Greek hotspots while waiting for their status to be determined, including poor hygiene facilities, insufficient medical care and increasing violence, as a 2017 Amnesty International Briefing revealed.[275] Furthermore, analysing the reception of migrants in the Greek island of Kos in 2015, Stevens and Dimitriadi showed how migrants arriving there were simply abandoned at first,[276] since there were 'no official accommodation or services'.[277] The case of the Italy-Libya cooperation has led to even more criticisms from human rights organisations due to the appalling conditions encountered by migrants returned to Libya. A 2019 Human Rights Watch report, for instance, revealed severe overcrowded and unsanitary living conditions as well as violent abuses from guards in official detention centres.[278] Common abuses include arbitrary detention, forced disappearances, torture and sexual violence, as reported by the UNHCR in its Position on returns to Libya from 2018.[279] Hayden's investigation in living conditions in migrants' detention centres in Libya confirmed that migrants faced arbitrary detention, torture, extorsion as well as

[275] Amnesty International, 'A Blueprint for Despair: Human Rights Impact of the EU-Turkey Deal' (February 2017) 22.
[276] Stevens and Dimitriadi, 'Crossing the Eastern Mediterranean Sea' (n 12) 269.
[277] Vicki Squire and others, *Reclaiming Migration: Voices from Europe's 'Migrant Crisis'* (Manchester University Press 2021) 142.
[278] Human Rights Watch, 'No Escape From Hell: EU Policies Contribute to Abuse of Migrants in Libya' (Report, 21 January 2019) <https://www.hrw.org/report/2019/01/21/no-escape-hell/eu-policies-contribute-abuse-migrants-libya> accessed on 10 August 2020.
[279] UNHCR, 'UNHCR Position on Returns to Libya (Update II)' (September 2018) para 8 <https://www.refworld.org/docid/5b8d02314.html> accessed 12 August 2020.

sexual abuses, to name a few.[280] Other human rights organisations also 'certifi[ed] the systematic violations of [migrants'] fundamental rights' in Libya.[281] Informal agreements appear, therefore, to contribute to widespread fundamental rights' violations for Third World migrants.

In addition, asylum seekers' access to protection is also jeopardised by atypical instruments. In the case of the EU-Turkey cooperation, access to asylum for migrants located in the Greek hotspots has been often questioned by scholars and human rights organisations, as Tunaboylu and Alpes pointed out.[282] In 2015, before cooperation with Turkey was developed, Stevens and Dimitriadi noted how migrants arriving to the Island of Kos had 'limited access to the asylum process and limited information on the options available' given that the Greek asylum service was not present on the island so reception of migrants was left in the hands of NGOs and volunteers.[283] In addition to the focus on return set by the EU-Turkey cooperation agreements, difficulties in accessing protection in Greece gave rise to concerns over migrants' returns to Turkey.[284] Indeed, in 2016, a number of organisations reported violations of migrants' fundamental rights during return operations, especially of their right to asylum, observing that some migrants were returned to Turkey despite having expressed their will to apply for asylum.[285] Similarly, Alpes, Tunaboylu and van Liempt explained how

[280] Sally Hayden, *My Fourth Time, We Drowned* (4th Estate 2022) 35-36, 41, 45-46.
[281] Anja Palm, 'The Italy-Libya Memorandum of Understanding: The Baseline of a Policy Approach Aimed at Closing All Doors to Europe?' (*EU Immigration and Asylum Law and Policy Blog,* 2 October 2017) <https://eumigrationlawblog.eu/the-italy-libya-memorandum-of-understanding-the-baseline-of-a-policy-approach-aimed-at-closing-all-doors-to-europe/> accessed 11 August 2020.
[282] Sevda Tunaboylu and Jill Alpes, 'The EU-Turkey Deal: What Happens to People who Return to Turkey?' (2017) (54) Forced Migration Review 9.
[283] Stevens and Dimitriadi, 'Crossing the Eastern Mediterranean Sea' (n 12) 269.
[284] Slominski and Trauner, 'How do Member States Return Unwanted Migrants?' (n 205) 110.
[285] Human Rights Watch, 'EU/Greece: First Turkey Deportations Riddled With Abuse' (19 April 2016) <https://www.hrw.org/news/2016/04/19/eu/greece-first-turkey-deportations-riddled-abuse> accessed 20 August 2020; UNHCR, 'UNHCR Concern Over the Return of 10 Syrian Asylum-Seekers from Greece' (21 October 2016) <https://www.unhcr.org/news/briefing/2016/10/5809e78d4/unhcr-concern-illegal-return-10-syrian-national> accessed 10 August 2020; Amnesty International, 'Greece: Evidence Points to Illegal Forced Returns of Syrian Refugees to Turkey' (28 October 2016) <https://www.amnesty.org/en/latest/news/2016/10/greece-evidence-

delays in asylum procedures and appalling living conditions faced by migrants in Greek hotspots left some feeling compelled to accept returning.[286] Similar cases included the voluntary return of migrants after they had applied for asylum or expressed their intention to do so but then withdrew them.[287] Such practices contrast with the Statement's provisions previously mentioned, notably the guarantee to respect the principle of *non-refoulement*.[288] The Italy-Libya MoU's provisions are even more controversial concerning asylum seekers' access to protection. Indeed, the MoU's aim is to intercept migrants departing from Libya to Europe,[289] and the absence of terms such as 'refugee' or 'asylum' in the whole agreement shows that its drafters had no consideration for migrants' access to protection. In the case of Italy-Libya cooperation, push- and pull-back operations are frequent and have a long-lasting history as exemplified in the *Hirsi Jamaa* case.[290] They remained in use following the 2017 Memorandum as shown by the legal action brought against Italy to the European Court of Human Rights in 2018,[291] and constitute a form of *refoulement* by proxy.[292] Using informal cooperation agreements, therefore, enables the EU and its member states to circumvent its obligations towards asylum seekers.

points-to-illegal-forced-returns-of-syrian-refugees-to-turkey/> accessed 10 August 2020.

[286] Maybritt Jill Alpes, Sevda Tunaboylu and Ilse van Liempt, 'Human Rights Violations by Design: EU-Turkey Statement Prioritises Returns from Greece Over Access to Asylum' (November 2017) EUI Policy Brief 2017/29, 2.

[287] Amnesty International, 'A Blueprint for Despair' (n 275) 20.

[288] Council of the European Union, 'EU-Turkey Statement' (18 March 2016) Press Release 144/16 para 1.

[289] Memorandum of Understanding on Cooperation in Development, Action against Illegal Immigration, Human Trafficking and Smuggling and Strengthening of Border Security Between the State of Libya and the Republic of Italy (Rome, 2 February 2017) art 1.

[290] *Hirsi Jamaa and Others v Italy* (2012) 55 EHRR 21.

[291] Global Legal Action Network, 'Legal Action Against Italy' (n 222).

[292] Charles Heller and Lorenzo Pezzani, 'Mare Clausum: Italy and the EU's Undeclared Operation to Stem Migration Accross the Mediterranean' (Forensic Oceanography Goldsmiths University of London, May 2018) 68 <https://www.dropbox.com/s/v208a1iw689il5r/2018-05-07-FO-Mare-Clausum-EN-3PM_Draft.pdf?dl=0> accessed 13 September 2021.

Additionally, all three case studies received criticisms for operating returns to third countries considered unsafe by NGOs and scholars.[293] The fact that returns are conducted to these countries nevertheless gives clear indications of the EU's scarce consideration of Third World migrants' human rights when conducting returns. As Warin and Zhekova argue, the Afghanistan-EU JWF constitutes 'a signal that Afghanistan should generally be considered a "safe" country'.[294] A similar performative effect can be deduced from the EU-Turkey and the Italy-Libya cooperation. By developing cooperation on readmission and containment with countries generally considered as unsafe, the EU makes them appear safer for migrants to stay in or return to. This is merely a continuation of the externalisation process which emerged since the 1990s at the EU level. As discussed previously, the EU increasingly used the notions of 'safe third country' or 'first country of asylum' to offload its responsibility of dealing with asylum applications to Third World countries, and the notion of 'safe country of origin' to limit access to protection.[295] The adoption of informal cooperation agreements, therefore, contributes to representing some countries as safe for return and increasing their responsibility in dealing with migrants while providing the EU and its member states with an apparent compliance with international refugee and human rights law.

Overall, migrants' human rights situations within these three cooperation frameworks reveal how the EU and its member states use the rhetoric of human rights as a façade. The fundamental rights guarantees contained in these agreements provide little to no protection in practice.

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[293] For Libya see for instance: Palm, 'The Italy-Libya Memorandum of Understanding' (n 281); for Turkey see for instance: Spijkerboer, 'Bifurcation of People, Bifurcation of Law' (n 237) 220-221; for Afghanistan, see for instance: Slominski and Trauner, 'Reforming Me Softly' (n 125) 106.
[294] Warin and Zhekova, 'The Joint Way Forward' (n 134)155.
[295] See chapter 2 section 1.3.3.

This is even more so considering the limited availability of judicial remedies against these agreements. Although the CJEU's increased role after Lisbon should have in principle led to higher levels of protection,[296] the General Court declared itself incompetent in reviewing the legality of the EU-Turkey Statement in a case brought by three asylum seekers in Greece who risked being returned to Turkey.[297] In this way, the 'liberal constraint',[298] expected from EU institutions such as the CJEU following the Lisbon Treaty, is in practice non-existent for migrants' fundamental rights' protection as it relates to these agreements.

The use of informal agreements reveals all its impacts on migrants' fundamental rights here. Using legally binding agreements would have enabled migrants whose fundamental rights are violated to access legal remedies. Therefore, by using non-binding agreements with its partners, the EU and its member states not only put migrants at risk of more human rights violations but prevent them from accessing remedies. Migrants' restricted access to legal remedies shows that informal agreements directly participate in the acceptance of human rights violations when dealing with so-called 'irregular' migrants. As I previously highlighted, such violations concern not only asylum seekers' access to protection but cover various fundamental rights, ranging from poor living conditions to torture or arbitrary detention. Thus, using informal agreements contributes to tolerating and normalising that migrants' human rights can be violated. This consideration results from the EU's approach to Third World migrants, particularly its conception of Third World migrants as a problematic phenomenon requiring a security-based and control-focused approach.

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[296] Slominski and Trauner, 'How do Member States Return Unwanted Migrants?' (n 205) 104; see also chapter 2 section 1.1.3.
[297] Case T-192/16 *NF v European Council* [2017] ECLI:EU:T:2017:128; Case T-193/16 *NG v European Council* [2017] ECLI:EU:T:2017:12; Case T-257/16 *NM v European Council* [2017] ECLI:EU:T:2017:130.
[298] Slominski and Trauner, 'How do Member States Return Unwanted Migrants' (n 205) 104.

The number of returns that took place within the three frameworks analysed in this case study gives more clarity on the EU's genuine objective when using informal cooperation. Numbers of returned migrants within the frameworks are not always available and difficult to compare; yet they show some tendencies. Indeed, although often presented as a success for stopping migration through the Aegean Sea,[299] the EU-Turkey Statement has led to few returns as in January 2017, only 865 migrants were returned from Greece to Turkey within the EU-Turkey cooperation framework.[300] Returns to Libya appear to be much more substantial than under the EU-Turkey cooperation framework, although little information is available. A 2019 report from UNHCR counted that over 8,800 migrants had been intercepted at sea by the Libyan Coast Guards and returned to Libya.[301] Although this report does not specify the period covered by this account, it still suggests that a significant number of migrants have been returned within the Italy-Libya cooperation. Scholars also generally agree that this informal agreement generated a 'very significant decrease in landings on Italian shores'.[302] The contrast with the EU-Turkey cooperation is also due to the nature of Italy's cooperation with Libya, as its aim is for the Libyan authorities to intercept migrants before reaching Italian territorial waters.[303] Return rates of unwanted Afghans, however, seem to have decreased since the adoption of the JWF, dropping from 30% returns of all return decisions in 2016 to 8% in 2019.[304] The nature of the

[299] Gatti and Ott, 'The EU-Turkey Statement: Legal Nature and Compatibility' (n 231) 175.
[300] Amnesty International, 'A Blueprint for Despair' (n 275) 17.
[301] UNHCR, 'Libya (UNHCR Update)' (20 December 2019) <https://reliefweb.int/sites/reliefweb.int/files/resources/UNHCR%20Libya%20Update%2020%20December%202019.pdf> accessed 11 August 2020.
[302] Martino Reviglio, 'Externalizing Migration Management through Soft Law: The Case of the Memorandum of Understanding between Libya and Italy' (2019) 20(1) Global Jurist 1, 6.
[303] Memorandum of Understanding on Cooperation in Development, Action against Illegal Immigration, Human Trafficking and Smuggling and Strengthening of Border Security Between the State of Libya and the Republic of Italy (Rome, February 2017) art 1.
[304] Council of the European Union, 'Implementing the Pact – Strengthening Comprehensive Migration Partnerships with Priority Countries: - Afghanistan' (Brussels, 25 May 2021) 8953/21 2 <https://www.statewatch.org/media/2675/eu-council-afghanistan-implementing-pact-discussion-paper-8953-

Afghanistan-EU JWF, fully focused on returning 'irregular' Afghans from the EU, partly explains its distinct impact compared to the EU-Turkey and Italy-Libya cooperation, both of which contain cooperation on border controls. Yet overall, what this suggests is that increasing return rates is not the primary effect of these cooperation frameworks. Despite the increase in returns being a key objective allegedly justifying the recourse to informal agreements, the previous analysis suggests this is far from being the main consequence of using this type of framework. This raises questions on the EU's and its member states' objectives when entering into atypical cooperation frameworks.

Rather than increasing returns, I suggest that the general lowering of human rights standards for 'irregular' migrants and the normalisation of human rights violations – such as arbitrary detention, torture, inhuman and degrading treatment, violation of the principle of *non-refoulement* to name a few with regards to Turkey or Afghanistan,[305] or acts which 'may amount to crimes against humanity' in the case of Libya–[306] for Third World migrants are central implications of using informal cooperation. Consequently, informal cooperation on migration not only implies that migrants are not entitled to stay and may be removed at any time, but that their human rights can be

21.pdf> accessed 13 September 2021.

[305] See for instance: Amnesty International, 'No Safe Refuge – Asylum-Seekers and Refugees Denied Effective Protection in Turkey' (3 June 2016) <https://www.amnesty.org/en/documents/eur44/3825/2016/en/> accessed 24 May 2022; Amnesty International, 'Greece: Evidence Points to Illegal Forced Returns of Syrian Refugees to Turkey' (28 October 2016) <https://www.amnesty.org/en/latest/news/2016/10/greece-evidence-points-to-illegal-forced-returns-of-syrian-refugees-to-turkey/> accessed 10 August 2020; Amnesty International, 'A Blueprint for Despair' (n 275); Amnesty International, 'Forced Back to Danger – Asylum-seekers Returned from Europe to Afghanistan' (5 October 2017) <https://www.amnesty.org/en/documents/asa11/6866/2017/en/> accessed 24 May 2022; Human Rights Watch, 'No Escape From Hell: EU Policies Contribute to Abuse of Migrants in Libya' (Report, 21 January 2019) <https://www.hrw.org/report/2019/01/21/no-escape-hell/eu-policies-contribute-abuse-migrants-libya> accessed on 10 August 2020; Amnesty International, 'Greece: Violence, Lies and Pushbacks – Refugees and Migrants Still Denied Safety and Asylum at Europe's Borders' (23 June 2021) <https://www.amnesty.org/en/documents/eur25/4307/2021/en/> accessed 24 May 2022; Human Rights Watch, '"Their Faces Were Covered" Greece's Use of Migrants as Police Auxiliaries in Pushbacks' (Report, 7 April 2022) <https://www.hrw.org/report/2022/04/07/their-faces-were-covered/greeces-use-migrants-police-auxiliaries-pushbacks> accessed 24 May 2022.

[306] OHCHR, Forty Eighth Session 13 September-1 October 2021 'Report of the Independent Fact-Finding Mission on Libya' (29 November 2021) UN Doc A/HRC/48/83, para 70.

violated without any consequence. Overall, the 'crisis' framing, by exceptionalising Third World migration to Europe, generalised the use of informal cooperation agreements, characterised as 'exceptional' measures. Because of this need for 'urgent' and 'exceptional' action, the 'crisis' frame supported the bypassing of the post-Lisbon EU institutional framework, now considered as a 'liberal constraint'.[307] It also means that references to international and European human rights law in atypical cooperation framework should only be understood as performative and actually contribute to the acceptance of Third World migrants' rights violations.

3. 'Crisis' framing: Legitimating the EU's repressive approach

In order to better understand the 'crisis' framing's implications for EU cooperation with third countries, I develop a close reading of the agreements that constitute the three case studies of this research. Doing so provides insights into the political underpinnings justifying the normalisation of atypical instruments. It also enables a critical engagement with the implications of using a 'crisis' frame in combination with informal agreements.

In this section, I argue that the 'crisis' frame legitimated the EU's coercive approach to Third World migration. Indeed, the close reading of the three case studies shows the EU's focus on furthering Third World migrants' exclusion, whether physically from the EU territory or legally and socially within the EU. In addition, my analysis reveals that the 'crisis' framing justified the EU's constant focus on expanding control-oriented measures towards Third World migration. Despite using a coercive approach to

[307] Slominski and Trauner, 'How do Member States Return Unwanted Migrants' (n 205) 104.

migrants and migration, the EU characterises itself and its migration policy as a form of benevolence. This contributes to the justification and acceptance of cooperation with third countries as not only a necessary measure due to the 'crisis' but also as a generous and beneficial action for both migrants and third countries.

3.1. The EU's approach to migrants: Excluding the unwanted

A close reading of the agreements that underpin the three case studies is revealing of the EU's approach to Third World migrants. In this subsection, I discuss the framing of Third World migrants within EU external migration policy by examining the language used in the case studies since it is particularly telling of the EU's conception of migrants. Indeed, the terminology used to refer to Third World migrants shows a constant blurring of migrants' categories. Choices of terminology overall facilitate the othering and exclusion of unwanted migrants as the imprecise language makes it difficult to identify precisely who is targeted by these instruments and therefore broadens their scope. Additionally, by avoiding any clear category, informal agreements contribute to migrants' illegalisation because the notion of 'illegality' – commonly used in the three case studies of this research – becomes Third World migrants' distinctive feature. Overall, the EU's approach to migration in its cooperation agreements contributes to the othering of Third World migrants. Amidst the so-called 'crisis', when identities and self-perception are more salient,[308] Third World migrants do not seem to fit within any category and appear as a blurred crowd, which contrasts with ourselves, citizens of the EU. In addition, the central element to distinguish or

[308] See chapter 1 section 3.3.

identify them is their so-called 'illegality'. This terminology has heavy connotations as discussed below. In the context of emergency or danger implied from the 'crisis' frame,[309] the illegalisation of Third World migrants furthers their representation as the 'threatening others' and justifies their exclusion both physically from the EU territory and legally from any human rights or international protection.

3.1.1. Blurring Third World migrants' categories

When reading the agreements that underpin the three case studies, it becomes rapidly clear that there was no consistent formulation used to refer to the migrants concerned by each of the cooperation framework. Rather, what I observed is a constant blurring of migrants' categories. Here, by blurring I mean the endeavour to make it difficult to understand exactly whom the provisions are applying to. This is achieved by using imprecise or very generic language to refer to migrants and mixing various terminologies with different meanings or connotations in terms of migrants' categories, including formal legal language at times.

The blurring of migrants' categories is revealed by the language used to refer, and more particularly to qualify or define, the migrants targeted within the three cooperation frameworks analysed here. A brief analysis of the formulations used to refer to migrants shows that the representation of migrants is rather inconsistent. Indeed, migrants are sometimes referred to as groups of individuals, such as 'migrants',[310]

[309] See chapter 1 section 2.
[310] The term 'migrant' appears 8 times in the EU-Turkey Joint Action Plan, 10 times in the EU-Turkey Statement, 5 times in the Afghanistan-EU Joint Way Forward and 3 times in the CAPD between the EU and Afghanistan.

'people',[311] 'persons'[312] or 'refugees'.[313] Other references focus on nationality, describing the migrants to which they apply as 'Syrians'[314] or 'Afghan'[315] and 'Afghan nationals'.[316] Here we can notice the inconsistency of formulations used and specifically the lack of legal precision, as these agreements mix terminology associated with a specific legal status, such as 'refugee', with non-legal terms such as 'people'. This demonstrates the EU's effort to avoid using any legally compelling category and keep the scope of informal agreements broad. Despite a few references to specific nationalities, most terminology used is, indeed, very generic. This gives informal agreements flexibility to cover all migrants entering the EU from Turkey or Libya, for instance.

These agreements also use terminology that does not reflect any individuality or humanhood of migrants or that weakens it. There is, for instance, a clear focus on presenting migrants as part of a broad phenomenon rather than as individuals or a group of human beings. Indeed, formulations such as 'migration',[317] 'flow',[318] 'influx'[319]

[311] The term 'people' appears once in the Afghanistan-EU Joint Way Forward and in the EU-Turkey Statement, and 4 times in the EU-Turkey Joint Action Plan.
[312] The term 'persons' appears twice in the EU-Turkey Joint Action Plan and in the EU-Turkey Statement and once in the Afghanistan-EU Joint Way Forward.
[313] The term 'refugee' appears once in the Afghanistan-EU Joint Way Forward and in the CAPD between the EU and Afghanistan, three times in the EU-Turkey Joint Action Plan and two times in the EU-Turkey Statement.
[314] Commission, 'EU-Turkey Joint Action Plan' (Brussels, 15 October 2015) MEMO 15/5860 Introduction and Part I; Council of the European Union, 'EU-Turkey Statement' (18 March 2016) Press Release 144/16 Preamble and para 2.
[315] Joint Way Forward on Migration Issues Between Afghanistan and the EU (Kabul, 2 October 2016) Part II <https://eeas.europa.eu/sites/eeas/files/eu_afghanistan_joint_way_forward_on_migration_issues.pdf> accessed 17 July 2020.
[316] ibid Introduction and Part I.
[317] The term 'migration' on its own is used 9 times in the Afghanistan-EU Joint Way Forward, 3 times in the CAPD between the EU and Afghanistan, 8 times in the EU-Turkey Joint Action Plan and 3 times in the EU-Turkey Statement. It is even more recurring when associated to 'challenges', 'issues', 'strategy' in the Afghanistan-EU Joint Way Forward, or associated to 'management', 'flows' in the EU-Turkey Joint Action Plan and to 'crisis' in the EU-Turkey Statement.
[318] The terms 'migration flows' appear twice in the CAPD between the EU and Afghanistan (art 28 (1) and art 28 (2)), the terms 'return flows' appear once in the Afghanistan-EU Joint Way Forward (Part VI (b)), the terms 'migration flows' appear once in the EU-Turkey Joint Action Plan (Introduction).
[319] The term 'influx' is used twice in the Introduction and once in Part I of the EU-Turkey Joint Action Plan.

or 'inflow'[320] are used several times to refer to migrants. Here, we also notice the use of 'aquatic terms'[321] – that is, in the three case studies considered here, terminology such as 'waves of illegal migrants',[322] 'migration flows',[323] 'return flows'[324] or 'inflow'.[325] Water metaphors to refer to migrants have been used in numerous national contexts – especially in Western European discourses – since at least the mid-19th century, as Taylor's research found.[326] This imagery has significant implications for the representation and understanding of migrants and asylum seekers, since 'flows' or 'waves' associate migrants with unavoidable and uncontrollable natural phenomena.[327] Finally, migrants are sometimes indirectly referred to by means of references to specific aspects of the migratory journey such as 'routes',[328] 'crossings',[329] 'departures',[330] 'returns'[331] or 'return operations'.[332] Through the use of these terms, the EU and its member states contribute to the dehumanisation of migrants. Using phenomena as proxies to refer to migrants indicates a very generic approach. This terminology is indeed broad and impersonal. It is not limited to a

[320] Commission, 'EU-Turkey Joint Action Plan' (Brussels, 15 October 2015) MEMO 15/5860 Part I.
[321] Anastassia Tsoukala, 'Looking at Migrants as Enemies' in Didier Bigo and Elspeth Guild (eds), *Controlling Frontiers: Free Movement Into and Within Europe* (Ashgate 2005) 174.
[322] Memorandum of Understanding on Cooperation in Development, Action against Illegal Immigration, Human Trafficking and Smuggling and Strengthening of Border Security Between the State of Libya and the Republic of Italy (Rome, February 2017) Preamble.
[323] The terms 'migration flows' appear twice in the CAPD between the EU and Afghanistan (art 28 (1) and art 28 (2)) and once in the EU-Turkey Joint Action Plan (Introduction).
[324] The terms 'return flows' appear once in the Afghanistan-EU Joint Way Forward (Part VI (b)).
[325] Commission, 'EU-Turkey Joint Action Plan' (Brussels, 15 October 2015) MEMO 15/5860 Part I para 2.
[326] Charlotte Taylor, 'Metaphors of Migration Over Time' (2021) (32)4 Discourse and Society 463, 470.
[327] Lesley J Pruitt, 'Closed due to "Flooding"? UK Media Representations of Refugees and Migrants in 2015-2016 – Creating a Crisis of Borders' (2019) 21(2) The British Journal of Politics and International Relations 383, 388.
[328] Council of the European Union, 'EU-Turkey Statement' (18 March 2016) Press Release 144/16 para 3.
[329] ibid para 4.
[330] Commission, 'EU-Turkey Joint Action Plan' (Brussels, 15 October 2015) MEMO 15/5860 Part II para 1.
[331] Joint Way Forward on Migration Issues Between Afghanistan and the EU (Kabul, 2 October 2016) Part II para 4 <https://eeas.europa.eu/sites/eeas/files/eu_afghanistan_joint_way_forward_on_migration_issues.pdf> accessed 17 July 2020.
[332] Commission, 'EU-Turkey Joint Action Plan' (Brussels, 15 October 2015) MEMO 15/5860 Part II para 3; Joint Way Forward on Migration Issues Between Afghanistan and the EU (Kabul, 2 October 2016) Part VII para b <https://eeas.europa.eu/sites/eeas/files/eu_afghanistan_joint_way_forward_on_migration_issues.pdf> accessed 17 July 2020.

specific category of migrants and can therefore encompass a wide variety of migration pattern or situation. In this way, by using generic terminology, the EU furthers the flexibility of these agreements.

In addition to the wide variety of formulations used to refer to Third World migrants, the terminology used in the case studies is rather inconsistent. Indeed, formulations are used alternatively without coherence or justification behind the choice of terminology, which creates confusion and uncertainty as to whom these agreements are referring. The confusion created by the variety of formulations used is particularly noticeable in some agreements. For instance, paragraph 2 of the EU-Turkey Statement detailing the resettlement process, firstly refers to 'Syrians' specifically. It then uses the terminology 'migrants' before using broader and impersonal terminology such as 'migration' or 'returns'.[333] The inconsistency in terms of formulations used in this short paragraph is flagrant. It shows the extreme difficulty to identify the migrants concerned by the Statement's 1-1 resettlement scheme, let alone migrants targeted by the whole agreement.

The confusion is also due to the lack of a list of definitions for key terms in the agreements and the difficulty in defining some of the terminology used. Some

[333] Council of the European Union, 'EU-Turkey Statement' (18 March 2016) Press Release 144/16 para 2: '2) For every Syrian being returned to Turkey from Greek islands, another Syrian will be resettled from Turkey to the EU taking into account the UN Vulnerability Criteria. A mechanism will be established, with the assistance of the Commission, EU agencies and other Member States, as well as the UNHCR, to ensure that this principle will be implemented as from the same day the returns start. Priority will be given to migrants who have not previously entered or tried to enter the EU irregularly. On the EU side, resettlement under this mechanism will take place, in the first instance, by honouring the commitments taken by Member States in the conclusions of Representatives of the Governments of Member States meeting within the Council on 20 July 2015, of which 18.000 places for resettlement remain. Any further need for resettlement will be carried out through a similar voluntary arrangement up to a limit of an additional 54.000 persons. The Members of the European Council welcome the Commission's intention to propose an amendment to the relocation decision of 22 September 2015 to allow for any resettlement commitment undertaken in the framework of this arrangement to be offset from non-allocated places under the decision. Should these arrangements not meet the objective of ending the irregular migration and the number of returns come close to the numbers provided for above, this mechanism will be reviewed. Should the number of returns exceed the numbers provided for above, this mechanism will be discontinued.'

formulations used, for instance, avoid giving migrants any identifiable characteristic. 'Migration' is a flagrant example of this process, as it focuses on the process of migrating rather than migrants themselves, representing Third World migrants as part of a generic phenomenon. It also prevents a clear understanding of who the people taking part in this 'migration' are, be it in terms of status, number or origin. Moreover, some terms used, although they refer to the individuals migrating, remain extremely difficult to define. For example, even though the word 'migrant' is frequently used in these three case studies, it is a terminology that lacks clarity from a legal standpoint. As Anderson and Blinder explain, 'there are many different ways to interpret the term "migrant"'.[334] It also does not have a legal definition,[335] which would offer more certainty and precision as to the group targeted.

As a consequence, it appears particularly complex to identify who the migrants concerned by these three cooperation frameworks are. I argue that it reveals the EU's approach towards Third World migration. Indeed, the use of such confusing and imprecise terminology is a central part of the distinction between European and Third World migrants. The representation of Third World migrants as 'threatening hordes' relies on the impossibility to identify them. Identification and precision give certainty, as they give an idea of who the targeted persons are and what they are entitled to. In other words, using precise terminology would give migrants an identity. Here, the terminology used contributes to migrants' othering, a process which did not result from the 'crisis' framing – contrary to what chapter 1 suggested – but rather is a long-lasting legacy of the EU's conception of Third World migrants.[336]

[334] Bridget Anderson and Scott Blinder, 'Who Count as a Migrant? Definitions and Their Consequences' (Migration Observatory Briefing, COMPAS, University of Oxford, July 2019) 2.
[335] ibid.
[336] See chapter 2 section 1.3.4.

3.1.2. 'Illegality', Third World migrants' main distinctive element

I now further the close reading of the three case studies. Contrary to the inconsistency of the terminology used to refer to migrants as my analysis observed in the previous subsection, migrants' 'illegality' appears as a consistent element used by the EU to characterise Third World migrants in atypical cooperation instruments. Overall, this contributes to Third World migrants' exclusion and illegalisation.[337] I argue that migrants' illegalisation results from both the lack of consistent categories used to refer to them and the use of language reflecting the notion of illegality,[338] including the adjective 'illegal' itself.

Firstly, the illegalisation of migrants operates in the three case studies partly due to the lack of consistent formulations used to refer to migrants, as I explained previously.[339] A major consequence of the absence of consistent and precise formulations to refer to the people targeted by these arrangements is their implicit illegalisation. Indeed, the legal designation on migration status is mainly binary: law generally categorises a migrant as either legal or illegal.[340] Migration law does not really seize the change in status that may operate over time for a migrant nor the diverse forms of migration that occur without fully complying with all legal requirements.[341] Moreover, since the law only defines who is 'legal', those who are not

[337] See chapter 2 section 1.3.4. for definition of 'illegalisation'.
[338] As we shall see below, 'illegality' is to be understood broadly here. The close reading of the case studies reveal the use of the words 'illegal' or 'illegally', 'clandestine' or 'clandestinely', and 'irregular' or 'irregularly', all of which are terminologies used to categorise migrants' situation as 'illegal' without necessarily using the word 'illegal' itself due to its connotations.
[339] See section 3.1.1. of this chapter.
[340] Franck Düvell, 'Clandestine Migration in Europe' (2008) 47(4) Social Science Information 479, 487; Cathryn Costello, *The Human Rights of Migrants and Refugees in European Law* (Oxford University Press 2015) 64.
[341] Costello, *The Human Rights of Migrants and Refugees* (n 340) 64.

covered by this definition are implicitly illegal.[342] That is why I argue that the inconsistent formulations avoid placing these migrants into any existing and recognisable legal category and thus creates uncertainty regarding their status to such an extent that these migrants are implicitly categorised as 'illegal'.

Migrants' illegalisation also occurs more directly in the three case studies considered in this thesis. Indeed, the language used to refer to migrants includes several terms, which generally reflect the notion of 'illegality' in a general sense. What I mean here by notion of 'illegality' is the wide range of terminology used to try to capture the situation of migrants who either do not have a legal status or do not fully respect all the legal requirements of their status.[343] They include expressions such as 'clandestine', 'non-status', 'irregular', 'illegal', 'unlawful', 'undocumented' or 'unauthorised' migrants, as well as other expressions specific to national contexts which do not have an equivalent in English such 'sans papiers' or 'sin papeles', respectively in French and Spanish contexts.[344] Each of these notions focuses on different aspects of migration status or situation, and their frequency depends on the context.

In the three case studies, three terminologies are noticeable. Firstly, the noun and adjective 'illegal' or the adverb 'illegally' can be encountered, although there are some differences in the frequency for each case. Except for the Italy-Libya MoU, where the adjective 'illegal' is used eight times – including in the title itself –[345] direct references

[342] Elspeth Guild, 'Who is an Irregular Migrant?' in Barbara Bogusz and others (eds), *Irregular Migration and Human Rights: Theoretical, European and International Perspectives* (Martinus Nijhoff Publishers 2004) 4.
[343] Costello, *The Human Rights of Migrants and Refugees* (n 340) 64.
[344] Düvell, 'Clandestine Migration' (n 340) 484; Harald Bauder, 'Why We Should Use the Term "Illegalized" Refugee or Immigrant: A Commentary' (2014) 26(3) International Journal of Refugee Law 327, 329.
[345] Memorandum of Understanding on Co-Operation in Development, Action against Illegal Immigration, Human Trafficking and Smuggling and Strengthening of Border Security between the State of Libya and the Republic of Italy (2 February 2017) Introduction, art 1(A) and (B), art 2(2), (3) and (6).

to the notion of 'illegality' are rather rare in EU agreements. Such vocabulary is never used in agreements related to the cooperation with Afghanistan and is barely ever used in the EU-Turkey cooperation as the adjective 'illegal' is used only once in the JAP and once in the Statement.[346] This avoidance of the term reflects a general trend in migration policy and scholarship. Academic, legal and policy documents tend to use the notion of 'illegality' relatively infrequently nowadays, essentially to avoid the pejorative connotations that 'illegality' raises.[347] This terminology has, indeed, rather strong connotations, especially since it suggests that migrants have committed a crime or that 'someone else […] has been wronged'.[348] Despite the various assumptions surrounding this terminology, the notion of 'illegality' does not have a precise definition.[349] The most straightforward way to define it is by reference, and in contradistinction, to 'legal' migration. In this way, any migrant entering or remaining in the EU in breach of the law has an 'illegal' status. Due to the variety of situations in which migrants may find themselves in breach of a legal provision and the absence of any official or generally accepted definition, the notion of 'illegal' migration remains extremely blurred and loaded with ideological implications.[350] In spite of the lack of the word in the case studies, it also remains present in substance in these arrangements.

The notion of 'clandestinity' can be used to refer to migrants in a way that connotes illegality even if the term illegal itself is not deployed. It can be found seven times in the Italy-Libya MoU,[351] and constitutes a specificity of the Italy-Libya cooperation since

[346] Commission, 'EU-Turkey Joint Action Plan' (Brussels, 15 October 2015) MEMO 15/5860 Part II(4); Council of the European Union, 'EU-Turkey Statement' (18 March 2016) Press Release 144/16 para 3.
[347] Costello, *The Human Rights of Migrants and Refugees* (n 340) 64.
[348] Bauder, 'Why We Should Use the Term "Illegalized"' (n 344) 328.
[349] Catherine Dauvergne, *Making People Illegal: What Globalization Means for Migration and Law* (Cambridge University Press 2008) 10.
[350] Franck Düvell, 'Irregular Migration: A Global, Historical and Economic Perspective' in Franck Düvell (ed), *Illegal Immigration in Europe: Beyond Control?* (Palgrave Macmillan 2006) 29.
[351] Memorandum of Understanding on Co-Operation in Development, Action against Illegal Immigration, Human Trafficking and Smuggling and Strengthening of Border Security between the State of Libya and the Republic of

neither the adjective ‘clandestine’ nor any of its derivatives is found in the two other case studies. Similarly, it is not used in any of the Council conclusions related to the EU-Libya cooperation either. This suggests that ‘clandestinity’ is a notion specific to the Italo-Libyan context or the Italian language because the analysis of the MoU produced here is based on a translation from the Italian version of this agreement. Some studies also suggest that ‘clandestine’ is a terminology that is rather specific to the Italian context, where it has been frequently used since the 1990s to describe migration.[352] Although the term ‘clandestine’ conveys the idea of migrants as ‘hiding’ or ‘remaining unseen’,[353] and is thus often associated with the idea of ‘clandestine entry’ or stay, it appears to be generally understood in a similar sense as ‘illegal’ within migration studies. Some scholars, such as Düvell,[354] use both terminologies interchangeably, thus suggesting they both refer to the same notion.

The term ‘irregular’ and its derivatives are, by far, those most frequently used to refer to migrants in the EU-Turkey and the EU-Afghanistan cooperation agreements, as it is found 26 times overall in these four agreements.[355] ‘Irregularity’ has a slightly different meaning than that of ‘illegality’, as it does not suggest a breach of the legal order or a violation of at least one legal provision related to migration, although, as

Italy (2 February 2017) Introduction, art 1(C), art 2(3) and art 2(4).

[352] Düvell, ‘Clandestine Migration’ (n 340) 481.

[353] Bauder, ‘Why We Should Use the Term “Illegalized”’ (n 344) 329.

[354] Düvell, ‘Clandestine Migration’ (n 340) 479.

[355] There are, respectively, seven references to the notion of ‘irregularity’ in the EU-Turkey Joint Action Plan, eight references in the EU-Turkey Statement, nine references in the EU-Afghanistan Joint Way Forward and 2 references in the CAPD between the EU and Afghanistan: Commission, 'EU-Turkey Joint Action Plan’ (Brussels, 15 October 2015) MEMO 15/5860 Introduction and Part II; Council of the European Union, ‘EU-Turkey Statement’ (18 March 2016) Press Release 144/16 Preamble, paras 1, 2, 3 and 4; Joint Way Forward on Migration Issues Between Afghanistan and the EU (Kabul, 2 October 2016) Introduction, Part I para 2, Part III para 2, Part IV para 2, Annex <https://eeas.europa.eu/sites/eeas/files/eu_afghanistan_joint_way_forward_on_migration_issues.pdf> accessed 17 July 2020; Cooperation Agreement on Partnership and Development between the European Union and its Member States, of the one part, and the Islamic Republic of Afghanistan, of the other part [2017] OJ L67/3 art 28(1) and 28(2).

Bauder rightly noted, it 'still implies that migrants somehow are not "regular"'.[356] In a way, 'irregularity' is broader than 'illegality' as it encompasses more situations in which migrants may find themselves. As Costello explains, it includes situations of 'illegality' strictly speaking and situations where migrants are not 'authorised' per se as they have not received an official approval but 'ought to be permitted for overriding legal or moral reasons'.[357]

Scholars tend to explain the evolution of terminology, from 'illegality' to 'irregularity', as a means of avoiding the pejorative connotations of the notion of 'illegality' and the problematic nature of using the term 'illegal' to refer to persons.[358] It is the result of various calls from international organisations, including the Council of Europe, to avoid 'the stigmatisation of the term "illegal"'.[359] It is sometimes also explained as a way to develop a more accurate description of migrants' situation when entering or living in a country without authorisation.[360] Yet as observed through the three case studies here, this change in the formulations used is not operated within EU documents as strictly as one would think. Despite its known problematic nature, the notion of 'illegality' is still used in rather recent EU policy documents, such as in the 2017 Council conclusions related to the cooperation with Afghanistan.[361] Moreover, these terms are often used interchangeably and therefore maintain a certain confusion between the different terminologies. The notion of 'irregularity' appears as being a perhaps more generally accepted manner of referring to what was previously referred to as 'illegality'.

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[356] Bauder, 'Why We Should Use the Term "Illegalized"' (n 344) 329.
[357] Costello, *The Human Rights of Migrants and Refugees* (n 340) 64.
[358] Dauvergne, *Making People Illegal* (n 349) 15-16; Bauder, 'Why We Should Use the Term "Illegalized"' (n 344) 328.
[359] Council of Europe Parliamentary Assembly, 'Human Rights of Irregular Migrants' Resolution 1509 (2006) adopted 27 June 2006 para 7.
[360] OHCHR, 'Immigration Control must not Compromise Human Rights' (22 September 2009) <https://www.ohchr.org/EN/NEWSEVENTS/Pages/MigrationPanel.aspx> accessed 13 September 2021.
[361] Council of the European Union, 'Council Conclusions on Afghanistan – Third Review of the EU Strategy for Afghanistan 2014-2016' (16 October 2017) 13098/17 1, 11.

This terminological change does not mean that the more recent formulations have no pejorative connotations, although these appear less obvious at first sight.

Moreover, the change of terminology observed in EU external migration policy extends the scope of application of cooperation agreements. As mentioned previously, the notion of 'irregularity' has a rather broad meaning which encompasses both migrants considered as lacking a legal status and lacking an authorisation. [362] Based on this understanding of the notion of 'irregularity', using the adjective 'irregular' instead of 'illegal' to qualify the migrants concerned by an agreement extends its scope of application. Indeed, it encompasses more situations in which migrants may find themselves, which means that more migrants could be included.

Despite some differences between the three case studies, general trends can be observed here. The notion of 'illegality' – understood as encompassing a variety of terminology referring to a similar situation encountered by migrants – is used rather frequently in informal cooperation agreements. This contrasts sharply with the previous section's observations noting the variety and inconsistency of formulations used to refer to migrants.[363] Yet, using the notion of 'illegality' as the most constant terminology does not offer any more precision regarding the target group of these cooperation as there is no official definition of 'illegal' migration.[364] This notion is also very broad and imprecise and is qualified as a 'fraught' by Costello,[365] as it encompasses a vast number of situations in which migrants may find themselves.[366] Alternative formulations such as 'irregular' or 'clandestine' do not offer a more accurate understanding of the migrants they are referring to. As previously explained, all these

[362] Costello, *The Human Rights of Migrants and Refugees* (n 340) 64.
[363] See section 3.1.1. of this chapter.
[364] Dauvergne, *Making People Illegal* (n 349) 10.
[365] Costello, *The Human Rights of Migrants and Refugees* (n 340) 64.
[366] Guild, 'Who is an Irregular Migrant?' (n 342) 3.

terminologies carry similar pejorative connotations. The frequent use of the notion of 'illegality' and the lack of consistent alternative formulations participate in categorising migrants. The notion of 'illegality' broadly speaking and its connotations constitute the distinctive element of Third World migrants. By further focusing on migrants' 'illegality' in the wake of the so-called 'crisis', EU external migration policy actively participates in their illegalisation.

Using 'illegality' as a distinctive feature to describe Third World migrants also does not take into consideration the link between law and so-called 'illegality'.[367] Using 'illegality' to characterise Third World migrants, therefore, enables the EU to avoid questioning the role of its migration policy, especially its cooperation with third countries, in creating situations of 'illegality'.

Overall, the close reading of the case studies shows the role of the EU's language when representing the migrants it targets. The analysis reveals the EU's consistent blurring of Third World migrants' categories combined with direct and explicit illegalisation. The EU's approach to migration not only illegalises migrants. Given the 'crisis' framing and its associated focus on identities,[368] it furthers their othering and justifies their exclusion through control-oriented measures.

3.2. The EU's approach to migration: Justifying the EU control-based approach

[367] Dauvergne, *Making People Illegal* (n 349) 27.
[368] See chapter 1 section 3.3.

The close reading of the three case studies also reveals how the framing of migration justifies the control-based policy answer developed by the EU. In my analysis of the case studies, I identified two elements as particularly relevant in framing a control-based approach as the only possible policy answer to the situation faced by the EU. Firstly, the 'crisis' framing contributes to the perpetuation of the EU's security focus in its external migration policy. Secondly, the managerial approach used leaves a security-oriented policy as the most appropriate answer.

3.2.1. The EU's long-lasting conception of Third World migration as a security issue

The EU's security concerns with regards to Third World migration did not emerge with the so-called 'crisis' in 2015,[369] although the 'crisis' framing emphasises ideas of danger and threat, as I discussed in chapter 1. The EU's focus on security, especially migrants' association with criminal activities, which I observe in the case studies of this research below, therefore corresponds to a continuation of pre-existing tendencies.

The EU's security focus is noticeable in the three case studies in the links drawn between migration and smuggling or trafficking. Indeed, EU informal cooperation frameworks with Turkey and Afghanistan refer to 'migrant smuggling', 'migrant smugglers' and/or 'trafficking in human beings'.[370] The CAPD between the EU and Afghanistan further exemplifies the association between measures on the fight against smuggling or trafficking and migration. The CAPD first mentions the 'fight against

[369] See chapter 2 section 1.2.2.
[370] Commission, 'EU-Turkey Joint Action Plan' (Brussels, 15 October 2015) MEMO 15/5860, Part II paras 2, 4 and 5; Council of the European Union, 'EU-Turkey Statement' (18 March 2016) Press Release 144/16, Preamble; Joint Way Forward on Migration Issues Between Afghanistan and the EU (Kabul, 2 October 2016) Part V <https://eeas.europa.eu/sites/eeas/files/eu_afghanistan_joint_way_forward_on_migration_issues.pdf> accessed 17 July 2020.

trafficking in human beings and migrant smuggling' in its Preamble,[371] before further stressing the need for both parties to 'pay particular attention to the links between organised crime and […] human trafficking and migrant smuggling' in its article related to cooperation against organised crime and corruption.[372] Yet, interestingly, tackling migrant smuggling and human trafficking also features among the aspects that EU-Afghanistan cooperation on migration shall cover,[373] which suggests that cooperation on migration necessarily includes fighting against human smuggling and trafficking. In other words, EU cooperation with third countries is framed as comprising measures addressing migrant smuggling and human trafficking. This corresponds to a general trend in the EU – including in most recent policy documents such as the New Pact on Migration and Asylum –[374] where migration policy is constantly outlined as part of EU action against smugglers and traffickers.[375] This characterisation relies on a misunderstanding of migrant smuggling and its causes as well as a misconception of the relationship between smuggled migrants and smugglers.[376] Legally, migrant smuggling and human trafficking are defined as two strictly distinct categories: trafficking involves 'force, coercion, abduction, fraud or deception' and thus implies that there are victims,[377] while smuggling refers to a person assisting a migrant without a legal authorisation to enter or transit through a member state.[378] Given the notion of

[371] Cooperation Agreement on Partnership and Development between the European Union and its Member States, of the One Part, and the Islamic Republic of Afghanistan, of the Other Part [2017] OJ L 67/3 Preamble.
[372] ibid art 25.
[373] ibid art 28(2).
[374] Commission, '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 Introduction.
[375] Federico Alagna, 'The EU and the Myth of Migrant Smuggling' (*EUROPP LSE Blog*, 4 January 2021) <https://blogs.lse.ac.uk/europpblog/2021/01/04/the-eu-and-the-myth-of-migrant-smuggling> accessed 16 September 2021.
[376] Squire and others, *Reclaiming Migration* (n 277) 92.
[377] Theodore Baird and Ilse van Liempt, 'Scrutinising the Double Disadvantage: Knowledge Production in the Messy Field of Migrant Smuggling' [2016] 42(3) Journal of Ethnic and Migration Studies 400, 402.
[378] Council Directive 2002/90/EC of 28 November 2002 Defining the Facilitation of Unauthorised Entry, Transit and Residence [2002] OJ L328/17 art 1.

'assistance', the notion of smuggling suggests that the smuggled migrant's decision was voluntary (as opposed to trafficking cases). Additionally, smuggling is usually understood as a form of 'business' for the smuggler, who receives a payment for providing such service.[379] In practice, differentiating between acts of smuggling or trafficking is not always clear.[380] Overall the approach to smugglers taken by the EU migration policy relies on a binary understanding of smugglers as predators and migrants as victims.[381] This approach is overly simplified and fails to consider that so-called 'illegal' migration – in which people are likely to resort to smugglers when crossing borders – results from restrictive migration policy.[382] What the EU's approach fails to consider is that smuggled migrants were most likely actively looking for smuggling networks given the lack of any alternative to reach the EU territory legally.[383] As Triandafyllidou explains, 'migrant smuggling emerges when and where borders are fixed'.[384] The growth in restrictive migration and border control policies thus makes migrants more dependent on smugglers,[385] and as numerous scholars argue, the tightening of borders and migration policies has created a thriving market for smugglers and traffickers,[386] and led to the increasing professionalisation of smuggling activities.[387] Therefore the characterisation in EU cooperation agreements of measures on migration as action against smuggling relies on a misconception of causes of migration and migrant smuggling.

[379] Baird and van Liempt, 'Scrutinising the Double Disadvantage' (n 377) 401.
[380] ibid 402.
[381] Sheldon X Zhang, Gabriella E Sanchez and Luigi Achilli, 'Crimes of Solidarity in Mobility: Alternative Views on Migrant Smuggling' (2018) 676(1) The Annals of the American Academy of Political and Social Science 6, 8.
[382] Franck Düvell, 'Paths into Irregularity: The Legal and Political Construction of Irregular Migration'' (2011) 13(3) European Journal of Migration and Law 275, 293-294.
[383] Squire and others, *Reclaiming Migration* (n 277) 92.
[384] Anna Triandafyllidou, 'Migrant Smuggling: Novel Insights and Implications for Migration Control Policies' (2018) 676(1) The ANNALS of the American Academy of Political and Social Science 212, 214.
[385] Squire and others, *Reclaiming Migration* (n 277) 98.
[386] See for instance : Stephen Castles, 'Why Migration Policies Fail' (2004) 27(2) Ethnic and Racial Studies 205, 207; Dauvergne, *Making People Illegal* (n 349) 72.
[387] Triandafyllidou, 'Migrant Smuggling: Novel Insights and Implications' (n 384) 219.

Additionally, this approach relies on a misconception of the relationship between smugglers and smuggled migrants. Although numerous migrants entering the EU using smuggling networks face violence and exploitation – as investigations of migrants crossing the central and Eastern Mediterranean revealed –[388] the EU's characterisation of migrants as helpless victims of cruel smugglers is a simplistic view. Indeed, contrary to the EU policy's conception, some smugglers are actually acquaintances, friends or relatives.[389] Smuggled migrants' views of smugglers is also more positive than that depicted by EU migration policies, at times.[390] Indeed, human smugglers play a central role in asylum seekers' routes to safety.[391] Migrants may therefore see smugglers as people who help them 'escape a difficult situation', while in other cases, migrants see smugglers as providing them a service they crucially need.[392]

The framing of EU migration policy as a fight against smugglers and human traffickers also contributes to the criminalisation of migration. Discussing the long-standing history of migration in Northern Africa and the Sahara, Brachet points out how the characterisation of people transporting migrants as 'smugglers' is recent.[393] Until recently, so-called 'irregular' migration in the region was tolerated, and migrants would, for instance, rely on goods' traders to cross the Sahara Desert due to their knowledge of its geography and how to navigate it.[394] The characterisation of migrant smuggling,

[388] Squire and others, *Reclaiming Migration* (n 277) 93; Sally Hayden, *My Fourth Time, We Drowned* (4th Estate 2022) 47.
[389] Baird and van Liempt, 'Scrutinising the Double Disadvantage' (n 377) 402; Squire and others, *Reclaiming Migration* (n 277) 94.
[390] Anne T Gallagher and Fiona David, *The International Law of Migrant Smuggling* (Cambridge University Press 2014) 12.
[391] Squire and others, *Reclaiming Migration* (n 277) 94.
[392] ibid.
[393] Julien Brachet, 'Manufacturing Smugglers: From Irregular to Clandestine Mobility in the Sahara' (2018) 676(1) The ANNALS of the American Academy of Political and Social Science 16, 17.
[394] ibid 19-20.

therefore, results from a shift in the conception of migration. Once so-called 'irregular' border crossing is no longer tolerated and becomes criminalised, traders previously considered transporters are also criminalised as 'smugglers' or 'human traffickers'. Moreover, by focusing its migration policy on the fight against smuggling and trafficking, the EU also criminalises migrants themselves. Indeed, the portrayal of people facilitating border and sea crossings as smugglers disregards the fact that in the Mediterranean, for instance, migrants are often steering boats themselves.[395] In this way, by associating migration policy with combating migrants' smugglers, EU cooperation with third countries contributes to criminalising unwanted migration and Third World migrants by setting actors of the migration process within a criminal law frame.

The framing of migration within a criminal law framework also shapes the EU policy answer. Indeed, criminalising migrants means migration is mainly conceived as a security issue, which justifies the use of repressive measures. The 'crisis' framing furthers the support for coercive measures, given that the notion of 'crisis' suggests a situation of instability and challenging times, as well as the characterisation of a system's failure, as I previously explained.[396] Thus, if migration is classified as a security issue requiring coercive measures, the emergence of a supposed 'crisis' supports the need for further control. The expansion of coercive measures following the 'crisis' framing can be observed in the case studies. Indeed, the EU-Turkey cooperation aims to 'reinforc[e] the Turkish Coast Guard patrolling and surveillance capacity'.[397] Furthermore, the Italy-Libya MoU, for instance, states in its first article that parties are committed to cooperating on providing 'support to security and military

[395] Alagna, 'The EU and the Myth of Migrant Smuggling' (n 375).
[396] See chapter 1 section 2.
[397] Commission, 'EU-Turkey Joint Action Plan' (Brussels, 15 October 2015) MEMO 15/5860, Part II para 2.

institutions with the aim to stem illegal migrants fluxes and their consequences'.[398] These examples show the EU's significant reliance on security- and control-focused measures aimed at preventing migrants from arriving to the EU. The 'crisis' frame enabled the EU to further its repressive approach by justifying it as a necessary action to end the smuggling and trafficking that led to the said 'crisis'.

In conclusion, the EU's focus on fighting migrant smuggling and human trafficking in its migration policy not only relies on a misconception of smuggling and migration but contributes to the criminalisation of Third World migrants. Here, the 'crisis' framing itself did not generate this security-oriented approach, as it existed before 2015.[399] Rather I argue that it justified the furthering of the EU's pre-existing control-focused policies towards Third World migrants, which a managerial rhetoric also supported, as I discuss below.

3.2.2. The EU's managerial approach to migration

This subsection furthers the analysis of the EU's approach to migration in the case studies by discussing the managerial approach developed. Although, as discussed below, the notion of 'migration management' is not recent, informal cooperation contains significant managerial reasoning that shapes migration policy as essentially control-focused and contributes to justifying the use of informal instruments. Therefore, the concept of 'migration management' appears generalised as it enables

[398] Memorandum of Understanding on Cooperation in Development, Action against Illegal Immigration, Human Trafficking and Smuggling and Strengthening of Border Security Between the State of Libya and the Republic of Italy (Rome, 2 February 2017) art 1.
[399] See chapter 2 section 1.2.2.

the EU to make its control-focused and non-binding measures more acceptable to public opinion.

Although the Italy-Libya MoU contains no such references, other frameworks of this case study frequently use the notion of 'management' or its derivatives. The CAPD between Afghanistan and the EU, for instance, stresses 'the importance of joint management of migration flows'.[400] Similarly, the Afghanistan-EU JWF refers to 'an orderly management of returns'[401] and to a 'manageable process for a smooth, dignified and orderly return of Afghan nationals'.[402] The EU's JAP with Turkey refers to 'Turkey's efforts in managing the situation of massive influx of people',[403] and the development of cooperation with the objective of 'improving the management of migration'.[404] The JAP also refers to 'migration management'[405] in general as well as to a 'migration management strategy and system'[406] and to a 'border management system'.[407]

As this brief analysis suggests, the concept of 'migration management' is a significant element framing the EU's approach to migration after the 'crisis' framing. This cncept predates the 'crisis' framing and international organisations dealing with migration, such as the UNHCR and the EU, have used it since the 2000s.[408] Through the managerial discourse, policymakers characterise migration as a potentially positive

[400] Cooperation Agreement on Partnership and Development between the European Union and its Member States, of the One Part, and the Islamic Republic of Afghanistan, of the Other Part [2017] OJ L 67/3 art 28(2).
[401] Joint Way Forward on Migration Issues Between Afghanistan and the EU (Kabul, 2 October 2016) Part II para 4 <https://eeas.europa.eu/sites/eeas/files/eu_afghanistan_joint_way_forward_on_migration_issues.pdf> accessed 17 July 2020.
[402] ibid Introduction.
[403] Commission, 'EU-Turkey Joint Action Plan' (Brussels, 15 October 2015) MEMO 15/5860 Introduction.
[404] ibid Part II.
[405] ibid Introduction.
[406] ibid Part I.
[407] ibid Part II.
[408] Stephan Scheel and Philipp Ratsfisch, 'Refugee Protection Meets Migration Management: UNHCR as a Global Police of Populations' (2014) 40(6) Journal of Ethnic and Migration Studies 924, 925.

and beneficial phenomenon for countries of destination, regions of origin and migrants themselves:[409] the so-called 'win-win-win' effect of migration.[410] In order to achieve migration's potential benefits, a managerial approach to migration policies is used. Such an approach to migration focuses on ensuring that migration is beneficial to stakeholders,[411] considering that not all forms of migration are economically beneficial. 'Orderly' and 'legal' migration is seen as productive,[412] while so-called 'irregular' or 'uncontrolled' migration is considered detrimental to some – if not all – actors (ie. countries of destination and origin and migrants themselves). From this perspective, migration needs to be 'managed' in order to 'maximize (or "optimize") its impact'.[413] A managerial approach to migration therefore includes a certain openness to 'economically needed and beneficial' migrants while maintaining 'restrictions regarding unwanted migration'.[414] In this way, migration management 'consists of a range of practices of obstructing, containing and circulating movement'.[415] Controlling 'illegal' migration, it is believed, will enable to fully maximise the positive impact of migration for all countries and migrants by making migration 'orderly, predictable and manageable'.[416] The context of 'crisis' framing in 2015, specifically its understanding as the paroxysm of a malfunctioning system,[417] supports the expansion of a managerial approach. The system's dysfunction leading to the so-called 'crisis' can be

[409] ibid.
[410] Sara Kalm, 'Liberalizing Movements? The Political Rationality of Global Migration Management' in Martin Geiger and Antoine Pécoud (eds), *The Politics of Internal Migration Management* (Palgrave 2010) 22.
[411] Martin Geiger and Antoine Pécoud, 'The Politics of International Migration Management' in Martin Geiger and Antoine Pécoud (eds), *The Politics of Internal Migration Management* (Palgrave 2010) 2.
[412] Christina Oelgemöller, '"Transit" and "Suspension": Migration Management or the Metamorphosis of Asylum-Seekers into "Illegal" Immigrants' (2011) 37(3) Journal of Ethnic and Migration Studies 407, 409.
[413] Geiger and Pécoud, 'The Politics of International Migration Management' (n 411) 9.
[414] ibid 3; Kalm, 'Liberalizing Movements?' (n 410) 35-36.
[415] Leonie Ansems de Vries and Elspeth Guild, 'Seeking Refuge in Europe: Spaces of Transit and the Violence of Migration Management' (2019) 45(12) Journal of Ethnic and Migration Studies 2156, 2157.
[416] Geiger and Pécoud, 'The Politics of International Migration Management' (n 411) 2.
[417] Jessica C Lawrence, 'The EU in Crisis: Crisis Discourse as a Technique of Government' (2014) 44 Netherlands Yearbook of International Law 187, 188; see also chapter 1 section 2 for further discussion on 'crisis' as paroxysm of a malfunctioning system.

explained by the lack of, or the mismanagement of, the system.[418] That is why the 'crisis' frame has not led to a change in the EU's control-focused approach, which existed before 2015.[419] Rather, to improve the malfunctioning system, the 'crisis' framing has led to an increasing recourse to a managerial approach, which essentially pushes for increasing control over unwanted migrants. Additionally, migration management tends to favour the use of informal norms, not only given their flexibility considered as more 'efficient' but also because it provides states with some room of manoeuvre when it comes to respecting human rights and other international law commitments which could impede their measures restricting unwanted migration.[420] With regards to the post-2015 developments analysed in this chapter, most of migration management discourse can be found in the Afghanistan-EU JWF and EU-Turkey JAP, two cases of informal cooperation agreement, as I mentioned earlier.[421] The use of a managerial approach to deal with migration supports the growing use of informal instruments and technocratic institutions, thus bypassing parliamentary oversight.

Moreover, 'migration management' constitutes a 'policy discourse' that introduces 'an economic, neoliberal and more pragmatic rationale into migration policies'.[422] As it originates from different disciplines, and is strongly correlated to international trade and finance governance,[423] this notion appears less bound to the security-based understanding of migration and suggests a move away from control-oriented

[418] See chapter 1 section 2.
[419] See chapter 2 section 1.2.2.
[420] Geiger and Pécoud, 'The Politics of International Migration Management' (n 411) 13.
[421] See: Joint Way Forward on Migration Issues Between Afghanistan and the EU (Kabul, 2 October 2016) Introduction and part II para 4 <https://eeas.europa.eu/sites/eeas/files/eu_afghanistan_joint_way_forward_on_migration_issues.pdf> accessed 17 July 2020; Commission, 'EU-Turkey Joint Action Plan' (Brussels, 15 October 2015) MEMO 15/5860 Introduction, part I and II.
[422] Scheel and Ratsfisch, 'Refugee Protection Meets Migration Management' (n 408) 925.
[423] Geiger and Pécoud, 'The Politics of International Migration Management' (n 411) 2.

measures, at least rhetorically.[424] In particular, using managerial vocabulary to refer to migration suggests a less repressive and coercive approach. Indeed, the concept of 'migration management' makes migration appear less political and more rationally driven. To put it differently, migration becomes 'a largely technical problem to be addressed by various management strategies'.[425] Using a managerial rhetoric is, therefore, significant in contributing to the acceptance of the measures provided in the case studies by making EU agreements appear less politically controversial. This is even more so considering the frequent use of the notions of 'effectiveness' and 'efficiency'.

Indeed, in the case studies, references to the notion of 'management' are combined with other concepts reflecting a managerial approach. This includes references to efficiency, with the Afghanistan-EU JWF stressing the need 'to identify effective ways to address the needs of both sides',[426] 'to establish a rapid, effective and manageable process',[427] '[draft] and [enact] effective legislation on migrant smuggling'.[428] Thus the EU-Afghanistan cooperation uses a management approach regarding the Afghan migrants' return and on fewer occasions when dealing with legislation or policy measures. In the EU-Turkey framework, the managerial vocabulary is mainly used to deal with funds and rarely related to legislation or action, as it refers, for instance, to 'ensur[ing] an efficient use of the funding',[429] or 'enhanc[ing] the effective implementation of the law on foreigners and international protection'.[430] Constant

[424] Kalm, 'Liberalizing Movements?' (n 410) 21.
[425] ibid.
[426] Joint Way Forward on Migration Issues Between Afghanistan and the EU (Kabul, 2 October 2016) Introduction <https://eeas.europa.eu/sites/eeas/files/eu_afghanistan_joint_way_forward_on_migration_issues.pdf> accessed 17 July 2020.
[427] ibid.
[428] ibid Part V para 1.
[429] Commission, 'EU-Turkey Joint Action Plan' (Brussels, 15 October 2015) MEMO 15/5860 Part I.
[430] ibid.

references to the notion of 'efficiency' when dealing with migration, whether migrants' returns to Afghanistan or funding of refugee facilities in Turkey, further the managerial consideration towards migration.

Additionally, using references to 'management' in migration policy emphasises that the measures introduced are beneficial to countries of origin and migrants, stressing the need for orderly and legal migration.[431] Yet, the other side of the coin of so-called 'orderly' migration relies on migration control. By using a management approach to deal with migration, the EU does not curtail the need for restrictive measures. Quite the opposite, managerial terminology following the 'crisis' framing justifies the furthering of EU control-focused external migration policy by 'strengthening cooperation to prevent irregular migration flow to the EU' in the case of the EU-Turkey JAP,[432] and by intensifying 'cooperation on addressing and preventing irregular migration, and on return of irregular migrants' in the Afghanistan-EU framework.[433] In other words, it is because the so-called 'crisis' constitutes an exemplification of the EU's failure to 'manage' Third World migration 'efficiently' that cooperation with third countries aimed at containing migrants is needed all the more.

Not only is it needed, but these measures are also presented as the most desirable policy choice during the so-called 'crisis'. As I discuss further below, the case studies demonstrate how the EU constantly characterises its migration policy and cooperation with third countries as a form of benevolence.

[431] Scheel and Ratsfisch, 'Refugee Protection Meets Migration Management' (n 408) 925.
[432] Commission, 'EU-Turkey Joint Action Plan' (Brussels, 15 October 2015) MEMO 15/5860 Introduction.
[433] Joint Way Forward on Migration Issues Between Afghanistan and the EU (Kabul, 2 October 2016) Introduction <https://eeas.europa.eu/sites/eeas/files/eu_afghanistan_joint_way_forward_on_migration_issues.pdf> accessed 17 July 2020.

3.3. EU external migration policy as a form of benevolence

In this subsection, I continue the case studies' close reading, which reveals how the EU represents itself and its measures as a form of benevolence for both migrants and partner countries. With regards to Third World migrants, firstly, the EU's benevolent discourse justifies the externalisation of EU migration and asylum policy as a form of humanitarian action protecting and saving migrants. Towards Third World countries, secondly, the EU's supposed benevolence characterises cooperation on migration as a form of aid. In this subsection, I show that due to their flexible nature, informal agreements enabled the EU to use benevolent rhetoric and measures to further justify its externalisation policy. Here the 'crisis' frame, particularly its humanitarian and emergency connotations,[434] was essential in framing EU external migration policy as a form of humanitarian action for migrants and development aid for countries of origin and transit.

3.3.1. The EU's benevolence towards migrants

The close reading of the case studies reveals the EU's self-representation as a benevolent actor towards migrants. This operates partly through the structure of some agreements, emphasising the support provided to migrants and partner states by the EU as the primary goal of cooperation with third countries. As I further explain below, the EU's benevolence is also noticeable through the compassionate language used towards migrants reflecting the EU's supposed humanitarian considerations. This

[434] See chapter 1 section 2.

benevolent approach could be considered the result of the 'crisis' framing – especially its humanitarian considerations – as I discussed in chapter 1. However, when put into perspective with the measures contained in these agreements and with the implication of externalisation for human rights' abuses, the EU's humanitarian rhetoric appears questionable. I argue that the EU's self-representation as a humanitarian actor towards Third World migrants, which was strengthened by the 'crisis' framing, is not accidental but contributes to justifying its policy choices following the so-called 'crisis'.

The close reading of the three case studies reveals firstly that the structure of some agreements reflects the EU's self-representation as a benevolent actor towards Third World migrants. This is observed in the EU-Turkey JAP. This agreement is divided into two main parts: the first one is entitled 'Supporting the Syrians under temporary protection and their Turkish hosting communities',[435] whereas the second part is called 'Strengthening cooperation to prevent irregular migration'.[436] In this way, the structure of the agreement firstly emphasises the support provided to Syrians staying in Turkey. Doing so suggests that the EU's priority is the support it provides to migrants rather than the other goals of the agreement, especially migration control. In other words, controlling migration appears secondary, even though the containment of migrants in Third World countries is one of the main objectives of externalisation measures.

Moreover, an analysis of the vocabulary used in EU cooperation agreements also reflects a humanitarian approach towards migrants and their needs through compassionate language. Here 'humanitarian' is understood in its general meaning, that is to say, aimed at improving human well-being or welfare.[437] The EU-Turkey

[435] Commission, 'EU-Turkey Joint Action Plan' (Brussels, 15 October 2015) MEMO 15/5860 Part I.
[436] ibid Part II.
[437] BS Chimni, 'Globalization, Humanitarianism and the Erosion of Refugee Protection' (2000) 13(3) Journal of Refugee Studies 243, 244.

Statement constitutes an exemplification of how the EU represents its external migration policy as aimed towards migrants' well-being and safety. Indeed, the Statement's preamble presents the EU's decision to stop so-called 'irregular' migrant crossings from Turkey as 'an alternative [for migrants] to putting their lives at risk'.[438] Similarly, the Statement's first paragraph stating the agreement's main measure – i.e. to return all migrants entering irregularly to Greece through Turkey – specifies that 'it will be a temporary and extraordinary measure which is necessary to end the human suffering'.[439] In this way, the EU presents explicitly its cooperation with Turkey and, most importantly, its measures to contain migrants in Turkey as a necessity for migrants' well-being and to save their lives. This rescue rhetoric is not used only for the EU-Turkey cooperation. Rather, as Little and Vaughan-Williams pointed out, it is a crucial element in framing the EU's answer to the so-called 'crisis' and was used by different EU institutions, notably the European Council and the Commission.[440]

Although the EU-Turkey Statement contains the most striking references to humanitarianism towards migrants, a similar reasoning can be observed in other agreements of this case study. Notably, the EU-Turkey JAP and the Afghanistan-EU JWF both stress the necessity to better inform migrants or potential migrants of the 'risks' or 'dangers' of so-called 'irregular' migration.[441] Although such information campaigns emerged before the 'crisis' framing as part of formal readmission agreements or other cooperation frameworks,[442] the fact that they remain included in

[438] Council of the European Union, 'EU-Turkey Statement' (18 March 2016) Press Release 144/16 Preamble.
[439] ibid para 1.
[440] Adrian Little and Nick Vaughan-Williams, 'Stopping Boats, Saving Lives, Securing Subjects: Humanitarian Borders in Europe and Australia' (2016) 23(3) European Journal of International Relations 533, 545.
[441] Commission, 'EU-Turkey Joint Action Plan' (Brussels, 15 October 2015) MEMO 15/5860 Part II; Joint Way Forward on Migration Issues Between Afghanistan and the EU (Kabul, 2 October 2016) Part III para 2 <https://eeas.europa.eu/sites/eeas/files/eu_afghanistan_joint_way_forward_on_migration_issues.pdf> accessed 17 July 2020.
[442] European Council, 'Tampere European Council - Presidency Conclusions' (15-16 October 1999) para 22; Hein de Haas, 'The Myth of Invasion: The Inconvenient Realities of African Migration to Europe' (2008) 29(7) Third

informal cooperation partnerships is telling of the EU's understanding of Third World migrants. Indeed, it relies on the assumption that migrants taking irregular migration routes to reach the EU are not aware of the hazardous nature of such journeys. Besides, the EU appears as a saviour in informing them of the risks they would face when undertaking such a risky journey. In this way, it represents the EU and its cooperation with third countries as a benevolent and generous measure for migrants themselves, aimed at their own good. It also suggests that deaths at EU external border – which, at least partly, characterised the 'crisis' framing in 2015 –[443] would be preventable if 'irregular' migrants would know the dangers and avoid using irregular channels to migrate. It transfers the responsibility to migrants and smugglers themselves instead of interrogating the role of EU migration policies and border controls in migrants' deaths.

The Afghanistan-EU JWF further stresses its consideration for humanitarian aspects when dealing with migrants targeted by its partnership. It, indeed, emphasises that it aims at taking into consideration the needs of those referred to as 'vulnerable groups', which in Part I paragraph 4 include 'unaccompanied minors, single women and women who are head of their families, family unity, elderly and seriously sick people',[444] while in Part IV paragraph 3 include 'women, children and other vulnerable groups'.[445] Contrary to the EU-Turkey cooperation where measures were characterised as a form of humanitarian action, examples from the Afghanistan-EU JWF do not present its measures as justified by humanitarian necessity. Still, it shows the EU's action as

World Quarterly 1305, 1306.
[443] See chapter 1 section 1.
[444] Joint Way Forward on Migration Issues Between Afghanistan and the EU (Kabul, 2 October 2016) Part I para 4 <https://eeas.europa.eu/sites/eeas/files/eu_afghanistan_joint_way_forward_on_migration_issues.pdf> accessed 17 July 2020.
[445] ibid Part IV para 3.

being particularly considerate of humanitarian aspects by using a compassionate vocabulary and stressing its commitment to people in need.

Despite these references to humanitarian considerations throughout the agreements of this case study, most of the measures taken focus on a security approach, as previously analysed.[446] The limited concrete humanitarian measures aimed at migrants appear contradictory with the supposedly compassionate approach the EU developed in response to the so-called 'crisis'. This is even more so considering the human rights implications of externalisation measures. As Little and Vaughan explain, there is significant research, since before the 'crisis' framing, establishing that human rights abuses are inherent to EU border policies.[447] Thus as Davitti argues, the EU's figure as a humanitarian actor conceals the fact that the situation faced by migrants, including asylum seekers, trying to reach the European territory 'is not accidental but, rather, inherent to the enhanced measures adopted by the EU and its member states'.[448] This particularly echoes all my previous observations on the case studies' use of a humanitarian rhetoric. By presenting its cooperation with Turkey as being aimed at saving migrants' lives, the EU conceals that the danger faced by migrants trying to reach the European territory is the result of the EU migration and asylum policy itself. Similar comments can be made on EU information campaigns on the risks of so-called 'irregular' migration and on the JWF's measures targeting specifically vulnerable migrants. By pressing its considerations of the most vulnerable, the EU covers the implications of its own migration and border policies. On the contrary, it suggests that increasing border controls, furthering the externalisation of EU migration

[446] See section 3.2.1. of this chapter for further details.
[447] Little and Vaughan-Williams, 'Stopping Boats, Saving Lives, Securing Subjects' (n 440) 540.
[448] Daria Davitti, 'Biopolitical Borders and the State of Exception in the European Migration "Crisis"' (2018) 29(4) European Journal of International Law 1173, 1174.

policies, and further enacting such policies, would help prevent migrants' deaths and human rights abuses.[449]

My previous observations reflect what Davitti refers to as the EU's appropriation of the humanitarian discourse. As she explains, the EU uses a humanitarian discourse 'to justify the adoption of draconian exceptional measures to stem the flow of refugees towards the EU'.[450] Chimni takes a similar approach regarding the use of humanitarian discourse in combination with international refugee law, arguing that the broad meaning of humanitarianism makes it a notion that can easily be manipulated and used to avoid criticism.[451] Humanitarianism, he further argues, 'has used the vocabulary of human rights to legitimize the language of security in refugee discourse'.[452] This parallels the use of a rescue rhetoric to legitimise the containment measures in the EU-Turkey Statement, as previously observed. Doing so justifies the externalisation of EU migration policy and EU cooperation with third countries as the most appropriate answer to the so-called 'crisis' from a supposedly humanitarian perspective. It frames EU cooperation with third countries as aimed at migrants' own good. The life-saving rhetoric combined with the EU's representation as a saviour prevents any questioning of the measures taken by the EU in response to the 'crisis' frame.

The 'crisis' framing, and especially its emergency and humanitarian connotations,[453] enabled the EU to use a benevolent rhetoric to justify its containment measures

[449] Little and Vaughan-Williams, 'Stopping Boats, Saving Lives, Securing Subjects' (n 440) 542.
[450] Davitti, 'Biopolitical Borders and the State of Exception' (n 448) 1194.
[451] Chimni, 'Globalization, Humanitarianism' (n 437) 244.
[452] ibid 251.
[453] See chapter 1 section 2.

towards Third World migrants and to shape its cooperation with third countries, as I discuss further below.

3.3.2. The EU's benevolence towards third countries

In addition to stressing the EU's benevolence towards migrants, the case studies reveal the EU's benevolence towards its partners. As my analysis shows, EU benevolence in this case is not purely rhetorical. It can be observed in the EU's increasing use of development aid and financial support when developing cooperation frameworks. The association between migration and development aid relies on a misconception of development and economic growth as reducing emigration. In this section, I argue that the use of development aid enables the EU to conceal its security-focused approach and provides the EU with a trade-off to convince its partners into cooperating.

Although none of the agreements analysed here contain a clear structural emphasis on the EU's benevolence towards third countries cooperating on migration control, as my previous analysis revealed it was the case in the EU-Turkey JAP towards migrants,[454] examining the topics' organisation in the agreement leads to similar observations. Indeed, the Italy-Libya MoU's full title is: 'Memorandum of Understanding on cooperation in development, action against illegal immigration, human trafficking and smuggling and strengthening of border security between the State of Libya and the Republic of Italy.[455] Here, development appears as the first

[454] See section 3.3.1. of this chapter.
[455] Memorandum of Understanding on Cooperation in Development, Action against Illegal Immigration, Human Trafficking and Smuggling and Strengthening of Border Security Between the State of Libya and the Republic of Italy (Rome, 2 February 2017).

domain of cooperation among the areas covered by this agreement, and the strengthening of border security is the final element. This is a rather interesting choice of ordering the domains of cooperation compared to the structure of the agreement itself. Although in the title development appears as the main or at least the first area of cooperation between the two partners, this is not reflected in the agreement's content. Indeed, it mentions cooperation on development, particularly development funding. Italy, for instance, commits to provide 'support and finance for growth programmes […] in various sectors such as renewable energy, infrastructure, health, transport, human resource development, teaching, personal training and scientific report',[456] while the parties commit 'to offer a wider and more complete vision of European-African cooperation' aimed at supporting countries of origin with 'strategic development projects.[457] They also commit to launching 'development programmes in the form of appropriate job creation initiatives'.[458] Still, these development-related initiatives are all intrinsically linked to the control of so-called 'irregular' migration to Europe since they specifically target 'regions affected by the phenomena of illegal migration' in Libya,[459] and countries of origin for the development aid targeting African countries.[460] Thus, although development is addressed in this agreement, the cooperation set up is not aimed at development itself; rather development aid is aimed at reducing migration from the regions benefiting.

Moreover, the language used stresses the support and assistance provided by the EU to its partner countries. The verb 'to help' and the expression 'humanitarian aid', which both strongly and expressly draw on a language of benevolence, are encountered

[456] ibid para 1(B).
[457] ibid para 2(4).
[458] ibid para 2(6).
[459] ibid paras 1(B) and 2(6).
[460] ibid para 2(4).

once in the EU-Turkey JAP.[461] That being said, the limited use of notions such as 'help' or 'aid' do not prevent the EU from stressing its benevolence. Indeed, the case studies reveal the frequent use of terminologies that can be assimilated to the concepts of 'help' or 'aid'. The concept of 'assistance', for instance, is encountered six times in the Afghanistan-EU JWF,[462] four times in the EU-Turkey JAP,[463] and twice in the EU-Turkey Statement.[464] Similarly, the notion of 'support' is one of the most frequently used synonyms to the concepts of 'aid' or 'assistance'. Indeed, the verb 'to support' or any of its derivatives are mentioned thirteen times in the EU-Turkey JAP,[465] ten times in the Afghanistan-EU JWF,[466] eight in the Italy-Libya MoU,[467] and once in the EU-Turkey Statement.[468]

In this way, although notions of 'help' or 'humanitarian aid' are rarely found in the case studies, alternative formulations stressing the help the EU provided to its partners are frequent. This participates in representing the EU as a vital supporter of its partners. By focusing on the EU's support, these agreements conceal the significant imbalance between the EU and its partners. Cooperation on migration between the EU and non-EU countries is often characterised as being asymmetric since agreements are seen

[461] Commission, 'EU-Turkey Joint Action Plan' (Brussels, 15 October 2015) MEMO 15/5860 Part I.
[462] Joint Way Forward on Migration Issues Between Afghanistan and the EU (Kabul, 2 October 2016) Part I para 4, part III para 1, part IV para 2 and part V para 1 <https://eeas.europa.eu/sites/eeas/files/eu_afghanistan_joint_way_forward_on_migration_issues.pdf> accessed 17 July 2020.
[463] Commission, 'EU-Turkey Joint Action Plan' (Brussels, 15 October 2015) MEMO 15/5860, Part I paras 1 and 6, and Part II para 6.
[464] Council of the European Union, 'EU-Turkey Statement' (18 March 2016) Press Release 144/16 paras 1 and 2.
[465] Commission, 'EU-Turkey Joint Action Plan' (Brussels, 15 October 2015) MEMO 15/5860 Introduction, Part I paras 1 and 4, and Part II paras 2, 3, 4, and 6.
[466] Joint Way Forward on Migration Issues Between Afghanistan and the EU (Kabul, 2 October 2016) Introduction, Part IV para 3, part V para 1 and Annex <https://eeas.europa.eu/sites/eeas/files/eu_afghanistan_joint_way_forward_on_migration_issues.pdf> accessed 17 July 2020.
[467] Memorandum of Understanding on Cooperation in Development, Action against Illegal Immigration, Human Trafficking and Smuggling and Strengthening of Border Security Between the State of Libya and the Republic of Italy (Rome, 2 February 2017) Preamble, paras 1(A), (B) and (C), and paras 2(3),(4) and (5).
[468] Council of the European Union, 'EU-Turkey Statement' (18 March 2016) Press Release 144/16 Preamble.

as favouring European interests over those of their partner.[469] Such asymmetry is particularly noticeable in readmission agreements: when negotiated at a bilateral level between two countries, there is an imbalance of interests between European and Third World states; while negotiations at the EU level increase the imbalance by pooling member states' interests. Transferring the competence to conclude readmission agreements to the EU level was indeed a way to increase European states' bargaining power and stimulate Third World states in entering into such cooperation, relying on the EU's 'negotiating weight'.[470] Informal agreements give the EU and its partners much more flexibility in terms of the areas covered by negotiations. By increasingly including other areas of negotiations, such as development, and stressing its willingness to offer support and assistance to its partners, rather than impose its objectives on them, the EU progressively masks the asymmetry inherent to such partnerships.

Stressing the EU's benevolent cooperation with third countries also masks the other – more primary – objective of these partnerships: border and migration control. Indeed, development, as it is used by the EU here, is considered a tool to prevent or stop further migration. It originates from the so-called 'root causes approach to migration', which according to Chetail leads to considering migration 'as a failure of development'.[471] The EU, which became 'a major promoter of the root causes approach' since before 2015 by developing its 'comprehensive' strategy,[472] includes aid and development in its external migration policy based on the belief that

[469] Franziska Zanker, 'Managing or Restricting Movement? Diverging Approaches of African and European Migration Governance' (2019) 7(1) Comparative Migration Studies 1.
[470] Nils Coleman, *European Readmission Policy: Third Country Interests and Refugee Rights* (Martinus Nijhoff 2009) 55.
[471] Vincent Chetail, 'Paradigm and Paradox of the Migration-Development Nexus: The New Border for North-South Dialogue' (2008) 52 German Yearbook of International Law 183, 187.
[472] ibid 190; see also chapter 2 section 2.2.

immigration to the EU could be mitigated in this way. Thus, the emphasis on development aid, as observed in the Italy-Libya MoU, is based on a specific understanding of migration and its relation to development. Although using development aid to address migration may seem 'laudable' at first sight, as de Haas puts it,[473] the association between migration and development is questionable mainly because the relationship between the two is much more complex than what is assumed by the root causes approach, Chetail and de Haas explain.[474] In particular, given that economic growth provides more opportunities and therefore increasing levels of mobility,[475] studies have concluded that 'development initially leads to an increase rather than a decrease in migration'.[476] Therefore, providing development aid from Italy to regions of Libya or neighbouring countries affected by migration or smuggling practices needs to be questioned as a method to mitigate migration from these areas.[477] Similarly, by insisting on the support and development aid they provide to their partners, the EU and its member states also mask the main objective of these partnerships, which is to increase migration controls.

In addition, although asymmetric relations have been inherent to cooperation on migration control since the inception of the common external migration policy, the use of informal agreements tends to further increase the EU's pressures towards its partners. Indeed, funding plays a key role in some of the case studies analysed here, as they not only include promises of future and vague development aid but also contain specific and determined pieces of funding. The case of Turkey is a particular example

[473] Hein de Haas, 'Turning the Tide? Why Development Will Not Stop Migration' (2007) 38(5) Development & Change 819, 821.
[474] ibid; Chetail, 'Paradigm and Paradox of the Migration-Development Nexus' (n 471) 190.
[475] de Haas, 'Turning the Tide?' (n 473) 832.
[476] Chetail, 'Paradigm and Paradox of the Migration-Development Nexus' (n 471) 191.
[477] Memorandum of Understanding on Cooperation in Development, Action against Illegal Immigration, Human Trafficking and Smuggling and Strengthening of Border Security Between the State of Libya and the Republic of Italy (Rome, 2 February 2017).

since the funding offered by the EU in exchange for the containment of migrants is an essential part of the cooperation. Indeed, precise amounts of EU funding offered to Turkey in exchange for its collaboration are explicitly stressed several times in both the JAP and the Statement.[478] This funding has been subject to various heated debates between the two partners, with the Turkish president accusing the EU of not having transferred the promised funds.[479] Even though Turkey's use of the EU's promised funding as a bargaining tool shows some limitations to the EU's dominant position when dealing with its partners, the key role played by the EU's funding in the achievement of the agreement itself show an increasing role of financial incentives. The case of the Afghanistan-EU JWF offers even stronger evidence of the use of potential funding by the EU when negotiating cooperation agreements on migration. As Warin and Zhekova pointed out, the adoption of the JWF coincided with negotiations on the renewal of development funds to Afghanistan. According to the authors, the renewed allocation of these funds for 2017-2020 was 'possibly made conditional […] to the adoption of the JWF'.[480] In this way, using informal agreements provided the EU with additional opportunities to pressure its partners to cooperate and has, thus, increased the role of funding as a trade-off for migration control. This raises significant questions regarding the use and understanding of development aid, particularly its association with migration control. It also reveals the use of development funding as a manner for the EU to legitimise its control-focused approach by compensating its partners for their cooperation and covering some of the costs

[478] Commission, 'EU-Turkey Joint Action Plan' (Brussels, 15 October 2015) MEMO 15/5860 Part I; Council of the European Union, 'EU-Turkey Statement' (18 March 2016) Press Release 144/16 para 6.
[479] Laura Pitel and Alex Barker, 'Turkey Demands EU Hands Over €3bn for Refugees' *Financial Times* (11 May 2016) <https://www.ft.com/content/ffad64a4-174f-11e6-b197-a4af20d5575e> accessed 15 September 2021.
[480] Warin and Zhekova, 'The Joint Way Forward' (n 134) 145.

created by such collaboration, as in the case of the EU-Turkey cooperation, including refugee facilities' funding.

The case studies of this research highlight the EU's active role in representing itself and the externalisation of its migration policy as a form of benevolent action, whether aimed at migrants or countries of origin and transit. Stressing the supposedly 'benevolent' nature of migration policy shifts it from a security-based framework – dominant in the early days of the common migration policy –[481] to a humanitarian one. This is even more so given the 'crisis' framing and its humanitarian connotations, as I discussed earlier.[482] In this way, EU cooperation with third countries and the containment of unwanted migrants was progressively dissociated from the political aspects usually associated with migration and asylum matters. The EU's benevolence is not purely rhetorical here. It relies on a growing use of development aid and other forms of funding to mitigate immigration to the EU. 'Crisis' framing and informal agreements increased the role of funding as a trade-off for cooperation on migration with third countries. Containing migrants in Third World countries has become characterised as a form of humanitarian action, which hinders challenges to the nature and content of this policy area.

Conclusions

[481] See chapter 2 section 1.2.
[482] See chapter 1 section 2.

The development of EU migration and asylum policy after 2015 analysed in this chapter shows that, instead of leading to major changes as the notion of 'crisis' suggests, the 2015 'crisis' frame furthered pre-existing tendencies.

Firstly, with regards to internal aspects of EU migration and asylum law, the 'crisis' frame led to the recrudescence of intergovernmental cooperation.[483] As I discussed in section 1, in the wake of the 'crisis', disparities of compliance and implementation of common rules within the EU appeared more flagrant and the laborious attempt at reforming the Dublin system exemplified member states' difficulties in cooperating. The post-2015 reform proposals reached a stalemate. Soft law measures, on the other hand, rose. Here, the 'crisis' framing played a substantial role in the growing use of informal cooperation due to its calls for emergency measures bypassing normal procedures.[484] But intergovernmental cooperation was central in the early developments of EU migration and asylum policy, as I argued previously.[485] This suggests it corresponds to a rather long-lasting legacy of the common asylum and migration law system.

Additionally, the 'crisis' frame contributed to normalising the use of informal cooperation agreements with third countries which began before 2015, as argued in chapter 2.[486] The generalised use of atypical instruments after 2015 normalised the bypassing of the post-Lisbon institutional framework. Generalising informal cooperation and circumventing institutional guarantees also mean that the EU's declared commitment to human rights and refugee law is purely performative. This overall participates in the acceptance that Third World migrants' human rights can be

[483] See chapter 2 section 1.1.1.
[484] See chapter 1 sections 2 and 3.4.
[485] See chapter 2 section 1.1.
[486] See chapter2 section 2.2.

violated. Although the ‘crisis’ frame perspective described in chapter 1 provides some understanding here by supporting the bypassing of normal procedures and processes, it does not fully explain the EU’s approach to Third World migrants which seems to rely on early considerations on migration.

Lastly, the ‘crisis’ frame and its connotations of emergency enabled the EU to legitimate its repressive approach towards Third World migrants. As I argued in section 3, the EU’s approach remained focused on migrants’ control and exclusion, thus perpetuating the pre-‘crisis’ approach.[487] Whether through the blurring of migrants’ categories or their illegalisation, EU cooperation with third countries focuses on excluding the unwanted from the EU and from accessing human rights safeguards for those who manage to reach its territory. Given the ‘crisis’ frame and its need for security-oriented measures, improved management of the EU asylum and migration system, and urgent action, a coercive approach to Third World migration becomes the most appropriate choice. The EU’s repressive approach is also legitimated by characterising EU external migration policy as a form of benevolence. In cooperation agreements, EU measures appear as a form of humanitarian action aimed at rescuing migrants and as a form of generosity providing aid and support to third countries. Overall, following the so-called ‘crisis’, the EU’s restrictive approach to Third World migration became unquestionable as it is urgently needed and constitutes a form of benevolence from the EU.

Taking a ‘crisis’ framing lens therefore does not leave space to fully challenge the EU’s action towards Third World migrants and its cooperation with Third World countries. The ‘crisis’ frame, indeed, legitimates the EU action by depoliticising it and

[487] See chapter 2 sections 1.3. and 2.2.1.

transforming it into a sort of humanitarianism. That is why, to really engage with the underpinnings of EU migration and asylum policy, we need to turn to critical approaches such as Third World Approaches to International Law.

Chapter 4 – A critical redescription of EU migration and asylum policy

Introduction

My analysis in chapters 2 and 3 suggested some long-lasting tendencies in the emergence and development of EU migration and asylum law, demonstrating that the 'crisis' framing did not lead to a profound transformation in the EU's approach, as the concept of 'crisis' would suggest.[1] Instead, the 'crisis' frame contributed to the furthering of existing phenomena such as the othering of Third World migrants as well as the securitisation and externalisation of borders, albeit through informalised modes of cooperation and agreement. Thus, in post-2015 EU migration policy control-focused and restrictive measures prevail. Despite the so-called 'crisis' disruption and its connotations of humanitarian emergency,[2] the conventional EU migration and asylum law narrative remains dominant, and no alternative approach towards migration and asylum has emerged among EU policymakers. Additionally, a 'crisis' frame perspective fails to fully account for the development of the EU's approach to Third World migration, as the legacies of early common migration policy remain deeply prominent in recent measures.

In this chapter, I therefore question the conventional narrative on EU migration and asylum law and draw on insights from TWAIL scholarship to develop an alternative

[1] See chapter 1 section 3.2.
[2] See chapter 1 section 2.

reading of the evolution of EU migration and asylum law and the so-called 'crisis'. In other words, I seek to critically address the tendencies observed in the previous chapters and the supremacy of the EU's restrictive approach to Third World migration. More specifically, my analysis below uses critical legal theories, especially TWAIL to frame a counter-narrative on the emergence and evolution of EU migration and asylum law. To do so, I engage with some classic TWAIL scholarship, such as Chimni and Anghie.[3] Relying on these classical TWAIL perspectives, I reanalyse some of the EU migration law tendencies previously outlined. My analysis, therefore, creates links between TWAIL theories and some developments of EU migration and asylum law, whether at its early stages as observed in chapter 2 or its more recent form following the 'crisis' framing as analysed in chapter 3.

Overall, I argue that reading EU migration and asylum law through a TWAIL lens enables a critical understanding of its form, content, rationales and effect. Indeed, taking a TWAIL approach reveals the embeddedness of Europe's colonial history in today's EU asylum and migration law system, which a 'crisis'-driven perspective fails to account for. My analysis shows that Europe's colonial legacies are central to understanding the EU's approach to Third World migrants, migration, and countries within its migration and asylum policy. Addressing these legacies makes it possible to fully understand the underpinnings of EU migration and asylum policy which justify a purely control-focused approach since early cooperation among EU member states to post-2015 developments.

In the first section, I discuss the EU's approach to Third World migrants from a TWAIL perspective and how it demonstrates the persistence of Chimni's 'myth of difference'

[3] See Introduction section 4 on the use of TWAIL in this thesis.

in today's EU migration and asylum policy. In the second section, I investigate the allocation of responsibility to deal with unwanted migration to third countries and actors. My analysis reveals the EU's neo-colonial approach to third countries and the EU's failure to engage with its own colonial past and its legacies. Lastly, I argue that the persistence of the 'myth of difference' and the allocation of responsibility to Third World countries reproduce a new form of 'civilising mission' both towards Third World migrants and countries.

1. A TWAIL perspective on the othering of Third World migrants in EU migration and asylum law

Using a TWAIL perspective on migration and asylum law, my analysis provides an alternative understanding of the EU's approach to Third World migrants in its migration and asylum law and policy. I argue that Chimni's 'myth of difference' provides a clearer insight regarding the distinction between European and Third World migrants underpinning the common migration and asylum policy. Moreover, the 'crisis' framing and the informalisation of EU migration law are two processes that contribute to the perpetual exclusion of Third World migrants from the EU, be it physically or socially and legally. Engaging with the neo-colonial origins of EU law related to migration triggers thinking on potential alternatives to the 'crisis'-driven understanding of the EU's approach to Third World migrants.

In this section, I firstly analyse Chimni's thesis and the implications of the 'myth of difference' for the international refugee law regime. I then highlight some of the central

elements of EU migration and asylum law, which reveal the large impact of the differentiation between European and Third World migrants.

1.1. The 'myth of difference': Unveiling racialised underpinnings of the international refugee law regime

My analysis of Chimni's 'myth of difference' shows that the current international refugee law regime is shaped by the distinction between European and Third World migrants. In this subsection, I discuss the meaning and implications of Chimni's thesis for international refugee law. I firstly define the meaning of the 'myth of difference' according to Chimni before turning to discussing the implications of the 'myth' for the current international refugee law system. My analysis shows that a racialised approach to Third World migration stemming from colonial and imperialist history has created a framework within international refugee law in which Third World migrants are demarcated through the 'myth of difference'. This 'myth' justifies the generalisation of restrictive policies in the First World.

1.1.1. Chimni's critical approach to international refugee law

Analysing international refugee law from a TWAIL perspective, Chimni claims that the international refugee law system relies on the distinction between European and Third World migration – which he refers to as the 'myth of difference' – to justify the use of restrictive policies towards refugees and asylum seekers. According to this 'myth',

Chimni explains, recent refugee flows are characterised as fundamentally different from earlier refugees when the refugee status was created.[4]

Given the 'ideological or geopolitical value' possessed by refugees during the Cold War,[5] the development of international refugee law between the Second World war and the 1980s saw refugee matters becoming an essential element of the opposition between Eastern and Western blocks.[6] Soviets seeking asylum in Western Europe 'were seen as confirming the values of Western liberal democracies'.[7] At the time, the conventional figure of a refugee was white, European, male and anti-communist.[8] This conception derived from the original temporal and geographical limitations of the Refugee Convention. The 1951 Convention restricted the status of refugees to people outside their country of nationality and unable or unwilling to return 'as a result of events occurring before 1 January 1951' in Europe,[9] and thus rooted the asylum regime as a Eurocentric system.[10] As Marfleet argues, the original legal category of 'refugee' was created for a specific time and space: only those asylum seekers who fit that paradigm were considered 'authentic candidates for protection'.[11] These original time and space limitations invisibilised all claims for protections in or from the Third World,[12] and racialised the legal status of refugee. The removal of temporal and geographical limitations of the Refugee Convention by the 1967 Protocol universalised

[4] BS Chimni, 'The Geopolitics of Refugee Studies: A View from the South' (1998) 11(4) Journal of Refugee Studies 350.
[5] ibid 351.
[6] BS Chimni, 'From Resettlement to Involuntary Repatriation: Towards a Critical History of Durable Solutions to Refugee Problems' (2004) 23(3) Refugee Survey Quarterly 55, 56.
[7] Bridget Anderson, *Us and Them? The Dangerous Politics of Immigration Control* (Oxford University Press 2013) 55.
[8] Lucy Mayblin and Joe Turner, *Migration Studies and Colonialism* (Polity Press 2020) 113.
[9] Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention) art 1(A)(2) and 1(B)(1).
[10] Mayblin and Turner, *Migration Studies and Colonialism* (n 8) 112.
[11] Philip Marfleet, 'Refugees and History: Why we Must Address the Past' (2007) 26(3) Refugee Survey Quarterly 136, 139.
[12] ibid 140.

the duty to protect asylum seekers and refugees.[13] The duty shall therefore apply to anyone simply due to them being human.[14] Despite the temporal and geographical limitations' removal, means of transportation and communication at the time meant that the number of Third World asylum seekers reaching Europe remained considerably low until the 1980s.[15] Until then, most asylum seekers in Western Europe came mainly from the Soviet Union and in small numbers.[16] This fitted within the conventional image of an individual, white, male fleeing political persecution, therefore maintaining a specific understanding of who 'genuine' asylum seekers and refugees are, based on racialised considerations.

Furthermore, the Cold War context during which international refugee law developed meant that Soviet asylum seekers' motives to flee received little attention. Whether migrating due to political persecution or more economic considerations such as 'looking for a better life in the West',[17] their genuineness as asylum seekers was not questioned. At the time, providing asylum to Soviet refugees was part of the ideological conflict opposing the West to the East. Western powers used the asylum system to prove the superiority of the capitalist world.[18] Recognising white, European, anti-communist individuals as genuine refugees was, therefore, a strong ideological and geopolitical tool.

In theory, since 1967 the universal applicability of the right to asylum should prevent any distinction between migration flows that may contain people seeking international

[13] Protocol Relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267 (1967 Protocol) art 1(2).
[14] Cathryn Costello, *The Human Rights of Migrants and Refugees in European Law* (Oxford University Press 2015) 10.
[15] Chimni, 'The Geopolitics of Refugee Studies' (n 4) 356.
[16] Bridget Anderson, *Us and Them? The Dangerous Politics of Immigration Control* (Oxford University Press 2013) 56.
[17] Mayblin and Turner, *Migration Studies and Colonialism* (n 8) 113.
[18] Randall Hansen, 'Migration to Europe Since 1945: Its History and its Lessons' (2003) 74 The Political Quarterly 25, 35; Anderson, *Us and Them?* (n 16) 55-56.

protection. However, a supposedly fundamental difference in recent migration flows was progressively pointed out by policymakers to justify their classification into different legal categories and their exclusion from the refugee status. The 'myth' purports that those seeking international protection migrated voluntarily for economic purposes, labelling them 'bogus asylum seekers'.[19] It dates back to the 1980s and the arrival of so-called 'new asylum seekers' in the First World.[20] This differentiation between 'genuine' and 'bogus' asylum seekers applies specifically to refugees from the Third World.[21] Given that following the end of the Cold War asylum seekers no longer had ideological or geopolitical value, arrivals of protection seekers from the Third World to the First World 'were represented as being radically different from refugee flows in Europe since the end of the First World War'.[22] They were perceived as of 'unprecedented' and 'unmanageable' in scale, and their motives to migrate were considered purely economic.[23] That is why they were presented as wrongfully seeking asylum.

In reality, refugee movements – including large scale ones – 'are neither new nor exclusive to specific regions', Skran explains.[24] Peoples' movement, including people seeking protection, has existed since time immemorial.[25] The 20th century, for instance, witnessed numerous forced migration movements over the world: due to the two World Wars or Balkan Wars in the early 20th century for Europe,[26] following the

[19] Stephan Scheel and Vicky Squire, 'Forced Migrants as "Illegal" Migrants' in Fiddian-Qasmiyeh, Elena and others (eds), *The Oxford Handbook of Refugee and Forced Migration Studies* (Oxford University Press 2014) 194.
[20] Chimni, 'From Resettlement to Involuntary Repatriation' (n 6) 58.
[21] Martin Lemberg-Pedersen, 'Manufacturing Displacement: Externalization and Postcoloniality in European Migration Control' (2019) 5(3) Global Affairs 247, 252
[22] Chimni, 'The Geopolitics of Refugee Studies' (n 4) 351.
[23] Lemberg-Pedersen, 'Manufacturing Displacement' (n 21) 252.
[24] Claudena Skran, *Refugees in Inter-War Europe: The Emergence of a Regime* (Oxford University Press 1995) 4.
[25] Marfleet, 'Refugees and History' (n 11) 136; Mayblin and Turner, *Migration Studies and Colonialism* (n 8) 116.
[26] Skran, *Refugees in Inter-War Europe* (n 24) 5; Dallal Stevens, 'The Humaneness of EU Asylum Law and Policy' in Nuno Ferreira and Dora Kostakopoulou (eds), *The Human Face of the European Union: Are EU Law and Policy Humane Enough?* (Cambridge University Press 2016) 238.

dismantlement of the Ottoman Empire in 1920s' Middle East,[27] or post-decolonisation displacements in Asia and Africa in the second half of the 20th century, [28] to give a few examples. Although each refugee and refugee movement is distinct, 'the differences between European and Third World refugees have been greatly exaggerated'.[29] Moreover, many similarities can be drawn between recent refugee movements and previous European refugees.[30] As previously pointed out,[31] in the case of the 2015 so-called 'crisis', scholars and EU Agencies drew parallels between 2015 refugee movements to Europe and the displacements engendered by World War II[32] or by the dissolution of Yugoslavia.[33] Frequent comparisons between recent displacements and historical refugee movements confirm Chimni's thesis that the supposed difference of recent refugee flow originating from the Third World is nothing but a myth. Indeed, if post-1980s' asylum seekers were genuinely 'new' and radically different from past displacements observed in Europe and elsewhere, those 'new asylum seekers' could not be compared to any other refugee movement occurring before the end of the Cold War. That is why it constitutes a 'myth' instead of a genuine difference.

In addition, as suggested earlier, the framing of Third World asylum seekers as 'bogus' assumes that the asylum system is used by the Third World's poorest to access the First World. Conventional understandings of Third World migration to Europe sees it

[27] Umut Özsu, 'Fabricating Fidelity: Nation-Building, International Law, and the Greek-Turkish Population Exchange' (2011) 24 Leiden Journal of International Law 823; Dawn Chatty, 'The Duty to be Generous (Karam): Alternatives to Rights-Based Asylum in the Middle East' (2017) 5 Journal of the British Academy 177, 181.
[28] Chimni, 'The Geopolitics of Refugee Studies' (n 4) 350; Marfleet, 'Refugees and History' (n 11) 143; Lucy Mayblin, *Asylum After Empire: Colonial Legacies in the Politics of Asylum Seeking* (Rowman and Littlefield International 2017) 144.
[29] Skran, *Refugees in Inter-War Europe* (n 24) 5.
[30] ibid.
[31] See chapter 1 section 1.
[32] Arne Niemann and Natascha Zaun, 'EU Refugee Policies and Politics in Times of Crisis: Theoretical and Empirical Perspectives' (2018) 56(1) Journal of Common Market Studies 3; Frontex, 'Migratory Routes - Eastern Mediterranean Routes' <https://frontex.europa.eu/we-know/migratory-routes/eastern-mediterranean-route/> accessed 18 November 2020.
[33] Adrian Little and Nick Vaughan-Williams, 'Stopping Boats, Saving Lives, Securing Subjects: Humanitarian Borders in Europe and Australia' (2016) 23(3) European Journal of International Relations 533, 534.

as resulting from poverty and considers that the most destitute of the world will flood Europe if they are not controlled.[34] The need to control poor Third World citizens from immigrating *en masse* to the First World did not only materialise in restrictions to work-related migration channels. It also led to the fear that so-called 'economic' migrants would abuse the asylum system to ensure access to the First World. Yet, two points should be raised on this perspective. Firstly, the very idea of 'bogus asylum seekers' migrating for mixed causes and applying for international protection despite moving in search of a 'better life' is not so distinct from the representation of Soviet refugees, as previously mentioned. Secondly, the use of poverty as the essential cause of Third World migration to Europe is also wrongfully based. Indeed, 'research […] has shown that poverty alone is not sufficient to compel someone to leave their home country'.[35] Migrating requires 'considerable costs and risks, and besides knowledge and networks, also requires the necessary aspirations'.[36] Considering poverty as the main cause of migration from the Third World constitutes a myth itself, as de Haas' research shows.[37] The idea that recent immigration to the First World is radically different from the past because they are supposedly mainly 'economic' migrants fleeing destitution and abusing First World's asylum systems is based on a misunderstanding of current and past migration flows.

The characterisation of Third World asylum seekers as radically different therefore relies on a racialised conception of migration and refugee movements. As Mayblin and Turner argue, 'their difference is not in the legitimacy of their claim to persecution but

[34] Hein de Haas, 'The Myth of Invasion: The Inconvenient Reality of African Migration to Europe' (2008) 29(7) Third World Quarterly 1305, 1306.
[35] Mayblin and Turner, *Migration Studies and Colonialism* (n 8) 117.
[36] Hein de Haas, 'International Migration, Remittances and Development: Myths and Facts' (2005) 26(8) Third World Quarterly 1269, 1271.
[37] ibid; de Haas, 'The Myth of Invasion' (n 34) 1306.

in their national origins'.[38] Third World refugees were considered distinct because they did not fit in the European conception of 'genuine' refugees, which, as previously described, were considered white, male, anti-communist individuals. The long-lasting legacy of this conception has significant implications for the international refugee law system as the 'myth of difference' supports the First World's restriction of access to asylum for protection seekers from the Third World, as I now turn to.

1.1.2. The implications of the 'myth of difference' for the international refugee law system

The 'myth of difference' led to the standard understanding that refugee flows in Europe and the Third World are distinct in nature and character, which justified the development of stricter asylum policies in the First World.[39] Given that so-called 'new' refugees are not considered 'genuine', the adoption of tighter policies appeared necessary to prevent so-called 'economic migrants' from hijacking First World's asylum systems to circumvent stricter work immigration rules. Discussing the United Kingdom's (UK) asylum system – though this could be generalised to the First World – El-Enany stresses how the official rhetoric that the UK has limited available resources and the economic 'burden' caused by asylum seekers justified the need for stricter asylum rules.[40] Such an economic-focused discourse resonated strongly in 1980s Western European countries facing increasing unemployment rates.[41]

[38] Mayblin and Turner, *Migration Studies and Colonialism* (n 8) 117.
[39] ibid 115.
[40] Nadine El-Enany, *Bordering Britain: Law, Race and Empire* (Manchester University Press 2020) 143.
[41] See chapter 2 section 1.2.2. on EU member states' conception of Third World migrants a threats to the Community's socio-economic stability.

Conventional narratives also focused on other aspects of the 'new' asylum seekers' radical distinctiveness, such as the use of so-called 'illegal' immigration channels to reach their destination. This was, and still remains,[42] a strong focus that seeks to legitimise Third World migrants' conception as distinct and threatening, thus justifying stricter controls. This figure of the 'irregular' migrant, combined with economic considerations, contributes to the mythology of Third World immigration to the First World as 'dangerous, exploitative and excessive' in nature.[43] To mitigate those supposed 'risks', First World countries developed exclusion-focused policies to restrain and control migration originating from the Third World.

The differentiation between migration flows justified the intensification of restrictive immigration measures and the development of the non-entry regime in Western countries.[44] As Chimni explains, it first led to the promotion of voluntary repatriation between 1985 and the early 1990s, before the emergence of the notion of 'safe return' in the mid-1990s. This later led to the increasing use of forced returns.[45] Moreover, the non-entry regime was further developed to limit asylum seekers' ability to reach First World countries' borders by including measures such as stricter visa regimes for countries where refugees originate from or generalising carrier sanctions.[46] These measures, along with the creation of international zones in airports or the deterrence of migrants' boats in high sea, constituted the non-entry regime's early forms, Gammeltoft-Hansen and Hathaway explain.[47] Traditional forms of non-entry have

[42] See chapter 1 section 1 on the role of 'irregular' means of migration for the characterisation of the 2015 'crisis'.
[43] Lemberg-Pedersen, 'Manufacturing Displacement' (n 21) 252.
[44] Chimni, 'The Geopolitics of Refugee Studies' (n 4) 352.
[45] Chimni, 'From Resettlement to Involuntary Repatriation' (n 6) 55.
[46] Elspeth Guild, 'The Legal Framework: Who is Entitled to Move?' in Didier Bigo and Elspeth Guild (eds), *Controlling Frontiers: Free Movement Into and Within Europe* (Ashgate 2005) 35-36; see also chapter 2 section 2.1. on the emergence of EU non-entry policies.
[47] Thomas Gammeltoft-Hansen and James C Hathaway, 'Non-Refoulement in a World of Cooperative Deterrence' (2015) 53(2) Columbia Journal of Transnational Law 235, 245-246.

been progressively complemented with other, more extensive, policies, such as measures based on cooperation with third parties: states, international organisations and private security companies.[48] The non-entry regime is a legacy of colonial ideas of human hierarchy as it relies on the conception that some migrants are undesirable and excludable while others enjoy free movement, Mayblin and Turner argue.[49] Racialised considerations of Third World migrants justify that *any* measure can be taken to control their migration.

The 'myth of difference', however, has broader implications than solely justifying policy agendas. Indeed, it feeds the First World's amnesia with regards to migration histories and its colonial past. Various scholars have pointed out how the conventional history-telling of refugee movements is selective and excludes refugees who do not originate from or move to the First World. Chimni, for instance, explains how at the time of the adoption of the Refugee Convention, there were refugees in the Third World too, but they received no consideration by the drafters,[50] despite the resistance expressed by former colonised states such as Pakistan, India or Afghanistan during the negotiations.[51] Although massive displacements resulted from decolonisation in Asia and Africa simultaneously to the negotiations and adoption of the Refugee Convention,[52] European refugees' conditions following World War II are the basis for contemporary international refugee law's development. In reality, there were refugees in the Third World before the 1980s and the emergence of what Chimni calls 'new asylum seekers' in Europe. As Mayblin explains, numbers of Third World asylum seekers before the 1980s were 'comparable to, or even in excess of, those seen within

[48] Lemberg-Pedersen, 'Manufacturing Displacement' (n 21) 253.
[49] Mayblin and Turner, *Migration Studies and Colonialism* (n 8) 120.
[50] Chimni, 'The Geopolitics of Refugee Studies' (n 4) 355.
[51] Mayblin and Turner, *Migration Studies and Colonialism* (n 8) 117.
[52] Chimni, 'The Geopolitics of Refugee Studies' (n 4) 350; Marfleet, 'Refugees and History' (n 11) 143; Mayblin, *Asylum After Empire* (n 28) 144.

Europe in the wake of the Second World War'.[53] Furthermore, movements of refugees and the migration of people seeking asylum existed long before the adoption of the Refugee Convention and the creation of a formal refugee status, or even of its predecessor, the Nansen Passport. European countries have a long history of offering sanctuary,[54] for instance, the notion of refugee was first used with regards to Huguenots seeking refuge across the Channel in the 17th century.[55] Likewise, in the Middle East, the Islamic notions of duty to provide hospitality to strangers and *Aman* are centuries-long traditions.[56] In this way, the 'myth of difference' – especially the narrative that 'new asylum seekers' are not genuine – combined with the Eurocentric origins of the refugee status led to the forgetting of alternative refugee histories,[57] which directly contributes to upholding the 'myth'. Concealing that people have sought asylum for time immemorial everywhere in the world creates the image that seeking asylum is 'exceptional' and that only a few 'genuine' refugees exist.

This forgetting concerns histories of First World countries receiving asylum seekers or witnessing refugee movements in their territories but also disregards the role played by the First World in producing forced migration elsewhere. Among histories of forced migrations induced by European powers, the transatlantic slave trade is one of the most prominent examples.[58] The colonial and imperialist history of First World countries played an important role in creating forced displacement in the past and in creating the conditions leading to some of the more recent refugee movements. The ignorance of Third World refugee histories and of the First World's shaping role means

[53] Mayblin, *Asylum After Empire* (n 28) 5.
[54] Stevens, 'The Humaneness of EU Asylum Law and Policy' (n 26) 238.
[55] Anderson, *Us and Them?* (n 16) 55; Mayblin, *Asylum After Empire* (n 28) 14.
[56] Stevens, 'The Humaneness of EU Asylum Law and Policy' (n 26) 238; Chatty, 'The Duty to be Generous' (n 27) 177.
[57] Lemberg-Pedersen, 'Manufacturing Displacement' (n 21) 252.
[58] ibid 247; Mayblin, *Asylum After Empire* (n 28) 14.

current refugees are understood from an ahistorical point of view, when actually, Marfleet explains, 'new and renewed refugee crises […] are the outcome of complex colonial legacies, global developments, external interventions, local tensions and conflicts'.[59] Furthermore, for El-Enany, the conception of so-called 'new asylum seekers' as unpredictable is erroneous. She argues that considering Britain's colonial and imperialist history, the arrival of migrants from its former colonies to the UK was predictable.[60] Consequently, the persisting 'myth of difference' and amnesia about colonial histories of forced migration means the First World's role in producing refugees is generally occluded and so is its responsibility to provide asylum to Third World citizens. Ignoring the legacies of colonialism and imperialism in current refugee movements means it is almost natural for First World countries nowadays to evade their responsibility towards Third World asylum seekers.

Furthering the reflection on colonialism's legacies for migration and asylum policies, Achiume stresses the important role of European emigration during colonialisation. Contrary to the 'myth of difference' and the characterisation of Third World immigrants as 'bogus asylum seekers' moving for purely economic purposes, colonial emigration was viewed as positive and even required to achieve the colonial project. In other words, European settlers 'were the original economic migrants'.[61] This aspect of European history of emigration is subject to constant amnesia when discussing current approaches to migrants in the First World, particularly when it comes to determining genuine and acceptable reasons to migrate.

[59] Marfleet, 'Refugees and History' (n 11) 137.
[60] El-Enany, *Bordering Britain* (n 40) 136.
[61] E Tendayi Achiume, 'Migration as Decolonization' (2019) 71(6) Stanford Law Review 1509, 1537.

In conclusion, TWAIL perspectives on international refugee law and particularly Chimni's 'myth of difference' show how the framing of Third World migrants is a result of colonial and imperialist history. Contemporary First World refugee policies remain based on the distinction between European and Third World migrants, which constrains policy responses to purely exclusionary measures and preserves official narratives on Third World immigrants. TWAIL perspectives call for an alternative analysis of migration and asylum policies, considering more historical views on how migrants are approached and conceived. In the following subsection, I take a TWAIL perspective to shape an alternative understanding of the EU's action in migration and asylum matters, showing the persistence of Chimni's 'myth of difference' in EU asylum and migration law.

1.2. EU migration and asylum policy from a TWAIL perspective: The persistence of the 'myth of difference'

I propose a redescription of the EU migration and asylum policy through the lens of Chimni's 'myth of difference'. Analysing some tendencies of EU migration and asylum law identified in chapters 2 and 3 from a TWAIL point of view provides an alternative to the orthodox understanding of this policy. My analysis in these two chapters showed how the EU's approach to Third World migrants reinforced their othering and exclusion and how this phenomenon is observable in the early measures taken by the EU in the areas of migration and asylum. Here, I argue that the 'myth of difference' provides a clearer insight into this phenomenon because it reveals the racialised legacies in the EU's approach to Third World migrants.

Firstly turning to the economic origins of the common migration and asylum policy, my analysis shows the significance of the 'myth of difference' in justifying the exclusion of unwanted, racialised migrants. It then turns to re-interpreting the association between Third World migration and security considerations through the lens of the 'myth of difference'. As previously explained, the 'crisis' framing also influenced the evolution of the EU's approach to Third World migrants. Here, a TWAIL approach throws a new light on the EU's use of 'crisis' framing and its role in furthering pre-existing tendencies in recent EU approach to migrants. Finally, the redescription I propose below suggests that the use of informal agreements can be understood as resulting from the 'myth of difference'.

1.2.1. The 'myth of difference' and the economic origins of the common migration and asylum policy

The standard presentation of the emergence of a common asylum and migration policy is commonly conceived as resulting from a 'spill-over' from the creation of the common market. My earlier analysis revealed the EU's focus on economic and security-related considerations since the very inception of the common migration policy.[62] The Treaty of Rome, for instance, considered only the free movement of people carrying out economic activities.[63] As my previous analysis further showed, the development of the common migration and asylum policy was framed as part of establishing the common market and the Schengen Area.[64] Yet in chapter 2, I pointed out the restrictiveness of

[62] See chapter 2 section 1.2.
[63] Treaty Establishing the European Economic Community [1957] art 48.
[64] See chapter 2 section 1.1.1.

the free movement area since its inception and its exclusivity to Europeans. My analysis examined EU law developments on so-called 'economic migration' and claimed it targets very specific categories of Third World migrants, such as highly-skilled migrants,[65] or intra-corporate transfer,[66] for instance. This showed that the development of a common approach to migration and asylum policy relied on a restricted conception of which third-country nationals should be allowed to enter the EU. Meanwhile, common developments on other legal migration channels remained strictly narrow.[67] Yet, restrictive measures targeting Third World migrants were ordinarily presented as 'accompanying'[68] or 'flanking measures'[69] to the establishment of the abolition of internal border controls. This would suggest that such measures were subsidiary and incidental – as opposed to being at the core – to the creation of the common market. Yet, my analysis in chapter 2 suggests that the EU's control-focused approach to Third World migrants was a central element of its migration and asylum policy since the early days and as I demonstrated in chapter 3, the exclusion of unwanted migrants was a cornerstone of post-2015 developments.[70] Taking a TWAIL approach brings me to engage further with the pivotal nature and the underpinnings of restrictive measures towards Third World migrants in the EU migration and asylum law system.

[65] Council Directive 2009/50/EC of 25 May 2009 on the Conditions of Entry and Residence of Third-Country Nationals for the Purposes of Highly Qualified Employment [2009] OJ L155/17.
[66] Directive 2014/66/EU of the European Parliament and of the Council of 15 May 2014 on the Conditions of Entry and Residence of Third-Country Nationals in the Framework of an Intra-Corporate Transfer [2014] OJ L157/1.
[67] See chapter 2 sections 1.3.2 and 1.3.3.
[68] Convention Implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the Gradual Abolition of Checks at their Common Borders [2000] OJ L239/19 ch 6; Georgia Papagianni, *Institutional and Policy Dynamics of EU Migration Law* (Martinus Nijhoff 2006) 117.
[69] Papagianni, *Institutional and Policy Dynamics* (n 68) 13; Loïc Azoulai and Karin de Vries (eds), *EU Migration Law: Legal Complexities and Political Rationales* (Oxford University Press 2014) 2.
[70] See chapter 3 section 3.1.

A TWAIL perspective indicates EU migration law is based on the 'myth of difference'. The EU's focus on creating the common market and facilitating the movement of European people carrying out economic activities, meant that other migrants – not contributing to the common market through their economic activities – could be excluded. Furthermore, according to the 'myth of difference', Third World migrants are considered poor and migrating to benefit from the better economic situation of First World countries.[71] Given that the conventional narrative in Western Europe since the 1970s considers migration from the Third World as a 'threat to economic growth and the welfare state',[72] they were considered an economic burden that could potentially hinder the establishment and development of a common market. Yet, the figure of Third World migrants depicted here recalls the original refugee figure from the Cold War era described previously.[73] As Mayblin and Turner explained, if some Soviet refugees were fleeing political persecutions, 'mixed motives related to poverty and "seeking a better life"' were also key aspects of those migration movements.[74] When Soviet asylum seekers fleeing economic hardships were considered genuine, recent Third World migrants were quickly framed as 'bogus asylum seekers' excludable from the EU due to the supposed hindrance they could cause to the common market.

A TWAIL approach to the communitarisation of migration and asylum law reveals how the exclusion of Third World migrants was not purely related to economic considerations, despite the common market's creation being framed as the main driver for migration policies' integration. Although economic considerations played a role in framing Third World migrants as excludable – the Treaty of Rome and the free

[71] Mayblin and Turner, *Migration Studies and Colonialism* (n 8) 117.
[72] Hein de Haas, 'Turning the Tide? Why Development will not Stop Migration' (2007) 38(5) Development and Change 819, 820.
[73] See section 1.1.1. of this chapter.
[74] Mayblin and Turner, *Migration Studies and Colonialism* (n 8) 113.

movement area focused on people conducting economic activities thus excluding all from underprivileged backgrounds – racialised understandings of migration were also significant. Indeed, the exclusion of Third World migrants results primarily from the distinction made between Europeans and Third World migrants. As the 'myth of difference' showed, the refugee law system distinguishes genuine asylum seekers – traditionally seen as white Europeans – from supposedly 'bogus' ones. If Third World asylum seekers are 'disguised' so-called 'economic migrants' seeking to hijack First World's immigration systems, it means they are likely to be considered as 'economic burden' for the establishment of a free movement area of people carrying out economic activities. The racialised consideration that Third World migrants are 'the poorest' led the common migration and asylum policy to be framed in a restrictive manner.

Rather than resulting from purely economic considerations, the exclusion of Third World migrants from the EU appears to be stemming from racialised considerations of Third World migration derived from the 'myth of difference'. The association between Third World migration and security considerations is also significant in framing Third World migrants as 'threats' within EU migration and asylum policy.

1.2.2. The 'myth of difference' and the EU's security-focused approach to Third World migration

As I previously discussed, security considerations and externalisation were central elements of recent EU migration and asylum law measures.[75] Indeed, the use of a

[75] See chapter 3 sections 3.2. and 3.3.

'crisis' frame in 2015 strengthened security considerations and exceptional measures.[76] This particularly influenced the EU's focus on controlling Third World migrants. This is noticeable through the focus on removal within internal EU migration policy with, for instance, the adoption of the Return Handbook in October 2015,[77] a soft law instrument aimed at increasing numbers of 'irregular' migrants returned by standardising return practices conducted by member states' authorities. Following the 'crisis' framing, the EU therefore aimed at coordinating member states' practices by furthering security-driven agendas. With regards to the EU migration and asylum policy's external dimension, the control-focused approach is observable in the expansion of informal cooperation agreements with third countries to increasingly externalise border controls. The EU-Turkey Statement and the Italy-Libya MoU are key examples of transferring responsibilities to control migration to Third World countries and containing Third World migrants outside the EU.[78]

But as chapter 2 showed, security concerns were already important during the early developments of the common migration and asylum policy.[79] For instance, the Trevi Group influenced the common migration and asylum law by associating migration and criminal activities since this intergovernmental cooperation mechanism focused on the fight against terrorism before working on migration.[80] The conflation between migration and criminal activities remained throughout the intergovernmental period when member states' interior ministers led the cooperation on migration and asylum. For

[76] See chapter 1 section 3.2.
[77] Commission, 'Commission Recommendation of 1.10.2015 Establishing a Common "Return Handbook" to be Used by Member States' Competent Authorities When Carrying Out Return Related Tasks' C(2015) 6250 final.
[78] Council of the European Union, 'EU-Turkey Statement' (18 March 2016) Press Release 144/16; Memorandum of Understanding on Cooperation in Development, Action against Illegal Immigration, Human Trafficking and Smuggling and Strengthening of Border Security Between the State of Libya and the Republic of Italy (Rome, 2 February 2017).
[79] See chapter 2 section 1.2.2.
[80] Tony Bunyan, 'Trevi, Europol and the European State' in Tony Bunyan (ed), *Statewatching the New Europe: A Handbook on the European State* (Statewatch 1993).

example, it engendered the creation of the SIS, gathering data on migrants denied entry and on people summoned to appear in court for criminal proceedings.[81] Overall, early developments of the common migration policy, especially stricter migration and border controls, were justified by referring to the supposed 'security deficit' created by the free movement area.[82] This security-driven approach remained following the so-called 'crisis' and fears of insecurity were accentuated by the 'crisis' framing and its connotations of exceptional circumstances.[83]

This constant focus on security reveals the persistence of the 'myth of difference' in the EU's approach to Third World migrants. Since starting cooperation on migration in the 1980s, the EU has constantly framed Third World migrants as 'threats' or potential 'danger', thus reflecting the figure of Third World migrants as distinct in their nature and character. Although Chimni does not stress security concerns as fundamental in shaping Third World asylum seekers' exclusion, this element is essential to understand the EU's approach to Third World migrants and the particular contours of the 'myth of difference' in this context. Migration scholars have analysed the role of the 'war on terror' and 'security' since 9/11 in shaping migration policies in the First World.[84] The occurrence of 'terrorist' incidents in France in 2015-2016 and in Belgium and Germany in 2016 coincided with the 'crisis' framing related to Third World migration and justified further restrictions on migration to prevent terrorists 'taking advantage' of the asylum system. For instance the Italy-Libya MoU specifically mentions the 'fight against terrorism' as one of the matters that the parties wish to

[81] Convention Implementing the Schengen Agreement of 14 June 1985 Between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the Gradual Abolition of Checks at their Common Borders [2000] OJ L239/19 art 96(1) and 98(1).
[82] Didier Bigo, 'Criminalisation of "Migrants": The Side Effect of the Will to Control the Frontiers and the Sovereign Illusion' in Barbara Bogusz and others (eds), *Irregular Migration and Human Rights: Theoretical, European and International Perspectives* (Brill 2004) 72.
[83] See chapter 1 section 3.2.
[84] Mayblin and Turner, *Migration Studies and Colonialism* (n 8) 136.

solve by cooperating.[85] Similarly, following the 2015-2016 New Year's Eve events in Cologne, Muslim men who had recently migrated to Germany were accused of sexual assaults and attacks, targeting specifically white German women, according to reports.[86] Both examples illustrate the framing of Third World migrants as 'threats' during the 'crisis', which suggested the need for safeguarding measures – such as stricter border controls – to prevent 'dangerous' migrants from entering the EU. Additionally, Gutiérrez Rodríguez argues, the framing of the Cologne New Year's Eve incident 'reactivated the dichotomy of civilization and barbarity' between the civilised white 'victims' and the barbarous Muslim 'assaulters'.[87] Similar could be said of the 'terrorist' incidents occurring in Western Europe during the 'crisis' as they shed light on the newcomers' potentially 'barbarous' nature. The naming of the European Commission Vice-President for 2019-2024 dealing with migration as Commissioner 'protecting our European Way of Life',[88] reformulated as 'promoting our European Way of Life' following opposition from Members of the EP,[89] also confirms the representation of Third World migration as a threat to the EU and its citizens. This recalls the categorisation of nations during the colonisation period, distinguishing the 'civilised' from the 'barbarous' and the 'savage'.[90] The role of security in the

[85] Memorandum of Understanding on Cooperation in Development, Action against Illegal Immigration, Human Trafficking and Smuggling and Strengthening of Border Security Between the State of Libya and the Republic of Italy (Rome, 2 February 2017) Preamble.
[86] Encarnación Gutiérrez Rodríguez, 'The Coloniality of Migration and the "Refugee Crisis": On the Asylum-Migration Nexus, the Transatlantic White European Settler Colonialism-Migration and Racial Capitalism' (2018) 34(1) Refuge 16.
[87] ibid.
[88] Nikolaj Nielsen, '"Migration" is now "protecting European Way of Life"' (*EUObserver*, 10 September 2019) <https://euobserver.com/migration/145900> accessed 27 May 2022; Margaritis Schinas, 'Answers to the European Parliament Questionnaire to the Commissioner-Designate Vice-President-Designate for Protecting our European Way of Life' (October 2019) <https://www.europarl.europa.eu/resources/library/media/20190927RES62437/20190927RES62437.pdf> accessed 27 May 2022.
[89] Ursula von der Leyden, 'Mission Letter – Margaritis Schinas – Vice-President for Promoting our European Way of Life' (Brussels, 1 December 2019) <https://ec.europa.eu/commission/commissioners/sites/default/files/commissioner_mission_letters/president_von_der_leyens_mission_letter_to_margaritis_schinas.pdf> accessed 27 May 2022.
[90] Mohammad Shahabuddin, *Ethnicity and International Law: Histories, Politics and Practices* (Cambridge

development of migration and asylum policy shows the racialised approach to Third World migrants. EU migration and asylum law relies on the assumption that it needs to protect Europeans, or the common market, from the 'threats' which 'barbarous' Third World migrants may create.

In conclusion, a TWAIL lens reveals how the EU's long-lasting security focus results from past colonial considerations of Third World citizens. It is the racialised approach to Third World migrants which frames the need for control over their movements, thus making security-driven measures a cornerstone element of EU migration policy.

1.2.3. 'Crisis' framing and the 'myth of difference'

My analysis of the legacies of Chimni's 'myth of difference' for current migration and asylum policy now turns to the implications of 'crisis' framing. It shows that the use of a 'crisis' frame in 2015 reveals the 'myth of difference's' continuity within the EU migration and asylum law system.

As I previously argued, rather than being a genuine crisis, Third World migration to the EU in 2015 was framed as a crisis to enable particular modalities of law and policy that intensified pre-existing traits of the EU's approach to migration and asylum.[91] My analysis demonstrated how 'crisis' framing, in general, tends to re-emphasize the distinction between 'us' and 'the other'.[92] Looking at the EU's response to the 'crisis', chapter 3 confirmed this hypothesis as the external dimension of the EU migration policy furthered unwanted migrants' physical exclusion from the EU by developing

University Press 2016) 47.
[91] See chapter 1 section 2.
[92] See chapter 1 section 3.3.

cooperation with third countries.[93] A paradigm of the distinction between 'us' and 'them' appeared particularly clearly in the close reading of the case studies. Indeed, my analysis revealed the constant blurring of Third World migrants' categories through the use of varied and inconsistent formulations.[94] My analysis also revealed how these cooperation agreements made migrants' 'irregular' status their distinctive characteristic, thus making Third World migrants inherently 'illegal'.[95] Migrants' association with 'illegality' contributed to the representation of Third World immigrants as threatening or potentially criminal figures. Most importantly, it reveals the depth of the EU's racialised considerations of Third World migrants, notably when blurring migrants' categories. The blurring of migrants' categories can be paralleled to the racialised approach to the colonised 'other'. As Anghie and Reynolds explain, the international law system relies on a 'complex vocabulary of cultural and racial discrimination',[96] which justifies applying different standards to various categories of nations or people.[97] In this way, by blurring Third World migrants' categories, the EU maintains its differentiated approach and justifies their exclusion from specific standards, especially human rights and refugee law standards. Indeed, blurring the categories and stressing their 'illegality' characterises Third World migrants as outside the law or not fitting clearly into the existing legal system. Through its racialised characterisation of migrants, the EU ensures their exclusion from its legal system. Consequently, measures taken by the EU after 2015 focused on increasing control over Third World migrants, especially by developing cooperation with third countries

[93] See chapter 3 section 3.1.
[94] See chapter 3 section 3.1.1.
[95] See chapter 3 section 3.1.2.
[96] Antony Anghie, *Imperialism, Sovereignty, and the Making of International Law* (Cambridge University Press 2005) 100.
[97] ibid; John Reynolds, *Empire, Emergency and International Law* (Cambridge University Press 2017) 65.

to keep them outside of the EU territory.[98] Considering that Third World migrants were regarded as potential threats to the EU's security and stability, the emergence of a 'crisis' supports the EU's increased efforts to ensure its 'others' are kept remotely. My analysis of EU measures following the 'crisis' demonstrates that the 'crisis' framing intensified the distinction between 'us' and the 'other' and confirms chapter 1's hypothesis, according to which 'crisis' frames further the othering. The salience of 'identity' concepts was particularly present in the 2015 'crisis' frame due to its focus on migration and asylum, two matters deeply intertwined with modern states' identities. This re-emphasised identities and thus the othering of Third World migrants.

Although 'crisis' frames entail significant humanitarian rhetoric, the hospitality approach to Third World migrants remained very limited. As I previously highlighted, the EU's response to the said 'crisis' contained few measures ensuring the respect of migrants' human rights and instead focused on control and management.[99] Moreover, as mentioned earlier, 'crisis' framing towards migration 'reactivated the dichotomy of civilisation and barbarity'.[100] Rather than highlighting migrants' humanity, the 'crisis' frame furthered their othering by pointing out increasing death rates at EU external borders or stressing their depiction as victims of unscrupulous smugglers and human traffickers. The victimisation of Third World migrants furthered migrants' othering as it emphasises aspects of migration considered 'abnormal' – such as using 'irregular' means of travel that increase risks of deaths, trafficking or smuggling – which contrasts with the EU's understanding of normal and even positive migration.

[98] See chapter section 3.2.1.
[99] See chapter 3 sections 2.3. and 3.2.
[100] Gutiérrez Rodríguez, 'The Coloniality of Migration and the "Refugee Crisis"' (n 86) 17.

Overall, the lack of an alternative approach towards Third World migrants can be better understood from a TWAIL perspective, given that the 'myth of difference' still plays a major role in the EU's understanding of Third World migration. As my analysis showed, the conception of Third World migrants as fundamentally different from others was central during the so-called 'crisis', due to 'crisis' frames re-focusing on identities. Here, the differentiation operated by stressing Third World migrants' unsuitability to existing legal categories, their supposed 'illegality', or their victimisation, for instance. Despite the situation's 'emergency' nature and especially its 'humanitarian' character, all these examples stress the distinctiveness of 'new' migrants and asylum seekers. The EU's answer to the so-called 'crisis' shows the deep embeddedness of the concept of 'bogus asylum seekers'. Even when facing a situation framed as a humanitarian 'crisis',[101] the myth that Third World refugees are not 'genuine', merely migrating for economic reasons, and may constitute a threat to the First World's security and resources, remains key,[102] as chapter 3 demonstrated.

In conclusion, 'crisis' framing continued and reinforced the legacy of the 'myth of the difference'. As my analysis showed, the 'crisis' frame and the re-centring of identities that it entails strengthened the necessity to strictly distinguish between deserving and non-deserving migrants. The persistence of the 'myth of difference' during the 'crisis' framing also led to generalising informal agreements, as I now turn to.

1.2.4. The 'myth of difference' and the use of informal agreements

[101] See chapter 1 section 1.
[102] BS Chimni, 'Globalization, Humanitarianism and the Erosion of Refugee Protection' (2000) 13(3) Journal of Refugee Studies 243, 252.

The ‘myth of difference’ and its continuity in EU migration and asylum law impacts policy choices related to Third World migrants. The conventional narrative that Third World asylum seekers are ‘bogus’ combined with persisting colonial legacies of hierarchies between human beings lead to different forms of law being used to address Third World migration, especially informal instruments, as I develop below. Rather than resulting from the ‘crisis’ framing, atypical instruments emanate from the EU’s very conception of Third World migrants.

Following the emergence of the ‘crisis’, the EU increased its use of soft law to react supposedly rapidly to the situation it was facing. As my analysis showed, these measures included the development of informal cooperation agreements with third countries combined with the informalisation of internal EU asylum and migration law.[103] At the time, using soft law and atypical arrangements was associated with or considered a consequence of the ‘crisis’; the situation was urgent and the time consuming and procedurally burdensome nature of ordinary law-making processes would not allow sufficiently swift and decisive action. What my analysis suggests, however, is that in reality the EU’s use of soft law and informal agreements to regulate asylum and migration is not recent and cannot be explained by reference to a purported crisis alone.[104] Rather the crisis framing created the conditions in which this long-standing tendency towards soft law could be pursued in informal cooperation arrangements such as those considered in the previous chapter. Since the common migration and asylum law and policy’s origins, soft law and informal cooperation have been in constant use. EU law in this area initially only developed at the intergovernmental level, that is to say, on an ad hoc, informal basis. Therefore, the

[103] See chapter 3 sections 1.3. and 2.1.
[104] See chapter 2 sections 1.1. and 2.2.2.

conventional claim that informal agreements and soft law – which could infringe migrants' human rights and limit the EU's legal responsibility – result from an emergency requiring rapid security and supposedly humanitarian measures, does not survive serious scrutiny. My analysis in previous chapters rather shows that informal measures have been consistently used by the EU when developing its action on migration and asylum.[105] Developed during the common migration policy's early beginnings in the 1980s, soft law was then formalised (or 'hardened') following the Treaties of Maastricht and Amsterdam. Despite the communitarisation of asylum and migration after Maastricht and Amsterdam and the strengthened democratic oversight on these matters provided by Lisbon, the legacies of earlier informal developments remained. The Schengen Borders Code is a prime example of the formalisation and long-lasting legacies of intergovernmental cooperation.[106] The recurring use of informal measures to deal with Third World migrants shows it is not the result of the 'crisis' framing.

A TWAIL approach provides us with a different perspective and understanding. Particularly, the 'myth of difference' shows the long-lasting legacies of colonial hierarchies of human beings in First World asylum and immigration policies. Indeed, the First World has gone to great lengths to maintain a hierarchy excluding colonised people and people of colour from accessing 'the category of the universal "human"'.[107] Due to such legacies, informal agreements and soft law are frequently used when dealing with Third World migrants. Since they are considered 'bogus asylum seekers', there is no need to guarantee basic refugee law principles—they are assumed simply

[105] See chapters 2 and 3.
[106] Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the Rules Governing the Movement of Persons Across Borders (Schengen Borders Code) (codification) [2016] OJ L77/1.
[107] Mayblin, *Asylum After Empire* (n 28) 40; Mayblin and Turner, *Migration Studies and Colonialism* (n 8) 121.

not to apply to most (if not all) of the people seeking to migrate into the EU. The narrative that their asylum claims are 'not genuine' persists and justifies using informal cooperation agreements, such as the EU-Turkey Statement, even though they would likely lead to mass infringements of the principle of *non-refoulement* if asylum seekers were 'genuine' – a possibility the myth of difference excludes. Similarly, as my previous analysis suggested, the blurring of migrants' categories contributes to the use of informal measures.[108] Blurring categories excludes them from existing legal statuses. Their characterisation as 'outsiders' of the legal system supports the normalisation of atypical instruments. In other words, as Third World migrants do not 'fit' within existing categories, using informal measures appears legitimate.

Furthermore, colonial legacies of hierarchies among human beings also fuel support for adopting informal measures, even if it risks infringing some migrants' fundamental rights. Conceptions of Third World citizens as inferior are underpinning here. This is particularly true for migrants likely to be 'illegalised', i.e. mostly Third World migrants, as the Schengen visa map shows.[109] As Crépeau and Samaddar explained, so-called 'illegal' migrants are 'close to having no legal personality at all'.[110] Even though human rights and asylum rights are now declared as universal, the practice suggests differently. In particular, the continuous use of informal agreements in the EU migration and asylum law system shows how, in practice, infringing Third World migrants' human and asylum rights can be considered legitimate or even necessary when using a 'crisis' frame.[111] The hierarchy among human beings inherited from the colonial times thus plays a major role in framing migrants' entitlement to human rights' and asylum rights'

[108] See chapter 3 section 3.1.1.
[109] Didier Bigo and Elspeth Guild, 'Le Visa: Instrument de la Mise à Distance des "Indésirables"' (2003) 49 Cultures & Conflits 82, 85.
[110] François Crépeau and Ranabir Samaddar, 'Recognizing the Dignity of Migrants' (2011) 37 Refugee Watch 55, 60.
[111] See chapter 3 section 2.3.

guarantees. So-called ‘illegal’ or ‘irregular’ immigration statuses have replaced concepts of ‘inferiority’, but the practical impact on human rights remains.

In this way, rather than resulting from the supposed need for emergency measures, as per the conventional narrative, a critical perspective reveals the persistent development of informal instruments to deal with Third World migrants. As argued previously, it was the EU’s perception of and disposition towards Third World migration, rather than the supposed ‘crisis’, that led to the post-2015 generalisation of informal agreements observed in chapter 3,[112] subsequently facilitated by using a crisis frame to shape the policy response.

Using TWAIL, particularly Chimni’s ‘myth of difference’, offers a counter-perspective to the orthodox understanding of Third World migrants in EU migration and asylum law. A critical lens reveals that throughout the evolution of the common migration and asylum policy, EU measures contributed one way or another to furthering unwanted migrants’ exclusion. Such exclusion could essentially be a physical distancing from the EU territory, as exemplified by the externalisation of border controls or the EU’s focus on readmission. My analysis also shows Third World migrants’ legal exclusion within the EU through their illegalisation and criminalisation. Therefore, a critical redescription crucially reveals the embeddedness of ‘othering’ in EU migration law and specifically the colonial legacies of the EU’s approach to Third World migrants. As I demonstrate below, stressing Third World migrants’ ‘distinct’ nature also enables the EU to allocate responsibilities to deal with them to ‘others’.

[112] See chapter 3 section 2.1.

2. Allocating responsibility to 'others': a neo-colonial tale

My analysis now turns to the allocation of responsibility to deal with migrants. I discuss how the EU shapes its migration and asylum policy in such a way as to circumvent its duty towards Third World migrants by allocating responsibility to and maintaining its supremacy over Third World states.

The EU's approach to Third World migrants relies on a specific understanding of migration that causes it to allocate the responsibility of dealing with migration and its consequences to third countries and third actors. My analysis also contends that placing responsibility upon non-EU countries also contributes to justifying the EU's approach to third countries and, particularly, maintaining a form of supremacy over them. Finally, my analysis addresses how EU migration and asylum policy fails to address the colonial legacies which influence contemporary Third World migration to the EU.

2.1. Allocating responsibility to third countries and third actors

The 1951 Convention does not contain any specific reference to the responsibility for refugee flows.[113] However, Chimni argues that the 'myth of difference' between European and Third World refugees has justified a position whereby the responsibility for offering protection to asylum seekers is left first and foremost to the state of origin, while other countries have few obligations towards those seeking protection.[114] The

[113] BS Chimni (ed), *International Refugee Law: A Reader* (Sage 2000) 266.
[114] Chimni, 'The Geopolitics of Refugee Studies' (n 4) 361.

'myth of difference' combined with internal understandings of 'root causes' of migration – i.e. considering migration to be the result of the country of origin's action or inaction – have therefore supported the prioritisation of return and readmission as key solutions for First World countries since the 1980s, and the associated development of the non-entry regime.[115] Indeed, the early 1990s observed the development of voluntary repatriation,[116] which, Chimni further argues, contributed to progressively 'legitimising involuntary repatriation'.[117] The development of return policies – voluntary or not – coincided with the furthering of the non-entry regime. The latter started in the 1980s in the Western world with the establishment of carrier sanctions and expanded after the end of the Cold War with cooperation-based non-entry.[118] The externalisation of EU border controls analysed in previous chapters thus originates in EU countries' very conception of Third World migration.[119]

As I previously argued, the origins of EU migration and asylum policy, especially the evolution of its external dimensions, demonstrate the EU's focus on return and readmission since early on in the common policy. My analysis showed how readmission agreements, a long-standing practice of EU member states, were progressively developed at the EU level, thus showing the heavy influence of member states' priorities regarding migration in the early days of the common market.[120] This included the development of a common readmission policy in the early 1990s. The Council recommendation on a template readmission agreement to be used by member states adopted in 1994,[121] was followed by the Treaty of Amsterdam in 1997 and the

[115] ibid, 351-352.
[116] ibid, 363.
[117] ibid, 365.
[118] Gammeltoft Hansen and Hathaway, 'Non- Refoulement' (n 47) 249-250.
[119] See chapter 2 section 2 and chapter 3 section 2.1.
[120] See chapter 2 section 2.2.1.
[121] Council Recommendation of 30 November 1994 Concerning a Specimen Bilateral Readmission Agreement Between a Member State and a Third Country [1996] C274/20.

Tampere European Council 1999, which intensified the development of EU readmission agreements.[122] Since then, removal and return of unwanted migrants remained central in the common migration and asylum policy, as my earlier analysis of the 2011 GAMM showed.[123] Following 2015, the 'crisis' framing shaped the European Agenda on Migration's priority as returning so-called 'irregular' migrants, among others.[124] In this way, the common migration and asylum policy is no exception to what Chimni described. The influence of member states' conceptions of Third World migrants established returns as the primary objective of EU migration and asylum policy.

Moreover, my earlier analysis has also shown that the transfer of responsibility to third countries was furthered as the EU developed the internal dimension of its common policy on migration. Indeed, the growing use of notions of 'safe third country', 'first country of asylum' and 'safe country of origin' developed by the asylum *acquis* exemplifies the EU's transfer of responsibility.[125] By deeming some non-EU countries as safe for asylum seekers, the EU discharges itself from any responsibility for providing people leaving those countries with access to asylum. This goes further than prioritising the return of so-called 'irregular' migrants, as in such case, migrants concerned are still legally allowed to apply for asylum where appropriate. Notions of 'safe third country', 'first country of asylum' or 'safe country of origin' are all used to declare applications inadmissible: in the first case, the EU considers either that the applicant could have requested asylum in another country where the applicant would not risk her life, freedom or discrimination and where the principle of *non-refoulement*

[122] Consolidated Version of the Treaty Establishing the European Community 1997 OJ C340/173; European Council, 'Tampere European Council - Presidency Conclusions' (15-16 October 1999).
[123] See chapter 2 section 2.2.2.
[124] Commission, 'A European Agenda on Migration' (Communication) COM(2015) 240 final; see also chapter 3 section 2.1.
[125] See chapter 2 section 1.3.3.

is said to be respected;[126] in the second, the EU deems that the applicant 'has been recognised […] as a refugee […] or otherwise enjoys sufficient protection in that country';[127] while in the third scenario the EU regards the applicant's country of origin or residence as not producing refugees.[128] Using these notions means the EU circumvents its legal obligation of respecting the principle of *non-refoulement* by avoiding its responsibility of processing asylum applications.[129] Similarly, following the so-called 'crisis', the growing use of cooperation agreements with third countries, including countries deemed unsafe by NGOs and scholars such as Afghanistan, contributed to the EU representing these countries as 'safe', as I previously demonstrated,[130] and thus as countries to which people could be returned. Additionally, the return policy and use of notions such as 'safe third countries' expanded in such a way as to not only include countries of origin but also transit countries. Thus, as outlined in chapter 3, the expansion of cooperation agreements after the so-called 'crisis' strengthened the role of transit countries, such as Turkey or Libya, in controlling Third World migration to the EU. Lastly, the use of containment instead of or in combination with measures on migrants' return in recent cooperation frameworks, such as EU-Turkey or Italy-Libya, illustrates the shift of responsibility to third countries. Contrary to return policies where countries of destination are dealing with migrants, containment measures transfer the responsibility to operate border controls on origin and transit countries' authorities.[131] The EU has, therefore, considerably lessened its responsibility towards migrants and asylum seekers by

[126] 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) [2013] OJ L180/60 art 38(1).
[127] ibid art 35.
[128] ibid art 36.
[129] Nadine El-Enany, 'On Pragmatism and Legal Idolatry: Fortress Europe and the Desertion of the Refuge' (2015) 22(1) International Journal on Minority and Group Rights 7, 16.
[130] See chapter 3 section 2.3.
[131] Annick Pijnenburg, 'Shifting State Responsibility in the Age of Cooperative Migration Control?' (2020) 20 Human Rights Law Review 306, 307.

transferring responsibility to an increasing number of third countries and by reducing its own action.

This transfer of responsibility to third countries was furthered by the 'crisis' framing. Indeed, the consideration of Third World migration as problematic and causing a 'crisis' suggests the 'root causes' in countries of origin have worsened. The threat of Third World countries' issues spreading to Europe through migration has been used as a justification to expand the EU's non-entry policy. The EU-Turkey JAP, for instance, mentioned 'addressing the root causes leading to the massive influx of Syrians' as one of its three ways to address the so-called 'crisis',[132] and Part I focuses on supporting Syrians in Turkey.[133] Similarly, although it does not mention 'root causes' specifically, the Italy-Libya MoU 'provide[s] support and finance […] in the regions affected by the phenomenon of illegal immigration'.[134] In this way, newly developed cooperation agreements contribute to developing EU policy addressing so-called 'root causes' of migration. As Zaun and Nantermoz explain, although calls for the EU to address 'root causes' were formulated since the 1990s, it did not translate into EU migration policies until recently.[135] It was particularly noticeable after the 'crisis' with the development of the EU Emergency Trust Fund for Africa for instance.[136] The EU's use of a 'root causes' approach to migration not only relies on a disproven causal relation between migration and development – there is a consensus among scholars

[132] Commission, 'EU-Turkey Joint Action Plan' (Brussels, 15 October 2015) MEMO 15/5860 Introduction.
[133] ibid Part I.
[134] Memorandum of Understanding on Cooperation in Development, Action against Illegal Immigration, Human Trafficking and Smuggling and Strengthening of Border Security Between the State of Libya and the Republic of Italy (Rome, 2 February 2017) art 1(B).
[135] Natascha Zaun and Olivia Nantermoz, 'The Use of Pseudo-Causal Narratives in EU Policies: The Case of the European Union Emergency Trust Fund for Africa' (2021) Journal of European Public Policy 1, 2 <https://doi.org/10.1080/13501763.2021.1881583> accessed 28 September 2021.
[136] Agreement Establishing the European Union Emergency Trust Fund for Stability and Addressing Root Causes of Irregular Migration and Displaced Persons in Africa and its Internal Rules (La Valletta 12 November 2015).

'that development fuels migration rather than stop it' –[137] but also puts the blame on third countries. The 'root causes' narrative is not only about addressing causes or supposed causes of migration. Stressing the need to address 'root causes' in origin and transit countries also discards the EU's responsibility as it represents third countries and their circumstances as leading causes of migration. In this narrative, migration appears to be solely generated by poor living conditions in the Third World. Likewise, in 2015 the so-called crisis 'was framed as emanating from outside Europe', disregarding the EU's responsibility in producing the circumstances leading to the events qualified as 'crisis'.[138] In this way, policies addressing 'root causes' enable the EU to shift the responsibility to third countries.

In conclusion, the EU has allocated responsibility to third countries and expanded such responsibility to countries of transit and origin to relieve itself of its legal responsibilities towards asylum seekers and refugees. Using a critical perspective, my analysis showed that the allocation of responsibilities to third countries is intrinsically bound to conceptions of Third World migrants and migration, and of its causes. The 'myth of difference' and 'root causes' understandings of migration, in particular, supported the focus on return and containment measures as they contribute to representing unwanted migrants as the result of Third World countries' action or inaction. Moreover, from this perspective, Third World migration constitutes a spread of other countries' problems to the EU, which justified the use of containment measures and the EU's action to address the said 'root causes' as my analysis shows below.

[137] Zaun and Nantermoz, 'The Use of Pseudo-Causal Narratives in EU Policies' (n 135) 2.
[138] Vicki Squire and others, *Reclaiming Migration: Voices from Europe's 'Migrant Crisis'* (Manchester University Press 2021) 134.

2.2. The EU's neo colonial approach to third countries

Analysing the colonial origins of the international legal system, TWAIL and critical scholars argue that colonisation constituted a central element in the emergence and development of the sovereignty doctrine.[139] As Miéville explains, sovereignty is 'the legitimising principle by which the subject in modern international law – the state – faces others'.[140] Discussing the relationship between Europeans and non-Europeans during the colonial encounter, Anghie argues that it did not constitute a relationship between equal sovereigns. On the contrary, it was an interaction between the Europeans considered as sovereign and the Indians who were denied sovereignty.[141] In the colonial mindset sovereignty depended on the level of civilisation: the former were deemed civilised and sovereign, while the latter were categorised as uncivilised and non-sovereign. It is precisely these different considerations that were used to justify colonisation. Sovereignty is, therefore, first and foremost a notion created by European states to ascertain their domination over colonised people.

Contemporary international law is often considered to be against any form of colonialism or imperialism because it has supposedly 'distanced' itself from its colonial past.[142] Although after decolonisation, all states were recognised as equal sovereigns and having the right to self-determination,[143] critical international law scholars consider that the system of political and economic inequalities, inherited from colonial

[139] BS Chimni, 'An Outline of a Marxist Course on Public International Law' in Susan Marks (ed), *International Law on the Left: Re-Examining Marxist Legacies* (Cambridge University Press 2008) 61; Shahabuddin, *Ethnicity and International Law* (n 90) 89-90.
[140] China Miéville, *Between Equal Rights: A Marxist Theory of International Law* (Brill 2005) 184.
[141] Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2005) 30.
[142] Frédéric Mégret, 'Where Does the Critique of International Human Rights Stand? An Exploration in 18 Vignettes' in José María Beneyto and others (eds), *New Approaches to International Law: The European and the American Experiences* (TMC Asser Press 2013) 9.
[143] Miéville, *Between Equal Rights* (n 140) 268.

domination, remains.[144] In other words, despite the 'formal equality' between past-colonisers and past-colonised, states are still 'material[ly]' unequal.[145] The content of international law has changed, but the economic, political, and social context in which it operates has not. For Marxist international lawyers, these extra-legal factors are the most influential elements in international law making.[146] Referring to the idea of Third World countries' 'dependent sovereignty', Anghie made a similar argument, arguing that Western states benevolently transferred them formal sovereignty but stayed in control of their economic and political affairs.[147] Therefore, as Miéville and Chimni argue, international law recognises equal rights to all states, but their power and significance remain unequal.[148]

EU migration and asylum policy, especially its external dimension, is a paradigm example of this *de facto* inequality. The allocation of responsibility for migration to third countries furthers the domination of the EU and its member states over Third World 'partners'. When origin and transit countries are deemed responsible for causing migration, the EU appears entitled to request their cooperation in migration control. Since its origins, EU migration and asylum policy has focused on return as the main solution through the constant development of readmission agreements.[149] Here, TWAIL conceptions of sovereignty show how return and readmission have been framed as the main 'solution' to Third World immigration due to the EU's domination

[144] Anghie, *Imperialism* (n 141) 3; Miéville, *Between Equal Rights* (n 140) 140; BS Chimni, 'The Past, Present and Future of International Law: A Critical Third World Approach' (2007) 8(2) Melbourne Journal of International Law 499, 502; Chimni, 'An Outline of a Marxist Course' (n 139) 61.
[145] BS Chimni, 'Marxism and International Law: A Contemporary Analysis' (1999) 34(6) Economic and Political Weekly 337, 339.
[146] Andrea Bianchi, *International Law Theories: An Inquiry into Different Ways of Thinking* (Oxford University Press 2017) 73.
[147] Antony Anghie, 'On Critique and the Other' in Anne Orford (ed) *International Law and its Others* (Cambridge University Press 2006) 392.
[148] Miéville, *Between Equal Rights* (n 140) 140; Chimni, 'An Outline of a Marxist Course' (n 139) 61.
[149] See chapter 2 section 2.

over Third World countries. The unequal power between the EU and its partners for migration controls means that even though, in theory, EU member states and Third World states are recognised as having equal rights under international law, the EU can determine how migration and its causes should be understood, and therefore which 'solution' is most appropriate, with clear implications for Third World countries.

Resistance from non-EU countries to EU-driven migration controls exists: some refuse or delay entering into readmission agreements with the EU, such as the EU-Morocco readmission agreement under negotiation since 2000,[150] while others use migration as a threat to pressure their European partners, such as Libya, Turkey or Morocco to name a few frequently threatening to stop controlling migration for the EU.[151] Still, the overall tendency towards more cooperation has been constant since early on in the common migration and asylum policy. My previous analysis, indeed, identified that the common readmission policy initiated after Maastricht rapidly intensified following the Treaty of Amsterdam with the strong impulse given by the Tampere European Council.[152] Developing readmission agreements and returning unwanted migrants to Third World countries remained an obsession of the EU since then. In the wake of the 'crisis', the EU's response thus also included a clear focus on returns. Although the EU signed only one formal readmission agreement since 2015,[153] the adoption of informal agreements on return, such as the EU-Turkey Statement and the

[150] Sergio Carrera and others, 'EU-Morocco Cooperation on Readmission, Borders and Protection: A Model to Follow?' (CEPS Paper in Liberty and Security in Europe, 2016) 5.
[151] Andrew Rettman, 'Libyan Faction Threatens EU with Migrant Boats' *EUObserver* (Brussels 3 November 2015) <https://euobserver.com/foreign/130939> accessed 28 September 2021; BBC News, 'Turkey Says Millions of Migrants May Head to EU' (2 March 2020) <https://www.bbc.co.uk/news/world-europe-51707958> accessed 28 September 2021; Kelly M Greenhill, 'Morocco "Weaponized" Migration to Punish Spain. That's More Common Than You Think' *The Washington Post* (1 June 2021) <https://www.washingtonpost.com/politics/2021/06/01/morocco-weaponized-migration-punish-spain-thats-more-common-than-you-think/> accessed 28 September 2021.
[152] See chapter 2 section 2.2.1.
[153] Agreement Between the European Union and the Republic of Belarus on the Readmission of Persons Residing Without Authorisation [2020] OJ L181/3.

Afghanistan-EU JWF,[154] demonstrates the EU's persistence in furthering unwanted migrants' returns.[155] The transfer of responsibility through cooperation on return shows the extent of the EU's supremacy over Third World countries and their citizens. TWAIL perspectives on the doctrine of sovereignty reveal that the EU's supremacy over migration does not result from supposed causes of migration attributed to Third World countries but rather results from unequal power distribution.

The use of 'crisis' framing in and after 2015 enabled the EU to further its domination in the field of migration by deepening its involvement and further displacing responsibility onto Third World countries. Using a 'crisis' frame that bears strong connotations of emergency and danger provided the EU with an opportunity and justification to further its dominant position when dealing with migration matters.[156] Framing Third World migration as a 'crisis' suggests an increased responsibility for origin and transit countries, as unwanted migration is seen as the exportation of Third World issues to the EU. This led to the EU's increasing pressure on Third World countries to strengthen migration controls. Indeed, due to the 'crisis' frame, the EU's involvement with third countries to 'better' control migration appears more needed than ever.

The deeper involvement of the EU in transferring migration control to third countries is noticeable in the development of informal cooperation. My earlier analysis highlighted that although formal cooperation agreements remained in use and informal agreements pre-dated the 'crisis',[157] the post-'crisis' era is marked by a move towards

[154] Council of the European Union, 'EU-Turkey Statement' (18 March 2016) Press Release 144/16; Joint Way Forward on Migration Issues Between Afghanistan and the EU (Kabul, 2 October 2016) <https://eeas.europa.eu/sites/eeas/files/eu_afghanistan_joint_way_forward_on_migration_issues.pdf> accessed 17 July 2020.
[155] See chapter 3 section 2.
[156] See chapter 1 section 2.
[157] See chapter 2 section 2.2.2. and chapter 3 section 2.

more atypical arrangements. As I suggested in chapter 3, this change of approach constitutes an alternative way for the EU to enter into cooperation agreements while avoiding long-lasting negotiations or resistance from third countries, and potential legal challenges or limitations within the EU legal order. For example, in the EU-Afghanistan cooperation, formal CAPD's negotiations lasted from 2011 to 2017 while the informal JWF was rapidly agreed on in 2016.[158] From a critical perspective, the 'crisis' framing enabled the EU to deepen its supremacy over Afghanistan in migration-related cooperation while circumventing procedural and political brakes. As Marxist scholars argue, in international law, more powerful states have the power 'to enforce [their] own interpretation of the legal rules'.[159] The EU's move towards more informal cooperation can be explained as resulting from the power imbalance between the EU and Third World countries which, TWAILers argue, is a consequence of sovereignty's colonial origins. Despite all states now being formally equal sovereigns, the supremacy that First World states maintain over Third World countries means that a First World actor such as the EU can use non-legally binding agreements. Given that the EU's partners are not fully equal, legal requirements for the EU to follow procedures guaranteeing a certain equality in the negotiation process are less robust.

Most importantly, informal agreements enable the EU to deepen its influence over transit and origin countries. The Afghanistan-EU JWF is a particular example as it coincided with the Brussels Conference negotiating the renewal of development funds to Afghanistan, which, Warin and Zhekova argue, was used to pressure Afghanistan

[158] Cooperation Agreement on Partnership and Development Between the European Union and its Member States, of the One Part, and the Islamic Republic of Afghanistan, of the Other Part [2017] OJ L 67/3; Council of the European Union, 'Draft Joint Way Forward on Migration Issues Between Afghanistan and the EU – Adoption' (Brussels, 22 September 2016) 12191/16 para 2; see also chapter 3 section 2.1.
[159] China Miéville, 'The Commodity-Form Theory of International Law' in Susan Marks (ed), *International Law on the Left: Re-Examining Marxist Legacies* (Cambridge University Press, 2008) 127.

into cooperating on migration.[160] The integration of development aid in migration-related measures may be interpreted as a form of 'civilising mission' as I further develop below,[161] but the EU-Afghanistan example shows the EU's increased use of various incentives to convince its partners into cooperating. Likewise, the EU-Turkey cooperation provided a significant amount of financial support for Turkey, and the Italy-Libya MoU included the provision of technical, technological and financial aid to Libya.[162] The EU's use of development aid or other support as incentives to convince third countries into cooperating has thus become almost systematic. Although this move is generally understood as resulting from Third World countries' resistance to cooperate on readmission and return, it reveals the interest in maintaining the EU's dominant position. Examples of cooperation with Turkey or Afghanistan mentioned earlier demonstrated that by using various incentives, the EU convinced its partners to cooperate. Overall it confirms that 'crisis' framing did not alter the power relations between the EU and its partners.

If anything, the deployment of the 'crisis' frame has confirmed the EU's supremacy on migration control by furthering its dominant position. The emergency connotations of the 'crisis' frame and the insistence on the supposedly exceptional nature of the situation – as described earlier –[163] contributed to putting the EU in a leading position to take action. The 'crisis' was framed mainly by First World actors, i.e. the EU and its member states, and has depicted the EU as being 'in danger' or 'threatened' by

[160] Catherine Warin and Zheni Zhekova, 'The Joint Way Forward on Migration Issues Between Afghanistan and the EU: EU External Policy and the Recourse to Non-Binding Law' (2017) 6(2) Cambridge International Law Journal 143, 145.
[161] See section 3 of this chapter.
[162] Commission, 'EU-Turkey Joint Action Plan' (Brussels, 15 October 2015) MEMO 15/5860 Part I; Council of the European Union, 'EU-Turkey Statement' (18 March 2016) Press Release 144/16 para 6; Memorandum of Understanding on Cooperation in Development, Action against Illegal Immigration, Human Trafficking and Smuggling and Strengthening of Border Security Between the State of Libya and the Republic of Italy (Rome, 2 February 2017) paras 1(B), 2(4) and 2(6).
[163] See chapter 1 section 3.2.

'uncontrolled' Third World migrants. Given its pre-existing dominant position, any threat provides the EU with a justification to take action to protect itself. The 'crisis' framing reinforced the EU's leading position on migration control and provided an opportunity to reassert its dominant position. It has enabled the EU to further its supremacy and influence over origin and transit countries, notably by generalising informal agreements.

2.3. The EU's failure to engage with its colonial past and its legacies

I now analyse how the EU and its member states fail to engage with Europe's colonial past and its legacies by allocating responsibility to deal with migration to third countries. Although the 'root causes' approach existed before 2015, the 'crisis' framing furthered the transfer of responsibility to Third World states by pushing for urgent and control-focused measures. As I demonstrate below, using critical perspectives to analyse EU migration and asylum law gives a better understanding of causes and responsibilities towards Third World migrants and asylum seekers by pointing out the role of colonial legacies in creating the conditions leading to today's Third World emigration to the First World.

The EU and its member states rely on a Eurocentric understanding of Third World migration. The approach to Third World migrants shaping EU migration and asylum policy suggests that migration, particularly from the Third World, is disconnected from Europe. Gutiérrez Rodríguez makes a similar point, explaining that today's refugees are represented as having 'no historical connection with Europe'.[164] Looking at the

[164] Gutiérrez Rodríguez, 'The Coloniality of Migration and the "Refugee Crisis"' (n 86) 18.

recent evolution of EU migration and asylum policy, the focus on asylum seekers' disconnection from Europe is clearly apparent. My earlier analysis, for instance, pointed out how following the so-called 'crisis', the EU further externalised its borders through cooperation agreements with third countries and the use of hotspots at external borders.[165] These measures are significant in terms of their practical impact of keeping potential asylum seekers at a distance, whether away from the EU territory or on its edge, and of their meaning. Externalisation policies indeed send a strong message that the migrants they target are disconnected from Europe and therefore are not entitled to reach its territory or are only confined to remote hotspots. Cooperation with third countries and hotspots aim at containing and/or returning unwanted migrants, which means that migrants are considered as having no connection to and no right to connect to Europe. Otherwise, these migrants would have a claim to access or remain on the EU territory fully and would not be targeted by containment policies. Analysing the common migration and asylum policy's earlier developments, my analysis suggested that the disconnection of Third World migrants was already present. This can be observed in third country nationals' exclusion from the free movement area, which reveals the EU's framing as an exclusive free movement area: while EU citizens enjoy the freedom to move and settle to another EU member state, Third World citizens are not.[166] Additionally, the freedom enjoyed by EU nationals was made conditional upon an increased control upon those considered 'externals', as my earlier analysis of the development of the Schengen Area revealed.[167]

[165] See chapter 3 section 1.1.
[166] See chapter 2 section 1.2.1.
[167] See chapter 2 section 1.2.2.

As discussed previously, the 'myth of difference' is strongly embedded in the racialised framing of free movement and who is entitled to move.[168] Still, these considerations also reveal the EU's and member states' disregard for European histories of migration, immigration, and emigration. Critical scholars such as Gutiérrez Rodríguez and Achiume have analysed the role of European migration during colonisation and highlighted the importance of European settler migration for the colonial project.[169] It is estimated that between the 19th and early 20th century, 62 million Europeans migrated from Europe to colonies around the world.[170] However, Gutiérrez Rodríguez explains that contemporary migration is represented as an issue that emerged recently after World War II or that was brought to Europe by globalisation from the 1970s onwards.[171] Looking back at Europe's history, including European history of migration, suggests a different story.[172] Human migration has existed from time immemorial and the 'transformation' of migration in the 20th century is not so much about numbers or proportion than it is about who migrates and where to. During the 19th century, most migration flows were either North-North or North-South. South-South migration also existed, but it was 'managed' by colonial powers between colonies. Immigration from the Third World to the First, on the other hand, was very limited.[173] Framing migration as a 'contemporary issue' is a consequence of an increase in Third World migrants arriving to Europe in the second half of the 20th century and, most importantly, their characterisation as 'distinct' through the 'myth of difference', as explained earlier.[174] The understanding of migration as an unnatural phenomenon, which can and should

[168] See section 1 of this chapter.
[169] Gutiérrez Rodríguez, 'The Coloniality of Migration and the "Refugee Crisis"' (n 86) 16; Achiume, 'Migration as Decolonization' (n 61) 1509.
[170] Achiume, 'Migration as Decolonization' (n 61) 1517.
[171] Gutiérrez Rodríguez, 'The Coloniality of Migration and the "Refugee Crisis"' (n 86) 23.
[172] El-Enany, 'On Pragmatism and Legal Idolatry' (n 129) 8.
[173] de Haas, 'Turning the Tide?' (n 72) 822.
[174] See section 1 of this chapter.

be controlled, is not only hypocritical considering the free movement area lying at the epicentre of the EU project; but shows the EU's amnesia of Europe's history of emigration and its close ties to Third World migration.

As my analysis suggested,[175] the allocation of responsibilities to third countries and the 'root causes' approach constitute a disregard of migration's causes, undermining the complexity of migration motives. This implies that the causes of migration are purely external to the EU and its member states. Indeed, from the mainstream perspective, international migration results from a combination of 'push' and 'pull' factors, where emigration occurs due to dire circumstances in migrants' country of origin, pushing them to leave, combined with more favourable circumstances in the destination country, attracting migrants. As Bakewell explains, Third World migration to Europe is generally understood as 'driven by desperation and poverty'.[176] Although 'causes' of migration are varied and complex, this perspective puts a heavy emphasis on the situation in countries of origin in the Third World, while destination countries in the First World bear little responsibility apart from being 'attractive' to would-be migrants. In other words, from this perspective, the main reason for immigration to the EU is the situation in third countries. Here, I do not deny the variety and complexity of factors leading to migration. Rather, I claim that the conventional understanding of 'root causes' of migration emphasises the responsibility of origin and transit countries and fails to engage with the provenance of those 'push' factors. In particular, it conceals the colonial origins of today's Third World socio-economic conditions and, therefore, the First World's responsibility in creating and maintaining the conditions considered as 'push' factors. This is exemplified by the EU migration and asylum

[175] See section 2.1. of this chapter.
[176] Oliver Bakewell, '"Keeping Them in Their Place": The Ambivalent Relationship Between Development and Migration in Africa' (2008) 29(7) Third World Quarterly 1341, 1346.

policy's focus on return and non-entry measures since the 1990s, as analysed earlier.[177] The EU's focus not only leads to allocating responsibility to deal with migration to third countries, as I showed earlier,[178] but also constitutes a misunderstanding of migration causes. This approach fails to take into consideration that current circumstances in the Third World result from colonial legacies of inequalities, as Squire and others argue,[179] as well as ongoing imperialism from First World countries.

Chimni discusses the 'root causes' of migration, particularly the focus on internal causes, by analysing the examples of Rwanda and ex-Yugoslavia. He points out that the First World interpreted these conflicts as essentially ethnic related, thus putting the responsibility for their emergence and related displacement upon these countries. In reality, Chimni explains, the causes of these conflicts are much more complex and include social and economic factors.[180] These are only two examples, but they are relevant in showing the complexity of causes of displacement and the First World's narrow approach to understanding these causes. Moreover, it is essential to stress the role of First World countries and international organisations in shaping the Third World's social and economic situation today. Tzouvala analyses the notion of 'under-development' – a concept often used to describe Third World origin countries – and shows its intrinsic link to global capitalism and its benefit to a few imperialist states.[181] Similarly, other critical scholars, such as Orford, discuss the association of international financial institutions and development agencies with the emergence of

[177] See chapter 2 sections 2.1. and 2.2.1.
[178] See section 2.1. of this chapter.
[179] Squire and others, *Reclaiming Migration* (n 138) 134.
[180] Chimni, 'The Geopolitics of Refugee Studies' (n 4) 360-361.
[181] Ntina Tzouvala, *Capitalism as Civilisation: A History of International Law* (Cambridge University Press 2020) 4.

some humanitarian crises.[182] Chimni notes, for instance, the International Monetary Fund (IMF) or the World Bank's significant roles in the lead up to conflict situations,[183] and Mayblin and Turner stress the role of the IMF's structural adjustments in the 1980s in producing displacement in sub-Saharan countries.[184] Likewise, discussing Myanmar's transition to democracy and market liberalisation in the 2010s, Shahabuddin tells of the rebound of ethnic violence against the Rohingya minority and their displacement during this transition, while international actors emphasise development as the solution to ethnic tensions.[185] In this way, the First World's – including the EU and its member states – understanding of migration from the Third World and its causes simply fails to acknowledge their responsibility for the emergence of situations of displacement.

A similar pattern can be observed in the EU's focus on fighting against human smugglers and traffickers. Strongly present in the post-'crisis' approach, as my analysis pointed out, the EU's blaming of smugglers and traffickers for deaths in the Mediterranean also leads to a hypocritical transfer of responsibility.[186] As Squire explains, blaming smugglers or migrants themselves for taking dangerous journeys constitutes a 'rejection of culpability'.[187] From a critical perspective, this phenomenon can be understood as more than for the EU to simply pass the blame and responsibility onto someone else. Indeed, the EU's approach towards human smugglers and traffickers also represents its incapacity to question its own action and inaction. Considering that the smugglers and human traffickers targeted by EU anti-smuggling

[182] Anne Orford, *Reading Humanitarian Interventions* (Cambridge University Press 2003) 85.
[183] Chimni, 'Globalization, Humanitarianism' (n 102) 255.
[184] Mayblin and Turner, *Migration Studies and Colonialism* (n 8) 71-72.
[185] Mohammad Shahabuddin, *Minorities and the Making of Postcolonial States in International Law* (Cambridge University Press 2021) 241.
[186] See chapter 3 section 3.2.1.
[187] Vicki Squire, 'Governing Migration Through Death in Europe and the US: Identification, Burial and the Crisis of Modern Humanism' (2017) 23(3) European Journal of International Relations 513, 522.

measures are generally Third World citizens and that, in some cases, smugglers are migrants or would-be migrants themselves, transferring them the responsibility for migrants' deaths corresponds to a form of othering. As Cuttitta explains, it represents the brutality and inhumanity immigrants face as they try reaching EU territory as something originating outside Europe.[188] Yet, migrants' deaths in the Mediterranean result from EU migration policies and could be avoided.[189] Such policies include, among others, the progressive disinvolvement of the EU or its member states in rescue operations at sea, leading to what Squire calls 'dynamics of abandonment'.[190] Smugglers are represented as unscrupulous and inhumane, while EU measures, such as cooperation with third countries following the so-called 'crisis', are increasingly justified through the humanitarian rhetoric of 'saving lives at sea'. This is telling of the EU's unwillingness to engage and address its own inhuman behaviour and brutality. Overall, this perspective strengthens the narrative of European innocence and generosity,[191] while omitting its history of control over Third World citizens through colonisation, slavery and slave trade.

Additionally, the EU's focus on migrants' illegality also shifts the focus away from the EU's own irregularities when dealing with Third World migrants. As I showed in the previous chapter, EU migration and asylum policy stresses migrants' use of 'irregular' routes and their connections to human traffickers and smugglers when migrating to the EU.[192] Doing so contributes in categorising Third World migrants as not abiding by legal norms, be it immigration or criminal law. The EU, on the contrary, remains represented as law-abiding. This representation contrasts with the growing use of

[188] Paolo Cuttitta, 'Delocalization, Humanitarianism and Human Rights: The Mediterranean Border Between Exclusion and Inclusion' (2018) 50(3) Antipode 783, 797.
[189] Mayblin and Turner, *Migration Studies and Colonialism* (n 8) 62-63.
[190] Squire, 'Governing Migration Through Death' (n 187) 516.
[191] Mayblin and Turner, *Migration Studies and Colonialism* (n 8) 72.
[192] See chapter 3 sections 3.1.2. and 3.2.1.

informal instruments following the so-called 'crisis', which my analysis suggested, leads to infringing human rights and refugee law and circumventing EU procedural norms.[193] Indeed, EU policies towards Third World migrants are increasingly developed outside of the EU legal framework established by Lisbon. Yet, the EU continually stresses its commitment to human rights and refugee law.[194] In this way, by focusing on Third World migrants' infringements of EU legal norms, the EU shifts the blame away from its own irregularities, and through its performative commitment to human rights and refugee law, maintains its status as a protector of human rights. Although my analysis of the EU's 'new civilising mission' towards third countries will be further developed below,[195] stressing Third World migrants' illegality also reinforces the legal positivist doctrine seeing law as 'the creation of unique, civilised and social institutions'.[196] In other words, the EU's amnesia towards its infringement of human rights and refugee law contributes to maintaining its dominant position over the international legal system. Shifting responsibility to others or blaming human smugglers and traffickers enables the EU to avoid engaging with its own legacies and responsibilities and to maintain its dominant position by stressing its innocence, generosity and law-abiding nature.

My analysis shows the need to develop critical perspectives on EU migration and asylum policy. Focusing on a 'crisis' lens restricts the understanding of Third World migration as a 'problematic' and 'exceptional' situation and characterises migration's causes as being mainly Third World countries' responsibility. Rather, a TWAIL approach engages more broadly with Europe's colonial past and its legacies today

[193] See chapter 3 sections 2.2. and 2.3.
[194] See chapter 3 section 2.3.
[195] See section 3 of this chapter.
[196] Anghie, *Imperialism* (n 141) 56.

and reveals the EU's hypocritical position towards Third World migration. It reveals, for instance, the EU's amnesia of its own history of migration, particularly so-called 'economic' migration, and the use of a 'root causes' approach to allocate responsibility to third countries. Yet, as I argue below, this failure to engage with colonial past and legacies does not only result from an omission. Rather, taking a critical perspective on EU migration and asylum law, especially its cooperation with third countries, suggests the allocation of responsibility to Third World countries supports the development of a new form of 'civilising mission'.

3. Towards a new form of civilising mission

The EU asylum and migration law system maintains a distinction between Europeans and 'others', which replicates the distinction set by 19th century international law between the 'civilised' and the 'uncivilised', where the former corresponds to the EU and its member states and the latter to the Third World and their citizens.

My analysis deepens the study of the concept of 'civilisation' already touched upon previously,[197] relying on classic TWAIL analyses of 'civilisation' and 'civilising mission', especially Anghie's work.[198] I use these critical perspectives to further re-describe EU migration and asylum law as part of a broader system aimed at reforming and transforming Third World countries. Analysing the EU's positioning as a benevolent actor, I argue that a new form of 'civilising mission' operates both towards Third World migrants, with EU migration policy acting as 'rescue' and lesson for migrants, and

[197] See sections 2.2. and 2.3. of this chapter.
[198] See for instance: Anghie, *Imperialism* (n 141).

towards origin and transit countries through increasing support and interventions from the EU.

In this section, I firstly explore the notion of ‘civilisation’ and its role in shaping contemporary international law. My analysis shows that the concept of ‘civilisation’ originated as a justification for colonisation before the development of the ‘civilising mission’ led to the Third World’s reform and transformation. Following decolonisation, the concept of ‘development’ progressively replaced that of ‘civilisation’ but maintained the ‘civilising mission’ rationale until now. Using a critical lens, my analysis then shows how the EU’s response to Third World migrants replicates a ‘civilising mission’. Moreover, from this perspective, the EU cooperation with third countries also characterises a new form of ‘civilising mission' towards Third World countries.

3.1. ‘Civilisation’ and the origins of international law

Critical scholars have pointed out how the distinction between the civilised and the uncivilised played an essential part in the development of modern international law. As Anghie explained, most of the doctrines of modern international law result from the colonial encounter between Europeans and non-Europeans.[199] The difference between Europeans and non-Europeans characterised as having reached distinct levels of civilisation was a crucial element in framing the doctrine of sovereignty which underpins the international law system.[200] During the colonial era, non-European states were refused full sovereignty due to their alleged ‘uncivilised’ or ‘backward’

[199] Anghie, *Imperialism* (n 141) 3.
[200] Antony Anghie, ‘The Evolution of International Law: Colonial and Postcolonial Realities’ (2006) 27(5) Third World Quarterly 739, 742.

nature and therefore excluded from participating as full members of the international community of sovereign states.[201] The exclusion of non-European states from sovereignty combined with their supposed 'backwardness' overall supported the achievement of the colonising project. Anghie traces back the colonial origins of the contemporary international law system to Vitoria's work, especially his lectures related to the Spanish conquest of Latin America and the encounter between Spaniards and Indians.[202] Anghie shows how Vitoria recognised Indians as humans yet denied them the ability to administer a state due to their 'backwardness',[203] thus justifying the establishment of a Spanish government over the 'uncivilised' as a form of trusteeship or guardianship.[204] The implied 'backwardness' of the colonised supported their domination by the 'civilised' Europeans and led to their progressive reform and transformation through the 'civilising mission'.

Although the 'civilising mission' had earlier origins,[205] the logic of improvement was increasingly present in 19th-century international law developments as the idea that the 'uncivilised' could improve and reach 'higher' levels of 'civilisation' was progressively spread.[206] In this way, 19th-century lawyers persevered in constructing international law as a way to deal with the non-European world,[207] with nations being categorised as either civilised, barbarous/semi-civilised, or savage/uncivilised based on their level of 'progress'.[208] The concept of the modern state was, thus, defined in relation to the idea of 'civilisation'. It coincided with jurists' increasing focus on the doctrine of legal positivism. Law was considered 'the creation of unique, civilised and

[201] Anghie, *Imperialism* (n 141) 55.
[202] ibid 13-14.
[203] ibid 20; Anghie, 'The Evolution of International Law' (n 200) 743.
[204] Anghie, 'The Evolution of International Law' (n 200) 743.
[205] Anghie, *Imperialism* (n 141) 96.
[206] Tzouvala, *Capitalism as Civilisation* (n 181) 56.
[207] Shahabuddin, *Ethnicity and International Law* (n 90) 46.
[208] ibid 47; Tzouvala, *Capitalism as Civilisation* (n 181) 51.

social institutions',[209] which were explicitly limited to European institutions, thus adding a racialised element to the distinction between 'civilised' and 'uncivilised' nations. 'Civilisation' and 'modernity' were closely associated with 19th-century European states, while 'backwardness' and 'uncivilised' were associated with the colonised 'others'. Both concepts of modernity and civilisation had a strong transformational nature, representing the world 'as in need of transformation via human intervention, industrial production, the harnessing of nature, and the establishment of market economy'.[210] Anghie further explains that it was believed that the gap between the world's civilised and uncivilised regions could be bridged thanks to positivist international law.[211] In this way, law, especially international law, was seen as a form of progress. This evolution and the increasing focus on the logic of improvement played an essential role in the Berlin Conference of 1884-1885 by adding increasingly humanitarian rhetoric to the justification of the colonial project.[212] States present at the conference committed themselves 'to watch over the preservation of the native tribes, and to care for the improvement of the conditions of their moral and material well-being'.[213] Therefore, since the origins of modern international law and throughout the colonisation period, the concept of civilisation was decisive in justifying the domination of the 'uncivilised' and resulted in their reform and transformation through the 'civilising mission'.

The second half of the 20th century and decolonisation processes in the Third World led newly decolonised states, formally considered equal and sovereign, to join the

[209] Anghie, *Imperialism* (n 141) 56.
[210] Luis Eslava, 'The Developmental State: Independence, Dependency, and the History of the South' in Jochen Von Bernstorff and Philipp Dann (eds), *The Battle for International Law: South-North Perspectives on the Decolonization Era* (Oxford University Press 2019) 74.
[211] Anghie, *Imperialism* (n 141) 56.
[212] ibid 97.
[213] Cited by Anghie, *Imperialism* (n 141) 97.

international legal system.[214] Despite international law being now considered 'truly universal',[215] legacies of the colonial project persisted in the international law system. As Anghie explains, post-colonial international law bears the enduring consequences of colonisation, particularly the 'systems of economic and political inequality […] created by colonialism'.[216] The post-World War II and decolonisation era also coincided with what Escobar refers to as 'the "discovery" of mass poverty in Asia, Africa and Latin America'.[217] Despite decolonisation, the 'gap' between former colonisers and former colonised remained and coupled with the rapid integration of newly independent states into the market economy. Only now, the 'gap' between former colonies and colonisers was formulated in more economic terms between developed and developing states.[218] In this way, postcolonial states were given 'sovereign equality at the political level', but hierarchies remained at the economic level,[219] notably through the concept of development. In Rajagopal's words, 'it has always been clear about who needs to be developed, who will do the "developing", how and in which direction'.[220] Thus, the notion of development, which emerged following formerly colonised countries' independence, was constituted as a hegemonic project relying on the colonial era's legacies and the differentiation between the First and Third World. The understanding of this concept was rapidly extended beyond purely economic considerations and expanded to 'basic needs, poverty reduction and sustainable livelihoods'.[221] As Rajagopal explains, 'development' is a broad notion

[214] Anghie, *Imperialism* (n 141) 197.
[215] ibid 196.
[216] ibid 111.
[217] Arturo Escobar, *Encountering Development: The Making and Unmaking of the Third World* (Princeton University Press 1995) 21.
[218] Anghie, *Imperialism* (n 141) 204.
[219] Shahabuddin, *Minorities and the Making of Postcolonial States* (n 185) 202.
[220] Balakrishnan Rajagopal, 'Counter-Hegemonic International Law: Rethinking Human Rights and Development as a Third World Strategy' (2006) 27(5) Third World Quarterly 767, 775.
[221] Parvati Raghuram, 'Which Migration, What Development? Unsettling the Edifice of Migration and Development' (2009) 15(2) Population, Space and Place 103, 104.

covering ‘economic growth, poverty alleviation, anti-corruption and transparency, environmental sustainability, and even democracy and freedom/rights’.[222] All these elements are used to assess the level of success or failure of a country’s development.[223] That is why, due to the broad understanding of ‘development’ and its constant inflation towards security, humanitarian or human rights aspects, it has become the driver of any transformation considered necessary for Third World countries.[224] Moreover, as Marks explains, ‘underdevelopment’, the other side of the coin, is not a spontaneous phenomenon but is produced by integrating the Third World into the global capitalist system.[225] Both development and underdevelopment are part of a domination system of the ‘underdeveloped’ or ‘developing’ Third World by the ‘developed’ First World and its institutions.

In this way, critical scholarship has questioned key notions and practices of international law. By revealing how modern international law is a form of ideology, representing itself as in the interests of the whole community while maintaining a domination system,[226] critical scholars challenge concepts such as that of ‘development’ and reveal its tie and continuity to former colonial domination.[227]

Through this critical lens, some international scholars have re-read recent developments of international law and proposed an alternative analysis. Among the developments that received interest for a re-description, ‘humanitarian interventions’ and the ‘war on terror’ are particular examples of how contemporary international law

[222] Rajagopal, ‘Counter-Hegemonic International Law’ (n 220) 776.
[223] Anghie, *Imperialism* (n 141) 206.
[224] Rajagopal, ‘Counter-Hegemonic International Law’ (n 220) 779.
[225] Susan Marks, ‘Introduction’ in Susan Marks (ed), *International Law on the Left: Re-imagining Marxist Legacies* (Cambridge University Press 2009) 12-13.
[226] Emmanuelle Jouannet, ‘La Pensée Juridique de Charles Chaumont’ (2004) (1) Revue Belge de Droit International 259, 265.
[227] Rajagopal, ‘Counter-Hegemonic International Law’ (n 220) 779.

reproduces a system of domination through 'civilising mission'. Indeed, so-called 'humanitarian interventions' received a certain enthusiasm following the end of the Cold War. In this context, Orford analysed how international law 'portrayed the need to intervene in order to protect and look after the people of "failed states"'.[228] She argues that it reproduces the 'civilising mission' rhetoric, especially the need to benevolently supervise the 'uncivilised' unable to govern themselves.[229] This process is characterised through the heroic narrative used to refer to the 'international community' or international actors backing humanitarian interventions such as the United Nations, NATO or the United States, Orford explains.[230] The narrative's focus on international organisations or First World states suggests a racialised understanding of who is considered as delivering peace, democracy and human rights. In addition to this heroic narrative, standard discourses on humanitarian interventions portray Third World citizens as both the cause and victims of abuses. For Mutua, the figure of Third World citizens as 'savages', whose culture supposedly deviates from human rights standards, is considered the cause of the abuses perpetrated during 'humanitarian crises' on other Third World citizens depicted as the powerless and innocent 'victims'.[231] The metaphor of savages, victims and saviours, as Mutua puts it,[232] frames the necessity of interventions, where innocent victims need to be rescued from barbarian practices perpetrated by Third World states or citizens.[233] This requires the saviour to intervene to stop the abuses and rescue the 'victims'. Here safeguarding the 'victims' corresponds essentially to the transformation and 'civilising' of the

[228] Anne Orford, *Reading Humanitarian Intervention: Human Rights and the Use of Force in International Law* (Cambridge University Press 2003) 11.
[229] ibid.
[230] ibid 159.
[231] Makau Mutua, 'Savages, Victims, and Saviors: The Metaphor of Human Rights' (2001) 42(1) Harvard International Law Journal 201, 203.
[232] ibid 201.
[233] Robert Knox, 'Civilizing Interventions? Race, War and International Law' (2013) 26(1) Cambridge Review of International Affairs 111, 116.

'savage' others.[234] In this way, humanitarian interventions and the humanitarian and human rights discourses are used to justify interventions directly replicating the civilising mission by maintaining a similar framing.

Similarly, the 'war on terror' can also be traced back to the civilising mission rhetoric. Developed in the wake of the 9/11 attacks, the 'war on terror' relies on an interpretation of states' right to self-defence which legitimises pre-emptive actions due to the specific threat caused by 'terrorism'. This interpretation, Knox explains, is combined with the development of the concept of 'rogue state', which argues that 'a small number of irresponsible, terrorist-supporting states […] either threaten the world by their existence, or are incapable of properly controlling populations that dwell within them'.[235] This directly replicates the distinction which 19th-century international law established between the 'civilised' and the 'uncivilised' world, Anghie argues.[236] The parallel goes even further since the 'rogue states' doctrine not only justified military interventions but also supported their transformation into 'liberal, democratic and stable states'.[237] The othering of terrorists as 'barbaric' supports interventions to 'civilise' them. In this way, the 'war on terror' and its doctrine of self-defence reproduces the civilising mission.[238]

Overall, the deep links between modern international law's early emergence and the notion of 'civilisation' remain influential on more recent developments. Considered an element of 'civilisation', international law was rapidly developed and used as a tool to justify the domination, control and transformation of colonies, as exemplified by the

[234] Mutua, 'Savages, Victims, and Saviors' (n 231) 204.
[235] Knox, 'Civilizing Interventions?' (n 233) 114.
[236] Antony Anghie, 'The War on Terror and Iraq in Historical Perspective' (2005) 43(1) Osgoode Hall Law Journal 45, 51.
[237] Knox, 'Civilizing Interventions?' (n 233) 115.
[238] Anghie, *Imperialism* (n 141) 302.

development of the 'civilising mission' in the 19th century. Discussing the evolution of international law in the second half of the 20th century, my analysis highlighted the persistence of the 'civilising mission' through the dichotomy between 'developed' and 'underdeveloped' or 'developing' countries. Critical scholars also pointed out the significant role the 'civilising mission' still plays in framing contemporary international issues and responses, such as humanitarian interventions or the 'war on terror'. International law today is, therefore, still strongly embedded in the 'civilising' rhetoric, and as I now turn to, the EU's approach to Third World migrants can also be described as a form of 'civilising mission'.

3.2. A new form of 'civilising mission' towards Third World migrants

Using TWAIL perspectives on the historical connections between international law and the 'civilising mission', my analysis offers a counter-analysis of the EU's approach towards Third World migrants. Reading the development of EU migration and asylum law through a critical perspective, I show the role of the 'civilising' rhetoric in framing the EU's approach to Third World migrants and argue that EU migration and asylum policy replicates the 'civilising mission'.

It should be noted that the EU approach to Third World migrants appears paradoxical. Indeed, on the one hand, the EU characterises migrants as both a threat, against which externalised border controls are put in place to protect the EU, and as ignorant victims, who need to be saved through the EU migration policy.[239] Yet, despite this

[239] Violeta Moreno-Lax, 'The EU Humanitarian Border and the Securitization of Human Rights: The "Rescue-Through-Interdiction/Rescue-Without-Protection" Paradigm' (2018) 56(1) Journal of Common Market Studies 119, 120.

apparent contradiction, the EU measures used and their end results remain unchanged, as Moreno-Lax explains.[240] Whether discussing of migrants as threats or victims, the EU migration policy is focused on restricting their access to the EU territory.

Moreover, what my close-reading of the case studies shows is a move away from purely representing Third World migrants as threats to increasingly characterise them in more humanitarian terms, which Moreno-Lax' analysis also suggests.[241] By representing itself and its migration policy for Third World migrants as a form of benevolence,[242] I argue that the EU replicates a form of 'civilising mission'. This is noticeable in the way the EU characterises itself as a 'saviour' of Third World migrants at risk. It also operates by framing EU migration and asylum policies as 'lessons' to supposedly 'ignorant' Third World migrants.

3.2.1. The EU as a saviour of Third World migrants

In this section, I analyse the EU's self-portrayal and the representation of its migration policy as 'rescuer' for migrants and argue that by doing so, it constitutes a form of 'civilising mission' towards Third World migrants. The 'crisis' framing following 2015 and its emergency and humanitarian connotations play a significant role in the EU's heroism narrative. The characterisation of the new 'civilising mission' operates in two ways: firstly, Third World migrants are identified as 'victims' of abuses perpetrated by human smugglers and traffickers while the EU and its policies are framed as migrants'

[240] ibid, 219.
[241] ibid.
[242] See chapter 3 section 3.3.1.

salvation. The non-entry regime, in particular, is consequently characterised as a necessary pre-emptive measure of protection for migrant victims.

The language used by the EU to refer to Third World migrants following the so-called 'crisis' provides a clear insight into migrants' characterisation as victims. As my previous analysis revealed, the vocabulary used by the EU when referring to migrants in the three case studies blurs migrants' categories.[243] The generic and impersonal terminology combined with the inconsistency of formulations used to characterise Third World migrants covered by the cooperation agreements portrays Third World migrants as hordes or masses. The perception of Third World migrants immigrating to the EU *en masse* was also a key aspect of the 'crisis' frame following 2015. Indeed, my earlier analysis showed that the numbers of asylum applications in 2015 in Europe were a decisive element to characterise the situation faced by the EU and its member states.[244] Parallels were often drawn between numbers of refugees and asylum seekers in Europe at the time and historical refugee movements such as World War II to further stress the 'exceptional' nature of circumstances. These comparisons contributed to representing Third World migrants as helpless masses. Although when used in relation to migration ideas of masses and hordes tend to be associated with a rhetoric of invasion and imminent danger,[245] it also provides a certain anonymity and dehumanisation that characterises the traditional portrayal of victims in human rights and humanitarian law discourses. As Mutua explains, conventional narratives surrounding victims of human rights abuses describe them as 'hordes of nameless, despairing and dispirited masses'.[246] This suggests a parallel between the

[243] See chapter 3 section 3.1.1.
[244] See chapter 1 section 1.
[245] See chapter 2 section 1.2.2. and chapter 3 section 3.1.1.
[246] Mutua, 'Savages, Victims, And Saviors' (n 231) 229.

conventional discourses on humanitarian 'victims' and the characterisation of migrants as masses, particularly within the 'crisis' framing.

The characterisation of Third World migrants as 'victims' is furthered through the language used by the EU to highlight the supposed 'dangers' of immigration to Europe. My analysis of the three case studies in chapter 3 revealed the EU's emphasis on the hazardous nature of so-called 'irregular' migration.[247] As I previously pointed out, both the Afghanistan-EU JWF or the EU-Turkey JAP mention the risks and dangers of the migration journey to Europe,[248] while the EU-Turkey Statement refers more explicitly to the 'human suffering' of migrants or that 'their lives [are put] at risk' due to their migration journey.[249] The use of 'crisis' framing furthered the emphasis on the dangers of migration, as my analysis in chapter 1 revealed earlier.[250] Post-2015 EU migration policy focused on migrants' deaths at EU borders and, in particular, on their supposedly unprecedented number. However approaching this through critical lens reveals that the EU victimises Third World migrants by depicting migration as a hazardous undertaking and suffering for Third World migrants. This understanding of migration contrasts rather sharply with the characterisation of EU citizens' migration within the EU. The latter is conceived as a natural, desired and positive undertaking, whereas the former contributes to the portrayal of Third World migrants as 'victims'.

Additionally, the portrayal of the victim-migrants also operates indirectly in contrast to the characterisation of human smugglers and traffickers as the 'new savage'. Indeed,

[247] See chapter 3 section 3.3.1.
[248] Commission, 'EU-Turkey Joint Action Plan' (Brussels, 15 October 2015) MEMO 15/5860 Part II; Joint Way Forward on Migration Issues Between Afghanistan and the EU (Kabul, 2 October 2016) Part III para 2 <https://eeas.europa.eu/sites/eeas/files/eu_afghanistan_joint_way_forward_on_migration_issues.pdf> accessed 17 July 2020.
[249] Council of the European Union, 'EU-Turkey Statement' (18 March 2016) Press Release 144/16 Preamble and para 1.
[250] See chapter 1 section 1.

rather than engaging with institutional and structural causes of so-called 'irregular' and 'dangerous' migration routes, EU migration policy establishes smugglers and traffickers as one of the main responsible parties for migrants' deaths and abuses suffered at EU external borders or during their migratory journey to Europe. This was strengthened following the so-called 'crisis', as my analysis showed,[251] at which point 'Europe [declared] war on smugglers'.[252] The European Agenda on Migration, for instance, escalated the focus of EU migration policy towards the fight against smuggling and trafficking.[253] The blaming of smugglers and human traffickers as causes of migrants' suffering is also observed in cooperation agreements with third countries. The full title of the Italy-Libya 2017 Memorandum of Understanding is indeed: Memorandum of Understanding on Co-Operation in Development, Action against Illegal Immigration, Human Trafficking and Smuggling and Strengthening of Border Security.[254] This shows how the EU and its member states increasingly represent smugglers and human traffickers 'as perpetrators of death and abuse at sea'.[255] The 'fight' against human smuggling and trafficking becomes a key element of its migration policy, and Third World migrants, thus at risk of smuggling and trafficking,[256] must be rescued and/or protected from such dangers.[257]

In parallel to migrants' victimisation, the EU and its migration and asylum policy are portrayed as saviours. In chapter 3, my analysis drew attention to the language and

[251] See chapter 3 sections 3.2.1. and 3.3.1.
[252] Commission, 'Remarks by Commissioner Avramopoulos at the Press Conference in Castille Place, Malta' (Valetta, 23 April 2015) <https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_15_4840> accessed 2 February 2022.
[253] Squire and others, *Reclaiming Migration* (n 138) 87.
[254] Memorandum of Understanding on Cooperation in Development, Action against Illegal Immigration, Human Trafficking and Smuggling and Strengthening of Border Security Between the State of Libya and the Republic of Italy (Rome, 2 February 2017).
[255] Moreno-Lax, 'The EU Humanitarian Border and the Securitization of Human Rights' (n 239) 119.
[256] ibid 120.
[257] ibid 130; Squire and others, *Reclaiming Migration* (n 138) 87-88.

structure used in EU policy documents and cooperation agreements.[258] It noticed, for instance, that the EU-Turkey JAP's structure emphasises support provision to Syrians in Turkey.[259] Further close reading of EU cooperation agreements with third countries showed notably how the EU-Turkey Statement portrays the hindrance of so-called 'irregular' migration from Turkey to Europe as an alternative to the dangers of migrating.[260] In this way, the EU represents its restrictive policies as 'a "necessary" life-saving device'.[261] Given that migrants are considered 'victims' of smugglers and human traffickers, who in turn are seen as putting would-be migrants at risk in hazardous migratory journeys, the EU frames its migration policy and particularly the development of a non-entry policy as essential and urgently needed.[262] Within this framework the danger is smugglers, human traffickers, and unsafe journeys; Third World migrants need to be protected from them and therefore prevented from undertaking such risky sea-crossings. Pre-emptive measures preventing migrants from departing from countries of origin or transit thus become the most appropriate devices to 'save lives'. Consequently, more than developing rescue operations at sea, it is the development of cooperation agreements with third counties and non-entry policies that became characterised as the best strategy to protect migrants following the so-called 'crisis'. Therefore, the EU becomes Third World migrants' 'saviour' and represents itself as a 'messianic' actor on the international scene by framing its migration and asylum policy as a rescuing tool. This clearly replicates patterns of the 'civilising mission' described earlier,[263] since it frames Third World migrants' 'backwardness' as their unawareness of the dangers of immigration to Europe. Their

[258] See chapter 3 section 3.3.1.
[259] Commission, 'EU-Turkey Joint Action Plan' (Brussels, 15 October 2015) MEMO 15/5860 Part I.
[260] Council of the European Union, 'EU-Turkey Statement' (18 March 2016) Press Release 144/16 Preamble.
[261] Moreno-Lax, 'The EU Humanitarian Border and the Securitization of Human Rights' (n 239) 120.
[262] Squire and others, *Reclaiming Migration* (n 138) 87.
[263] See section 3.1. of this chapter.

status as 'victims', unable to know what is best for them, justifies the intervention from an external actor such as the EU and the adoption of pre-emptive 'protective' measures for their own good. This replicates the early rhetoric used to justify colonisation, which I analysed previously,[264] such as the Indians' supposed inability to govern themselves justifying their colonisation by Spaniards as Anghie explained.[265]

Overall, using a critical lens provides an alternative perspective on migrants' victimisation and the EU's recent focus on more 'humanitarian' approaches to migration. It demonstrates that the characterisation of Third World migrants as victims suffering from abuses perpetrated by smugglers and human traffickers enables the EU to justify its restrictive migration and asylum law as a rescuing device. The pattern observed here reproduces a form of 'civilising mission', where the victimised 'other' requires to be protected and saved by its European 'saviour'. As part of this new 'civilising mission', my analysis identified Third World migrants as victims, while smugglers and human traffickers, as well as the migration process itself were characterised as the dangers and potential sources of abuses for migrants. The EU legitimises its restrictive policies as tools to protect victim-migrants and thus assumes the role of the 'saviour'.

3.2.2. EU migration and asylum law and policy as 'lessons' to Third World migrants

As I discussed in the previous section, the EU's approach to Third World migrants and their victimisation portrays 'irregular' immigration from the Third World as risky and

[264] See section 3.1. of this chapter.
[265] Anghie, 'The Evolution of International Law' (n 200) 743.

life-threatening. Third World migrants who decide to migrate to Europe in an 'irregular' manner despite the danger are thus considered as either 'ignorant' or 'backwards', unaware of the hazardous nature of this form of immigration. To protect migrants from such risks, EU migration and asylum policy increasingly includes aspects aimed at 'teaching' Third World migrants, which I further argue below replicates patterns of the 'civilising mission'.

These 'lessons' firstly focus on informing migrants of the dangerous aspects of 'irregular' migration. This is noticeable in EU cooperation frameworks with third countries as they include provisions on information campaigns targeting migrants in transit or origin countries. Information campaigns existed before the so-called 'crisis', and European countries as well as international organisations, such as the IOM, have funded various campaigns since the 1990s-2000s. For their awareness-raising campaigns, European countries and international organisation use various formats. It includes television adverts or videos featuring local celebrities to reach younger population considered more likely to attempt migration, such as Senegalese singer Youssou N'Dour featuring in an advert campaign funded by the Spanish government in 2007.[266] The 'crisis' framing used in 2015 and the following years led to an intensification of awareness-raising campaigns. As my analysis in chapter 3 showed,[267] both the EU-Turkey JAP and the Afghanistan-EU JWF included specific provisions aimed at 'better inform[ing]'[268] or 'sensitiz[ing]'[269] would-be migrants of the risks of so-called 'irregular' migration. They normally include information about the life-

[266] Antoine Pécoud, 'Quand la Lutte Contre L'immigration Irrégulière Devient une Question de "Culture"' (*The Conversation,* 26 February 2019) <https://theconversation.com/quand-la-lutte-contre-limmigration-irreguliere-devient-une-question-de-culture-112200> accessed 25 June 2021.
[267] See chapter 3 section 3.3.1.
[268] Commission, 'EU-Turkey Joint Action Plan' (Brussels, 15 October 2015) MEMO 15/5860 Part II.
[269] Joint Way Forward on Migration Issues Between Afghanistan and the EU (Kabul, 2 October 2016) Part III para 2 <https://eeas.europa.eu/sites/eeas/files/eu_afghanistan_joint_way_forward_on_migration_issues.pdf> accessed 17 July 2020.

threatening nature of 'irregular' sea-crossings and the harsh living conditions in countries of destination or transit, stressing the severity of immigration enforcement or the limitations of social security benefits for immigrants in EU member states. They also emphasise the pointlessness of migrating by emphasizing that 'irregular' immigrants are deported from the EU.[270] Information campaigns targeting Third World migrants in countries of origin or transit rely on the assumption that 'irregular' migrants are unaware of the life-threatening character of sea-crossings, the harsh living conditions as an 'irregular' immigrant in the EU or the risks of being deported by European immigration enforcement authorities. EU policymakers consider migrants as 'rational actors',[271] thus if migrants knew of the dangers that awaits, it is believed they would not take such risks. Information campaigns rely on the portrayal of 'irregular' migrants as innocent 'victims' who ignore the danger and have an idealised representation of the EU and its member states. Campaigns also aim to break down the system of human smugglers and traffickers, who, supposedly, use potential migrants' 'false hopes of a better life abroad' to entice them into dangerous journeys.[272] By informing, sensitising, and teaching would-be migrants of the difficult conditions that await them if they attempt to immigrate 'irregularly', the EU wishes to discourage them from undertaking such a hazardous and 'pointless' journey. This phenomenon not only shows the EU's misunderstanding of how migrants decide to migrate – as research by Squire and others demonstrated –[273] but also replicates a form of 'civilising mission'. As observed previously, the 'aware' and 'knowledgeable' EU and its member states give 'lessons' to the 'ignorant' and 'unaware' Third World

[270] Antoine Pécoud and Julia Van Dessel, 'Campagnes de Dissuasion Massive' *Le Monde Diplomatique* (March 2021) 16.
[271] Squire and others, *Reclaiming Migration* (n 138) 83.
[272] Céline Nieuwenhuys and Antoine Pécoud, 'Human Trafficking, Information Campaigns, and Strategies of Migration Control' (2007) 50(12) American Behavioral Scientist 1674, 1675.
[273] Squire and others, *Reclaiming Migration* (n 138) 83-84.

migrants. What these information campaigns, though, 'omit' to mention is the role of EU migration policies in creating and increasing the dangers of irregular immigration. The EU and its member states thus remain in their position of protectors or guardians of migrants.

The 'teachings' to Third World migrants also operate through the increasing development of resettlement programmes conceived as 'alternatives' for migrants in need of international protection to reach safety without taking the risks of 'irregular' migration routes. This is a significant element of the EU-Turkey Statement. As mentioned previously,[274] the Statement's 1-1 resettlement system works as follows: for each Syrian returned to Turkey after entering or attempting to enter the EU 'irregularly', 'another Syrian will be resettled from Turkey to the EU'.[275] It also specifies that migrants who have not entered the EU in an 'irregular' manner or attempted to do so will be prioritised for this resettlement scheme. Using a critical perspective, the development of resettlement schemes and prioritisation of migrants who have not attempted to enter the EU 'irregularly' also constitutes a form of 'teaching' directed at Third World migrants. 'Irregular' migration is unwanted and considered avoidable if Third World migrants were warned of the dangers and pointlessness of migrating 'irregularly' and instead taught to wait for European countries to provide them with a space on a resettlement programme or to migrate through another legal immigration channel. This consideration overestimates the possibility for Third World migrants to migrate 'legally' and undervalues the difficulties and limited opportunities for asylum seekers to obtain protection through a resettlement programme. Moreover, a critical perspective reveals a new form of 'civilising mission' through the constant aim of

[274] See chapter 3 section 3.1.1.
[275] Council of the European Union, 'EU-Turkey Statement' (18 March 2016) Press Release 144/16 para 2.

‘controlling’ Third World bodies and movements. The resettlement programme set by the EU-Turkey Statement and its prioritisation system is a clear exemplification of the way the EU aims at ‘rewarding’ supposedly ‘well-behaved’ migrants who, instead of daringly attempting to reach the European territory through any possible manner including ‘illegal’ routes, patiently waits for the ‘saviour’ to provide them with a space of safety.

Overall, in this section, my analysis provided a re-description of the EU’s approach to Third World migrants. Taking a TWAIL perspective, especially reflections on the continuation of the ‘civilising mission’ within the contemporary international law system, reveals that the EU frames its migration and asylum policy as a ‘lesson’ to Third World migrants on the appropriate way to migrate. Whether through information campaigns raising awareness to ‘ignorant’ would-be migrants or through the over-promotion of limited legal migration routes, EU migration and asylum law replicates a form of ‘civilising mission’ towards Third World migrants. However, as I now turn to, the EU also reproduces a ‘civilising mission’ towards third countries when developing its cooperation agreements on migration.

3.3. The EU’s ‘civilising mission’ towards Third World countries

In this section, my analysis focuses on EU cooperation with third countries and the EU’s approach to its partners. Taking a TWAIL perspective, I offer a redescription of EU cooperation on migration, arguing that it leads to a new form of ‘civilising mission’ towards Third World countries, especially countries of origin and transit. As I explain below, the EU’s focus on developing readmission agreements set a control-oriented

approach towards third countries where the EU 'teaches' its partners to agree to unbalanced cooperation and participate in the First World's migration control. Moreover, expanding EU cooperation on migration control to other aspects of EU external action has enabled the EU to increase its influence over third countries by further reforming their internal policies.

3.3.1. Readmission agreements as control-oriented tools

Although the premises of a common readmission policy date back to the early 1990s, the Treaty of Amsterdam is the primary legislation that provided the EU with the competence to deal with so-called 'irregular migration' through the adoption of readmission agreements.[276] As I explained earlier, the development of EU readmission agreements derives from member states' long-lasting tradition of readmission agreements.[277] Despite calls for a more 'comprehensive approach' to migration since early on, as expressed by the European Council in 1999 in Tampere,[278] the EU maintained its focus on intensifying third country nationals' readmission as a key objective of the common migration policy. Diversification of cooperation tools emerged in the early 2000s, with the Cotonou Agreement being the first example of an EU development agreement including a readmission clause,[279] before the Lisbon Treaty confirmed it.[280] The integration of migration-related

[276] Consolidated Version of the Treaty Establishing the European Community [1997] OJ C340/173 art 63(3)(b).
[277] See chapter 2 section 2.2.1.
[278] European Council, 'Tampere European Council - Presidency Conclusions' (15-16 October 1999) para 11.
[279] Partnership Agreement between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000 [2000] OJ L317/3.
[280] Bernd Martenczuk, 'Migration Policy and EU External Relations' in Loïc Azoulai and Karin de Vries (eds), *EU Migration Law: Legal Complexities and Political Rationales* (Oxford University Press 2014) 103.

measures, especially readmission clauses, to other fields of EU's external action remained an essential part of EU's action on migration following the 'crisis' framing, as the integration of a migration clause in the EU-Afghanistan CAPD shows.[281] In this way, as my analysis in chapter 2 showed, the diversification of cooperation tools did not operate a shift from the EU's focus on increasing returns and readmission.[282]

Moreover, as noted earlier,[283] EU readmission agreements are frequently criticised for their lack of efficiency in increasing return rates,[284] as their objective states. The EU's obstinacy for readmission and return persisted following the 'crisis' framing. Given the crisis' calls for emergency measures, formal readmission agreements were less favoured,[285] but the EU's objective to increase returns remained. Readmission is, indeed, the main aspect of the Afghanistan-EU JWF.[286] Although it is not the only element of EU-Turkey cooperation post-'crisis', readmission of so-called 'irregular' migrants is included in the EU-Turkey JAP,[287] and the EU-Turkey Statement's first action point concerns the return of all 'irregular' migrants entering Greece from Turkey.[288] Likewise, the return of migrants is part of the Italy-Libya 2017 Memorandum.[289] Overall, returning unwanted migrants remained a general objective of the EU's response to the so-called 'crisis'. The 2015 European Agenda on Migration included 'stronger action so that third countries fulfil their obligations to readmit their

[281] Cooperation Agreement on Partnership and Development between the European Union and its Member States, of the One Part, and the Islamic Republic of Afghanistan, of the Other Part [2017] OJ L 67/3 art 28.
[282] See chapter 2 section 2.2.2.
[283] See chapter 2 section 2.2.1. and chapter 3 section 2.1.
[284] Georgia Papagianni, 'Forging an External EU Migration Policy: From Externalisation of Border Management to a Comprehensive Policy?' (2013) 15(3) European Journal of Migration and Law 283, 295.
[285] See chapter 1 section 3.4. and chapter 3 section 2.
[286] Joint Way Forward on Migration Issues Between Afghanistan and the EU (Kabul, 2 October 2016) <https://eeas.europa.eu/sites/eeas/files/eu_afghanistan_joint_way_forward_on_migration_issues.pdf> accessed 17 July 2020.
[287] Commission, 'EU-Turkey Joint Action Plan' (Brussels, 15 October 2015) MEMO 15/5860.
[288] Council of the European Union, 'EU-Turkey Statement' (18 March 2016) Press Release 144/16.
[289] Memorandum of Understanding on Cooperation in Development, Action against Illegal Immigration, Human Trafficking and Smuggling and Strengthening of Border Security Between the State of Libya and the Republic of Italy (Rome, 2 February 2017).

own nationals' as key measure to better manage migration for instance,[290] and 'an effective return policy' remains high on the objective list of the 2020 New Pact on Migration and Asylum.[291] Thus, although the EU diversified its action in migration and asylum matters and furthered this process following the so-called 'crisis', returning unwanted migrants to third countries remains a key priority. Moreover, as the European Agenda on Migration quote openly suggests, returning migrants to third countries includes a pressuring element from the EU over its partners. Through its focus on returns, the EU maintains an imbalanced relationship with its partners, given that although readmission obligations are framed as reciprocal, they are in practice essentially used in one way only. It maintains the EU's dominant position regarding migration control as it is the EU and its member states that decide who to return, when and where to. Through the 'crisis' framing, the EU increased its pressure on and control over third countries when it comes to readmitting migrants because the 'crisis' frame includes connotations of emergency and danger, justifying the use of informal agreements to accelerate return processes.

From a critical perspective, the EU's constant focus on developing cooperation on return and readmission reveals how the EU frames its relationship towards Third World partners. The EU's persistence in developing such cooperation despite their doubtful efficiency suggests the EU's interest in maintaining its dominant position when dealing with Third World countries. Indeed, it confirms that although Third World countries are now considered equally sovereign, they remained involved in unbalanced cooperation frameworks.

[290] Commission, 'A European Agenda on Migration' (Communication) COM(2015) 240 final 10.
[291] Commission, '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 2.

Moreover, the EU's insistence on Third World countries cooperating in readmitting their nationals can be interpreted as a form of 'civilising mission'. By increasing returns to third countries, whether through formal or informal readmission agreements or by including readmission clauses in other cooperation partnerships, the EU is not only 'teaching' unwanted migrants the 'acceptable' way to migrate, as I argued previously,[292] but also 'teaches' third countries that they need to cooperate with the EU and readmit their nationals or other citizens when the EU deems it necessary. Although cooperation on return does not involve an in-depth transformation of transit or origin countries, it constitutes an opportunity for the EU to tell its Third World partners how to deal with and manage Third World nationals. The EU's constant need to further or strengthen return cooperation with Third World countries suggests a certain 'backwardness' from their side. Indeed, the EU needs to insist and diversify its tools to convince partners to cooperate, which reproduces a form of 'lesson' where the EU 'educates' countries of origin and transit to fulfil their obligation to readmit so-called 'irregular' migrants. This is furthered by using other cooperation tools, especially development and financial aid, as incentives to cooperate, as observed most notably during the negotiations of the Afghanistan-EU JWF taking place in parallel with the Brussels Conference on development aid for Afghanistan.[293] In this way, the EU's financial and development support is framed as a form of 'reward' for Third World countries who cooperate with the EU.

In conclusion, the EU's constant focus on developing cooperation on readmission and return establishes EU cooperation with third countries within a control-focused approach. Overall, it maintains the EU in a dominant position and as argued, replicates

[292] See section 3.2.2. of this chapter.
[293] Warin and Zhekova, 'The Joint Way Forward' (n 160) 145.

a form of civilising mission towards third countries. Despite Third World countries' equal sovereignty, the EU can push its partners into unbalanced cooperation. In addition, such cooperation enables the EU to position Third World countries as key actors in migration control for the First World. Expanding cooperation on migration to other fields of EU external action provided the EU with deeper influence onto Third World states, as I argue in the following section.

3.3.2. Expanding cooperation on migration and asylum to other fields of external action: Deepening EU influence on Third World countries

Although migrants' return and readmission were central elements of EU migration and asylum policy throughout its development and after the so-called 'crisis' as shown in previous chapters,[294] calls for a more 'comprehensive approach' to migration were formulated as early as the 1999 European Council.[295] Members of the European Council referred to actions 'addressing political, human rights and development issues in countries and regions of origin and transit',[296] thus suggesting the EU's shift towards using more diverse tools and linking cooperation on development aid with cooperation on migration. The 2005 Hague Programme confirmed this evolution with a call for a 'comprehensive approach' which should cover all stages of migration, that is to say including the factors leading to emigration.[297] This shift in the EU's approach to cooperation with third countries led to include readmission clauses in development aid

[294] See chapter 2 section 2.2.1. and chapter 3 sections 1.3. and 2.1.
[295] European Council, 'Tampere European Council - Presidency Conclusions' (15-16 October 1999) para 11.
[296] ibid.
[297] The Hague Programme: Strengthening Freedom, Security and Justice in the European Union [2005] OJ C53/1 para 1.2.

cooperation agreements, such as the 2003 Cotonou Agreement.[298] It has remained a common practice ever since, as exemplified by the EU-Afghanistan CAPD adopted in 2017.[299] The inclusion of readmission or other migration-related clauses in cooperation agreements is connected to both to the growing linkage between migration and development, and the informal nature of development cooperation. Indeed, since Maastricht, the EU development policy is shaped by a combination of hard and soft law.[300] Informal cooperation and soft law therefore play a significant role for development frameworks at EU and international law level.[301] Moreover, the entanglement between migration and development was deepened following the 'crisis' framing and its influence on the EU's approach to migration. Indeed, framing Third World migration to the EU as a 'crisis' constituted a culmination of the association between migration and development. The conventional 'root causes' approach considers migration as resulting from 'a failure of development', as Chetail explains.[302] This understanding, combined with the 'crisis' framing, understood as the paroxysm of a malfunctioning system as chapter 1 explained,[303] meant that the 'crisis' was also understood as resulting from a cumulation of development failures. In this way, the inclusion of migration-related measures in soft law cooperation frameworks on

[298] Partnership Agreement between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000 [2000] OJ L317/3.
[299] Cooperation Agreement on Partnership and Development between the European Union and its Member States, of the one part, and the Islamic Republic of Afghanistan, of the Other Part [2017] OJ L 67/3 art 28.
[300] Fabien Terpan, 'Soft Law in the European Union – The Changing Nature of EU Law' (2015) 21(1) European Law Journal 68, 88.
[301] Paul James Cardwell and Davor Jancic, 'The European Parliament and Development Cooperation: Democratic Participation in the "Low Politics" of EU External Relations' (2019) 41(3) Journal of European Integration 365, 369; Sarah L Beringer, Sylvia Maier and Markus Thiel, 'Introduction' in Sarah L Beringer, Sylvia Maier and Markus Thiel (eds), *EU Development Policies: Between Norms and Geopolitics* (Springer 2019) 5; Maryna Rabinovych, 'Legal Status and Effects of the Agenda 2030 Within the EU Legal Order' (2020) 16(2) Journal of Contemporary European Research 182, 190.
[302] Vincent Chetail, 'Paradigm and Paradox of the Migration-Development Nexus: The New Border for North-South Dialogue' (2008) 51 German Yearbook of International Law 183, 187
[303] Jessica C Lawrence, 'The EU in Crisis: Crisis Discourse as a Technique of Government' (2014) 44 Netherlands Yearbook of International Law 187, 188; see also chapter 1 section 2.

development was characterised as a suitable answer to the so-called 'crisis'. Additionally, as previously observed in the case studies, development aid is growingly used as an instrument of migration management.[304] The migration-management paradigm, which considers migration as a potentially productive phenomenon,[305] supports the inclusion of migration-related clauses in other cooperation agreements in order to maximise the economic benefits of migration. By doing so, the managerial approach to migration also favours non-binding norms to leave room for states to circumvent human rights obligations.[306]

The 'crisis' framing thus led to the intensification of development funding and financial support linked to migration control. However, each case study reveals a distinct aspect of the use of development funding in combination with migration, as I analysed in chapter 3.[307] In the case of the Italian-Libyan Memorandum, a great emphasis on development is noticeable in the title itself,[308] and the agreement's content insists on supporting and financing growth programmes and on launching development programmes in areas impacted by human smuggling and trafficking, as well as so-called 'illegal' migration.[309] This shows how development funding is used to address 'root causes' of migration and elements correlated to migration. Here, the funding aims to provide would-be migrants with better conditions to reduce incentives to migrate to the EU and provide human smugglers and traffickers with alternatives to their criminal

[304] Mark Furness and others, 'EU Development Policy: Evolving as an Instrument of Foreign Policy and as an Expression of Solidarity' (2020) 16(2) Journal of Contemporary European Research 89, 97.
[305] Martin Geiger and Antoine Pécoud, 'The Politics of International Migration Management' in Martin Geiger and Antoine Pécoud (eds), *The Politics of Internal Migration Management* (Palgrave 2010) 14; Christina Oelgemöller, '"Transit" and "Suspension": Migration Management or the Metamorphosis of Asylum-Seekers into "Illegal" Immigrants' (2011) 37(3) Journal of Ethnic and Migration Studies 407, 409.
[306] Martin Geiger and Antoine Pécoud, 'The Politics of International Migration Management' in Martin Geiger and Antoine Pécoud (eds), *The Politics of Internal Migration Management* (Palgrave 2010) 13.
[307] See chapter 3 section 3.3.2.
[308] Memorandum of Understanding on Cooperation in Development, Action against Illegal Immigration, Human Trafficking and Smuggling and Strengthening of Border Security Between the State of Libya and the Republic of Italy (Rome, 2 February 2017).
[309] ibid art 1(B) and art 2(6).

activities, thus addressing both 'pull-' and 'push-factors'. Given that the lack of development in parts of Libya is understood as the underlying cause of human smuggling and trafficking, development programmes aim to discourage smugglers and traffickers from 'abusing' would-be migrants' 'vulnerability' as their means of living.

The study of the Afghanistan-EU cooperation provides insights into the use of development aid to convince Third World countries into cooperating. As my earlier analysis pointed out, the adoption of the JWF coincided with the renewal of major development funds to Afghanistan.[310] In this case, migration control is not incorporated in a development cooperation agreement. Instead, development aid is used to pressure Afghanistan and, presumably, made conditional on Afghanistan's cooperation on readmission with the EU.[311] Using development funding to entice Third World partners to cooperate suggests that unwanted migrants are exchangeable in financial terms. It also assumes that development is 'positive' for Third World countries and, therefore, that development aid is desirable in exchange for the less desirable readmission cooperation with the EU.

In addition to development aid, financial support generally speaking also plays a significant role in recent agreements. The EU-Turkey Statement is the most obvious example since it relied essentially on Turkish authorities' collaboration in containing migrants in exchange for the allocation of 3 billion euros to contribute towards the development of refugee facilities in Turkey.[312] This example shows the targeted use of financial support in transit countries. In this case, the EU's financial support does not address 'root causes' of migration but aims to enhance reception capacities of

[310] See chapter 3 section 3.3.2.
[311] Warin and Zhekova, 'The Joint Way Forward' (n 160) 145.
[312] Council of the European Union, 'EU-Turkey Statement' (18 March 2016) Press Release 144/16 para 6.

countries *en route* to Europe. By developing the Turkish reception system, the EU further displaces its responsibility of dealing with refugees and asylum seekers to third countries as it contributes to concretising the concept of 'safe third country'. This shows the use of aid as ultimately a means for the EU to circumvent its legal obligations.

Although each case study suggests a distinct use of development aid and financial support for cooperation on migration, the development of the EU's 'comprehensive approach' to migration is not a sporadic phenomenon. Rather it is part of a broader paradigm shift in the perception and understanding of migration that results from the 'root causes' narrative conventionally used to understand migration from the Third World. Since the 1980s, conventional migration scholarship considers that poverty is essentially what leads Third World migrants to emigrate to the First World,[313] as I explained earlier.[314] Since then, the securitisation of borders in the First World has shown its limits, and the emergence of 'terrorist' threats such as 9/11 was also interpreted as a demonstration that Third World poverty and feelings of injustice could vividly impact the First World.[315] Moreover, difficulties in returning so-called 'irregular' migrants to their countries of origin led to more preventive measures to curb migration by addressing the circumstances in origin and transit countries considered 'push factors'. Such measures typically focus on 'social and economic development through development aid and trade liberalization' in Third World countries.[316] Given that the 'root causes' approach to migration typically considers migration as resulting from 'underdevelopment',[317] supporters of this approach assume development aid and

[313] Gaim Kibreab, 'Environmental Causes and Impact of Refugee Movements: A Critique of the Current Debate' (1997) 21(1) Disasters 20.
[314] See section 2.3. of this chapter.
[315] Raghuram, 'Which Migration, What Development?' (n 221) 104.
[316] de Haas, 'Turning the Tide?' (n 72) 820.
[317] Chetail, 'Paradigm and Paradox' (n 302) 187; Raghuram, 'Which Migration, What Development?' (n 221) 105.

trade facilitation will contribute to the 'development' of countries of origin and therefore reduce emigration from the Third World.[318] In other words, measures improving would-be migrants' socio-economic circumstances in their regions of origin are expected to reduce incentives to migrate.[319] This clearly corresponds to EU and member states practices with Libya, Afghanistan and Turkey, which I observed earlier in this subsection. The evolution of EU migration and asylum policy fits within a paradigm linking development and migration, based on the belief that migration can be controlled or managed and that development is essentially 'positive'.[320]

Although many assumptions on the 'root causes' of migration are unfounded or incomplete, as explained earlier,[321] discussions on the migration-development nexus increased exponentially, and EU development aid aimed at reducing migration escalated. The central assumption is that development aid in the Third World would reduce or stop would-be migrants from departing.[322] This is rather dubious given that the view that development causes migration more than it limits it has been frequently postulated by migration scholars. Indeed, for people to migrate, some 'degree of social and economic well-being' is needed, as Raghuram explains.[323] Hence, more development may lead to more emigration. Moreover, using critical approaches to analyse the increasing combination of development aid and migration control in EU migration policy reveals the limited understanding of 'causes' of migration. The conventional understanding of the development-migration nexus fails to question the EU's and First World's role in creating the so-called 'underdevelopment' of origin and transit countries. Namely, it conceals the legacies of colonisation in creating the power

[318] de Haas, 'Turning the Tide?' (n 72) 826; Bakewell, '"Keeping Them in Their Place"' (n 176) 1342.
[319] Bakewell, '"Keeping Them in Their Place"' (n 176) 1342.
[320] Raghuram, 'Which Migration, What Development?' (n 221) 104.
[321] See section 2.3. of this chapter.
[322] de Haas, 'Turning the Tide?' (n 72) 821.
[323] Raghuram, 'Which Migration, What Development?' (n 221) 105.

and wealth imbalances between different regions of the world that shape so-called 'push-' and 'pull-factors'. It also fails to consider the role of the incorporation of formerly colonised states into global capitalism and market economy. As Escobar explains, this integration impacted Third World citizens' access to land, water and other resources, creating conditions for the emergence of massive poverty,[324] which the 'root causes' approach considers the cause for Third World migrants to emigrate.[325] The EU's approach to migration and the framing of its cooperation deliberately avoids engaging with the role of European actors in shaping the conditions in origin or transit countries that lead to emigration, and disregards the role of development aid in creating migration as well.

Overall, EU cooperation on migration relies on the assumption that development is positive and progressive.[326] This also needs to be questioned. From a critical perspective, this understanding relies on the distinction between 'developed' and 'developing' or 'underdeveloped' states, which emerged after decolonisation,[327] in succession to the concept of civilisation,[328] as I explained earlier on in this chapter.[329] Indeed, providing development aid to address migration 'causes' relies on the assumption that the First World is 'developed'. Third World countries, on the other hand, are considered not to have reached a sufficient stage of 'development', which pushes their nationals attracted by the First World's 'development' to emigrate. This replicates patterns of the 'civilising mission'. Given that Third World's lack of development is what 'causes' migration, 'development' of origin and transit countries is considered desirable and even urgent, especially since the 'crisis' framing. This

[324] Escobar, *Encountering Development* (n 217) 22.
[325] Kibreab, 'Environmental Causes' (n 313) 20.
[326] Raghuram, 'Which Migration, What Development?' (n 221), 104.
[327] Anghie, *Imperialism* (n 96) 204.
[328] Mayblin and Turner, *Migration Studies and Colonialism* (n 8) 40.
[329] See section 3.1. of this chapter.

reproduces the ‘civilising mission’ rhetoric explained earlier where the Third World needed to ‘catch-up’ on the First World.

In this way, when cooperating on migration with Third World countries, the EU managed to deepen its influence. Cooperation nowadays aims to get unwanted migrants returned to origin or transit countries or get third countries to contain migrants before their departure towards Europe. Now it also has a preventive and reformative nature. The EU cooperation on migration with Third World countries enabled the EU to deepen its influence by furthering these countries’ reform and transformation. As seen earlier, the EU’s reformation of third countries linked to migration includes economic and social development of specific regions and the training of border guards or the provision of funding to enhance refugee reception facilities, for instance. Therefore, the entanglement between migration and development permitted the First World to foster its cooperation with Third World countries,[330] and enabled the EU to transform its partners deeply. A TWAIL perspective reveals that the EU’s growing linkage between migration and development fits within the expansion of developmentalism in international law since the decolonisation era. A critical perspective also reveals the colonial origins of the EU’s approach to cooperation on migration since it results from a universalised understanding of modernity and development and reproduces a form of ‘civilising mission’.

In conclusion, a critical perspective re-contextualises EU cooperation with third countries. It reveals the ‘civilising mission’ underpinning the EU’s supposed ‘humanitarian’ objective when introducing development aid combined with migration-related measures. It shows that development aid is used by the EU to ascertain its

[330] Chetail, ‘Paradigm and Paradox’ (n 302) 184.

domination over Third World countries and to deepen its control over migration originating from these regions. Whether used as a means of pressure to cooperate on the readmission of Third World migrants or to deal with so-called 'causes' of migration, it enabled the EU to further its leverage over countries of origin or transit. Using the 'crisis' frame only expanded a process that was already initiated earlier with the increasing use of informal agreements and the constant use of development aid as a 'solution' to the supposed 'migration problem'. A TWAIL analysis of the EU's use of development aid in relation to migration also further showed that the assumptions supporting the 'root causes' approach were unfounded. The conventional approach, indeed, considers 'development' as a positive and desirable objective, while migration from the Third World is framed as a negative phenomenon that can and should be managed or controlled. This contrasts rather sharply with the conception of EU citizens' migration within the EU. Moreover, the erroneous understanding of 'causes' of migration positions the EU and other First World organisations and countries as key actors in 'resolving' those causes while failing to consider their own role in shaping the Third World's supposed 'underdevelopment'. The entanglement between migration and development thus includes an ever-increasing reform of regions of transit and origin. It also maintains the distinction between 'developed' and 'underdeveloped' or 'developing' countries resulting from the colonial era, thus perpetuating the EU's dominant position. Only a critical perspective can provide an alternative understanding of the evolution of cooperation on migration with third countries and reveal the significant role of colonial legacies in framing contemporary EU migration and asylum policy.

Conclusions

Non-exhaustive in nature, this chapter offered insights into a TWAIL redescription of the EU migration and asylum law system and its evolution. My analysis showed the alternative understandings a TWAIL lens could offer to the tendencies identified in chapters 2 and 3, which a 'crisis' driven approach failed to fully account for.

My analysis firstly focused on the relevance of Chimni's 'myth of difference' to develop an alternative understanding of the EU migration and asylum law system. After clarifying the meaning and implications of Chimni's theory, the first section shaped a redescription of the EU's approach to Third World migrants from the origins of the common migration and asylum policy to its most recent developments following the 'crisis' framing. Using the 'myth of difference' provides a clear insight into the embedded nature of the othering of Third World migrants within EU law and showed that 'crisis' framing and informalisation only constituted a perpetuation of exclusion. Therefore, using the 'myth of difference' is crucial to reveal the embeddedness of Third World migrants' 'othering' in EU migration and asylum law. Critical perspectives also provided much-needed questioning of the colonial legacies of the racialised 'othering' of Third World migrants, which the EU migration and asylum law system perpetuates.

My analysis also addressed the allocation of responsibility to deal with migration to Third World countries. At first, I analysed how this allocation of responsibility results from the 'myth of difference' and the internalist understanding of 'root causes' of migration. Both assumptions actively support the EU's focus on the return and readmission of unwanted migrants, as my analysis highlighted. After discussing the colonial origins of international law and states' unequal powers resulting from these

legacies, I provided a re-description of the EU migration and asylum law system. Taking a TWAIL perspective on the external dimension shows that EU migration and asylum law constitutes a paradigm of these inequalities. Moreover, a critical approach revealed how the EU benefits from its dominant position to define how migration and its causes ought to be understood and addressed. Despite some third countries' resistance in cooperating with the EU, the increasing use of financial or developmental support as incentives combined with the 'crisis' framing maintained the EU's supremacy over the Third World when dealing with migration. The EU's framing of Third World migration as 'problematic' and the control-focused policy agenda also derive from a misunderstanding of migration 'causes'. Indeed, the EU and its member states fail to engage with their colonial history and consider its legacies in today's Third World. Taking a TWAIL perspective revealed that contrary to the orthodox understanding of migration as a recent 'issue', the EU and its member states have a long-lasting migration history and connections to Third World migrants. Characterising contemporary migration, particularly so-called 'irregular' or 'economic' migrants, as 'problematic' is only possible due to Europe's amnesia of its own history of economic migration. Moreover, blaming Third World countries as responsible for 'root causes' of migration fails to consider the role of colonisation and post-colonial imperialism in creating the Third World's current socio-economic conditions. Taking a critical approach to analyse EU migration and asylum policy is therefore necessary to reveal the EU's supremacy when cooperating with third countries and provide a clearer insight into the EU's responsibility towards Third World migrants.

The final part of my analysis relocated EU migration and asylum law within a broader system of domination, transformation and reform of the Third World. The third section, firstly, provided some clarification as to the notion of 'civilisation' and its role in framing

modern international law by developing the ‘civilising mission’. It argued that the concept of ‘development’ following the Second World War was essential in perpetuating the ‘civilising mission’. Using this theoretical basis, I then developed a redescription of the EU’s approach to migrants as a form of ‘civilising mission’. This operates firstly through the characterisation of the EU as the ‘saviour’ of Third World migrants: while Third World migrants are ‘victims’ of human traffickers and smugglers characterised as ‘savages’, EU migration and asylum policy became a rescuing tool. Pre-emptive measures such as furthering the non-entry regime are then considered forms of protection, even more so since the ‘crisis’ framing and its calls for urgent humanitarian action. The EU’s new ‘civilising mission’ towards migrants also operates by shaping EU migration and asylum policy as a ‘lesson’. Concretely this is achieved through information campaigns raising awareness on the dangers of so-called ‘illegal’ migration to would-be migrants in countries of origin and transit, and through the emphasis put on resettlement programmes despite the narrow opportunities they provide. My re-description of the EU migration and asylum law system as a ‘civilising mission’ continued by analysing EU cooperation with third countries. I explored how the focus of EU cooperation on returns constitutes tools to ensure Third World countries are aware and implement what is considered the appropriate way to deal with migrants and migration. At last, my analysis engaged with the increasing association of migration control measures with development aid within EU cooperation agreements. A TWAIL lens showed the colonial legacies underpinning the assumption that more development in transit and origin countries could reduce migration. It also revealed the furthering of the EU’s dominant position over Third World countries by setting their reform and transformation.

Using classical TWAIL theories in this chapter, I provided a critical re-description of the EU migration and asylum law system. By furthering the analysis I developed in previous chapters, a critical perspective offers a clearer understanding of the long-lasting colonial legacies framing contemporary EU migration and asylum policy. My analysis in this chapter demonstrated the relevance and significance of engaging with critical legal theories when dealing with current evolutions of the EU migration and asylum system as it provides alternative understandings to the orthodox approach which remains, so far the main one in EU law and policy analysis.

Conclusions

In this thesis, I investigated the EU migration and asylum law system and its relation to the so-called ‘crisis’ of 2015. I argued that migration in 2015 was not a crisis, properly understood, but was framed as such in order to enable, expand, intensify and continue pre-existing approaches to asylum and migration in the EU which seek, primarily, to exclude while presenting the EU as a benevolent, humanitarian, and law-abiding actor. By exploring the role of the 2015 ‘crisis’ frame in shaping the development of EU migration and asylum policy, this PhD thesis engaged with the evolution of both its internal and external dimensions from the common policy’s origins until its most recent additions. In doing so, my analysis provided a clearer insight into the EU’s long-lasting racialised conception of Third World migration and the ‘crisis’ frame’s role in shaping the EU’s more recent approach to Third World migrants by furthering pre-existing tendencies. By highlighting the continuities within EU migration and asylum law, my analysis demonstrated the need to engage with critical legal theories for alternatives to conventional narratives on the EU migration and asylum law system to emerge. In particular, this thesis engaged with TWAIL to develop a counter-history of the emergence and development of EU migration and asylum policy, thus shedding a new perspective on the EU’s positioning as a global actor in these fields. More broadly, this thesis developed a critical understanding of the EU’s approach to its ‘others’ as this provides clearer insights into the human rights system and the EU’s posture as a human rights actor.

This PhD thesis firstly clarified the conceptualisation of ‘crisis’ framing to assess its role in shaping the EU migration and asylum law system. Critically analysing the

genuineness of the so-called ‘crisis’, I put the characterisation of Third World migration to the EU into perspective with past as well as Third World migratory contexts. The critiques developed in chapter 1 go further than discussing the nature of the said ‘crisis’ – be it of ‘refugees’, of ‘the EU asylum system’ or of ‘Europe’ – and show that the most critical scholarship on the 2015 Third World migration to the EU remained enclosed within a ‘crisis’ approach. Instead, I claim that rather than a genuine ‘crisis’, 2015 revealed the EU’s use of a ‘crisis’ frame to characterise Third World migration. ‘Crisis’ framing has significant implications for EU policy choices because frames provide a meaning to situations and shape the solutions and measures to be adopted. More specifically, a ‘crisis’ frame exceptionalises circumstances and policy action, contributes to the othering of some key players and causes of the ‘crisis’, and justifies the circumvention of ordinary procedures and safeguards in law- and policy-making.

In the second chapter, I explored the emergence of a common migration and asylum policy and questioned the conventional narrative, which considers that the common market and economic considerations were the main drivers of intergovernmental cooperation in these areas. Although the common market played a role in shaping the EU migration and asylum law system, my analysis showed that security-related considerations were significant in the emergence of the EU’s control-focused approach to Third World migration. Here, member states’ influence, especially their interior ministers, was substantial in structuring the common policy’s focus on controlling and returning the ‘unwanted’. Despite asylum and migration policy being progressively transferred to the EU level, the legacies of early intergovernmental developments remained, and the communitarisation brought few additional safeguards for Third World migrants’ rights, which showed the limitations of conceptualising EU institutions as more protective of human rights and favourable to

migrants than national states. These findings relate to the research question on the evolution of the EU migration and asylum law system and the role of the 'crisis' frame for its development. Indeed, the features of 'crisis' framing discussed in chapter 1, namely the use of control-oriented and return-focused policies and the use of informal cooperation circumventing democratic oversight and with little consideration for migrants' human rights, predated 2015 and constitute long-lasting tendencies of EU asylum and migration law.

Despite the Lisbon Treaty strengthening EU institutions' role in asylum and migration, my analysis in chapter 3 found that the 'crisis' framing led to furthering pre-existing trends. An in-depth analysis of EU asylum and migration policy post-'crisis' demonstrated that the EU control-focused approach towards Third World migrants was accentuated following 2015, as I observed in the thriving use of intergovernmentalism and atypical instruments at internal and external levels. This engages with the research question on the 'crisis' frame's role and the EU's conception of Third World migrants. Indeed, my analysis showed that, rather than constituting a rupture pushing for more humanitarian-oriented measures as one would expect, the 'crisis' framing legitimised the expansion of EU's repressive approach to Third World nationals and countries. It justified unwanted migrants' exclusion by portraying the EU's control-based and managerial program as the only possible approach to address a situation of danger or humanitarian emergency. My analysis also reveals that 'crisis' framing goes further in legitimating the EU's restrictive migration and asylum policy by characterising it as a form of benevolence. Framing the EU as a benevolent actor towards Third World migrants and countries precludes any genuine challenge to EU migration and asylum policy as it appears driven by humanitarian considerations.

Having identified the persisting domination of the EU's control-focused approach to migration and asylum, I called for a critical redescription of this policy's emergence and evolution to engage fully with its underpinnings in chapter 4. Here, my findings contribute to the research question on alternative understandings of the EU asylum and migration law system. Specifically, I used TWAIL as a theoretical framework to develop a counter-analysis to conventional narratives about EU migration and asylum law and the implications of the 'crisis' framing. A TWAIL approach notably revealed the significant and persistent role of the 'myth of difference' in shaping the EU's conception of Third World migrants and perpetuating their othering as excludable. Here, the racialised conception of migration is essential to fully apprehend EU policy choices related to Third World migrants and the hypocrisy of EU institutions' mythological sympathy towards migrants. Additionally, the critical redescription developed also revealed that by allocating responsibility to deal with migration to Third World countries the EU perpetuates a neo-colonial supremacy over its partners, where the EU can determine which migration is considered 'problematic' and its causes and who should be responsible for it. A counter-perspective provides insight into the EU's understanding of Third World migration and its role as a global actor in the fields of migration and asylum. Finally, a critical approach to EU migration and asylum law revealed the new 'civilising mission' developed by the EU to transform Third World migrants and countries in such a way as to curtail what the EU characterises as unwanted migration. Thus, the EU's racialised understanding of Third World migration not only frames and legitimates its policy choices and restrictive approach as the only possible option, but given the EU dominant position, it also exports such consideration as the dominant and accepted approach to migration more globally. The EU's influence on Third World countries' migration policies goes further than characterising

‘uncontrolled’ migration as an issue. A TWAIL perspective reveals the colonial legacies that shape the current international law system in which the EU is acting and from which the EU benefits from a dominant position. Overall this enables the EU to push for reforms in countries considered as poorly ‘managing’ migration according to EU standards.

The key findings of this thesis contribute mainly to EU migration and asylum law scholarship but cover various aspects of this scholarship. My analysis firstly contributes to the overall analysis of EU asylum and migration law and its evolution. This thesis includes some of its most recent developments when the existing scholarship providing an overview of EU migration and asylum law focuses on its early developments. This research, thus, provides a more up-to-date overview of EU migration and asylum law since its origins.

Additionally, my analysis thoroughly engages with the EU’s use of ‘crisis’ framing when dealing with Third World migration, which also contributes to this aspect of EU migration and asylum law scholarship. Although abundant scholarly discussions and analyses of the so-called 2015 ‘crisis’ exist, all remain within the ‘crisis’ framing. Therefore, this thesis contributes to this area of EU law scholarship by taking a different perspective on the so-called ‘crisis’ and demonstrating the relevance of characterising 2015 as ‘crisis’ framing rather than a genuine ‘crisis’ to develop a broader analysis of the ‘crisis’ implications. Although not exhaustive, the analysis of key EU migration and asylum policy elements demonstrates the existence of continuities and long-lasting tendencies, which a short-term and ‘crisis’-driven perspective would not identify. The findings of this thesis thus demonstrate the benefits

of developing a broader approach to migration and asylum to distance itself from the 'crisis' official narrative as shaped by policy actors and engage fully with the underpinnings of this policy area.

Moreover, my analysis of the three case studies shows the relevance of expanding the study of EU migration and asylum law instruments, whether formal or informal. The close-reading analysis of the three case studies provided a deeper understanding of the considerations leading to the use of atypical instruments. By putting these recent policy developments into perspective with the overall development of EU migration and asylum law, this thesis also sheds light on the factors and long-lasting tendencies within the EU migration and asylum law system, which led to the growing use of informal frameworks. This notably highlights the key role of the 'crisis' frame in furthering this pre-existing practice. The close-reading analysis of the three case-studies also reveals EU asylum and migration policy's ideological underpinnings that justified circumventing normal procedures and human rights or asylum guarantees., especially regarding the EU's conception of Third World migration. This would not be identified through a general analysis of EU legal provisions. In this way, this thesis contributes actively to the scholarship on EU soft law and informal agreements related to migration and asylum. Although there exist a few scholarly analyses of some recent atypical instruments, such studies remain sporadic. The very nature of these instruments makes their access complex, as they receive little publicity or remain unpublished for some. This thesis therefore addresses the lack of transparency of informal cooperation agreements or policy instruments by deepening their study. My analysis of the three case studies also further feeds the existing scholarship on this aspect of EU migration and asylum law. The existing discussions on EU atypical instruments tend to focus on one example. By analysing three cases, I develop the

understanding of continuities and commonalities between informal frameworks and their respective singularities. In this way, this thesis contributes to deepening the understanding of the EU's use of non-binding instruments and their function within the EU migration and asylum law system.

The critical redescription I developed in this thesis confirms the relevance of critical theories for EU migration and asylum law and policy scholarship. As my analysis demonstrated, the use of critical legal theories such as TWAIL enables to shape counter-narratives to the conventional understanding of EU's action in migration and asylum. TWAIL is particularly relevant to this policy as it enables to address the EU's racialised approach towards Third World migrants and reveals the colonial legacies framing today's cooperation on migration control between the EU and Third World countries. This thesis, therefore, shows the added-value of using a critical theoretical framework to address this policy area as it provides insights into the EU's dominant position and racialised considerations towards migration, which are not contemplated within the conventional EU migration law scholarship and which a crisis-focused approach fails to capture. This thesis therefore overall contributes generally to EU law scholarship by enriching critical approaches to EU law, which so far remain limited.

Additionally, a TWAIL approach on this policy area also points out the EU's amnesia regarding its colonial past and its legacies. In doing so, the EU ignores current power imbalances creating situations of migration in the Third World and disregards its connections to Third World migration and so-called 'economic' migration more broadly. In this way, a TWAIL approach gives the opportunity for alternative understandings of Third World migration to emerge. Developing a counter-narrative also allows for critical perspectives on causes of and responsibility for migration to arise. This thesis thus also contributes to initiating the deconstruction of conventional narratives on the

European construction of the common migration and asylum policy and to developing much-needed critical perspectives on this policy area.

This thesis may constitute the basis for potential future research. Although it contributes to the analysis of informal instruments and their use by the EU, EU law scholarship on migration and asylum would benefit from further engagement with these types of instruments considering their growing relevance within this policy area. My analysis of the three case studies could foment research on other informal cooperation partnerships developed by the EU, including less publicised ones. This thesis would complement such research projects by providing a close-reading of some existing atypical instruments and a better understanding of continuities and singularities between the three cases. This could be usefully put into perspective with other cases. Further research may confirm some of the tendencies identified in this thesis or suggest the existence of additional elements driving the development of EU atypical instruments to address Third World migrants and develop cooperation with third countries.

This doctoral research could also constitute the basis of further developments in critical studies of EU migration and asylum law and, more generally, critical studies of EU law. Indeed, little scholarship is taking a critical approach to EU law, even less so to the EU asylum and migration law system. As this thesis demonstrated, developing critical perspectives on the common migration and asylum policy is essential to deepen the understanding of the EU's action in this field and the role of policy frames such as the 2015 'crisis' for its development. Here, using a TWAIL approach was particularly relevant to highlight the colonial legacies and racialised conceptions

underpinning this specific area of law. However, this critical redescription remained limited in many ways. Therefore, it could be used as a starting point to develop further critical analyses of EU migration and asylum law from a TWAIL perspective, for instance. Critical approaches are not limited to TWAIL, as explained in the introduction. So, this thesis could contribute to the emergence of other critical perspectives analysing EU's action in the fields of migration and asylum. Given the limited extent of critical scholarship on EU law generally speaking this thesis could also foment the expansion of critical approaches to EU law. Whether using TWAIL or other critical approaches, deepening critical redescriptions of EU law is crucial for a better understanding of EU law and the EU's role in general.

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