

Between sovereignty and international legal cosmopolitanism: a
comparative investigation into irregular migrant detention in the
European Union

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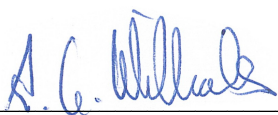
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Statement of Originality

Unless otherwise acknowledged in the text, this thesis represents the original research of the author.

Signed: Andrew Willcocks

Signature: _____

Date: 30 September 2020

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Author & Professor Jürgen Habermas (Norway, September 2014)

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Abstract

This thesis conducts a comparative investigation into tensions between multiple levels of norms, between European Union (EU) policy regarding the detention of asylum seekers against the backdrop of international law, and the transposition of those rules into domestic policy and law by EU Member States via supranational regulation in the Common European Asylum System (CEAS). The theoretical basis of the research rests on Jürgen Habermas' conception that greater state authority should be transferred upwards via supranational and international institutions in order to solve difficult cross-border issues. Qualitative analysis and fieldwork gathered primary and secondary material from actors in case study countries France, the Czech Republic, and actors linked to the European Union and international institutions. The results of this original research confirm that an ongoing struggle for power is occurring for actors who wish to influence the CEAS, both among and between actors at the Member State level, the supranational EU level, and the international level. NGOs at all levels are not achieving their desired supranational reach, instead being substantially limited in their influence by national regulatory realities. Equally, supranational and institutional actors at all levels are limited in their aspirations for coherent national implementation of the CEAS by the confines of national regulatory realities that serve to hold powerful influences at bay. The research suggests that NGOs and supranational institutions may need to move via Habermas' civil society learning processes towards a more coherent supranational cross-border model of civil society advocacy to support common rules such as are contained in the CEAS, in order to achieve greater convergence in the development and implementation of common rules at the national level by EU Member States.

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Table of Abbreviations

CADA	Centre d'accueil pour demandeurs d'asile (French Centre for Asylum Seekers)
CASF	Code de l'action sociale et des familles (French Code of Social Action and Families)
CIL	Customary International Law
CDA	Critical Discourse Analysis
CEAS	Common European Asylum System
CESEDA	Code de l'entrée et du séjour des étrangers et du droit d'asile (French Code of Entry and Residence of Foreigners and of the Right to Asylum)
CJA	Code de justice administrative (French Code of Administrative Justice)
CJEU	Court of Justice of the European Union
CNDA	Court Nationale du Droit D'Asile (French National Court of Asylum)
EASO	European Asylum Support Office
EC	European Commission
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECSC	European Coal and Steel Community
ECtHR	European Court of Human Rights
EU	European Union
EURODAC	European Asylum Dactyloscopy Database
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ILO	International Labour Organization
IOM	International Organization for Migration
IRO	International Refugee Organization
JRS	Jesuit Refugee Service
NGO	Non-governmental Organisation
OFFI	Office français de l'immigration et de l'intégration (French Office of Immigration and Integration)

OFPRA	Office français de protection des réfugiés et des apatrides (French Office for the Protection of Refugees and Stateless Persons)
OHCHR	Office of the High Commissioner for Human Rights
PICMME	Provisional Intergovernmental Committee for the Movement of Migrants from Europe
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UN	United Nations
UDHR	Universal Declaration of Human Rights
UNHCR	UN High Commissioner for Refugees
VCLT	Vienna Convention on the Law of Treaties
UDHR	Universal Declaration of Human Rights
UNHCR	UN High Commissioner for Refugees
VCLT	Vienna Convention on the Law of Treaties

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I. INTRODUCTION

‘To date, and despite rhetoric to the contrary, states simply have not been willing comprehensively to limit their sovereignty in favor of the essential dignity of the human person’ – James Hathaway¹

This research conducts a comparative investigation into tensions surrounding the European Union’s (EU) Common European Asylum System; between EU policy regulating the detention of asylum seekers against the backdrop of international law, and the transposition of those rules into Member State policy and law in the lead up to the 2015 influx of asylum seekers into the EU and its aftermath. The project draws on multiple social science disciplines including political science, international relations, international legal studies, and sociology, in order to both explore normative tensions between and among Member States and the supranational institutions of the EU, and to locate and analyse perceptions of stakeholders at each level. Results of the fieldwork are analysed to uncover the influence these perceptions and tensions have on the formation and implementation and development of policy and regulation at both the national (Member State) and supranational (EU) levels, against the backdrop of international law.

The willingness of a democratic state to limit its sovereignty in favour of cosmopolitanism in international law – described in the literature as international legal cosmopolitanism² – is dependent on the arguments its citizenry can make towards the popular support of such divestments of that sovereignty. Few new academic perspectives on the detention of irregular migrants can be heard in the discourse and, although there is a great deal of literature in the area of legal positivism that this project considers, there is ultimately a benefit to developing new interdisciplinary perspectives that go beyond examinations of black letter law. It bears upon international lawyers to explore a diversity of legal frameworks from new hybrid vantage points, in an attempt to provide renewed diversity and perspectives in the public discourse on the movement of asylum seekers across national borders in the context of international and regional frameworks. This project therefore aims to explore the relationships between EU

¹ James C. Hathaway, *The Rights of Refugees under International Law* (Cambridge England ; New York: Cambridge University Press, 2005), 16.

² Basak Çali, “On Legal Cosmopolitanism: Divergences in Political Theory and International Law,” *Leiden Journal of International Law* 19, no. 4 (2006): 1155.

institutional structures, civil society actors at supranational and national levels, and EU Member States, with a focus on irregular migrant detention and associated international protection frameworks.

Despite the uneven distribution of asylum applications between Member States during the 2015 influx and its aftermath, the EU (supranational) legal framework that steers the management of asylum seekers in the EU – known as the Common European Asylum System (CEAS) – continued to treat all Member States the same, using a legal approach that assumed a common capacity to implement EU principles and rules in the pursuit of a shared regional regulatory outcome.³ The CEAS continues to the present day to be regulated via the conditions of the principle of shared competence (explained further in Chapter Three), effectively catching the institutions of the EU and its Member States between two social spaces; between on the one hand an international legal cosmopolitan framework that largely assumes each state party to the EU treaties has an equal capacity – and duty – to develop a common region-wide outcome that accords with international law, and on the other, sovereign regulatory development and implementation that must deal with realpolitik of domestic political and legal forces. Even agencies of the EU that have been created to assist Member State capacity implementing the CEAS, such as the European Asylum Support Office (EASO), may only act ‘[a]t the request of the Member States concerned’,⁴ rather than being able to act in the event that Member States engage in uneven implementation. As a result, refugees seeking to access distributed regulatory protections frameworks in the EU are at risk of being caught in the tensions between the cosmopolitan supranational aims of the EU resonating with the lofty goals of international law, and the frequently contrasting reality of sovereign implementation of these principles on the ground in the Member States. This phenomenon is expanded later in this and other chapters.

The tensions and complexities of supranational and national law and policy are not only evident in the historical development of the CEAS, but also in the terminology it presently uses, which makes capturing the scope of the system for the purposes of this research challenging. For example, it is necessary to clarify the definitions of ‘irregular

³ Kris Pollet, “A Common European Asylum System under Construction: Remaining Gaps, Challenges, and Next Steps,” in *Reforming the Common European Asylum System: The New European Refugee Law*, ed. Vincent Chetail, Phillipe De Bruycker, and Francesco Maiani (Boston: Brill Nijhoff, 2016), 85.

⁴ *Regulation (EU) No 439/2010 of the European Parliament and of the Council of 19 May 2010 Establishing a European Asylum Support Office*, [2010] OJ L 132/11 of 29 May 2010. Article 10

migrant’ and ‘asylum seeker’ used in this thesis. Member State institutions often assign the label ‘irregular migrant’ to individuals prior to application for asylum, and following rejection of an application, but not in between those times.⁵ This distinction means that asylum seekers arriving in the EU are in nearly all cases firstly described by institutional actors as a subset of irregular migrants.

In order to capture the whole EU and Member State approach to such applicants as they move through the system – from being classified as an irregular migrant, to an asylum seeker (or applicant), and often back to an irregular migrant – this thesis looks at the wider policy implications in the CEAS of detaining irregular migrants who are also asylum seekers, against the backdrop of international legal principles relating to refugees. It follows that the rejection of an application for asylum by a Member State does not automatically mean the person making the application is no longer an asylum seeker in terms of the United Nations 1951 *Convention Relating to the Status of Refugees* and associated 1967 *Protocol Relating to the Status of Refugees* (henceforth 1951 *Refugee Convention*).⁶ In this way, the thesis scope does not cease at the point of asylum application and rejection, and instead endeavours to capture the wider scope of asylum detention, despite regulatory labelling. Thus, it is clarified that the use of the phrase ‘asylum seeker’ in the thesis is taken to mean a person who is classified as an irregular migrant in the EU, who is seeking recognition as a refugee under the 1951 *Refugee Convention*.

This thesis also uses constructivist critical theory (via Jürgen Habermas’ model of a societal move to international legal cosmopolitanism, described in Chapter Two) to overcome the ‘bipolar’⁷ effect of traditional dichotomies surrounding the supranational/national debate by examining perceptions through a critical dialectical – rather than dichotomous – lens.⁸ Thus, both an examination of the rules forming the

⁵ French General Directorate for Immigration, “Annual Report on Migration and Asylum (Part 2) - April 2018,” (<https://www.immigration.interieur.gouv.fr/content/download/109567/872937/file/3_arm_2017__%20FR_NCP-part-2-EN-version.pdf> accessed 14 May 2018).

⁶ *Convention Relating to the Status of Refugees*, Opened for Signature 28 July 1951, 189 UNTS 150 (Entered into Force 22 April 1954); *Protocol Relating to the Status of Refugees*, Opened for Signature 31 January 1967, 606 UNTS 267 (Entered into Force 4 October 1967).

⁷ The ‘mean line’: Sarah Nason, “Practical Political Jurisprudence and the Dual Nature of Law,” *Ratio Juris* 26, no. 3 (2013): 447.

⁸ Vincent Chetail, “Are Refugee Rights Human Rights? An Unorthodox Questioning of the Relations between Refugee Law and Human Rights Law,” in *Migrations and Human Rights, Collected Courses*

framework that impacts on asylum seekers' detention in the EU, and the perceptions of stakeholders at each level (national, supranational, international) form the core platform for the research.

Traditionally, efforts to understand and explain the regulatory response of sovereign states to the global issue of irregular migration and asylum seekers have been made through an adversarial lens of transnational (international or supranational) versus the sovereign (or national).⁹ Adversarial actors tend to be cast in polarised binaries of legitimacy, and familiar tropes include: regular versus irregular migration, cosmopolitanism or hospitality versus sovereignty, refugees versus citizens, positivism versus constructivism, and the social legitimacy of domestic law versus the normative backdrop of international law.¹⁰ These competing pairs are usually explored to explain the operation of frameworks that directly affect the lived experience of irregular migrants – both when in transit and on arrival at destination States.¹¹ However, in order to attempt new insights on this topic, this research deploys a critical dialectical mode of analysis to go beyond traditional adversarial binaries on the topic. This is discussed further in this chapter.

The soaring possibilities of the international legal cosmopolitan project inherent in the aims of international law are frequently blunted by the habit of legal discourse to utilise legal positivism as its own justification, which is concerned mainly with the operational existence, rather than the social construction, of laws.¹² Legal positivism by no means presents a limitation on the possibilities for the expansion of legal discourse, but it does present a limitation on perspectives that could – and arguably should – be on offer in the academic panoply and to society at large.¹³ This is particularly so where increasing

of the Academy of European Law (Forthcoming), ed. R. Rubio Marin (Oxford: Oxford University Press, 2013), 14.

⁹ D. McMaster, "Asylum-Seekers and the Insecurity of a Nation," *Australian Journal of International Affairs* 56, no. 2 (2002): 280.

¹⁰ Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, trans. William Rehg, Studies in Contemporary German Social Thought (Cambridge, Mass.: MIT Press, 1996), 38-39.

¹¹ Pollet, "A Common European Asylum System under Construction: Remaining Gaps, Challenges, and Next Steps," 81.

¹² Cf. international normative projects contained in other frameworks such as the Sustainable Development Goals and Global Compact on Refugees: UN General Assembly, *Transforming Our World: The 2030 Agenda for Sustainable Development* (21 October 2015, A/RES/70/1); Office of the UNHCR, *Report of the United Nations High Commissioner for Refugees* (73rd Session Supp No 12, UN doc A/73/12 (Part II) (13 September 2018)).

¹³ Of the positivist limitation on legal discourse, Habermas states: '[T]he positivity of procedurally produced and compulsory legal norms remains accompanied and overlaid by a claim to

irregular migration demands an evaluation and discussion by the state – beyond the state – of the merits of consenting to cosmopolitan laws, and yet discourses available are overwhelmingly comprised of merit-neutral legal positivism.

As the above introduction relates, the EU CEAS remains reliant on shared competence with its Member States for implementation of the common system. Asylum policies negotiated by the EU and its Member States therefore remain a site of supranational and national normative tension, spurred on by an ongoing high volume of annual asylum applications (discussed in Chapter Two). This site also tests sovereign and cosmopolitan interests, and demands a dialectical – rather than adversarial – construct between actors to navigate contributing and competing perceptions and motivations. It is the effect of these influences on the civil ‘learning processes’ described by Habermas (discussed in Chapter Two) that this thesis intends to examine and explore, through analysing and investigating the construction of norms at each level of the EU and Member State regulatory framework, particularly in relation to the detention of irregular migrant asylum seekers.

II. RESEARCH QUESTIONS

This research aims to investigate the tensions amongst and between the national and supranational institutional levels of the EU and its Member States, in the scoping context of the detention of irregular migrant asylum seekers under the CEAS. The fieldwork began in 2014 in relation to case studies in EU institutions, France, and the Czech Republic, leading up to the 2015 asylum seeker influx into the geographic territory of the EU (described in Chapter Two). The research reveals unique insights into the 2015 influx, particularly in relation to the normative dynamics among governmental and civil society actors at the national and supranational levels. While there are many factors influencing perceptions in relation to these matters across the influx, including the focus of media and popular culture, due to length limitations this thesis focuses on individual perceptions of systems within NGOs, EU and international institutions, and Member State authorities. These three types of actors were chosen as

legitimacy...[t]he legal mode of validity refers both to the political expectation that citizens are willing to comply with enforceable commands and to the moral expectation of a rationally motivated recognition of a normative validity claim that can be vindicated only through argumentation’ – Jürgen Habermas, “Law and Morality,” *The Tanner Lectures on human values* 8 (1988): 278.

they are representative of a cross-section of society in the EU engaged in stakeholder negotiations on regulatory frameworks, also falling within a manageable scope of research design for the thesis.

The theoretical framework of the thesis is founded in the constructivist philosophy of law and governance relating to international legal cosmopolitanism, particularly Habermas' theory that international law should be transformed into a global legal order, from being the law of States to the law of global individuals.¹⁴ Recent scholarship in this context suggests the traditional *Grundnorm* of international law is changing, with the primacy of state sovereignty moving towards human rights 'in the direction of an individual-centred, humanized system',¹⁵ via what Habermas refers to across his works as social 'learning processes'.¹⁶ For Habermas, this 'learning process concerns peoples more than their governments, namely, overcoming an obstinate frame of mind historically bound up with the evolution of the nation-state'.¹⁷

The following research questions focus on these Habermasian social learning processes at the national, supranational, and international levels, and have been developed to meet the thesis scope and aims:

1. What are the political and legal tensions (national, supranational, and international) associated with detention of irregular migrants seeking asylum in EU Member States?
2. How do we explain the political and legal friction associated with the detention of irregular migrants in the EU?
3. What are the normative dimensions of the perceptions of actors between and amongst each level?

¹⁴ Jürgen Habermas, *The Divided West* trans. Ciaran Cronin (Cambridge; Malden: Polity, 2006), 124.

¹⁵ Anne Peters, "Humanity as the (Alpha) and (Omega) of Sovereignty," *European Journal of International Law* 20, no. 3 (2009): 514.

¹⁶ Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, 373; Jürgen Habermas, *The Crisis of the European Union: A Response*, trans. Ciaran Cronin, English ed. (Polity, 2012), 45; Habermas, *The Divided West* 145; Jürgen Habermas, "The Constitutionalization of International Law and the Legitimation Problems of a Constitution for World Society," *Constellations* 15, no. 4 (2008): 451.

¹⁷ Habermas, "The Constitutionalization of International Law and the Legitimation Problems of a Constitution for World Society," 453.

The research is conducted to explore the difficulties and tensions related to regulating irregular migrant detention at the EU level against the backdrop of individual refugee rights proposed by international law, with a view to better understand what factors and perceptions influence the manner in which EU policy and Directives are received and translated into policy and law by Member States. Habermas' theoretical framework is used throughout the thesis in the context of Interpretive Social Science methods,¹⁸ in order to illuminate how the EU has implemented international legal principles relating to the detention of asylum seekers, and to compare contrasting case studies in two States – the Czech Republic and France – to determine how the EU regulations, policies and directives have been implemented at the national level.

France and the Czech Republic were chosen as case studies by the researcher primarily on the basis of their contrasting percentage of asylum applications. The Czech Republic receives several hundred applications annually, whereas France receives thousands of applications annually (statistics detailed further in Chapter Two). Another consideration influencing this choice was the availability of potential interviewees to the researcher in each case study country (further details on snowball sampling technique later in this chapter).¹⁹ A secondary consideration was that France and the Czech Republic have differing political and institutional histories in the context of the EU. The Czech Republic developed many of its national institutions and regulatory frameworks following the decline of the Soviet Union in 1989 and its eventual independence in 1993, joining the EU in 2004.²⁰ By contrast, French national institutions have undergone continuous development since the end of World War II, and France is a founding member of the EU (the then European Coal and Steel Community established in 1951).²¹

The right of a state to receive and process asylum seekers in the manner it sees fit often exists in contrast to international legal principles that propose cosmopolitan or international legal norms. Thus, a tension frequently arises between instruments that

¹⁸ William Lawrence Neuman, *Social Research Methods: Qualitative and Quantitative Approaches*, 7th ed. (Boston: Pearson, 2011), 101.

¹⁹ Other practical fieldwork reasons for selection of case study countries included personal safety considerations in 2014 and 2015, and considerations in the research design.

²⁰ Martin Dedman, *The Origins & Development of the European Union 1945-2008: A History of European Integration* (London: Routledge, 2010), 189.

²¹ *Ibid.*, 51.

attempt to express cosmopolitanism such as the 1951 *Refugee Convention*,²² and the principle of Westphalian sovereignty that the state is absolutely sovereign, and that there is no law amongst States to which they have not consented.²³ At present, the domestic adoption (ratification) of cosmopolitan legal principles regarding the detention of asylum seekers within a state depends entirely on the will of that state. Accordingly, in the EU context there is tension between policy at the supranational level, and subsequent implementation at the national level within each EU Member State.

The Westphalian system of state consent is still present within the EU structure, and has frequently resulted in sovereign law that does not clearly match international legal principles, thereby causing a conflict of systems experienced by individuals whose irregular migration across national boundaries relies on the principles of international refugee law, against the regulation and policy of the destination state in which they seek asylum. This thesis uncovers struggles for power that occur across a range of actors involved between and among each level in the structure of the EU.

III. HYPOTHESIS

This thesis tests the hypothesis that the interception and detention of irregular migrant asylum seekers by EU Member States occurs at the intersection of the will of the state as sovereign, the will of EU institutions seeking to regulate supranational frameworks, and the will of the global citizen (the refugee) and their defenders, operating in line with Jürgen Habermas' model of a societal move towards international legal cosmopolitanism through civil society learning processes.²⁴ When interacting with each another in a dialectic, these competing wills – which relate to sovereign and cosmopolitan ideals in the EU – generate norms that have a resulting effect not only on EU-wide asylum policy, but also on individuals seeking asylum in the EU who rely on the universalist principles of international refugee law.

Habermas has argued that we live in a post-Westphalian world, and that a global society with a corresponding global citizenry is an emerging reality – indeed, year-on-year

²² Opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954).

²³ Jianming Shen, "The Basis of International Law: Why Nations Observe," *Dickinson Journal of International Law* 17, no. 2 (1999): 309.

²⁴ Habermas, *The Crisis of the European Union: A Response*.

asylum applications to the EU (described in Chapter Two) suggest an unabated stream of global citizens are already reliant on just such a cogent universal society.²⁵ Habermas theorises a cosmopolitan system of international governance, which would involve a three tiered system with global institutions at the supranational level (decisions binding on states even where they have not consented), intermediate democratic institutions at the transnational level (such as a reformed EU), and at the national level institutions that have vested the majority of their sovereignty into the supranational and transnational tiers.²⁶ This thesis utilises this theoretical model of current and idealised future political and regulatory arrangements to explore how the EU and Member States – including those examined in case studies in the Czech Republic and France – presently perceive, interact, and respond to the administration and regulation of the detention of irregular migrants against the backdrop of international legal principles relating to refugees. The Habermasian theoretical framework underpinning the project is discussed in Chapter Two, and is to be distinguished from methods and tools of data analysis (Fairclough’s Critical Discourse Analysis and Yin’s coding techniques)²⁷ that are discussed in the methods section of this chapter.

IV. OVERVIEW: METHODOLOGY AND METHODS

Limited sections of this thesis engage in a comparative legal analysis drawing on the author’s background as a lawyer operating in positivist disciplines, but the main body of the thesis primarily utilises critical theory to try to understand and critique the nature and position of the tensions mentioned above. In this regard, the thesis seeks to find answers to the research questions on the basis of several qualitative methods outlined briefly below, which are explored in more detail in the second half of this chapter.

Semi-structured In-Depth Interviews:

- Actors operating at the international, supranational, and national (France, Czech Republic) levels, including NGOs and institutional authorities, were interviewed across 2014 and 2015 using a semi-structured in-depth interviewing technique,

²⁵ Georg Cavallar, *Imperfect Cosmopolis: Studies in the History of International Legal Theory and Cosmopolitan Ideas* (University of Wales Press, 2011), 3.

²⁶ Habermas, *The Divided West*

²⁷ Norman Fairclough, *Critical Discourse Analysis* (Routledge, 2013); Robert K. Yin, *Qualitative Research from Start to Finish, Second Edition*, 2nd ed. (New York: Guilford Publications, 2015).

as per an Interpretive Social Science approach that is concerned with the way social beings interrelate and interact in society.²⁸ These interviews were recorded and transcribed.

Qualitative Analysis:

- Critical Discourse Analysis (CDA) of the semi-structured in-depth interviews was conducted, including qualitative thematic analysis via disassembly, compiling, and reassembly processes as described by Yin.²⁹ This nonreactive method built on the interviews, in order to analyse in greater detail content that may have been missed on a linear reading of the transcripts.³⁰
- CDA of publications by government and non-government actors operating in the Czech Republic, France, and at the EU level (including international actors operating at the EU level), with coding analysis conducted via the computer program HyperResearch. CDA was used to identify the ways in which NGOs sought to influence and shape political outcomes among and between power structures.³¹

Direct Observation:

- Conducted at the European Parliament in 2014, and particularly of the Standing Committee on Civil Liberties, Justice and Home Affairs. Notation included direct observation, inference notes, and analytic notes.³²

Legal Analysis:

- This method was conducted on the basis of professional legal training. It was used minimally to aid in describing regulatory frameworks at the opening of the thesis.

²⁸ Maggie Walter (ed.), *Social Research Methods*, 2nd ed. (South Melbourne, Vic.: Oxford University Press, 2009), 21.

²⁹ Yin, *Qualitative Research from Start to Finish, Second Edition*, 184.

³⁰ Neuman, *Social Research Methods: Qualitative and Quantitative Approaches*, 49.

³¹ Norman Fairclough, *Discourse and Social Change* (Cambridge, Mass: Polity Press, 1992), 225.

³² Neuman, *Social Research Methods: Qualitative and Quantitative Approaches*, 445.

V. METHODS IN-DEPTH: INTERDISCIPLINARY APPROACHES

This section of Chapter One sets out in full the qualitative methods used to analyse the fieldwork data. The methods described are analytical tools of research. They should be distinguished from the Habermasian theoretical framework underpinning the thesis, explored in Chapter Two. In approaching the research design phase, the researcher weighed risks and suitability of methods in response to both the research questions and aims, and the theoretical basis of the thesis. An interdisciplinary approach was taken, leaning towards qualitative methods that are best suited to uncovering a unique social world of human interaction and normative tension, rather than reporting quantitative results that suppose generalisation across a population.³³

This research takes a refugee in flight to be a person vaulting two interlinked and unseen social obstacles, a conception that in turn informed the chosen research methods. The first conceptual hurdle is a (positivist) legal framework – by analogy, a *wall of law* – at which the refugee encounters regulations that are empirically produced, backed by force, and legitimated by the de facto power of the institution that wields them.³⁴ The second hurdle arises as a softer superstructure underpinning the first, comprising an interplay of moving and socially contested spaces occurring among and between national, supranational, and international spheres. In these hidden social spaces, institutional and civil society actors come together via constructivist learning processes (cf. Habermas’ theory, discussed in Chapter Two) to critique, inform, and legitimate the production of the law and power to be wielded by institutions,³⁵ which are then in turn faced towards the refugee and their advocates confronting the first hurdle.

The research questions required the analysis of fieldwork results to take place in a manner that encompassed the above two hurdles, taking care to limit the focus to the context of normative dynamics and tensions. It was therefore not enough to merely describe the first (positivist legal) hurdle via descriptions of legislation, regulation, judgments of relevant Courts and legal opinions of decision-makers. Nor was it enough

³³ Walter (ed.), *Social Research Methods*, 26.

³⁴ Kevin T. Jackson, “Rethinking Economic Governance: A Naturalistic Cosmopolitan Jurisprudence,” *Boston College International and Comparative Law Review* 36, no. 1 (2013): 117; Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, 38.

³⁵ Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, 39.

for the researcher to only explore a portrayal of the actors' actions and their explanation of the (socially constructed) meanings of their actions, somehow divorced from an exploration of the regulatory and social worlds in which these actors operated. Because of this, the two conceptual hurdles were combined using an interdisciplinary approach that draws on legal analysis, fieldwork, and qualitative analysis, in order to provide a thick and rich description of the unique, social world and uncover the normative dynamics and tensions operating within it.

The primary risk of combining these approaches was that the breadth of the project could expand beyond a manageable scope and length. As discussed in the broad overview above, the research design dealt with this challenge by reducing the research focus to the tensions (national, supranational, international) amongst and between the key NGO and institutional authorities in case study countries (France, Czech Republic, EU related institutions and NGOs), then in turn further limited this to fieldwork interviews and secondary source analysis.

On the other hand, narrowing the breadth of data too much ran the risk of stifling the ambition of the research questions to explain the normative dimensions of the tensions among and between each level. Accordingly, the research methods were selected in order to strike a balance between, on the one hand, gathering fieldwork data that met the scope of the research questions and the methodology, and on the other, providing enough data for analysis to be triangulated effectively, allowing the thesis to lean qualitatively closer to the normative truths operating on these important social matters.³⁶ The chosen methods of analysis are described in the later subsections of this chapter, and therefore are not repeated at the commencement of later Chapters Four, Five, and Six that analyse the qualitative results of the fieldwork.

Clifford Geertz states that qualitative research is ultimately a constructivist endeavour, in which 'what we call our data are really our own constructions of other people's constructions of what they and their compatriots are up to'.³⁷ For Geertz, the job of the qualitative analyst is not merely to describe what happened, but moreover to sort out and arrange structures of signification in the data, then 'thickly' determine the social grounds for those structures and their importance. In this way, a researcher embarks on

³⁶ Yin, *Qualitative Research from Start to Finish, Second Edition*, 86.

³⁷ Clifford Geertz, *The Interpretation of Cultures : Selected Essays* (New York,: Basic Books, 1973), 314.

a ‘double task [t]o uncover the conceptual structures that inform our subjects’ acts...and to construct a system of analysis in whose terms what is generic to those structures... will stand out against the other determinants of human behavior’.³⁸ Famously, Geertz sets out a ‘thickness’ threshold to be considered by a researcher undertaking the task of Interpretive Social Science:

*[I]f ethnography is thick description and ethnographers those who are doing the describing, then the determining question for any given example of [ethnography] ...is whether it sorts [for example] winks from twitches and real winks from mimicked ones.*³⁹

Following Geertz’s approach, this thesis attempts to provide thick interpretive descriptions via qualitative analysis of fieldwork data (Chapters Four, Five, and Six), in order to illuminate the social meaning behind discourse, rather than merely thinly describing laws and regulation, or what was said and done by the various respondents in examples of discourse. Such thick social descriptions aim to also take into account the researcher’s own position and biases in forming a construction of what is believed to be going on in the discourse, with the ultimate goal of forming a system that can better understand the social structures and dynamics taking place behind the data.

In addition to thickness condition of analysis described above, attention was paid to the *richness* of the data collected. A key discussion in the literature arises from Michael Patton in 2002, who stated that ‘[i]n many instances, more can be learned from intensively studying exemplary (information-rich) cases than can be learned from statistical depictions of what the average case is like’.⁴⁰ Patton’s argument for in-depth case studies has been repeated by others in the literature such as Ruiz, who also highlights that the qualitative examination of a text is not for the purposes of the text itself, but to uncover social meaning through intensive ‘abductive’ processes that obtain rich data, which sees the researcher moving backwards and forwards between the social meaning and the text to achieve richness in the description of what is socially going on behind the discourse.⁴¹ Building on the concept of attaining rich abductive movement,

³⁸ Ibid., 321.

³⁹ Ibid., 317.

⁴⁰ Michael Quinn Patton, *Qualitative Research and Evaluation Methods*, 3 ed. (Thousand Oaks, Calif.: Sage Publications, 2002), 234.

⁴¹ Jorge Ruiz Ruiz, “Sociological Discourse Analysis: Methods and Logic,” *Forum : Qualitative Social Research* 10, no. 2 (2009).

the literature holds that qualitative analysis should aim to comprehensively analyse and process the data sampled, to the point where it is ‘saturated’ – in other words, until the researcher is ‘no longer revealing new information on meanings or understandings’.⁴² In this way, the findings in Chapters Four, Five, and Six, are not generalisable across a large population due to sample size, but due to the richness of texts and interviews, the diversity of the authors, and the abductive analysis of the data leading to saturation, the findings are highly indicative.

By using the tools of Fairclough’s Critical Discourse Analysis (CDA)⁴³ alongside Yin’s disassembling and reassembling technique⁴⁴ (the use of these methods are explained further in the following subsections, and in Chapters Four and Five), the researcher aims to provide a thick and rich description of what is happening socially behind the given social-structural event, namely: the tensions in the power dynamics occurring among and between the national, supranational, and international levels, in relation to the detention of irregular migrant asylum seekers in the EU. The methods chosen concur with Patton’s stance above, in that the ‘information-rich’ aspects of the CDA analysis of the selected examples of discourse (both secondary texts in Chapter Four, and interview-based in Chapters Five and Six) are a better match with the demands of the research questions, than the alternative of obtaining a quantitative generalisable ‘average case’ across a given population.

To reduce complexity in demonstrating how the analysis chapters (Chapters Four, Five, and Six) relate to the introduction, methodology, and regulatory description (Chapter Three), a chart of the research process and methods has been adapted from an original layout contained in Maggie Walter (ed.) *Social Research Methods*, in Figure 1.⁴⁵

Figure 1 - How Methods Selected Relate to the Overall Research Process (adapted from Walter)⁴⁶	
1. The Topic and Question:	Study of tensions amongst and between the national and supranational institutional levels of the EU and its Member

⁴² Walter (ed.), *Social Research Methods*, 141.

⁴³ Fairclough, *Discourse and Social Change*.

⁴⁴ Yin, *Qualitative Research from Start to Finish, Second Edition*.

⁴⁵ Walter (ed.), *Social Research Methods*, 83.

⁴⁶ Ibid.

	States, in the scoping context of the detention of irregular migrant asylum seekers under the Common European Asylum System (CEAS).
2. Research Questions:	1. What are the political and legal tensions (national, supranational, and international) associated with detention of irregular migrants seeking asylum in EU Member States? 2. How do we explain the political and legal friction associated with the detention of irregular migrants in the EU? 3. What are the normative dimensions of the perceptions of actors between and amongst each level?
3. Theoretical Frame:	Meaning is socially constructed (Chapter Three): Habermas' theoretical framework is based on his contention that hospitality for strangers (refugees) in a supranational regulatory environment is only legitimate when the supranational society can engage in civic solidarity (and Habermasian will-formation discussed in Chapter Two) beyond the borders of the (national) Member States. Thus, the supranational feat of the EU causes the shift in law away from state power (Habermas' second innovation, described in Chapter Two), which in turn infers friction from societal movement under learning processes towards supranational solidarity amongst European peoples (Habermas' first innovation, described in Chapter Two), which might then present democratically legitimate supranational solutions to cross-border problems that are presently subjected to the political and economic tensions and limitations of the national level.⁴⁷
4. Research Method(s):	• Semi-Structured In-depth Interviews • Direct Observation • Qualitative Analysis of Secondary Materials – Published texts

⁴⁷ Habermas, *The Crisis of the European Union: A Response*.

	(Tools: Critical Discourse Analysis of language of published texts, using computer-aided disassembling/reassembling coding per Yin)⁴⁸ • Qualitative Analysis of Primary Material – In-Depth Interview Data (Tools: Critical Discourse Analysis of interview data, establishing thematic categories through manual disassembling/reassembling coding per Yin)⁴⁹ • Legal Analysis • Engagement with Academic Texts
5. Main Variables or Processes:	Meanings and interpretations of the tensions among and between actors at the national, supranational and international levels in relation to the detention of irregular migrants seeking asylum.
6. Defining and Measuring:	• Abductively derived concepts to examine dialectical power and tension dynamics (via Critical Discourse Analysis as per Fairclough including abductive discourse technique via Ruiz and coding method described by Yin).⁵⁰ • Understanding normative dimensions of tensions and frictions through interpreting power dynamics occurring both in published textual discourse (Chapter Four, using a CDA language analysis and computer-assisted coding) and through a thematic analysis of participants' responses (Chapters Five and Six, using CDA and Yin disassembling/recompiling coding of thematic categories).
7. Sampling:	<u>Examination of a unique social phenomenon, not sampling representative of a generalised population:</u>

⁴⁸ Fairclough, *Discourse and Social Change*; Yin, *Qualitative Research from Start to Finish, Second Edition*, 184.

⁴⁹ Yin, *Qualitative Research from Start to Finish, Second Edition*.

⁵⁰ Fairclough, *Critical Discourse Analysis*; Ruiz, "Sociological Discourse Analysis: Methods and Logic."; Yin, *Qualitative Research from Start to Finish, Second Edition*, 184.

	Purposive non-probability sampling of published texts and participants,⁵¹ with the ‘goal or purpose for selecting the specific instances...that will yield the most relevant and plentiful data – in essence, <i>information rich</i>’ as per Yin, including snowball and convenience sampling.⁵² Sampling strategy further delineated by the national, supranational, and international levels, and narrowed by the case study areas (Czech Republic, France, EU-level actors and institutions).
8. Ethics and Politics of the Research (via Hypothesis):	The interception and detention of irregular migrant asylum seekers by EU Member States occurs at the intersection of the will of the state as sovereign, the will of EU institutions seeking to regulate supranational frameworks, and the will of the global citizen (the refugee) and their defenders, operating in line with Jürgen Habermas’ model of a societal move towards international legal cosmopolitanism through civil society learning processes.
9. Analysis and Interpretation:	Critical Discourse Analysis of published texts by relevant actors, and thematic analysis (per CDA and Yin) of interview data by participants. All analysis informed by Habermas’ theoretical framework discussed in Chapter Two.
10. Writing Up:	PhD thesis containing results of analysis

Figure 1 – How Methods Selected Relate to the Overall Research Process (adapted from Walter)

A. Critical Discourse Analysis (CDA): tensions and power struggles

Critical Discourse Analysis (CDA) is a qualitative research method used as a tool in the analytical chapters of this research and was first proposed in 1992 by Norman

⁵¹ Neuman, *Social Research Methods: Qualitative and Quantitative Approaches*, 268.

⁵² Yin, *Qualitative Research from Start to Finish, Second Edition*, 93.

Fairclough in his book *Discourse and Social Change*.⁵³ Fairclough's method aims to bring 'a normative element into analysis...focus[ing] on what is wrong with a society...and how "wrongs" might be "righted"...from a particular normative standpoint'.⁵⁴ Through the method, Fairclough seeks to address perceived one-sidedness in traditional Foucauldian discourse analysis methods, which Fairclough says are problematic as they focus primarily on social 'structures' instead of basing themselves in normative examples of social 'practice'.⁵⁵ Fairclough achieves this by widening the task of CDA to not only assess the structures of social power, but to do so on the basis of 'concrete instances of [social] practice and the textual forms and processes of interpretation associated with them'.⁵⁶ Accordingly, the central aim of CDA is to draw together analysis and social theory to 'explore dialectical relations between discourse and power, and their effects on other relations within the social process and their elements'.⁵⁷ In the context of the research aims of this project, the relationship between discourse and power naturally includes tensions and frictions among and between actors operating at the international, supranational, and national levels in relation to the detention of irregular migrant asylum seekers in the EU.

Fairclough achieves the drawing together of concrete textual forms with an assessment of the broader social structures by asking the researcher to perform analysis of data at three main levels. These levels of analysis are variously characterised in social research methods textbooks as being the micro analysis level, the meso level, and the macro level – where micro analysis relates to linguistic concerns (most relevant to Chapter Four in this thesis examining secondary published texts), meso analysis relates to the social production of texts, and the macro analysis is associated with social theory (most relevant to Chapters Five and Six relating to thematically interpreting interview data).⁵⁸ The idea of CDA is that the researcher can approach data analysis by searching for meaning at each of the three levels, the micro, meso, and macro levels, both satisfying Fairclough's desire to ground the discourse analysis in normative practice, and his project to retain the Foucauldian assessment of power dynamics within discourse data.

⁵³ Fairclough, *Discourse and Social Change*.

⁵⁴ Fairclough, *Critical Discourse Analysis*, 7.

⁵⁵ Fairclough, *Discourse and Social Change*, 57.

⁵⁶ Ibid.

⁵⁷ Fairclough, *Critical Discourse Analysis*, 8.

⁵⁸ Walter (ed.), *Social Research Methods*, 356.

Fairclough claims that CDA as a social research tool has three basic properties: ‘it is relational, it is dialectical, and it is transdisciplinary’.⁵⁹ Serving as a deliberately relational and constructivist method, CDA does not focus on individual or institutional discourse as an isolated object or text in itself, but rather casts discourse as complex sets of social communication between people that create moments of meaning. Fairclough characterises communicative relations as dialectical – that is to say, as ‘objects which are different from one another but...not fully separate in the sense that one excludes the other’.⁶⁰ For example, he points out that while power and discourse are separate aspects to a social process, the relationship between power and discourse flows between one another (indeed, often containing aspects of one another) and therefore cannot be analysed in isolation.

The mapping of the three core tenets of CDA onto the research aims of this thesis is useful to demonstrate how this method suits the objectives of this research. The research questions in this chapter aim to explore normative dynamics between various actors operating at the national, supranational and international levels in relation to the detention of irregular migrants seeking asylum – this need is largely matched by Fairclough’s relational definition of discourse described above (that is to say, communication by one actor alone is not possible without the dialectical machinations of other actors operating among and between the levels mentioned in the research questions).

As a method, CDA not only enables an exploration of normative meaning-making between the given actors in this research, but also enables analysis of the power tensions in the discourse among and between each level of the national, supranational, and international structures, making it a good fit for the aims of the research and compatible with Habermas’ theoretical frameworks (Chapter Two). Accordingly, Chapter Four uses the linguistic foundation of Fairclough’s methods to explore and reveal power struggles in secondary published text, and Chapters Five and Six use the method to apply a thematic analysis of power structures in speech

⁵⁹ Fairclough, *Critical Discourse Analysis*, 3.

⁶⁰ *Ibid.*, 4.

acts from interview data, organised in a thematic way through Yin's disassembling/reassembling coding technique.⁶¹

CDA is also an overtly interdisciplinary method (Fairclough declares it 'transdisciplinary')⁶² and this makes it a good tool to better straddle the two theoretical hurdles described in this chapter, drawing on sociology, political science, international legal studies and international relations. CDA accommodates a crossover in disciplines in this research design by allowing the analysis of relations in discourse from different disciplines to overlap. For example, as part of the wider mechanism of triangulation via multiple data sources, the categories of analysis discovered in the discourse in Chapters Four served to further assist in the analysis of open-ended interviews conducted during fieldwork in Chapters Five and Six, and vice versa as the researcher worked back and forward across the fieldwork data.⁶³ The freedom to cross disciplinary boundaries makes CDA more closely allied to the research questions and aims.

Criticism of CDA and Fairclough's method is not difficult to find in the literature, due to the subjective task of researcher at the important meaning-finding phase of the method. As will be explained below, it is one thing to adhere to the method in order to locate features that indicate power relations at the micro, meso, and macro levels, but it is quite another to launch into an interpretation of data in order to 'specify the social and hegemonic relations and structures which constitute the matrix of this particular instance of social and discursive practice' or to 'explai[n] why the discourse practice is as it is; and the effects of the discourse practice upon the social practice'.⁶⁴ However, this same leeway for subjective interpretation of the power structures is arguably why CDA is a strong tool to achieve the aims of this research: with close analysis of both primary and secondary materials, CDA permits a level of openness that allowed the researcher to compare and contrast Habermas' theoretical model of European democratic legitimacy that gradually moves power between the national and supranational, against the backdrop of the international. This leeway allowed the researcher to explore and explain the dynamics of the tensions, as

⁶¹ Yin, *Qualitative Research from Start to Finish, Second Edition*, 186.

⁶² Norman Fairclough, *Analysing Discourse: Textual Analysis for Social Research* (Psychology Press, 2003).

⁶³ Yin, *Qualitative Research from Start to Finish, Second Edition*, 18.

⁶⁴ Fairclough, *Discourse and Social Change*, 232.

required by the research questions, across multiple types of actors in multiple disciplinary fora.

Several criticisms of CDA in the literature should be addressed as a means to acknowledging some of the concerns regarding the use and rigour of the CDA method. Ruth Breeze raised a litany of issues in 2011, most of which rest on the following category of concern:

*[M]any readings are possible, and the purpose of analysis is to provide something more solid than a subjective impression, by applying a rigorous method that is theoretically grounded... the problem of method and interpretation is a serious one which is not satisfactorily resolved in Fairclough's later studies.*⁶⁵

Writing in the 2000s, Fairclough had earlier resisted this claim by convincingly arguing that all data requires interpretation one way or another:

*There is no such thing as an 'objective' analysis of a text, if by that we mean an analysis which simply describes what is 'there' in the text without being 'biased' by the 'subjectivity' of the analyst.*⁶⁶

Fairclough's argument is that it seems there is little possibility of escaping a constructivist reality – that is to say, if meaning is taken to be socially constructed (as discussed earlier in this chapter), in the act of reading a qualitative researcher will almost always have to make interpretive statements about the results to analyse discourse, even considering that in some circumstances analysis could be automated.

As discussed above, CDA characterises discourse as a fluid concept requiring the researcher to act as part of the interpretive process of dialectical communication between power structures. While the bias of this researcher must be taken into account – including that the researcher as a lawyer is affected by ongoing public discourse as to the normative dynamics of law relating to refugees in Europe – this in itself is arguably not a significant problem when considering the research aims and questions against the premise of the CDA task at hand: to explore and explain the

⁶⁵ Ruth Breeze, "Critical Discourse Analysis and Its Critics," *Pragmatics* 21, no. 4 (2011): 507.

⁶⁶ Fairclough, *Analysing Discourse: Textual Analysis for Social Research*.

relations and tensions between the moving discursive normative parts between and among national, supranational, and international levels in relation to the detention of irregular migrant asylum seekers in the EU.

An alternative and perhaps more convincing criticism of the CDA method is presented by applied linguist Henry Widdowson, who warns that Fairclough's requirement to examine all textual features 'is too pernicky...[and that] it is unfair to pick texts apart in this way...[as] readers normally seek to co-operate and will not subject texts to such microscopic scrutiny'.⁶⁷ From the point of view of the researcher using this method, it can be confirmed that meeting the demands of Fairclough's method is certainly an exhaustive and comprehensive task, with a constant risk of missing the relational forest for the textual trees should the analysis dive too deeply into the features of each text.

It is indeed unnatural in the usual flow of discourse for ordinary interpreters to delve so deeply into textual and power-relational features as the researcher is required to do under CDA, risking an interpretive abuse of the text (or its actual alteration in live in-depth interview settings) in the quest to obtain the functional grounds of the macro power dialectic. A researcher risks inserting meaning into the text that may not be there – as Widdowson puts it, the danger is in '[Fairclough's] argument...that otherwise all manner of ideas and attitudes are insinuated into the readers' minds without them being aware of it'.⁶⁸ To avoid this valid concern, this research placed more weight on the Social Practices aspect (see Figure 4) of Fairclough's CDA method, taking care to only employ textual interpretive analysis (the micro and meso levels of CDA described above) as an evidentiary tool to access the macro interpretative platform on which an exploration of the power dynamics and tensions between the national, supranational, and international might take place.

B. Coding Techniques: Compiling, disassembling, and reassembling

Meeting the task demanded by Fairclough's CDA method under the conditions of thickness, richness and saturation described above was a substantial undertaking,

⁶⁷ H. G. Widdowson, "N. Fairclough: Critical Discourse Analysis (Book Review)," *Applied Linguistics*, 19, no. 3 (1998): 512.

⁶⁸ Ibid.

particularly given the risk of the researcher losing sight of the social practices (macro) in the midst of the textual (micro and meso). To reduce this risk, this research used coding techniques from Yin to marshal and organise concepts into categories of results.⁶⁹ In Chapter Four (secondary published texts) coding was assisted by the computer program HyperResearch, and in Chapters Five and Six (CDA thematic analysis of in-depth interview data) the researcher discovered that coding conducted manually achieved thicker and richer results, given the researcher's own influence within the production of the interview data. Ruiz warns that using a computer-assisted means of coding can also risk 'concealing the researcher as an agent in the analysis process beyond the role of program executor',⁷⁰ which is why Chapter Four is the only chapter to use computer-aided coding, as the researcher was not involved in the production of the secondary published texts. This also assisted in reducing the risk of researcher bias in reading the secondary published texts, whereas by contrast the fieldwork interviews involved the researcher directly.

Published texts authored by relevant actors naturally differed from live speech acts arising from in-depth interviews with individuals; the former was expected by the researcher to be static, guarded, and carefully crafted as public positioning for certain audience levels (national, supranational, international, or a mix), whereas the latter was expected to be unguarded, colloquial, and reveal more personal insights on perceptions of the social world being studied.

A problem that emerged during the early phases of gathering data – and particularly in relation to secondary texts examined in Chapter Four – was the potential high cost of translating materials in languages other than English, and the risk that meaning and context could potentially be lost in the process of translation. Due to the cost limitations of the research, and due to the fieldwork interviews being conducted in English, it was decided that free software (Google Translate) be used to translate the text of published discourse and materials written in the Czech and French languages, given significant advances in the quality of translation under those electronic systems in recent years.

⁶⁹ Yin, *Qualitative Research from Start to Finish, Second Edition*.

⁷⁰ Ruiz, "Sociological Discourse Analysis: Methods and Logic."

Roth, writing in 2013 of the difficulties of translation in qualitative research, attempted to combat the problems of equivalence between qualitative texts using automated translation by arguing as follows:

The very act of qualitative social research, where the researcher seeks to establish patterns in the data—whatever the particular means (method)—constitutes an abstraction and, therefore, a translation into the language of the researcher...[T]he equivalence between two texts, two situations, then is recognized as something produced rather than as presupposing the translation. Two texts [translated and untranslated] are the same and different simultaneously.⁷¹

Using the subjectivity of interpreting any data as an argument to reduce concerns around interpreting translated data is not to say the matter of translation is therefore solved – appropriately determining language and meaning under the conditions of auto-translated discourse was still an appreciable risk relating to the equivalence of meaning, one which was considered throughout the research design and the entire analysis process.

The risk of using translation was described succinctly by Patton: ‘it is tricky enough to be sure what a person means when using a common language, but words can take on a very different meaning in other cultures’.⁷² This is true also of automated language translations, where a computer may generate an approximation of a word – thus the translated secondary texts in Chapter Four were treated with great care and caution. On the other hand, using a dispassionate electronic translation system ensured all instances of meaning – for better or worse – were painted with the same automated brush, somewhat avoiding Patton’s problem that translation can ‘contaminat[e] the interviewee’s actual response with the interpreter’s explanation to such an extent that you can no longer be sure whose perceptions you have’.⁷³

After careful consideration, the researcher decided that the appreciable risk of having instances of incorrect equivalence of meaning generated by Google Translate due to

⁷¹ Wolff-Michael Roth, “Translation in Qualitative Social Research: The Possible Impossible,” *Forum: Qualitative Social Research*, 14, no. 2 (2013).

⁷² Patton, *Qualitative Research and Evaluation Methods*.

⁷³ *Ibid.*, 392.

cost of translation, was far outweighed by the importance of accessing highly valuable information-rich data in other languages when it came to light, either through the snowball method described in this chapter, or aided by tip-offs from anonymous interview participants. While this was by no means a risk-free choice in the research design, a means of reducing the risk of faulty meaning under the conditions of translation was decided, in which the researcher acknowledged when a text had been translated, and took extreme caution when deriving conclusions from translated data, both in the analysis and results of the discourse data processing.

This thesis does not utilise grounded theory in relation to the coding of data across Chapters Four, Five, and Six – however it should be clarified that much of the procedural literature on coding is based in Glaser and Strauss’ processes of grounded theory that produces open, axial, and selective coding.⁷⁴ Yin describes this type of coding process as being useful ‘not just [for] people practicing grounded theory’, concluding that guidance on ‘compiling, disassembling, and reassembling’ data is ‘relevant to all scholars who want to consider coding their data’.⁷⁵ Thus, the methods of coding strategy presented by Yin described below (after Glaser and Strauss) have been employed across this thesis. The initial organisation of data and coding under Yin (compiling, disassembling and reassembling) does not preclude the subsequent interpretation and power-tension discussion of the results required in Fairclough’s CDA method – indeed, the researcher’s interpretation and discussion of results under the CDA method flows throughout Chapters Four, Five and Six.

To summarise, Yin’s procedure following Glaser and Strauss, and its relationship to the coding of the discourse under the conditions of CDA, have been adapted into the following procedural matrix (Figure 2):

⁷⁴ Barney G. Glaser and Anselm L. Strauss, *The Discovery of Grounded Theory: Strategies for Qualitative Research* (New Brunswick USA: AldineTransaction, 1967; repr., 2006).

⁷⁵ Yin, *Qualitative Research from Start to Finish, Second Edition*, 196.

Figure 2 – Coding Procedure as per Yin 2014	<u>Description of coding procedure:</u>
Step 1 of 5:	Compiling – ‘means formally arranging all the notes in some useful order’.⁷⁶ In this thesis, the sampled discourse data text (secondary materials in Chapter Four, and interview data in Chapters Five and Six) have been placed into a consistent electronic format and separated into separate textual units, then arranged according to the international, supranational and national levels (bounded by the case study areas EU, France and Czech Republic) in preparation for the next steps of coding.
Step 2 of 5:	Disassembling – ‘may (but does not have to) be accompanied by your assigning new labels, or “codes,” to the fragments or pieces’,⁷⁷ which can generate a ‘schematic diagram’.⁷⁸ In this thesis, both texts and interview transcripts were firstly linearly assessed by the researcher who applied codes to each unit, reading for meaning and power structures according to the multiple subcategories in the three CDA branches (see also Figure 4). Resulting schematic output is discussed in Chapters Four, Five and Six.
Step 3 of 5:	Reassembling – ‘using substantive themes, based on combinations of disassembled items, to reorganize the fragments or pieces into different groupings and sequences than might have been in the original notes’, ensuring the analyst is ‘making constant comparisons, watching for negative cases, and engaging in rival thinking’.⁷⁹ The themes lining up with Habermas’ model discussed in

⁷⁶ Ibid., 186.

⁷⁷ Ibid.

⁷⁸ Ibid., 197.

⁷⁹ Ibid., 187, 211.

Figure 2 – Coding Procedure as per Yin 2014	<u>Description of coding procedure:</u>
	Chapter Two were constantly compared with and among each text, and challenged with rival thinking for possible negative cases – that is, whether the features of each examined text match or oppose (in tension) the emerging overall themes of tension among and between actors at the national, supranational, and international level. Accordingly, the disassembled items were able to be reassembled into newly organized arrangements as identified in the results.
Step 4 of 5:	Interpreting – ‘involves using the reassembled material to create a new narrative, with accompanying tables and graphics where relevant, that will become the key analytic portion of your draft manuscript’.⁸⁰ Each chapter of data analysis reporting (Chapters Four, Five, and Six) discusses and interprets the results of the Critical Discourse Analysis conducted via the coding method. Fairclough argues that the aim of results in CDA is for the analyst ‘to produce interpretations and explanations of areas of social life which both identify the causes of social wrongs and produce knowledge which could (in the right conditions) contribute to righting or mitigating them.’⁸¹ Accordingly a discussion of the results of using the CDA method– as per the research questions – includes an interpretation of what tensions are at work behind the detention of irregular migrant asylum seekers in the EU, and the normative dynamics of those tensions in the power structures at work. This interpretation is conducted through the lens of the theoretical framework underpinning the thesis, arising from Habermas’ model of

⁸⁰ Ibid.

⁸¹ Fairclough, *Critical Discourse Analysis*, 8.

Figure 2 – Coding Procedure as per Yin 2014	<u>Description of coding procedure:</u>
	power structures and learning processes (discussed in Chapter Two).
Step 5 of 5:	Concluding – ‘calls for drawing the conclusions from your entire study. Such conclusions should be related to the interpretation in the [interpreting] phase and through it to all the other phases of the cycle’.⁸² The results of the analysis are a subsection of the wider research aims, and serve to also inform the synthesis and conclusion of the thesis.

Figure 2 – Coding Procedure as per Yin 2014

Guided by Yin’s coding procedure, the researcher was able to saturate the information-rich sample through compiling, disassembling, then reassembling the data under CDA for Chapters Four, Five, and Six, creating in the results what Yin calls a ‘conceptual tree...[that is] upside-down, with the thinnest branches representing the most concrete concepts’.⁸³ The reporting of the results of analysis under Yin’s coding schema takes place across Chapters Four, Five and Six.

VI. LITERATURE REVIEW: FINDING THE GAP

The literature on the tensions between supranational and national actors against the backdrop of international law is focused on numerous academic conversations including in international law, legal philosophy, political science, and international relations. The following brief survey of the academic landscape – the analysis of which is continued throughout the thesis – is therefore carefully contained by restrictive criteria, namely the supranational and national friction described above between cosmopolitanism and sovereignty, and particularly relating to the detention of asylum seekers under supranational regulatory systems in the lead up to the influx in 2015.

⁸² Yin, *Qualitative Research from Start to Finish, Second Edition*.

⁸³ Ibid., 198.

A. Cosmopolitanism and sovereign hospitality

This thesis explores the research site outlined by existing literature by using the Habermasian conception of the EU polity being made up of European citizens (cosmopolitan) who are also state citizens (sovereign) communicating within both national and supranational regulatory and political power structures.⁸⁴ Habermas' model, in turn, is based on the Kantian conception that a society's basic moral intuitions are founded not only on tradition, but also refer to innate and universal principles within humanity, and that the meaning of norms in a given society structure is socially constructed. In Chapter Two a more detailed examination is made of Habermas' theory regarding legal cosmopolitanism – in which sovereign states are regulated by cosmopolitan (international) law for the benefit of human welfare – building on Immanuel Kant's foundational work *Perpetual Peace*.⁸⁵ Of particular focus is Habermas' resurgent work interpreting Kant's cosmopolitanism, and foundationally for this thesis, Habermas' theoretical notions of global legal cosmopolitanism recently expanded in his work *The Crisis of the European Union* (henceforth *The Crisis*) published in 2012.⁸⁶

Seyla Benhabib, in her book *Another Cosmopolitanism*,⁸⁷ adopts critical theory to address the interaction between the international, the supranational, and the national, particularly regarding universal principles of human rights. Citing Habermas' model, she neatly identifies the dialectic arising when a sovereign state chooses to respond to the directives of international legal norms (emphasis in original):

*Throughout the international system, as long as territorially bounded states are recognized as the sole legitimate units of negotiation and representation, a tension, and, at times even a fatal contradiction, is palpable: the modern state system is caught between **sovereignty** and **hospitality**, between the prerogative to choose to be a party to*

⁸⁴ Habermas, *The Crisis of the European Union: A Response*, 59.

⁸⁵ Immanuel Kant, *Perpetual Peace* (New York, Liberal Arts Press, 1957).

⁸⁶ Habermas, *The Crisis of the European Union: A Response*.

⁸⁷ Seyla Benhabib et al., *Another Cosmopolitanism*, The Berkeley Tanner Lectures (Oxford ; New York: Oxford University Press, 2006).

*cosmopolitan norms and human rights treaties, and the [ethical]
obligation to extend recognition of these human rights to all.*⁸⁸

The contradiction is perhaps not felt as keenly by citizens within a state as it is by those seeking asylum, who may operate under the assumption of a countervailing hospitality. This complexity is increased in the EU, in which national and supranational actors hold varying power to set prerogatives and obligations. Sam Adelman's account of Benhabib's hospitality contradiction is convincing, as it finds the importance not only on the state as an actor, but on the individual citizens who contribute to the sovereign state as a whole: the notion of Kantian cosmopolitan hospitality granted by the individuals within the sovereign towards the individuals (or foreigners) outside it.⁸⁹ State citizenry reaches to humanity both within and beyond the jurisdiction (and borders) of the state by citing universal principles contained in international refugee law and its associated instruments, allowing non-citizens into the surrogate hospitality of the state, which paradoxically defines itself via exclusion of non-citizens.⁹⁰ Thus there exists a tension between what is within and without the state, which is magnified in the European Union as a supranational entity located in the dialectical middle ground between national and international.

On this basis, the conception of Kantian sovereign hospitality becomes a core function of the people in the society acting as a European (or alternatively national) whole. As Adelman points out, this 'arises not from altruism, kindness or generosity, but from the categorical imperative to treat others as ends rather than means'.⁹¹ It is for these reasons that this thesis aims to study individual perceptions of such contradictions operating between the various levels – national, supranational, international – to inform and explore macro, meso and micro institutional machinations.⁹² Individuals also form a common linkage between the cosmopolitan and the sovereign in Habermas' theoretical model (discussed in Chapter Two). Adelman brings individuals in society into greater focus (both the citizen and the foreigner) as a contrast to the workings of the macro state actor, concluding that

⁸⁸ Ibid., 31.

⁸⁹ Sam Adelman, "Cosmopolitan Sovereignty," in *Cosmopolitan Justice and Its Discontents*, ed. Cecilia Bailliet and Katja Franko Aas (Abingdon, Oxon ; New York: Routledge, 2011).

⁹⁰ James C. Hathaway and Michelle Foster, *The Law of Refugee Status*, 2nd ed. (Cambridge: Cambridge University Press, 2014), 51.

⁹¹ Adelman, "Cosmopolitan Sovereignty," 20.

⁹² Neuman, *Social Research Methods: Qualitative and Quantitative Approaches*, 69.

‘sovereignty’s inherent impulse towards universality makes it incapable of dealing with singularity or particularity, which it therefore seeks to obliterate’.⁹³ While this point is debatable, in the context of this thesis such arguments emphasise the importance of individual human perceptions in identifying – almost through a kind of human echolocation – the contradictions between and amongst supranational and national systems, which are further informed by international (universal) systems of law. For this thesis argument, it is an examination of individual perceptions that makes more possible a better understanding of the interplay and friction between and among these different levels.

The focus of the research on the perception of individuals at each level also co-aligns with the theoretical argument modelled in 2013 by Habermas that the cosmopolitan citizenry can and will drive ‘a constitutive role of their states on all supranational levels’.⁹⁴ Habermas’ argument lends support for the thesis argument that alternative sites for understanding are available from a multi-level investigation of individual perceptions that shape the contradiction. Given Adelman’s focus, Benhabib’s dialectic therefore becomes not merely about institutions, or what the state actor will or will not do in relation to non-citizens, but is instead about the constitutive power of citizens within the state to make decisions based on cosmopolitan (as opposed to sovereign or national) ideals. The resulting configuration is arguably closer to Habermas’ vision in *The Crisis* of a future of shared sovereignty between national and supranational entities, which would see ‘the two constituent subjects - namely, the EU citizens and the European peoples - one day act consistently as equal partners in all legislative functions’.⁹⁵

Notions of sovereign identity in the context of the citizen versus the foreign are addressed by Habermas as above, but also by the philosopher Giorgio Agamben and political theorist Carl Schmitt. Schmitt famously defined the political as being the level of friend-enemy distinction amongst a grouping of individuals – whereby the ‘degree of intensity of a union or separation, of an association or disassociation’⁹⁶ informs the political acceptance or rejection of the alien attempting entry. This has

⁹³ Adelman, “Cosmopolitan Sovereignty,” 21.

⁹⁴ Habermas, *The Crisis of the European Union: A Response*, 59.

⁹⁵ *Ibid.*, 41.

⁹⁶ Carl Schmitt, *The Concept of the Political*, Expanded ed. (Chicago: University of Chicago Press, 2007), 26.

particular resonance in the EU context in relation to notions of European solidarity foundational to the Treaty on European Union discussed in Chapter Three, versus nationalism within each Member State. Likewise, Agamben formulates a conception of the political on the friends-enemies distinction, and argues that traditional sovereignty is made up of a trinity of the state, the nation (via birth), and the land, with a newer fourth element that disrupts the previous three, in which modern sovereign states are the dislocation of the local via the ‘camp’ (he particularly highlights the Nazi death camp and the refugee camp as an example).⁹⁷ Resonance of Agamben’s camp is particularly acute in light of detention (or reception) centres for asylum seekers in some domestic Member States. However, Agamben’s conceptions of the political have often been criticised for a certain level of unproductive pessimism, which has been argued suggests reduction of the sense of future social change.⁹⁸ Likewise, Benhabib has also criticised Schmitt’s characterisation of the political as a historical recount that fails to cater for the ‘mediations between international law and democratic sovereignty that are created by [modern] developments’.⁹⁹ It is for these reasons that although Agamben and Schmitt’s ideas have relevance to the thesis topic, Habermas’ model arguably provides a locus for a more constructive and malleable discussion.

B. European Union asylum policies pre-2015 influx

Since the select contemporary theoretical literature above focuses on the sovereign-cosmopolitan dialectic and narrows in on the perceptions of individuals, it is useful to turn to practical examples in the literature of the need for research into regulatory and policy dialectics within the EU, particularly where related to the implementation of EU rules on the detention of asylum seekers prior to the 2015 influx of refugees into the territory of the EU. There is evidence in the academic conversation of a multi-disciplinary set of open-ended questions on which this research seeks to build. For example, in 2008 Thomson conducted a policy study examining European

⁹⁷ Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life* (Stanford, Calif.: Stanford University Press, 1998), 111, 175

⁹⁸ Brian Elliott, “Theories of Community in Habermas, Nancy and Agamben: A Critical Evaluation,” *Philosophy Compass* 4, no. 6 (2009): 901.

⁹⁹ Seyla Benhabib, “Carl Schmitt’s Critique of Kant: Sovereignty and International Law,” *Political Theory* 40, no. 6 (2012): 705-06.

Commission relationships with EU Member States, and the influence nationality has on decision-making.¹⁰⁰ By examining a range of policy areas and their application at each level, Thomson found that Commissioners' nationality influences and guides their behaviour. However, the operation of the asylum policies between the EU and Member States was not an included aspect of the study, and Thomson suggested future research should examine more deeply such causal relations between the European Commission and Member State policy positions.¹⁰¹

Similarly, we are advised in Bloch and Chimienti's 2011 policy overview of the macro and micro patterns of irregular migration, that:

*[An] important area of research is the analysis of the relationships between irregular migrations, nation-state allegiances, forms of belonging, citizenship and human rights. Linked to this is the role of civil society, not just in terms of perceptions about irregular migrants but also in terms of the role of civil society in the recognition or repression of this group.*¹⁰²

Bloch and Chimienti's research justification points to the need for an examination of the *human* aspects of the sovereign-cosmopolitan dialectic driven by the *individual perceptions* related to the actions of the sovereign as a whole towards the non-citizen asylum seeker. More recently, Rosenberger and König have also concluded in relation to the reception conditions of asylum seekers in the EU that there is 'a research lacuna with respect to the multi-level governance of reception comprising the European, national and sub-state levels'.¹⁰³ These calls for further and better research clearly resonate with the theoretical literature covered above – rather than describing the state actor's behaviour at the macro level, we might also seek to better understand the acuties of society that drive such state behaviour.

If the literature suggests an available space for investigation on the supranational-national dialectic surrounding the detention of irregular migrant asylum seekers in

¹⁰⁰ Robert Thomson, "National Actors in International Organizations: The Case of the European Commission," *Comparative Political Studies* 41, no. 2 (2008): 189.

¹⁰¹ Ibid.

¹⁰² Alice Bloch and Milena Chimienti, "Irregular Migration in a Globalizing World," *Ethnic and Racial Studies* 34, no. 8 (2011).

¹⁰³ S. Rosenberger and A. König, "Welcoming the Unwelcome: The Politics of Minimum Reception Standards for Asylum Seekers in Austria," *Journal of Refugee Studies* 25, no. 4 (2012): 551.

the EU, then how is the tranche of legal literature to be brooked with the above notions? Positivist accounts of the law in relation to sovereignty appear to some as an anti-critical fortress:

*[The] positivistic viewpoint postures itself as purely empirical and therefore neutral and value-free, and its analysis tends to center upon thinking in de facto power terms.*¹⁰⁴

In relation to the EU, however, the legal literature critiquing the EU's CEAS and its application in Member States is heavy with contention, and has a great deal to offer in terms of finding the gap for this research. Take, for example, the sentiments offered by Ida Staffans in her 2012 publication *Evidence in European Asylum Procedures*. She depicts the sovereign-cosmopolitan dialectic in the EU's regulatory systems as follows:

*[It] is clear that European asylum procedures, despite all efforts towards harmonisation and integration, have not melted into one in the manner expected by those who masterminded developments. Nevertheless, Union efforts towards the common are not ending, and new legislation with the aim of procedural approximation is continuously presented. Hence in Europe today there is a situation of comparably divergent national asylum procedures despite efforts and a strong will of the European legislator to harmonize.*¹⁰⁵

The functioning of the contrasting regulatory frameworks may well be described in positivist legal terms, but the meaning behind their divergence or harmonisation arguably falls squarely within the ambit of the interpretive social research. The notion of the will of the actor is also alive in the legal discourse – as per this project's hypothesis, the detention of the irregular migrants in the EU occurs at the intersection of the will of actors at the national, supranational and international levels. As such, this research aims to uncover the perceptions of individuals on the topic of the divergent national and supranational legal systems, who each attempt in their own way to influence the will of the institutional actors at each level.

¹⁰⁴ Jackson, "Rethinking Economic Governance: A Naturalistic Cosmopolitan Jurisprudence," 117.

¹⁰⁵ Ida Staffans, *Evidence in European Asylum Procedures* (Leiden; Boston: Martinus Nijhoff Publishers, 2012).

As part of the appraisal of the legal landscape in this area, the components of international refugee law relating to detention of irregular migrants are reviewed in more detail in Chapter Three according to operational instruments, including the 1951 *Refugee Convention* and associated *Protocol*, alongside key guiding commentary from jurists and academics, including Hathaway's *The Rights of Refugees under International Law*,¹⁰⁶ Kneebone's *Refugees, Asylum Seekers and the Rule of Law*,¹⁰⁷ and additional EU specific discourse relating to the application of international refugee law, including Goodwin-Gill and Lambert's *The Limits of Transnational Law*,¹⁰⁸ and Boccardi's work *Europe & Refugees*.¹⁰⁹ Boswell and Geddes have conducted a comprehensive recent examination of the relationship between irregular migration in the EU and the distribution of authority between supranational and national bodies in *Migration and Mobility in the European Union*.¹¹⁰ This work particularly highlights the uneven successes of migration policy and integration in different EU Member States from a descriptive analytical framework, and there is arguably room for further examination of the individual perceptions that form the bases of these differences particularly in relation to the section on asylum.

C. European Union asylum policies post-2015 influx

Habermas argues in his 2012 *The Crisis* that the inability of the EU structure to resolve cross-border problems is the issue on which to focus effort, not simply the various cross-border problems themselves, observing that 'the current [GFC] crisis is monopolizing all the attention'.¹¹¹ This attention was to shift in 2015, a year after the fieldwork was conducted for this research, when the mass influx of refugees into the territory of the EU described in Chapter Two commenced. The researcher observed that the topic of this thesis became extremely popular, sparking studies into the

¹⁰⁶ Hathaway, *The Rights of Refugees under International Law*.

¹⁰⁷ Susan Kneebone, *Refugees, Asylum Seekers, and the Rule of Law : Comparative Perspectives* (Cambridge [UK] ; New York: Cambridge University Press, 2009).

¹⁰⁸ Helene Lambert and Guy S Goodwin-Gill (eds.), *The Limits of Transnational Law : Refugee Law, Policy Harmonization and Judicial Dialogue in the European Union* (Cambridge University Press, 2010).

¹⁰⁹ Ingrid Boccardi, *Europe and Refugees: Towards an EU Asylum Policy* (Kluwer Law International, 2002).

¹¹⁰ Christina Boswell and Andrew Geddes, *Migration and Mobility in the European Union* (Palgrave Macmillan, 2011).

¹¹¹ Habermas, *The Crisis of the European Union: A Response*, 3.

media coverage of migrants that aimed to uncover ‘the forces behind certain types of coverage and its effects...[to] understand] ongoing and future shifts in public perception and public policy of migration in Europe’.¹¹² The popularity of the topic from 2015 onwards also shifted academic focus onto the operation of CEAS and how the EU managed the influx. The researcher elected to maintain the research focus on the maturation of the EU asylum policy space before, during, and after the 2015 influx, rather than shift focus onto popular topics in the media sparked by the influx.

Some commentators took the view that the CEAS had collapsed. Sandra Lavenex, for example, argued that ‘[a]s long as EU institutions lack the power and legitimacy to exert supranational authority towards unwilling Member States...organized hypocrisy is likely to persist’.¹¹³ The concept of ‘unwilling’ resonates with the intersection of wills in the hypothesis described above in this chapter. Others took the view that the crisis was a challenge that presented an opportunity to reform the system, such as David Owen, who argued of the CEAS that ‘both states and refugees have reasons to endorse a model [that] combines harmonization with accelerated access to free movement’.¹¹⁴ In either camp – whether the CEAS was held to be failing, or needing remodelling on international principles – the trend across the literature was to debate a cross-border problem (the 2015 influx) as a fundamentally international social problem needing correction. That the debate is evident in the global literature in the first place is not necessarily evidence of a failure, rather this thesis takes the debate as a dialectic, indicative of the existence of Habermas’ civil society learning processes ‘along the route to a politically constituted world society’.¹¹⁵

Post-2015 literature also addressed tensions between role of NGOs in the European asylum protection framework and the role of states or supranational institutions. For example, Ludger Pries writing in 2019 noted that ‘state agencies sometimes cooperate with NGOs as equally important actors, in other cases NGOs are

¹¹² Jakob-Moritz Eberl et al., “The European Media Discourse on Immigration and Its Effects: A Literature Review,” *Annals of the International Communication Association* 42, no. 3 (2018): 219.

¹¹³ Sandra Lavenex, “‘Failing Forward’ Towards Which Europe? Organized Hypocrisy in the Common European Asylum System,” *JCMS: Journal of Common Market Studies* 56, no. 5 (2018): 1208.

¹¹⁴ David Owen, “Refugees, EU Citizenship and the Common European Asylum System a Normative Dilemma for EU Integration,” *Ethical Theory and Moral Practice* 22, no. 2 (2019): 360.

¹¹⁵ Habermas, *The Crisis of the European Union: A Response*, 2.

exploited...[and] sometimes marginalized from specific tasks'.¹¹⁶ This observation was borne out in findings on the analysis of the fieldwork data, discussed in Chapters Five and Six. Pries and others questioned 'if and how state agencies, organizations and civil society will develop in arranging the public discourse and practical integration of refugees'.¹¹⁷ This interdisciplinary research aims to go some way – within the limits of the research questions – to uncovering new and diverse aspects on the 'how' elements of the questions raised in the literature.

The pessimistic language of the academic literature in relation to post-2015 analysis of the CEAS should also be noted, and this thesis distinguishes itself from these approaches due to its objective to provide renewed diversity and perspectives on this topic. From 2015 onwards, the literature frequently holds that the CEAS is a 'European failure',¹¹⁸ that 'EU law and policy...have caused the crisis',¹¹⁹ that in reforming the CEAS the 'EU legislature [needs to] live up to its responsibility sooner rather than later',¹²⁰ and that 'the range of shortcomings present in EU asylum systems...chip away not only at the asylum system, but also at the public perception of it as a just system'.¹²¹ As noted above, critical assessment of existing regulatory and institutional structures is a sign of a healthy dialectic occurring between academic and institutional forces, but Habermas also warns us that 'the role of human rights must not be exhausted by moral criticism of the injustices prevailing within a highly stratified world society'.¹²² Accordingly, this research aims not merely to critique EU regulations and the implementation of the CEAS by Member States in relation to irregular migrants, but also to explore and uncover new interdisciplinary perspectives with a view to adding to the civil society learning process that Habermas describes (discussed in Chapter Two).

¹¹⁶ Ludger Pries, "Introduction: Civil Society and Volunteering in the So-Called Refugee Crisis of 2015—Ambiguities and Structural Tensions," in *Refugee Protection and Civil Society in Europe*, ed. Margit Feischmidt, Ludger Pries, and Celine Cantat (Springer, 2019), 14.

¹¹⁷ *Ibid.*, 17.

¹¹⁸ Nevena Nancheva, "The Common European Asylum System and the Failure to Protect: Bulgaria's Syrian Refugee Crisis," *Southeast European and Black Sea Studies* 15, no. 4 (2015): 439.

¹¹⁹ Maarten Den Heijer, Jorrit Rijpma, and Thomas Spijkerboer, "Coercion, Prohibition, and Great Expectations: The Continuing Failure of the Common European Asylum System," *Common Market Law Review* 53, no. 3 (2016): 160.

¹²⁰ Mattias Wendel, "The Refugee Crisis and the Executive: On the Limits of Administrative Discretion in the Common European Asylum System," *German Law Journal* 17, no. 6 (2016): 1032.

¹²¹ Hanne Beirens, "Cracked Foundation, Uncertain Future: Structural Weaknesses in the Common European Asylum System," (Migration Policy Institute, 2018), 24.

¹²² Habermas, *The Crisis of the European Union: A Response*, xii.

D. Concluding comments on the literature

Recent developments in the study of EU national and supranational tensions do not include many interdisciplinary perspectives, but as this literature review demonstrates, some have attempted to address the issue of tension between actors. Following the 2015 influx, the literature tended to either focus on critiquing EU regulatory asylum systems as well as EU actors, or to take an approach that attempted to remodel the existing EU CEAS on the basis of the 2015 influx. There has not, however, been an apparent examination of dynamics relating to actors' *perceptions* surrounding the EU national and supranational tensions on asylum policy and regulatory systems, and this is the gap in which the project intends to sit.

VII. CHAPTER OVERVIEW

This thesis is divided into seven chapters, and while each is not commensurate in size, chapters Four, Five, and Six examine the results of the field research and are therefore the most substantive.

Chapter Two discusses the history of asylum seeker influx into the geographic territory of the EU, setting this as a cross-border problem relating to Habermas' philosophy of international legal cosmopolitanism that forms the theoretical foundation of the thesis. The chapter reviews Habermas' theory relating to global governance contained in *The Crisis*, and how his model places individuals – rather than States – at the centre of a future global rule of law. The review provides a subsequent platform for further discussion of the tensions between EU institutions seeking to implement a common policy relating to detention of irregular migrant asylum seekers against the backdrop of international refugee law, and the reaction by EU Member States to implementing such policies.

Chapter Three presents an overview of present international and EU law relating to the detention of irregular migrant asylum seekers, particularly the 1951 *Refugee Convention* and associated *Protocol*, and regional treaties that reflect key principles such as the *European Convention on Human Rights* and the *Charter of Fundamental Rights of the European Union*. Included is a focus on how these laws ought to – and do – operate to

affect individuals, as argued by the works of prominent jurists and academics. Included is an overview of EU policy, regulations and European Commission Directives regarding the detention of irregular migrants seeking asylum by its Member States. In particular, an outline of state regulatory responses to the CEAS in the two case study countries, the Czech Republic and France, demonstrates ways in which EU regulations, policy and EC directives have been incorporated into national law and national policy.

Chapter Four explores and highlights differing kinds of frictions evident in the discourse between and among EU institutions and Member States regarding the detention of irregular migrant asylum seekers, through the lens of Habermas' theoretical framework outlined in *The Crisis* and under the processes of computer-aided Critical Discourse Analysis. The chapter provides an analysis that focuses on compiling, disassembling, and reassembling power and tensions narratives evident in policy papers, reports and positioning statements by NGOs and institutional actors, with a view to assess the ways in which these interact in a power structure to form the basis of premises and perceptions regarding the detention of irregular migrant asylum seekers in the EU.

Chapter Five reports the results of thematic analysis applied to field research results, particularly in relation to the perceptions of both national NGOs and national government actors (grouped together as national-level actors) linked to case studies in France and the Czech Republic. It discusses and thematically analyses data using CDA in line with the thesis theoretical framework and thesis argument, with the aim to better understand the influence that national-level perceptions have on the dialectical process of EU policy formation occurring at each level. National-level actors are interviewed using a semi-structured method in relation to the details of their lobbying of the EU institutions. National-level actors linked to France and the Czech Republic are interviewed particularly in light of their reaction to regulatory responses to the detention of irregular migrant asylum seekers in each respective Member State.

Chapter Six uses the same methods as Chapter Five, and reports the results of thematic analysis applied to field research results, particularly in relation to the perceptions of actors at the international and EU levels including governmental, NGO, and institutional actors (taken together as EU/international-level actors). EU/international-level actors are interviewed in order to explore individual perceptions of friction at the national and

EU levels relating to the detention of irregular migrant asylum seekers. In relation to the operation of the EU, officials are interviewed at EU institutions and agencies. International-level organisations are also included in order to obtain their perceptions relating to the tensions at each level linked to the CEAS.

Chapter Seven synthesises and concludes the research. It brings the results and analysis of the fieldwork together in an evaluative discussion on the basis of the research questions, through the lens of the theoretical framework. This synthesis relates the Habermasian model outlined in *The Crisis* discussed in Chapter Two to the research findings, with a view to comparing and contrasting the results of the research with the theory relating to international, supranational and national tensions. The results are also scrutinized against existing literature, the strengths and weaknesses of the methods and methodology are discussed, implications of the research findings in the public domain are assessed, and future research topics emerging from the research are explored.

CHAPTER TWO: HABERMAS AND METHODOLOGY

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I. OVERVIEW: HABERMAS AND METHODOLOGY

This chapter grounds the research in Jürgen Habermas' theory relating to international legal cosmopolitanism and the EU project. It analyses the history of the development of the CEAS, and explores concepts from Habermas' ground-breaking The Crisis of the European Union (The Crisis). It describes Habermas' theoretical model explaining supranational and national legal and political frictions in cross-border challenges recently faced by the EU as shifts occur towards international legal cosmopolitanism. Habermas' theory and model described in this chapter forms the lens through which the research questions and hypothesis were assessed, choices about the research design and methods were made, and by which the results of the research were explained and analysed.

II. INTRODUCTION

What is being tested is the will and capability of citizens, of political elites and the mass media, to conclude the next stage of integration...and in the process to take the civilization of the exercise of political authority a step further. – Habermas, The Crisis¹

Jürgen Habermas' *The Crisis* presents a theory and accompanying methodology for improved supranational governance and a resulting legal cosmopolitanism – referred to in this thesis as international legal cosmopolitanism – in order to highlight its cross-border foundations. This makes Habermas' theory uniquely placed to aid in addressing the normative dimensions of the research questions of this thesis, listed in Chapter One. Habermas' theory relating to international legal cosmopolitanism is based on a collaboration of his ideas contained in *The Crisis* and in previous works, particularly *Between Facts and Norms* (1992),² *The Postnational Constellation* (2001),³ and *The Divided West* (2006).⁴ *The Crisis* binds together many of Habermas' early philosophical

¹ Habermas, *The Crisis of the European Union: A Response*, 20.

² Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*.

³ Jürgen Habermas and Max Pensky, *The Postnational Constellation: Political Essays*, 1st MIT Press ed. Ibid. (2001).

⁴ Habermas, *The Divided West*

arguments and theories in order to prosecute the EU's institutional and political arrangements, particularly in the aftermath of the Global Financial Crisis (GFC).

Over the time this research was conducted, Habermas has continued to publish on the crisis facing the EU, but his position has remained into 2019 consistent with his positions developed in *The Crisis* in 2012, and so this chapter will not seek to take into account his work in other divergent topics. For example, in late 2018 when commenting in the media on Germany taking on more asylum seekers, Habermas reiterates his duality of citizenship answer to the cross-border issues in the EU, which are explained in detail across the sections of this chapter. An excerpt from the 2018 article is a useful preamble demonstrating Habermas' unchanged and unflinching positions first expressed in *The Crisis*, here re-expressed six years later:

*Given that within the EU public opinions on politics are formed exclusively within national borders and that these different public spheres are not yet readily available **one for one another**, contradictory crisis narratives have taken root in different eurozone countries during the past decade. These narratives have deeply poisoned the political climate since each one draws exclusive attention to one's **own** national fate and prevents that kind of **mutual** perspective-taking without which no understanding **of and for another** can be formed – let alone any feeling for the shared threats that afflict all of us equally and, above all, for the prospects of pro-active politics that can deal with common issues and only do so in a cooperative mode and mentality. [Emphasis in original].⁵*

Habermas' model presented in *The Crisis* – improving supranational governance through greater democratic legitimacy at the national and supranational levels – is explored in detail in the second half of this chapter. The model is not only relevant to the contemporary European and globalised political scene relating to irregular migration, but is also thick with theoretical and practical questions relevant to interpretive social science, creating sites for deeper discussion of the ways in which our

⁵ Jürgen Habermas, ““New” Perspectives for Europe,” in *Social Europe* (<<https://www.socialeurope.eu/new-perspectives-for-europe>> accessed at 5 March 2019).

modern social and political world is shaped.⁶ In relation to this thesis, Habermas' model forms the theoretical grounding for the development of the research aims, and the theoretical lens through which the research questions are addressed and discussed. It also informs the selection of the social research methods chosen and outlined in the introductory chapter. It is important to clarify this research does not seek to act as a polemic for Habermas' model – rather, the theory is used as a site to discuss the subject-matter of the research questions and explore the research hypothesis.

III. THE NEED FOR AN EU-WIDE SUPRANATIONAL REFUGEE FRAMEWORK

Habermas' theory in *The Crisis* focuses on resolving cross-border problems through improved supranational governance. During the 1990s, sudden influxes of refugees into the geography of the EU sparked a need for EU institutions to begin developing a common system of managing asylum claims at the supranational level, with a view to eventually covering all EU Member States. The original aim of the common system was to gradually transform national Member State asylum approaches into a supranationally coordinated regulatory framework – the beginnings of the CEAS. Because this thesis examines the tensions over this EU-wide common regulatory system through the lens of Habermas' theoretical model of supranational innovations to cross-border issues, it is useful to first consider the pressure on EU Member States created by increasing influxes of refugees, and the accompanying history of the supranational response to these challenges.

In 1992, the mass arrival of refugees from the former Yugoslavia caused new asylum applications to the EU (then EU-15) to rapidly and unexpectedly rise to over 670,000 in a single year.⁷ By 1999, the European Council – the group of heads of state of the EU Member States – called for the creation of common supranational regulatory structures to manage asylum claims, and a common system began to be developed and agreed among the Member States.⁸ Due to a range of external factors, the following decade saw the number of new asylum applications to the EU approximately halve, dropping by

⁶ Neuman, *Social Research Methods: Qualitative and Quantitative Approaches*, 102.

⁷ Eurostat (European Commission), "Asylum Statistics - Statistics Explained," (http://epp.eurostat.ec.europa.eu/statistics_explained/index.php/Asylum_statistics#) accessed at 1 March 2018).

⁸ Ioannis Papageorgiou, "The Europeanization of Immigration and Asylum in Greece (1990-2012)," *International Journal of Sociology* 43, no. 3 (2013): 75.

2012 to just 306,490 (EU-27).⁹ In 2012, the two EU Member States receiving the largest number of applications were France and Germany, with France receiving 61,440 applications, or 18% of the EU total for that year, and Germany receiving 77,485 applications, or 23% of the EU total.¹⁰ Smaller EU Member States received fewer applications mostly due to geographic location. For example, in 2012 the Czech Republic received just 740 asylum applications, accounting for 0.2% of the EU total in that year.

However, by late 2012 conflict in Syria created a new influx of irregular migration to Europe. Applications for asylum to the EU soared, tripling in just three years. By 2013 there were 431,100 new applications for asylum in the EU, followed by an increase in 2014 to 626,965 applications – a return to 1992 levels.¹¹ More challenges were yet to come, when in 2015 a staggering surge of over 1.3 million new applications for asylum were made in the EU, mostly driven by the Syrian crisis.¹² This number remained high across 2016 (1.26 million), only dropping to 712,250 in 2017. By 2018 the number of first-time applicants dropped to 647,170, levelling out at 721,090 applicants in 2019.¹³ The 2015 surge marked the beginnings of significant pressure and tensions on the supranational regulatory CEAS put in place by the institutions of the EU after the original 1992 influx; pressures that remain at the time of publication of this research.

Uneven distribution of asylum applications was a hallmark of the 2015 asylum application influx to the EU, with most of the processing burden placed on Germany.¹⁴ While other Member States such as France and the Czech Republic received increased application numbers, these were far fewer than the numbers Germany received. For some EU Member States, the proportion of applications during the 2015 influx did not rise significantly in either 2015 and 2016, and in some cases the comparative burden even dropped. For example, in 2015 France received a total of 76,165 applications for

⁹ Eurostat (European Commission), “Asylum Statistics - Statistics Explained.”

¹⁰ Eurostat (European Commission), “Asylum Statistics - Asylum and First Time Asylum Applicants - Annual Aggregated Data (2019),” (<<http://ec.europa.eu/eurostat/web/products-datasets/product?code=tps00191&lang=en>> accessed at 30 May 2020).

¹¹ Ibid.

¹² Eurostat (European Commission), “Asylum Statistics - Citizenship of First Time Applicants,” (<http://ec.europa.eu/eurostat/statistics-explained/index.php?title=Asylum_statistics#Citizenship_of_first-time_applicants:_most_from_Syria_and_Iraq> accessed at 1 March 2018).

¹³ Eurostat (European Commission), “Asylum Statistics - Asylum and First Time Asylum Applicants - Annual Aggregated Data (2019).”

¹⁴ Ibid.

asylum (6% of total annual 2015 EU claims; compared to 18% of total EU claims in 2012), while the Czech Republic received 1,515 (0.1% of total EU claims in 2015; compared to 0.2% of claims in 2012).¹⁵ The vast bulk of new applications for asylum across 2015, 2016 and 2017 were made in Germany, where applications numbered 476,510 in 2015 (just over 36% of all EU), then by 2016 rose to 745,160 (or 59% of all EU applications). It was not until 2017 that annual applications made to Germany began to decline (222,565 or 31% of all EU applications for that year), diminishing further to just 184,180 – or 28% of all EU applications for 2018.¹⁶

The history of how the CEAS was developed explains some of its challenges. Although the CEAS began to be developed by the European Commission in consultation with Member States in 1992, its regulatory structure did not start taking shape until 1999, achieving legal effect through a combination of specific Directives and related legal instruments (discussed in Chapter Three). The current patchwork of regulatory structures that make up the CEAS continues to leave much of the procedural implementation to national administrations. As a result, the parameters of the CEAS are broad and flexible, but remain largely silent on unique factors relating to migration in each national sphere. The deliberate flexibility of the CEAS may be attributable to the legal principle of subsidiarity in the EU (described in Chapter Three), and yet this same flexibility is often criticised for causing uneven domestic implementation.¹⁷

In its current form the CEAS has become a contested site involving many actors, including institutions, government actors, and civil society stakeholders – requiring what Habermas names ‘learning processes’ to occur between these actors, along the route to a more fully legitimated supranational solution (discussed later in this chapter).¹⁸ As a shared power structure created at the EU level, the CEAS remains a largely aspirational concept (discussed in Chapter Three). From a supranational standpoint, it envisions multiple national coordination of action that assumes every Member State has equivalent regulatory output and equal interest in setting up its own

¹⁵ Ibid.

¹⁶ Ibid.

¹⁷ Pollet, “A Common European Asylum System under Construction: Remaining Gaps, Challenges, and Next Steps,” 94.

¹⁸ Habermas, *The Crisis of the European Union: A Response*, 45; Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, 373; Habermas, *The Divided West* 145; Habermas, “The Constitutionalization of International Law and the Legitimation Problems of a Constitution for World Society,” 451.

domestic arrangements to meet the agreed EU-level supranational standards. However, the realisation of these ambitious common outcomes on (national) implementation in the present day may not be so clear. Unevenness is particularly an issue with regard to domestic provisions for the detention of asylum-seekers and irregular migrants,¹⁹ and it remains an ongoing question as to how national and supranational actors ought to better seek influence over the CEAS regulatory structure.

As a result of the supranational-national flexibility and tension inherent in the CEAS, some national regulatory systems contain subtle operational differences that have been found by both national and supranational judicial bodies to be in direct contradiction with supranational CEAS objectives.²⁰ These differences frequently involve the treatment and incarceration of asylum-seekers under the EU *Dublin Regulation*.²¹ For example, the European Court of Human Rights (ECtHR) has recognised problems of domestic implementation in relation to detention and minimum standard of treatment and assessment of asylum seekers between Belgium and Greece, in the case of *M.S.S. v Belgium and Greece*.²² Systemic inadequacies were found in the Greek determination regime that could result in refoulement of a refugee to face torture, openly calling into question the assumptions and success of the CEAS as a supranational means of achieving common outcomes. Such contradictions are discussed in Chapter Three, which reviews the parameters of the legal framework over which the contest between government and civil society takes place.

The contemporary regulatory system of the CEAS is in force as empirical law in the EU, but exists as a result of a regulatory (patch)work in progress, causing tensions among and between each level of regulatory power at the national, supranational, and international levels. As a result, the development of the CEAS at the supranational level is underscored by a complex and fragmented national and transnational history. The following brief overview of EU regulatory systems provides introductory context in

¹⁹ Izabella Majcher, Michael Flynn, and Mariette Grange, *Immigration Detention in the European Union: In the Shadow of the "Crisis"* (Springer Nature Switzerland AG, 2020), 453.

²⁰ Vincent Chetail, "The Common European Asylum System: Bric-A-Brac or System?," in *Reforming the Common European Asylum System: The New European Refugee Law*, ed. Vincent Chetail, Phillipe De Bruycker, and Francesco Maiani (Boston: Brill Nijhoff, 2016).

²¹ *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*, [2013] OJ L 180/31.

²² *M.S.S. v Belgium and Greece*, Application no. 30696/09, Council of Europe: European Court of Human Rights, 21 January 2011.

light of the CEAS as an ongoing ambition, caught between the tension of sovereign (national) control and supranational regulation (a phenomenon addressed in greater detail in Chapter Three). There are several key moments in the historical development of the contemporary CEAS that demonstrate how the supranational system responds to the overarching international law framework contained in the 1951 *Refugee Convention* and associated *Protocol*.²³

The beginnings of the supranational CEAS are found within the text of the 1993 *Treaty of Maastricht* (*Maastricht*), which created three pillars of the European Union: the European Communities pillar with its own legal personality (social, economic and environment policies), the Common Foreign and Security Policy pillar, and the third pillar of Justice and Home Affairs (including asylum and immigration policy).²⁴ The third *Maastricht* pillar of 1993 granted no legislative power to the EU for matters concerning immigration and asylum. Instead, any action on the part of the EU institutions on these topics required intergovernmental cooperation. Some commentators note that the early relegation of asylum and immigration matters to the weaker third pillar precluded preventive measures being created early on in the post-*Maastricht* EU.²⁵ On the other hand, it is arguable that these were merely the first tentative steps among multiple sovereign states along the path towards a future unified common policy on migration and asylum, rather than a comprehensive single regulatory leap.

In 1990 the Member States of the then European Communities came to agree on the *Dublin Convention* – a separate regulatory process that would come to be included in the later CEAS – which related to the orderly assignation of asylum claims, entering into force in 1997. The 1990 *Dublin Convention* intended *inter alia* to assign the processing of an asylum application to a single Member State, to which other Member States could return the applicant, thus preventing forum-shopping on the part of the applicant and in most cases requiring the Member State of first entry to take responsibility for processing. The *Dublin Convention* and its later EU replacement the *Dublin Regulation* (also known as the Dublin System) have been the source of popular

²³ *Convention Relating to the Status of Refugees; Protocol Relating to the Status of Refugees*.

²⁴ European Parliament, *Fact Sheets on the European Union: The Maastricht and Amsterdam Treaties* (<https://www.europarl.europa.eu/ftu/pdf/en/FTU_1.1.3.pdf> accessed at 1 February 2020).

²⁵ Christina Boswell, “The ‘External Dimension’ of EU Immigration and Asylum Policy,” *International Affairs* (Royal Institute of International Affairs 1944-) 79, no. 3 (2003): 626-27.

academic criticism.²⁶ The stated goal of the *Dublin Regulation* is for the burden of asylum applications to be shared amongst Member States of the EU, but in its current form the regulation is frequently subject to the tensions between the objectives of the supranational goals of the EU, and the realities of the domestic implementation by Member States.²⁷ The same problematic tensions are evident in the fate of related attempts at burden-sharing at the level of policy between Member States. For example, a recent plan devised by Germany, France, and Italy to spread the burden of migrants crossing the Mediterranean into southern Member States was posed to a meeting of EU Interior Ministers in late 2019, but was subsequently rejected by other northern Member States.²⁸ The topic of burden-sharing remains an ongoing issue in the CEAS.

In 1999, the *Schengen Agreement* of 1985 was incorporated into the EU body of rights and obligations (the EU *acquis*)²⁹ via the *Treaty of Amsterdam*.³⁰ This had the effect of moving EU asylum policy from the third pillar of EU laws to the first pillar, making the topic of asylum a matter of shared competence between the EU and its Member States.³¹ The move also consolidated the eradication of internal borders for the movement of people within the EU, a process that began with the *Single European Act* of 1986. After the 1999 signing of the *Treaty of Amsterdam*, the European Council concluded that a Common European Asylum System should be developed in the EU using uniform standards (known as the Tampere Programme) based on the 1951 *Refugee Convention*.³²

In 2003, the *Dublin II Regulation* (enacted by the European Council to replace the 1990 *Dublin Convention*) entered into force as binding on EU Member States, including a hierarchy of criteria to determine which Member State was responsible for processing an asylum claim. In 2004, the European Council meeting in The Hague included the creation a deadline for the completion of the CEAS by 2010 (Hague Programme). By

²⁶ Violeta Moreno-Lax, “Dismantling the Dublin System: MSS v. Belgium and Greece,” *European Journal of Migration and Law* 14, no. 1 (2012).

²⁷ Ibid.

²⁸ Aleksi Teivainen, “EU Ministers Find No Breakthrough on Burden Sharing, Finland Still Undecided,” in *Helsinki Times* (<<https://www.helsinkitimes.fi/finland/finland-news/politics/16829-eu-ministers-find-no-breakthrough-on-burden-sharing-finland-still-undecided.html>> accessed at 10 October 2019).

²⁹ European Commission, “Acquis - Glossary of Summaries: Summaries of EU Legislation,” (<<https://eur-lex.europa.eu/summary/glossary/acquis.html>> accessed at 30 July 2020).

³⁰ *Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities, and Certain Related Acts*, [1997] OJ C 340/1.

³¹ European Parliament, *Fact Sheets on the European Union: The Maastricht and Amsterdam Treaties*

³² European Council, *Presidency Conclusions - Tampere European Council*, 1999, SN 200/99, Brussels (October 16, 1999).pp. 13-21.

2007, with the Council following the mandated Tampere and then Hague Programmes, the first phase of the CEAS was implemented. The central components of the CEAS were therefore comprised of the following legal instruments as a notional supranational framework: Regulation (EC) 343/2003 (*Dublin II Regulation*), Directive 2003/9/EC (*Reception Conditions Directive*) Directive 2004/83/EC (*Qualification Directive*) and Directive 85/2005/EC (*Asylum Procedures Directive*).³³ At time of writing the CEAS is going through a third phase of development with EU Member States currently negotiating amendments with the EU institutions, including the European Commission proposing a *New Pact on Migration and Asylum* for Member States.³⁴

In 2009, the *Treaty of Lisbon* was agreed, not only granting the EU new competences on asylum (particularly on minimum reception standards), but also rendering the *Charter of Fundamental Rights* binding on Member States.³⁵ This dual achievement at the EU level reinforced the role of the Court of Justice of the European Union and the European Parliament as institutions key to the functioning of the CEAS, and asserted their influence on the domestic regulations and policies of national Member States. Further influence of the supranational over the national was achieved via the authority of the European Court of Human Rights (ECtHR) over Member States' obligations to meet the CEAS.³⁶ Judicial influence over the CEAS is described further in Chapter Three. Also in 2009, the European Council's Stockholm Programme replaced the Hague Programme, and focused European solidarity on the topics of asylum and migration, calling for cooperation of EU institutions in the coordination of responses to asylum seekers.

The focus of the Hague Programme was a significant moment in the European project, as it attempted to form a coordinated supranational response to the pressures asylum influxes placed on Member States. By 2013, three of the CEAS instruments had been implemented: the *Reception Conditions Directive*, the *Dublin Regulation*, and the

³³ Marcelle Reneman, *EU Asylum Procedures and the Right to an Effective Remedy*, Modern Studies in European Law ; v. 46. (Oxford, United Kingdom ; Portland, Oregon: Hart Publishing, 2014), 27-35.

³⁴ European 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, dated 23 September 2020).

³⁵ *Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community*, Opened for Signature 13 December 2007, [2007] OJ C 306/1 (Entered into Force 1 December 2009).

³⁶ *M.S.S. v Belgium and Greece*.

Asylum Procedures Directive.³⁷ Under these present Directives, Member States were required to transpose the new Directives into law within three years of their adoption, with the binding regulation taking effect three years after entry into force in 2013. The altered *Dublin Regulation* also notably included changes to detention periods which are discussed in more detail in Chapter Three. Combined, these instruments form the supranational framework of the CEAS at time of writing – and yet as this research shows, the EU-wide system remains an uneasy and contested supranational normative governance framework.

IV. HABERMAS AND COSMOPOLITAN ORDER FOR EUROPE AND THE WORLD

The citizens of a democratic political community do not subject themselves to the law simply as a matter of fact because of the threat of sanctions by the state; they can also accept the law in principle as 'right' because it was enacted through a democratic procedure. – Habermas, *The Crisis*³⁸

Habermas argues in *The Crisis* for a model of reformed supranational governance that would ensure democratic legitimacy (under the conditions of Habermas' discourse theory of deliberative democracy) at the national, supranational and (eventually, according to his theory) world levels, which in turn would better civilise increasing international problems attributed to the issues of globalisation.³⁹ Supranational systems such as the CEAS accord with Habermas' cross-border problems requiring supranational reform, pushing upwards from the national towards supranational levels of control, via several EU innovations discussed in the following paragraphs. For Habermas, global morality and a functionally global world society is already in train, but current realities – and cross-border matters that demand such global functions – lack legitimate political expression in supranational and world cosmopolitan institutions that

³⁷ 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 2013/33/EU, [2013] OJ L 180/96; 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; 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 2013/32/EU, [2013] OJ L 180/60.

³⁸ Habermas, *The Crisis of the European Union: A Response*, 23.

³⁹ *Ibid.*, 61.

are properly imbued with the legal authority to regulate and manage such cross-border matters.

In the interests of scope and length limitations of this thesis, this chapter mostly cites the practical model Habermas presents in *The Crisis*, and does not exhaustively explore the philosophical and theoretical concepts from his earlier works. Nevertheless, it is important to acknowledge the model in *The Crisis* is fundamentally based on Habermas' philosophical oeuvre relating to cosmopolitan discourse theory, and so joinder and discussion of relevant literature in the field frequently refers to earlier works that support ideas in the contemporary text.

The central contention of *The Crisis* is that globalisation and the interactions of world society increasingly generate cross-border problems that 'individual states, or coalitions of states, are no longer able to master',⁴⁰ and that a solution lies in a reformed supranational and cosmopolitan political community ensuring 'democratic legal domestication across national borders',⁴¹ that would better tame 'the social forces of nature that have been unleashed at the transnational level'.⁴² Habermas argues such cross-border (or transnational) challenges are to be civilised through the constitutionalisation of international law, and through the actions of democratic supranational institutions operating in a politically constituted cosmopolitan society – as might end up being the case in a reformed European Union and beyond that, a reformed United Nations (UN).

Problems Habermas identifies with the current construction of the EU particularly relate to the erosion of democracy at the supranational level, resulting in a notional erosion of the legitimacy of supranational power, which in turn for Habermas threatens the ability of the EU to manage cross-border problems. Whilst Habermas endorses the cosmopolitan ideal of transnational decision-making beyond the nation-state, he is at pains to avoid a disconnect between the collective will-formation of national citizens and the decision-making of supranational bodies; particularly that one should not be at the expense of the other. He subsequently illustrates his vision for a reformed EU in *The Crisis* by conducting a select critique of its institutions, and characterising the EU as a

⁴⁰ Ibid., xi.

⁴¹ Ibid., 53.

⁴² Ibid., 10.

‘stage along the route’⁴³ towards a cosmopolitan transnational democracy. He also singles out the opaqueness of legal order caused by executive federalism ‘implicit in the Lisbon Treaty’ of 2009,⁴⁴ and directly criticises the operation of the European Council, whose decisions he argues encroach on the core business of the nation-state without necessary democratic legitimacy, subsequently undermining the entire EU project.

The Crisis proposes an altered model of supranational governance as a reaction to his perceived weaknesses of supranational arrangements in the EU. The model is founded on the transnationalisation of popular sovereignty for the ‘democratic legal domestication and civilisation of state power’,⁴⁵ which would ultimately result in a move from an ‘international community of states...into a cosmopolitan community of states and world citizens’.⁴⁶ This movement naturally engenders tensions between and among the two levels. In order to achieve this goal in the context of the EU, Habermas suggests a revision of the European treaties as they presently stand, to eradicate the notion (removing a ‘mental block’ as he describes it)⁴⁷ that popular sovereignty is somehow limited to operate at the level of the justification of state sovereignty. The resulting model accordingly recasts three concepts – democratic free association, the organisation of collective decision-making institutions, and civic solidarity – releasing them from the sphere of the national into the domain of the supranational, whilst retaining the traditional nation-state’s primacy in its role as constitutional guarantor of laws and freedoms.

Seeking worldwide expansion of his model, Habermas then extrapolates the supranational model to the global sphere, describing a Kantian-inspired cosmopolitan world society, with a reformed UN in charge of enforcing human rights and prohibiting state violence, and a UN Security Council whose decisions would be subject to oversight by an independent judiciary. The envisioned cosmopolitan world society would elect a world parliament, whose decisions would also be reviewable. Habermas’ world citizens would experience a concessionary ‘reduced legitimacy requirement’⁴⁸ in relation to the world parliament, such that world elections would only indicate a willingness to be bound by supranational application of ‘presumptively shared moral

⁴³ Ibid., 2.

⁴⁴ Ibid., 52.

⁴⁵ Ibid., x.

⁴⁶ Ibid., xi.

⁴⁷ Ibid., 13.

⁴⁸ Ibid., 65.

principles and norms'.⁴⁹ Other matters of world domestic politics would be 'diverted into a transnational negotiation system'⁵⁰ which would have weaker legitimation, but which would itself be overseen by the elected world parliament and associated judiciary, thus aiding to correct any possible legitimacy imbalance.

V. EU INNOVATIONS ENABLING BETTER SUPRANATIONAL GOVERNANCE

These innovations explain how a transnationalization of popular sovereignty is possible in the shape of a democratic alliance of nation states. – Habermas, *The Crisis*⁵¹

In critiquing present European political arrangements, Habermas argues that the current 'gubernatorial-bureaucratic style' of the EU must move towards 'a sufficiently democratic mode of juridification' for the purposes of enduring political stability and to improve the handling of cross-border issues.⁵² He argues this movement is possible via two unique innovations of the EU not common to other political systems, both of which he argues have historically 'proven to be ground-breaking':⁵³

*[O]n the one hand, the subordination under European Union law of the member states which enjoy a monopoly on the means for a legitimate use of force and, on the other, the sharing of sovereignty between the 'citizens' and the 'peoples' as the constitution founding subjects.*⁵⁴

The first innovation contains two elements: the first is that sovereign power is indeed presently relinquished by the Member States to the EU in relation to matters of pre-agreed EU competence, whilst the second is that despite cession of power, Member States still retain a monopoly on the right to use legitimate force. Habermas contrasts this arrangement with a traditional federation, in which subordinate entities *must* give up the right to use legitimate force (*viz.* cede independence). He notes the EU cannot be described as a federation in this way; indeed, nor should it ever become federated under

⁴⁹ Ibid., 66.

⁵⁰ Ibid., 68.

⁵¹ Ibid., 11.

⁵² Ibid., 20.

⁵³ Ibid., 54.

⁵⁴ Ibid.

the traditional model.⁵⁵ Together the two elements of the first innovation (relinquished powers; retention of right to use legitimate force) result in the civilisation of violence ‘at the core of political power’⁵⁶ in the EU due to the concurrent tensions inherent in the operation of *both* national and supranational governance, on the basis of the democratic legitimisation of laws developed within frameworks operating at each level. The resulting effect is a sharing of traditional sovereign power beyond the Member State, such that ‘the balance in the relation between the sanctioning power of the state and the law shifts’.⁵⁷ The bifurcation of state subordination and state independence is crucial to the model, as it suggests that the laws affecting individuals in Member States may be located in (and sourced from) a zone slightly beyond the traditional domain of nation-state power, via the gradual and democratically legitimate relocation of that zone. The question of what constitutes the edges of this theoretically shifting zone, including its tensions as it shifts, is crucial to establishing and explaining the tensions arising in supranational systems, such as surround the research questions to be explored by this thesis.

The second innovation, relating to the dual role the European people are to play in the life of the Habermas’ reformed EU, is core to his aims for greater democratic legitimacy of political decision-making at the supranational level, and explains how the first innovation has hitherto been possible. Habermas argues that the constitution-founding subjects of the EU are not the Member States, but rather the peoples of Europe, acting as the common founding denominator of both levels.⁵⁸ For Habermas, successful democratic legitimacy for both the national and supranational systems is possible through a theoretical splitting of the function of Europe’s ‘constitution-founding subjects’⁵⁹ – the people of Europe – in a ‘twofold manner’:⁶⁰ on the one hand citizens are acting as the subjects of the European Union, whilst on the other concurrently acting as citizens of their respective Member States. The causal chain of legitimacy does not proceed in linear fashion from Member States to the EU as it might in federal (United States of America) or international (UN) systems – rather it flows from peoples to the EU, and from peoples to Member States (which in turn also guarantee the EU).

⁵⁵ Ibid., 32.

⁵⁶ Ibid., 41.

⁵⁷ Ibid., 25.

⁵⁸ Ibid., 35.

⁵⁹ Ibid., ix.

⁶⁰ Ibid., 35.

Habermas cites the genesis of this split to be the Preamble of the 1992 Treaty of Maastricht (in its current form, the Treaty on European Union or TEU).⁶¹ The Preamble sets out the objectives and limits of supranational power, to achieve ‘an ever closer union among the *peoples* of Europe’ (emphasis in Habermas).⁶²

Having developed a common denominator in the peoples of Europe, Habermas sets out to explore the factors that might lead to supranational civic solidarity through so-called civil society ‘learning processes’,⁶³ caused by a civil awareness of sovereign ‘political and economic constraints’.⁶⁴ He claims solidarity of the peoples of Europe at the EU level is presently obstructed by a host of sovereign political practices that ‘obey a stubborn political code which is connected with the legal normative framework’.⁶⁵ This is linked with his central statement in *The Crisis* that ‘innovative constitutional norms linking law and politics at the supranational level in many cases have a constructive anticipatory, stimulating effect by prompting learning and adaptation processes’.⁶⁶ This notion (as described above) is connected with the traditional nation-state legitimacy of laws being slightly relocated by the EU (the first innovation), and the stimulation this dissonance brings in shifting law away from the sanctioning power of the state.

Habermas concludes that if the role of individual citizens in the legitimation of governing entities is split between the EU and the Member States, fluid loyalties of the citizenry must also overlap beyond national borders, and accordingly the tiers in a multi-level political system including stubborn national frameworks are not a given, as many incorrectly assume.⁶⁷ Since loyalties of individual citizens are naturally not restricted to the state – citizens attribute allegiance to a number of politically diverse factors, only some of which include ‘one’s region of origin...one’s domicile...[one’s] country or nation’ – then civic solidarity is possible beyond the nation-state.⁶⁸ National

⁶¹ Ibid., 34.

⁶² Ibid.

⁶³ Ibid., 45; Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, 373; Habermas, *The Divided West* 145; Habermas, “The Constitutionalization of International Law and the Legitimation Problems of a Constitution for World Society,” 451.

⁶⁴ Habermas, *The Crisis of the European Union: A Response*, 48.

⁶⁵ Ibid., 45.

⁶⁶ Ibid.

⁶⁷ Ibid., 47.

⁶⁸ Ibid.

allegiances are only relevant in cases of conflict or war when ‘they have to be balanced against each other’.⁶⁹

Habermas argues that the accepted legitimacy of the democratic nation-state (with non-split peoples) has long been in train, but under the contemporary arrangement of the EU (split peoples via the two innovations) the older polity is now somewhat pitted against the legitimacy of its newer supranational counterpart. Thus, the hurdle faced by Member States in the EU is the cession of established national power to a newer supranational entity, on the condition that the supranational entity retains the democratic character of the nation-states of which it comprises. This ensures concurrent legitimacy of both the supranational power and its constituent Member States – effectively creating the conditions for what Habermas calls ‘shared sovereignty’.⁷⁰

The problem Habermas identifies with the current EU arrangements arises from national and supranational regulatory dissonance and tensions that exist despite the two innovations he cites, which he attributes to opaque and weakly legitimated decision-making at the EU level that should be strengthened. He argues that EU legitimacy could be bolstered by better civic solidarity amongst European peoples,⁷¹ and that national citizens unfortunately ‘perceive the decision-making processes [in the EU] as a zero-sum game in which their own actors [nations] have to prevail against the others’, instead of ‘looking to the parliament in Strasbourg which they have elected’.⁷² Furthermore, he claims that better civic solidarity at the EU level cannot be achieved if social inequalities between nations results in divisions between wealthy and poor Member States.⁷³ For this thesis, the research findings in Chapters Four, Five, and Six, suggest that similar divisions and tensions are observable not only at the national level, but among and between civil society and government actors at each level – suggesting the early signs of a supranational civic solidarity is an end-goal that is underway in relation to the CEAS. These findings are discussed further in later chapters, as the focus of this chapter is to describe the Habermasian theoretical framework as it relates to the research questions.

⁶⁹ Ibid.

⁷⁰ Ibid., 35.

⁷¹ Ibid., viii.

⁷² Ibid., 131.

⁷³ Ibid., 53.

Despite modern fluidity in modern European loyalties, Habermas warns that the ‘long shadow cast by nationalism continues to obscure the present’,⁷⁴ and thus his two-fold project – of overcoming the stubborn political practices of nationalism and realising his model of supranational civic solidarity via the two innovations – depends on the success of what he calls ‘learning processes’⁷⁵ linked to growing civic awareness beyond the borders as the theoretical shift of democratic loyalties occurs. Historically and in the context of the first innovation, this process has been commenced by ‘innovative constitutional norms linking law and politics at the supranational level [that] in many cases have a constructive anticipatory, stimulating effect by prompting learning and adaptation processes’.⁷⁶ It appears that the purpose of Habermas’ proposed theoretical model is to further agitate for the continuance of these effects.

VI. CROSS-BORDER WILL-FORMATION AND LEARNING PROCESSES TOWARDS A COSMOPOLITAN COMMUNITY

Democratic elections are the result of a shared practice of opinion- and will-formation, which is normally marked by the self reference to the 'we' of a particular, because limited, community. – Habermas, The Crisis⁷⁷

The civil society learning processes cited by Habermas in *The Crisis* are claimed to enable the growth of cross-border awareness and better transnational will-formation at the supranational level, which would in turn better legitimate supranational and international regulation and laws. For Habermas, these learning processes are variously to be performed amongst society, on the basis of dissatisfaction with the limitations of the state ability to handle cross-border (or transnational) problems.⁷⁸ Habermas places particular emphasis on the mass media to provide learning processes and solidarity at the European (rather than national) level: ‘the transnationalization of the existing national publics does not call for different news media, but instead for a different practice on the part of the existing leading media’.⁷⁹ The results of transforming traditional national civic solidarity to the transnational sphere (i.e. via transnational

⁷⁴ Ibid., 47.

⁷⁵ Ibid.

⁷⁶ Ibid., 45.

⁷⁷ Ibid., 63.

⁷⁸ Ibid., 51.

⁷⁹ Ibid., 49.

media) would result in ‘the expansion of communication networks and horizons of perception, the liberalization of values and attitudes, an increase in the willingness to include strangers, [and] the strengthening of civil society initiatives and a corresponding transformation of strong identities’.⁸⁰ The inclusion of ‘strangers’ in this section is a direct reference to Kant’s cosmopolitan sketch of world citizenship in *Towards Perpetual Peace*, in which Kant states: ‘hospitality means the right of a stranger not to be treated as an enemy when he arrives in the land of another’.⁸¹ Habermas is therefore arguing that Kantian universal hospitality for strangers (refugees) in a supranational regulatory environment is only legitimate when the supranational society can engage in civic solidarity (and will-formation) beyond the borders of the (national) Member States.⁸² Thus, the supranational feat of the EU causes the shift in the rationale for law’s legitimacy away from state power (the second innovation), which in turn infers friction from societal movement under civil society learning processes towards supranational solidarity amongst European peoples (the first innovation), which might then present democratically legitimate solutions to cross-border problems that are presently subjected to the political and economic tensions and limitations of the national level.

The reducibility of legitimacy to the individual level is therefore the theoretical solution Habermas presents to this problem caused by national limitations, on which discussions concerning tensions investigated by this project are based. The theoretical reduction to the individual also constitutes a major point of departure between the picture Habermas paints of the current European political landscape, and his envisioned model of improved supranational civic solidarity and cross-border regulatory success. Aside from describing the notional legitimization of a shared sovereignty between the EU and its Member States through the shared loyalties of the individual, Habermas makes the following crucial statement (emphasis in original):

*[A] different and peculiar kind of ‘shared’ sovereignty is involved in the present case. The division of the constituent power divides sovereignty **at the origin of a political community which is going to be constituted,***

⁸⁰ Ibid., 46.

⁸¹ Kant, *Perpetual Peace*, 20.

⁸² Habermas, *The Crisis of the European Union: A Response*, 21.

*and not only at the source of the already constituted political community.*⁸³

Habermas' notional division occurs along a timeline that commences at formation of a model future supranational community, legitimated by the pre-existing political community of the peoples of Europe – the same peoples who presently legitimate Member States. Effectively, this means the grounds of a reformed EU arise from the existence of the 'peoples of Europe', as codified by the Preamble to the TEU (see above).⁸⁴ This notion then supports the rationale of a subsequent model of supranational power, which for sovereign Member States results in the transferal of sovereign state power – via the duality of citizens' loyalty – to the supranational entity, with the sovereign rights of reservation, legitimate use of force, and withdrawal remaining intact with the states as a safeguard on supranational and transnational power. Habermas argues that the moment of division of sovereign power marks the point of a possible departure for future improved supranational and transnational arrangements, under the auspices of shared rather than absolute democratic legitimacy. In the context of this thesis, Habermas points out that these historical moments of division require examination, and that 'social scientific analysis of the exacting political-cultural conditions...must be satisfied if transnational will-formation by citizens of the EU is to take place'.⁸⁵ It is the tensions inherent in this category of will-formation (between and amongst national and supranational) that this project seeks to examine, and it is Habermas' notional split of individual loyalties between the national and the supranational that forms the theoretical underpinnings of this study.

VII. MOVING TOWARDS INTERNATIONAL LEGAL COSMOPOLITANISM

According to classical international law... governments enjoy the prerogative of concluding international treaties...If the chain of democratic legitimation were to break off at this point, however, the proposed design would not be able to satisfy its claim concerning the unity of a global legal

⁸³ Ibid., 38.

⁸⁴ Consolidated Versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, [2012] OJ C 326/1, Preamble.

⁸⁵ Habermas, *The Crisis of the European Union: A Response*, 49.

order which lowers the threshold between international and national law. –

Habermas, *The Crisis*⁸⁶

The second half of *The Crisis* extrapolates the reformed model for arrangements between the EU and its Member States, towards a vision of how the present international community of sovereign states (the present United Nations) might shift from an international to a cosmopolitan community of ‘states *and* citizens’⁸⁷ (emphasis in original) in a reformed UN. The movement of legitimacy of laws to a zone beyond the power of state sanctions, as described earlier in the chapter, is by extension expandable to a zone of legitimacy beyond the supranational, even if to a limited extent. The reasons Habermas gives for this shift at the global level refer to his earlier remarks that international problems are becoming unmanageable for national actors, and that ‘it is not individual states or coalitions of states which are confronted with such problems of the world society but politics in the singular’.⁸⁸ For Habermas, globalisation of politics demands an according requirement of civil society learning processes towards globalised regulation, which must also be democratically legitimated to be effective:

*Politics no longer encounters social problems only within the institutional framework of nation states but, insofar as these problems have a cross-border character, as objects of intergovernmental regulations... [T]he national actors, in whose hands the political decision-making powers are still basically concentrated, are not equal to the regulatory needs of the functionally differentiated world society.*⁸⁹

The last sentence of the above paragraph is significant for the aims of this thesis, since Habermas infers that because world citizens increasingly function under conditions materially different to that of life within the nation-state, a regulatory system needs to be produced at the global level as extant at the national level. The basis for this argument – that global function demands global regulatory catch-up through civil society ‘learning processes’ from the state level upwards towards the international level⁹⁰ – is critical to understanding the underpinning formula of Habermas’

⁸⁶ Ibid., 67.

⁸⁷ Ibid.

⁸⁸ Ibid., 55.

⁸⁹ Ibid.

⁹⁰ Ibid., 47.

supranational goal, and beyond that, a cosmopolitan community of world citizens under international legal cosmopolitanism.

The depiction of Habermas' formula for better shared sovereignty for improved supranational governance (to, in turn, overcome problems of globalisation that nations alone cannot handle) is a central feature of *The Crisis*. His resulting model incorporating the formula is instructive for the research questions explored by this thesis, and forms the basis for the normative dimensions of tensions between and among actors explored throughout the fieldwork and research design described in Chapter One. Parsing a thought-problem is a possible method of understanding the operation of this formula and the model. Take, for example, an EU Member State's given regulatory mechanisms to manage irregular migrant asylum seekers (a global functional reality). The authorities of that Member State engage in administration and implementation of state laws relating to managing asylum seekers, and respond to state law, international law as incorporated domestically, and a common asylum system administered by the supranational EU. On Habermas' model, in the thought-problem a reduction to the individual level is then undertaken to establish legitimacy in each active component to the transaction:

- i) the third-country asylum seeker operating under international law and faced with the receiving state law;
- ii) the members of the state police authority responding to state law, EU regulation, and international treaties incorporated domestically;
- iii) the members of the state legislature responding to state constituents, EU Directives, EU regulation in areas of EU competence, and international treaties incorporated domestically;
- iv) the citizens of the state bound by state law and international treaties incorporated domestically, responding to constitutional requirements to democratically elect representatives in the state legislature;
- v) the citizens of the States responding to requirements of domestically incorporated international treaties to democratically elect representatives

in the European Parliament to better legitimate laws at the EU level; and finally

- vi) the members of the European Parliament responding to Member State constituents and international treaty requirements in developing a common asylum system.

Common to nearly all components of the thought-problem transaction is international law's normative influence on the transaction. Elections at iv) and v) infer will-formation by Habermas' dual-loyal citizenry, the supranational success of which depends on the learning processes he describes to achieve supranational civic solidarity (i.e. national populations would need to understand the limitations of their state to handle such matters). Components ii) and iii) are traditional nation-state elements managing the shifted zone of legitimation of law away from the sanctioning power of the nation-state towards the EU. Component vi) is the supranational entity suffering from what Habermas argues is weak legitimacy, whilst component i) is Habermas' global citizen demonstrating the 'needs of the functionally differentiated world society',⁹¹ possibly against the realities of the state law receiving the global citizen.

Under Habermas' conditions set out in *The Crisis*, the above thought-problem demonstrates that the presence of asylum seekers within the borders of an EU Member State, operating as an individual person under a functionally global set of norms (as codified in international laws) may actually challenge the sanctioning powers of the nation-state, such that asylum seekers could be said to act on a different set of legal norms in tension with those of the destination. Cast into this conceptual mix, caught between the middle of the state and the international law, is the supranational role of the EU, which may also bring its own tensions to bear. Which way does the EU lean – towards the international or towards the national? Does it draw downwards from the international law norm level, does it react from constituent Member State demands emanating below, or does it draw upwards from the European people as a transnational whole? Or should it engage in a combination of all three? This thesis attempts to answer some of these matters through the research questions. Overall, it is clear that on contemplation of the thought-problem reducing a cross-border event to the individual level, the actions and expectations of asylum seekers validated at the international norm

⁹¹ Ibid., 56.

level may be in direct contrast with actions and expectations at the national norm level, even where mediated by supranational guidance somewhere in between. The point of the formula and Habermas' resulting theoretical model is that the common denominator is individuals as ends in themselves; all transactionally involved both within and without the nation and the EU, in an activity that is borne of functionally global problems that the traditional nation-state is systemically unable to handle.

Habermas' theoretical solution in strengthening supranational legitimacy through supranational civic solidarity via his civil society learning processes (and thereby providing better solutions to cross-border issues) is convincing in this light. In the thought-problem, the lowest common denominator is the starting point: both the asylum seeker and the citizen of the Member State (who is also a person of Europe voting for representation in the EU) are global citizens responding to the realities of 'world society', as well as national and supranational constituents.⁹² From there, the collective allegiances and loyalties of individuals give legitimacy to various levels of political and legal norms. For the asylum seeker, the action and belief are based on internationally accepted norms codified by the international laws relating to refugees, and the procedural expectations that codification brings. For individuals within the receiving Member State, the loyalties are legion, and may collide.

For Habermas' model, this collision and resulting duality (multiplicity) of essentially *norm loyalties* in the peoples of the world (whatever their national allegiance) drives the need for organisational changes beyond the structures of the nation, towards a better form of supranational and global regulation, underpinned at all levels by at least basic levels of democratic legitimation, which would in turn be supplied by peoples all voting as national, supranational, and world citizens. This is the theoretical basis on which, under Habermas' model, that the act of seeking asylum may be a function of global citizenry, intersecting with the will of the nation-state, the will of the supranational EU, and the normative influence of international law.

In moving towards international legal cosmopolitanism, Habermas' model applies differing levels of importance to each of the three suggestion reformations at each political level (national, supranational, and cosmopolitan/global). He places greatest importance on the national, since the functioning of the other two parts (supranational

⁹² Ibid., 55.

and beyond that the cosmopolitan) are to be guaranteed by constitutionalisation of operations at the national level. Habermas clarifies that the closest political mode that expresses the will of the people is the national mode, which can then in turn assist in defending the existence of the supranational and cosmopolitan settings beyond it through the operation of the National Courts in each nation-state applying international legal norms in the domestic sphere, acting as ‘guarantors of law and freedom’ for Europe.⁹³

As noted above, Habermas is at pains to ensure that a reformed supranational EU would not take on the role of a ‘supreme constitutional authority (*Kompetenz-Kompetenz*) at the European level’, (emphasis included)⁹⁴ as would be the case for ordinary federations of states. Instead, for Habermas the transfer of power to the supranational level should only be partial in the model: ‘member states transfer the sovereign rights of their already constituted states in part, and only one by one, to the new polity’, but are to retain their constitutionally independent character to ensure that the Union does not ‘fall below the level of taming and civilising state power already achieved in the states’.⁹⁵

Habermas places the weakest role (in terms of legitimacy requirements) on a reformed UN with basic functions limited to the core tasks of regulating (via global laws) human rights, and global security.⁹⁶ In order to allow for estimated variability of global cultural norms, Habermas describes the world organisation as having a ‘reduced legitimacy requirement’, based on the most basic of ‘intuitively known norms...[relating to] collective will-formation in the essentially political sense’.⁹⁷ The reformed UN would therefore be subject to world elections by world citizens but only on the basis of the ‘morally justified “yes” or “no”...application of presumptively shared moral principles and norms’ relating to human rights and global security’.⁹⁸ National and supranational entities would have control over the remainder of competences, under a ‘transnational negotiation system’ in which supranational entities would make military forces available for enforcing security and human rights, under a standard of justice (informed by human rights) negotiated at the world level.⁹⁹ The purpose of Habermas’ entire

⁹³ Ibid., 41.

⁹⁴ Ibid., 39.

⁹⁵ Ibid.

⁹⁶ Ibid., 57.

⁹⁷ Ibid., 65.

⁹⁸ Ibid., 66.

⁹⁹ Ibid., 68.

reformed cosmopolitan system is to ensure the ‘justice perspectives’¹⁰⁰ of all constituent global subjects – both transnational actors (being nations and supranational entities) *and* world citizens – ‘converge as concerted political action [gives] rise to a factual assimilation of living standards’.¹⁰¹ The only place, Habermas claims, for an appropriate or normative discussion of what are the proper global justice perspectives and living standards, is not ‘just in academia, but instead in a world parliament’.¹⁰²

VIII. HUMAN RIGHTS, REFUGEES AND THE COSMOPOLITAN WORLD ORDER

Human rights rely on finding institutional embodiment in a politically constituted world society. –Habermas, *The Crisis* ¹⁰³

Having argued for the importance of the move from national to globally legitimate political arrangements in order to better manage cross-border problems, Habermas sets out to discuss the late arrival of the concept of human dignity on the international legal scene, and the problems associated with divorcing morality from positivist legal conceptions of human rights. This discussion is of course relevant to the thesis subject matter, which in part explores the interplay between international law, the EU, and its Member States. Habermas interlinks this discussion to his previously described model, by virtue of his grounds for the establishment of a global cosmopolitan political community that would better establish and protect human rights. He compares the philosophical concept of human dignity to the concept of universal human rights, and he argues that even though legal notions of human dignity have only recently been applied, these ‘unmistakeably re-echo Kant’s categorical imperative [that] respect for the dignity of every person forbids the state to dispose over any individual merely as a means to another end, even if that end be to save the lives of many other people’.¹⁰⁴

The conflation of the legal concept of human dignity with Kant’s categorical imperative of people-as-ends is a direct link to the lowest common denominator in Habermas’ model for better supranational legitimacy – a formula commencing with a reduction to the individual, regardless of national, supranational or regional loyalties, subsequently

¹⁰⁰ Ibid., 70.

¹⁰¹ Ibid.

¹⁰² Ibid.

¹⁰³ Ibid., xii.

¹⁰⁴ Ibid., 73.

justifying an expansion of regulatory legitimacy beyond sanctioning power of the nation-state. Habermas complains that nations ‘struggle to implement human rights’, and that the spread of universal human rights ‘beyond national boundaries [has] never been possible without social movements’.¹⁰⁵ This means that the only means to attain a universal notion of human rights beyond statehood would be ‘within an inclusive worldwide political community’.¹⁰⁶ His argument directly ties in with his previous model for the development of this type of cosmopolitan world entity.

In discussing the need to charge law with morality (instead of unlinking it, as he argues national posited law tends to do), Habermas particularly singles out the plight of asylum seekers. His several important statements are reproduced in entirety below to allow for proper discussion:

Whenever an asylum seeker is deported at an airport behind closed doors, whenever a ship carrying refugees capsizes on the crossing from Libya to the Italian island of Lampedusa, whenever a shot is fired at the border fence between the United States and Mexico, we, the citizens of the West, confront one more troubling question. The first human rights declaration set a standard which inspires refugees...a standard which can give them the assurance that their suffering is not a natural destiny. The translation of the first human right into positive law gave rise to a legal duty to realize exacting moral requirements which has become engraved into the collective memory of humanity...The tension between idea and reality which was imported into reality itself as soon as human rights were translated into positive law confronts us today with the challenge to think and act realistically without betraying the utopian impulse. This ambivalence can lead us all too easily into the temptation either to align ourselves in an idealistic, but non-committal, way with the exacting moral requirements, or to adopt the cynical pose of the so-called realists.¹⁰⁷

This passage reveals Habermas’ larger project behind better legitimation of supranational and international legal cosmopolitanism. For Habermas, international

¹⁰⁵ Ibid., 94.

¹⁰⁶ Ibid., 93.

¹⁰⁷ Ibid., 94-95.

human rights law (including international law relating to refugees) codifies universal or global morals relating to human rights that reflect the Kantian categorical imperative. Habermas argues the moment human rights, such as refugee rights, were codified into positive law at the international level was the moment that the moral idea of human rights came into tension with a domestic political and legal reality. However, tensions arising from the codification of human rights into domestic law are largely due to the removal of morality of the law under positivist conditions (cf. the first hurdle of positivist law facing asylum seekers, described in Chapter One).

In order to solve this problem, and ensure the translation of idealistic and morally-driven international law into effective and binding regulation, Habermas argues for the institutionalisation of international legal norms into supranational and national political systems, through a process of constitutionalisation of international law.¹⁰⁸ International law would become codified as domestic law, along with its moral backing. The reason this translation can better occur in the model is via the legitimation of supranational and world societies, sharing sovereignty (and therefore binding power) by virtue of the split role of individuals acting as constituents to each level. The above passage in *The Crisis* relating to asylum seekers should therefore be understood in the context of Habermas' arguments surrounding the inability of states to manage cross-border problems with domestic regulation, and normative sources of law (and morality) on which individuals-as-asylum-seekers act. Habermas argues we should remember the universal morality behind universal human rights led to the implementation and creation of the domestic legal duty, rather than strictly adhering only to posited legal duties that '[strip] human rights themselves of their moral surplus'.¹⁰⁹

Habermas also argues in the passage that the political choices constituents might take are incorrectly simplified to either vague idealistic stances, or a cynical 'realist' stance – an indirect reference to Carl Schmitt's political philosophy that political expediency trumps morality.¹¹⁰ The tension described is as discussed above, between a morally utopian ideal of universal human rights, and the reality of domestic policy and laws stripped of the moral backing. Yet Habermas assures us that the achievement of universal human rights is not merely philosophical, but is instead a practical problem to

¹⁰⁸ Ibid., 28.

¹⁰⁹ Ibid., 99.

¹¹⁰ Schmitt, *The Concept of the Political*, 86.

be dealt with at a national political level and beyond: ‘human rights constitute a *realistic* utopia insofar as they... anchor the ideal of a just society in the institutions of constitutional states themselves’.¹¹¹ Just as he described the capacity for national courts to ensure the minimum standards of rights and obligations exist in the EU, here he again argues that the safeguard on human rights and peace occurs first and foremost at the national level.

Habermas further argues that the ‘civil’ rights implemented at the national level were sourced from the concept of universal human rights in the first place – these are in effect the same species of moral thought, but pitted against each other due to the removal of morality in their domestic codification as law. By divorcing morality from domestic laws relating to human rights, nation-states experience ‘the still-persisting tensions between universal human rights and particular civil rights at the domestic level [which] provide the normative reason for the [present] international dynamic’.¹¹² For Habermas, legal positivism minimises the role of the moral backing of universal human rights, and forgets that the tensions between the national law and international rights are the same tensions that gave rise to civil rights being implemented within the nation-state.

IX. ADDRESSING SELECT CRITICISM OF HABERMASIAN DUALITY OF LOYALTIES

Writing in the mid 1990’s, Robert Dahl criticised the ability of international institutions – including the EU – to sufficiently provide what he saw as the basic tenets of democracy that are often missing from the legitimisation dynamics of international and supranational institutions. In his critique, Dahl claimed that democracy could only exist where political association would absolutely guarantee an according equal participation about the decisions of the given democracy.¹¹³ Of his argument that the European Union is unable to legitimise the supranational population’s desires in an effective parliament, he stated that instead of democracy, crucial decisions are reached ‘mainly through bargaining among political and bureaucratic elites [and] limits are not set by democratic

¹¹¹ Habermas, *The Crisis of the European Union: A Response*, 95.

¹¹² *Ibid.*, 99.

¹¹³ Robert A. Dahl and Ian Shapiro, *On Democracy*, 2nd edition. ed. (New Haven: Yale University Press, 2015), 38.

processes but mainly by what negotiators can get others to agree to'.¹¹⁴ Dahl's central criticism appears aimed at the supranational model for system of government that is not federal but loosely federal, constructed in a manner that prevents full democratic legitimization of decisions and regulation stemming from the supranational level.

Responding to the possibility of this type of criticism in *The Crisis*, Habermas characterises such challenges as 'scepticism concerning a democratic legal domestication of political authority that reaches beyond national borders'.¹¹⁵ He then cites the first innovation of the EU regarding the duality of citizen loyalty – under conditions of solidarity – as described above. To Habermas, these challenges by sceptics such as Dahl are disprovable by virtue of a 'collectivist misunderstanding which confuses popular and state sovereignty'.¹¹⁶ Habermas describes the misconception as being one in which popular sovereignty is mistakenly taken to lead to and reify state sovereignty on the world stage, which then in turn is incorrectly taken to be the ultimate expression of the will of the people. The truth, Habermas argues, is that 'restricting national sovereignty by transferring sovereign rights to supranational authorities by no means necessarily comes at the cost of disenfranchising democratic citizens'.¹¹⁷ Furthermore, the misconception that popular sovereignty equates to state sovereignty 'obscures the artificial, and thus floating, character of the consciousness of national identity constituted in nineteenth-century Europe'.¹¹⁸ Habermas essentially responds to Dahl's arguments by simply pointing out the synthetic nature of European nationalism possible in the EU – again utilising the first innovation to underscore the sense of European solidarity that causes the theoretical shift via civil society learning processes towards supranational legitimacy.

Other criticism of *The Crisis* stems from practical limitations of Habermas' suggested theoretical model, in which he gives minimal specifics of how the structure should be reformed. For example, Thomas Hueglin states that *The Crisis* falls short in prescribing solutions to the 'quasi-monarchical European Council (of government leaders)', claiming that the 'slim institutional reform considerations are flanked by a number of

¹¹⁴ Ibid., 115.

¹¹⁵ Habermas, *The Crisis of the European Union: A Response*, 16.

¹¹⁶ Ibid.

¹¹⁷ Ibid., 18.

¹¹⁸ Ibid., 17.

additional suggestions [that] belong more into the realm of wishful thinking'.¹¹⁹ Habermas does warn of the expansion of executive federalism by the European Council in *The Crisis*, but simply says that this risk is at odds with the spirit of the Treaty on European Union.¹²⁰ Similarly Duygu Gül argues that Habermas is incorrectly trying to paint 'the ineffective performance of the political leaders and bureaucrats [as] the major reason behind the EU's current impasse... propos[ing] an idealistic solution to a deeply material and structural problem'.¹²¹ While it is true that *The Crisis* is limited in specificities on exactly how the EU institutions could be reformed, and admittedly Habermas is, as Hueglin puts it, certainly guilty of being a 'critical philosopher with a strong normative bent',¹²² the wishful thinking – or normative elements – of the theoretical model Habermas paints in *The Crisis* is a close match with the aims and objectives arising from the research questions of this thesis, particularly in relation to the supranational political and legal structures of the EU and how these exist in tension the national level of EU Member States.

X. CONCLUSION

Influxes of asylum seekers into the geographic territory of the EU, and their interception and detention, have presented a cross-border issue to Member States, who in turn called for a supranational solution to be developed, beginning the development of the CEAS. And yet, as this research demonstrates, the CEAS remains a contested framework, and therefore a Habermasian step along the route to a more legitimated supranational (and future global) regulatory framework. Taken in totality, Habermas' theoretical model argues that a larger democratic political community than that of nation-states is possible via civil society learning processes emerging from the duality of the loyalties of world citizens with respect to a multitude of actors, including nations, supranational entities, and towards a future world society that manages cross-border issues in a global – rather than piecemeal – framework. Habermas' model offers a mechanism to understand the current national-supranational dialectic and normative tensions among actors, and

¹¹⁹ Thomas O. Hueglin, "Recensions / Reviews: The Crisis of the European Union. A Response," *Canadian Journal of Political Science* 48, no. Generic (2015).

¹²⁰ Habermas, *The Crisis of the European Union: A Response*, 52.

¹²¹ Duygu Gül, "The Crisis of the European Union. A Response," *Journal of Contemporary European Studies* 21, no. 3 (2013).

¹²² Hueglin, "Recensions / Reviews: The Crisis of the European Union. A Response," 486.

provides a possible pathway out of the tensions via understanding them as the result of civil society learning processes along the route to an eventually supranational – and world – society.

For Habermas, human rights and related frameworks relating to asylum and detention – described in the following Chapter Three on relevant international and national legal systems – are predominantly legitimated within the boundaries of nations, and less so within the boundaries of supranational entities. Habermas argues that universal human rights can only be ensured via proper supranational democratic legitimacy, and beyond that a global parliament that protects human rights and global security, including refugee rights, leaving other competences to national and supranational actors in transnational negotiations. The struggle of asylum seekers and their advocates is, under Habermas' model, the struggle of world citizens operating under the auspices of one of the first elements of universal morality to be codified into law as a duty. Yet the findings of this research reveal that tension remains amongst national and supranational actors as to who is included and excluded from exercising these global rights that are set up as solutions to cross-border issues – such as the common framework making up the CEAS – and from what socially supported political platform these rights are to be regulated.

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I. OVERVIEW: INTERNATIONAL REFUGEE LAW AND RELATED INSTRUMENTS

The purpose of this chapter is to present an overview of select legal and normative elements of refugee protection relevant to the research questions and the Habermasian framework described in Chapter Two, operating at the international, supranational (European Union) and national levels (case study countries France and the Czech Republic). Much has been written on European asylum law, but in the interests of brevity and on account of the scope of the research this chapter does not intend to be an exhaustive description of every element or case relating to detention of irregular migrants. Instead, only the main pillars of the legal framework at each level will be discussed and outlined, as will select key interpretive juridical cases demonstrating the safeguarding of core legal principles at the European and national levels. This overview provides the normative and legal context for the analysis and discussion occurring in the chapters that follow.

II. 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES

The framework for international refugee protection is a dynamic regulatory landscape, carved out of global legal order primarily by the force of instruments codifying historic moments of international political consensus, and further shaped by finer ongoing delineation under state practice and jurisprudence at national, supranational and international levels. Although the modern international framework spans a range of core international and regional instruments placing various obligations on states, its central feature is the 1951 *Convention Relating to the Status of Refugees* and the amending 1967 *Protocol* (1951 *Refugee Convention*).¹

The 1951 *Refugee Convention* was drafted as a treaty between states and concerned the management of refugees amongst signatories. At the time it was negotiated, the concept of the individual as a beneficiary of international human rights – familiar today – was not a settled concept.² Subsequent developments that would see treaties having ‘direct

¹ *Convention Relating to the Status of Refugees*; *Protocol Relating to the Status of Refugees*.

² Guy S. Goodwin-Gill, “Convention Relating to the Status of Refugees, Protocol Relating to the Status of Refugees,” *United Nations Audiovisual Library of International Law* (<http://www.un.org/law/avl>) (2008): 1.

effect' on the human rights of individuals, explained later in this chapter, had not yet emerged. Instead, the 1951 *Refugee Convention* was negotiated by states, for states, in response to influxes and flows of refugees, setting out basic responsibilities of states towards people who are refugees. It should also be noted that while the 1951 *Refugee Convention* does not directly address procedures for assessment, such an assessment is necessary for a refugee to enjoy rights under the treaty, since recognition of status under the treaty is declaratory, not constitutive.³ As such, the norms and principles in the 1951 *Refugee Convention* not only provide a global framework for protection, but also underpin many contemporary supranational and national protection mechanisms.

A. A note on the evolution of complementary sources of norms

Before discussing the 1951 *Refugee Convention*, it is important to acknowledge other historic sources of international law that have also helped to shape normative refugee protection principles in the present day. In the interests of brevity, these principles sitting outside the 1951 *Refugee Convention* will not be discussed in detail, save to illustrate their non-universally implemented nature. A first principle of note is the right of an individual to seek asylum, which is presupposed by the 1951 *Refugee Convention*, but not located within it. This historic juridical principle is focussed on protecting the ability of a person to depart a country. As such, the 1948 *Universal Declaration of Human Rights* (UDHR) is considered as binding on all states as a reflection of customary international law, and at Article 13(2) states that anyone 'has the right to leave any country, including his own' and at Article 14 that everyone 'has the right to seek and to enjoy in other countries asylum from persecution'.⁴ A later instrument supporting this principle (which only binds state parties, not all states) is found in the later 1966 *International Covenant on Civil and Political Rights* (ICCPR), which at Article 12(2) states that anyone 'shall be free to leave any country, including his own'.⁵

³ Hathaway and Foster, *The Law of Refugee Status*, 25.

⁴ *Universal Declaration of Human Rights*, GA Res 217a (Iii), UN GAOR, 3rd Session, 183 Plen Mtg, UN Doc a/810 (10 December 1948).

⁵ *International Covenant on Civil and Political Rights*, Opened for Signature 16 December 1966, 999 UNTS 171 (Entered into Force 23 March 1976).

The second notable principle is the right of an individual to be granted asylum (as distinct from having a right to seek it). This is not a settled international concept, but is more frequently codified in regional and national asylum arrangements that are complementary to the international pillar of protection in the 1951 *Refugee Convention*, as is discussed below. The international community nearly adopted this norm as a global principle in negotiations of the UDHR in 1948, but the idea was later quashed by political dissent. The original drafting of the UDHR had contained a controversial provision that the individual had a right to be granted asylum at the international level in Article 14(1), which in its draft stages read: ‘[e]veryone has the right to seek *and to be granted*, in other countries, asylum from persecution’ (emphasis added).⁶ However, national political influences intervened when Australia, Britain and Saudi Arabia objected to this drafting, resulting in a finalised Article 14(1), which to this day proclaims everyone has a right ‘to seek and *enjoy* in other countries asylum from persecution’ (emphasis on the ambiguous *enjoy* added). This type of normative influence by national and other actors, referred to across the body of this thesis, continues to directly affect the framework of posited law on asylum that has developed over time.

The third notable principle is the right not to be arbitrarily detained, and to receive a remedy for illegal detention. To this end, additional forms of judicial protection against arbitrary detention have been drawn into international law from various domestic and regional human rights law traditions. For example, ancient English judicial commands (writs) of *habeas corpus* were initially used to provide a judicial check against unlawful detention, then codified into English legislation by the seventeenth century before spreading to other domestic legal systems.⁷ By the end of World War II the English *habeas corpus* model of judicial oversight was in use in many countries, and began to be drafted into the early instruments of modern international law, including into the 1948 drafts of the Universal Declaration of Human Rights (UDHR).⁸ An equivalent principle of *habeas corpus* had also been evolving in Mexico since 1847, and this provided a remedy to safeguarded individual

⁶ Felice Morgenstern, “The Right of Asylum,” *The British yearbook of international law* 26 (1949): 336.

⁷ Brian R. Farrell, *Habeas Corpus in International Law* (New York, New York: Cambridge University Press, 2017), 18.

⁸ *Ibid.*, 38.

liberty against arbitrary arrest via a writ known as *amparo-libertad*.⁹ The Mexican judicial protection was eventually adapted and drafted into Article 8 of the UDHR, which the UN General Assembly approved unanimously on 10 December 1948,¹⁰ as follows:

Article 8:

*Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.*¹¹

Article 8 is then linked to Article 9 in the UDHR, which further decrees that ‘[n]o one shall be subjected to arbitrary arrest, detention or exile’.¹² The judicial scrutiny afforded by the *habeas corpus* principle has also been woven into other treaties such as the American Declaration of the Rights and Duties of Man, the European Convention on Human Rights, and the ICCPR.¹³ The ICCPR also contains important provisions on detention at Article 9 that state *inter alia* that ‘[n]o one shall be subjected to arbitrary arrest or detention [or] deprived of his liberty except on such grounds and in accordance with such procedure as are established by law’.¹⁴

It follows that while there are other important sources of human rights law that helped shape the refugee protection framework we see today, these are mostly either not internationally settled and uniformly applied as discussed above, or have at their core a set of general principles and guidance, rather than clear cut international rules on procedure. This is in contrast to regional arrangements that feature more detail for treaty parties, and more normative regional obligations.¹⁵ The above select international instruments are therefore important – but ultimately complementary – pillars of norm-formation to the main international protections provided by the 1951 *Refugee Convention*.

⁹ Pedro Pablo Camargo, “The Right to Judicial Protection: “Amparo” and Other Latin American Remedies for the Protection of Human Rights,” *Lawyer of the Americas* 3, no. 2 (1971): 204.

¹⁰ Farrell, *Habeas Corpus in International Law*, 42.

¹¹ *Universal Declaration of Human Rights*.

¹² *Ibid.*

¹³ Farrell, *Habeas Corpus in International Law*, 203.

¹⁴ *International Covenant on Civil and Political Rights*.

¹⁵ Dinah Shelton, “Normative Hierarchy in International Law,” *The American Journal of International Law* 100, no. 2 (2006): 321.

B. Monist and dualist doctrines of implementation, and the Vienna Convention on the Law of Treaties

Many ‘teachings of the most highly qualified publicists’¹⁶ in international law approach the topic of domestic implementation of treaties by highlighting the monist and dualist doctrines.¹⁷ Antonio Cassese provides an overview of the dualist doctrine as follows:

*The doctrine started from the assumption that international law and municipal legal systems constitute two distinct and formally separate categories of legal orders...[for international law t]o become binding on domestic authorities and individuals, it must be ‘transformed’ into national law...[The conception] advocated the need for national legal systems to comply with international rules by turning them into national norms binding at the domestic level.*¹⁸

On this basis, it is possible in dualist systems for a treaty to be ratified, but where treaty obligations are not subsequently transformed into domestic law, the treaty will not have domestic legal effect on the individuals and authorities within the given state.

The second doctrine is the monistic doctrine, which as Cassese points out is based on a number of propositions: firstly, that there exists a unitary legal system encompassing various legal orders, secondly, that international law sits ‘at the top of the pyramid and validates or invalidates all the legal acts of any other legal system’,¹⁹ and thirdly that the subjects of international law and national law are the same: ‘both in municipal law and in international law individuals are the principal subjects of law’.²⁰ Under a monist system international law can be binding on individuals and authorities without transformation of treaty obligations into domestic law.

¹⁶ Subsidiary means for the determination of rules of law: *Statute of the International Court of Justice*, June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 933. Article 38(1)(d).

¹⁷ Antonio Cassese, *International Law* (New York: Oxford University Press, 2005), 213.

¹⁸ *Ibid.*, 214-15.

¹⁹ *Ibid.*, 215.

²⁰ *Ibid.*

While many states adopt a blend of dualist and monist approaches to the implementation of international law,²¹ there are long-standing global principles of interpretation that are so important as to have been codified into binding international rules. These rules originally existed in the form of customary international law among nations, until they were codified in the Vienna Convention on the Law of Treaties (VCLT), which entered into force in 1980.²² VCLT Article 26 states:

‘Pacta sunt servanda’ – Every treaty in force is binding upon the parties to it and must be performed by them in good faith.

This basic peremptory principle of international law must be followed by treaty parties, and has limited alternatives.²³ The principle of pacta sunt servanda was interpreted by the International Court of Justice (ICJ) in the *Gabčíkovo-Nagymaros Project (Hungary v Slovakia) (Merits)* case of 1997,²⁴ which addressed ‘good faith’ as follows:

*This latter element [good faith], in the Court's view, implies that, in this case, it is the purpose of the Treaty, and the intentions of the parties in concluding it, which should prevail over its literal application. The principle of good faith obliges the Parties to apply it in a reasonable way and in such a manner that its purpose can be realized.*²⁵

There is ongoing debate on the scope of ‘good faith’ in relation to unilateral statements and subsequent obligations at international law. The ICJ had earlier stated in the *Nuclear Tests Case (Australia v. France)*²⁶ of 1974:

One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence are inherent in international co-operation, in particular in an age when this co-operation in many fields is becoming

²¹ Pierre-Hugues Verdier and Mila Versteeg, “International Law in National Legal Systems: An Empirical Investigation,” *The American journal of international law* 109, no. 3 (2015): 516.

²² United Nations, *Vienna Convention on the Law of Treaties* (23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331).

²³ Christina Binder, “Stability and Change in Times of Fragmentation: The Limits of Pacta Sunt Servanda Revisited,” *Leiden journal of international law* 25, no. 4 (2012): 911.

²⁴ *Gabčíkovo-Nagymaros Project (Hungary v Slovakia) (Merits)*, [1997] ICJ Reports 7.

²⁵ *Ibid.*, para. 142.

²⁶ *Nuclear Tests Case (Australia v. France)*, [1974] ICJ Reports 253.

*increasingly essential. Just as the very rule of pacta sunt servanda in the law of treaties is based on good faith, so also is the binding character of an international obligation assumed by unilateral declaration. Thus interested States may take cognizance of unilateral declarations and place confidence in them, and are entitled to require that the obligation thus created be respected.*²⁷

Article 27 of the VCLT further clarifies obligations as to the inconsistency of domestic (internal) laws as follows:

‘Internal law and observance of treaties’ – A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.

Most of the provisions of the VCLT are considered to be customary international law or general principles of international law, and thus binding on all states.²⁸

Specifically, the International Court of Justice has held Article 27 of the VCLT to be a ‘rule of customary law’,²⁹ and as such it also forms part of the international law norms of treaty implementation. Accordingly, international law places a normative expectation on states that a given treaty is binding on parties, and must also be implemented by the parties. Likewise, treaty obligations according with purpose of the treaty are to be performed by the parties to the treaty in good faith, and a contracting party cannot use their own internal laws to avoid performance of their obligations under the given treaty.

C. The development of the 1951 Convention into the present day

The first iteration of the 1951 *Refugee Convention* was exclusively Eurocentric in focus, and contained provisions primarily directed to events on account of the extraordinary displacement of populations in Europe prior to 1951. Its original scope was later expanded to include the rest of the world via the 1967 *Protocol*, which removed all temporal and geographic restraints (at the option of the parties to the

²⁷ Ibid., para. 46.

²⁸ Robert Kolb, *The Law of Treaties: An Introduction* (Edward Elgar Publishing, 2016), 261.

²⁹ *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France) (Merits)*, [2008] ICJ Reports 177, para. 124.

treaty).³⁰ Despite this expansion, the European political and social influences affecting the content of the 1951 *Refugee Convention* remained imprinted in the legal text of the framework, even after the additional provisions added in 1967. In light of this, the European origins of the regulatory framework ought not be divorced from a consideration of its content, and instead are to be understood as having the hallmarks of the political and social influences of the major stakeholders responsible for negotiating the treaty, against the backdrop of the Cold War occurring at the time the negotiations took place. These influences and tensions in negotiations are manifold, and discussed in minute detail in the travaux préparatoires (or negotiating history) to the 1951 *Refugee Convention*.³¹ In the interests of brevity these will not be exhaustively covered here.

The treaty was understood in 1951 to grant specific rights to *states*, rather than granting specific rights to individuals, even though today these rights are often thought of as applying to – and enjoyed by – individuals. Accordingly, negotiations leading up to the agreement on the original 1951 instrument (expanded by the 1967 *Protocol*) involved regulating *state behaviour* relative to *other states* with regard to refugee migration events occurring on the international stage. The 1951 *Refugee Convention* and its associated *Protocol* therefore confer no right of asylum to individuals, nor do they oblige states to grant asylum to refugees.³² Instead, the primary purpose of these instruments is to confer upon state parties to the 1951 *Refugee Convention* the right to grant asylum, and provide an outline of the orderly manner in which states must do so.³³ As discussed above, the right of an individual to be granted asylum from a source of law at the international level is not yet a settled international concept, and is rather the domain of regional and national systems of protection.³⁴

³⁰ Sara E. Davies, “Redundant or Essential? How Politics Shaped the Outcome of the 1967 Protocol,” *International Journal of Refugee Law* 19, no. 4 (2008): 703.

³¹ Paul Weis, *The Refugee Convention, 1951: The Travaux Préparatoires Analysed, with a Commentary*, vol. 7. (Cambridge; New York, NY: Cambridge University Press, 1995).

³² Colin Harvey, “Regionalism, Asylum and Solidarity in Europe,” in *Renegotiating Westphalia: Essays and Commentary on the European and Conceptual Foundations of Modern International Law*, ed. Christopher Harding and C Chin L Lim (Martinus Nijhoff Publishers, 1999), 249.

³³ Roman Boed, “The State of the Right of Asylum in International Law,” *Duke Journal of Comparative & International Law* 5, no. 1 (1994): 4.

³⁴ *Ibid.*, 23.

Even though not all states are parties to the 1951 *Refugee Convention*, certain elements it contains have remained strictly observed and as such regulate all state behaviour around the globe, not only the state parties to the treaty – both through state opinion of legal obligation (*opinio juris*) and state practice reflecting attitudes towards the norms.³⁵ This phenomenon has come about in part through active use of the treaty framework by states, which in turn continuously reinforce certain normative legal principles that are supported in the text of the 1951 *Refugee Convention*. One of these principles is non-refoulement – the principle that a refugee shall not be returned to the place of original persecution. This category of legal principle at the international level is known as Customary International Law (CIL): recognised as binding on all states by a combination of settled state practice undertaken according to *opinio juris*, being a widely held belief among states that the given practice is obligatory.³⁶ Some commentators have argued that the principle of non-refoulement is *jus cogens*, a type of super-custom of international law from which no state can derogate, however it is important to remember the juridical notion of *jus cogens* is itself a modern phenomenon and not settled.³⁷ As such, it is useful to understand that when the 1951 *Refugee Convention* was negotiated, human rights as an international regulatory concept was in its infancy, and as such previous definitions and general principles such as non-refoulement were understood to be CIL, that had been encompassed and codified by the new treaty text. Subsequent state practice with regard to non-refoulement reinforced this codified principle, as did interpretive jurisprudence in the following decades.

In the 1951 *Refugee Convention*, the provision that famously prohibits refoulement internationally and codifies Customary International Law,³⁸ is Article 33:

1. *No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion,*

³⁵ Jan Klabbers and Touko Piiparinen, *Normative Pluralism and International Law: Exploring Global Governance* (New York: Cambridge University Press, 2013), 83.

³⁶ *North Sea Continental Shelf, Judgment* [1969] ICJ Rep 3. para. 77

³⁷ J. Allain, “The Jus Cogens Nature of Non-Refoulement,” *International Journal of Refugee Law* 13, no. 4 (2001): 535.

³⁸ James C Simeon, “What Is the Future of Non-Refoulement in International Refugee Law?,” in *Research Handbook on International Refugee Law* (Edward Elgar Publishing, 2019), 183.

nationality, membership of a particular social group or political opinion.

2. *The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.*

As mentioned above, this principle – along with its exceptions – existed prior to codification in the 1951 *Refugee Convention*, in a range of pre-war international instruments via the League of Nations, which had their antecedents in a range of socially accepted norms, and in the interests of brevity these will not be discussed here.³⁹ The codification of non-refoulement in the 1951 *Refugee Convention* is an example of dynamic progression in the international framework, which then acted as guidance to subsequent state practice, such that the principle is thought of by all nations to be implemented universally as Customary International Law (discussed above), regardless of acceptance of the treaty.⁴⁰ Furthermore, interpretive institutions of international law such as the International Court of Justice (ICJ) had been set up to deliver jurisprudence that accepted these type of norms as sources of international law. As per the 1945 *Statute of the International Court of Justice* (Article 38(1)), Customary International Law (such as non-refoulement) is to be considered in the formation of ICJ interpretive decisions.⁴¹ In this manner, certain codified principles found in the 1951 *Refugee Convention* and its accompanying protocol came to be the internationally accepted normative standard across all states, whether or not those states were parties to the 1951 *Refugee Convention*.

D. Transient definitions: splitting ‘refugee’ from ‘migrant’

The definition of a refugee is possibly the most operationally diverse provision in the 1951 *Refugee Convention*, and although the treaty contains an explicit definition,

³⁹ Allain, “The Jus Cogens Nature of Non-Refoulement.”

⁴⁰ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, [1986] ICJ Reports 1986, para. 186.

⁴¹ *Statute of the International Court of Justice*, Opened for Signature 26 June 1945, 1 UNTS 16 (Entered into Force 24 October 1945).

application at the national point of implementation is varied: one country's refugee is another's irregular migrant. Historical institutional arrangements for the management of refugees during the early Cold War era, pre-dating the conclusion of the 1951 *Refugee Convention*, had a direct influence on the eventual definition of 'refugee'. This influence is evident in the expanded definition still in force today, unaltered, at Article 1A(2):

A. For the purposes of the present Convention, the term "refugee" shall apply to any person who: ...

(2) As a result of events occurring before 1 January 1951 and 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 as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

The later 1967 Protocol enhanced the coverage to refugees throughout the world, beyond the original European focus, and to cover refugees not covered by the initial instrument.

The historical circumstances influencing the eventual convention definition of a 'refugee' cited above – which remains in place today – are often overlooked in academic literature, but cannot be understated as an important factor impacting later state-based implementation outcomes. In the aftermath of World War II the terms refugee and migrant had been fluid notions, referring then to a displaced population of European peoples inclusive of both refugees and unemployed persons.⁴² The distinction between the two terms began to emerge via the Western notion that protection should be afforded to those fleeing a Cold War type definition of 'persecution' based on social and ideological pro-Western values, particularly

⁴² Katy Long, "When Refugees Stopped Being Migrants: Movement, Labour and Humanitarian Protection," *Migration Studies* 1, no. 1 (2013): 5.

favouring dissidents escaping Communist regimes.⁴³ As a result, during the negotiation of the 1951 *Refugee Convention* the term ‘refugee’ was divorced from the term ‘migrant’.⁴⁴ An understanding of the history of this separation is crucial to subsequently understand the development of modern regulatory responses to asylum seekers in supranational entities and nation states.

The split between the terms ‘migrant’ and ‘refugee’ at the level of international law laid out by the 1951 *Refugee Convention* is the result of a division of negotiations played out during conferences at Naples and Brussels in 1951, between on the one hand a plan formed by the United Nations (UN) and International Labour Organization (ILO), and on the other hand the United States (US).⁴⁵ Post World War II activities with regard to managing masses of displaced persons – particularly in Europe – had been bound up in the expensive activities of a specialised post-war agency known as the United Nations’ International Refugee Organization (IRO), which aimed to provide protection, assistance, and solutions to the post-war refugee problem, up to an initially agreed termination date of 30 June 1950.⁴⁶ The IRO ended up being operative from 1946 to 1952, but its existence would not be maintained long past the birth of the body responsible for the legal protection of refugees, the United Nations High Commissioner for Refugees (UNHCR).

The IRO’s function was as a temporary intergovernmental, rather than international, practical administrative institution. It uniquely divided populations forced out of their country of origin into different categories according to the motives for flight (political/civil or economic/social), rather than the earlier method of assigning refugee status to a certain people or category of peoples.⁴⁷ This method of categorising a person according to the reasons of their flight (rather than their geographic or national origins) satisfied a growing political need on the part of the United States (one of the IRO’s key funders) for the protection of defectors from the

⁴³ James C. Hathaway, “A Reconsideration of the Underlying Premise of Refugee Law,” *Harvard International Law Journal* 31, no. 1 (1990): 148.

⁴⁴ Long, “When Refugees Stopped Being Migrants: Movement, Labour and Humanitarian Protection,” 5.

⁴⁵ R. Karatani, “How History Separated Refugee and Migrant Regimes: In Search of Their Institutional Origins,” *International Journal of Refugee Law* 17, no. 3 (2005): 518.

⁴⁶ Erika Feller, “The Evolution of the International Refugee Protection Regime,” *Washington University Journal of Law & Policy* 5 (2001): 130.

⁴⁷ Karatani, “How History Separated Refugee and Migrant Regimes: In Search of Their Institutional Origins,” 529.

Soviet bloc countries.⁴⁸ The according IRO method of resettling populations was to treat displaced populations as a migration issue, and as a result it attempted to match the skills of individual refugees with the labour demands in the receiving country, with much the same remit as long-standing role of the ILO, which had been operating since 1919.⁴⁹ In some senses, the IRO and the ILO were almost performing the same function. However, the IRO's operations to move refugee populations in this way proved extremely expensive requiring substantial funding as the refugee population problem continued through the late 1940's and became permanent in the Cold War setting.⁵⁰

Following the establishment of the United Nations High Commissioner for Refugees (UNHCR) by the UN General Assembly in 1950, and with the IRO's scheduled termination in the offing, the ILO attempted to expand its reach, proposing at its Naples Migration Conference in 1951 that it begin to cover the work of the IRO as a permanent international UN institution (an ILO-UN function), making assessments and decisions on both refugee status and labour migration.⁵¹ However, during the Naples conference, the United States and a range of other key stakeholders spoke out against this plan, which they saw as internationalism proposed by the UN and ILO. Instead, the US wished to instead retain their own national policy settings in relation to migration where possible. Subsequently, at the following conference in Brussels the same year, the US proposed another temporary institution be set up of an *intergovernmental* character, similar to the IRO.⁵² The result meant the ILO-UN proposal of unified, centralised, permanent management of refugees and migration failed, and instead a body was created known as the Provisional Intergovernmental Committee for the Movement of Migrants from Europe (PICMME), which later became the International Organization for Migration (IOM), which is still active today.⁵³ The definition of 'refugee' protection found in the 1951 *Refugee Convention* reflects the criteria laid out by the IRO Constitution and Annex 1 during the post-war

⁴⁸ Long, "When Refugees Stopped Being Migrants: Movement, Labour and Humanitarian Protection," 14.

⁴⁹ Karatani, "How History Separated Refugee and Migrant Regimes: In Search of Their Institutional Origins," 530.

⁵⁰ *Ibid.*, 531.

⁵¹ *Ibid.*, 532.

⁵² *Ibid.*, 537.

⁵³ Long, "When Refugees Stopped Being Migrants: Movement, Labour and Humanitarian Protection," 18.

period;⁵⁴ a definition favoured by the US and other countries who at the time wished to retain their domestic policy settings without losing control to a centralised international management of refugees (i.e. rejecting UN-ILO model). It follows, then, that the modern definitional arrangements of the framework we have today, as a whole, are also dependent on national implementation and assessment (cf. the IRO), rather than depending on a centralised international system of refugee management at the international level (i.e. the proposed ILO-UN model).⁵⁵

Given the intergovernmental (rather than international) history and subsequent modern definitional splits in the refugee protection framework, there are some further comments to be made on transient definitions experienced by asylum seekers across their geographic movements. Beyond the various legal frameworks operating at a multitude of levels (national, supranational, international), modern so-called ‘irregular migrants’ arrive in a host state and will often traverse multiple legal definitions under various domestic and regional laws, if not international law, during their translocation. For example, a person fleeing a crisis in their country of origin may arrive in a host state as an ‘irregular migrant’ (*sans-papier*, in France),⁵⁶ and automatically fall within a given definitional category of domestic migration law. When that same person claims asylum, a range of international, supranational and domestic legal obligations and definitions are triggered with regard to the behaviour of the host state towards the individual. However, should a claim for asylum be rejected, the person once again returns to being defined as an ‘irregular migrant’ and is treated accordingly in a ‘migrant’ category – despite being of the belief that they fall into a ‘refugee’ category and are owed various obligations on the part of the receiving state. At all times the same person has the same reasons for flight to the host country, but the assessment and processing redefines the person over time. The traversal of the individual across multiple frameworks is demonstrated in the simple graphic below (Figure 3).

⁵⁴ Guy S. Goodwin-Gill and Jane McAdam, *The Refugee in International Law*, 3rd ed. (Oxford: Oxford University Press, 2007), 559.

⁵⁵ Karatani, “How History Separated Refugee and Migrant Regimes: In Search of Their Institutional Origins,” 538.

⁵⁶ La Cimade, *Interview* (20 August 2014).

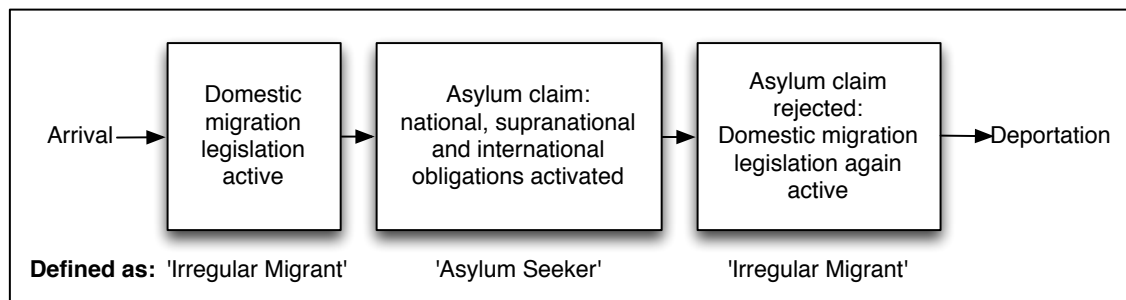


Figure 3 - Example of definitional changes across national legal frameworks

E. Non-Penalisation for irregular entry or stay; and freedom of movement

As discussed above, several principles in the 1951 *Refugee Convention* are not settled as customary international law on account of varied state opinion and practice, but nevertheless remain important guiding principles in the obligations owed to refugees by state parties to the treaty, regardless of the status of the individual asylum seeker or refugee under national laws. These unsettled principles include the principle of non-penalisation for illegal entry, and the principle of freedom from detention. Article 26 of the 1951 *Refugee Convention* also contains the principle of freedom of movement, but with reference to those lawfully within a state's territory. Both principles (non-penalisation and freedom of movement) are described in Article 31 as follows:

1. *The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.*
2. *The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.*

Widespread debate surrounds the impact of these two principles contained in the 1951 *Refugee Convention* – these will not be extensively covered here, save to demonstrate their non-universal implementation on account of the ill-defined exceptions ‘*not impose penalties...on refugees who...coming directly...provided they present themselves...and show good cause*’ (1) and ‘*other than those which are necessary*’ (2). For example, Guy Goodwin-Gill laments that ‘despite this provision [on non-penalisation], asylum seekers are placed in detention facilities throughout Europe, North America, and Australia, owing to their illegal entry or presence’.⁵⁷ It is true that practice of state parties to the treaty often materially derogates from the spirit of the principles contained in Article 31, although relevant states might argue such activities fall under the exception of ‘necessity’ at 31(2): ‘*other than those which are necessary*’. The implementation of the principles varies from state to state.

It therefore follows that the provisions at Article 31 are far from universally applied or having a CIL status, nor are they settled as a clear principle in the same way that, say, non-refoulement is. This then leaves the two principles – prohibition on non-penalisation and the right for freedom from detention – existing in a declaratory but ultimately unclear category of law at the international level. In this way, despite extensive academic debate, states remain able to effectively penalise asylum seekers for the manner in which they arrive (the counterargument being to detain on the basis of necessity for processing), and are similarly able to restrict asylum seekers’ movement (or, again, to detain on the basis of necessity) due to unclear exceptions allowed by the international legal framework – unsettled international principles ultimately lead to divergence in national application.⁵⁸

Only the principle of non-refoulement has the character of CIL, binding on all states (even if they are not parties to the 1951 *Refugee Convention*). The rest of the treaty certainly places obligations on states, but these are often ill-defined and contingent, and as a result not followed consistently by certain states at the point of state implementation or processing. Under the international framework, an asylum seeker can functionally be penalised (whether intended or not) by a state for the manner of

⁵⁷ Guy S Goodwin-Gill, “Article 31 of the 1951 Convention Relating to the Status of Refugees: Non-Penalization, Detention, and Protection,” in *Refugee Protection in International Law: Unhcr's Global Consultations on International Protection*, ed. Erika Feller, et al. (Cambridge University Press, 2003), 187.

⁵⁸ Hathaway and Foster, *The Law of Refugee Status*, 3-4.

arrival, by being denied freedom of movement. Such actions may be argued to be a breach of the 1951 *Refugee Convention*, but Article 31 remains in a practical sense an unsettled principle retaining broad and ill-defined exceptions, that states respond to in a variety of ways. As such, the treaty arguably fails to mandate state compliance as to an internationally agreed threshold for detention, or the types of processes that could be agreed as punishment for mode of arrival, and the refugee remains at the mercy of the sovereign state.⁵⁹ For historical reasons, the treaty leaves the thresholds and interpretation to national regulatory systems that each respond to the international guidance in the 1951 *Refugee Convention*.

F. Conclusion on international framework

The 1951 *Refugee Convention* forms the central pillar (amongst other complementary normative and legal sources) of the refugee protection framework at the international level. The framework is best characterised as a landscape shaped by many political and historical forces, featuring some principles that by virtue of Customary International Law are binding on all states (such as non-refoulement), and other norms that guide state behaviour – but do not ultimately achieve a coherent and uniform implementation internationally. This makes for a patchwork of principles at the operational end of the spectrum, rather than a blanket framework from norms to practice.

The reasons for the sporadic nature of the international framework can partly be explained by the history surrounding the negotiations of the 1951 *Refugee Convention*, which involved the failure of UN-ILO attempts to negotiate a centralised and international management of refugees following World War II, and the subsequent organic development of diverse regional and national systems of assessment and implementation. This in turn resulted in the split between the terms ‘migrant’ and ‘refugee’ as influenced by political Cold War matters, and left largely unsettled any clear international principles for the right of individuals to be *granted* asylum. As a result of the historical political environment surrounding the

⁵⁹ Nergis Canefe, “The Fragmented Nature of the International Refugee Regime and Its Consequences: A Comparative Analysis of the Applications of the 1951 Convention,” in *Critical Issues in International Refugee Law: Strategies toward Interpretative Harmony* (Cambridge University Press, 2010), 209.

negotiation of the 1951 *Refugee Convention*, institutional actors such as the UNHCR and the IOM remain operating in the present day under a characteristically *intergovernmental* set of mandates, rather than under a centralised UN-based *international* set of processes and institutions that are uniform and implemented universally by state parties to the treaty.

The failure of *international* – and preference for *intergovernmental* – systems to protect refugees has subsequent clear links to the modern experience of individuals fleeing across multiple jurisdictions having multiple national responses to the international principles. These are manifest, and include a myriad of definitional labels often assigned according to geographic movement, and depending on the systems existing in each state. Furthermore, it is telling that in the formation of regional and national systems of regulatory frameworks dealing with refugee protection discussed below, it is states – not international actors – who ultimately bear the responsibility of carrying out obligations under the international framework. The practical implementation is therefore carried out at the national level in a myriad of ways, resulting in diverse practices, many which arguably do not reflect the guidance and spirit of the 1951 *Refugee Convention* and associated instruments.

Finally, the international normative legal stance on detention of asylum seekers, and non-penalty for method of arrival, remains in a category of international legal principles that are frequently ignored at the national level on the grounds of necessity. These two core principles are certainly present in a normative sense at the international level (indeed, such state conduct detaining or penalising is explicitly prohibited in the 1951 *Refugee Convention* text), but at implementation at the national level, these principles on non-penalisation and freedom of movement remain frequently unapplied or avoided by oblique reference to the exceptions in the same provision. In this way, the international framework is arguably best described as a patchwork of refugee rights and non-universal normative principles, some of which are binding on states, but many of which are not uniformly implemented in practice.

III. SUPRANATIONAL FRAMEWORK: EU COMMON EUROPEAN ASYLUM SYSTEM

The supranational framework for the protection of asylum seekers operating in Europe is largely underpinned by the European Union (EU) *Common European Asylum System* (CEAS), which is in turn informed by the international principles laid out in the 1951 *Refugee Convention*. As with the international framework, there are other treaties and agreements at the European level that enable the operation of the CEAS, but these will be discussed following a sketch of its main components. The core feature of the modern framework is that it aims not merely for minimum procedural and protective standards across the EU Member States, but more recently now attempts to bind Member States to developing a *common* system in relation to refugee protection.

Even though all EU Member States have signed the 1951 *Refugee Convention* in their own right, the CEAS contains more granular obligations that clarify and expand the general international obligations within the boundaries of the EU. This is not to say the CEAS and 1951 *Refugee Convention* have been formed in the same way. While the history of negotiations leading to the CEAS has been discussed briefly in Chapter One, there are clear differences between the negotiation of the international 1951 *Refugee Convention* discussed above at the global level, and contrasting development of the supranational CEAS as it stands. The difference is in the initial discussion between an international community of states negotiating around UN-ILO and US proposals for a centralised global approach in the late 1940's (as discussed above), and the regional negotiations around the same time by certain European countries towards a post-war common market in certain goods, under limited supranational control, which would in later decades grow to cover other areas of European life, including migration and asylum. In Europe, this regional negotiation began with *European Coal and Steel Community* (ECSC),⁶⁰ a treaty following World War II that created a common regional market in coal and steel, between Belgium, France, West Germany, Italy, the Netherlands and Luxembourg. These and similar treaties on Union were upgraded by newer amending treaties over time, with more European states being added to the regional grouping. Newer treaties bound European Member States to a supranational

⁶⁰ *Treaty Instituting the European Coal and Steel Community*, Signed 18 April 1951, 261 UNTS 140 (Entered into Force 23 July 1952).

regulatory system that had its own institutions and procedures, with varying degrees of competence over certain European matters. This process of European regulatory integration has led to a degree of supranational governance of immigration and asylum, in contrast to the international refugee system, which as we have seen above leaves states much more to their own devices when implementing international obligations.

The two main treaties underpinning the modern constitutional basis for the European Union, ratified by all EU Member States, are the *Treaty on European Union* (TEU) and the *Treaty on the Functioning of the European Union* (TFEU).⁶¹ These treaties have been updated as the EU has progressed by amending treaties, the most recent being the *Treaty of Lisbon*, signed by all EU Member States and entering into force on 1 December 2009.⁶² Articles 67(2) and 78 of the post-Lisbon TFEU upgraded the asylum protection requirements across all Member States, from previously requiring a *minimum standard* on asylum, to a post-Lisbon development of requiring a *common system* to be developed. This meant that uniform status and procedures would need to be further developed and implemented across the EU Member States. The ambition at the supranational level is spelled out, with notable reference to the 1951 *Refugee Convention*, by the following (abridged) TFEU provisions:⁶³

Article 67

2. *[The Union] shall...frame a common policy on asylum, immigration and external border control, based on solidarity between Member States, which is fair towards third-country national[s].*

Article 78

1. *The Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement. This policy must be in accordance with the*

⁶¹ *Consolidated Versions of the Treaty on European Union and the Treaty on the Functioning of the European Union.*

⁶² *Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community.*

⁶³ *Consolidated Versions of the Treaty on European Union and the Treaty on the Functioning of the European Union*, 75.

Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties.

2. *For the purposes of paragraph 1, the European Parliament and the Council...shall adopt measures for a common European asylum system comprising:*
 - a) *a uniform status of asylum for nationals of third countries, valid throughout the Union;*
 - b) *a uniform status of subsidiary protection for nationals of third countries who, without obtaining European asylum, are in need of international protection;*
 - c) *a common system of temporary protection for displaced persons in the event of a massive inflow;*
 - d) *common procedures for the granting and withdrawing of uniform asylum or subsidiary protection status;*
 - e) *criteria and mechanisms for determining which Member State is responsible for considering an application for asylum or subsidiary protection;*
 - f) *standards concerning the conditions for the reception of applicants for asylum or subsidiary protection[n]*

The ambition of a *supranational* common (and unified) regional system for refugee protection envisioned in the above provisions draws on – but is ultimately more nuanced than – the outcomes generated by the *international* framework under the 1951 *Refugee Convention*. There is also reference to common subsidiary protection in the TFEU provisions, which creates another category of protection available on a humanitarian basis across the EU – this will not be discussed here in the interests of brevity.

Ultimately, the above provisions in the TFEU demonstrate the contemporary CEAS emerging as the result of the supranational ambition, which when combined with the

binding action of several other European-based human rights treaties has the effect of *granting* individuals limited rights to asylum within the EU.⁶⁴ This is to be distinguished from the international framework, which as discussed earlier does not create a clear right for an individual to be granted asylum. Therefore, on paper at least, it might be said the supranational-level framework and the resulting CEAS offer wider and deeper protection to asylum seekers and refugees, than do the concordant obligations arising under the 1951 *Refugee Convention* and its associated framework of international-level instruments.

A. EU Competence, Subsidiarity and the effect of EU Directives and Regulations

The EU and its Member States agree on certain levels of EU governance and control, at either the national or supranational levels (or shared control, on select matters). In shorthand, the level of control conferred by TFEU is known as simply *competence*. There are four general categories of EU competence set out by the TFEU at Articles 3 to 6:⁶⁵ exclusive competence, shared competence, competence to support actions of Member States, and competence to provide arrangements for policy coordination amongst Member States.

The first competence granted to the EU by the TFEU is exclusive competence established under Article 3, which allows the EU to exclusively cover matters relating to the customs union, the internal market, monetary policy relating to the Euro, marine resources, and common commercial policy. The second competence is shared competence, granted to the EU under the TFEU at Article 4, covering a host of topics including environment, consumer protection, research, and most importantly for this thesis the ‘area of freedom, security and justice’ at Article 4(j), under which matters of migration and asylum fall. The third competence is provided by Article 6, giving the EU the competence to support, coordinate or supplement the actions of Member States in relation to areas such as industry, tourism, civil protection and administrative cooperation. The final competence is for the EU to

⁶⁴ Maria Teresa Gil-Bazo, “Asylum as a General Principle of International Law,” *International Journal of Refugee Law* 27, no. 1 (2015): 27.

⁶⁵ *Consolidated Versions of the Treaty on European Union and the Treaty on the Functioning of the European Union*, 51, 52.

provide arrangements for Member States to coordinate policy, under Article 5, particularly involving economic and social matters.

Overlaying the EU's competences to exercise power is the principle of subsidiarity guaranteeing the primacy of the nation-state, set out in the *Treaty on European Union* (TEU) at Article 5 (3), as follows:

Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.

This principle is clarified by TFEU *Protocol No 2 On the Application of the Principles of Subsidiarity and Proportionality*.⁶⁶ In essence, the EU principle of subsidiarity holds that in the areas in which the Member States and the EU share responsibility (shared competence), the Member States are by default free to make decisions and take action to achieve specified EU objectives – and the EU may only act *if* the actions of Member States are insufficient to achieve those ends, in effect guaranteeing the state-centric nature of the Union, rather than centralising power.⁶⁷ The principle of proportionality also contained in TEU Article 5 and *Protocol No 2* further restrains EU power, such that when the EU does take action, it must do so in a manner that is necessary only to achieve treaty objectives.

There are a range of means by which the EU acts under the above competences and principles. These are listed under Article 288 of the TFEU – in order of effect on implementation in Member States – allowing the institutions of the EU to adopt: regulations, directives, decisions, recommendations and opinions. Article 288 succinctly states the effect of each type of administrative instrument as follows:⁶⁸

⁶⁶ Ibid., 206.

⁶⁷ Andreas Follesdal, "The Principle of Subsidiarity as a Constitutional Principle in International Law," *Global Constitutionalism* 2, no. 1 (2013): 39.

⁶⁸ *Consolidated Versions of the Treaty on European Union and the Treaty on the Functioning of the European Union*, 171.

A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.

A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.

A decision shall be binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them.

Recommendations and opinions shall have no binding force.

Central to the arguments in this thesis is the fact that Directives are binding but ‘shall leave to the national authorities the choice of form and methods’ (Article 288 TFEU as above). EU regulations and decisions have the greatest authority over the actions of Member States, and at the other end of the spectrum recommendations and opinions have no binding force. As we shall see below, most of the CEAS is made up of Directives, which are binding as to the ends, but with Member States retaining authority of the means by which each attempts to arrive at those ends. This systemic feature of governance and implementation is highly analogous to the implementation obligations of states under the 1951 *Refugee Convention* framework as discussed above – including, of course, that consistency in measures taken to achieve the outcomes desired is not assured and that the regulations are clear on paper, but differ on implementation by each state.

B. CEAS: Asylum Procedures Directive

As outlined above, the nature of EU directives mean that Member States are bound to achieve the ends of agreed EU measures, but the means by which they achieve this is left up to each Member. The first component of the Common European Asylum System (CEAS) is the *Asylum Procedures Directive* (recast and applicable from 21 July 2015 – henceforth *Procedures Directive*),⁶⁹ which contains common standards and safeguards for all EU Member States handling applications for asylum on the

⁶⁹ 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 2013/32/EU.

basis of the 1951 *Refugee Convention* (the international framework discussed above). Member States are obliged under the *Procedures Directive* to apply its objectives to their national procedures, in order to match the common standards across the EU. The directive contains a multitude of guarantees for asylum seekers, including the following core standards: applications for asylum shall not be refused if not made promptly (Article 10), applicants are entitled remain in the country while the application is being processed (Article 9), applicants are to be informed in a language they understand of the procedures to be followed (Article 12) including when in detention (Article 8), and applicants are to be provided with notice of decisions on their application in writing (Article 11).

On detention, the *Procedures Directive* states at Article 26:

1. *Member States shall not hold a person in detention for the sole reason that he or she is an applicant. The grounds for and conditions of detention and the guarantees available to detained applicants shall be in accordance with Directive 2013/33/EU. [Reception Directive, discussed below]*
2. *Where an applicant is held in detention, Member States shall ensure that there is a possibility of speedy judicial review in accordance with Directive 2013/33/EU. [Reception Directive, discussed below]*

The *Procedures Directive* also sets out the maximum time allowable across the EU for processing of applications for international protection, in Article 31 (3) (abridged):

3. *Member States shall ensure that the examination procedure is concluded within six months of the lodging of the application.*

Member States may extend the time limit of six months set out in this paragraph for a period not exceeding a further nine months, where:

- (a) complex issues of fact and/or law are involved;*
- (b) a large number of third-country nationals or stateless persons simultaneously apply for international protection, making it very*

difficult in practice to conclude the procedure within the six-month time limit;

(c) where the delay can clearly be attributed to the failure of the applicant to comply with his or her obligations under Article 13.

By way of exception, Member States may, in duly justified circumstances, exceed the time limits laid down in this paragraph by a maximum of three months where necessary in order to ensure an adequate and complete examination of the application for international protection.

The resulting arithmetic in the *Procedures Directive* for examination of an application for refugee status: 6 months, with an additional allowance for a further maximum 9 months on condition of complexity, influx or applicant compliance failure, followed by a final additional 3 months to ensure complete examination on the basis of ‘duly justified circumstances’. Therefore under the *Procedures Directive*, the total maximum allowable time for an EU Member State to process an application for international protection is 18 months.

C. CEAS: Reception Conditions Directive

The *Reception Conditions Directive* (recast and applicable from 21 July 2015 – henceforth *Reception Directive*)⁷⁰ sets out a range of common standards for the standard of living for applicants across all EU Member States, and also limits the secondary movements of asylum seekers once they have made an application for international protection. Also covered are the events that precipitate a reduction or withdrawing of conditions for an asylum seeker who disappears, withdraws an application, or poses a threat to national security. This directive will not be exhaustively covered here, but essential for the purposes of this thesis are provisions in the *Reception Directive* requiring applicants to have freedom of movement in the

⁷⁰ 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 2013/33/EU.

territory of the country of application, at Article 7 (on Freedom of Movement, abridged):⁷¹

1. *Applicants may move freely within the territory of the host Member State or within an area assigned to them by that Member State. The assigned area shall not affect the unalienable sphere of private life and shall allow sufficient scope for guaranteeing access to all benefits under this Directive.*

And most importantly, the exception to this at Article 8 (on Detention, abridged):

2. *When it proves necessary and on the basis of an individual assessment of each case, Member States may detain an applicant, if other less coercive alternative measures cannot be applied effectively.*
3. *An applicant may be detained only:*⁷²
 - a) *in order to determine or verify his or her identity or nationality;*
 - b) *... when there is a risk of absconding of the applicant;*
 - c) *in order to decide, in the context of a procedure, on the applicant's right to enter the territory;*
 - d) *when he or she is detained subject to a return procedure...*
 - e) *when protection of national security or public order so requires;*

The grounds for detention shall be laid down in national law.

4. *Member States shall ensure that the rules concerning alternatives to detention, such as regular reporting to the authorities, the deposit of a financial guarantee, or an obligation to stay at an assigned place, are laid down in national law.*

⁷¹ Ibid., 101.

⁷² Reception Directive Article 7 (3) also recalls the European Convention on Human Rights (Article 5): *Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)*, Opened for Signature 4 November 1950, 213 UNTS 221 (Entered into Force 3 September 1953).

And finally Article 9 (abridged) requires subjective time limits on detention of applicants, as follows:

1. *An applicant shall be detained only for as short a period as possible and shall be kept in detention only for as long as the grounds set out in Article 8(3) are applicable...Delays in administrative procedures that cannot be attributed to the applicant shall not justify a continuation of detention.*

It is important to observe the *Reception Directive* at Article 8(2) contains the exact same discretionary exception allowing a subjective national (rather than uniform supranational) threshold to establish grounds for ‘necessity’ per the narrow scope in Article 8(3), as was discussed above in relation to the wider scope of necessity in the 1951 *Refugee Convention* at Article 31 (on freedom of movement). The words ‘when it proves necessary’ in the *Reception Directive* are directly linked to the words ‘other than those which are necessary’ in the 1951 *Refugee Convention*. Both the international and supranational frameworks acting together allow Member States an exception to detain an asylum seeker on the basis of a state-based assessment of necessity, which may vary from country to country.

Neither the CEAS nor the international framework mandate a uniform test of necessity with regard to a decision to detain an applicant. On this basis, it could be argued that in some ways the *intergovernmental* character of the 1951 *Refugee Convention* reaches down through the EU supranational CEAS framework, allowing variation in national implementation of detention requirements even under a supranational system aiming for common policy. As we shall see below, there are some judicial supranational safeguards to clarify these standards in certain circumstances, but the two frameworks nevertheless allow for a lack of uniformity in implementation of obligations to exist between states.

D. CEAS: Qualification Directive

The *Qualification Directive* (recast and applicable from 9 January 2012)⁷³ sets out minimum standards for how Member States are to grant refugee or subsidiary protection to applicants. Accordingly, in assessing an application a Member State must pay attention to a set of certain matters, including relevant documentation or statements evidencing serious harm (Article 4(b)), and to the particular situations that amount to persecution on the basis of race, religion, nationality, membership of a particular social group or political opinion (Article 10). The substantive provisions of the *Qualifications Directive* at Article 33 are reflective of the content of the protections set out by the 1951 *Refugee Convention*, particularly with regard to freedom of movement:⁷⁴

Member States shall allow freedom of movement within their territory to beneficiaries of international protection, under the same conditions and restrictions as those provided for other third-country nationals legally resident in their territories.

The *Qualification Directive* at Article 33 also mandates freedom of movement for those qualifying for refugee or subsidiary status, in the same manner of Article 31 of the 1951 *Refugee Convention*. In a 2016 case, the Court of Justice of the European Union (CJEU) held that under Article 33 of the *Qualification Directive* Member States are unable to impose restrictions on the freedom of movement of beneficiaries of subsidiary protection, while also holding that it is up to national courts in Member States to determine if a limitation on the freedom of movement can be alternatively justified according to national migration or integration policy applied to third-country nationals in comparable situations.⁷⁵

⁷³ Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on Standards for the Qualification of Third-Country Nationals or Stateless Persons as Beneficiaries of International Protection, for a Uniform Status for Refugees or for Persons Eligible for Subsidiary Protection, and for the Content of the Protection Granted 2011/95/EU, [2011] OJ L 337/9.

⁷⁴ *Ibid.*, 22.

⁷⁵ *Alo and Osso Joined Cases C-443/14 and C-444/14*, CJEU Judgment of the Court (Grand Chamber) 1 March 2016 (CJEU ECLI:EU:C:2016:127).

E. Dublin Regulation and the EURODAC Regulation

The two regulations in the CEAS – the *Dublin Regulation* and the *EURODAC Regulation* – serve as instruments that are each ‘binding in its entirety and directly applicable in all member states’ (as per the TFEU discussed above). These EU regulations differ from the CEAS directives, in that Member States are not left to their own means of arriving at the objective, and instead all implementation must be uniform. For example, the *EURODAC Regulation* (recast and applicable from 20 July 2015)⁷⁶ establishes an EU asylum fingerprint database, and specifies the exact process by which this information is to be collected by national agents. When an application for asylum is made anywhere in the EU, fingerprints of applicants are taken and sent to a centralised database under a strict set of conditions. Recent innovations in the regulation text now allow criminal checks to be conducted on applicants at the same time their fingerprints enter the database.

The *EURODAC Regulation* directly serves the purpose of the *Dublin Regulation* (recast and applicable from 1 January 2014),⁷⁷ which determines the Member State responsible for undertaking an assessment of asylum, by using fingerprints taken in the country of first arrival. As discussed in Chapter One, the *Dublin Regulation* predated the CEAS, and had its origins in a group of European states seeking to deter forum-shopping on the part of asylum applicants in the early 1990’s. The original *Dublin Convention* (as it then was) was also open for ratification by non-EU states. In 2003 the European Commission adopted the convention, making it officially the *Dublin Regulation*, which has to date been recast three times. Many commentators frequently refer to it by its most recent iteration, *Dublin III* – in this thesis it will

⁷⁶ Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the Establishment of 'Eurodac' for the Comparison of Fingerprints for the Effective Application of Regulation (EU) No 604/2013 Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Application for International Protection Lodged in One of the Member States by a Third-Country National or a Stateless Person and on Requests for the Comparison with Eurodac Data by Member States' Law Enforcement Authorities and Europol for Law Enforcement Purposes, and Amending Regulation (EU) No 1077/2011 Establishing a European Agency for the Operational Management of Large-Scale It Systems in the Area of Freedom, Security and Justice, [2013] OJ L 180/1.

⁷⁷ 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.

simply be referred to as the *Dublin Regulation*, to remind us of its enhanced general effect on Member States.

Under the provisions of the *Dublin Regulation*, asylum seekers arriving in one Member State and moving freely (via the suppression of internal EU borders) to another Member State can be returned to the state of first entry via a ‘take charge’ or ‘take back’ request (Articles 22-25), and that first Member State is then responsible for processing. This holding followed by movement is known simply a ‘transfer’. *Dublin Regulation* Article 28 outlines the grounds for detention of asylum seekers undergoing transfer, including subjective time criteria:

1. *Member States shall not hold a person in detention for the sole reason that he or she is subject to the procedure established by this Regulation.*
2. *When there is a significant risk of absconding, Member States may detain the person concerned in order to secure transfer procedures in accordance with this Regulation, on the basis of an individual assessment and only in so far as detention is proportional and other less coercive alternative measures cannot be applied effectively.*
3. *Detention shall be for as short a period as possible and shall be for no longer than the time reasonably necessary to fulfil the required administrative procedures with due diligence until the transfer under this Regulation is carried out.*

The *Dublin Regulation* has been heavily criticised in terms of its procedural outcomes (cf. ‘as short a period as possible’ above), particularly with regard to its automatic assumption of an existing uniformity in the standard of protection to applicants and refugees in each Member State, and its role in moving applicants to the geographically southern-most Member States (Italy, Greece) for processing, risking unfairly burdening those states.⁷⁸ This issue is discussed later in this chapter, in relation to juridical interpretations clarifying and restricting Member State activities under the *Dublin Regulation*.

⁷⁸ Moreno-Lax, “Dismantling the Dublin System: MSS v. Belgium and Greece,” 30.

F. The Returns Directive – outside the CEAS

The final EU instrument to mention is the so-called *Returns Directive*,⁷⁹ which does not form part of the CEAS. Rather, this directive contains the common set of safeguards that Member States must offer, prior to the expulsion of ‘irregular migrants’ (illegally staying third-country nationals) via a ‘return decision’ (Article 6). An irregular migrant may include asylum seekers who have had their application rejected. The *Returns Directive* also imposes a maximum 5 year entry ban on irregular migrants who have either been given no period for voluntary departure, or who have not complied with the return decision (Article 11). Interestingly, the *Returns Directive* appears to encourage the discretionary humanitarian compassion of Member States when contemplating a return decision (particularly with regard to failed asylum applicants), at Article 6(4):⁸⁰

Member States may at any moment decide to grant an autonomous residence permit or other authorisation offering a right to stay for compassionate, humanitarian or other reasons to a third-country national staying illegally on their territory. In that event no return decision shall be issued. Where a return decision has already been issued, it shall be withdrawn or suspended for the duration of validity of the residence permit or other authorisation offering a right to stay.

Additionally, the *Returns Directive* contains an explicit provision respecting the international legal principle of non-refoulement (cf. 1951 *Refugee Convention*), building several extra grounds for an application into the protection framework at the EU level, although it should be noted it allows for Member States to exercise significant discretion (‘take due account of’) at Article 5 as follows:⁸¹

When implementing this Directive, Member States shall take due account of:

a) the best interests of the child;

⁷⁹ 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 2008/115/EC, [2008] OJ L 348/98.

⁸⁰ Ibid., 102.

⁸¹ Ibid.

- b) *family life;*
 - c) *the state of health of the third-country national concerned*
- and respect the principle of non-refoulement.*

The *Returns Directive* provides standards for the detention of an illegally staying third-country national, the grounds for which are contained in Article 15. Firstly, it provides that detention of a person who is subject to return procedures should only occur where there is a risk of the person absconding, or if the third-country national avoids or hampers the return process. Secondly, Article 15 states ‘any detention shall be for as short a period as possible and only maintained as long as removal arrangements are in progress and executed with due diligence’. This is a subjective standard for the implementation of detention arrangements, which was subsequently subject to judicial interpretation in which the principle of proportionality is to be applied throughout the whole procedure, from the measure granting the greatest liberty, to detention being the final option.⁸² In the interests of brevity, this interpretation will not be discussed here.

Finally, the *Returns Directives* imposes a standard in relation to the length of detention of irregular migrants, on the above conditions, at Article 15. The ordinary period of detention is 6 months, with an additional allowable period of 12 months on the grounds of either lack of cooperation of the individual, or delays in obtaining the necessary documentation from the third country. The resulting maximum detention time of an irregular migrant under the *Returns Directive* is 18 months.⁸³

IV. FRANCE: REGULATORY RESPONSES TO EU DIRECTIVES

The core French legislative instruments relevant to asylum procedures, reception and detention that reflect the CEAS are (translated in English) the *Code of Entry and*

⁸² *Hassen El Dridi, Alias Karim Soufi C-61/11 PPU*, CJEU Judgment of the Court (First Chamber) 28 April 2011 (CJEU ECLI:EU:C:2011:268); Diego Acosta Arcarazo, “The Returns Directive: Possible Limits and Interpretation,” in *The Returns Directive: Central Themes, Problem Issues, and Implementation in Selected Member States*, ed. Karin Zwaan (Nijmegen: Wolf Legal Publishers, 2011), 16.

⁸³ *Saïd Shamilovich Kadzoev v Direktsia Migratsia Pri Ministerstvo Na Vatreshnite Raboti (Huchbarov)*, (C-357/09) [2009] ECR I-11189, pp. 37.

Residence of Foreigners and of the Right to Asylum (CESEDA),⁸⁴ the *Code of Administrative Justice* (CJA),⁸⁵ and the *Code of Social Action and Families* (CASF).⁸⁶ These reflect France's direct obligations under the 1951 *Refugee Convention*, contain additional subsidiary and constitutional protections, and aim to adhere to the directives of the CEAS relating to common standards. Accompanying the three main instruments are a range of circulars implementing obligations, including the *Circular on the implementation of Dublin and Accelerated Procedures*,⁸⁷ the *Circular on the Implementation of Alternatives to Administrative Detention of Families*,⁸⁸ and the *Decision on the Associations Entitled to Send Representatives to Access Administrative Detention Facilities*.⁸⁹

A. Code of Entry and Residence of Foreigners and of the Right to Asylum (CESEDA)

The CESEDA is a relatively new meta-instrument that entered into force on 1 March 2015, serving as a constantly updated codification of the law (*codification à droit constant*) compiling all legislative and regulatory texts relating to the admission and residence of foreigners in France. The content of CESEDA is too vast to explore here in detail, however the relevant provisions will be outlined relating to asylum and

⁸⁴ *Code de L'entrée Et Du Séjour Des Étrangers Et Du Droit D'asile (CESEDA)*, Version Consolidée Au 20 Juin 2020 (<<https://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006070158>> accessed at 20 June 2020).

⁸⁵ *Code de Justice Administrative (CJA)*, Version Consolidée Au 26 Avril 2020 (<<https://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006070933>> accessed at 20 June 2020).

⁸⁶ *Code de L'action Sociale Et Des Familles (CASF)*, Version Consolidée Au 19 Juin 2020 (<<https://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006074069>> accessed at 20 June 2020).

⁸⁷ *Circulaire IOCL1107084C Du 1er Avril 2011 Relative Au Droit D'asile: Application Du Règlement CE N° 343/2003 Du Conseil Du 18 Février 2003*, (<<https://www.interieur.gouv.fr/fr/Media/Immigration/Files/Circulaire-IOCL1107084C-du-1er-avril-2011-relative-au-droit-d-asile.-Application-du-reglement-CE-n-343-2003-du-Conseil-du-18-fevrier-2003-dit-Reglement-Dublin-Mise-en-oeuvre-des-procedures-d-examen-prioritaire-de-certaines-demandes-d-asile-ment>> accessed at 20 June 2020).

⁸⁸ *Mise En Oeuvre de L'assignation À Résidence Prévue À L'article L.561-2 Du CESEDA, En Alternative Au Placement Des Familles En Rétenion Administrative Sur Le Fondement de L'article L.551-1 Du Même Code*, (<<http://circulaires.legifrance.gouv.fr/index.php?action=afficherCirculaire&hit=1&r=35851>> accessed at 20 June 2020).

⁸⁹ *Décision Du 1er Mars 2013 Fixant La Liste Des Associations Humanitaires Habilitées À Proposer Des Représentants En Vue D'accéder Aux Lieux de Rétenion*, (<<https://www.interieur.gouv.fr/fr/Publications/Bulletin-officiel-du-ministere-de-l-Interieur/Decision-du-1er-mars-2013-fixant-la-liste-des-associations-humanitaires-habilitees-a-proposer-des-representants-en-vue-d-acceder-aux-lieux-de-retention>> accessed at 20 June 2020).

detention. These are contained in Book VII of CESEDA, which aims to implement the CEAS Directives, and assigns the role of consideration of asylum applications to *L'Office français de protection des réfugiés et apatrides* (the French Office for the Protection of Refugees and Stateless Persons, henceforth OFPRA) at Articles L721-1 to L724-3.

Importantly, detention (known in French instruments as *rétenion*) only occurs under French law as administrative detention for the purposes of removal of illegally staying third-country nationals (irregular migrants), and does not apply to asylum applicants, who enjoy freedom of movement under the code. However, asylum applications made by a person already in administrative detention on the grounds of illegally staying, do not by default entitle the applicant to be released from detention. The maximum length of administrative detention in CESEDA was extended from 45 days to 90 days in 2019 (Article L552-7). An the initial period of detention encompasses two days (Article L551-1 CESEDA), after which the 'judge of freedom and detention' is required to decide on a 28 day extension, thereafter a 30 day extension, after which there can be two further extension of 15 days each (Article L552-7 CESEDA), making a maximum of 90 days.

Applications for asylum are made to the prefecture in which the asylum seeker resides (Article R741-2 CESEDA), after which the prefecture may decide on one of three options for processing. The first option is for the prefecture to issue an asylum claim certification (an *attestation de demande d'asile* per Article L741-1) to the applicant within 10 working days of application. Granting of the asylum claim certification allows the applicant to stay in France whilst making their application to OFPRA, within ten months.⁹⁰ At this first stage, the prefecture must also provide the option to the applicant of residence in a Centre for Asylum Seekers (*Centre d'accueil pour demandeurs d'asile* or CADA) under Articles L744-1 to L744-3. If the original one-month period of the certificate expires, the applicant may re-apply and obtain a six month certification.

⁹⁰ *Arrêté Du 9 Octobre 2015 Pris En Application de L'article L. 741-1 Du Code de L'entrée Et Du Séjour Des Étrangers Et Du Droit D'asile*, (Version consolidée au 27 juin 2020 <<http://circulaires.legifrance.gouv.fr/index.php?action=afficherCirculaire&hit=1&r=35851>> accessed at 20 June 2020).

The second option available to the prefecture on application by an asylum seeker is to make an ‘accelerated procedure’ ruling (CESEDA Article L723-2) on the grounds that the person is either a citizen of a safe origin country, is security threat to the public, or has made a fraudulent application. The prefecture cannot deny the individual access to the asylum procedure, but the length of processing time is curtailed – applicants subject to a ‘accelerated procedure’ under CESEDA Article R723-1 have 21 days to send their application to OFPRA, and OFPRA has 15 days to make a decision (Article R723-4 CESEDA). Where an applicant placed under ‘accelerated procedure’ is also held in administrative detention, OFPRA must make a ruling within 96 hours (Articles R723-4 and L551-1 CESEDA).

The third option available to the prefecture is a refusal process an application, on the basis of an applicant who is subject to a *Dublin Regulation* ‘transfer’ order. The provisions directly reflecting the CEAS *Dublin Regulation* are found at Articles L742-1 to L742-4 CESEDA, and are binding as per the regulation.

B. Court Nationale Du Droit d’Asile (CNDA)

The CESEDA notably provides for the establishment of the *Court Nationale du Droit D’Asile* (National Court of Asylum, henceforth CNDA) at Articles L731-1 to L733-5. The administrative court has national jurisdiction and is under the control of the *Conseil d’État* (French Council of State), and provides rulings on appeals against the decisions of OFPRA, opinions, and considers appeals on material error.

The *Code de justice administrative* (Code of Administrative Justice, henceforth CJA) also allows for a review of the procedural aspects of a CNDA decision, as per CJA Articles L777-1 to L777-4. These provisions will not be expanded on here in the interests of brevity.

V. CZECH REPUBLIC: REGULATORY RESPONSES TO EU DIRECTIVES

The Czech Republic (Czech) legal system is similar in structure to French arrangements, as both are based in the civil law tradition. Unlike the common law tradition (Britain, Canada, Australia and other Commonwealth countries), civil law

systems give primacy to legal acts over and above the role of the judiciary, which serves a more interpretive rather than constructive function. As in France, Czech laws are codified into a formal collection of law, which serves to implement the supranational obligations of the CEAS at the national level and obligations found in the 1951 *Refugee Convention*. The primary source of rights granted to asylum seekers by the Czech Republic arises from *Czech Charter of Fundamental Rights and Basic Freedoms* (shortened title), which states explicitly at Article 43 that the Czech Republic:⁹¹

shall grant asylum to aliens who are being persecuted for the assertion of their political rights and freedoms. Asylum may be denied to a person who has acted contrary to fundamental human rights and basic freedoms.

The above guarantee creates an individual right to asylum seekers provided for explicitly in the Czech laws, as contrasted with the looser international framework discussed above that creates no right to asylum for the individual. In this way, *Czech Charter* provides a broad platform for constitutional protection of asylum seekers in the Czech domestic regulatory landscape, which in turn forms a part of the subsequent operational procedures for managing asylum under the objectives of the CEAS.

Regulations covering applications for asylum in the Czech Republic are contained within the *Asylum Act*,⁹² which prescribes procedure to be followed by public officials and applicants in preparation for a decision (prescriptions as to how decisions are to be made are separated into the *Code of Administrative Procedures*).⁹³ The *Asylum Act* designates locations where an individual can make an application at Chapter II Section 3a (paraphrased in English below), with the Police:

(a) at the border crossing

(b) at a reception centre

⁹¹ *Resolution of the Presidium of the Czech National Council of 16 December 1992 on the Declaration of the Charter of Fundamental Rights and Freedoms, in the Constitutional Order of the Czech Republic*, Constitutional Act No. 2/1993 Sb as Amended (Czech Republic).

⁹² *Asylum Act*, 325/1999sb Act of 11 November 1999 as Amended (Czech Republic) (Czech Government - Ministry of Interior Website: Asylum <<https://www.mvcr.cz/mvcren/file/asylum-act.aspx>>).

⁹³ *Code of Administrative Procedure*, 500/2004sb Act of 24 June 2004 as Amended (Czech Republic).

- (c) *at the department of Aliens Police at Regional Headquarters in the event the applicant arrived there voluntarily*
- (d) *at a detention centre (excepting those subject to the Dublin Regulation transfer)*

Czech grounds for detention of asylum seekers are restricted by general laws relating to irregular migration (in this case, the *Foreigners Act*).⁹⁴ A detention decision is normally exercised only the basis of impending expulsion of the person as an identified irregular migrant, or transfer order under the *Dublin Regulation*. However, in practice, legislation does give leeway for the Ministry of Interior to require the applicant to remain at a reception centre to provide fingerprints (as per *EURODAC Regulation*) and health checks. The flexibility of the decision-maker in this regard is substantial – the applicant can even be required to remain at the Reception Centre for up to 120 days. The relevant provision allowing for this flexibility in relation to detention is the *Asylum Act* Chapter VII Section 46a, which states (paraphrased in English):

1. *The Ministry shall decide on the obligation of an applicant for international protection to stay in a reception centre or in a detention facility for foreign nationals...*
 - a. *if the applicant's identity had not been established in a reliable manner,*
 - b. *if the applicant had produced forged or altered identity documents, or*
 - c. *in the case of a well-founded assumption that the applicant could threaten security of the state or public [order.] ...*
6. *In its decision on detention the Ministry shall stipulate the detention period which can be extended, even repeatedly, to a maximum of 120 days.*

This is a broad power granted to the public official, with appeal available to the applicant through the regional Czech court system or through the Ministry of Interior,

⁹⁴ *Residence of Foreigners Act*, 326/1999sb Act of 30 November 1999 as Amended (Czech Republic).

and after that by either party via the Supreme Administrative Court. The detention decision is one of the few types of decisions that does not have suspensive effect as per Section 46a(4) (i.e. the decision is not immediately suspended and the applicant released). The timeframes on processing such an appeal are largely in favour of the state, as the Ministry is allowed 5 days from appeal to file a response while the applicant may remain in detention, and only then is a matter heard by the court, requiring a judicial decision another 7 days after the Ministry's response (section 43a(8)). These arrangements in the Czech framework allow the potential to require an asylum seeker subject to such a decision by public officials to be detained for up to 12 days without immediate recourse.

Although the totality of Czech procedure cannot be covered here in the interests of brevity, it is important as a final note to cover the period of time in which a decision must be made in relation to an application for asylum or subsidiary protection under the *Asylum Act*. The following provisions allow for a great deal of flexibility on the part of the decision-maker to extend the time limit of 6 months, as per *Asylum Act* Chapter III Section 27(1) and (2) as follows (paraphrased in English):

1. *Unless the Act stipulates otherwise, a decision of the Ministry in matters of international protection shall be issued by the Ministry without undue delay, at latest however within 6 months of the date of provision of information in support of a made application for international protection...*
2. *The deadline for issuance of a decision according to subsection 1 [of 6 months] may be extended by up to 9 months:*
 - a. *in materially or legally complex cases,*
 - b. *if a large number of applications for international protection is made at one time, or*
 - c. *if an applicant for international protection fails to perform his/her obligations according to this Act, and therefore a decision cannot be made within the deadline as per subsection 1.*

As is the arrangement for decisions on detention, the explicit grounds for extension are not included in the regulation ('legally complex case' is undefined), and are therefore largely at the discretion of the public official making the decision.

Despite the flexibility of the above procedural processes in the management of an application for asylum, the Czech legal framework contains a right to asylum, supported in turn by a range of regulatory instruments that allow for the orderly application and granting of several types of protection, either under the international protection under 1951 *Refugee Convention* refugee protections, or under subsidiary protection where the applicant fails to establish grounds for asylum, but during the process establishes a risk of serious harm if returned to the original state (section 14a, *Asylum Act*). Decisions made across the whole process can be appealed, even though some types of appeal are not suspensive and can result in applicants being held without immediate recourse.

VI. INTERPRETATION OF THE LAW: JUDICIAL ACTORS IN EUROPE

European judicial actors have been increasingly active at the supranational and national levels, clarifying and steering the regularisation of refugee protection within Europe and under the CEAS. The full range of juridical impacts are too vast to cover here, so instead an overview of select cases will demonstrate how supranational and national courts serve to impact refugee protection frameworks at the national level and across the EU framework.

It should be noted that much of the literature contains substantial debate around judicial activism in the EU, which Mark Dawson describes as an argument between those who characterise judicial activities in Europe as 'giving individuals access to the law...[so that] new political pathways are opened up', and on the other hand, those who see judges engaging in 'a usurpation of power, using...individual rights and entitlements to subvert the settled preferences of the political community as a whole'.⁹⁵ The debate is not central to the thesis, save that the cases in the sections below are notable for their impact on the protection of the refugee under supranational normative order in the EU.

⁹⁵ Mark Dawson, "The Political Face of Judicial Activism: Europe's Law-Politics Imbalance," in *Judicial Activism at the European Court of Justice: Causes, Responses and Solutions*, ed. Bruno de Witte, Elise Muir, and Mark Dawson (Cheltenham, Gloucestershire, United Kingdom: Edward Elgar Publishing Limited, 2013), 12.

For this reason, the following cases have been chosen not based on case study countries, but instead because they best represented circumstances where judicial actors in the supranational framework of the EU have shaped the EU protection framework, considering questions and referrals from Member States on the operation of the Common European Asylum System. The selection of cases is in line with the purpose of this chapter to provide an overview of the regulatory structures operating among and between the national and supranational (EU) levels, on the topic of irregular migrant detention (as per Chapter one).

A. The European Court of Justice

The *European Court of Justice* (henceforth ECJ, sometimes referred to in the literature as the *Luxembourg Court*) provides opinions and clarifications on European Union law for national courts in Member States, as per TEU Article 19 and TFEU Articles 251-281. The court also helps to determine how Member States are to interact with the institutions of the European Union, and how the institutions of the EU are to interact with each other. The ECJ does not deal with matters of national law, it is instead confined to matters arising from the TEU and TFEU. The *Huchbarov* case of 2009 demonstrates how the ECJ functions to shape the implementation of refugee protection frameworks across the EU – particularly with regard to the detention of irregular migrants.

A.1 Example ECJ ruling on detention: Huchbarov Case

The *Huchbarov* case in the ECJ concerned an individual who was detained in 2006 as an irregular migrant by Bulgarian authorities under the EU's *Returns Directive* (the EU instrument discussed above).⁹⁶ The individual applied for refugee status three times from detention between 2007 and 2009, but was rejected each time as domestic decision-makers disputed whether the applicant was from Russia as he claimed. The applicant appealed to the national Bulgarian court (Supreme Administrative Court) on the basis of the Bulgarian implementation of the *Returns Directive*. As a result, the Bulgarian Supreme

⁹⁶ *Saïd Shamilovich Kadzoev v Direktsia Migratsia Pri Ministerstvo Na Vatrashnite Raboti (Huchbarov)*.

Administrative Court sought a preliminary ruling from the ECJ on the operation of the *Returns Directive* maximum detention provisions. The ruling made by the ECJ regarding the proper operation of the *Returns Directive* is paraphrased as follows:

When determining the maximum allowable time in detention under the EU's Returns Directive, the Member State must include:

- 1. Time spent in detention prior to the implementation of the Directive.*
- 2. Periods of time detention falling between a decision to classify the individual as an irregular migrant and to classify to the individual as an asylum applicant.*
- 3. Periods of detention occurring during judicial review of the applicant's appeal.*

Bulgaria and all other Member States were then obliged to comply with the ruling in relation to the detention of irregular migrants under the *Returns Directive*. The nuances of the ECJ's decision in *Huchbarov* are not discussed here in the interests of brevity, but the case serves to demonstrate the influence of the ECJ on the implementation of the common asylum system.⁹⁷ National courts in Member States (and in some cases, individuals – see section on direct effect below) are able to request that the ECJ provide clarification of EU-level instruments, in order to ensure the Member State is fulfilling its obligations under the supranational system. And national courts must follow the rulings of the ECJ in their application of directives and regulations. In this way, the ECJ working with national courts helps to ensure more even implementation of the CEAS and the EU-level framework. The limitations of the ECJ mechanism is that its reaction is necessarily based on a negative feedback system, which usually requires elements or processes in the system not being clear in the first place – and often for lengthy and costly court action to ensue at the national level – prior to EU-level decisions being given.

⁹⁷ Elitsa Mincheva, "Case Report on Kadzoev, 30 November 2009," *European Journal of Migration and Law* 12, no. 3 (2010).

B. The ECJ and the Charter of Fundamental Rights of the European Union

The *Charter of Fundamental Rights of the European Union* (henceforth *Charter*) was drafted via a meeting known as the *European Convention 1999-2000*, consisting of Members of the European Parliament, representatives of EU Member States, the European Commission and other EU observers, in response to the June 1999 meeting of the European Council in Cologne.⁹⁸ The purpose of the *Charter* was to consolidate pre-existing fundamental political, economic and social rights common to EU Member States via national and international law (including rights observed under the 1950 *European Convention on Human Rights* or ECHR, discussed below), in order to centralise these rights in one codified instrument for EU citizens. Although the *Charter* was proclaimed by the European Council, European Parliament and European Commission in Nice in December 2000, it did not gain binding legal effect until the eventual Treaty of Lisbon in 2009, which gave it equal standing to the TEU and TFEU.

The *Charter* directly impacts the regulatory capacity of the EU institutions, which must only take action and create regulation that is consistent with the fundamental rights proclaimed in the *Charter*. Enforcement is conducted by the ECJ, which is empowered to make findings in relation to the EU's institutions (subject to the principle of subsidiarity), and in relation to the implementation of EU regulation in Member State contexts (see Article 51 of the *Charter* for scope of application). The United Kingdom and Poland negotiated an opt-out from the effect of enforcement of the treaty.⁹⁹

Importantly, the *Charter* contains the following right to asylum – granting individuals a right to asylum across the EU (cf. discussion of the international framework lacking a right granted to individuals) at Article 18 as follows:

Article 18 - Right to asylum

The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January

⁹⁸ *Charter of Fundamental Rights of the European Union*, [2012] OJ C 326/02.

⁹⁹ Steve Peers, "The 'Opt-out' That Fell to Earth: The British and Polish Protocol Concerning the EU Charter of Fundamental Rights," *Human Rights Law Review* 12, no. 2 (2012).

*1967 relating to the status of refugees and in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union (hereinafter referred to as 'the Treaties').*¹⁰⁰

This provision both ties the international framework to the EU-level framework, and creates an explicit 'right to asylum' in EU Member States (beyond a right to seek asylum), which in turn allows individuals arriving inside the boundaries of the European Union and subject to the CEAS to be guaranteed this right from Member States applying EU law. The means by which an individual can invoke the direct effect of the *Charter* and EU laws as a treaty, is explained in the following brief section.

B.1 Direct effect doctrine, the ECJ, and supranational regulatory effect

Not long after the formation of the European Community the European Court of Justice established a principle in the *Van Gend en Loos* case,¹⁰¹ known as the *direct effect* doctrine. Traditionally in international law, only states have the right to obligations arising under a treaty conducted between states.¹⁰² However, the ECJ in the *Van Gend en Loos* case held that where a treaty provision on a certain European Community topic or matter was clear and unconditional, a Member State was required to take no further action on that matter in order to become effective and to create individual rights. On this basis, obligations could be therefore imposed on a Member State to take action, or refrain from doing so, producing a direct effect on the legal relationship between a Member State and its subjects, thereby allowing a citizen of that Member State the right to expect the same treaty obligations to be complied with.

The Court in its decision of 1962 stated that the EU (then European Community) was:

¹⁰⁰ *Charter of Fundamental Rights of the European Union*, 399.

¹⁰¹ *Van Gend En Loos v Nederlandse Administratie Der Belastingen*, (C-26/62) [1963] ECR 1.

¹⁰² P.K. Menon, "The Subjects of Modern International Law," in *Hague Yearbook of International Law: Annuaire de La Haye de Droit International*, ed. T.M.C. Asser Institut (The Hague: Martinus Nijhoff, 1990), 30.

*[A] new legal order of international law for the benefit of which states have limited their sovereign rights...the subjects of which comprise not only Member States but also their nationals.*¹⁰³

This statement is crucial to the theoretical basis of the thesis, discussed in Chapter Two. The Court has the same conceptual departure that Habermas takes for improvement of the modern EU, via the dual function of the *people of a nation* acting to better legitimating supranational power as the *people of Europe*. Ultimately the *direct effect* doctrine allows the *people of Europe* the binding capacity, regardless of which Member State they reside in, to directly request state compliance at the national level with the supranational obligations arising from the EU regulatory framework. This includes obligations stated under the *Charter*, including Article 18 on the right of individuals to claim asylum.

B.2 Example ECJ ruling on the basis of the Charter: N.S. Case

In 2011 the ECJ issued a pivotal ruling on the application of the *Dublin Regulation* (discussed above), in the case of *N.S. v Secretary of State for the Home Department and M.E. e.a. v Refugee Applications Commissioner* (henceforth the *N.S.* case).¹⁰⁴ The *N.S.* case immediately followed a pivotal case in the ECtHR, involving Member States Belgium and Greece, which is discussed below. In relation to the *N.S.* case in the ECJ, at the request of the Court of Appeal of England and Wales, and the Irish High Court, the ECJ considered whether certain asylum seekers appealing their transfer to Greece under the *Dublin Regulation* risked being subjected to inhuman and degrading treatment in Greece, in breach of the *Charter* at Article 4, which states:

Article 4 - Prohibition of torture and inhuman or degrading treatment or punishment

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

¹⁰³ *Van Gend En Loos v Nederlandse Administratie Der Belastingen*.

¹⁰⁴ *NS v Secretary of State for the Home Department*, (Joined cases C-411/10 and C-493/10) [2011] ECR I-13905.

The ECJ held that the CEAS contains a presumption of compliance with EU law (and implementation of the minimum standards), but that given Greece in 2010 was the point of entry for 90% of Europe's undocumented migrants, Greek authorities were unable to cope with the situation in reality. The ECJ held that:

*Member States, including the national courts, may not transfer an asylum seeker...where they cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that Member State amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of that provision.*¹⁰⁵

Accordingly, this case saw the ECJ steering the behaviour of Member States operating under the CEAS and the *Dublin Regulation*, including Member States' assessment of proper reception conditions and procedures at the other Member State to which the asylum seeker would be transferred. This pivotal case meant that considerations of applicability of the EU legal framework alone was not grounds enough to detain and move asylum seekers to other Member States. Instead, an actual appraisal of the reality on the ground in the responsible Member State was required.¹⁰⁶ Effectively, this was the *Charter* operating in an attempt to improve the harmonisation and uniformity of national application of the CEAS and its accompanying regulations, against the backdrop of a reality of differences in implementation of the CEAS.¹⁰⁷ The discussion of the European Court of Human Rights below identifies a similar judicial guidance.

C. The European Convention on Human Rights and its Court

Situated alongside the EU and its institutions in the international space (and applying to EU Member States concurrently as a separate instrument of international law) is a second European agreement negotiated to protect human rights in the aftermath of

¹⁰⁵ Ibid., I-14032.

¹⁰⁶ Mark Angelo Provera, *The Detention of Asylum Seekers in the European Union and Australia* (The Netherlands: Wolf Legal Publishers, 2013), 569.

¹⁰⁷ Kate Ogg, "A Sometimes Dangerous Convergence: Refugee Law, Human Rights Law and the Meaning of 'Effective Protection'," *Macquarie Law Journal* 12, no. 2013 (2013): 124.

World War II, known as the *European Convention on Human Rights* (henceforth ECHR).¹⁰⁸ The ECHR is a treaty arising from the Council of Europe, which was founded in 1949, established by the *Statute of the Council of Europe*.¹⁰⁹ At its core, the Council of Europe aims to achieve greater unity between its state parties to facilitate greater economic and social progress. The *Statute of the Council of Europe* has been ratified by many more countries than have ratified the TEU and TFEU – the number of state parties to the treaty at the time of writing stands at 47, as opposed to the EU's 27. The Council of Europe's ECHR entered into force on 3 September 1953 (at around the same time as the 1951 *Convention* covering global refugee protections). The treaty establishes a range of human rights obligations, and its own court to adjudicate breaches of same, known as the European Court of Human Rights (ECtHR – often referred to as the Strasbourg Court). The treaty allows applications to the ECtHR by any 'person, nongovernmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols' as long as 'all domestic remedies have been exhausted'.¹¹⁰ This means that state parties to the ECHR agree to allow their own citizens to make applications to the ECtHR on the basis of the rights in the ECHR – a similar concept (and influential) to the later doctrine of *direct effect* granted by the ECJ in 1962 and discussed above.

The ECtHR can make binding decisions on state parties to the ECHR, and it can give advisory opinions as to the operation and interpretation of the ECHR. Relevant to the discipline on detention of irregular migrants is Article 3 of the ECHR, which states:

Prohibition of torture – No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

Article 3 is linked to ECHR Article 5 which protects the right liberty and security against unlawful detention, including reinforcing a right to review of the lawfulness of detention. Articles 5 and 13 of the ECHR are also integral provisions in relation to

¹⁰⁸ *Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)*.

¹⁰⁹ *Statute of the Council for Europe*, Opened for Signature 5 May 1949, 8 UNTS 103 (Entered into Force 3 August 1949).

¹¹⁰ *Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)*, Articles 34 and 35.

protecting individuals from arbitrary detention. Article 5 covers the “right to liberty and security”, including the following (abridged) provisions of Article 5:

1. *Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:[...]*
 - c) *the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;[...]*
 - f) *the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.[...]*
3. *Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.*
4. *Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.*

It should be noted that ECHR Article 5(1) above mandates that detention be ‘in accordance with a procedure prescribed by law’. The ECtHR has published guidance on the operation of Article 5(1), which states that procedure may be prescribed by both national law, and ‘where appropriate, to other applicable legal standards, including those who have their source in international law’ – this sentence in the guidance is drawn directly from key cases heard by the ECtHR.¹¹¹ In the context of

¹¹¹ *Medvedyev and Others v France*, Application no. 3394/03, Council of Europe: European Court of Human Rights, 29 March 2010, 79; European Court of Human Rights, “Guide on Article 5 of the

the ECHR, Article 5 allows arguments for protection from arbitrary detention to be considered by the ECtHR.

Similarly, Article 13 of the ECHR is linked to Articles 3 and 5, and provides for a ‘right to an effective remedy’ at the national level for breach of the ECHR, as follows:

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

Lawyers and NGOs have successfully used the ECHR, particularly Articles 3, 5, and 13, to argue against the detention of irregular migrants in EU Member States. In a prominent decision handed down in 2011, the ECtHR – via its concurrent binding authority over its European state parties to the ECHR – reached into the operation of the European Union’s Common European Asylum System over an alleged violations of ECHR rights by Greece and Belgium, particularly under Article 3 on account of the conditions of detention of the applicant. The case is discussed briefly below in order to demonstrate how judicial actors have used the CEAS to reinforce supranational frameworks of regulation on Member States.

C.1 Example ECtHR ruling on detention: M.S.S. v Belgium and Greece

The 2011 case of *M.S.S. v Belgium and Greece* involved an assessment by the ECtHR on the compatibility of the EU’s *Dublin Regulation* with the rights laid out in the Council of Europe’s ECHR.¹¹² The applicant, M.S.S. had fled Kabul in 2008, first entering the EU through Greece and then travelling to Belgium where he lodged his asylum claim. In June 2009, Belgium returned M.S.S. to Greece under the provisions of the EU’s *Dublin Regulation*. Having been returned to Greece, M.S.S. was detained in overcrowded and degrading conditions, before living on the streets without material support. The applicant appealed to the

European Convention on Human Rights, Updated on 30 April 2020,” (https://www.echr.coe.int/Documents/Guide_Art_5_ENG.pdf) accessed at 15 August 2020.).

¹¹² *M.S.S. v Belgium and Greece*.

ECtHR for multiple breaches of his rights under the ECHR. The ECtHR held *inter alia* that Greece exposed M.S.S. to inhuman and degrading treatment in breach of Article 3 of the ECHR, and that M.S.S.’s right to an effective remedy under Article 13 of the ECHR had also been violated due to Greece’s systemic inefficiencies, risking a breach of 1951 *Refugee Convention* Article 31(1) on refoulement. The ECtHR also held that Belgium had violated Article 3 of the ECHR for returning the applicant to Greece and exposing the applicant to inhuman or degrading treatment.

The result of the ECtHR decision is important, as it heralded the end of the assumption by EU Member States that standards of implementation of protection frameworks in fellow receiving Member States did not matter to the sending state. Member States returning asylum seekers under the *Dublin Regulation* were now required to consider whether the receiving Member State was compliant with international and EU obligations. This finding was to be reiterated in parallel by the ECJ in the *N.S.* decision, discussed above. Through such decisions, the ECtHR functions to influence the way EU Member States engage in their implementation of the CEAS and the associated EU regulations as a community, and further helps to steer Member States towards a harmonised and unified common asylum framework – albeit under the auspices of the rights laid out by the Council of Europe, rather than just the EU’s own framework.

D. National Courts and Tribunals in France and Czech Republic

Finally, we engage in a brief observation of the impacts of the national courts in the case study countries. The following are select examples of where judicial action has taken place – on the basis of the French and Czech regulatory systems described in detail above – to guide application of the various protection frameworks at the national level in each Member State. Although there are thousands of cases that could be discussed, in the interests of brevity two are selected with regard to detention, the first being the French Administrative Tribunal’s *Case of Mr. A* in

2010,¹¹³ and the second being the Czech Supreme Administrative Court's decision in *K.K. v Ministry of Interior*.¹¹⁴

D.1 France: Administrative Tribunal – case of Mr A. No 10103868/9-1

The applicant to the French Administrative Tribunal, Mr A., fled Afghanistan in 2008 and entered EU Member State Hungary in 2009 where he was detained in unsuitable conditions and subjected to death threats for converting to Christianity in detention. The applicant then fled Hungary, entered Switzerland, but was transferred back to Hungary in the same year. The applicant again fled in 2010 to France, where he was issued by the prefecture with a transfer order that was to return the applicant to Hungary under the provisions of the *Dublin Regulation*. Before the transfer to Hungary took place, the applicant appealed. The Tribunal held that Article 53-1 of the French Constitution, and the *Dublin Regulation* Article 3(2) allowed for French authorities to examine an application for asylum even if another Member State was technically responsible, particularly where an applicant's rights under international, EU, and national law are likely to be infringed. It was held that Hungary would not provide the applicant with the necessary safeguards for protection, and so the appeal was allowed and application for asylum was heard by France.

This domestic French decision slightly predates the decisions in *N.S.* and *M.S.S.* discussed above, and serves as a further example of circumstances where judicial actors at the national level ensure that individuals are not exposed to uneven implementation of the CEAS and international protection frameworks – even where the scope of the alleged treatment falls outside the geographic jurisdiction of the national court or tribunal, but within the bounds of the EU and the reach of the CEAS.

¹¹³ *Mr. A.*, Tribunal Administratif de Paris, Decision No. 1013868/9-1, 29 Jul. 2010.

¹¹⁴ *K.K. v Ministry of Interior*, Czech Republic Supreme Administrative Court, 1 As 12/2009-61, 15 April 2009.

D.2 Czech Republic: K.K. v Ministry of Interior

The Supreme Administrative Court of the Czech Republic heard the matter of *K.K. v Ministry of Interior* in 2009. The applicant arrived in the Czech Republic using a falsified document in 2007, and when requesting asylum was subsequently detained by Czech police under Article 24 of the *Aliens Act* on account of a potential threat to public order (regulatory framework discussed above). The applicant's asylum application was therefore only allowable from detention, so he appealed to the Regional Court, which rejected the appeal. The applicant then appealed to the Supreme Administrative Court of the Czech Republic, which held that because the applicant was an asylum seeker, and his original intention at the police station in 2007 was to apply for asylum, the applicant could not legally be detained as expulsion of an asylum applicant was not allowable as required by the Czech *Asylum Act*. The Supreme Administrative Court then cancelled the decision of the lower Regional Court, and the applicant was removed from detention while his application proceeded under Czech and EU laws. The Supreme Administrative Court finally held that future implementation of detention procedures by the authorities must always consider whether expulsion is a feasible outcome, before detention takes place.

The *K.K.* case demonstrates that internal steering of national implementation is possible through appeal mechanisms within the national frameworks, with the national courts tending to provide greater reference to EU regulatory frameworks than lower domestic courts. Despite this, such steering generally relies on test cases where individuals appeal upwards in the line of a domestic chain of courts, so steering is not always efficient or guaranteed from the ground level of implementation upwards.

VII. CONCLUSION

This chapter has endeavoured to support the research questions in Chapter One formed under the Habermasian theoretical model described in Chapter Two, by providing a select overview of the various refugee protection frameworks and laws operating at the international, supranational and domestic levels, with reference to the implementation

by EU Member States of the CEAS, particularly highlighting disciplines regarding detention. The international framework – with the 1951 *Refugee Convention* as its central pillar – is by reason of historical political forces a patchwork of regulatory principles, which are *intergovernmental* rather than *international* in character. This allows states to implement and interpret many international legal principles in a myriad of ways, rather than providing international consistency for individuals fleeing across boundaries. At the regional level, the supranational framework in the EU with its CEAS endeavours to provide a harmonised common system, under which Member States are to use their own means to achieve a set of standardised ends. As a legal framework, the CEAS contains clear codified principles that seek to clarify some of the gaps in the international framework across the territory of the EU. And yet, a sample of two Member States (France and Czech Republic) demonstrates differing domestic legal frameworks at the implementation end of the spectrum, resulting in differential treatment of individuals across internal borders.

The chapter has also covered select examples of supranational and national juridical control over the implementation of the CEAS and the 1951 *Refugee Convention*, demonstrating that at least in the regional context of the EU, the loose principles of refugee protection at the international level are to an extent guarded by a judiciary operating to restrain divergence.¹¹⁵ The overview intends to make clear that at the international end of the regulatory spectrum, principles are broad but often lack clarity and clear universal implementation with regard to enforcement, whilst at the other end, national frameworks of protection within the EU may well be prescribed and enforced, but are ultimately different from one another, creating the conditions for fragmentation and unevenness in the implementation of legal principles. The phenomenon of diversity in implementation evidences the tensions this thesis explores, which catches individual asylum seekers between the goals of international legal cosmopolitanism and the realities of the implementing sovereign state. The following chapters build on this evidence, through the qualitative analysis of fieldwork data gathered from case studies that operate under the CEAS and national legal frameworks described in this chapter, at both the EU level, and in Member State countries France and the Czech Republic.

¹¹⁵ Madeline Garlick, “The Dublin System, Solidarity, and Individual Rights,” in *Reforming the Common European Asylum System: The New European Refugee Law*, ed. Vincent Chetail, Phillipe De Bruycker, and Francesco Maiani (Boston: Brill Nijhoff, 2016), 170.

CHAPTER FOUR: UNCOVERING TENSIONS IN DISCOURSE

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I. OVERVIEW: UNCOVERING TENSIONS IN DISCOURSE

This chapter contains the results of a qualitative Critical Discourse Analysis (CDA) conducted on secondary texts published by case study actors at the national, supranational, and international levels described in Chapter One, particularly with regard to irregular migrant detention under the CEAS and associated legal frameworks described in Chapter Three. The CDA method was partly supported by computer-assisted coding and reassembling of data, providing a thick and rich description of normative civil society tensions that corresponded with the theoretical framework discussed in Chapter Two. The results discussed in this chapter also served as a comparative platform to triangulate the analysis of other fieldwork data discussed in Chapters Five and Six.

II. INTRODUCTION

There exists an international citizenship that has its rights and its duties, and that obliges one to speak out against every abuse of power, whoever its author, whoever its victims. After all, we are all members of the community of the governed, and thereby obliged to show solidarity. – Michel Foucault, Statement to United Nations on Vietnamese Refugee Influx, 1981¹

What is critique, what is critical discourse analysis? Critique brings a normative element into analysis...it focuses on what is wrong with a society (an institution, an organisation etc.), and how ‘wrongs’ might be ‘righted’ or mitigated, from a particular normative standpoint. – Fairclough, 2013²

Supranational regulation in the EU’s Common European Asylum System (CEAS) – which aims for common supranational implementation through the principle of *shared competence* across diverse national jurisdictions as described in Chapter Three – is as argued above neither *de facto* generalisable nor homogenous in national practice and implementation. As discussed in Chapter Two, according to Habermas’ theory the expression of power and (regulatory) control at the EU supranational level interacts

¹ Michel Foucault, “Confronting Governments: Human Rights (1981),” in *Power: Essential Works of Foucault, 1954-1984*, ed. J.D. Faubion (New York: New Press: 2000), 474.

² Fairclough, *Critical Discourse Analysis*, 7.

with – and often exists in tension with – expressions of democratically legitimised power and control at the national (or Member State) level. Accordingly, as also discussed in Chapter Two, there exists a model in Habermas’ theoretical framework of cross-border will-formation under the conditions of shared regulatory control that – under the normative pressure of international law – is theoretically gradually moving away from the control of the nation state towards the supranational EU level, causing a Habermasian learning process to occur both *within* European civil society, and *among* the peoples of Europe towards a concomitant dual solidarity between the national and supranational levels.

This thesis aims to test the hypothesis described in Chapter One – that the interception and detention of irregular migrant asylum seekers by EU Member States occurs at the juncture between these points of friction and tension as the theoretical shift via civil society learning processes occurs, via the intersection of the will of the state as sovereign, the will of EU institutions seeking to regulate supranational frameworks, and the will of the global citizen (the refugee) and their defenders operating in line with Habermas’ model of international legal cosmopolitanism.

III. SECONDARY TEXTS: COMPUTER-ASSISTED CRITICAL DISCOURSE ANALYSIS (CDA)

The objective of this chapter and the CDA analysis on secondary texts is to better triangulate meaning arising from other types of data arising from fieldwork (Chapters Five and Six),³ and to achieve a thick and rich (per Geertz)⁴ description of the tensions and power dynamics relating to the implementation of the CEAS at the international, supranational, and national levels amongst and between significant actors. In order to more manageably explore the tensions evident in the selected published material, the scope of analysis is further limited by the research questions to the case study areas (EU institutions/related NGOs, France Government/NGOs, and Czech Republic Government/NGOs).

³ Triangulation: Margaret R. Roller and Paul J. Lavrakas, *Applied Qualitative Research Design: A Total Quality Framework Approach* (2015), 41. Thickness of cultural description: Geertz, *The Interpretation of Cultures : Selected Essays*, 310.

⁴ Geertz, *The Interpretation of Cultures : Selected Essays*, 314.

Accordingly, as discussed in Chapter One, Fairclough's textual analysis published in *Discourse and Social Change* in 1992 is a particularly useful guide for the type of close textual analysis undertaken on the static texts explored in this chapter. Fairclough presents rigorous options for different types of analysis possible under CDA (at micro, meso, and macro levels discussed in the sections above), listed in Figure 4 below.

Figure 4 - Elements and Subtypes of Fairclough's Critical Discourse Analysis (1992)⁵	Analytical Subtypes of CDA (Fairclough 1992)
Discourse Practice	Interdiscursivity, Intertextual Chains, Coherence, Manifest Intertextuality, Conditions of Discourse Practice
Texts	Interactional Control, Cohesion, Politeness, Ethos, Grammar: Transitivity, Grammar: Theme, Grammar: Modality, Word Meaning, Wording, Metaphor
Social Practices	Social Matrix of Discourse, Orders of Discourse, Ideological and Political Effects of Discourse

Figure 4 – Elements and Subtypes of Fairclough's Critical Discourse Analysis (1992)

It is important to define what is meant by discourse in these contexts, as the literature on discourse analysis is vast, covering both quantitative and qualitative modes of data processing and organisation. Put simply, Fairclough's definition of discourse in *Discourse and Social Change* focuses on a fluid and relational non-objective concept:

Any discursive 'event' (i.e. any instance of discourse) is seen as being simultaneously a piece of text, an instance of discursive practice, and an instance of social practice.⁶

Fairclough further warns that discourse is 'not simply an entity we can define independently...we can only arrive at an understanding of it by analysing sets of relations'.⁷

⁵ Fairclough, *Discourse and Social Change*, 225.

⁶ Ibid., 4.

Subsequently, the discourse that was selected for analysis in this chapter was relational in nature – taking the form of public communication between and among actors at the international, supranational and national levels, including written text types such as published reports, policy papers and position statements by both government and non-government actors who contribute to the public conversation on the detention of irregular migrant asylum seekers in the EU, as bounded by the case studies’ focus on the EU, France and Czech Republic.

The researcher used purposive and snowball sampling for this chapter, and Chapters Five and Six, to ensure manageability of sources lined up with the most open discovery approach possible, and to ensure the researcher’s analytical time and efforts were shared equally across examples falling into the case studies (EU supranational level, France, Czech Republic) that combined the national, supranational, and international levels. Purposive non-probability sampling is defined by Neumann as ‘select[ing] unique cases that are especially informative...[and] identify[ing] particular types of cases for in-depth investigation to gain a deeper understanding of types’.⁸ Patton describes snowball sampling as ‘an approach for locating information-rich key informants or critical cases’, by which ‘the snowball gets bigger and bigger as you accumulate new information-rich cases’.⁹ The challenge for the researcher was to ensure there were snowballs sampled, not avalanches of sources.

A practical and balanced framework limiting ‘slots’ for possible candidate texts – limiting the texts to no earlier production than 2012 on account of the legal framework being different prior to that moment in time – was drawn up (see Figure 5 below) prior to the fieldwork to ensure there was not an overload of data obscuring the aims of the research questions, and to ensure the most information-rich texts would win a given ‘slot’ while low-information texts would be assessed then set aside. This limiting framework ensured the researcher’s time was apportioned to evaluating valuable textual candidates across each level, with a preference for high quality, information-rich texts. At the international level, intergovernmental organisations and NGOs often share the same non-State-actor legal status and function, so the framework was more relaxed for

⁷ Fairclough, *Critical Discourse Analysis*, 3.

⁸ Neuman, *Social Research Methods: Qualitative and Quantitative Approaches*, 268.

⁹ Patton, *Qualitative Research and Evaluation Methods*, 237.

the number of ‘slots’ available at the international level. The framework to limit the data for this chapter is shown in Figure 5:

Figure 5 - Framework to limit discourse data to manageable information-rich texts <i>2012 onwards: on account of legal regimes being different prior to 2012</i>	
<u>Level as per Research Questions</u>	<u>Apportionment of open ‘slots’ for information-rich discourse texts (government and non-government actors)</u>
International (operating on supranational level)	1 non-government text, 3 intergovernmental organisation texts (all international texts must adhere to supranational context)
European Union	1 institution text, 3 non-government texts
France	1 government text, 3 non-government texts
Czech Republic	1 government text, 3 non-government texts

Figure 5 – Framework to limit discourse data to manageable information-rich texts

The snowball method employed from the commencement of the fieldwork was two-fold – both directly asking interview participants for possible richly relevant policy papers, reports or statements, and using internet searches to narrow possible other relevant texts, which in turn when analysed led to other texts. Purposive internet searches were initially conducted via the search engine Google with consecutively narrowed search strings closing in on each set of search results: ‘asylum seekers’ ‘detention’ ‘Common European Asylum System’ (and ‘France’/ ‘Czech Republic’ / ‘European Commission’ to narrow further to the case areas). An anonymous interview participant produced the first selected text, which was a report into detention of irregular migrants by Science Po and France Terre D’Asile (listed in the chart of texts at Figure 6) – an assessment of that text led to references in other texts, alongside the snowball method and internet searches.

IV. DISCOURSE TEXTS SAMPLED

Taking into account the procedures of the Critical Discourse Analysis method and sampling discussed above, the following 16 texts – being policy papers, reports, positions statements and media statements by intergovernmental organisations, government and non-government actors operating each level of discourse bounded by the case studies (EU/international, France, Czech Republic) – were uncovered using the sampling methods undertaken during fieldwork and secondary research phases (Figure 6 as follows, corresponding to the framework in Figure 1 in Chapter One):

Figure 6 – Secondary texts for CDA analysis selected according to level and type	
<u>Level of Discourse</u>	<u>Type and Title of Discourse Text</u>
International Level Operating on Supranational Level (in Brussels as non-government entities)	• (NGO) Amnesty International – <i>Cruel migration detention exposes hypocrisy of European Commission</i> – Media Release, 3 March 2017 • (Government [intergovernmental organisation]) The Office of the United Nations High Commissioner for Refugees (UNHCR) – <i>UNHCR Comments on the Proposal for a Directive of the European Parliament and of the Council laying down standards for the reception of applicants for international protection (recast)</i> – COM (2016) 465 – Position Paper, August 2017 • (Government [intergovernmental organisation]) International Organization for Migration et al. – <i>Let's Work to End Child Immigration Detention</i> – Position Statement Released at the European Commission, 11th EU Forum on the Rights of the Child, 7-8 November 2017, Brussels • (Government [intergovernmental organisation]) Office of the United Nations High Commissioner for Human Rights – <i>Zeid Urges Czech Republic to Stop Detention of Migrants and Refugees</i> – Media Release, 22 October 2015

Figure 6 – Secondary texts for CDA analysis selected according to level and type	
<u>Level of Discourse</u>	<u>Type and Title of Discourse Text</u>
Supranational Level	• (Government) European Commission – <i>Explanatory Memorandum: Proposal for a Directive of the European Parliament and of the Council laying down standards for the reception of applicants for international protection (recast)</i> – COM(2016) 465 final dated 13 July 2016 • (NGO) European Council on Refugees and Exiles – <i>Boundaries of Liberty: Asylum and De Facto Detention in Europe</i> – Report dated 31 December 2017 • (NGO) Jesuit Refugee Service Europe – <i>The CEAS reform Package: the Death of Asylum by a Thousand Cuts?</i> – Working Paper January 2017 • (NGO) Joint Global Detention Project, Organization for Aid to Refugees and Forum for Human Rights – Submission to the Universal Periodic Review 28th session of the UPR Working Group, October-November 2017
National Level (France)	• (Government) French Office for the Protection of Refugees and Stateless Persons – <i>Listening to the World: Activity Report 2017</i> (translated) • (NGO) France terre d'asile – <i>Extend the Maximum Duration of Administrative Detention, "a useless and ineffective idea"</i> – Le Monde Newspaper, 28 September 2017 (translated) • (NGO) Science Po Law School & France Terre d'Asile – <i>The Effect of Administrative Retention on Migration Routes: an illusion?</i> – January 2015 (translated) • (NGO) ASSFAM, Forum réfugiés-Cosi, France terre d'Asile, La Cimade, Ordre de Malte France, Solidarité Mayotte –

Figure 6 – Secondary texts for CDA analysis selected according to level and type	
<u>Level of Discourse</u>	<u>Type and Title of Discourse Text</u>
	<i>Report: Administrative Retention Centers and Premises – 2016</i> (translated)
National Level (Czech Republic)	• (Government) Czech Prime Minister Bohuslav Sobotka – <i>Media Article: Czech Police Mark Migrants on their Forearms, Italian Jews Complain</i> – Novinky.cz News, 3 September 2015 • (NGO) Beáta Szakácsová, Lawyer – <i>Closed Detention in the Czech Republic: On What grounds?</i> – Article in Forced Migration Review Online No 44, September 2013 • (NGO) Organization for Aid to Refugees in the Czech Republic – <i>Refugees Being Treated like Criminals in Czech Detention Centres</i> – Online Media Article, ECRE, 14 September 2015 • (NGO) Consortium of Migrants Assisting Organizations in the Czech Republic – <i>Position Paper on the Proposed Reform of the Common European Asylum System</i> – Position Paper dated October 2016

Figure 6 – Secondary texts for CDA analysis selected according to level and type

V. CONDUCTING COMPUTER-ASSISTED CDA: SCHEMATIC CODING DIAGRAM

Taking into account the coding method discussed in Chapter One (in addition to the elements of CDA at Figure 4), the schematic diagram of coding for this chapter is summarised and prepared at Figure 7 below in the interests of framing the emergent CDA thematic categories into an A4 page size for reporting. It should be noted that the descriptions given in Figure 7 are not the end conclusive results of the discourse analysis, but the thematic categories discovered by the researcher at the close of the reassembly phase as per the processes described in Chapter One. These categories

subsequently inform and support inferences and discussion occurring in the results in the next section.

Figure 7 - Emergent Schematic Diagram Uncovered During Disassembly and Reassembly Phases of Discourse Analysis		
<i><u>Fairclough Heads of Analysis (1992) - Discourse Practice/Texts/Social Practice</u></i>	<i><u>Fairclough sub-categories of analysis (1992)</u></i>	<i><u>Reassembly codes (Yin 2014) uncovered via computer-assisted analysis of 16 published texts (Note: codes below are non-enumerative & abbreviated prior to discussion)</u></i>
A. Discourse Practice	A1. Interdiscursivity	Institutional report
		Joint report
		Lobbying as news media
		Magazine genre
		News media
		Position paper
		Explanatory Memorandum
		Study
	A2. Intertextual Chains	Recommendations to transform discourse
		Reaction to asylum seekers
		Uses gathered localised data against national power
		Uses gathered localised data to support national power
	A3. Coherence	Ambivalent
		Does not receive resistant readings
		Low level of ambivalence
	A4. Manifest Intertextuality	Govt decision makers
		National law
		Supranational decision makers
		Supranational law
		Supranational laws as superior
	A5. Conditions of Discourse Practice	Appealing to civil society regarding govt decision makers
		Appealing to civil society regarding supranational decision makers
		Appealing to civil society to support national power
		Appealing to govt decision makers

Figure 7 - Emergent Schematic Diagram Uncovered During Disassembly and Reassembly Phases of Discourse Analysis		
<i><u>Fairclough Heads of Analysis (1992) - Discourse Practice/Texts/Social Practice</u></i>	<i><u>Fairclough sub-categories of analysis (1992)</u></i>	<i><u>Reassembly codes (Yin 2014) uncovered via computer-assisted analysis of 16 published texts (Note: codes below are non-enumerative & abbreviated prior to discussion)</u></i>
		Appealing to supranational institutions regarding supranational decisions
		Group lobby against national social practice
		Restructuring national to fit supranational
		Restructuring supranational to fit international
		Restructuring supranational to fit national
<i>B. Texts</i>	B1. Interactional Control	Experts appealing to supranational power
		Group of participants appealing to a national power
		Multiple perspectives regarding national and supranational
		National participant appealing to a national power
		One participant appealing to a power
	B2. Cohesion	Colloquialism to build rapport
		Conjunction used to politicise
		Factual statements with no evidence
		Language of group argument against national
		Past tense to build rapport
		Personification of institution
		Sentence structure attributes ownership of problems with national implementation
		En dash use to augment critique
	B3. Politeness	False positivity or sarcasm

Figure 7 - Emergent Schematic Diagram Uncovered During Disassembly and Reassembly Phases of Discourse Analysis		
<i>Fairclough Heads of Analysis (1992) - Discourse Practice/Texts/Social Practice</i>	<i>Fairclough sub-categories of analysis (1992)</i>	<i>Reassembly codes (Yin 2014) uncovered via computer-assisted analysis of 16 published texts (Note: codes below are non-enumerative & abbreviated prior to discussion)</i>
		High degree of politeness to all actors
		Low degree of politeness as call to action
	B4. Ethos	Author as expert commentator
		Author mediating between power and own opinion
	B5a. Grammar: Transitivity	Active adherence to supranational
		Active advocate of national
		Active criticism of supranational
		Text does not take sides
	B5b. Grammar: Theme	Confirming national practice
		Correcting incorrect national practices
		Correcting incorrect supranational practices
	B5c. Grammar: Modality	Controlling representations of reality
		Low degree of affinity
		No affinity
		Speaking with asylum seekers' voice
	B6. Word Meaning	Better and success of national
		Concerns over supranational decisions
		Cruelty of supranational decisions
		Deterrent of detention as seen by civil society
		Duration of detention
		Emotive language
		Ensure
		Fairness emotive appeal
		National has been enabled to circumvent

Figure 7 - Emergent Schematic Diagram Uncovered During Disassembly and Reassembly Phases of Discourse Analysis		
<i>Fairclough Heads of Analysis (1992) - Discourse Practice/Texts/Social Practice</i>	<i>Fairclough sub-categories of analysis (1992)</i>	<i>Reassembly codes (Yin 2014) uncovered via computer-assisted analysis of 16 published texts (Note: codes below are non-enumerative & abbreviated prior to discussion)</i>
		Struggle over national definition or international definition
		Useless increase of detention at national level
	B7. Wording	Alternatives keyword
		Condemned keyword
		Credible reports keyword
		Deprivation of liberty keyword
		Further keyword
		Ineffective national reform keyword
		Is now detaining keyword
		Mobilisation keyword
		Rather than improved solidarity
		Reported keyword
		Retention is perceived differently by different actors
		Shocking keyword
		Should keyword
		Welcomes keyword
	B8. Metaphor	Dispute as to correctness of national law and action
		Dispute as to correctness of supranational law and implementation
		Dispute as to detention playing two roles
		Dispute as to EU policy being hypocritical
		Dispute as to international working together with national govts
		Dispute as to solidness of system
		Dispute as to training time reduction equating to betterment

Figure 7 - Emergent Schematic Diagram Uncovered During Disassembly and Reassembly Phases of Discourse Analysis		
<u>Fairclough Heads of Analysis (1992) - Discourse Practice/Texts/Social Practice</u>	<u>Fairclough sub-categories of analysis (1992)</u>	<u>Reassembly codes (Yin 2014) uncovered via computer-assisted analysis of 16 published texts (Note: codes below are non-enumerative & abbreviated prior to discussion)</u>
		Dispute as to way in which national law is obstinately applied
		Dispute as to who is trusting the system
		Dispute over false benevolence hospital safety chain
C. Social Practices	C1. Social Matrix of Discourse	Conventional and normative
		Oriented to restructuring social practice
	C2. Orders of Discourse	Aims to transform discourse
		Reproduces existing power
	C3. Ideological and Political Effects of Discourse	Hegemonic to national power

Figure 7 – Emergent Schematic Diagram Uncovered During Disassembly and Reassembly Phases of Discourse Analysis

VI. CDA INTERPRETATION AND RESULTS: PREAMBLE

Critical discourse analysts take an explicit position and thus want to understand, expose, and ultimately challenge social inequality...CDA is discourse study with an attitude. – Van Dijk, 2015¹⁰

The aim of this section of the chapter is to provide a systematic, saturated and thick discussion of the results of a Critical Discourse Analysis undertaken on the information-rich texts in the discourse sample (see also sampling and conditions of discourse analysis in the above sections). However, if this reporting chapter were to provide a comprehensive exploration of each of the hundreds of coded elements in the computer-

¹⁰ Tuen A. Van Dijk, "Critical Discourse Analysis," in *The Handbook of Discourse Analysis*, ed. Deborah Tannen, Heidi E. Hamilton, and Deborah Schiffrin (Hoboken, United States: John Wiley & Sons, Incorporated, 2015), 466.

assisted compiling, disassembling, and reassembling phases, it would take up the remaining space in the thesis. As a result, in order to achieve efficiency in the reporting of the results only the most striking instances of each subtype under the three headers of CDA analysis (Discourse Practice, Texts, Social Practice) is raised and discussed, taking care to also include any significant negative cases when discussing the themes uncovered from the processes of analysis.

Both the discussion of the interpretation and the results below are grouped by subtype units of analysis according to how they are similarly treated under the conditions of CDA – for example, the grammar subtypes of Fairclough’s Text header (transitivity, theme, modality) are grouped into a single discussion below. Because the CDA method is designed to build through Discourse Practice and Text towards critical normative assessments under the final header Social Practice (see Chapter One discussion on method), the latter macro subtypes are discussed later in the chapter in order to produce overall stances about tension and power dynamics, drawing on the results of the CDA analysis via Discourse Practice and Texts headers.

VII. CDA INTERPRETATION AND RESULTS: DISCOURSE PRACTICE

A. Interdiscursivity, Intertextual Chains, and Manifest Intertextuality

Interdiscursivity is the first subtype of the Discourse Practice header of Fairclough’s tripartite CDA secondary text analysis system (the other two heads of analysis being Text and Social Practice – for a comprehensive list of Fairclough’s headers and subtypes see above Figure 4). Fairclough describes the Interdiscursivity subtype as follows:

The principle of interdiscursivity [suggests] that orders of discourse have primacy over particular types of discourse, and that the latter are constituted as configurations of diverse elements of orders of discourse.¹¹

¹¹ Fairclough, *Discourse and Social Change*, 124.

Fairclough breaks the ‘types’ of discourse down into smaller categories that include “‘genre”, “style”, “register”, and “discourse” [such that] one can talk of “interview genre”, “conversational style”, “the register of cookery books”, or “scientific medical discourse”’.¹² For the analyst using CDA, the question to ask of Interdiscursivity in texts is: does there exist ‘an obvious way of characterizing the [text] overall (in terms of genre)...[and] what does it imply in terms of how the sample is produced, distributed, and consumed?’.¹³

Similarly, Intertextual Chains are taken to be texts that are ‘transformationally related to each other in the sense that each member of the series is transformed into one or more of the others in regular and predictable ways’.¹⁴ The key question the CDA analyst must ask is ‘are there signs that the text producer anticipates more than one sort of audience?’.¹⁵ Likewise, the objective of scanning the sample for Manifest Intertextuality is ‘to specify what other texts are drawn upon in the constitution of the text being analysed, and how genres differ in the modes of manifest intertextuality with which they are associated’.¹⁶ The core question asked of Manifest Intertextuality is: ‘are there links to the prior texts of others, or the prior texts of the text producer?’.¹⁷

The coding process (discussed in Chapter One) across the 16 published texts in the compiling and disassembling processes revealed a mass of coded instances relating to Interdiscursivity, Intertextual Chains and Manifest Intertextuality. These instances were simplified and reassembled into thematic categories. It should be noted that the categories listed below are the researcher’s own organised flags (or codes) arising from a reassembly of the coded evidence uncovered in the analysis of the sample, having meaning for the researcher, rather than each one being a conclusive category in its own right. As noted above when describing the purpose of the Schematic Diagram (Figure 7 above), codes (or categories on reassembly) are indicative of a stage in the CDA coding process, rather than finalised interpretations or conclusions. They are relevant to list in this discussion, however, as they form the basis for the

¹² Ibid.

¹³ Ibid., 232.

¹⁴ Ibid., 130.

¹⁵ Ibid., 233.

¹⁶ Ibid., 234.

¹⁷ Ibid.

researcher's interpretative stance and critical conclusions about how each analytic subtype operates on the overall picture of the discourse.

In relation to Interdiscursivity, the uncovered thematic categories on reassembly of coding were as follows:

Figure 8 – CDA Emergent Categories: Discourse Practice - Interdiscursivity	
• Institutional report • Joint report • Lobbying as news media • Magazine genre	• News media • Position paper • Explanatory memorandum • Study

Figure 8 – CDA Emergent Categories: Discourse Practice - Interdiscursivity

In relation to Intertextual Chains, the reassembled thematic categories uncovered were:

Figure 9 – CDA Emergent Categories: Discourse Practice - Intertextual Chains	
• Recommendations to transform discourse • Reaction to asylum seekers	• Uses gathered localised data against national power • Uses gathered localised data to support national power.

Figure 9 – CDA Emergent Categories: Discourse Practice – Intertextual Chains

In relation to Manifest Intertextuality, the reassembly phase revealed the following categories:

Figure 10 – CDA Emergent Categories: Discourse Practice - Manifest Intertextuality	
• Government decision makers • National law • Supranational decision makers	• Supranational law • Supranational laws as superior

Figure 10 – CDA Emergent Categories: Discourse Practice - Manifest Intertextuality

When taken together the sample of 16 texts demonstrates strong evidence of a hierarchy of interdiscursive ordering on the topic of detention of irregular migrant asylum seekers, through the use of chains of discourse and intertextuality according to various assertions of power (Figure 9) via text type (Figure 8). The texts ranged from either seeking to assert no power dominance at all through type and intertextual features, to assuming total power dominance over the reader and other texts – thus the tensions between and among the actors at each level were revealed in the manner that each type appeared to the researcher to essentially jostle for genre position. While many examples of power dynamics at work were found via the interdiscursive and intertextual ordering among and between the 16 texts, the two most polarised examples are useful in demonstrating this range. They are discussed as follows.

At the more extreme end of the interdiscursive order revealed by the analysis of interdiscursive and intertextual features of the 16 texts – indeed, having the most strikingly dominant power dynamic across the sample – was the European Commission’s document titled *Proposal for a Directive of the European Parliament and of the Council laying down standards for the reception of applicants for international protection (recast)*.¹⁸ The title of the document by itself asserts an assumed genre dominance: on the title page of the document the phrase ‘Proposal for a’ is obscured in small font, with the remainder of the title occurring in capitalised emboldened letters on a lower line, giving the audience the impression that this document is from a more authoritative genre, namely, a completed Directive of the European Parliament and of the Council.

In terms of its Manifest Intertextuality (Figure 10), the document reveals an underlying desire to masquerade as a different text type (supranational law), while its true genre is obscured – being in reality merely a regulatory *proposal* for consideration by its governmental and civil-society audience, and not a concluded regulatory *Directive*. It is therefore revealed by the CDA analysis to be a consultative document, sporting livery of a completed supranational decision. The charade is further underscored by the title of the overview of the document on its second page, which is titled ‘Explanatory Memorandum’, another possible intertextual reference to

¹⁸ European Commission, *Explanatory Memorandum: 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, dated 13 July 2016).

other concluded (non-negotiable) supranational regulation that are agreed by the European Parliament and the European Council.¹⁹

CDA demands that we ask why the authors might wish to obscure the true nature of the type of document, in a manner that pushes it up a rung on the interdiscursive ladder of authority. The power inference available is that the Commission authors may well wish to enhance Commission authority with regard to the contents of the document, even though the true purpose of the document is to lay out a proposal for discussion by supranational decision-makers and civil society. The European Commission also possibly wished to push this document upwards in the intertextual hierarchy, such that its masqueraded authority could reduce opportunities for debate about the document's contents and proposals – effectively avoiding its hidden function in actually being a proposal for debate. Inequality and potential abuse of power is therefore suggested in the document's interdiscursive and intertextual aspects.

Falling at the other end of the interdiscursive spectrum, is an unambitious Czech Republic news media bulletin titled *Czech police mark migrants on their forearms, complain Italian Jews* (translated), which arguably plays down its type and social function through distancing via intertextual mechanisms.²⁰ Due to the risk of translation inequivalence discussed in Chapter One, the muted choice of wording in the title was treated with caution during analysis and ignored. Nevertheless, when considered as a whole, the interdiscursive features of the article suggested muted elements relating to the genre's purpose on the emergent chain of interdiscursive hierarchy in the sample – namely, in an interdiscursive hierarchy, the article tries not to make it onto the authoritative ladder at all. The article takes a third-party approach to reporting extraordinary national events, which at the time had led to a supranational crisis over the detention of 200 migrants in the Czech Republic.

Although falling into a genre of balanced news reporting by a well-known national media group operating within the Czech Republic as an EU Member State, the reason for the creation of the article appears in its enlarged by-line: 'the British

¹⁹ 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 2013/33/EU.

²⁰ "Czech Police Mark Migrants on Their Forearms, Complain Italian Jews," *Novinky.cz News*, 3 September 2015.

newspaper *The Independent* on Wednesday described how the Czech police pull the refugees from the trains'.²¹ In the context of CDA's focus on intertextual chains, this article is suggestive of a national media outlet abrogating the expectations of its audience, distancing itself from the content of its reporting by rerouting its authority via intertextual reference to a national media outlet in another (former) EU Member State. This distancing occurs despite the audience's genre expectations that a description of local events would be conducted by a corresponding local media outlet.

The effect of such discursive abrogation – that is to say, the hidden imposition of a once-removed frame of reporting to distance the news agency from taking a position on the content of the article – arguably reduces and disempowers the genre of this text to being about what foreigners think about the home country, loading the Czech Government's statement to the journalists at the conclusion of the piece with a higher level of interdiscursive authority. The resulting inference is that complaints about the Czech Republic Government's treatment and detention of 200 irregular migrant asylum seekers are located conveniently (intertextually) outside the national borders, in the UK. In this way, the text is revealed to use non-national type positioning to distance itself from its own expected national authority and power in relation to the events on which it would be expected by its audience to report.

On consideration of the group of 16 texts that form the entire sample, it is evident in relation to Interdiscursivity that authors were highly likely to select text type (or genre, register or style) not just according to whom they thought their audience might be, but also according to the power dynamics underlying their purpose and (often) hidden social agenda. A phenomenon was observed across the sample whereby text types frequently attempted to intertextually squeeze and transform themselves into other text types, as the discourse jostled for a higher more authoritative position on the intertextual chain in relation to the issue of the detention of irregular migrant asylum seekers (or the corollary: distancing from authority when wishing to seem less involved with the topic) across the uncovered interdiscursive hierarchy.

The analysis uncovered patterns of interdiscursive transformations occurring broadly across the whole sample that suggested texts jostle for authoritative position in the

²¹ Ibid.

discourse – alluding to Habermas’ model of the civil society ‘learning processes’ as supranational society moves from national to supranational democratically legitimated structures (discussed in Chapter Two). This phenomenon was frequently found in many of the 16 texts; in a balanced qualitative study authored by a university and NGO that ended up leaning towards being a national lobbying paper aimed at the French Government,²² and in a formal position statement authored by intergovernmental actors directed at a supranational institution, assuming the conversational style of a colloquial motivational speech essentially begging for regulatory change.²³

B. Coherence, and Conditions of Discourse Practice

Two subtypes of the CDA analysis – Coherence and Conditions of Discourse Practice – mainly relate to how texts are discursively constructed for a wide or narrow interpretation by a readership, including a consideration of the social means by which a text is produced. Coherence using CDA is not considered as a property of a text but a property of its interpretation. Fairclough defines a Coherent text as ‘a text whose constituent parts (episodes, sentences) are meaningfully related’.²⁴ The key question he asks of the analyst is: ‘[h]ow heterogeneous and how ambivalent is the text for particular interpreters [and] does this sample receive resistant readings?’.²⁵

Linked to this is another analytical subtype of CDA labelled Conditions of Discourse Practice, which aims to ‘specify the social practices of text production and consumption associated with the type of discourse the sample represents’.²⁶

Fairclough takes the social production of a text to be threefold, namely, ‘a distinction between “animator”, the person who actually marks on paper, “author”, the one who puts the words together ...and “principal”, the one whose position is represented by the words’.²⁷ The general goal of assessing Coherence and Conditions of Discourse

²² Science Po Law School and France Terre d’Asile, *The Effect of Administrative Retention on Migration Routes: An Illusion?*, The Social Notebook No 36 (France: Science Po Law School), 54.

²³ International Organization for Migration et al., *Joint Statement on Child Immigration Detention in the EU*, (Position Statement Released at the European Commission 11th EU Forum on the Rights of the Child 2017).

²⁴ Fairclough, *Discourse and Social Change*, 83.

²⁵ *Ibid.*, 233.

²⁶ *Ibid.*

²⁷ *Ibid.*, 78.

Practice is, as Fairclough puts it, ‘to explain how interpreters [i.e. readers] reduce the potential ambivalence of texts, and show part of the effect of context in reducing ambivalence’.²⁸

The reassembly phase of coding the 16 texts for this chapter revealed emergent categories of Coherence. As described above, the emergent reassembly categories serve as computer-coded flags for the researcher prior to the interpretation phase, rather than conclusions in themselves. The emergent categories for Coherence were:

Figure 11 – CDA Emergent Categories: Discourse Practice - Coherence	
• Ambivalent • Does not receive resistant readings	• Low level of ambivalence

Figure 11 – CDA Emergent Categories: Discourse Practice - Coherence

It should be noted there was not a single instance during coding across all 16 texts that found a total lack of ambivalence – that is to say, all texts were found to be at least partly open to multiple interpretations.

The coding instances of Conditions of Discourse Practice were of a greater number, as for each text the researcher considered what kind of consumer would be involved based on the producer’s (authorial and principal) assumptions evident in the text. The coding categories that were uncovered were:

²⁸ Ibid., 81.

Figure 12 – CDA Emergent Categories: Discourse Practice - Conditions of Discourse Practice	
• Appealing to civil society regarding government decision makers • Appealing to civil society regarding supranational decision makers • Appealing to civil society to support national power • Appealing to government decision makers • Group lobby against national	• Appealing to supranational institutions regarding supranational decisions • Restructuring national to fit supranational • Restructuring supranational to fit international • Restructuring supranational to fit national

Figure 12 – CDA Emergent Categories: Discourse Practice - Conditions of Discourse Practice

This list (Figure 12) is not intended as a description of what each text sets out to do, but rather is a consideration of the wide range of Conditions (of Discourse Practice) detected by the coding analysis. There was also evidence that texts utilised a range of social assumptions when producing a text for a varied range of possible interpretations according to ‘authorial’ and ‘principal’ purposes and interpreter targets.

Two of the most striking examples of Coherence and Conditions of Discourse Practice in the analysis fall at either end of an approximate spectrum. The first of these, coding for extremely low Coherence and confused social production (per Conditions subtype), was the media release by Amnesty International titled *Cruel migration detention exposes hypocrisy of European Commission*.²⁹ The reader’s attention is first drawn to the title of the release, in bold capitalised font, against a background picture of a male refugee in Greece gripping wire netting, with a subtitle in smaller font: ‘Refugee in Greece’. The by-line to the title describes the social problem the release seeks to address:

²⁹ Amnesty International, “Cruel Migration Detention Exposes Hypocrisy of European Commission (3 March 2017),” (Accessed at <<https://www.amnesty.org.au/cruel-migration-detention-regime-exposes-hypocrisy-european-commission/>> on 20 November 2017).

*Recommendations by the European Commission to detain almost all irregular migrants before returning them to their home countries, with no limitations on where they can be apprehended, have laid bare the cruelty and hypocrisy of European Union (EU) Commissioners' migration policies.*³⁰

An audience familiar with the European Union Directives on the detention of irregular migrants (comprehensively covered in Chapter Three) recalls that irregular migrants who have not applied for asylum are not covered by the CEAS. This means that the text may cause the reader to fall into Coherence gaps between the visual and textual parts of the release, being the background picture, the subtitle to that picture, and the first paragraph. It is evident that several graphic artists may have been involved in the text production, including perhaps a web designer removed from the textual development of the piece. As a result of its mixed production, multiple interpretations are possible and a reader may attempt multiple resistant readings. For example, is the complaint relating to detention of failed asylum applicants? Is this text an article about migrant workers lacking visas? Is this an article about irregular migrants being detained in new ways compared to the past? It remains unclear throughout the remainder of the media release as to what the social targets are for the complaint, or the author's and principal's goals.

The apex of Amnesty International's argument in the media release arrives in the final sentence, which states: 'Commissioners' recent attempts to distance themselves from the despicable migration policies of the Trump administration now ring extremely hollow'.³¹ There is no contextual reference to the injection of United States migration policy in the text, nor is there a hint as to what the apparent distancing by the European Commission actually involved, or how this relates to the current construction of the in-force EU regulation or to the picture of the male refugee at the header of the article. The author's purpose appears to be muddled by its social structure and unseen contextual references – on the whole a reader (in this case, the researcher coding) is extremely likely to take this text as having low Coherence and an according range of ambivalent authorial and principal propositions. The combined result of the analysis on this text (insofar as Coherence

³⁰ Ibid.

³¹ Ibid.

and Conditions of Discourse Practice are concerned) reveals an attempt by an international non-government actor (Amnesty International) to be extremely critical of a supranational actor in the European Commission (via the language ‘cruelty and hypocrisy’). This approach arguably fails to find its mark due to its social production and mass of interpretative possibilities caused by its ambivalence. This text serves as an example of an actor losing potential power in the discourse, via incoherence and confused social production of texts – on Habermas’ model an internationally sourced voice of civil society (international non-government actor) failing to find its mark when lobbying for reform from an unreformed EU (supranational) institution.

At the other end of the Coherence and Conditions of Discourse Practice spectrum, having an extremely high Coherence and extremely clear social production, is the media release for the UN High Commissioner for Human Rights titled *Zeid Urges Czech Republic to Stop Detention of Migrants and Refugees*.³² The internal parts of the media release are closely related to each other with low heterogeneity and low ambivalence – leading to coding for a high degree of Coherence in a loose spectrum when the sample was reassembled. The title of the release nominates its full objective and purpose for the reader – it is difficult to obtain multiple interpretations throughout the article as the authorial production and principal’s voice is unwavering in its purpose throughout. The core argument in the article is made early on, aligning author with principal voice in production by quoting the UN High Commissioner for Human Rights Zeid Ra’ad Al Hussein:

*“Many of these people are refugees who have suffered horrendously in their countries of origin as well as during their journey to the Czech Republic,” the High Commissioner said. “International law is quite clear that immigration detention must be strictly a measure of last resort”.*³³

The source of the normative authority levelled by the principal’s own voice is spelled out: international law. There is extremely low ambivalence around an interpretation

³² Office of the United Nations High Commissioner for Human Rights, “Zeid Urges Czech Republic to Stop Detention of Migrants and Refugees,” (Accessed at <<http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=16632&LangID=E>> 23 October 2015).

³³ Ibid.

of what the principal in this piece (Zeid) is telling the interpreters (audience). The social production of the text is also striking, since the institutional publisher is the Office of the United Nations High Commissioner for Human Rights (OHCHR). Considering that the Commissioner is the central focal point of the institution – even in its name – the text has an extremely organised and obvious social production – the discourse is formally released by the OHCHR under the conditions of a clear ladder of social hierarchy, with the author in the release lining up with the principal and deferring to the principal throughout, sharpening the message-as-fact to increase its chances of landing a powerplay on the national-level actor (‘immigration detention must be strictly a measure of last resort’).

This text is an example, as far as CDA Coherence and Conditions of Discourse Practice are concerned, of a text that has a clear interpretive ambition via its social production and a high level of Coherence – as a result, and against the backdrop of the Habermasian modelling discussed in Chapter Two, this text is an example of an international intergovernmental actor demonstrating a sharp and effective ability to reach out to a national actor with normative statements arguing against the behaviour of the national actor.

VIII. CDA INTERPRETATION AND RESULTS: TEXTS

A. Interactional Control, Cohesion, Politeness, and Ethos

The Texts header of Fairclough’s CDA text analysis method (the other two headers being Discourse Practice, above, and Social Practices, as per Figure 4) offers grouped subtypes of analysis including Interactional Control, Cohesion, Politeness, and Ethos. Each of these subtypes follows a method-based instruction for the analyst of secondary texts under Fairclough’s regime. For example, Interactional Control is a matter of text structure around interactions between participants in a text, such that the analyst asks ‘[w]hat turn-taking rules are in operation [and are] the rights and obligations of participants (with respect to overlap or silence, for example) symmetrical or asymmetrical?’.³⁴ Cohesion conveys how clauses in the sentence

³⁴ Fairclough, *Discourse and Social Change*, 235.

structure are related, where the analyst asks ‘[w]hat functional relations are there between the clauses and sentences of the text?’ (further divided into two types of relations, functional between participants, and ‘explicit surface cohesive markers of functional relations’).³⁵ Politeness relates to negative and positive utterances of participants, asking ‘which politeness strategies are most used [by] participants, and what these features suggest about social relations between participants’.³⁶ Finally, the subtype Ethos relates to constructed selfhood in the text, and the question that is asked relates to: ‘how the total comportment of a participant, of which her verbal (spoken or written) style and tone are a part...signal her social identity and subjectivity’.³⁷

Unlike earlier subtype discussions above, these subtypes of analysis uncovered a varied range of results due to their unique features, and as a consequence do not suit discussion taking place on an approximately encountered spectrum. However, there are similarities and contrasts in the results of the reassembly coding, and accordingly the most striking instances uncovered during the reassembly phase are outlined below, in the interests of creating a thick description of what is socially going on behind the scenes of the discourse in the 16 texts.

The emergent categories at the reassembly phase (prior to interpretation) produced the following codes in relation to Interactional Control:

Figure 13 – CDA Emergent Categories: Texts - Interactional Control	
• Experts appealing to supranational power • Group of participants appealing to a national power • Multiple perspectives regarding national and supranational	• National participant appealing to a national power • One participant appealing to a power

Figure 13 – CDA Emergent Categories: Texts - Interactional Control

The reassembly coding categories emerging from Cohesion were:

³⁵ Ibid.

³⁶ Ibid.

³⁷ Ibid., 143.

Figure 14 – CDA Emergent Categories: Texts - Cohesion	
• Colloquialism to build rapport • Conjunction used to politicise • Factual statements with no evidence • Language of group argument against national • Past tense to build rapport	• Personification of institution • Sentence structure attributes ownership of problems with national implementation • En dash use to augment critique

Figure 14 – CDA Emergent Categories: Texts - Cohesion

The categories arising from Politeness were:

Figure 15 – CDA Emergent Categories: Texts - Politeness	
• False positivity or sarcasm • High degree of politeness to all actors	• Low degree of politeness as call to action

Figure 15 – CDA Emergent Categories: Texts - Politeness

And finally, Ethos produced reassembly codes as follows:

Figure 16 – CDA Emergent Categories: Texts - Ethos	
• Author mediating between power and own opinion	• Author as expert commentator

Figure 16 – CDA Emergent Categories: Texts - Ethos

When considering the whole sample, Interactional Control (Figure 13) emerged most prominently as a textual feature in the French-language (translated) report by Science Po Law School and French NGO France Terre d'Asile, titled *The Effect of Retention on Administrative Migration Routes: An Illusion? (The Effect of Retention)*.³⁸ As discussed in Chapter One, the researcher treated all conclusions drawn from translated texts with high levels of caution, due to the risk of inequivalence in translation into English. However, the textual elements of the study became obvious due to their repetition in coding, caused by the clear interactional divisions emerging between elements of the translated text. The text, being partly an NGO lobbying

³⁸ Science Po Law School and France Terre d'Asile, *The Effect of Administrative Retention on Migration Routes: An Illusion?*

document and partly a qualitative research study, is from its outset extremely diligent in ensuring the voices of refugees – whose interview data forms the basis of the text – are kept as far away as possible from the voices of the study authors. This is stated in the text as an explicit methodological feature of the study, ensuring research results were not contaminated by the subjective views of its authors.

A high degree of Interactional Control is especially stark at the conclusion of *The Effect of Retention* in the recommendations to governmental actors – the path of the interacting voices does not follow an NGO-to-authority route, but rather appears to flow from refugee-to-authority via silent NGO. An example of this phenomenon occurs in the following excerpt:

[Recommendation]The maximum duration of placement in holding and holding centers in waiting areas should be shortened, especially in view of the absence of deterrent effect: Several participants believe that the legal deadline for placement in administrative detention centers and in waiting should be shortened, some suggesting that this delay of two weeks, one participant suggesting two days.³⁹(emphasis in original)

The interaction between recommendation and refugee is not mediated by the voice of the authors, who appear present but silent in interaction. This reveals that there is an unsaid interactional assumption the authors are making about the power of the link between refugees and government actors – one that the authors do not wish to interrupt. The effect on a reading of the whole text for Interactional Control is that the report authors intend – and do – make statements, but they are made solely on the basis of the opinions of the affected refugee interviewees. This text is evidence of an NGO using Interactional Control in discourse to background itself while empowering the refugee subjects of its study, enabling them to almost talk directly to national government decision-makers.

Coding for Cohesion (Figure 14) in the reassembly phase revealed a diversity of relational features identified in sentence clauses, but these most frequently featured one participant in the text demonstrating relational authority over others using a range of textual or symbolic features. A striking example of this arises in the

³⁹ Ibid., 58.

Amnesty International media release *Cruel Migration Detention Exposes Hypocrisy of European Commission*,⁴⁰ which in the midst of a passionate and emotional argument uses an en dash to assign a heightened cohesive argument to the clauses that follow after the en dash:

Instead the European Commission is pushing EU governments to round them up through almost any means necessary – whether that means through terrifying night raids, or asking social workers and doctors to cooperate in finding them.

The colloquial clause ‘round them up’ is relationally linked to an increasingly emotional expansion in ‘any means necessary’, and the use of the en dash announces a relational acceleration for more participants in the following clauses that contain further escalation. We read of ‘terrifying night raids’ and doctors betraying their patients’ confidences in order to help ‘round them up’.

The cohesive effect in terms of power operating in this text is that participant relations are manipulated through clauses, such that the audience is moved rapidly up an emotive scale from mere European Commission decisions, to the wartime themes of night raids and doctors-as-government-snitches. The effect of this textual feature achieves arguably the opposite of what is intended by the piece as a whole – the textual cohesion between clauses is too much of a leap for the ordinary reader, causing a suspension of disbelief as expected in fiction, which in turn causes damage the text’s truth value and therefore disempowering the text in the discourse.

Politeness is a subtype that is easier to discuss on a spectrum – approximately encountered as high and low levels of politeness. Across the 16 texts there were many examples of formal and positive language to engender a sense of dignity about the demands of the text – in a sense, most texts asked for reform or improvements to detention of irregular migrant seekers in a polite and nice manner.

Consider, for example, the UNHCR’s position statement *UNHCR Comments on the Proposal for a Directive of the European Parliament and of the Council Laying Down Standards for the Reception of Applicants for International Protection (recast)*

⁴⁰ Amnesty International, “Cruel Migration Detention Exposes Hypocrisy of European Commission (3 March 2017).”

– *COM (2016) 465*, in which the UNCHR contemplates some ‘welcome [proposed EU] provisions’, is ‘concerned by some of the proposed changes’, and ‘cautions against using detention as a punitive measure’.⁴¹ The respectful language is not overly judgemental, suggesting the UNHCR acknowledges power rests in the hands of the supranational EU institutions, and that the UNHCR is not in a position to impose international power on the EU as a regulatory body. Rather, the UNHCR normatively suggests international legal standards as a preferred choice. In this way, an international actor evidences power structures through the Politeness subtype operating in the text, whereby which the supranational decision-maker has comparative authority to the normative voice at the international level.

In contrast, and falling at the other end of an encountered interpretive spectrum, are the Politeness textual features that were coded in the newspaper article *Extend the Maximum Duration of Administrative Detention, "a useless and ineffective idea"* (Translated, *Le Monde*, 28 September 2017).⁴² While the author’s voice (interviewing reporter) makes way for the NGO interviewee (principal), it is the language choices the interviewee uses to address the issue of a potential doubling of the length of administrative detention in France. This text was translated into English, so as recalled in the Chapter One section on sampling, caution was taken by the researcher during the disassembly and reassembly phases to ensure the risk of inequivalence of texts was reduced. The interviewee is the Director General of the French NGO France Terre d’Asile, who comments on national legislative proposals with a Politeness level bordering on ridicule:

*The release of this first version [of the draft law]...is a symbolic measure, which can only provoke the mobilization and indignation of [NGO] associations...all the associations working in these CRAs have long demonstrated that retention beyond thirty days was perfectly useless...what is the use of increasing the time of deprivation of liberty?*⁴³

⁴¹ Office of the UNHCR, “UNHCR Comments on the 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,” (Geneva: UNHCR, August 2017).

⁴² Romain Geoffroy, “Extend the Maximum Duration of Administrative Detention ‘a Useless and Ineffective Idea’,” *Le Monde* 28 September 2017.

⁴³ *Ibid.*

The argumentative tone of the language in this text demands Politeness is used as a textual tool, such that the work of the argument emerges through the language ‘symbolic’, ‘provoke’, ‘indignation’, ‘perfectly useless’ and ‘what is the use?’. In this way, the core normative message is carried forward to the audience via a reduction in Politeness by the national NGO, in an attempt to criticise and thus remove the power of the national legislative proposal.

The final CDA subtype in this section is Ethos (Figure 16), which relates to how social selves are constructed in the texts. One of the most prominent examples of Ethos uncovered during the reassembly phase of the coding was found in a paper by the Consortium of Migrants Assisting Organizations in the Czech Republic, titled *Position Paper on the Proposed Reform of the Common European Asylum System*.⁴⁴ At the beginning of the text, a footnote indicates that the Consortium is made up of 18 NGOs working in the Czech Republic on migration and asylum issues, making the text an example of the bundling of many NGOs into a unified national voice in order to lobby regulatory power at the supranational level.

With this in mind the project of this text is two-fold, namely to lobby, but also to achieve a harmonised unified voice to reinforce the volume of the normative messaging in the position statement. The degree of success in the latter project is evidenced in the language that constructs a unified selfhood – accordingly, the unified principal is initially nominated in the text as ‘The Consortium’ with its arguments ‘based on the experience of our members’.⁴⁵ However, across the remainder of the text the construction of selfhood as a singular or multiple voice is mixed, occasionally nominated as ‘we’, and occasionally as ‘The Consortium’.⁴⁶

On face value, the distinction between these two self-actualisations in this text seems unimportant, but on coding and reassembly it became evident that the authors of the text used repeated duplication of self-as-we and self-as-The-Consortium to achieve an increase in the volume of the message being transmitted to the supranational actor. As a result, the position statement gathers strength in accumulated reminders to the audience that multiple voices are at work – its final core message carrying with

⁴⁴ Consortium of Migrants Assisting Organizations in the Czech Republic, *Position Paper on the Proposed Reform of the Common European Asylum System* (October 2016).

⁴⁵ Ibid., 1.

⁴⁶ Ibid., 3.

it the anthropomorphised language of a crowd chanting at a protest, reminding the supranational target once more of the multiple selfhoods united in their message, with: ‘the Consortium loudly rejects the proposal to provide protection principally for a fixed period’.⁴⁷

B. Grammar: Transitivity, Theme, and Modality

In the Texts header of CDA, Fairclough divides grammar into three subtypes, namely Transitivity (ideational functions of language), Theme (textual functions of language), and Modality (interpersonal functions of language).⁴⁸ Transitivity is defined as ‘deal[ing] with the types of process which are coded in clauses, and the types of participant involved in them (participant here means elements in clauses)’.⁴⁹ When coding for Transitivity the researcher asks of the text ‘what process types (action, event, relational, mental) are most used, and what factors may account for this?’.⁵⁰ The aim of the Theme subtype is to ‘see if there is a discernible pattern in the text’s thematic structure to the choices of themes for clauses’, such that the research asks ‘are marked themes frequent, and if so what motivations for them are there?’.⁵¹ And finally, the purpose of reading the discourse for Modality ‘is to determine patterns in the text in the degree of affinity expressed with propositions’, as indicated by subjective clauses such as ‘I think/suspect/doubt that’ or objective clauses such as ‘may be/is probably’.⁵²

The reassembly phase of the CDA process across the 16 texts revealed a range of emergent categories relating to Transitivity, Theme, and Modality – these were treated as markers (or flags) for the researcher when moving into the interpretation phase.

Transitivity on reassembly revealed:

⁴⁷ Ibid., 7.

⁴⁸ Fairclough, *Discourse and Social Change*, 235.

⁴⁹ Ibid., 178.

⁵⁰ Ibid., 236.

⁵¹ Ibid.

⁵² Ibid., 159.

Figure 17 – CDA Emergent Categories: Texts - Transitivity	
• Active adherence to supranational, active advocate of national • Active criticism of supranational	• Text does not take sides

Figure 17 – CDA Emergent Categories: Texts - Transitivity

Theme revealed the following emergent categories:

Figure 18 – CDA Emergent Categories: Texts - Theme	
• Confirming national practice • Correcting incorrect national practices	• Correcting incorrect supranational practices

Figure 18 – CDA Emergent Categories: Texts - Theme

On reassembly the Modality subtype revealed:

Figure 19 – CDA Emergent Categories: Texts - Modality	
• Controlling representations of reality • Speaking with asylum seekers' voice	• No affinity • Low degree of affinity

Figure 19 – CDA Emergent Categories: Texts - Modality

While Transitivity was extremely frequent and occurred in most texts, some examples from the reassembly phase stand out for their relevance and contribution to power elements operating in the discourse. For example, Transitivity elements were uncovered within a position paper by the Jesuit Refugee Service (JRS, supranational office), titled *The CEAS Reform Package: The Death of Asylum by a Thousand Cuts?*.⁵³ As was the approach across all the 16 texts, the search for clausal process types in the JRS report was fourfold, with the analyst searching for action, event, relational and mental processes.⁵⁴ The Key Issues section of the report was found to be rich with clausal process instances indicating Transitivity. One key example

⁵³ Jesuit Refugee Service, *The CEAS Reform Package: The Death of Asylum by a Thousand Cuts?*, Working Papers No 6 (January 2017).

⁵⁴ Fairclough, *Discourse and Social Change*, 180.

occurred through the sentence ‘ever more restrictive policies for accessing EU territory have been introduced’.⁵⁵

Breaking down the clause, the action element of the clause was the introduction of restrictive policies, the event was the accessing of the EU territory, and the relational aspect was the ‘ever more’ phrase indicating progression over time. The process of breaking down clauses in this way to identify Transitivity is useful, as it provides a site for discussion about power in how each component of meaning in a text conveys its messages to the interpreter. In this case, the analyst can see the issue in clear profile, namely, restrictive policies relating to the access of the EU territory – inferring that an unnamed actor (asylum seeker) is expected to want to access the EU territory, which in turn is said to be getting more difficult. The relational element of the language clause is the event and mental process contained in ‘have been introduced’. To introduce something requires purpose, will and power. Accordingly, we can see emerging from this tiny portion of the text a useful demonstration of a power relation, in which the JRS lobbies against the entity that introduces increasingly restrictive practices on those who need less restrictive practices on EU territory. The entire lifeworld of the issue of irregular migrant detention is uncovered in the smallest of clauses in the discourse.

Coding on reassembly for the language subtype Theme should be distinguished from the thematic analysis conducted in Chapters Four and Five, the methods for which are described in Chapter One. In the context of analysis on secondary materials conducted in this chapter, the researcher remained diligent to the requirements of the CDA secondary text analysis method, and limited the coding and reassembly to Themes uncovered in language clauses – that is to say, the researcher looked for language clauses that were structured in such a way as to bring a theme (or a key word) into the foreground as a pattern across a given text.

One text that yielded clear results in this regard was the report by the European Council on Refugees and Exiles titled *Boundaries of Liberty: Asylum and De Facto Detention in Europe*.⁵⁶ Written from a mostly legal practitioner’s perspective, the text foregrounded certain themes by a repetitive use of words, alluding to a social

⁵⁵ Jesuit Refugee Service, *The CEAS Reform Package: The Death of Asylum by a Thousand Cuts?*, 3.

⁵⁶ European Council on Refugees and Exiles, *Boundaries of Liberty: Asylum and de Facto Detention in Europe* (ECRE, 2017).

power interaction behind the text. The following passage contained the introduction to the theme at work across the whole text:

Even though detention is formally acknowledged in those countries, in most cases it falls far short of complying with the requirements of an individualised assessment, necessity, proportionality and prior consideration of less coercive alternatives.⁵⁷

From the phrase ‘even though’, the reader is made aware that a more important counterargument follows the first subordinate clause. The second clause then raises items that are *not* formally acknowledged, this being the Theme of the whole report. The report claims a range of thresholds are not being met by EU Member States, mainly: ‘individualised assessment, necessity, proportionality and prior consideration of less coercive alternatives’ to detention. These important Themes are then repeated throughout the rest of the text, as elements of refugee processing that go beyond the formal acknowledgement in the first clause, effectively highlighting that mere formal acknowledgement of detention is not enough (in the report author’s view). In this way, a text signalled power relations within its patterns of thematic clauses, preferring its recommendations over the current activities of the respective Member States.

Modality was a fruitful subtype that revealed NGO texts in the discourse sample to be often surprisingly non-committal with regard to lobbying statements to governmental actors. Frequently NGOs expressed doubts about their own conclusions in the textual features, revealing a low level of affinity with their own arguments and suggesting self-weakening of their normative power in the discourse. This was most apparent in a joint statement released by the International Organization for Migration together with other groups at an EU Forum on the Rights of the Child, titled *Let’s Work to End Child Immigration Detention*.⁵⁸ The statement opens with the first clause ‘Migrant children are Europe’s children too’ – followed closely by a second set of clauses: ‘Yet immigration detention of children and families is still widely used in the EU and has become a growing feature of European migration policies’. The affinity with the rights of the child is evident in the ‘are’ of

⁵⁷ Ibid., 20.

⁵⁸ International Organization for Migration et al., *Joint Statement on Child Immigration Detention in the EU*,.

‘are Europe’s children too’, such that the premise is automatically accepted, leading to there being a high degree of affinity in the first clause. However, this affinity is arguably lost in the second set of clauses, which muddle the impact of the messaging through the phrases ‘still widely’, and ‘become a growing feature’. This is non-committal language and low in affinity to the overall message, and makes the message seem apologetic and indirect. Consider, for example, if the clause had instead stated firmly: immigration detention of children and families is still used in the EU and is a feature of European migration policies. The affinity of the sentence would be retained. The normative power of messages such as these can risk losing directness when the affinity level is lowered in clauses – messaging retaining a direct and high-affinity approach may assist in avoiding this failing.

C. Word Meaning, Wording, and Metaphor

Fairclough groups the three last subtypes of the Text header of CDA into Word Meaning, Wording, and Metaphor. Word Meaning is a subtype of analysis that places emphasis on the researcher reading the discourse for three types of language, namely, ‘“key words” which are of general or more local cultural significance; upon words whose meanings are variable and changing; and upon the meaning potential of a word’.⁵⁹ The Wording subtype of analysis has a slightly different purpose, having as its aim ‘to contrast the ways meanings are worded with the ways they are worded in other (types of) text’, such that the researcher finds keywords in the text and asks ‘does the text contain new lexical items, and if so what theoretical, cultural or ideological significance do they have?’.⁶⁰ Finally, the Metaphor subtype asks the researcher to ‘characterize the metaphors used in the discourse sample, in contrast to metaphors used for similar meanings elsewhere, and determine what factors [determines their origins] (cultural, ideological, etc.)’.⁶¹

The reassembly phase revealed the following codes (as flags for the researcher prior to the interpretation phase) for Word Meaning:

⁵⁹ Fairclough, *Discourse and Social Change*, 236.

⁶⁰ Ibid.

⁶¹ Ibid., 237.

Figure 20 – CDA Emergent Categories: Texts - Word Meaning	
• Better and success of national • Concerns over supranational decisions • Cruelty of supranational decisions • Deterrent of detention as seen by civil society • Duration of detention • Emotive language	• Ensure fairness emotive appeal • National has been enabled to circumvent • Struggle over national definition or international definition • Useless increase of detention at national level

Figure 20 – CDA Emergent Categories: Texts - Word Meaning

The Wording subtype revealed:

Figure 21 – CDA Emergent Categories: Texts - Wording	
• Alternatives keyword • Condemned keyword • Credible reports keyword • Deprivation of liberty keyword • Further keyword • Ineffective national reform keyword • Is now detaining keyword • Mobilisation keyword	• Rather than improved solidarity keyword • Reported keyword • Retention is perceived differently by different actors' keywords • Shocking keyword • Should keyword • Welcomes keyword

Figure 21 – CDA Emergent Categories: Texts - Wording

Finally, the Metaphor subtype of CDA analysis revealed on reassembly the following codes expressed as disputes underlying the metaphors (as flags for the researcher on interpretation):

Figure 22 – CDA Emergent Categories: Texts - Metaphor	
• Dispute as to correctness of national law and action • Dispute as to correctness of supranational law and implementation • Dispute as to detention playing two roles • Dispute as to EU policy being hypocritical • Dispute as to international working together with national govts	• Dispute as to solidness of system • Dispute as to training time reduction equating to betterment • Dispute as to way in which national law is obstinately applied • Dispute as to who is trusting the system • Dispute over false benevolence hospital safety chain

Figure 22 – CDA Emergent Categories: Texts - Metaphor

Coding for Word Meaning was most prominent in texts that focused on law, because as a discipline law has its own terminologies that are unique to each area and the interpreter's expectations. Legal analysis was common in the discourse when addressing regulation on irregular migrant detention. Some NGO texts were more valuable than others in this subtype, whenever they revealed possible specialised and unique legal arguments against coercive normative power that may be harder for the hegemonic supranational and state actors to resist. For example, in Beáta Szakácsová's article titled *Closed Detention in the Czech Republic: On What Grounds?*,⁶² several interesting contested key words emerged across the whole article: 'closed', 'limited', and 'open camp'. The Word Meaning here has significance, as the article tells us the Government of the Czech Republic uses what it refers to as Reception Centres (rather than detention centres) to process irregular migrant asylum seekers – reception centres that are usually intended to be open for a period during the day, with a curfew. By repeatedly using the key word 'closed' before describing a Reception Centre, the author is challenging and reclaiming the power and social meaning of the word to describe that detention may be happening under the guise of alternative phrases used by government authorities. This challenge

⁶² Beáta Szakácsová, "Closed Detention in the Czech Republic: On What Grounds?," *Forced Migration Review* 44 (September 2013).

is underscored in the article through the repeated use of the phrase ‘open camp’, to which the author believes irregular migrant asylum seekers should be transferred.

Wording (via keywords) was a subtype of analysis most strenuously coded for in translated texts. The researcher’s keen focus on this subtype was due to the translation issues addressed in Chapter One, and was part of a cautious attempt look for repeated terms to ensure a given concept did exist in a translated text, and was not simply the result of equivalence error. One such text was the report by a group of French NGOs headed by La Cimade (translated), titled *Report: Administrative Retention Centers and Premises – 2016*.⁶³ On certain key occasions in the text, detention was referred to not as ‘retention’ or ‘detention’ as would be expected in a French NGO report. However, detention itself was most often referred to as ‘deprived of their liberty’ – such that relevant sentences read: ‘From 2012 to 2016, 232,162 people were deprived of their liberty’.⁶⁴ The effect of this culturally different means of expressing detention is deeply textual – in the French NGO manner of communicating, it was revealed detention is not just something that happens, but it happens to people, as a deprivation of the rights of a person. These keywords appeared repeatedly in the report, confirming its special meaning in the debate. This example of a textual feature using Wording as a means to underscore the power dynamic was subtle, but ultimately reveals social mechanisms operating on word choice by the authors.

Finally, the Metaphor subtype revealed numerous contested meanings in the text that were signified in the reassembly coding as ‘disputes’. Fairclough is careful to widen the term Metaphor, stating that CDA is keen to highlight that Metaphors ‘are not just superficial stylistic adornments of discourse [but] constructing our reality in one way rather than another’.⁶⁵ The most prominent text that uncovered a large amount of coding during reassembly was the Jesuit Refugee Service (JRS) position statement titled *The CEAS Reform Package: The Death of Asylum by a Thousand Cuts?*, which was an attempt to strengthen the power of JRS arguments through metaphor. The main metaphors were used in an overview of the arguments of the position, and are briefly listed as follows:

⁶³ ASSFAM et al., *Report: Administrative Retention Centers and Premises* (Paris 2016).

⁶⁴ Ibid., 4.

⁶⁵ Fairclough, *Discourse and Social Change*, 194.

Opening the hospital door with the safety chain on, instead of creating more safe pathways (e.g. humanitarian visas, liberalisation of family reunification etc.).

Children travelling alone will be hit the hardest: if passed the proposals will put children more at risk of detention.

We'll protect you, but only for a while: the introduction of compulsory status reviews undermines the security and permanency of status for beneficiaries of international protection.

The metaphors in the above example are used to make an impact and assume different voices in the power struggle – as such, the reader infers one type of audience opening the hospital door and another type of audience placing the chain on the same door. This may have a different reading for, say, a Member of the European Parliament. To express this phrase in terms of plain language would be not as entertaining for a reader, and without metaphor the text might lose its vigour. ‘Hit the hardest’ is a tough metaphor that would make most types of reader uncomfortable, conveying the power of the rights of the child in the debate on detention. And finally, the metaphor ‘We’ll protect you but only for a while’ is at its core a transfer of the voice of the state (the protecting force) abandoning its obligations under refugee protection frameworks, and is more likely to find its mark. Metaphor in this sense acts a textual feature to convey power dynamics, but the coding suggested that it must be carefully directed so as not to alienate the targeted reader, or make normative messaging less serious.

IX. CDA INTERPRETATION AND RESULTS: SOCIAL PRACTICES

A. Social Matrix of Discourse, Orders of Discourse, and Ideological and Political Effects of Discourse

The results of the Social Practices header of CDA are discussed in the conclusions sections that follows. In this section it is useful to firstly ground the context and processes of the CDA method under which the statements in the conclusion section below are made. The final header of Fairclough’s CDA system for analysing secondary texts is Social Practices, which groups three main analytical (and

normative-based) ideas together. As discussed above, this is the summit of CDA that asks the researcher to arrive at a position in relation to what he or she interprets as being the overall power dynamics – the frictions and tensions – evident in the social world occurring behind (and through) the discourse sample. Fairclough states that the ‘social practice [header] is more difficult to reduce to a checklist, so the following heads should be seen only as very rough guidelines’: namely, that tensions are evidenced within a social matrix, through transformative social ordering of discourse, and that ideological and political effects of discourse play out these tensions and power dynamics.⁶⁶

Of discourse as a Social Matrix, Fairclough states that the question the analyst must ask is:

*Is [the discourse] conventional and normative, creative and innovative, oriented to restructuring [the social structures], oppositional etc....and what effects [does] it contribut[e] to, in terms of reproducing or transforming them?*⁶⁷

In relation to Orders of Discourse, Fairclough states that the aim is to:

*[s]pecify the relationship of the instance of social and discursive practice to the orders of discourse it draws upon, and the effects of reproducing or transforming orders of discourse to which it contributes.*⁶⁸

The last subtype is Ideological and Political Effects of Discourse, which relates to a two-fold consideration of ideology and hegemony. Fairclough asks the analyst to be aware of the following statement:

[D]iscursive practices are ideologically invested in so far as they incorporate significations which contribute to sustaining or restructuring power relations [remembering that] hegemony is leadership as much as domination across the economic, political, cultural and ideological domains of a society.

⁶⁶ Fairclough, *Discourse and Social Change*, 237.

⁶⁷ Ibid.

⁶⁸ Ibid., 238.

These macro subtypes are treated differently by Fairclough than the micro (textual) and meso (discursive practices) levels, since the discussion of power dynamics based on social practices evident in the text is intended by Fairclough to draw the analysis of power structures together, and is therefore unique to the features of the social circumstances examined by the researcher. It is for this reason that the conclusion in the following section serves to address the third macro element in the CDA method in a holistic manner, bringing together the results of all of the coding and analysis conducted for this chapter.

X. CONCLUSIONS ARISING FROM CDA ANALYSIS: SOCIAL PRACTICES

This conclusion forms the interpretation and results of CDA Social Practices analysis of the 16 texts as a whole, meeting the overarching subtypes of CDA, namely: Social Matrix of Discourse, Orders of Discourse, and Ideological and Political Effects of Discourse (discussed at the opening of this chapter).

Through a close examination of secondary texts, the above analysis carves out a window on key aspects of a unique closed social world involving the detention of irregular migrant asylum seekers in the EU, revealing in the discourse tangible evidence that a significant struggle for power and authority exists among and between institutional, governmental and non-governmental actors operating at national, supranational, and international levels. To draw normative critical conclusions about this social world is to acknowledge arrival at a pivotal moment in this research, so it is useful to briefly map out the path of how this chapter arrived at this moment, what was done by the researcher to arrive at this point, and where these conclusions and arguments fit into the research design.

The three research questions in Chapter One define the thesis scope and aims, and focus on identifying political and legal tensions across a threefold regulatory stratum (national, supranational, and international levels). This focus is then set against the backdrop of Habermas' theoretical model of national societal processes that must move via civil society learning processes towards a more democratically legitimated European Union. The research questions seek to explain and understand the normative dimensions of these frictions – including those possibly caused by movements described in

Habermas' model – regarding the detention of irregular migrant asylum seekers between and amongst government and non-government actors at each level under the regulatory systems described in Chapter Three, with particular focus on the three case study areas France, the Czech Republic, and European Union institutions (including NGOs operating at the supranational level). A discourse analysis using CDA on secondary texts is proposed in the research design in Chapter One with the intention to check the Habermasian theory discussed in Chapter Two against the evidence, and to bolster triangulation with multiple sources of data gathered during the fieldwork phase, including the in-depth interviews from fieldwork (which are analysed in later chapters).

As described in Chapter One, the systematic qualitative method chosen to examine and explain the power tensions evident in the discourse is Fairclough's CDA, assisted in this chapter by coding using the software program HyperResearch to ensure exhaustive data treatment in the compiling, disassembling, and reassembling phases. The CDA method has its foundation in tangible aspects of discourse analysis (including a method of examining secondary texts and discursive practice) in order to uncover a platform on which the normative operation of power dynamics can be explained (social practice). This analytical method for secondary texts in CDA matches closely with the research questions and aims.

Subsequently, the use of the CDA method allowed the researcher to collect information-rich samples of discourse in 16 texts (Figure 6), then through CDA's abductive processes conduct a saturated analysis to uncover textual (micro) and discursive (meso) practices evident in the text, to related social (macro) practices manifest across the discourse sample providing this conclusion. This in turn allowed the researcher to provide a thick and rich description of social power dynamics – the civil society learning processes – operating in the given unique social world, as viewed through the evidentiary lens of the discourse. As discussed in Chapter One, the findings in the analysis of the discourse in this chapter – and Chapters 5 and 6 – are not generalisable across a large population due to sample size, but due to the richness of texts, the diversity of authors, and the saturation of analysis, the findings are highly indicative.

There is extremely convincing evidence in these secondary texts of serious normative conflict existing amongst and between actors operating in the matrix of national, supranational, and international levels in relation to irregular migrant asylum seeker

detention in the EU. The overall picture of power operating in the discourse is one of serious imbalance: governmental or institutional actors at both the national and supranational levels are revealed in these texts to retain clear and robust normative power and authority on the topic of irregular migrant asylum seeker detention in the EU, despite a multitude of relatively tenuous attempts by civil society at all levels to challenge that substantial normative power.

A range of struggles for power and control of the discourse are available in the sampled secondary data. National governmental actors are revealed as ignoring civil society and appear unchallenged in their social normalisation of the detention of irregular migrant asylum seekers. Supranational NGOs are revealed as struggling – for various reasons of competence in communication – to land effective normative messaging on supranational and national governmental targets. State-funded international intergovernmental actors are revealed to be cautious, casual, and deferential in relation to defending the normative value of international law. And all NGOs both at the supranational and national levels are revealed to attack national (Member State) and EU-level normative structures with a range of linguistic and textual implements, there being little evidence either self-reflexively or operationally in the texts that the norms of the super-structure of the state and EU are being altered in any way at all from such efforts.

The macro conclusion drawn by this chapter is as follows: governmental actors (both Member State and EU institutions) are found to be forming hegemonic normative discourse and protecting their executive version of norms relating to the ongoing detention of irregular migrant asylum seekers, with little input from civil society actors who attempt to promote the protection and implementation of alternative international legal norms on behalf of asylum seekers. On the basis of the power structures in the discourse, civil society's role in the adaptation and learning processes at all levels of the sample is to ineffectually react to expressions of governmental normative power by either pleading for alternative normative structures, or powerlessly distributing words into a discourse void. In a concerning number of texts NGOs also casualise or muddle normative messaging through a lack of cross-sector coherence, arising from a wide range of originating ideologies.

As such, a picture emerges of a disorganised piecemeal civil society operating in isolation at different levels in the EU (national, supranational and international non-government actors) that neither engenders a Habermasian popular European solidarity nor matches the organised normative super-structure of the supranational and national government entities that remain unchallenged by civil society. Without effective ideological opposition, the normative expressions of state and supranational power have been (as per Chapter Three) converted into the coercive punitive power of supranational and national regulation and practice – backed in practice by unregulated state force – which results in the ongoing risk of abuse of human rights in the EU, namely the risk of denial of liberty to asylum seekers in a breach of their rights under international law.

Since CDA requires the research to take a critical normative stance on what the alternatives *should* be to an identified social problem, an exploration of the findings in this chapter against the hypothesis is relevant. The hypothesis in Chapter One is that the interception and detention of irregular migrant asylum seekers by EU Member States occurs at the intersection of the will of the state as sovereign, the will of EU institutions seeking to regulate supranational frameworks, and the will of the global citizen (the refugee) and their defenders, operating in line with Jürgen Habermas' model of a societal move via civil society learning processes towards international legal cosmopolitanism.

Who is the supporter of international legal norms in the picture painted by the 16 sampled secondary texts? The analysis of the discourse reveals that the state is not the patron of international legal norms regarding detention of asylum seekers, indeed many Member States are revealed in the discourse downplaying the importance of such norms via their frequent flouting of them. The EU institutions seeking to regulate the middle ground appear in the discourse to have ambition to reduce opportunities for detention of irregular migrant asylum seekers, without the capacity to fully implement (per the legal concept of *shared competence* discussed in Chapter Three) and without expressly laying out clear terms for Member States as to when(ever) detention 'proves necessary'.⁶⁹ The irregular migrant asylum seekers, themselves being at the mercy of coercive structural powers and either in a perpetual cycle of fleeing, awaiting results of an asylum

⁶⁹ European Commission, *Explanatory Memorandum: Proposal for a Directive of the European Parliament and of the Council Laying Down Standards for the Reception of Applicants for International Protection (Recast)*, 10.

application, or being admitted as a refugee, do take action under the protection of international legal norms in the discourse, but were found to be rarely present or organised in their defence of those norms in the discourse.

The analysis of the 16 texts shows repeatedly that civil society is nevertheless attempting to be the defender of international norms, in line with Habermas' model discussed in Chapter Two. Although limited, the power of resistance is observably present throughout the micro, meso, and macro CDA dynamics evident in the texts – in short, civil society continues to make the attempt to normatively influence the CEAS. By acting in concert with national and European populations, and operating under Habermas' conditions of communicative rationality and European solidarity, civil society has a theoretical future opportunity to be a better cosmopolitan defender of international human rights norms where state power is unfettered. In this way the findings suggest that civil society is – and will be in the future – a key participant in a broader societal move – via Habermas' learning processes – towards a supranational and cosmopolitan world order. However, the analysis conducted on secondary texts for this chapter has revealed that at present, civil society in the EU may not be succeeding in its theoretical task on the topic of irregular migrant detention in the EU – and indeed there is evidence of civil society barely succeeding in challenging even singular Member State actors.

Accordingly, this section introduces the following proposition into the outcomes of this research, being a contention arising from consideration of the macro power structures behind the 16 texts and more linked with the findings in Chapters Five and Six: the notion that civil society must be organised at the same social height – having a similar multi-state depth and cross-border popular force – as the supranational super-structures it seeks to influence. This proposition for the formation of mega civil society actors to match a cross-border supranationally regulated world knits together with Habermas' arguments for a reformed EU (discussed in Chapter Two), which would for Habermas enhance elements of democratic legitimacy and also reduce opportunities for abuse of executive power at the supranational levels. The analysis in this chapter suggests that far from civil society's David successfully subduing hegemonic Goliath, Goliath can only be challenged by another Goliath.

Habermas' picture of a unified enhanced peoples of Europe injecting mass legitimacy into the regulation of a cosmopolitan European society (discussed in Chapter Two) also fits this picture. It is arguable that civil society actors, too, will have to undergo Habermas' theoretical learning processes towards better cross-border will-formation and European solidarity in civil society – to essentially grow into the supranational size required by the supranational hegemonic power structure that is evidently operating behind these secondary texts. It is proposed that the project of solving cross-border problems facing the EU is not only a case of reformed EU institutions – as Habermas puts it – that contain more democratic legitimacy, but it must also be a case of better organising and linking national and supranational civil society actors into a larger and more robust structure to enable Habermas' learning processes to occur through a civil society structure that matches the organisation and super-structure of the EU institutions.

CHAPTER FIVE: CASE STUDIES – NATIONAL ACTOR PERCEPTIONS SURROUNDING THE REGULATION OF IRREGULAR MIGRATION

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I. OVERVIEW: NATIONAL ACTOR PERCEPTIONS SURROUNDING THE REGULATION OF IRREGULAR MIGRATION

This chapter is linked with Chapter Six, and reports on extensive thematic qualitative analysis of the interview data generated by national-level NGOs and governmental actors during in-depth open-ended interviews conducted across the fieldwork. The most notable themes emerging from the data at the national level is discussed, along with the implications of the results in the context of the research questions. The full linear interview transcriptions for this chapter and Chapter Six can be found at Annex I to this thesis.

II. INTRODUCTION

This chapter and Chapter Six report the results of thematic analysis of data obtained from in-depth interviews during fieldwork, building on the findings of secondary textual analysis in Chapter Four. Specifically, this chapter explores the perceptions of relevant actors at the national level, whereas Chapter Six explores perceptions of relevant actors at the EU/International level. The analysis of interview data in both chapters seeks to obtain a ‘thick and rich’ (per Geertz, as per Chapter One) description of the perceptions and tensions in a unique social world occurring at the intersection in the case studies between CEAS and the institutional and civil society actors operating upon it, in an attempt to reveal the dynamics operating on the detention of irregular migrants in the EU through the lens of Habermas’ model (Chapter Two).¹

This chapter contains full aggregate interview questions, full coding labels, and full thematic categories emerging across all actors for the purposes of both this chapter and Chapter Six. It should be noted that the analysis and results for both chapters are thematic and unique to the particular social intersection and moment in time, and are not intended to be generalisable across a large population as might be expected in a quantitative analysis.²

¹ Geertz, *The Interpretation of Cultures : Selected Essays*, 316.

² Walter (ed.), *Social Research Methods*, 26.

III. ACHIEVING A THICK AND RICH DESCRIPTION: THEMATIC ANALYSIS OF INTERVIEW TRANSCRIPTION DATA

Over 100,000 transcribed words of interview data from 20 in-depth interviews were generated in the fieldwork phase relating to this chapter and Chapter Six. Interviews took place across 2014 and 2015 in a wide variety of geographic locations including France, Czech Republic, Malta, and Brussels. Interviews in these locations were conducted with a range of institutional and civil society actors, covering the case studies, namely: actors linked to France and the Czech Republic, and actors linked to the European Union (Brussels and other related locations).

The qualitative analysis methods used in this chapter and Chapter Six were discussed at length in the section on coding methods of Chapter One; namely, transcribed interview data was thematically analysed according to CDA, recalling Glaser and Strauss's open, axial, and selective coding as updated and recontextualised in Yin's concepts of thematic disassembling, compiling, and re-assembling.³ This produced the qualitative analysis results that are then interpreted and reported in this chapter and Chapter Six (see also Figure 2 for a detailed description of Yin's coding procedure for qualitative research).⁴

As part of the iterative analysis process for this chapter and Chapter Six, the researcher discovered that while the assistive software HyperResearch used in Chapter Four was effective at mechanically reducing a corpus of secondary textual data to its core themes, the software was not as effective for interview analysis. It formed a barrier to incorporating the researcher's direct involvement and influence in interviews, and did not take advantage of the researcher's close understanding arising from conducting transcription of the audio interviews. Each response was instead manually coded across the interview transcriptions in a linear fashion, then using CDA the researcher conducted the compiling and re-assembling of these codes using a mix of cross-coding matrices (per Yin) using Microsoft Excel, the results and select discussion of which are described in this chapter and Chapter Six.⁵

³ Yin, *Qualitative Research from Start to Finish, Second Edition*, 184.

⁴ Glaser and Strauss, *The Discovery of Grounded Theory: Strategies for Qualitative Research*; Yin, *Qualitative Research from Start to Finish, Second Edition*.

⁵ Yin, *Qualitative Research from Start to Finish, Second Edition*, 206.

Accordingly, for both this chapter and Chapter Six, the entire corpus of interviews was transcribed and at the same time coded according to discourses of power (CDA) operating in the interviewee responses, at any level (national, supranational, or international; or ‘multi-level’) in a linear fashion. As per the discussion of coding above, the themes were then disassembled by gathering codes together in a non-linear fashion, followed by further coding to produce thematic categories that were then split according to actor type. The re-assembling of the thematic categories through CDA principles was conducted on the basis of five uppermost multi-level tension-based thematic categories identified by *national-level actors* (both NGOs and governmental/institutional actors) discussed in this chapter, and the corresponding five uppermost multi-level tension-based themes raised by *EU and international-level actors* (both NGOs and institutional actors), as discussed in Chapter Six.

The same sampling method used for Chapter Four was used in the selection of interviewees in relation to Chapters Five and Six; namely, interviews were gathered from purposive non-probability sampling of participants, with the ‘goal or purpose for selecting the specific instances...[that would] yield the most relevant and plentiful data—in essence, information rich’ from the case studies as per Yin, including snowball and convenience sampling.⁶

It should also be noted that the organisation of the interview data into this chapter and Chapter Six (national, and EU/international respectively) does not exclude analytic results from crossing these jurisdictional levels. For example, data stemming from national actors are able to reveal tensions among and between all other levels, as per the hypothesis. The organisation of this chapter and Chapter Six therefore seeks to place the reporting of the results in a logical flow according to the layout of the thesis in accordance with the research aims, but does not represent the prevention of abductive analytical cross-over in the analysis. The results of the analysis of the interview data is discussed further below, and in Chapter Six.

⁶ Ibid., 93.

A. Open-ended interview questions – all actors

Indicative interview questions for the semi-structured open-ended interviews were determined by the research in accordance with the research aims and hypothesis, prior to the fieldwork taking place in 2014 and 2015. Chapters One, Two and Three had also been drafted prior to the fieldwork, guiding the researcher to develop the questions on the basis of a holistic approach incorporating the thesis aims and the literature review.

The semi-structured in-depth interview questions for this chapter and Chapter Six were settled as follows, unpacking the tensions surrounding the CEAS, and seeking deeper perceptions around irregular migrant detention in the regulatory framework. The guidance questions for the researcher are displayed in the following table (Figure 23):

Question No.	Figure 23 – Indicative sampling of semi-structured interview guidance questions, all actors, all levels:
C1.	How has the European Union's Common European Asylum System (EU CEAS) been implemented in Member States (or this Member State)?
C2.	Has the domestic implementation of the CEAS been difficult? If yes, why? If no, why?
C3.	Has there been difficulty for any Member States (or this Member State) with complying with the lengths of detention stipulated by the EU CEAS? If yes, why? If no, why?
C4.	What kind of administrative problems are associated with detaining asylum seekers?
C5.	Are there similar administrative problems seen with allowing asylum seekers into the community in Member States? And how does that work?
C6.	If the actor was allowed to unilaterally change the CEAS to make things easier for the administration of asylum seekers in the EU as a whole, would

Question No.	Figure 23 – Indicative sampling of semi-structured interview guidance questions, all actors, all levels:
	you change anything about the detention arrangements? If yes, why? If no, why?
C7.	If there was no CEAS that was enforced on this Member State, and it was purely a matter of Member State competence, what would you see as being the best way to manage irregular migrant asylum seekers who enter (France/Czech Republic/EU) without a visa?
C8.	Alternatively, if there was no CEAS that was enforced on Member States, and it was purely a matter of EU Competence, what would you see as being the best way to manage irregular migrant asylum seekers who enter Europe without a visa?
C9.	Have the EU's laws and regulations made it harder for Europe to manage asylum seekers, or easier? Why?
C10.	Is there anything further you would like to say?

Figure 23 – Indicative sampling of semi-structured interview guidance questions, all actors, all levels

B. Coding Types – all actors

Actors at the national, supranational, and international levels were interviewed by the researcher in line with the hypothesis and thesis aims and coding methods described in Chapter One. The interviews were conducted based on geographic location, regardless of their link to the EU/International-actor level, or the national-actor level. Because of this, the transcription of interviews in preparation for disassembling of data required each actor to be categorised prior to open, axial, then selective type coding under Yin's updated configuration of Glaser and Strauss' qualitative analysis methods, which Yin describes as disassembling, compiling, reassembling in order to

make ‘constant comparisons’ across the data in a complete and constant manner, ensuring saturation of analysis.⁷

The split of labelling required an assessment of each type of actor, falling into the following labelling criteria: Non-Governmental Organisation, Government or Institution, Intergovernmental Organisation. Further differentiation was required in labelling in order to understand the level on which the actor normally operates, which as per Chapter One is taken to be national-level actors (A), and EU/International-level actors (B and C respectively for the purposes of labelling).

The resulting labelling at Figure 24 demonstrates the coding types for all actors interviewed, together with a linear unique identifier, presented in a matrix as per Yin’s guidelines for qualitative research reporting.⁸

Figure 24 – Labelling of interviewee types (NGOA, NGOB, NGOC, IGOC, GOVA, GOVB)			
Interviewee	Type of actor (Non-Governmental Org, Government/Institution, Intergovernmental Org)	National-level (A), EU level (B), International level (C).	Linear Unique Identifier
In-Depth Interview 1 of 20 – French NGO: La Cimade, person DA01	NGO	A	A
In-Depth Interview 2 of 20 – French NGO: France Terre d’Asile, person TM02	NGO	A	B
In-Depth Interview 3 of 20 – French Government: OFPRA, person MR03	GOV	A	A

⁷ Ibid., 210.

⁸ Ibid., 206.

Figure 24 – Labelling of interviewee types (NGOA, NGOB, NGOC, IGOC, GOVA, GOVB)

Interviewee	Type of actor (Non-Governmental Org, Government/Institution, Intergovernmental Org)	National-level (A), EU level (B), International level (C).	Linear Unique Identifier
In-Depth Interview 4 of 20 – French NGO: ELENA, person PG04	NGO	A	C
In-Depth Interview 5 of 20 – EU NGO: Jesuit Refugee Service, person KS05	NGO	B	A
In-Depth Interview 6 of 20 – EU NGO: Amnesty International Brussels, person BA06	NGO	B	B
In-Depth Interview 7 of 20 – EU NGO: UNHCR Brussels, person CP07	NGO	B	C
In-Depth Interview 8 of 20 – EU NGO: Migration Policy Institute Brussels, person GM08	NGO	B	D
In-Depth Interview 9 of 20 – EU NGO: UNHCR Malta, person SU09	NGO	A	D

Figure 24 – Labelling of interviewee types (NGOA, NGOB, NGOC, IGOC, GOVA, GOVB)

Interviewee	Type of actor (Non-Governmental Org, Government/Institution, Intergovernmental Org)	National-level (A), EU level (B), International level (C).	Linear Unique Identifier
In-Depth Interview 10 of 20 – EU Level Actor: Unidentified Org, person EU10	GOV	B	A
In-Depth Interview 11 of 20 – Czech NGO: Unidentified Org, person CZ11	NGO	A	E
In-Depth Interview 12 of 20 – Czech Government: Ministry of Interior, person CV12	GOV	A	B
In-Depth Interview 13 of 20 – Czech NGO: OPU, person SB13	NGO	A	F
In-Depth Interview 14 of 20 – Czech NGO: SIMI, person FM14	NGO	A	G
In-Depth Interview 15 of 20 – EU Institution: European Commission, person SU15	GOV	B	B

Figure 24 – Labelling of interviewee types (NGOA, NGOB, NGOC, IGO, GOVA, GOVB)			
Interviewee	Type of actor (Non-Governmental Org, Government/Institution, Intergovernmental Org)	National-level (A), EU level (B), International level (C).	Linear Unique Identifier
In-Depth Interview 16 of 20 – EU NGO: ECRE Brussels, person SC16	NGO	B	F
In-Depth Interview 17 of 20 – EU Institution: Unidentified Institution, person SU17	GOV	B	C
In-Depth Interview 18 of 20 – International IGO: International Organization for Migration, person PR18	IGO	C	A
In-Depth Interview 19 of 20 – International NGO: Global Detention Project, person MI19	NGO	C	A
In-Depth Interview 20 of 20 – EU NGO: PICUM, person SU20	NGO	B	G

Figure 24 – Labelling of interviewee types (NGOA, NGOB, NGOC, IGO, GOVA, GOVB)

**C. Aggregate frequency of thematic categories arising from both
International/EU and National actors**

This section contains an aggregate listing of the thematic categories – obtained from disassembling, compiling, and reassembling – enumerating 69 categories in total, covering all interview data and arranged here according to frequency, demonstrated in matrix form (Figure 25 below). This section serves as a reference point across the thesis, and will therefore not be repeated in Chapter Six.

Figure 25 – Aggregate thematic categories arising from interview data across all actors, as determined by disassembling, compiling, and reassembling		
Code	Theme	Total Frequency (all actors)
N8	Divergence in Member State implementation of Directives	27
N2	NGOs are coordinating with other NGOs - safety in numbers	25
N34	Length of time in detention in a Member State - including alternatives	25
N53	NGO seeking common implementation across Member States against inconsistent or divergent implementation of EU system	25
N37	NGOs are experts and EU and Member States must consult them for the real picture	24
N50	Member State judicial or Court actor tempering Member State activity - including strategic litigation	22
N39	Member State problems with the cost or funding of processing - issues around reducing the cost and time of asylum processing	20

Figure 25 – Aggregate thematic categories arising from interview data across all actors, as determined by disassembling, compiling, and reassembling

Code	Theme	Total Frequency (all actors)
N1	NGO and the ways it tries to lobby and be heard	18
N6	Member States using EU Directives to race to bottom of the minimum standard barrel so as not to be more attractive to asylum seekers	18
N21	Member State organising to consult with NGOs	18
N3	Member State ignoring NGOs and acting in isolation from input	17
N5	EU-level judicial or Court actor tempering Member State activity - including strategic litigation by NGOs and EU institutions threatening infringement notices	17
N55	Definition between Reception Centre and Detention Centre blurred by Member States	17
N52	EU level NGO coordinating multiple national NGOs in Member States	15
N67	EU level institution attempting to bring Member States upwards to a common standard in a positive light	15
N7	Dublin Regulation causing problems	14
N33	Member State not processing as many asylum seekers as other Member States - including lack of generosity by a Member State or failure of burden-sharing	14

Figure 25 – Aggregate thematic categories arising from interview data across all actors, as determined by disassembling, compiling, and reassembling

Code	Theme	Total Frequency (all actors)
N46	International law protections perceived as having top-down primacy over EU Directives and Member State regulations	14
N64	European Commission expected to take charge and responsible for driving action in order to paper over implementation differences	14
N51	EU Parliament or other EU-level institution perceived as being too weak to temper Member State activity - including lack of EU institution funding	12
N28	Member States lacking transparency about processing systems - including as to how civil society stakeholders are to be included in decision-making	11
N41	Member State issues struggling with the process of managing asylum claims - including identity and treating different nationalities differently	11
N44	Member State sharing and comparing their processing practices with other Member States via an EU institution - moving towards common implementation - Member States working together to train each other in their asylum processing methods - helping create convergent (not divergent) policy approaches	11
N27	Member States wanting to make asylum a national rather than supranational issue - including right wing anti-immigration political influence	10

Figure 25 – Aggregate thematic categories arising from interview data across all actors, as determined by disassembling, compiling, and reassembling

Code	Theme	Total Frequency (all actors)
N54	NGO examples of directly assisting asylum seekers within the Member State and EU framework	9
N61	EU Parliament as institution swayed by NGO lobbying	9
N40	Member State steps to improve application process for asylum seekers - movement towards better conditions	8
N47	Member State perceived as creating inequality between its power and the asylum seeker - sovereign overpowering rights under international and EU law; Habermas: legal domestication of the violence at the core of the state	8
N23	IGO or UN agency organising to consult with NGOs - UN agency as a ‘facilitator’	7
N25	Member State shift from dealing with asylum seekers as a matter of immigration to dealing with them as a matter of security	7
N60	European Council overriding European Parliament and lacking transparency - including democratic deficit	7
N11	NGOs perceiving that they are compromised due to working for Member State in Reception Centres	6
N19	EU Directives seen as a pathway to international law protections	6

Figure 25 – Aggregate thematic categories arising from interview data across all actors, as determined by disassembling, compiling, and reassembling

Code	Theme	Total Frequency (all actors)
N26	National NGO working through a supranational NGO to be heard	6
N38	Perception that Member States are being forced to comply with supranational EU standards against national will	6
N43	Member State processing unit not connected with Member State policy unit	6
N56	Any actor seeking to change Member State voter perception of asylum seekers	6
N18	NGO at Member State level wanting to be heard at EU institutional level	5
N20	NGO disclosing that they are funded by Member State to work in Reception Centres	5
N29	EU-level regulation not working and dysfunctional	5
N48	NGO having positive engagement with IGO at international level (i.e. UNHCR or other)	5
N57	NGO directly impacting either Member State or EU-level Directives and Regulations	5
N68	IGO funded by states so policy output vetted by funders - perception that IGO is compromised	5

Figure 25 – Aggregate thematic categories arising from interview data across all actors, as determined by disassembling, compiling, and reassembling

Code	Theme	Total Frequency (all actors)
N13	Perception that ECHR and its Court conflicts with the behaviour of Member States	4
N14	High Member State rejection of application rates	4
N22	EU institution organising to consult with NGOs	4
N36	Member State not sufficiently responding to external emergency asylum flows	4
N58	EU level NGOs forming coalitions with other NGOs at EU level	4
N9	Member State restraining freedom of asylum seekers in some manner	3
N15	Maximum detention time allowed by Member State	3
N16	Perception that use of detention by Member States will increase	3
N17	Issues around whether asylum seekers should be able to choose (choice of) the Member State they want to live in	3
N24	Perception of Member State ticking the box on NGO consultation	3
N32	Perception that Member States are increasingly against migration - building walls	3

Figure 25 – Aggregate thematic categories arising from interview data across all actors, as determined by disassembling, compiling, and reassembling

Code	Theme	Total Frequency (all actors)
N49	Member State perceived as not providing appropriate procedures for asylum applicants	3
N63	NGO additionally operating globally	3
N65	International law or related IGO as not providing detailed protections - reliance on EU and Member State systems to fill in the detail	3
N66	NGO having more sway over Member States than at EU level	3
N69	IGO gives state private processing guidance vetted by funding state	3
N10	Lack of resources a barrier to lobbying EU level effectively	2
N12	Asylum seekers themselves not lobbying to change the EU system	2
N31	National NGO perceives its Member State is behind the other Member States on asylum standards	2
N35	Preference for a supranational asylum system not a national system	2
N62	UN level ineffective on supranational EU level	2
N4	Member State perception that asylum seekers are abusing the system	1

Figure 25 – Aggregate thematic categories arising from interview data across all actors, as determined by disassembling, compiling, and reassembling		
Code	Theme	Total Frequency (all actors)
N30	National NGOs only hearing about their own Member State's positions on asylum via the EU level	1
N42	Member State organising to consult with NGOs but only via the EU level	1
N45	Any level or actor stifling civil society debate on asylum issues	1
N59	Member State NGOs not working together	1

Figure 25 – Aggregate thematic categories arising from interview data from all actors, as determined by disassembling, compiling, and reassembling

A deep analysis of the aggregate thematic categories arising from all actors (Figure 25) is not included in this section, and is instead discussed in detail on a per-actor basis (as per Chapter One, these are taken to be national-level actors, and EU/International-level actors) across the later sections of this chapter and across Chapter Six for reasons that are explained below. However, some observations can already be made on basis of the emerging thematic categories in the above matrix (Figure 25).

The most frequent category of power structures indicating tension in the aggregate transcribed discourse involved data coded as ‘Divergence in Member State implementation of Directives’ (Code: N8). Whether the interviewee was an NGO actor at EU level, a state actor at the national level, or an institutional actor at the international level, the same theme of power and tension emerged; namely, that perception of tension among and between the national, supranational, and international levels referred to as the divergence of EU Member States in implementing the CEAS.

As will be discussed in the more detailed sections below and in Chapter Six, there are several types of power and tension contained within the interview data fragments linked to the N8 code.

The least frequent category of power structures indicating tension among and between actors was an equal tie between codes N4, N40, N32, N45, and N59. These are listed in the above Figure 25 in no particular order, but by consequence of their assessment linearly in the initial disassembly process. Predominant among these least-frequent categories was tension in a power structure by reference to the Member State level (i.e. the national-level actors). This may be due to several reasons, anecdotally that Member State actors ended up not being the primary focus of many of the open-ended in-depth interviews, or that the researcher when conducting the disassembling, compiling, and reassembling process did not interpret the tensions between power structures emerging from that data. Nothing concretely conclusive will therefore be attributed to this low frequency across those respective thematic categories.

D. Explaining how the frequency score is attributed to each level to distinguish tensions among and between actors

Having set out the aggregate total frequency of thematic categories above (Figure 25), it is important to the remainder of the analysis across Chapters Five and Six to explain how the frequency of thematic categories was further delineated according to the interviewee types (Figure 24) during the compiling and reassembling phase as per Yin.⁹

Put simply, some thematic categories of tension among and between power structures (Figure 25) coded more frequently in some interviewee types (Figure 24), and thus this distribution was measured, then used by the researcher upon reassembly as an indicative measure of how important that particular theme as an expression of perception emanating from that particular level (national, supranational, international – corresponding to the hypothesis and research aims described in Chapter One).

⁹ Ibid.

By way of example, the most frequent aggregate thematic category appearing across all interviews was N8 (Figure 25), achieving 27 identified instances across all the interview data. However, the 27 instances can then be further divided up on the basis of interviewee types, in order to better triangulate constructivist truths about the dialectical nature of such perceptions (cf. Habermas’ theory in Chapter Two) emerging in the data, as per Yin’s guidance on triangulation that seeks to better ‘develo[p] converging lines of inquiry’.¹⁰ The result for N8 incorporating the labels at Figure 24 above is as follows (to be taken as an extract only, demonstrating the method applied by the researcher):

Figure 26 – Demonstration Extract: N8 thematic category frequencies broken down into actor sub-types								
Code	Theme	Freq. Total	Freq. NGOA	Freq. NGOB	Freq. NGOC	Freq. IGOC	Freq. GOVA	Freq. GOVB
N8	<i>Divergence in Member State implementation of Directives</i>	27	1	17	0	0	7	2

Figure 26 – Demonstration Extract: N8 thematic category frequencies broken down into actor sub-types

As can be seen in Figure 26, the majority (63%) of tensions found in the power structures relating to ‘*Divergence in Member State Implementation of Directives*’ were via responses by NGOs operating at the supranational (EU) level. This hints at a thicker – and richer – story underpinning this category than is available in the overall aggregate view offered at Figure 25 above. This extract is only for the purposes of demonstrating the method of disassembly, and will be discussed in further detail in the sections below.

¹⁰ Ibid., 87.

E. Explaining how and why each level is reassembled for the purposes of Chapters Five and Six respectively

In addition to the Coding Types section above, Chapter One sets out the reporting of results according to a division of actor types corresponding to the research aims and methodology – namely, that the findings are reported on the one hand for national-level actors, and on the other for EU/international-level actors. Chapter Five seeks to analyse the perceptions of national-level actors relating to the tensions among and between each level (NGOA and GOVA as per Figure 24 and the research aims in Chapter One), while Chapter Six seeks to analyse the perceptions of EU/international-level actors relating to the tensions among and between each level (NGOB, NGOC, IGOC, GOVB as per Figure 24 and the research aims in Chapter One).

The researcher stresses that this choice of splitting Chapters Five and Six is for reporting purposes only, and does not create imbalance in the analysis or method (per Yin) used to treat the raw interview data. This is borne out in an approximate balance between the split: combined national (NGOA and GOVA) frequency of coded categories totalled 323 coding instances, whereas combined EU/international (NGOB, NGOC, IGOC, GOVB) frequency of coded categories totalled 280 coding instances. This approximate balance between the two groupings of actors is achieved due to a large number of interviews being conducted with national NGOs and national government actors willing to talk to the researcher, which approximately balanced out the smaller number of EU and international NGOs, EU institutions, and intergovernmental organisations willing to talk to the researcher (see the interviewee types at Figure 24 above).

The deeper logic of splitting the levels across the two chapters was to better support the reporting of the research findings without preventing thematic categories emerging ‘among and between’ the levels as is required by the research aims in Chapter One. Accordingly, this reporting layout ensures that thematic categories emerging through national-level actors’ data (NGOA or GOVA) were still processed from the same batch – arising from the same disassembling, compiling, and reassembling action incorporating also the EU/international-level actors’ data

(NGOB, NGOC, IGOC, GOVB). This ensures that the data of any type of actor data was able to influence the coding and reassembling process on any other type of actor data, meeting the ‘among and between’ requirement of the thesis aims in Chapter One.

For these reasons, and building on the demonstration extract at Figure 26 above, the following split was performed on the frequency and types of each thematic category in order to create separate reporting between Chapters Five and Six. As follows, Figure 27 serves as an extract to demonstrate the example of the splitting:

Figure 27 – Demonstration Extract: N8 thematic category frequencies broken into national-level and EU/international-level				
Code	Theme	Freq. Total	<i>Freq. NGOA + GOVA</i> (Chapter Five)	<i>Freq. NGOB + NGOC + IGOC + GOVB</i> (Chapter Six)
N8	<i>Divergence in Member State implementation of Directives</i>	27	8	19

Figure 27 – Extract: N8 thematic category frequencies broken into national-level and EU/international-level

It becomes clear on even a cursory analysis of the demonstration extract at Figure 27 that even though more national-level actors operating in the Common European Asylum System (CEAS) were interviewed in the fieldwork, it was actually EU institutions, EU-level NGOs, and intergovernmental organisations that produced more frequently coded activity to do with perceived tensions related to divergence in Member State implementation of the EU CEAS Directives. We might begin to draw some indicative assumptions here on the frequencies without going into what was said at interview – perhaps the frequencies suggest that actors of all kinds at the national level do not essentially *see* beyond the borders to the bigger supranational picture, in the way that supranational actors might do. The balance of the analysis follows below.

F. Deciding on the cut-off point: reporting results on the basis of select national-level and EU/international-level data

In order to avoid describing categories covering all 100,000 words transcribed in the interview data, the researcher allocated a logical cut-off point for reporting the thematic categories, as relevant to the national-level actors (in Chapter Five in the following sections), and the EU/international-level actors (contained in Chapter Six). Each thematic category produced a multitude of instances of interviewee data relevant to the coded category, within the cut-off point. For the purposes of keeping the reporting manageable, the researcher also decided to further limit the reporting to the most pertinent and germane coded instances, in order to demonstrate the most thick and rich results emerging from the thematic category work. Two aspects to generating cut-off points for the purposes of reporting were therefore decided in the following steps.

In the first step the researcher assessed how many thematic categories would be appropriate to discuss in each chapter in the interests of manageable reporting – and this was estimated as the five uppermost thematic categories, containing select instances within each, to be discussed across this chapter and Chapter Six.

The second step involved combining the frequency of codes for all interviewee types (see Figure 24 above) then ordering these by greatest to least, to create the frequency of codes for national-level actors (NGOA, GOVA) and EU/international-level actors (NGOB, NGOC, IGOC, GOVB).

In relation to the national-level actors' combined scores (NGOA, GOVA), the uppermost five of these to be discussed in Chapter Five required the cut-off frequency to sit at 14 and above, as per the following matrix:

Figure 28 – Establishing reporting cut-off for five uppermost thematic categories relating to national-level actors (NGOA, GOVA)				
Uppermost rank	Code	Theme	Total Freq. (all actors)	National-level Freq. (NGOA+ GOVA)
1	N50	<i>Member State judicial or Court actor tempering Member State activity - including strategic litigation</i>	22	21
2	N34	<i>Length of time in detention in a Member State - including alternatives</i>	25	17
3	N21	<i>Member State organising to consult with NGOs</i>	18	17
4	N3	<i>Member State ignoring NGOs and acting in isolation from input</i>	17	15
5	N39	<i>Member State problems with the cost or funding of processing - issues around reducing the cost and time of asylum processing</i>	20	14

Figure 28 – Establishing reporting cut-off for five uppermost thematic categories relating to national-level actors (NGOA, GOVA)

In relation to the EU/international-level actors' combined scores (NGOB, NGOC, IGOC, GOVB), the uppermost five of these to be discussed in Chapter Six required the cut-off frequency to sit at 13 and above, as per the following matrix:

Figure 29 – Establishing reporting cut-off for five uppermost thematic categories relating to EU/international-level actors (NGOB + NGOC + IGOC + GOVB)				
Uppermost rank	Code	Theme	Total Freq. (all actors)	National-level Freq. (NGOB + NGOC + IGOC + GOVB)
1	N53	<i>NGO seeking common implementation across Member States against inconsistent or divergent implementation of EU system</i>	25	24
2	N8	<i>Divergence in Member State implementation of Directives</i>	27	19
3	N37	<i>NGOs are experts and EU and Member States must consult them for the real picture</i>	24	16
4	N2	<i>NGOs are coordinating with other NGOs - safety in numbers</i>	25	14
5	N64	<i>European Commission expected to take charge and responsible for driving action in order to paper over implementation differences</i>	14	13

Figure 29 – Establishing reporting cut-off for five uppermost thematic categories relating to EU/international-level actors (NGOA, GOVA)

Both matrices (Figure 28 and Figure 29) form the basis for the discussion of the most pertinent results in the thematic categories reported both in this chapter and in

Chapter Six, and will not be presented elsewhere in this thesis in this same combined national and EU/international form.

IV. NATIONAL ACTORS' PERCEPTIONS: A DISCUSSION OF PERTINENT RESULTS

As described in the above sections, a range of actors including national governmental actors and non-governmental actors were interviewed for the research (Figure 24). The resulting transcription data was fed into a holistic disassembling, compiling, and reassembling analysis process per Yin (Figure 25), which then subsequently enabled reassembly data to be presented per actor type for the purposes of logical reporting (Figure 26).¹¹ The results were then prepared for interpretation and reporting by splitting further on a per-level basis (Figure 27), and as such are reported here according to the five uppermost frequent thematic categories appearing for actors at the national level (Figure 28).

On this basis, the following sections discuss the interpretation and results, with the researcher selecting the most pertinent coded instances per thematic category in order to represent a thick and rich demonstration of the social aspects of the tensions among and between actors operating at each level, as per the research aims and hypothesis in Chapter One.

A. National perceptions: rank 1 of 5 – Member State judicial or Court actor tempering Member State activity - including strategic litigation

In relation to national-level government or NGO actors, the coding process revealed tensions in discourse when discussing Member State judicial or Court actors, who were taken to be active in tempering Member State activity on irregular migration in some way. This links to the description of legal protection frameworks and judicial actors in Europe described across Chapter Three, and especially section VI of that chapter.

¹¹ Ibid.

Figure 30 – National perceptions: rank 1 of 5 – Member State judicial or Court actor tempering Member State activity - including strategic litigation		
Code	Total Freq. (all actors)	National Freq. (NGOA + GOVA)
N50	22	21

Figure 30 – National perceptions: rank 1 of 5 – Member State judicial or Court actor tempering Member State activity - including strategic litigation

Several instances occurring in the respective coded interview data shed light on what the perceived tensions were in relation to strategic litigation to temper institutional activity – being the most prominently occurring coding element for national-level actors interviewed. The researcher’s collective experience across all the national-level interviews was that NGOs operating at the national level relied on litigation and the Court system (either domestic courts, or the European Court of Human Rights, as discussed in Chapter Three) as a forum to temper Member State activity that might be deemed to be against either international or supranational agreed treaty rules, such as those contained in the *1951 Refugee Convention*, or the CEAS itself. In relation to rules and litigation relating to the detention of asylum seekers, it was frequently mentioned to the researcher by national-level interviewees that there was little settled agreement on the notion of using detention as a last resort, as is required by the CEAS Reception Conditions Directive Article 8 (discussed in Chapter Three above see page 124).

The perception of NGO actors suggested that they felt they could rely on a proxied power structure (i.e. the Courts interpreting and upholding what the actors clearly saw as the hospitality aspects of EU legislation) in order to win in a power struggle with an essentially wayward Member State actor, who from the point of view of the NGO was seen to be breaking the supranational and international rules. This phenomenon in the data first became apparent in the following extract from the case study of France, during the in-depth interview with French NGO ELENA (European Legal Network on Asylum):

In-Depth Interview 4 of 20 – French NGO: ELENA, person PG04

Researcher: *You try test cases? This is one of the ways that you're active in trying to shape the system?*

Interviewee: *Our group, ELENA, has challenged those decisions in the*

Higher Administrative Court, so we take a lawyer, and then we go to the Administrative Court to make the case. So we won two times already, and then there is still a case pending against the list of the safe countries.

(National Rank 1 of 5: Extract A – NGOAC– per Figure 24)

During the moments recorded in this extract, the researcher observed Mr GP leaning forward over his desk, tobacco pipe in hand, using extremely vocally animated speech about the ‘challenge’ and having ‘won’ – this memorable vocal emphasis is available on the audio recording. The recursive effect of this instance on the research, was that going forward in later interviews the researcher asked about the litigation phenomenon, drawing the issue upwards in the research through the iterative and recursive relationships Yin describes.¹²

Mr GP’s attitude and speech revealed a power struggle at play, demonstrating that NGOs feel they have a backup option to use should their lobbying efforts have low impact – they tend to find a safe haven for their arguments in the Court system, and judicial actors, who they see as a mechanism to restrain and limit the power of the state and institutional actors. This underpins Chapter Three on the law above, revealing the social meaning of law for the actors who use it at the intersection of the will of the state actors, the supranational EU, and the refugees operating under international law, as per the hypothesis in Chapter One.

Because of Mr GP’s initial and important response, greater exploration of this area of tension was further woven into later interviews during the fieldwork phase, iteratively producing more rich and saturated results in the interview data.

Another notable response was from a Czech NGO that did not wish to be identified, describing their attitude to strategic litigation in the Czech Republic as follows:

In-Depth Interview 11 of 20 – Czech NGO: Unidentified Org, person CZ11

Researcher: *So what happens when you have an opinion that the Government isn't going to listen to, what happens?*

¹² Ibid., 187.

Interviewee: *That's a good question. Well, if they don't listen to these recommendations, then I mean there are other means of how to raise these concerns, either through the implementing of the laws which we are doing now, or basically strategic litigation in the cases.*

(National Rank 1 of 5: Extract B – NGOAE – per Figure 24)

The language used by the interviewee in this extract is instructive, as the purpose of engaging in strategic litigation was to raise ‘concerns’, in other words finding an alternative conduit for NGO influence to take shape, by referring matters to Court system in order to achieve the desired outcome, in order to essentially be heard in the dialectic, as per the hypothesis discussed in Chapter One. This data demonstrated that the perception of strategic litigation in making a weak NGO stronger in the power struggle with governmental actors was not just limited to the French case study, but was also found in the Czech case study. Although not discussed here, as per Figure 30 at least one other EU/International-level actor was alive to the ability of NGOs to run strategic litigation against governmental actors.

Further developments on tensions among and between actors across the emergent thematic category of strategic litigation were available from the Czech Republic case study interview data. For example, in the following extract, the interviewee discusses judicial power operating with the Member State, and concerns around the alteration of the operation of the domestic Courts in a manner that would result in more asylum seekers potentially being deported before their appeals were heard.

In-Depth Interview 13 of 20 – Czech NGO: OPU, person SB13

Researcher: *So Minister, then Regional Court, then Supreme Administrative. And you're saying the Supreme Administrative Court is actually quite good, with lots of expertise.*

Interviewee: *Yes, yes. And in several cases - of course many cases are refused - but we have many cases where the Supreme Administrative Court cancels a decision not only of the Court, but also of the Minister of Interior directly, and then the Minister gets to decide again.*

Researcher: *So it's not a completely flawed appeals system, but there are suspensive effect cases that you are worried about?*

Interviewee: *Yes, at the moment it's working quite well, because the Court has suspensive effect in almost all cases. In general all cases have all appeals to the Courts, with suspensive effect. There are only a few exceptions, but there are going to be more exceptions. Also the Minister of Interior will probably more tempted to make a decision that the case is manifestly unfounded, when they know in that case if they know an action is filed, and the Court fails to grant suspensive action within 30 days, then the person would have to leave. So I think it would lead to decisions of worse quality, because the Minister of Interior would know that there is less access to legal reviews.*

(National Rank 1 of 5: Extract C – NGOAF – per Figure 24)

Here the researcher noted the interviewee's positivity around the domestic Court power to rescind Ministerial decisions on detention and deportation, contrasted with her anxieties around the changes to that Court system risking what she called 'decisions of worse quality' from the Minister of Interior. This risk was on the basis of her perception that governmental actors operating in the Czech Republic would push the boundaries of the law set down in that Member State. The uncovered power struggle in this regard is a perception by NGOs surrounding the domestic Court's ability to rein in the power of the Member State in the detention and deportation asylum seekers, where conversely this valuable Court restraining power is unstable and under threat from the executive authority of the Member State.

The researcher observed across all interview data that the stability of judicial actor's control was never a settled matter for interviewees, demonstrating an area of friction between judicial systems of both national and supranational types discussed in Chapter Three, and the executive power of Member States in their implementation of the CEAS. This data builds further on the results the textual analysis in Chapter Four, which uncovered evidence of Member States protecting their executive version of norms, while avoiding the inputs of civil society actors attempting to promote international legal norms on behalf of asylum seekers (Chapter Four, see page 195).

B. National perceptions: rank 2 of 5 – Length of time in detention in a Member State - including alternatives

Although central to this thesis, and a focal point of all interviews conducted, most of the resulting interview data demonstrated a relegation of detention matters to asylum seekers who had applied and had their applications rejected, and who were therefore classed as irregular migrants and detained at that moment for deportation, as per Chapter Three on splits occurring at the point of transient definitions (described above see page 111). The interview data bears out this split, as interviewees had a tendency at the splitting point to reduce the researcher's insistence on the topic into mere procedure. This splitting is instructive in the assessment the thematic category surrounding length of time in detention, because in most interviews the researcher observed interviewees of all types demonstrating less urgency around the *ought* statements in relation to detention, and more a practical acceptance – a positivist tendency as discussed in Chapter One – that the state power to detain is a *de facto* by-product of the legal and judicial process, despite interview data showing that definitions of alternatives to detention were not settled among civil society in the CEAS.

The discussion on definitional transience in Chapter Three will not be reiterated here, save to say that the international protections afforded to an asylum seeker are not automatically extinguished simply due to a rejection of an application to a given Member State – indeed, there was much evidence of appeals through the Court system leading to subsequent acceptance of applications (i.e. the Member State frequently made initial incorrect assessments). Nevertheless, across most of the fieldwork interviews it appeared to be an accepted fact that an irregular migrant who had received a rejection from a Member State authority was not as urgently represented in speech, as asylum seekers were generally. This distinction was then emergent in discussions with the researcher on the length of time a person might stay in detention, as is demonstrated in the following extracts.

Figure 31 – National perceptions: rank 2 of 5 – Length of time in detention in a Member State - including alternatives		
Code	Total Freq. (all actors)	National Freq. (NGOA + GOVA)

34	25	17

Figure 31 – National perceptions: rank 2 of 5 – Length of time in detention in a Member State - including alternatives

A useful starting point is the practical responses of a Member State government authority, the French Office for the Protection of Refugees and Stateless Persons (OFRPA). The language in this extract moves from *ought* statements about the correctness of detention, immediately into a practical regulatory itemisation from the point of view of the detaining authorities. The researcher observed that this bordered on dismissive power – not in terms of the respondent intending to be dismissive, but that concepts relating to detention were relegated to mere items on a legislative list.

In-Depth Interview 3 of 20 – French Government: OFPRA, person MR03

Researcher: *I've read in some of the NGO materials, that currently asylum seekers are paid for, so their accommodation is paid for across Paris, in different areas. Is that more cost effective than having them all in the one reception centre?*

Interviewee: *I'm not sure that putting people in detention is really effective, because the idea of having them in detention is because first they were arrested over breaking the law about an illegal stay, or illegal entry. So the detention is supposed to be important. And they have these period of 5 days, during which they are allowed to apply for asylum. From the point of view of the police, this asylum request is mostly just in order to avoid deportation. And it may be not really founded, from the point of view of the police.*

(National Rank 2 of 5: Extract A – **GOVAA** – per Figure 24)

The researcher identified at this moment in the interview the sense of a power struggle in the discourse, on the one hand between Member State authorities doing their best to follow the rules, and on the other the irregular migrant being detained and applying for asylum perhaps without foundation for the application. The moral commencement of this extract announces its starting point; namely, that detaining people is not an effective strategy in the mission to process applications. The struggle then moves through the reasons for detention, namely illegal stay or illegal entry –

thus the detention is legitimate even if unwanted. Then the struggle takes a turn at the point of the 5 day allowable period to make an application – at this moment, the interviewee recalls a conflicting moral sentiment of the police authorities of the Member State, namely that the police may believe asylum seeker is doing something furtive and pointless by making an application from inside detention. And yet, the researcher notes that such an application is perfectly legal and allowable by the Member State law. This uncovers a tension around the site of detention, where the legitimacy of an asylum seeker already in detention is somehow reduced compared to the application of a fellow asylum seeker outside detention.

This tension is further elaborated and explained by a French NGO in the following extract:

In-Depth Interview 4 of 20 – French NGO: ELENA, person PG04

Researcher: *Yes. And there is no change to this, there is no change in the dynamic of the Member States to try to stop doing this, this pushing back, using force?*

Interviewee: *All those situations show that even the state wants to prove its force, in fact the necessity of the person is more higher than the force of the state and this is the other side. OK, sovereignty, but the necessity of the person show by the terms, so maybe the person can accept to spend six months in gaol. He can accept to spend one year in gaol.*

(National Rank 2 of 5: Extract B – NGOAC – per Figure 24)

In this extract (National Rank 2 of 5 Extract B) we can see the direct inversion with the extract preceding it (National Rank 2 of 5 Extract A). In the present extract, the interviewee is a French NGO and from this standpoint commences the moral argument by stating that the Member State (France) wishes to prove its force in detaining a person. Sovereignty is acknowledged, but the moral questioning of the Member State needing to detain someone for six months or a year against the necessity (or needs) of the asylum seeker under the supranational and international regulations, seems to the interviewee to be disproportionate to the state need to demonstrate its power. The *ought* aspects of the extract is linked to the correctness of

the asylum seeker, against the apparent disproportionate use of power by the Member State.

Further nuances on this theme arising from the Czech Republic case study are found in the following extract:

In-Depth Interview 11 of 20 – Czech NGO: Unidentified Org. person CZ11

Researcher: *And some countries that have been above the standard, particularly for Reception, some countries have actually contemplated dropping their standard to the minimum standard. Rather than the requirement. So is Czech Republic one of those places?*

Interviewee: *So there was a maximum of six months for detention. And then the new Directive said a few years ago, that it could be up to 18 months. Because certain countries, certain Member States, didn't have any maximum period. And so the Czech Republic said: it will now be 18 months maximum, even though we used to have only six months. And of course the migration NGOs were outraged, and said that we should be raising our standards, not lowering them. So they made it that it would only be applicable in exceptional cases. But actually this provision can be extended to times for very serious reasons, so it can be up to 6 months, then it can be extended by six months, and again by six months.*

(National Rank 2 of 5: Extract C – NGOAE – per Figure 24)

The changing of supranational limitations around the length of detention has appeared to work against the position of NGOs attempting to limit the detention of asylum seekers and irregular migrants – the Czech Republic used the new Reception Conditions Directive (discussed in Chapter Three) to extend the maximum length of detention in the Member State to 18 months, up from 6 months. As in Chapter Three, it is clear that there are grounds that have to be met in order for a Member State to validly extend detention. However in this extract, the idea of ‘raising’ standards appears analogous to raising them towards the international regulatory ideal of no detention, despite the supranational regulation. The Member State perspective given by the interviewee is that there is a certain cynicism in the government actor

following supranational regulation to the letter, including the 18 month maximum detention length, as per the Reception Conditions Directive discussed in Chapter Three (see page 130). In this way, the ‘outrage’ of the NGOs hints at drawing on an international-level normative dimension available in the 1951 Refugee Convention, namely, that non-penalisation for the method of arrival of an asylum seeker is a desired and paramount position (see Chapter Three, page 115).

There were further examples in the interview data on the topic of length of detention that further underpinned deep concerns that supranational regulation in the CEAS was a substandard protection. Power struggles among and between the different normative levels of regulation emerged in the recounting of several stories in the interview data. For example, an NGO in the Czech Republic referred to the Member State laws implementing the EU’s Dublin Regulation regulations ended up conflicting with the European Convention on Human Rights (ECHR) provisions, on the basis that an asylum seeker subject to detention under Dublin Regulation provisions failed to claim asylum in the transit zone of Prague Airport.

In-Depth Interview 13 of 20 – Czech NGO: OPU, person SB13

Researcher: *Reception Centres I understand they have three days then you have to apply for leave, as in you have to tell them if you're going from a Reception Centre?*

Interviewee: *[The] Minister of Interior stated that while there was a well-founded assumption that they would be a threat to the public order because they used their visa to travel to Sweden, so we were then appealing the cases in the Supreme Administrative Court, and that Court stated that because of an article in the Dublin Regulation, it is not even possible to keep a person who is transferred under the Dublin Regulation in a reception centre. That it's not in compliance with Article 5 of the European Convention on Human Rights – because according to that, detention must be according to the law. And the law only states, that foreigners who declare their intention to apply for asylum, declare their intention in the transit area of the airport. But the Court stated that the person has not declared their intention not in the transit area in*

Sweden, so they did not fall under this article.

(National Rank 2 of 5: Extract D – **NGOAF** – per Figure 24)

The resulting perception of the interviewee was that the ECHR provisions were not appropriately being applied by the domestic Court. In this circumstance, the perception and tension related to a challenge to supranational normative authority – and, while the EU Dublin Regulation treaty required Member State behaviour linking detention to geographic location, the NGO believed by contrast that the European Convention on Human Rights demanded different behaviour linking detention to rights. A similar interplay and power struggle between detention and location, and detention and rights, was apparent across the interview data revealing the thematic category on length of detention.

C. National perceptions: rank 3 of 5 – Member State organising to consult with NGOs

The third uppermost ranked thematic category emerging from the data were tensions relating to Member States organising to consult with NGOs. Both types of national actors – governmental and NGO – referred to the importance of consultation with civil society actors. However, the results of such consultation was a contested space in the power struggle between and among each level of actors.

Figure 32 – National perceptions: rank 3 of 5 – Member State organising to consult with NGOs		
Code	Total Freq. (all actors)	National Freq. (NGOA + GOVA)
N21	18	17

Figure 32 – National perceptions: rank 3 of 5 – Member State organising to consult with NGOs

The following extract demonstrates the French Government point of view on stakeholder consultation:

In-Depth Interview 3 of 20 – French Government: OFPRA, person MR03

Researcher: *I understand the French Government has done a new package of laws in response to the changes at the EU level with the Common System. And I understand that the NGOs participated in a stakeholder discussion, and were you part of that?*

Interviewee: *The French Government organised a vast consultation last year in 2013, and it involved most of the stakeholders in the field of asylum, so there were several workshops organised under the umbrella of the Ministry of Interior. NGOs participated, the different official stakeholders like OFPRA, CNDA, there is another institution which is the French Office for Immigration and Integration (OFFI), and the lawyers, ELENA, tried to be involved but I think it was quite difficult for them, if I remember correctly.*

(National Rank 3 of 5: Extract A – GOVAA – per Figure 24)

There is very clear acknowledgement in the above extract that a specific NGO had difficulty being involved in consultations, for unspecified reasons. This level of detail suggests that the government actor both knew about certain large NGO actors, and also cared about their attendance openly, even in the context of an in-depth interview for research. There is very open acknowledgement across the data by governmental actors that stakeholder consultation not only was happening in relation to the changes in the CEAS, but also that it was necessary and desired. This was an attitude sometimes not matched in the perceptions of the NGO actors over NGO consultation, who saw the gaps in the consultation process as extremely suspicious and lacking in transparency – but the researcher concluded during the fieldwork that this was understandable as often governmental machinations around policy making are not open to the public, and therefore generate suspicion and intrigue for NGOs attempting to observe all parts of the policy-making process.

In this similar vein, we see the governmental actor in the other case study country, Czech Republic, demonstrating the same care and concern for NGO stakeholder consultation as was the case in France:

In-Depth Interview 12 of 20 – Czech Government: Ministry of Interior, person CV12

Researcher: *Firstly, how has the Common European Asylum System been implemented in the Czech Republic?*

Interviewee: *[Within] the next two weeks in September 2014, there will be open conversations with other actors that are involved - meaning NGOs, people from the highest Supreme Court, which is the highest Court for asylum and migration matters, and other Ministries, and the Police.*

(National Rank 3 of 5: Extract B – **GOVAB** – per Figure 24)

The comprehensive listing of the attendees was in the researcher's view in order to satisfy the inferred mandate of the Czech Government to consult widely with stakeholders on the implementation of policy and regulation inside the Member State – the need for a democratic Member State to demonstrate its power is at least partly conditional on civil society guidance. It was evident that judicial actors were included in the listing, even though they also were found in the data to often restrain government executive authority around the detention of irregular migrants, as discussed in the previous sections of this chapter.

Further descriptions of the power dynamics operating in Czech Republic NGO stakeholder engagement was available from other national NGO interviews:

In-Depth Interview 14 of 20 – Czech NGO: SIMI, person FM14

Researcher: *So in terms of your contribution to how this system works in the Czech Republic, what do you do in terms of trying to influence or help people?*

Interviewee: *On the national level, changing the policies and legislation, we are the members of a committee on the rights of migrants, it's the Committee of the Council of Human Rights of the Czech Government. And this committee is now under the Ministry of Human Rights, and the whole system works such that if there is an amendment of the new law, the Minister responsible sends it out, and there are some institutions that*

can comment, and their comments have to be addressed.

(National Rank 3 of 5: Extract C – NGOAG – per Figure 24)

In this extract, we see a wider and deeper description of other institutions within the Member State power structure that also have a stake in restraining governmental conduct around the detention of irregular migrants. The phrase the interviewee uses is ‘their comments have to be addressed’ – indicating a mandatory system of checks and balances at play for the Czech Republic’s implementation of the CEAS against international human rights law which, as discussed in Chapter Three, is an international normative regulatory element operating across EU Member States, in addition to the CEAS. In this way, we find subtle hints at the international-level intervention inside a case study Member State.

Finally, there is further data available that produced another strain of inquiry under the category of NGO consultation, namely, the way that NGOs seek to exploit stakeholder consultation to influence the power structure and subsequent implementation of the CEAS rules:

In-Depth Interview 14 of 20 – Czech NGO: SIMI, person FM14

Researcher: *[I mean] how to influence the legislation.*

Interviewee: *Well we definitely use the Committee (or Council) for the Rights of Migrants, because it meets regularly, every two months usually, and we are able to influence the content. And this body is formed by the representatives of the civil sector, and the Government, so there are representatives of the Ministry of Interior, Ministry of Social Affairs, Ministry of Foreign Affairs, and other Ministries - all the Ministries. Ministry of Justice and Healthcare are there too.*

(National Rank 3 of 5: Extract D – NGOAG – per Figure 24)

The listing mirrors the Czech Republic governmental interviewee’s listing at the opening of this section, but for inverted reasons. Here, we see the listing of representatives in the form of opportunity to influence, rather than a democratic requirement to consult. The Council for the Rights of Migrants is especially cited, the researcher observed, because there is particular influence of the NGO in its workings and outcomes. Notable inclusions are the judicial actors, which other

thematic categories show up as being vital to the successful constraint and direction of implementation of the CEAS rules around detention of irregular migrants.

D. National perceptions: rank 4 of 5 – Member State ignoring NGOs and acting in isolation from input

In contrast to the emergent thematic category described in the above section, were instances in the interview data demonstrating concerns around Member States ignoring the wishes of NGOs and keeping them away from input. The frequency of this thematic category was evidently most keenly felt by national-level actors (15 instances) rather than EU/international-level actors (2 instances).

Figure 33 – National perceptions: rank 4 of 5 – Member State ignoring NGOs and acting in isolation from input		
Code	Total Freq. (all actors)	National Freq. (NGOA + GOVA)
N3	17	15

Figure 33 – National perceptions: rank 4 of 5 – Member State ignoring NGOs and acting in isolation from input

The researcher was acutely aware that in the telling of stories, an NGO interviewee was but a single stakeholder in a field of many stakeholders consulted by a given Member State actor. The researcher found that during interviews, subsequent questions had to be guided in order to follow-up on possibly loaded claims about the history of Member State treatment of NGOs – was the treatment of the NGO across history always bad, or was this more a recent occurrence? Was it getting worse? The results revealed the balancing act played by the researcher in the questioning. This was very apparent in the following extract:

In-Depth Interview 1 of 20 – French NGO: La Cimade, person DA01

Researcher: Right. And then what happened when the Government then presented? When did they do that? Did they let you know about what the content of those laws would be recently?

Interviewee: The political arguments to present the law, but this argument we heard that maybe for 20 or 30 years ago, it's always the

same arguments. Too much asylum seekers, and too much migrants, and false asylum seekers in this system. This is not our analysis, but this is what they say every time when they want to reform the system and to make it more strict, more hard, they present the same arguments.

(National Rank 4 of 5: Extract A – **NGOAA** – per Figure 24)

The frustration in interviewee's voice in the recording bears witness to the real power struggle clearly at play in the perception of the NGOs, especially where some representatives had been undertaking lobbying and advocacy for decades even prior to the drafting and implementation of the CEAS. Notable in this extract is 'this is not our analysis' – hinting at a contestation of evidence-based policy, and a constant problem with ideological arguments. The rest of the same interview explains this at length, particularly hanging on the argument that it is not a crime to seek asylum.

By comparison, we can see a linkage back to the previous section on stakeholder engagement being a site of power struggle, in the following extract addressing the French NGO ELENA.

In-Depth Interview 3 of 20 – French Government: OFPRA, person MR03

Researcher: *[Was French NGO ELENA trying to be involved in Government dialogue] in terms of conflict? Or in terms of their passion?*

Interviewee: *I know that they wanted to be involved, but I'm not sure that they were actually involved and invited to the workshops.*

(National Rank 4 of 5: Extract B – **GOVAA** – per Figure 24)

What the circumstances of the French Government's approach to this specific NGO were, is unclear in the data. The researcher also noted, as in the above section, the French Government showed high levels of care about consulting NGOs, and the interviewee was observed by the researcher to be somewhat crestfallen that ELENA had not participated. What is available on the facts, however, is that for whatever reason, a pivotal French NGO was not able to be included in stakeholder consultation on the updates to the CEAS rules and regulations – suggesting that there was definitely tension at work in this particular thematic category.

The Czech Republic NGO experience, by contrast, is less obscure:

In-Depth Interview 11 of 20 – Czech NGO: Unidentified Org, person CZ11

Researcher: *And you're not quite of the Member State, but you're not quite like the NGOs, you are somewhere in between.*

Interviewee: *I also studied in London, and they say over in the UK the civil society actors are considered to be big experts. But here, people from civil society - well here you hear the word activist. It's like anarchy, activists, and they are not considered experts, even though they should be. I think we are still at a point in between that. It is pretty interesting.*

(National Rank 4 of 5: Extract C – NGOAE – per Figure 24)

The way that the interviewee perceives the attitudes of Czech Republic authorities to her own organisation is a palpable sign of underlying struggles in power structures in the discourse. The NGO sees the treatment of similar society actors in other parts of the world (the UK being mostly outside the implementation aspects of the CEAS as discussed in Chapter Three) as being entirely different from the Czech Republic experience. Here, the NGO seems tied down by its national circumstances – and the power interplays between Member State and the NGOs with which it consults are obvious. The researcher observed the interaction as highlighting the power of disdain in operation, in which governmental actors were perceived as relegating the function of civil society and prioritising the hegemonic status of the government actor.

This difference between Member State and civil society stakeholders was appropriately and professionally acknowledged by the Czech Government interviewee in the following extract, who later in the interview reassured the researcher that the NGOs were indeed given a great deal of weight and importance in policy making.

In-Depth Interview 12 of 20 – Czech Government: Ministry of Interior, person CV12

Researcher: *What interests me is that inside the Czech Republic there is consultation, everyone comes together and talks about it, whereas*

outside and inside the European Union, the NGOs are trying to go directly, rather than as a country trying to say what they think in those initial Recast situations. That's very interesting.

Interviewee: *But of course our opinions are different. So, sometimes absolutely different.*

(National Rank 4 of 5: Extract D – **GOVAB** – per Figure 24)

An acknowledgement of difference between the civil society actors and the Member State that they try an influence is not a pivotal aspect of this thematic category, but it is a much clearer demonstration of the significance in the expectations of actors operating among the national levels when it comes to stakeholder consultation and resulting influence.

E. National perceptions: rank 5 of 5 – Member State problems with the cost or funding of processing - issues around reducing the cost and time of asylum processing

The fifth ranked thematic category related to practical considerations about the cost and time of processing asylum applications by Member States. One aspect of this was the cost and time of detaining irregular migrants in preparation for deportation if their asylum application was rejected.

Figure 34 – National perceptions: rank 5 of 5 – Member State problems with the cost or funding of processing - issues around reducing the cost and time of asylum processing		
Code	Total Freq. (all actors)	National Freq. (NGOA + GOVA)
N39	20	14

Figure 34 – National perceptions: rank 5 of 5 – Member State problems with the cost or funding of processing - issues around reducing the cost and time of asylum processing

The government interviewee for the case study country France demonstrated a focus on reducing processing time, in order to improve the conditions of reception of asylum seekers. The researcher noted this was in direct cohesion with the provisions in the CEAS Reception Conditions Directive, which is discussed in Chapter Three above.

In-Depth Interview 3 of 20 – French Government: OFPRA, person MR03

Researcher: So when your General Director goes to the Minister of Interior, can he or she say that they need certain things because this system is overloaded? Does OFPRA give feedback to Ministry of Interior and then what happens?

Interviewee: *The reason that the General Director (of OFPRA) can get new resources is because if you invest in OFPRA, if you can reduce the processing time, you will gain in terms of reception conditions. Because the longer the examination process is at OFPRA, and in the second instance, the longer the applicant is in France and has to be granted social security, and all the reception conditions - it costs money. If you can reduce the processing time, the people are supposed to stay in the system less time, and so in the global point of view, it should be more money effective.*

(National Rank 5 of 5: Extract A – GOVAA – per Figure 24)

The link between efficiency of cost burdens and the reception conditions of the applicant are made in a manner suggestive of a power balance leant towards the Member State – then again, the researcher expected this to be the case. The underpinning moral argument appeared to be that keeping applicants trapped in a lengthy process was against the provisions of the Procedures Directive discussed in Chapter Three, and the researcher notes that on its face the interview data was true to this objective. However, what is available in the above data is the perception that cost efficiency is the underlying driver of reducing time: ‘the longer...the applicant...has to be granted social security’. While it is natural that the Member State aims to deploy taxpayer’s money responsibly, it is clear there is tension around the underlying purpose of the speed of decisions, where the Procedures Directive states that decisions must be made ‘within six months of the lodging of the application’ as per Chapter Three, page 122.

By contrast, in the Czech Republic case study, the focus is very much on the time processing takes – whether the applicant is detained or not – for other reasons.

Namely, the Court is held by the government and NGO community alike to take a long time in making decisions:

In-Depth Interview 12 of 20 – Czech Government: Ministry of Interior, person CV12

Researcher: *I understand that there are probably less than 50 people in detention who are claiming asylum – this doesn't cause problems in your Court system at all?*

Interviewee: *Okay, courts are another thing. It is a big issue for us, because we are facing the problems of the big time limits for the Courts. So our Department is the first body for a silent procedure or detention procedure, and we try to decide really quickly, and then in the Court, the Court takes months. Years. It's a problem.*

(National Rank 5 of 5: Extract B – **GOVAB** – per Figure 24)

The contested space in the above extract is clear – the Court is perceived to slow the whole processing of asylum applications down, which is held out by the interviewee as a negative problem. The internal machinations of a Member State, in particular the judiciary, are frequently seen across the interview data as obstructing normative aspects of national procedure – the researcher has suggested in Chapters Two and Three that such interference is actually the interference of normative regulatory dynamics arising from other levels of regulation, namely the supranational and international.

However, the Czech NGO interview data tells a different story on timeliness of applications in the case study country:

In-Depth Interview 13 of 20 – Czech NGO: OPU, person SB13

Researcher: *I already know from reading various reports, the judges and the Court system is a little bit slow at the moment and they take a while. Do you have any comments on that?*

Interviewee: *Actually the Minister of Interior used to be very slow. And we probably the longest case - we had a client who was waiting for a first decision for four years. And there really wasn't any reason for them*

to wait that long. Also considering how long an asylum seeker waits. But the Ministry of Interior used to be very slow - so we filed a few complaints on the inactivity of the Ministry.

(National Rank 5 of 5: Extract C – NGOAF – per Figure 24)

It is without doubt that for all national-level actors in the Czech Republic, slowness of processing applications for asylum was not a desirable trait, giving primacy to the CEAS notion of speed of processing. But the government appeared to blame the Courts for being slow – which the researcher as a lawyer believes undoubtedly they are, for the good reason of due process. While on the other hand the NGOs appeared to blame governmental actors for long delays – citing in the above example an unverified story of a four-year wait which, if true, would far exceed the maximum CEAS allowable processing times.

These power struggles within the discourse around timing and assisting processing were further underpinned by notions of NGOs compromising in order to receive government funding, and flows of EU-level funding through the Member State:

In-Depth Interview 14 of 20 – Czech NGO: SIMI, person FM14

Researcher: *Well this is something that I've talked to other NGOs about, and it is, it's a conflict a bit - even in France, some of the NGOs run the reception centres. And so they get funding to do this, but they complain about this, how much can you do?*

Interviewee: *I mean here it is more - the law on asylum says that the asylum seekers must have access to legal services, and so the Government is supposed to do some funding for that, and they fund it through the European Refugee Fund at the national level, and then some money we get from the fact that we are registered as a social service, and social counselling is part of that. And this national money goes from the Ministry of Social Affairs, and there is no problem with that - they don't really care about the content. But the European Refugee Fund goes from the Ministry of Interior. And it was the same department for a very long time - but since last year they formed the new Department for*

funding. But it's still pretty much connected to it all.

(National Rank 5 of 5: Extract D – NGOAG – per Figure 24)

The starting point for the above comment by the NGO interviewee, is that the law requires funding to be provided by the Member State. It is important that the law is the foundation for funding flows to the benefit of asylum seekers – namely, their legal representation, indicating some force there arriving from the EU level down into this Member State. Some of the language at the edges of the descriptive sentences, however, reveal other power battles going on in this response: the ‘national’ money goes from the Ministry of Social Affairs ‘and there is no problem with that’ and the Ministry ‘[doesn’t] really care about the content’. On the other hand, money flowing through the other Ministry is somehow different. There is a ‘but’ in the phrase ‘[b]ut the European Refugee Fund goes from the Ministry of Interior’. This seems to indicate a sense that the European Refugee Fund is at the behest of the Ministry of Interior, and that could come with strings attached when used for NGO purposes, unlike the perhaps much less restrictive Ministry of Social Affairs funding. In this way, the circumstances of the national serve to restrain in some ways the activities of the NGOs in attempting to assist with processing asylum seekers within the Member State.

V. CONCLUSION

In this chapter, the results of the qualitative analysis performed on the interview data relating to national-level actors revealed numerous thematic categories, uncovering tensions occurring among and between each level (national, supranational, international) in relation to the CEAS and its provisions on irregular migrants, particularly surrounding the issue of detention. As discussed in Chapter One, the results of both this chapter and Chapter Six result from the same qualitative analysis processing, and are divided into these two chapters for the purposes of organising and reporting the results. Accordingly, the findings of this chapter (national actors) are to be taken in correspondence with the findings discussed in Chapter Six (EU and international actors). A thick and rich description (per Geertz) is available in the

analysis of the data for both chapters, and speaks directly to the hypothesis and research questions contained in Chapter One.¹³

Select results discussed in this chapter highlight some of the most pertinent thematic instances of analysis in relation to national actors interviewed, where intersections and tensions were most apparent – on a frequency basis – in the data. The results suggest that the interception and detention of irregular migrant asylum seekers by EU Member States is indeed the scene of a diverse range of normative power struggles – the intersection of the will of the state as sovereign, the will of EU institutions seeking to regulate supranational frameworks, and the will of the global citizen (the refugee) and their defenders, operating in line with Habermas’ model of a societal shift via ‘learning processes’ towards international legal cosmopolitanism.¹⁴ In this context, the results discussed in this chapter reveal a normative dynamic occurring for both Member State and NGO actors at the national level, between positivist approaches to national and supranational regulation discussed in Chapter One (i.e. the law perceived as legitimate by virtue of it being law), and constructivist approaches in forming a dialectic among actors to shape and legitimate regulation at all levels (i.e. the law legitimated democratically by civil society, in the context of the national, supranational, and international regulatory frameworks discussed in Chapter Three).

In other words, and recalling the two conceptual hurdles described in Chapter One: there is indicative evidence in these findings of the positivist and empirically produced framework of regulations being the first hurdle encountered by the asylum seeker – by analogy a *wall of law* implemented by states discussed in Chapter One – but also evidence of the second socially constructed hurdle, being a hidden interplay of moving and socially contested spaces among civil society, state, and supranational actors to critique, inform, and legitimate the production of the law and power to be wielded by institutions in the form of the first hurdle.

To this end, all national actors – both NGO and governmental – were observed often referring to CEAS regulatory structures in a *de facto* positivist sense, as opposed to less frequently seeing the framework as contestable by civil society constructivist

¹³ Geertz, *The Interpretation of Cultures : Selected Essays*.

¹⁴ Habermas, *The Crisis of the European Union: A Response*, 47.

dialectical approaches discussed in Chapter One. This is a central issue for the thesis. For example, in one pertinent example discussed earlier in this chapter, NGOs were found to perceive that they could rely on a proxied power structure via Court system (both national and supranational), thus giving them a lever of resistant power to pull in order to constrain Member State activity in the implementation of the CEAS. Member States in case studies openly acknowledged the existence of this same lever, but treated this as a matter of adversarial legal fact – *de facto* positivist legal power – rather than a matter of social concern that the lever needed to be used in this way in the first place. The fact that NGOs obtained this proxied power via national or supranational institutions (i.e. the Courts described in Chapter Three), lends more weight to the argument made at the conclusion of Chapter Four on the analysis of secondary texts: that the normative aims of NGOs might be enhanced through NGOs attaining a collective supranational height of normative influence matching the supranational level, rather than – as is suggested by the findings for this chapter – perceiving that individual NGOs may only mainly rely on judicial avenues to civilise state power and influence the development of the CEAS.

This argument is further backed by observations in the findings of this chapter that actors of both kinds at the national level had a high frequency of concerns relating to consultation of NGOs by Member States in the implementation of the CEAS. As discussed above, governmental actors at the national level were found to be keen to mention stakeholder consultation at interview, but the researcher also observed that such consultation was often perceived as merely process (or box-ticking exercises on the part of governments). It was also found that NGOs that organised themselves into consortiums perceived their position as more advantageous in consultations, compared to other NGOs who perceived consultations as mere box-ticking exercises. A similar pertinent example discussed in the sections above related to the dissonance between the Member States' desire to reduce the cost of processing application for asylum, appearing in contrast to the demands of the CEAS and the national-level NGOs to reduce the time of processing. There were subsequent synergies between Member State and national-level NGOs around reducing the time of processing, as there were on consultations, but these were revealed to be for vastly different and conflicting reasons. These findings further support the Habermasian notion that a future collective civil society that obtains a supranational height – and accompanying

cross-national influence over topics such as NGO consultations and asylum application processing time – might better catalyse learning processes towards a more legitimated supranational regulatory framework in the context of the CEAS.

Support for this argument was also observable in this chapter among national actors in relation to perceptions about of length of time in detention under the CEAS. The researcher found Member States tended to reduce detention length to mere practical regulatory itemisation – essentially *de facto* legal positivism, bordering on exercising dismissive power – thereby inferring the reduction by Member States of the importance of the topic of asylum seekers in detention in the civic arena. National-level NGOs were sometimes *also* observed treating the length of detention in the CEAS as an element of *de facto* state power, approaching it as an analogous positivist wall of law (discussed in Chapter One) by virtue of the CEAS being a product of the legal and judicial processes described in Chapter Three. This tendency arguably risked all types of national actors merely accepting the law’s legitimacy by virtue of it being law, instead of alternatively viewing the topic of the length of time in detention under the CEAS as a site of necessary civil society dialectic between national and supranational levels, that would legitimate and support the implemented laws.

The findings reveal that the topic of the length of detention of irregular migrants under the CEAS risks falling between the contested national and supranational regulatory spaces – thereby risking asylum seekers themselves falling and being caught between these gaps. This finding is a prime example of how the Habermasian model can assist civil society to move away from positivist (unquestioned) stances on the length of detention in the CEAS (i.e. the law is legitimate by virtue of it being law), and instead move via civil society learning processes towards democratically legitimated regulatory frameworks operating at both the national and supranational level (i.e. the law is democratically legitimated by civil society at the national and EU level), to achieve better solutions to these cross-border challenges that do not risk asylum seekers unnecessarily being detained.

CHAPTER SIX: CASE STUDIES – INTERNATIONAL AND EU ACTOR PERCEPTIONS SURROUNDING THE REGULATION OF IRREGULAR MIGRATION

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I. OVERVIEW: INTERNATIONAL AND EU ACTOR PERCEPTIONS SURROUNDING THE REGULATION OF IRREGULAR MIGRATION

The purpose of this chapter is to continue the assessment of the interview data commenced in Chapter Five, in this instance addressing data generated by EU/International-level NGOs and Governmental actors in the in-depth open-ended interviews conducted during fieldwork. Assessment occurs via extensive thematic qualitative analysis of the resulting data to create both a thick and rich description, and also the opportunity for a selective discussion of the most notable themes emerging from the data.

II. INTRODUCTION

Chapter Five contains the full aggregate interview questions, full coding labels, and full thematic categories emerging across all actors for both Chapters Five and Six, and these will not be repeated in this chapter. As discussed in Chapter Five, the assessment of the EU/international actor interview data emerges from the same holistic act of processing all the interview data, to ensure the ‘above and between levels’ multi-level tensions sought by the research aims and hypothesis are met. Accordingly, this chapter is separated solely for the purposes of logical reporting of results.

III. INTERNATIONAL AND EU ACTORS’ PERCEPTIONS: A DISCUSSION OF PERTINENT RESULTS

Figure 29 in the previous chapter demonstrates the reporting cut-off for the five uppermost thematic categories relating to EU/international-level actors (NGOB, NGOC, IGOC, GOVB) and will not be repeated here. Reporting of the five uppermost categories continues on from Chapter Five, in this chapter reporting the perceptions and Habermasian learning processes of international and EU actors as follows:

A. EU/international perceptions: rank 1 of 5 – NGO seeking common implementation across Member States against inconsistent or divergent implementation of EU system

The issue of NGOs seeking common implementation of the Common European Asylum System (CEAS) – as opposed to any other actor at any level – was the uppermost thematic concern of the EU/international-level actors across the in-depth open-ended interviews. There was but one single coding instance in national-level actors in relation to this thematic category relating specifically to NGOs, and this result stood out to the researcher as being a possible indicator of a perception attributable to a macro multi-jurisdictional vantage point on the part of the respective EU/international actors. That is to say, it is likely that actors operating at the supranational and international levels could see how Member States as a group were implementing the CEAS in divergent ways, and subsequently noted that NGOs at all levels were pushing for unity, in conflict with the perceived behaviour of Member States.

Figure 35 – EU/international perceptions: rank 1 of 5 – NGO seeking common implementation across Member States against inconsistent or divergent implementation of EU system		
Code	Total Freq. (all actors)	EU/International Freq. (NGOB + NGOC + IGOC + GOVB)
N53	25	24

Figure 35 – EU/international perceptions: rank 1 of 5 – NGO seeking common implementation across Member States against inconsistent or divergent implementation of EU system

Several instances occurring in the coded interview data shed light on perceived tensions relating to NGOs pushing towards harmonised implementation of the CEAS against the apparent divergence among Member States. The following excerpts uncover a tension in the perceptions as to how Member States were implementing the common system. Many EU/international-level NGOs were uncovered to be attempting to influence the EU-level regulation and Directives in order to achieve what the researcher observed to be a top-down impact of lobbying by the respective NGOs. This is shown, for example, in the following excerpt from an EU-level NGO in Brussels:

**In-Depth Interview 5 of 20 – EU NGO: Jesuit Refugee Service,
person KS05**

Interviewee: *So we have been sometimes lobbying on discussions relating to the Qualification Directive, to include in the definition of the common understanding of who is a refugee, and also those who do not flee from the classical political persecution but from, say, general violence.*

(EU/International Rank 1 of 5: Extract A – **NGOBA** – per Figure 24)

Disclosure by an NGO of its lobbying approaches to the EU institutions is revealing, since the other parts of the interview showed there was no stakeholder base for the Jesuit Refugee Service other than country offices located in the Member State. Instead, this NGO drew down on international refugee protection frameworks in order to justify its lobbying positions to the EU institutions. In this excerpt, negotiations in 2014 surrounding the recast Qualification Directive (discussed in Chapter Three see page 126) were being subjected to direct pressure not by a Member State-specific NGO with implementation problems on the ground, but by a supranational NGO drawing on international law to make its case. The impression the researcher obtained was that some NGOs sought Member State harmonisation over the implementation of the CEAS not simply because of EU regulations and Directives, but also on Habermasian principles of international legal cosmopolitanism.

The following instance thickens the description of the perspectives on offer in the data, by highlighting an EU-level NGOs concerns around the efficacy of the entire CEAS, commenting on it as a flawed regional protection instrument from an international standpoint:

**In-Depth Interview 6 of 20 – EU NGO: Amnesty International
Brussels, person BA06**

Researcher: *So usually what I ask people is how the Common European Asylum System is going, from your point of view, as a stakeholder.*

Interviewee: *To talk about a Common European Asylum System is*

making a political statement, because there isn't such a system. And the way that they have tried to accommodate the divergent practices of Member States within the system. So I suppose from the so-called first phase instruments that we adopted under different methodologies - it was still the intergovernmental process, with Council leading, and the European Parliament being sidelined, and unanimity making it a race to the bottom, we moved to a system where it was about negotiation, about trying to find compromises that will accommodate the European Parliament view that was more civil liberties let's say, and the Member States' view that was concerned about security and costs, and the impact on the political stresses. That is to say how they could politically justify the positions they were taking. But this common system is a long way in the making.

(EU/International Rank 1 of 5: Extract B – **NGOBB** – per Figure 24)

Amnesty International – the Brussels office operating at EU-level – provided its perceptions for the reasons as to divergent implementation of the CEAS by Member States not from the perspective of implementation, but in terms of historical stakeholder and political process over time. The researcher observed the NGO approaching the EU CEAS as analogous to a long journey that was at the present moment in time unfinished. Key perceived tensions in the interview was a power balance between the European Parliament's desire for civil liberties for irregular migrants, and the Member State concerns about security (cf detention), cost, and political ramifications. The data supporting the thematic category was underpinned by other uppermost categories from national level actors surrounding cost and time of detention as discussed in Chapter Five (page 241), and will not be discussed again here. Amnesty International elaborated on its position further, as follows:

**In-Depth Interview 6 of 20 – EU NGO: Amnesty International
Brussels, person BA06**

Researcher: *Do you think the fact that they are Directives, and allow some flexibility about how the means by which the Member States get there, do you think that's got to do with the lack of a common approach in each Member State?*

Interviewee: *We're talking about very divergent legal systems, we cannot just meet it. We need to give it time for things to be put in place, so it's a matter of pragmatism. It would be very difficult, we would have to look into the different systems to challenge decisions. You would need to be able to allow Member States to adapt their traditions, their mentality as well - to challenge their mentality to adopt the norms. [F]or example, in terms of detention you have a requirement to provide alternatives to detention. But not many Member States have a system in place for alternatives to detention. So you need to put in place a decision-making body, someone that looks into what the Directive means, you need some infrastructure.*

(EU/International Rank 1 of 5: Extract C – **NGOBB** – per Figure 24)

The EU-level NGO brings to bear the issues of oversight and a flawed supranational system, on the topic of detention in the CEAS, which is core to this thesis. The suggested power imbalance is one where Member States refuse to adapt a tradition of sovereign control, in the face of the normative supranational dimensions of the shared competence (described in Chapter Three above see page 119) of European Union Directives – in other words, the NGO suggests Member States are refusing to allow regulatory authority to flow upwards from the national into the domain of the supranational. Subsequently, the NGO in this extract calls for ‘infrastructure’, or a ‘decision-making body’ to have oversight.

Across fieldwork in 2014 and 2015 the researcher found the EU/international-level actors (both governmental and NGO) to be extremely influential in ‘snowballing’ – or giving added importance to – further sites for information-rich key informants on these points (as per Patton’s discourse sampling method described in Chapter Four, page 155). The following extract demonstrates the development of the researcher’s own knowledge and perceptions during the course of the interviews, leading to snowballing on the topic of divergence against common implementation of the CEAS around detention of irregular migrants. The theme of divergence – and tension therein – lent itself to the recursive and iterative processes across this qualitative research, this being evident in researcher’s own dialogue by the time the final interview was conducted in 2015, reported here in full, as part of this chapter and section:

In-Depth Interview 20 of 20 – EU NGO: PICUM, person SU20

Interviewee: *[And] so even when we are talking about migrants in a sympathetic way, the undocumented piece, the irregular piece, tends to fall out of the conversation. That was a long spiel.*

Researcher: *No! That's exactly the kind of juicy stuff that is actually useful. And the way I have been trying to deal with getting the regulatory spectrum - which is quite narrow when it comes to the Common European Asylum System - to sit against the people that happen to pass underneath it and maybe out the other side is by referring to people as irregular migrants, so it is the detention of irregular migrants specifically that I refer to. But detention being a sideshow to the main gig, which is saying that people are passing, just as they pass across borders, so do they pass underneath a protection framework then often out the other side. And as you are well aware, detention of asylum seeker can happen if they fail in their bid, and then they are detained for expulsion purposes. And various national regimes are set up for these arrangements. But at the same time there is no consistency in how long they are detained for, or what their access to health services might be for example before they are expelled, and I am interested in – in terms of things which you are just saying – the fact that we should not morally consider them any differently because of the human rights that attached to the inalienable rights attached to them as a human being. And I feel that the Common European Asylum System misses that, because there is a problem in how we develop regulations in a vertical rather than horizontal way. But those are just my reflections on it. But this is absolute research gold, to hear what you have said.*

Interviewee: *Well what we were talking about earlier of the tension between the supranational and national, and what is sort of you could say is objectively mainly in the interests of the Union, and the direction that Members want to take – and we'd just see a classic case in the migration situation. I mean, Europe is trying to push for tiny commitments, but even just in terms of the basic question of resettlement.*

We are not even talking about big picture migration reform and Member States are totally divergent in their willingness to come on board. And so I think you are right, migration is one of these areas where I think there is a particular tension in terms of what might be best for the union, what might be most compatible with its values, and where national level realpolitik takes hold.

(EU/International Rank 1 of 5: Extract D – **NGOBG** – per Figure 24)

The EU-level NGOs response to the researcher's partially-formed notions of where implementation tensions lay prior to the disassembling, compiling, and reassembling process, speaks to the thickness and recursive saturation of the interview data in general. The researcher drew this thinking across this later fieldwork, uncovering even further the clear tension perceived by the EU/international-level NGOs, between the supranational normative ambition of the Directives of the CEAS, and the realities of the law in implementation on the ground in Member States, at the national level. The NGOs ultimately appears to be against national-level divergence, and for supranational convergence.

B. EU/international perceptions: rank 2 of 5 – Divergence in Member State implementation of Directives

This thematic category is to be carefully distinguished from that described in the above section, which was related solely to NGOs seeking common implementation of the CEAS. This thematic category, on the other hand, was more broadly present across the interview data, as it was directly linked to examples of actual divergence in Member State implementation of the CEAS Directives, whoever was describing such an occurrence. In the disassembling phase of the analysis, the researcher found this unique strand of concerns about implementation had a different character of power struggle, and so a separate thematic category was applied. The coding instances from interviewees of actual divergence in Member State implementation of the CEAS were accordingly spread wider across national and EU/international-level actors in the data, as per Figure 36 below.

Figure 36 – EU/international perceptions: rank 2 of 5 – Divergence in Member State implementation of Directives		
Code	Total Freq. (all actors)	EU/International Freq. (NGOB + NGOC + IGOC + GOVB)
N8	27	19

Figure 36 – EU/international perceptions: rank 2 of 5 – Divergence in Member State implementation of Directives

Several instances occurring in the coded interview data are useful to describe the perception of actual divergence in Member State implementation of the CEAS, the first extract being from an EU-level NGO in Brussels:

**In-Depth Interview 5 of 20 – EU NGO: Jesuit Refugee Service,
person KS05**

Researcher: *So have you made statements regarding Dublin recently?*

Interviewee: *[And] that's our main criticism to the Dublin System but also to any other proposals that have been made so far. We don't have a common system and we don't have a truly common understanding across Europe as to who is a refugee and who is in need of protection. And therefore all systems that would oblige asylum seekers to go to a certain country, would make this common understanding a valid conception for an alternative offer of that procedure.*

(EU/International Rank 2 of 5: Extract A – **NGOBA** – per Figure 24)

Although complex, the conclusion the NGO interviewee draws is that any compulsory system such as the Dublin Regulation (described in Chapter Three see page 127) that demands an asylum seeker must go to a given Member State of first application, should (or *ought*) to be backed up by a common EU-wide understanding of who is a refugee. However, as described in Chapter Three, each Member State in the EU makes its own determinations of applications for refugee status – and yet there is perceived tension between those sovereign determination capacities. Here, the researcher observed an NGO inferring that there ought to be such a common understanding – an almost international legal cosmopolitan understanding – that would match the supranational regulation. An insight into the nature of the intersection between and among the national, supranational, and international levels is uncovered in this small excerpt.

The possible reasons for such actual divergence in implementation of the CEAS were raised by an unidentified staffer in the European Commission, who did not want to be identified in the research:

In-Depth Interview 15 of 20 – EU Institution: European Commission, person SU15

Researcher: *Do you think there is the political will in the current arrangement of Member States in the European Union, to move towards the goal that was set of a Common European Asylum System, or do you think it has plateaued, or it is growing? In terms of CEAS?*

Interviewee: *[So] you have quite a big group of Member States where it is really very quiet, and they don't have anyone going there, and they are not really doing anything to wake up anyone to this situation. And it's very silent there. And that discussion is increasingly going towards being a bit more concrete on what we actually mean when we talk about sharing responsibility.*

(EU/International Rank 2 of 5: Extract B – **GOVBB** – per Figure 24)

The anxiety around Member States that may not receive direct flows of asylum applicants was palpable to the researcher in this interview. The concept of shared responsibility (i.e. shared competence in the CEAS, in Chapter Three see page 119) among Member States was highlighted by EU institutional actors being interviewed, many times. The hope from EU institutions appeared to be that all Member States should share the burden of asylum flows, but the detected tensions on analysis revealed that the burden was not being shared as hoped.

Interpretation leading to divergent implementation of EU CEAS Directives under the conditions of shared competence was also discussed by a number of NGOs, most notably in this extract from ECRE, an EU-level NGO operating in Brussels:

In-Depth Interview 16 of 20 – EU NGO: ECRE Brussels, person SC16

Researcher: *Exactly, now what do you do if Member States are fairly free and loose in their interpretation of the Directives, and they don't*

implement the whole spirit of the Directives? Particularly relating to detention for example?

Interviewee: *So one of the main things that ECRE does is try and illustrate the differences between country practice, and what's actually there. Of course, with Directives there is room to implement, they have a certain room for manoeuvre when implementing the Directive into regulation. One of the main ways we try and illustrate this, is through pan-European reports. And that report looks at hundreds of different cases, from different national Courts, to illustrate the differences between Member States, and illustrating what the standards are or how it should be interpreted in the Directive, and highlighting good or bad practices depending on the Member State.*

(EU/International Rank 2 of 5: Extract C – **NGOBF** – per Figure 24)

Here again is the notion of normative regulations that the CEAS aims for, versus the sovereign divergent implementation on the ground in reality. This NGO described their lobbying method via pan-European (supranationally normative) reports – broken down further into a moral assessment of ‘good or bad practices’ per Member State. The NGOs decisions to organise data in this way reveals a determination that failure to implement properly at the national level, is something that should be fixed by appealing to supranational normative structures – again giving credence to the Habermasian concept of international legal cosmopolitanism described in Chapter Two.

C. EU/international perceptions: rank 3 of 5 – NGOs are experts and EU and Member States must consult them for the real picture

The aggregation of the thematic analysis on EU and international actors’ interview data revealed a third uppermost category of power dynamics, related to the role NGOs play as independent reporters of implementation conditions inside Member States. Across the interview data this involved interplay between the legal world the CEAS contemplates (described in Chapter Two), and the realities of implementation of the CEAS Directives by Member States at the national level. The frequency of coded instances at Figure 37 below suggests that both national-level and

EU/international-level actors felt that NGOs played this essential role that Member States could not ignore.

Figure 37 – EU/international perceptions: rank 3 of 5 – NGOs are experts and EU and Member States must consult them for the real picture		
Code	Total Freq. (all actors)	EU/International Freq. (NGOB + NGOC + IGOC + GOVB)
N37	24	16

Figure 37 – EU/international perceptions: rank 3 of 5 – NGOs are experts and EU and Member States must consult them for the real picture

The first instance in the simple extract below is from the UNHCR operating in Malta, in relation to their dealings with the EU agency the European Asylum Support Office (EASO). The purpose of EASO is to increase Member State cooperation in the implementation of the CEAS. Here, the UNHCR, an international actor operating domestically in Member States, declared that it was part of the steering mechanism for EASO:

In-Depth Interview 9 of 20 – EU NGO: UNHCR Malta, person SU09

Researcher personal observations: *How did UNHCR appear to work with EASO?.*

Researcher Notes: *UNHCR is a non-formal member of the EASO Board.*
(EU/International Rank 3 of 5: Extract A – **NGOAD** – per Figure 24)

This observation underscored the importance of the UNHCR in the work of the EU institutions when attempting to encourage harmonised implementation of the CEAS – the observations by the researcher across the interview (NGOAD) were that the UNHCR perceived itself as indispensable to the EU institutions generally, due to its on-the-ground knowledge and expertise that was independent of the Member States, but could be used to lobby those same Member States.

Likewise, the following extract from an unidentified EU-level actor (dubbed the ‘UEU’ in the transcriptions) suggested an EU-level acceptance that national-level NGOs and national-level civil society understand the *true* picture of implementation of the CEAS on the ground in Member States, and so the views of civil society from the national level should never be discounted in the EU-level actors’ work:

**In-Depth Interview 10 of 20 – EU Level Actor: Unidentified Org,
person EU10**

Researcher personal observations: *What about NGOs essentially going it alone – was the unidentified EU level actor (dubbed ‘UEU’) helping them?*

Researcher Notes: *The UEU also views itself working for the EU, so ultimately their work must rely on empirical evidence – that being said, they expressed that they would never say civil society actors are not telling the truth about their claims on asylum.*

(EU/International Rank 3 of 5: Extract B – **GOVBA** – per Figure 24)

In the extract above, it is clear that empirical – not emotional or rhetorical – evidence is preferred by supranational actors, and yet the idea of ‘truth’ about implementation of the CEAS in Member States was not something that was necessarily thought of by the EU-level actor as emerging from Member States alone. This generated a site for friction between the EU-level operating directly with Member States, and the EU-level operating to understand the behaviour of Member States via the feedback from NGOs operating at the national level.

The following extract builds on this notion further, but this time arising from perceptions uncovered within the European Commission:

**In-Depth Interview 15 of 20 – EU Institution: European
Commission, person SU15**

Researcher: *And is there a formal process for involving the NGOs? Do you have a forum process with them? Not necessarily France Terre D'Asile, but with NGOs?*

Interviewee: *[All] of those countries, so we go there quite a lot to actually follow up on developments etcetera. And then we always meet with the NGOs, because if you're only meeting with the Government, you tend to maybe not always get the full picture.*

(EU/International Rank 3 of 5: Extract C – **GOVBB** – per Figure 24)

The idea of the ‘full-picture’ as the interviewee puts it, is again the same concept detailed in above Extract B, that the EU-level institution can essentially triangulate what the Member State implementation of the CEAS looks like not just by reference to the Member State’s own reporting or the EU-level institution observing this itself, but also by reference to the NGO observations at the national level, in order to push Member States to converge in their implementation of the CEAS.

The same thematic category was further underpinned in another unidentified EU-level institution, who reinforced the NGOs dominance in uncovering the truth on CEAS implementation with the Member States, this time on behalf of the European Parliament:

**In-Depth Interview 17 of 20 – EU Institution: Unidentified
Institution, person SU17**

Researcher personal observations: *Did the European Parliament get its info from NGOs, in the Staffer’s point of view?*

Researcher Notes: *European Parliament is heavily reliant on NGOs to be the eyes and ears of the EP on the ground, even if a Member State is not coming forward with the information on the treatment of asylum seekers in its jurisdiction.*

(EU/International Rank 3 of 5: Extract D – GOVBC– per Figure 24)

In the above extracts, we can see triangulation of NGOs being the truth holders of implementation of the CEAS was extremely strong. An international-level NGO collecting data on detention rounded out this thematic category by confirming that globally, NGOs are considered in many countries – not just EU Member States – to hold the ‘truth’ as to implementation on refugee protection frameworks:

**In-Depth Interview 19 of 20 – International NGO: Global Detention
Project, person MI19**

Researcher: *And is that because of a lack of transparency in those countries?* **Interviewee:** *So basically how we work, we receive information either from people working directly on the ground, basically this is our privilege we are receiving information. They can be NGOs*

and other associations, activists, academics from the countries.

(EU/International Rank 3 of 5: Extract E – **NGOCA** – per Figure 24)

The uncovering of the thematic category surrounding tension and contest for the social *truth* (cf. Habermas’ civil society learning processes on the route to improved legitimization of supranational frameworks described in Chapter Two) surrounding implementation of the CEAS in Member States and the pivotal role that NGOs play in allowing that social truth to be triangulated by actors operating at the EU level, was firmly established in the interview data.

D. EU/international perceptions: rank 4 of 5 – NGOs are coordinating with other NGOs - safety in numbers

Reoccurring across the EU/international-level actor interview data were themes of NGOs networking their knowledge about the CEAS and implementation within EU Member States, with other NGOs, thus reinforcing their own power within their unique national or supranational constructs. It was natural that both national and EU/international-level actors touched on this theme, as revealed by the frequencies at Figure 38.

Figure 38 – EU/international perceptions: rank 4 of 5 – NGOs are coordinating with other NGOs - safety in numbers		
Code	Total Freq. (all actors)	EU/International Freq. (NGOB + NGOC + IGOC + GOVB)
N2	25	14

Figure 38 – EU/international perceptions: rank 4 of 5 – NGOs are coordinating with other NGOs - safety in numbers

An EU-level NGO, the Jesuit Refugee Service, revealed substantial interactions with other NGOs to reinforce their own position of power and influence in the civil society dialogue on the development of the CEAS as stakeholders to the EU institutions. The following extract reveals the machinations of this process:

**In-Depth Interview 5 of 20 – EU NGO: Jesuit Refugee Service,
person KS05**

Researcher: *So that's quite interesting to me, that this is the way you feed advocacy through. And even down to - it's quite wonderful to hear that you've even been able to influence what the MEP's are doing on the text?*

Interviewee: *one thing is that especially on the European level we very often, almost always, work in coalition with other NGOs. There are some very good networks who can do that, and you must do it, because alone, you are lost. Much work here in Brussels is done also on the level of actions on information, and developing a common position. And then of course going together to stakeholders and promoting those positions.*

(EU/International Rank 4 of 5: Extract A – **NGOBA** – per Figure 24)

The idea of being lost and alone – or risking isolation as an NGO – was common across many of the NGO interviews, whether at the national, supranational, or international levels. In the above extract, the researcher felt the concept of NGOs developing a ‘common position’ was almost mirroring the ‘common’ regulatory aspect of the ‘Common European Asylum System’ where Member States had also formed a common system. This links back to the discussion of textual analysis findings in Chapter Four (page 197), which suggests that the formation of mega civil society actors may be a possible avenue to match the supranational nature of the European Council. In this way, NGOs could be seen in the interview data to aim to grow their impact larger than their own limited national – or even supranational – station.

The following simple extract from the researcher’s notes during one interview that was requested not to be recorded, further underscores even the largest international NGO actors rely on forming common positions:

In-Depth Interview 7 of 20 – EU NGO: UNHCR Brussels, person CP07

Researcher: *How does UNHCR form its views?*

Researcher notes: *In house, but also through NGOs.*

(EU/International Rank 4 of 5: Extract B – **NGOBC** – per Figure 24)

Here, the UNHCR operating at the supranational level through its Brussels office, confirms that its views are its own, but also influenced by working in concert with other NGOs. The legitimacy of its lobbying is therefore strengthened by working with other NGOs.

Similarly, the EU-level NGO the Platform for International Cooperation on Undocumented Migrants (PICUM) described this process as formalised within its own internal structure, drawing on over 140 stakeholder members as follows:

In-Depth Interview 20 of 20 – EU NGO: PICUM, person SU20

Researcher: *Well that's good - I'm interested in the fact that it is happening. You say you have got 142 members, when you develop a position on something, do you consult 142 members?*

Interviewee: *No, generally not. It's sort of yes and no. We are a membership organisation, so typically the issues that we address are issues that have been raised by our members as important. And the approach we take is informed by the way - well, we understand the issues through our members sharing their experiences.*

(EU/International Rank 4 of 5: Extract C – **NGOBC** – per Figure 24)

The idea of PICUM understanding the issues to lobby the EU institutions on being based on ‘their experiences’ suggests a similar dual approach taken by the UNHCR at the EU level, demonstrated at the extract (EU/International Rank 4 of 5: Extract B) above. In short, the EU-level NGOs all suggested it was essential that coordination with a variety of other NGOs occurred, in order to bolster and improve the power of their arguments to the EU-level institutions – in other words, for NGOs the interview data revealed there was a sense of safety in numbers.

E. EU/international perceptions: rank 5 of 5 – European Commission expected to take charge and responsible for driving action in order to paper over implementation differences

The fifth uppermost thematic category emerging from EU/international-level interviewee data – but evenly distributed across all actor types as per Figure 39 – was the suggestion that it was mostly the European Commission’s job to drive action on solving implementation differences between Member States.

Figure 39 – EU/international perceptions: rank 5 of 5 – European Commission expected to take charge and responsible for driving action in order to paper over implementation differences		
Code	Total Freq. (all actors)	EU/International Freq. (NGOB + NGOC + IGOC + GOVB)
N64	14	13

Figure 39 – EU/international perceptions: rank 5 of 5 – European Commission being expected to take charge and responsible for driving action in order to paper over the implementation differences

The following EU-level actor who did not wish to be identified (dubbed the ‘UEU’), emerged in the researcher’s reflections following the interview as having provided a structural reason for placing ultimate responsibility for the CEAS at the feet of the European Commission:

In-Depth Interview 10 of 20 – EU Level Actor: Unidentified Org, person EU10

Researcher personal observations: *How did information appear to flow from the organisation into the EU?*

Researcher notes: *The (unidentified EU actor) UEU had to cooperate closely with the Commission on everything, they work with the Commission without a hierarchy between them and the Commission. The Executive Agencies in the EU structure are a part of Commission executive policy. The Regulatory Agencies are independent and work with the Commission and NGOs.*

(EU/International Rank 5 of 5: Extract A – GOVBA – per Figure 24)

The researcher felt that the type of information the unidentified interviewer revealed, was that while agencies of the EU institutions are independent and work with NGOs, ultimately the functional actor was the European Commission itself, of which the unidentified actor was a mere part, rather than a central responsible component.

These perceptions were then contrasted by the unidentified interviewee from the European Commission itself, which revealed the internal responsibilities are formed through a stakeholder process leading to practical cooperation:

In-Depth Interview 15 of 20 – EU Institution: European Commission, person SU15

Researcher: *So, almost the virtual schizophrenia the Member States get when they come to the EU and they say ‘yes we will sign up for this’, and then they go home and they tell their populations ‘I was forced to sign’. And that's what I look at, that tension there, including implementation issues particularly regarding detention.*

Interviewee: *So it's an ongoing process. And as you know we have this asylum support office in Malta (EASO), which you might have visited. And it's an office in the process of becoming an agency for a couple of years. And we very much hope and the expectation lies on the shoulders of those people working there, because it's the practical cooperation that will be key now. I mean, we have the legislation on paper agreed, so now it's the reality that needs to catch up. And they will be vital in that process.*

(EU/International Rank 5 of 5: Extract B – **GOVBB** – per Figure 24)

The idea in this interview appears to be of practical cooperation between the EU and its Member States, in the form of a process that over time is playing ‘catch up’, indicating a tension in where that process of cooperation is, compared with where it should have been according to the interviewee. Here, the EASO EU-level institutional actor was labelled as an actor or component in that cooperative process that will serve as a catalyst for the process that will move forward over time. The interview data reveals that this movement forward is in the interests of the European

Commission's own goals to harmonise the responses of Member States – revealing an underlying tension in present reality versus that goal.

It is worth extracting another longer instance from the unidentified interviewee to show the European Commission's own perception that the responsibility of the common implementation of the CEAS in Member States lies first at its own feet, but is gradually drawing in other EU institutional actors:

In-Depth Interview 15 of 20 – EU Institution: European Commission, person SU15

Researcher: *And the idea of getting information out there, so that people are making informed decisions not only in the Commission but in the Parliament as well: is that a trend on the increase, or back when the first generation of Common European Asylum System developed, was there much information on the ground, or is there more information now?*

Interviewee: *Also institutionally here, after the Lisbon Treaty etc, it has - although asylum legislation was actually co-decision back then, but migration has moved into more part of this as well. So Parliament has a different role anyway, and is requiring to be informed much more than before as well. Sometimes in this institutional triangle, the Parliament can be almost viewed as being the Commission and the Council discussing things, where the Commission is always present but Parliament is never there and only on special occasions. So the Parliament is getting increasingly involved in the issue, and there is much more focus on the things that are basically lacking in Member States, which makes the work of the NGOs important. I mean some NGOs are complimenting what should be normally under the national authority when it comes to reception.*

(EU/International Rank 5 of 5: Extract C – **GOVBB** – per Figure 24)

The growing role for the European Parliament to assist with the supranational responsibility of harmonising of the CEAS in Member States is acknowledged by the Commission interviewee, again in the form of a movement over time towards a

future of common implementation among Member States. The researcher noticed in the above extract that several instances also crossed over into other thematic categories – such as NGOs being the on-the-ground source of the truth in Member States (as per Figure 38 Rank 4 of 5, above). The Commission is acknowledged as ‘always being there’ as a constant in the developments.

The final extract is from an EU-level NGO that attempts to have the European Commission arbitrate on Member State infractions when it came to the implementation of the CEAS, almost using the Commission as a judicial actor or referee in the process. This was dependent on the issue at hand:

In-Depth Interview 16 of 20 – EU NGO: ECRE Brussels, person SC16

Researcher: *Yes, who do you go to? Do you say: ‘we need to really talk to the Commission’?*

Interviewee: *I mean the first thing we do first of all is talk to our members, to see what their position is on things, to get their take on things, and to get their input as to what they think our added value would be or should be. There you are looking at talking to the Commission, and try to bring about relevant infringement proceedings. You're talking about then having a specific focus on it, perhaps I mean it really depends on the issue.*

(EU/International Rank 5 of 5: Extract D – **NGOBF** – per Figure 24)

This extract underscores the NGOs perceptions that the role of the European Commission is the referee on the implementation of the CEAS, and that the responsibility of the success of Member States having common implementation of the CEAS lies at its feet. NGOs, consulting among themselves and finding safety in numbers (as per Figure 38 Rank 4 of 5, above), then attempt to lobby the Commission in order to focus on issues and iron out discrepancies in Member State implementation of the CEAS.

IV. CONCLUSION

Using the methods discussed in Chapter One, the results of qualitative analysis on the interview data for Chapter Six uncovered a number of thematic categories relating to the perceptions of EU and international interviewees. As was found in Chapter Five, the qualitative analysis process revealed and confirmed tensions occurring among and between each level described in Chapter One (national, supranational, international) in relation to the provisions relating to irregular migrants, and detention, under the CEAS. The results discussed in Chapter Six further reinforced and triangulated the findings in other chapters, particularly underscoring the hypothesis that the interception and detention of irregular migrant asylum seekers by EU Member States occurs at the intersection of the will of the state as sovereign, the will of EU institutions seeking to regulate the supranational frameworks, and the will of the global citizen (the refugee) and their defenders, operating in line with Habermas' model of a societal move via learning processes towards international legal cosmopolitanism.¹

Select results discussed in this chapter covered thematic instances that were most striking in relation to EU and international-level data, limiting these to the uppermost five frequent thematic categories. As discussed in Chapter Five, these findings support the arguments of the thesis discussed in Chapter One and other chapters. For example, it was apparent in the findings that NGOs at all levels were perceived as central agitators seeking out common implementation of the CEAS across Member States, arguing strongly for supranational convergence. On the basis of the Habermasian model discussed in Chapter Two, this finding was evidence of civil society learning processes along the route towards an enhanced legitimation of the supranational level of governance. Similarly, friction was also observed along similar lines on the issue of divergence in the implementation of the CEAS by particular Member States – here EU and international actors revealed anxieties around the flows of asylum seekers and uneven burden-sharing between Member States, with supranational normative structures forming the basis on which interviewees criticised national-level sovereign implementation standards. The presence of a high frequency of criticism of Member States by EU international level actors responds strongly to the research questions –

¹ Habermas, *The Crisis of the European Union: A Response*, 47.

painting a picture of EU-level actors attempting to draw power upwards to the supranational level.

A further important finding was that NGOs were perceived by both other NGOs and supranational actors to be the ultimate experts when it came to on-the-ground realities of CEAS implementation within Member States, raising the possibility that the trusted status of NGOs could be used by supranational actors to encourage Member States to converge and harmonised their implementation practices.² This supports the conception of NGOs having access to authentic facts about CEAS implementation that bureaucratic elements of the EU institutions were perceived as often unable to see in the reporting of Member States. This finding further supports the arguments made in Chapters Four and Five that NGOs might be better able to influence both the supranational and national regulatory frameworks by cross-linking their authentic experiences of national implementation, thereby growing their normative power to the same collective height as the supranational institutions – the analogy of Goliath versus Goliath. In such a scenario, the perceived authentic experiences of civil society actors might serve as a potential supranational normative check on Member States attempt to paint a favourable normative picture of national-level CEAS implementation.

Frictions were also apparent where NGOs sought safety in numbers, coordinating their own lobbying positions with other NGOs to essentially grow their lobbying positions larger than their mere national or Brussels-based station – this finding further resonates with the findings in Chapters Four and Five arguing for the creation of mega cross-border civil society actors. The European Commission was also revealed to be considered as the final arbiter and owner of implementation of the CEAS, even though this conflicted with the Commission's own notions that implementation of the CEAS was a joint venture meant to draw on actors among and between all levels (national, supranational, international). This finding supports the arguments also made in Chapter Five, namely: that while the first hurdle facing asylum seekers described in Chapter One – the analogous positivist *wall of law* – exists in the perception of EU and international-level actors, the second constructivist hurdle is uncovered by the data, revealing hidden social spaces where institutional and civil society actors come together via learning

² Betts et al. make the same finding in relation to the influence of the UNHCR, in Alexander Betts, James Milner, and Gil Loescher, *The United Nations High Commissioner for Refugees (UNHCR): The Politics and Practice of Refugee Protection into the 21st Century*, 2nd ed., vol. 62. (New York: Routledge, 2012), 162.

processes to contest the improved legitimacy of supranational regulatory frameworks to be wielded by institutions (cf. Habermas' theory, discussed in Chapter Two), which are then in turn faced towards the refugee confronting the first hurdle.

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I. CHAPTER SEVEN: SYNTHESIS AND CONCLUSION

The purpose of this chapter is to synthesise in summary the descriptive chapters and results of the fieldwork described above. Since much of the descriptive and analytical work is already contained in the discussions across each chapter, this shorter chapter seeks to present the findings in an integrated assessment of the results of the research, as against the research aims and hypothesis described in Chapter One.

II. INTRODUCTION

The research was prepared with fieldwork taking place in 2014 in the leadup to the 2015 influx of asylum seekers into Europe, providing insight into the aftermath of the influx and political upheavals in relation to waves of asylum seekers arriving in the geographic territory of the European Union (EU). The findings reveal the presence of a first positivist legal hurdle facing asylum seekers and their advocates – by analogy the positivist *wall of law* discussed in Chapter One – behind which the data uncovered a second hurdle, comprising of a hidden constructivist interplay among civil society and institutional actors at all levels, contesting normative power over the legitimization of the legal frameworks wielded by institutional authorities in the form of the first hurdle. This research captures a unique and pivotal social moment, making the findings important not just for institutional and NGO actors in the field, but also for national and international public policy purposes.

The research investigated and uncovered a range of triangulated thick and rich qualitative descriptions from many actors, supplying normative explanations for a range of tensions occurring among and between the national and supranational, and international influences on the EU and its Member States, with regard to the detention of irregular migrant asylum seekers under the Common European Asylum System (CEAS). Through substantial analysis of data in fieldwork, the researcher has uncovered the perceptions of actors involved in normative power struggles over the development and implementation of a supranational regulatory system that intended to control the movement and processing of asylum seekers entering the EU, at the now historical moment of influx in 2015. The meaning of the research results is discussed across the

following sections, and conceptually linked to form the researcher's evidence-based arguments.

A recapitulation of hypothesis, aims, and research questions is useful, given the summary and conclusive purpose of this chapter. The hypothesis set out in Chapter One is as follows:

This thesis tests the hypothesis that the interception and detention of irregular migrant asylum seekers by EU Member States occurs at the intersection of the will of the State as sovereign, the will of EU institutions seeking to regulate supranational frameworks, and the will of the global citizen (the refugee) and their defenders, operating in line with Jürgen Habermas' model of a societal move towards international legal cosmopolitanism through civil society learning processes.¹

Accordingly, the research questions focusing on Habermasian civil society learning processes at the national, supranational, and international levels, were structured as follows:

1. What are the political and legal tensions (national, supranational, and international) associated with detention of irregular migrants seeking asylum in EU Member States?
2. How do we explain the political and legal friction associated with the detention of irregular migrants in the EU?
3. What are the normative dimensions of the perceptions of actors between and amongst each level?

An important component of Chapter One also bears repeating: in order to limit the scope of the research, the researcher selected case studies linked to the Czech Republic, France, and to international and EU actors linked to the supranational level. The research was conducted prior, during, and after the 2015 influx of refugees into the geographic territory of the EU.

¹ Habermas, *The Crisis of the European Union: A Response*.

Each chapter above has comprehensively addressed – to the point of optimal qualitative saturation² – each of the research questions according to the methodology selected by the researcher. The application of qualitative research methods described in Chapter One resulted in a rigorous, thick and rich description of the social world emerging from the fieldwork, across which both primary and secondary perspectives were uncovered and recursively analysed, triangulating social meaning according to the methods described in Chapter One, and applied to data in Chapters Four, Five, and Six (these methods will not be repeated here).³ The following sections tie together the results of the research to form the researcher’s broader conclusions and arguments, as supported by the results.

III. HABERMAS AND UNDERPINNING THEORY

The results of this research suggest the nature and risks inherent in the European Union’s flawed constitutional structures – as they stand – limit its present ability to address cross-border problems, resonating with Habermas’ theory as to the preconditions that perpetuate such supranational structural flaws (discussed in Chapter Two). The tensions uncovered across the qualitative results correspond with Habermas’ conception of a shift towards international legal cosmopolitanism, and misplaced and unnecessary nation-state allegiances within supranational settings. His view – that only once such allegiances are fully cast aside through civil society learning processes can a civic solidarity be achieved beyond the nation-state – is largely borne out in the indicative results of this research, particularly in the results discussed in Chapters Four, Five, and Six. This is not to say, however, that this research considers the regulatory integration ambitions of supranational and international projects to be moribund – rather, it is argued that the frictions and flaws in the implementation of the CEAS revealed in the data are actually missteps to be *expected* along the Habermasian route towards an eventual cosmopolitan transnational democracy; these results support an argument that a natural dialectical battle for normative supremacy in the EU is

² Walter (ed.), *Social Research Methods*, 237.

³ Triangulation: Roller and Lavrakas, *Applied Qualitative Research Design: A Total Quality Framework Approach*, 41.

underway, caused by civil society going through adaptive learning processes as regulatory legitimisation moves to the supranational level.⁴

The (legally positivist) conception that somehow because the supranational CEAS is law, it ought to function without missteps along the route towards its national implementation – notions that are frequently revealed in the data when examining perceptions surrounding the detention of irregular migrants – belies the findings of this research that reveal the CEAS is ultimately an instrument of dialectical social adaptation between the national (Member State), supranational (EU), and international (refugees as global citizens and their defenders) levels. Findings across Chapters Four, Five, and Six support the argument that beyond the first hurdle facing asylum seekers – the positivist *wall of law* posed by the CEAS discussed in Chapter One – exists a hidden second hurdle, being a social space in which institutional and civil society actors come together via constructivist learning processes (cf. Habermas’ theory) to critique, inform, and legitimate the production of the law and power to be wielded by institutions, which are then in turn faced towards the refugee confronting the first hurdle.

Accordingly, the research supports the argument that normative tension and contest between such actors is not necessarily a block to progress towards supranational harmonised implementation of a common system regulating asylum in the EU, but rather are the side-effects of an ongoing dialectical process between supranational actors, civil society, and nation states, as the shift in power and democratic legitimisation of law slowly moves upwards from national to the supranational levels in the EU – essentially fulfilling Habermas’ depiction of this process occurring ‘along the route to a politically constituted world society’.⁵ That the development of the CEAS is still ongoing at time of writing, and that all Member States remain engaged in some form, appears to also support such arguments.

The hypothesis in Chapter One influenced by Habermas’ model is borne out in the data and findings, in that civil society and Member States, the supranational EU, and individual asylum seekers operating under international law, are found in the data to be intersecting at the site of the CEAS, observably engaging in a contest for normative power over the law towards an eventual transnational civic solidarity and an

⁴ Habermas, *The Crisis of the European Union: A Response*.

⁵ *Ibid.*, 2.

accompanying transnational democracy. Although the Member States in the research results appear to comfortably hold the balance of power and influence over the development of the CEAS, the findings also suggest that there is a determination among NGO actors at all levels to remain engaged in normative conversations at both the Member State and supranational (EU) levels. The researcher's findings support the argument made in Chapter Four that future innovations to improve the normative influence of NGO actors might best occur by building up NGO actors to the same normative height as the EU institutions, drawing NGOs together across EU Member States as larger supranational entities, which would then optimally operate at both national and supranational levels.

Findings arising from the Critical Discourse Analysis (CDA) undertaken in Chapter Four demonstrated that governmental actors in the system formed hegemonic normative discourse and protected their powerful executive version of norms relating to the detention of irregular migrant asylum seekers, with attempted input from less powerful civil society actors who tried to promote the protection and implementation of alternative international legal norms on behalf of asylum seekers in the lead up to the 2015 influx. The researcher has concluded that this finding is not necessarily a bleak picture of NGO failure in the lead up to the influx, but rather the early vital signs of dialectical normative interaction with nation states by civil society, in the negotiation of a gradual shift of power and control over asylum management in the EU from the national to the supranational (EU) level. Such findings support Habermas' notion discussed in Chapter Two that the learning processes between civil society and nation states not only exist, but is actively observable through the data collected in the fieldwork.

The findings arising from qualitative analysis of interview data discussed in Chapter Five and Six further triangulate the same notion that civil society actors at all levels are locked in what the researcher assesses to be a desperate struggle to influence the normative power of institutional authorities at both the national and supranational levels over the CEAS. Taken together, these results do not demonstrate failure on the part of NGOs, but instead reveal indications of the information-age beginnings of a civil society engaging in cross-border will-formation; the early signs and struggles of global citizens on a contested path towards a future constituted world society. In this context, the 2015 influx of asylum seekers into the EU can be understood not as a crisis

threatening the EU, but rather a challenge to the early-stage treaty instruments of a supranationally semi-organised society, that precedes an eventual world society.

For academe to critique the CEAS as it endured the 2015 influx as dysfunctional, cracked, or to cast the EU as causing problems for sovereign states (see Chapter One literature review) is to ignore the extremely clear message available in the results of this research: through the lens of the Habermasian model, the CEAS is a functional work in progress towards international governance of refugee management, despite the normative tensions perceived between and among actors operating at the national, supranational, and international levels. Far from the CEAS and the supranational project being a failure, this research uncovers what is in many respects a completely normal state of affairs for such a social structure undergoing a shift from sovereign national frameworks towards supranational regulatory legitimation – the research results in this context arguably indicated the expected early growing pains of a future global transnational society.

When taken together, the findings across Chapters Four, Five, and Six, also support the underlying theory and Habermasian concepts relating to the flaws of supranational control and authority discussed in Chapter Two. Specifically, Habermas' contention in *The Crisis* that input from civil society actors is essential to supranational regulation (including the CEAS and its Directives) obtaining the character of democratic legitimacy that in turn is necessary for its enforcement at the national level. However, such successful legitimation by civil society actors is revealed by the qualitative analysis across Chapters Four, Five, and Six, to be largely perceived as relatively limited in its present formation, contributing to a perception of Member States being able to conduct piecemeal implementation of the CEAS. Accordingly the researcher suggested the creation of mega cross-border civil-society actors at the same normative height as the supranational institutions with which they attempt to grapple.

Also confirmed by the findings were the concerns of actors at all levels as to the erosion of the legitimacy of supranational power, which under Habermas' model represents a theoretical threat to the ability of the EU to manage cross-border problems such as the management of irregular migrants, including their detention under the CEAS. The findings further support Habermas' argument that the EU institutions themselves also require further reform to attain greater democratic legitimacy, as doing so may optimise

the conditions for a more successful implementation of supranational regulation (such as the CEAS).

The research results also correspond to Habermas' hopeful assessment of what innovations might correct the tension between the national and supranational frictions explored across the above research. Accordingly, the researcher has been fortunate enough to encounter a moment in time where an essential component of EU supranational regulation – the Common European Asylum System (CEAS) – was challenged and contested by the Habermasian 'learning processes' of stakeholders at all levels. It should be highlighted that the fieldwork was conducted across 2014 and 2015, during which time the CEAS was perceived by actors in both primary and secondary data to stumble in its objectives of solving cross-border issues (see also the literature review in Chapter One), causing subsequent tensions to emerge between key actors at the national, supranational, and international levels, attributable to a range of conflicting allegiances of those actors among and between each level.

Here, the literature review in Chapter One also picked up on such allegiances being a rich site for academic study around irregular migration, as Bloch and Chimienti put it:

*[An] important area of research is the analysis of the relationships between irregular migrations, nation-state allegiances, forms of belonging, citizenship and human rights. Linked to this is the role of civil society, not just in terms of perceptions about irregular migrants but also in terms of the role of civil society in the recognition or repression of this group.*⁶

The fundamental importance of civil society (both national and cross-border actors) to the success supranational and international project cannot be understated – no matter how normatively uninfluential the actors have been revealed in the present data, the very presence of civil society at the site of national, supranational, and international tensions is a sign that civil society learning processes are – and will be in future – possible and necessary.

The centrality of civil society's influence in the literature is again underscored and borne out via the Habermasian notions of the preconditions of a successful

⁶ Bloch and Chimienti, "Irregular Migration in a Globalizing World."

supranational regulation operating in common across nation-state actors, namely: his two-fold project – of overcoming the stubborn political practices of nationalism and realising his model of supranational civic solidarity via his two innovations discussed in Chapter Two – both of which depend upon the success of such ‘learning processes’ linked to growing civic awareness beyond the borders, as the theoretical shift of democratic loyalties to a future transnational society occurs.⁷ Habermas clarifies his position on this point in *The Crisis*:

*I am, of course, a long-standing defender of the thesis that the collective identity of democratic political communities can be extended beyond the borders of existing nation states.*⁸

The findings discussed in Chapters Four, Five, and Six, provide evidence that through dialectical efforts to improve normative influence in relation to the legitimization of supranational and national regulation, civil society can expect to contest the piecemeal national implementation of irregular migrant management and detention in the EU, in favour of a shift to full common regulatory control at the supranational level as per Habermas’ model.

IV. LEGAL STRUCTURES: INTERNATIONAL FRAMEWORKS AND THE EU COMMON EUROPEAN ASYLUM SYSTEM

Chapter Three endeavoured to provide a select descriptive overview of the various refugee protection frameworks operating at the international, supranational and domestic levels, with reference to the implementation by EU Member States of the CEAS, particularly highlighting regulation regarding detention. The international framework with the 1951 *Refugee Convention* as its central pillar – with other treaties such as the ICCPR and ECHR as serving as supporting structures – is by reason of historical political forces a patchwork of regulatory principles, which are intergovernmental rather than international in character. This allows states to implement and interpret many international legal principles in a myriad of ways, rather than providing international consistency for individuals fleeing across boundaries.

⁷ Habermas, *The Crisis of the European Union: A Response*, 47.

⁸ *Ibid.*, 94.

At the regional level, the supranational framework in the EU via the CEAS endeavours to provide a harmonised common system, under which Member States are to use their own means to achieve a set of standardised ends. The CEAS contains clear codified principles that seek to clarify some of the gaps in the international framework across the territory of the EU. A sample of regulations in two case-study Member States (France and Czech Republic) demonstrated differing domestic legal frameworks at the implementation end of the spectrum, resulting in differential treatment of individuals across internal borders. Select examples of supranational and national juridical control over the implementation of the CEAS and the 1951 *Refugee Convention* demonstrated that at least in the regional context of the EU, the loose principles of refugee protection at the international level are to an extent guarded by a judiciary operating to restrain divergence among Member States and reinforce the supranational structure.

The legal analytical discussion highlights the open-ended nature of the regulatory spectrum, such that at the international and supranational end of the regulatory spectrum, principles are broad but often lack clarity for enforcement, whilst at the other end, national frameworks of protection within the EU may well be prescribed and enforced, but are ultimately different from one another, creating a reality of unevenness and a lack of harmonisation in the implementation of legal principles. The phenomenon of diversity in implementation is further evidenced in the findings explored by this research in Chapters Four, Five, and Six, catching individual asylum seekers in the space between international legal cosmopolitanism of the international and EU levels, and the sovereignty of the state.

V. CRITICAL DISCOURSE: ANALYSIS OF TEXTS

Chapter Four drew on the descriptive elements of Chapters Two and Three, and then produced conclusions from interpretation and results of a Critical Discourse Analysis (CDA) conducted on secondary texts produced by actors in the case studies (method and processes discussed in Chapter One). This element of the research produced substantive results.

The findings in Chapter Four on the CDA results were highly indicative, and recursively supported the findings in Chapters Five and Six. The analysis of texts

uncovered convincing qualitative evidence of significant normative conflict existing amongst and between actors operating in the matrix of national, supranational, and international levels in relation to irregular migrant asylum seeker detention in the EU.

As was similarly found in the analysis of the interview data in Chapters Five and Six, the CDA analysis in Chapter Four revealed that national governmental actors were more normatively powerful than civil society, and appeared often unchallenged in their social normalisation of the detention of irregular migrant asylum seekers. Supranational NGOs were revealed as attempting to land effective normative messaging with mixed results, while state-funded international intergovernmental actors were revealed to be cautious, casual, and deferential in relation to defending the normative value of international law. All NGOs both at the supranational and national levels were revealed to be presently perceived as sub-optimal in their efforts to influence EU-level normative structures.

A picture of power imbalance emerged in the CDA analysis process, in which governmental actors at both the national and supranational levels were revealed to retain dominance in their normative power and authority in regulating irregular migration – this was more than social normalisation, but a type of positivist self-sourced legitimisation (contrasted with Habermasian constructivist European democratic legitimation discussed in Chapter Two). This apparently unfettered normative power demonstrated in the texts retained its character despite evidence of attempts by civil society at all levels to challenge it. This power imbalance was further confirmed through the triangulation of the results of the interview data analysis in Chapters Five and Six.

The macro conclusion available on the findings of Chapter Four, and supported by the findings on primary interview data in Chapters Five and Six, was that secondary sources revealed governmental actors were forming hegemonic normative discourse with little input from civil society actors, and in this way were able to presently protect their executive version of norms relating to the ongoing detention of irregular migrant asylum seekers.

An argument was produced in Chapter Four by the researcher (as per the CDA method) on the basis of the data: with reduced ideological opposition, the normative expressions of state and supranational power in secondary social discourse on the topic of regulating

irregular migration – including detaining asylum seekers – have been (as per the legal frameworks described in Chapter Three) converted into the coercive punitive power of supranational and national regulation and practice. Accordingly, the EU institutions that sought to regulate the supranational level (per the hypothesis in Chapter One) appeared in the discourse to have ambition to reduce opportunities for detention of irregular migrant asylum seekers, without the capacity to fully implement (per *shared competence* discussed in Chapter Three) and without expressly laying out clear terms for Member States as to when(ever) detention ‘proves necessary’.⁹

The findings in Chapter Four were then recursively linked back to the theoretical framework underpinning the research in Chapter Two, in order to produce further arguments available on the evidence: by acting in concert with national and European populations, and operating under Habermas’ conditions of communicative rationality and European solidarity, civil society has a dialectical role as the cosmopolitan defender of international human rights norms against unfettered normative state power relating to the detention of irregular migrants under the CEAS, and that civil society is a key participant in a broader societal move via learning processes, towards a supranational and a future cosmopolitan world order as per Habermas’ model.

However, Chapter Four also found evidence in the discourse that civil society in the 2015 influx of refugees into the EU was not fully succeeding in the theoretical task that Habermas sets out – and indeed barely succeeding in challenging singular Member State actors in their divergence from the rules. Accordingly, the normative dictates of the CDA method allowed the researcher to propose that civil society actors might be more optimally organised for normative influence by achieving the same normative height – having a similar multi-state depth and cross-border popular force – as the supranational super-structures it sought to influence. By analogy, far from civil society’s David successfully subduing hegemonic Goliath, Goliath can only be challenged by another cross-border civil society Goliath.

⁹ European Commission, *Explanatory Memorandum: Proposal for a Directive of the European Parliament and of the Council Laying Down Standards for the Reception of Applicants for International Protection (Recast)*, 10.

VI. INTERVIEW DATA: NATIONAL, AND EU/INTERNATIONAL LEVEL ACTORS

The abductive processes described in Chapter One in relation to secondary data complemented the results of rich and thick qualitative analysis of thematic categories emerging interview data in Chapters Five and Six. These thematic results further supported the findings of the research that the interception and detention of irregular migrant asylum seekers by EU Member States is indeed the scene of power struggles – the intersection of the will of the state as sovereign, the will of EU institutions seeking to regulate supranational frameworks, and the will of the global citizen (the refugee) and their defenders, operating in line with Jürgen Habermas’ model of a societal move via Habermasian learning processes, towards international legal cosmopolitanism.¹⁰

The results of Chapters Five and Six are synthesised in this section. At the national level, it was clear from the findings that national NGOs perceived they could inhabit alternate larger power structures to achieve a sense of alternative supranational power – in many instances this was via the national and supranational judicial systems (described in Chapter Three), through which NGOs felt they had a lever to pull in order to constrain Member State activity in the implementation of the CEAS. Member States confirmed and openly acknowledged the existence of this judicial lever in the data. This type of alternate inhabitation of power was also displayed among international-level actors in the data, who observed that NGOs found safety in joint lobbying positions in coordination with other NGOs, in order to essentially grow their positions larger than their mere national or Brussels-based normative station. This feature of the interview data then links back to the Goliath versus Goliath arguments made by the researcher in Chapter Four, which is further expanded upon in the concluding section below.

Another key site of tension amongst and between the national, supranational, and international actors arose through topic of the length of detention in the CEAS. For example, the data revealed that Member States tended perceive detention length as a mere practical regulatory itemisation – a regulatory positivist checklist of things to be done to an applicant; yet only some NGOs were observed to push back against this, causing a site for conflict around this issue. Indeed, interviewees of all types demonstrated less urgency as to what *should* or *ought* to happen in relation to detention,

¹⁰ Habermas, *The Crisis of the European Union: A Response*.

replacing this with a surprising practical positivist acceptance of detention as a by-product of a legal and judicial process – essentially reducing it to perceptions of box-ticking – despite the research showing that definitions of alternatives to detention are not settled in the CEAS (per Chapter Three).

In a similar vein, consultations of NGOs by Member States over the CEAS and its detention provisions was also an area in which the dominance of State-actors was apparent across both the primary and secondary data. The thematic analysis of the interview data revealed a piecemeal nature of consultations, perceived by NGOs as mere box-ticking on the part of Member States, and by Member States conversely as mere normal procedure. This tension between types of actors was further muddled by a lack of transparency in the results of such consultations, further frustrating the ownership and purpose of certain implementation outcomes in relation to detention at the national level. NGOs at all levels were perceived as agitators for the common implementation (convergence) of the CEAS across Member States, yet Member States appeared to be perceived as heading in the other direction, towards national-level divergence; sovereign versus the supranational recalling the binaries discussed in Chapter One, with actors pulling in different directions. This suggests further support for the Goliath versus Goliath arguments made in relation to the formation of cross-border civil society actors in Chapter Four.

A battle for normative truth in the interview data among and between the national, supranational, and international levels further demonstrated a battle for a kind of civil society power that Habermas links to legitimating regulatory control – and here the analysis of primary data attempted to sort out which category of actor was normatively dominant, the sovereign, the EU, or international law (or a mixture of all three). The European Commission was often uncovered in the data to be the final arbiter and owner of implementation of the CEAS, whereas the Commission's own perceptions suggested a more removed role, with implementation of the CEAS being a joint venture of actors amongst and between all levels (national, supranational, international). The Commission's joint venture notion was further confirmed by interview data revealing that all actors conceded (begrudgingly or openly) that NGOs were the ultimate experts when it came to on-the-ground realities of CEAS implementation within Member States. This suggested that at least some normative power was held by NGO actors operating at the national, supranational, and international levels, and was most sharply

revealed when being wielded by NGOs in aggregate. NGOs revealing efforts to work in concert provided further evidence for the supporting the arguments for mega civil society actors in Chapter Four, and in the conclusions below.

VII. CONCLUSIONS FROM THE COMBINED DESCRIPTIVE AND ANALYTICAL ELEMENTS OF THE RESEARCH

The descriptive elements of Chapters Two and Three are combined with the analysis and results of Chapters Four, Five, and Six, creating a platform for the following evidence-based arguments suggested by the research as a whole. As discussed in Chapter One, the fieldwork was conducted in 2014 and concluded in 2015. It is therefore important that the conclusions on the fieldwork are not to be considered as making assumptions about events that happened after 2015. Rather, the conclusions have their basis in data collected in the lead-up to the influx of asylum seekers into the territory of the EU in 2015, and the analysis allows for several indicative take-aways to be made in relation to the aftermath of the influx, particularly including broader implications as to the implementation of supranational regulatory systems that seek to respond to cross-border problems.

A. Implications of the findings

The following propositions are the result of recursive and abductive processes conducted on the research data, which aim to tie the research project together as described in Chapter One. The findings uncovered by the research suggest that Habermas' theory on international legal cosmopolitanism in *The Crisis* in 2012 (discussed in Chapter Two) is largely accurate, and that the asylum influx events in Europe across 2014 to the present time indicate that the EU is moving along an imperfect path through civil society learning processes and adaptations, towards a future common asylum system that can manage cross-border problems better than sovereign states, but which would need to be supported by enhancing cross-border civil solidarity among the European peoples and across EU Member States.

This research makes a unique and innovative contribution to public policy as it relates to international, EU, and national law on asylum, by addressing gaps in the

literature discussed in Chapter One through uncovering the dynamics of normative contests between and among civil society and institutional actors over the shift from national to supranational regulatory frameworks in the EU. These shifts occurred in relation to the CEAS both in the lead up to the 2015 influx of asylum seekers into the territory EU, and across its aftermath. It is clear on the findings of fieldwork conducted in 2014 and 2015 that state and supranational authorities in the EU were normatively dominant in influencing the formation of regulations and rules regarding irregular migration and detention that operate at both the national supranational levels, while civil society was observed to be in the early stages of being able to powerfully influence such norms through a dialectical contest among actors. The research confirms, through indicative qualitative analysis of thick and rich perceptions available in primary and secondary data, that divergence in the Member State implementation of the CEAS in relation to detention is perceived by all actors at all levels to be systemically deficient, and caught between supranational and international ambition, and the realpolitik of national domestic and legal implementation. There is clearly a long way to go along the Habermasian route towards the a more comprehensively implemented CEAS. However, this finding is not to suggest that either the CEAS or project of European Union is failing. Rather, this research has revealed an important and necessarily contested process of normative legitimization of regulation remains steadily underway, with NGOs, Member States, and supranational and international actors continuing to engage in the dialectical challenge.

In this regard, Member States were revealed in the findings to be avoiding convergence and preferring their own interpretations of the supranational CEAS rules, with data indicating inconsistencies around the detention of irregular migrants in different Member States. NGOs attempted to influence their own Member State authorities in relation to the CEAS on the topic of detention, but were at the same time revealed not to be focused on influencing the EU-level CEAS. Likewise, stakeholder consultations conducted by governmental actors at the national and supranational levels appeared to be viewed as a muted tick-box exercise, with actors revealing a perception that such consultations contained little opportunity to normatively influence the structure of the regulatory instruments.

Imbalances in normative influence over the CEAS detected in the data inferred the implication that such imbalances may need to be corrected in order for future resolution of cross-border problems to be successful – resonating with Habermas’ arguments for a reformed EU based on cross-border civil solidarity among the European peoples (discussed in Chapter Two). This implication is supported by the triangulated findings across Chapters Four, Five and Six, which suggested that current weaknesses in normative influence among civil society actors indicates a need for more work to be done on enhancing cross-border civil solidarity to enhance democratic legitimacy at the supranational level, and in doing so more effectively engage with the normative dominance by Member States and EU institutions that shows up clearly across the results of the analysis of the primary and secondary data in this research.

At the time of writing, the size and type of NGO actors operating at the national and supranational levels has not changed a great deal since the fieldwork was conducted. However, the reach of media (including social media) continues to expand and cross borders, causing popular social movements to rebound across the globe. In relation to the implications of the research findings, current developments in communication technologies suggests there is hope for the ability of civil society to gather enhanced popular cross-border support through new communication methods, towards improved democratic legitimization of supranational regulatory frameworks such as the CEAS. This is also true for the project of European Union, which continues to enhance its reach through its institutions such as the European Commission, to the European peoples (cf. Habermas’ first innovation described in Chapter Two) via innovative digital communication mechanisms.¹¹

B. Positive implications post-2015 influx

The 2015 influx of refugees into the territory of the EU followed the initial fieldwork period of this project, and sparked an increase in media activity and a renewed focus in the academic literature (discussed in Chapter One). Many in academe critiqued the CEAS as a failed mechanism for handling the influx, and a sign of the failure of the

¹¹ Diego Giannone and Mauro Santaniello, “Governance by Indicators: The Case of the Digital Agenda for Europe,” *Information, Communication & Society* 22, no. 13 (2019): 1890.

project of the European Union. However, taking into account the findings in Chapters Four, Five, and Six from fieldwork across 2014 and 2015, it is arguable that rather than causing it to fail, the 2015 challenge instead put the whole machinery of the CEAS to the test, also putting under pressure the mix of its attached national, supranational, and international stakeholders. At time of writing, the CEAS has not collapsed and remains operational, and Member States continue to actively engage in a process of improved implementation. Indeed, in September 2020, the European Commission announced a proposed *New Pact on Migration and Asylum* to be agreed by Member States.¹² This is suggestive of the ongoing machinations of Habermasian learning and adaptation processes among civil society actors linked to the CEAS, as was evident in the results of the analysis of the data in Chapters Four, Five and Six.

There are several possible enhancements available from the results of this research, which post-influx may enhance the engagement of actors in producing more coherent implementation of the CEAS in the future. The results suggested that some actors were more normatively empowered than others in the data, and this resulted in the contest at the site of the intersection to be perceived as one-sided. The findings also suggest that the European Union frequently breaks into a diverging morass of sovereign states when asylum seekers encounter it. Accordingly, placing a focus on developing enhanced cross-border civil society actors may improve the adaptation and cross-border learning processes required to keep the system truly common as it moves forward into the future.

It has been argued in this research that current civil society actors should be willing to undergo Habermas' theoretical learning and adaptation processes to achieve a greater cross-border reach and normative size. This conceptual resizing would, as per Habermas' theory, allow better cross-border will-formation and optimised European solidarity at the supranational level, with greater opportunity to cross-border issues to be resolved by Member States via common unified implementation. Civil society actors in the data already thought of themselves as 'EU-level' or 'international-level', but their character across the broad sample was revealed in the data to be in reality tied to a national-level status. The project of solving cross-border problems

¹² European 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*.

facing the EU, such as the detention of irregular migrants, is therefore arguably not only a case of reformed EU institutions – as Habermas puts it – which would contain more democratic legitimacy, but might also be best achieved by organising and linking national and supranational civil society actors into a larger and more robust superstructure, as mega civil society actors, in a manner that matches the organisation and super-structure of the EU institutions.

As was first described in Chapter Four, and reiterated here, the research results suggest that far from civil society's David successfully subduing hegemonic Goliath, Goliath can only be challenged by another Goliath. As such, this research suggests that in the future, the supranational level of governance would need to partner with a truly supranational cross-border civil society to legitimate the better implementation of supranational frameworks that aim to solve cross-border problems more effectively than sovereign states could on their own. Given the Internet's role in bringing together global popular reaction to cross-border crises in the decade 2010 to 2020, it is conceivable that technologically-minded civil society actors may be able to bring to bear massive unprecedented cross-border support for enhanced domestic legitimisation of regulatory frameworks (or supranational frameworks where relevant) in situations where implementing authorities fail to adequately meet the normative standard expressed in international human rights and protection frameworks supported by the massive cross-border popular movement.¹³

The formation and habits of such a future enhanced supranational and international civil society would also move towards Habermas' model of a unified world society backed by cross-border civic solidarity. In relation to the CEAS, such a society would increasingly see itself as the peoples of Europe, injecting mass legitimacy into the cross-border regulation of a legally cosmopolitan European society, which would in turn better allow for the international law rights of the irregular migrant to be implemented in a consistent and truly harmonised even manner, as they move geographically into – and freely through, without restraint or detention – the European Union.

¹³ Hans-Jörg Trenz et al., "Taking Voice and Taking Sides: The Role of Social Media Commenting in Solidarity Contestation," in *Citizens' Solidarity in Europe* (Edward Elgar Publishing, 2020), 152.

This notion then brings about a brief discussion about persistence of advocates for an enhance world society, and the fundamental mechanism of will-formation as an activity of global citizens. As discussed in Chapter Two, Kant's sovereign hospitality is based on the idea of innate and universal principles existing within humanity. For Kant, 'hospitality means the right of a stranger not to be treated as an enemy when he arrives in the land of another'.¹⁴ The cross-social realities of today's digitalised and globally accessible social spaces inhabited by global citizens, means the universality of Kant's hospitality principle has arguably become more achievable than it has been at any point in history. Chapter One described the act of will-formation occurring above and between the national, supranational, and international levels, as bounded by the scope of this research. However, it is important to note that cross-border will-formation should be thought of as a wider exercise beyond the examination in the thesis, in which civil society has a vital role to play in a global conversation. This is to be distinguished idea of civil society *resisting* state and supranational authorities through popular uprisings. Instead, it is suggested that civil society as global citizens should be *engaging* at sites of normative contest, specific in order to participate in and catalyse learning processes (such as those examined by this thesis), in order help humanity move sovereign national societies closer to a future transnational society legitimated by cross-border civic solidarity.

VIII. EVALUATING THE RESEARCH AND IMPLICATIONS FOR FUTURE RESEARCH

The researcher uncovered several areas in which the methods selected prior to the EU asylum seeker crisis unfolding were no longer suited to the expansion of the data at hand. Since the fieldwork was already underway, an adaptive and recursive approach was used as per Yin allowed for parallel tasks to occur in line with the changes in the field.¹⁵ One method that both assisted the research, and later complicated it, was the use of the software program HyperResearch. During the analysis of the data, it was clear that in relation to the textual analysis (Critical Discourse Analysis) the software helped to uncover the key CDA elements in the texts. However, when it came to the recursive back and forward of the thematic analysis of the interview data, the researcher resorted

¹⁴ Kant, *Perpetual Peace*, 20.

¹⁵ Yin, *Qualitative Research from Start to Finish, Second Edition*, 32.

to coding manually via Microsoft Excel spreadsheets to incorporate the experience of the researcher during the interviews, which produced enumerated results, which in turn proved to be much faster to manipulate than the text-only features of the software program.

A further problem occurring in the research was the scope and expense of conducting the appropriate interviews with a range of actors spread across a wide geographic range. The research funding covered the initial fieldwork in Europe in 2014, however the researcher was then faced with bidding for further research funding beyond the standard supplied amount for PhD research, in order to conduct further fieldwork in 2015. The problem was overcome when the gift of additional funding was provided by the Australian National University, a decision that greatly enhanced and positively influenced this research.

Several key implications of the research findings on possible future research are available from the results. First, it is clear to the researcher that there is an entire undiscovered world of civil society activity among and between institutional, governmental, and NGO actors operating on the topic of asylum seekers entering the EU. This is almost entirely unrevealed to the European populous, and indeed civil society actors themselves. Civil society actors may benefit from further and deeper research in this context – it is clear that there continue to be large gaps in the literature, as discussed in Chapter One.

The results also show evidence that actors are locked in intense lobbying and power struggles among and between the national, supranational (EU), and international levels, in relation to normative influence. These struggles are mostly hidden from the view of the European peoples that Habermas describes as being vital to form cross-border solidarity (as described in Chapter Two, see page 82 above). This research does not cover the conduct of the mass media in revealing struggles for normative power (is there a European Union television channel or newspaper that is not captured by a Member State in some way?), and indeed such mass media studies are a completely separate and well-established avenue of academic research. Nevertheless, further linkages for interdisciplinary research may be formed between the hopeful development of regulatory superstructures such as the CEAS, and the impacts on these unique regulations by the mass media in its theoretical function described by Habermas in *The*

Crisis, as supranational regulations are attempted to be adapted and implemented as a common legal framework.

It also appears to the researcher on the basis of the results, that the availability to the public or civil society of a deep and rich social perception of cross-border will-formation occurring in the European Union appears to be almost completely lacking. In order for civil society to be aware of cross-border issues, and to better cope with such frictions (through civil society learning processes as Habermas points out in *The Crisis*), and in order for cross-border will-formation to occur to legitimise supranational legislation – the same will-formation contemplated by the research hypothesis – the public needs to understand the transactions (the site of tensions) that are occurring between the national and supranational levels. Numerous cross-cutting EU regulatory and perception problems therefore spring to mind that could benefit from similar understanding among and between affected actors at the national, supranational, and international levels.

Future research may involve an exploration of Habermasian cross-border multi-level will-formation and learning processes in the support of similar attempts at supranational and international regulatory implementation, under the conditions of international legal cosmopolitanism. Given the multitude of present politico-legal problems emerging in our changing cross-border world, such research projects could include examining issues around cross-border will-formation and civil society learning processes in the international regulation of climate change frameworks, the conditions of regulating supranational and international trade, the cross-border regulation of health and pandemics, movements towards global governance on human rights, and other related cross-border topics ripe for future research, all of which can draw value from the insights from this thesis into political theory, EU regulatory integration against the backdrop of international law, and asylum seeker policy.

BIBLIOGRAPHY

- Acosta Arcarazo, Diego. "The Returns Directive: Possible Limits and Interpretation." In *The Returns Directive: Central Themes, Problem Issues, and Implementation in Selected Member States*, edited by Karin Zwaan, 7-24: Nijmegen: Wolf Legal Publishers, 2011.
- Adelman, Sam. "Cosmopolitan Sovereignty." In *Cosmopolitan Justice and Its Discontents*, edited by Cecilia Bailliet and Katja Franko Aas. Abingdon, Oxon ; New York: Routledge, 2011.
- Agamben, Giorgio. *Homo Sacer: Sovereign Power and Bare Life*. Stanford, Calif.: Stanford University Press, 1998.
- Allain, J. "The Jus Cogens Nature of Non-Refoulement." *International Journal of Refugee Law* 13, no. 4 (2001): 533-58.
- Alo and Osso Joined Cases C-443/14 and C-444/14*, CJEU Judgment of the Court (Grand Chamber) 1 March 2016 (CJEU ECLI:EU:C:2016:127).
- Amnesty International. "Cruel Migration Detention Exposes Hypocrisy of European Commission (3 March 2017)." Accessed at <<https://www.amnesty.org.au/cruel-migration-detention-regime-exposes-hypocrisy-european-commission/>> on 20 November 2017.
- Arrêté Du 9 Octobre 2015 Pris En Application de L'article L. 741-1 Du Code de L'entrée Et Du Séjour Des Étrangers Et Du Droit D'asile*. Version consolidée au 27 juin 2020
<<http://circulaires.legifrance.gouv.fr/index.php?action=afficherCirculaire&hit=1&r=35851>> accessed at 20 June 2020.
- ASSFAM, Forum réfugiés-Cosi, France terre d'asile, La Cimade, Ordre de Malte France, and Solidarité Mayotte. *Report: Administrative Retention Centers and Premises*. Paris 2016.
- Asylum Act*. 325/1999sb Act of 11 November 1999 as Amended (Czech Republic). Czech Government - Ministry of Interior Website: Asylum
<<https://www.mvcr.cz/mvcren/file/asylum-act.aspx>> accessed 20 June 2020.
- Beirens, Hanne. "Cracked Foundation, Uncertain Future: Structural Weaknesses in the Common European Asylum System." Migration Policy Institute, 2018.
- Benhabib, Seyla. "Carl Schmitt's Critique of Kant: Sovereignty and International Law." [In English]. *Political Theory* 40, no. 6 (Dec 2012): 688-713.
- Benhabib, Seyla, Jeremy Waldron, Bonnie Honig, Will Kymlicka, and Robert Post. *Another Cosmopolitanism*. The Berkeley Tanner Lectures. Oxford ; New York: Oxford University Press, 2006.

- Betts, Alexander, James Milner, and Gil Loescher. *The United Nations High Commissioner for Refugees (UNHCR): The Politics and Practice of Refugee Protection into the 21st Century*. 2nd ed. Vol. 62., New York: Routledge, 2012.
- Binder, Christina. "Stability and Change in Times of Fragmentation: The Limits of Pacta Sunt Servanda Revisited." *Leiden journal of international law* 25, no. 4 (2012): 909-34.
- Bloch, Alice, and Milena Chimienti. "Irregular Migration in a Globalizing World." *Ethnic and Racial Studies* 34, no. 8 (2011): 1271.
- Boccardi, Ingrid. *Europe and Refugees: Towards an EU Asylum Policy*. Kluwer Law International, 2002.
- Boed, Roman. "The State of the Right of Asylum in International Law." *Duke Journal of Comparative & International Law* 5, no. 1 (1994): 1.
- Boswell, Christina. "The 'External Dimension' of EU Immigration and Asylum Policy." *International Affairs (Royal Institute of International Affairs 1944-)* 79, no. 3 (2003): 619-38.
- Boswell, Christina, and Andrew Geddes. *Migration and Mobility in the European Union*. Palgrave Macmillan, 2011.
- Breeze, Ruth. "Critical Discourse Analysis and Its Critics." *Pragmatics* 21, no. 4 (2011): 493-525.
- Çali, Basak. "On Legal Cosmopolitanism: Divergences in Political Theory and International Law." *Leiden Journal of International Law* 19, no. 4 (2006): 1149-63.
- Camargo, Pedro Pablo. "The Right to Judicial Protection: "Amparo" and Other Latin American Remedies for the Protection of Human Rights." *Lawyer of the Americas* 3, no. 2 (1971): 191-230.
- Canefe, Nergis. "The Fragmented Nature of the International Refugee Regime and Its Consequences: A Comparative Analysis of the Applications of the 1951 Convention." In *Critical Issues in International Refugee Law: Strategies toward Interpretative Harmony*, 174-210: Cambridge University Press, 2010.
- Cassese, Antonio. *International Law*. New York: Oxford University Press, 2005.
- Cavallar, Georg. *Imperfect Cosmopolis: Studies in the History of International Legal Theory and Cosmopolitan Ideas*. University of Wales Press, 2011.
- Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France) (Merits)*, [2008] ICJ Reports 177.
- Charter of Fundamental Rights of the European Union*. [2012] OJ C 326/02.
- Chetail, Vincent. "Are Refugee Rights Human Rights? An Unorthodox Questioning of the Relations between Refugee Law and Human Rights Law." In *Migrations and*

Human Rights, Collected Courses of the Academy of European Law (Forthcoming), edited by R. Rubio Marin. Oxford: Oxford University Press, 2013.

———. "The Common European Asylum System: Bric-À-Brac or System?". In *Reforming the Common European Asylum System: The New European Refugee Law*, edited by Vincent Chetail, Phillipe De Bruycker and Francesco Maiani, 32: Boston: Brill Nijhoff, 2016.

Circulaire IOCL1107084C Du 1er Avril 2011 Relative Au Droit D'asile: Application Du Règlement CE N° 343/2003 Du Conseil Du 18 Février 2003.

<<https://www.interieur.gouv.fr/fr/Media/Immigration/Files/Circulaire-IOCL1107084C-du-1er-avril-2011-relative-au-droit-d-asile.-Application-du-reglement-CE-n-343-2003-du-Conseil-du-18-fevrier-2003-dit-Reglement-Dublin-Mise-en-oeuvre-des-procedures-d-examen-prioritaire-de-certaines-demandes-d-asile-ment>> accessed at 20 June 2020.

Code de Justice Administrative (CJA). Version Consolidée Au 26 Avril 2020.

<<https://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006070933>> accessed at 20 June 2020.

Code de L'action Sociale Et Des Familles (CASF). Version Consolidée Au 19 Juin 2020.

<<https://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006074069>> accessed at 20 June 2020.

Code de L'entrée Et Du Séjour Des Étrangers Et Du Droit D'asile (CESEDA). Version Consolidée Au 20 Juin 2020.

<<https://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006070158>> accessed at 20 June 2020.

Code of Administrative Procedure. 500/2004sb Act of 24 June 2004 as Amended (Czech Republic).

Consolidated Versions of the Treaty on European Union and the Treaty on the Functioning of the European Union. [2012] OJ C 326/1.

Consortium of Migrants Assisting Organizations in the Czech Republic. *Position Paper on the Proposed Reform of the Common European Asylum System*. October 2016.

Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). Opened for Signature 4 November 1950, 213 UNTS 221 (Entered into Force 3 September 1953).

Convention Relating to the Status of Refugees. Opened for Signature 28 July 1951, 189 UNTS 150 (Entered into Force 22 April 1954).

"Czech Police Mark Migrants on Their Forearms, Complain Italian Jews." *Novinky.cz News*, 3 September 2015.

- Dahl, Robert A., and Ian Shapiro. *On Democracy*. 2nd edition. ed. New Haven: Yale University Press, 2015.
- Davies, Sara E. "Redundant or Essential? How Politics Shaped the Outcome of the 1967 Protocol." *International Journal of Refugee Law* 19, no. 4 (2008): 703-28.
- Dawson, Mark. "The Political Face of Judicial Activism: Europe's Law-Politics Imbalance." In *Judicial Activism at the European Court of Justice: Causes, Responses and Solutions*, edited by Bruno de Witte, Elise Muir and Mark Dawson, 11-31. Cheltenham, Gloucestershire, United Kingdom: Edward Elgar Publishing Limited, 2013.
- Décision Du 1er Mars 2013 Fixant La Liste Des Associations Humanitaires Habilitées À Proposer Des Représentants En Vue D'accéder Aux Lieux de Rétention*. <<https://www.interieur.gouv.fr/fr/Publications/Bulletin-officiel-du-ministere-de-l-Interieur/Decision-du-1er-mars-2013-fixant-la-liste-des-associations-humanitaires-habilitees-a-proposer-des-representants-en-vue-d-acceder-aux-lieux-de-retention>> accessed at 20 June 2020.
- Dedman, Martin. *The Origins & Development of the European Union 1945-2008: A History of European Integration*. London: Routledge, 2010.
- 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 2008/115/EC*. [2008] OJ L 348/98.
- Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on Standards for the Qualification of Third-Country Nationals or Stateless Persons as Beneficiaries of International Protection, for a Uniform Status for Refugees or for Persons Eligible for Subsidiary Protection, and for the Content of the Protection Granted 2011/95/EU*. [2011] OJ L 337/9.
- 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 2013/32/EU*. [2013] OJ L 180/60.
- 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 2013/33/EU*. [2013] OJ L 180/96.
- Eberl, Jakob-Moritz, Christine E. Meltzer, Tobias Heidenreich, Beatrice Herrero, Nora Theorin, Fabienne Lind, Rosa Berganza, *et al.* "The European Media Discourse on Immigration and Its Effects: A Literature Review." *Annals of the International Communication Association* 42, no. 3 (2018): 207-23.
- Elliott, Brian. "Theories of Community in Habermas, Nancy and Agamben: A Critical Evaluation." *Philosophy Compass* 4, no. 6 (2009): 893-903.
- European Commission. "Acquis - Glossary of Summaries: Summaries of EU Legislation." <<https://eur-lex.europa.eu/summary/glossary/acquis.html>>, accessed at 30 July 2020.

- . *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, dated 23 September 2020.
- . *Explanatory Memorandum: 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, dated 13 July 2016.
- European Council. *Presidency Conclusions - Tampere European Council*. 1999, SN 200/99, Brussels. October 16, 1999.
- European Council on Refugees and Exiles. *Boundaries of Liberty: Asylum and de Facto Detention in Europe*. ECRE, 2017.
- European Court of Human Rights. "Guide on Article 5 of the European Convention on Human Rights, Updated on 30 April 2020."
<https://www.echr.coe.int/Documents/Guide_Art_5_ENG.pdf>, accessed at 15 August 2020.
- European Parliament. *Fact Sheets on the European Union: The Maastricht and Amsterdam Treaties*
<https://www.europarl.europa.eu/ftu/pdf/en/FTU_1.1.3.pdf> accessed at 1 February 2020.
- Eurostat (European Commission). "Asylum Statistics - Asylum and First Time Asylum Applicants - Annual Aggregated Data (2019)."
<<http://ec.europa.eu/eurostat/web/products-datasets/product?code=tps00191&lang=en>>, accessed at 30 May 2020.
- . "Asylum Statistics - Citizenship of First Time Applicants."
<http://ec.europa.eu/eurostat/statistics-explained/index.php?title=Asylum_statistics#Citizenship_of_first-time_applicants:_most_from_Syria_and_Iraq>, accessed at 1 March 2018.
- . "Asylum Statistics - Statistics Explained."
<http://epp.eurostat.ec.europa.eu/statistics_explained/index.php/Asylum_statistics#>, accessed at 1 March 2018.
- Fairclough, Norman. *Analysing Discourse: Textual Analysis for Social Research*. Psychology Press, 2003.
- . *Critical Discourse Analysis*. Routledge, 2013.
- . *Discourse and Social Change*. Cambridge, Mass: Polity Press, 1992.
- Farrell, Brian R. *Habeas Corpus in International Law*. New York, New York: Cambridge University Press, 2017.
- Feller, Erika. "The Evolution of the International Refugee Protection Regime." *Washington University Journal of Law & Policy* 5 (2001): 129.

- Follesdal, Andreas. "The Principle of Subsidiarity as a Constitutional Principle in International Law." *Global Constitutionalism* 2, no. 1 (2013): 37.
- Foucault, Michel. "Confronting Governments: Human Rights (1981)." In *Power: Essential Works of Foucault, 1954-1984*, edited by J.D. Faubion. New York: New Press, 2000.
- French General Directorate for Immigration. "Annual Report on Migration and Asylum (Part 2) - April 2018."
<https://www.immigration.interieur.gouv.fr/content/download/109567/872937/file/3_arm_2017_%20FR_NCP-part-2-EN-version.pdf> accessed 14 May 2018.
- Gabčíkovo-Nagymaros Project (Hungary v Slovakia) (Merits)*, [1997] ICJ Reports 7.
- Garlick, Madeline. "The Dublin System, Solidarity, and Individual Rights." In *Reforming the Common European Asylum System: The New European Refugee Law*, edited by Vincent Chetail, Phillipe De Bruycker and Francesco Maiani, 159-96: Boston: Brill Nijhoff, 2016.
- Geertz, Clifford. *The Interpretation of Cultures : Selected Essays*. New York,: Basic Books, 1973.
- Geoffroy, Romain. "Extend the Maximum Duration of Administrative Detention 'a Useless and Ineffective Idea'." *Le Monde*, 28 September 2017.
- Giannone, Diego, and Mauro Santaniello. "Governance by Indicators: The Case of the Digital Agenda for Europe." *Information, Communication & Society* 22, no. 13 (2019): 1889-902.
- Gil-Bazo, Maria Teresa. "Asylum as a General Principle of International Law." *International Journal of Refugee Law* 27, no. 1 (2015): 3-28.
- Glaser, Barney G., and Anselm L. Strauss. *The Discovery of Grounded Theory: Strategies for Qualitative Research*. New Brunswick USA: AldineTransaction, 1967. 2006.
- Goodwin-Gill, Guy S. "Article 31 of the 1951 Convention Relating to the Status of Refugees: Non-Penalization, Detention, and Protection." In *Refugee Protection in International Law: Unhcr's Global Consultations on International Protection*, edited by Erika Feller, Volker Türk, Frances Nicholson and Office of the UNHCR: Cambridge University Press, 2003.
- Goodwin-Gill, Guy S. "Convention Relating to the Status of Refugees, Protocol Relating to the Status of Refugees." *United Nations Audiovisual Library of International Law* (<http://www.un.org/law/avl>) (2008).
- Goodwin-Gill, Guy S., and Jane McAdam. *The Refugee in International Law*. 3rd ed. Oxford: Oxford University Press, 2007.
- Gül, Duygu. "The Crisis of the European Union. A Response." *Journal of Contemporary European Studies* 21, no. 3 (2013): 463-64.

- Habermas, Jürgen. "The Constitutionalization of International Law and the Legitimation Problems of a Constitution for World Society." *Constellations* 15, no. 4 (2008): 444-55.
- . "Law and Morality." *The Tanner Lectures on human values* 8 (1988): 217-79.
- . "'New' Perspectives for Europe." In *Social Europe*.
<<https://www.socialeurope.eu/new-perspectives-for-europe>>, accessed at 5 March 2019.
- Habermas, Jürgen. *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*. Translated by William Rehg. Studies in Contemporary German Social Thought. Cambridge, Mass.: MIT Press, 1996.
- . *The Crisis of the European Union: A Response*. Translated by Ciaran Cronin. English ed.: Polity, 2012.
- . *The Divided West* Translated by Ciaran Cronin. Cambridge; Malden: Polity, 2006.
- Habermas, Jürgen, and Max Pensky. *The Postnational Constellation: Political Essays*. Studies in Contemporary German Social Thought. 1st MIT Press ed. Cambridge, Mass.: MIT Press, 2001.
- Harvey, Colin. "Regionalism, Asylum and Solidarity in Europe." In *Renegotiating Westphalia: Essays and Commentary on the European and Conceptual Foundations of Modern International Law*, edited by Christopher Harding and C Chin L Lim: Martinus Nijhoff Publishers, 1999.
- Hassen El Dridi, Alias Karim Soufi C-61/11 PPU*, CJEU Judgment of the Court (First Chamber) 28 April 2011 (CJEU ECLI:EU:C:2011:268).
- Hathaway, James C. "A Reconsideration of the Underlying Premise of Refugee Law." *Harvard International Law Journal* 31, no. 1 (1990): 129.
- . *The Rights of Refugees under International Law*. Cambridge England ; New York: Cambridge University Press, 2005.
- Hathaway, James C., and Michelle Foster. *The Law of Refugee Status*. 2nd ed. Cambridge: Cambridge University Press, 2014.
- Heijer, Maarten Den, Jorrit Rijpma, and Thomas Spijkerboer. "Coercion, Prohibition, and Great Expectations: The Continuing Failure of the Common European Asylum System." *Common Market Law Review* 53, no. 3 (2016): 607-42.
- Hueglin, Thomas O. "Recensions / Reviews: The Crisis of the European Union. A Response." *Canadian Journal of Political Science* 48, no. Generic (2015): 485.
- International Covenant on Civil and Political Rights*. Opened for Signature 16 December 1966, 999 UNTS 171 (Entered into Force 23 March 1976).

- International Organization for Migration et al. *Joint Statement on Child Immigration Detention in the EU*, . Position Statement Released at the European Commission 11th EU Forum on the Rights of the Child 2017.
- Jackson, Kevin T. "Rethinking Economic Governance: A Naturalistic Cosmopolitan Jurisprudence." *Boston College International and Comparative Law Review* 36, no. 1 (2013): 39.
- Jesuit Refugee Service. *The CEAS Reform Package: The Death of Asylum by a Thousand Cuts?* Working Papers No 6. January 2017.
- K.K. v Ministry of Interior*, Czech Republic Supreme Administrative Court, 1 As 12/2009-61, 15 April 2009.
- Kant, Immanuel. *Perpetual Peace*. New York, Liberal Arts Press, 1957.
- Karatani, R. "How History Separated Refugee and Migrant Regimes: In Search of Their Institutional Origins." *International Journal of Refugee Law* 17, no. 3 (2005): 517-41.
- Klabbers, Jan, and Touko Piiparinen. *Normative Pluralism and International Law: Exploring Global Governance*. New York: Cambridge University Press, 2013.
- Kneebone, Susan. *Refugees, Asylum Seekers, and the Rule of Law : Comparative Perspectives*. Cambridge [UK] ; New York: Cambridge University Press, 2009.
- Kolb, Robert. *The Law of Treaties: An Introduction*. Edward Elgar Publishing, 2016.
- La Cimade. *Interview*. 20 August 2014.
- Lambert, Hélène, and Guy S Goodwin-Gill (eds.). *The Limits of Transnational Law : Refugee Law, Policy Harmonization and Judicial Dialogue in the European Union*. Cambridge University Press, 2010.
- Lavenex, Sandra. "'Failing Forward' Towards Which Europe? Organized Hypocrisy in the Common European Asylum System." *JCMS: Journal of Common Market Studies* 56, no. 5 (2018): 1195-212.
- Long, Katy. "When Refugees Stopped Being Migrants: Movement, Labour and Humanitarian Protection." *Migration Studies* 1, no. 1 (2013): 4-26.
- M.S.S. v Belgium and Greece*, Application no. 30696/09, Council of Europe: European Court of Human Rights, 21 January 2011.
- Majcher, Izabella, Michael Flynn, and Mariette Grange. *Immigration Detention in the European Union: In the Shadow of the "Crisis"*. Springer Nature Switzerland AG, 2020.
- McMaster, D. "Asylum-Seekers and the Insecurity of a Nation." *Australian Journal of International Affairs* 56, no. 2 (Jul 2002): 279-90.

- Medvedyev and Others v France*, Application no. 3394/03, Council of Europe: European Court of Human Rights, 29 March 2010.
- Menon, P.K. "The Subjects of Modern International Law." In *Hague Yearbook of International Law: Annuaire de La Haye de Droit International*, edited by T.M.C. Asser Institut. The Hague: Martinus Nijhoff, 1990.
- Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, [1986] ICJ Reports 1986.
- Mincheva, Elitsa. "Case Report on Kadzoev, 30 November 2009." *European Journal of Migration and Law* 12, no. 3 (2010): 361-71.
- Mise En Oeuvre de L'assignation À Résidence Prévue À L'article L.561-2 Du CESEDA, En Alternative Au Placement Des Familles En Rétention Administrative Sur Le Fondement de L'article L.551-1 Du Même Code.*
<http://circulaires.legifrance.gouv.fr/index.php?action=afficherCirculaire&hit=1&r=35851> accessed at 20 June 2020.
- Moreno-Lax, Violeta. "Dismantling the Dublin System: MSS v. Belgium and Greece." *European Journal of Migration and Law* 14, no. 1 (2012): 1-31.
- Morgenstern, Felice. "The Right of Asylum." *The British yearbook of international law* 26 (1949): 327-57.
- Mr. A.*, Tribunal Administratif de Paris, Decision No. 1013868/9-1, 29 Jul. 2010.
- Nancheva, Nevena. "The Common European Asylum System and the Failure to Protect: Bulgaria's Syrian Refugee Crisis." *Southeast European and Black Sea Studies* 15, no. 4 (2015): 439-55.
- Nason, Sarah. "Practical Political Jurisprudence and the Dual Nature of Law." *Ratio Juris* 26, no. 3 (2013): 430-55.
- Neuman, William Lawrence. *Social Research Methods: Qualitative and Quantitative Approaches*. 7th ed. Boston: Pearson, 2011.
- North Sea Continental Shelf, Judgment* [1969] ICJ Rep 3.
- NS v Secretary of State for the Home Department*, (Joined cases C-411/10 and C-493/10) [2011] ECR I-13905.
- Nuclear Tests Case (Australia v. France)*, [1974] ICJ Reports 253.
- Office of the United Nations High Commissioner for Human Rights. "Zeid Urges Czech Republic to Stop Detention of Migrants and Refugees." Accessed at <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=16632&LangID=E> 23 October 2015.
- Ogg, Kate. "A Sometimes Dangerous Convergence: Refugee Law, Human Rights Law and the Meaning of 'Effective Protection'." *Macquarie Law Journal* 12, no. 2013 (2013): 109-30.

- Owen, David. "Refugees, EU Citizenship and the Common European Asylum System a Normative Dilemma for EU Integration." *Ethical Theory and Moral Practice* 22, no. 2 (2019): 347-69.
- Papageorgiou, Ioannis. "The Europeanization of Immigration and Asylum in Greece (1990-2012)." *International Journal of Sociology* 43, no. 3 (2013): 72-90.
- Patton, Michael Quinn. *Qualitative Research and Evaluation Methods*. 3 ed. Thousand Oaks, Calif.: Sage Publications, 2002.
- Peers, Steve. "The 'Opt-out' That Fell to Earth: The British and Polish Protocol Concerning the EU Charter of Fundamental Rights." *Human Rights Law Review* 12, no. 2 (2012): 375.
- Peters, Anne. "Humanity as the (Alpha) and (Omega) of Sovereignty." *European Journal of International Law* 20, no. 3 (2009): 513-44.
- Pollet, Kris. "A Common European Asylum System under Construction: Remaining Gaps, Challenges, and Next Steps." In *Reforming the Common European Asylum System: The New European Refugee Law*, edited by Vincent Chetail, Phillipe De Bruycker and Francesco Maiani, 74-100: Boston: Brill Nijhoff, 2016.
- Pries, Ludger. "Introduction: Civil Society and Volunteering in the So-Called Refugee Crisis of 2015—Ambiguities and Structural Tensions." In *Refugee Protection and Civil Society in Europe*, edited by Margit Feischmidt, Ludger Pries and Celine Cantat, 1-23: Springer, 2019.
- Protocol Relating to the Status of Refugees*. Opened for Signature 31 January 1967, 606 UNTS 267 (Entered into Force 4 October 1967).
- Provera, Mark Angelo. *The Detention of Asylum Seekers in the European Union and Australia*. The Netherlands: Wolf Legal Publishers, 2013.
- Regulation (EU) No 439/2010 of the European Parliament and of the Council of 19 May 2010 Establishing a European Asylum Support Office*. [2010] OJ L 132/11 of 29 May 2010.
- Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the Establishment of 'Eurodac' for the Comparison of Fingerprints for the Effective Application of Regulation (EU) No 604/2013 Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Application for International Protection Lodged in One of the Member States by a Third-Country National or a Stateless Person and on Requests for the Comparison with Eurodac Data by Member States' Law Enforcement Authorities and Europol for Law Enforcement Purposes, and Amending Regulation (EU) No 1077/2011 Establishing a European Agency for the Operational Management of Large-Scale It Systems in the Area of Freedom, Security and Justice*. [2013] OJ L 180/1.
- 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. [2013] OJ L 180/31.

Reneman, Marcelle. *EU Asylum Procedures and the Right to an Effective Remedy.* Modern Studies in European Law ; v. 46. Oxford, United Kingdom ; Portland, Oregon: Hart Publishing, 2014.

Residence of Foreigners Act. 326/1999sb Act of 30 November 1999 as Amended (Czech Republic).

Resolution of the Presidium of the Czech National Council of 16 December 1992 on the Declaration of the Charter of Fundamental Rights and Freedoms, in the Constitutional Order of the Czech Republic, . Constitutional Act No. 2/1993 Sb as Amended (Czech Republic).

Roller, Margaret R., and Paul J. Lavrakas. *Applied Qualitative Research Design: A Total Quality Framework Approach.* 2015.

Rosenberger, S., and A. Konig. "Welcoming the Unwelcome: The Politics of Minimum Reception Standards for Asylum Seekers in Austria." *Journal of Refugee Studies* 25, no. 4 (Dec 2012): 537-54.

Roth, Wolff-Michael. "Translation in Qualitative Social Research: The Possible Impossible." *Forum: Qualitative Social Research*, 14, no. 2 (2013).

Ruiz, Jorge Ruiz. "Sociological Discourse Analysis: Methods and Logic." *Forum : Qualitative Social Research* 10, no. 2 (2009).

Saïd Shamilovich Kadzoev v Direktsia Migratsia Pri Ministerstvo Na Vatrešnrite Raboti (Huchbarov), (C-357/09) [2009] ECR I-11189.

Schmitt, Carl. *The Concept of the Political.* Expanded ed. Chicago: University of Chicago Press, 2007.

Science Po Law School, and France Terre d'Asile. *The Effect of Administrative Retention on Migration Routes: An Illusion?* The Social Notebook No 36. France: Science Po Law School.

Shelton, Dinah. "Normative Hierarchy in International Law." *The American Journal of International Law* 100, no. 2 (2006): 291-323.

Shen, Jianming. "The Basis of International Law: Why Nations Observe." *Dickinson Journal of International Law* 17, no. 2 (1999): 287.

Simeon, James C. "What Is the Future of Non-Refoulement in International Refugee Law?". In *Research Handbook on International Refugee Law*: Edward Elgar Publishing, 2019.

Staffans, Ida. *Evidence in European Asylum Procedures.* Leiden; Boston: Martinus Nijhoff Publishers, 2012.

Statute of the Council for Europe. Opened for Signature 5 May 1949, 8 UNTS 103 (Entered into Force 3 August 1949).

Statute of the International Court of Justice. Opened for Signature 26 June 1945, 1 UNTS 16 (Entered into Force 24 October 1945).

Statute of the International Court of Justice. June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 933.

Szakácsová, Beáta. "Closed Detention in the Czech Republic: On What Grounds?". *Forced Migration Review* 44 (September 2013).

Teivainen, Aleksi. "EU Ministers Find No Breakthrough on Burden Sharing, Finland Still Undecided." In *Helsinki Times*.
<<https://www.helsinkitimes.fi/finland/finland-news/politics/16829-eu-ministers-find-no-breakthrough-on-burden-sharing-finland-still-undecided.html>>, accessed at 10 October 2019.

Thomson, Robert. "National Actors in International Organizations: The Case of the European Commission." *Comparative Political Studies* 41, no. 2 (2008): 169-92.

Treaty Instituting the European Coal and Steel Community. Signed 18 April 1951, 261 UNTS 140 (Entered into Force 23 July 1952).

Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities, and Certain Related Acts. [1997] OJ C 340/1.

Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community. Opened for Signature 13 December 2007, [2007] OJ C 306/1 (Entered into Force 1 December 2009).

Trenz, Hans-Jörg, Verena K Brändle, Manlio Cinalli, and Olga Eisele. "Taking Voice and Taking Sides: The Role of Social Media Commenting in Solidarity Contestation." In *Citizens' Solidarity in Europe*: Edward Elgar Publishing, 2020.

UN General Assembly. *Transforming Our World: The 2030 Agenda for Sustainable Development*. 21 October 2015, A/RES/70/1.

UNHCR, Office of the. *Report of the United Nations High Commissioner for Refugees*. 73rd Session Supp No 12, UN doc A/73/12 (Part II) (13 September 2018).

———. "UNHCR Comments on the 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." Geneva: UNHCR, August 2017.

United Nations. *Vienna Convention on the Law of Treaties*. 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331.

Universal Declaration of Human Rights. GA Res 217a (Iii), UN GAOR, 3rd Session, 183 Plen Mtg, UN Doc a/810 (10 December 1948).

- Van Dijk, Tuen A. "Critical Discourse Analysis." In *The Handbook of Discourse Analysis*, edited by Deborah Tannen, Heidi E. Hamilton and Deborah Schiffrin, 466. Hoboken, United States: John Wiley & Sons, Incorporated, 2015.
- Van Gend En Loos v Nederlandse Administratie Der Belastingen*, (C-26/62) [1963] ECR 1.
- Verdier, Pierre-Hugues, and Mila Versteeg. "International Law in National Legal Systems: An Empirical Investigation." *The American journal of international law* 109, no. 3 (2015): 514-33.
- Walter (ed.), Maggie. *Social Research Methods*. 2nd ed. South Melbourne, Vic.: Oxford University Press, 2009.
- Weis, Paul. *The Refugee Convention, 1951: The Travaux Préparatoires Analysed, with a Commentary*. Vol. 7., Cambridge; New York, NY: Cambridge University Press, 1995.
- Wendel, Mattias. "The Refugee Crisis and the Executive: On the Limits of Administrative Discretion in the Common European Asylum System." *German Law Journal* 17, no. 6 (2016): 1005-32.
- Widdowson, H. G. "N. Fairclough: Critical Discourse Analysis (Book Review)." *Applied Linguistics*, 19, no. 3 (1998): 136.
- Yin, Robert K. *Qualitative Research from Start to Finish, Second Edition*. 2nd ed. New York: Guilford Publications, 2015.

