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E INTERNAZIONALE

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## SCRITTI DI DIRITTO PRIVATO EUROPEO E INTERNAZIONALE

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# Current Legal Challenges in European Private and Institutional Integration

*edited by*

Bettina Heiderhoff  
Ilaria Queirolo

*Contributors*

Simone Carrea  
Siel Demeyere  
Andrea Fusaro  
Piotr Górecki  
Paulina Kowalska  
Francesca Maoli  
Francesco Munari  
Lara Trucco  
Zhicheng Wu





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[www.aracneeditrice.it](http://www.aracneeditrice.it)  
[info@aracneeditrice.it](mailto:info@aracneeditrice.it)

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[info@giacchinoonoratieditore.it](mailto:info@giacchinoonoratieditore.it)

via Vittorio Veneto, 20  
00020 Canterano, Rome  
(06) 4551463

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## Preface

The aim of the Series of Essays of Private European and International Law (*Scritti di diritto privato europeo ed internazionale*) is to foster critical and interdisciplinary reasoning on legal problems to explore the growing interconnections among the fields of Private, European and International law.

The coordinated approach to common legal issues by professors, researchers, and legal experts from different fields of specialization, with different backgrounds and methodologies is nowadays felt as an added value to the study of all subjects that experience the influence of supra-national regulation over domestic legal systems. By bringing together PhD candidates from different EU Member States to attend four seminars of advanced learning in a Programme in European Private Law for Postgraduates (PEPP), the PEPP is playing an active role in moulding law practitioners and scholars with an international and comprehensive approach. The Programme is coordinated by the University of Münster and involves nine Partners amongst the best law Universities and Research Centres in Germany (University of Münster, Bucerius Law School, the Max Planck Institute for Comparative and International Private Law Hamburg), Belgium (Catholic University of Leuven), Italy (University of Genoa), Poland (Silesian University at Katowice, University of Wrocław, University of Cracow), Spain (University of Valencia), and the United Kingdom (University of Cambridge). PEPP attendants deal with a whole variety of topics in the field of private law and private international law, and the Programme's aim is to boost knowledge and understanding of the emerging legal system, and to build up a network among academics and lawyers addressing similar issues.

Sharing the same interdisciplinary approach, a cooperation between the PEPP Programme and the Series of Essays is the natural follow up of the European network created by PEPP. This Volume is the third that stems from this cooperation, and builds upon the positive results of the previous volumes. In every round of the seminars, the PEPP lectures were characterized by the active participation of all PhD can-

didates, who gave their own contribution to the discussion and made it possible to start debates and critical assessments that have been taken into consideration by the Authors in their writings. This third PEPP Volume collects the works of some of the lecturers of the Programme, and of the participants of the 2015-2016 round. All contributions were subject both to a double-blind referee procedure and to revision by an English native speaker. Our gratitude goes to all the participating Institutions, to all Lecturers, and to all attendees for their efforts and their work.

*Bettina Heiderhoff*  
*Ilaria Queirolo*

## Index of Authors

*Simone Carrea*, Lawyer, Adjunct Professor in International Law at the University of Genoa

*Siel Demeyere*, PhD Candidate, University of Leuven

*Andrea Fusaro*, Notary, Full Professor of Comparative Private Law at the University of Genoa

*Piotr Górecki*, PhD Candidate, University of Wrocław

*Paulina Kowalska*, PhD Candidate, University of Silesia in Katowice

*Francesca Maoli*, PhD Candidate, University of Genoa

*Francesco Munari*, Lawyer, Full Professor of European Union Law at the University of Genoa

*Lara Trucco*, Lawyer, Associate Professor of Constitutional Law at the University of Genoa

*Zhicheng Wu*, PhD Candidate, University of Oxford



# The EU legal regime on migration and asylum Faced with migrations by sea\*

FRANCESCO MUNARI

SUMMARY: 1 The normative picture: the sources of EU law on asylum – 2. The ‘Dublin format’. – 3. The missing assumptions of the ‘Dublin format’ and the flaws in the CEAS. – 4. The ECJ role in shaping the CEAS consistently with the Geneva regime and with the EU Charter. – 5. The ‘Dublin Regulation Recast’ and the still existing limits of EU asylum law. – 6. Financial solidarity measures to... back the Dublin regime. – 7. Burden sharing and relocation... – 8. ...coupled with the explosion of unilateral measures: the downsides of an uncompleted Union. – 9. Will Turkey save the CEAS? – 10. Migrations in the Mediterranean: another blow for the EU rule of law. – 11. Concluding remarks: some legal arguments to entirely refresh the CEAS.

## 1. The normative picture: the sources of EU law on asylum

Asylum viz. migration issues are defined by the TFEU as shared competences between EU and Member States in the area of freedom, security and justice. Concerning asylum and maritime law/safety at sea issues, important rules of international law also exist that apply to Member States and, concerning asylum, to the Union too, at least as customary rules of international law accepted as general principles of EU law in the European legal system<sup>1</sup>. Suffice to mention, on the one

\* This paper, in a longer version, will also be published on the legal review *Diritti umani e diritto internazionale*, 2016, forthcoming.

<sup>1</sup> Cf., *inter alia*, Judgment of the Court of 15 January 2015, *Raad van bestuur van de Sociale verzekeringsbank v L. F. Evans*, case C-179/13, ECLI:EU:C:2015:12, § 35; Judgment of the Court of 25 February 2010, *Firma Brita GmbH v Hauptzollamt Hamburg-Hafen*, case C-386/08, ECLI:EU:C:2010:91, § 42; Judgment of the Court of 3 September 2008, *Yassin Abdullah Kadi e Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities*, joined cases C-402/05 P and C-415/05 P, ECLI:EU:C:2008:461, § 291; Judgment of the Court of 16 June 1998, *A. Racke GmbH & Co. v*

hand, the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, but also other relevant treaties expressly referred to by article 78.1 TFEU; on the other hand, and conversely, to the customary rule of international law under which sovereign States are free to decide the conditions under which they admit non-citizens in their territory, subject to the ‘law of Geneva on refugees’<sup>2</sup>.

Still concerning primary rules of EU law, worthy of note is the Charter of Fundamental Rights of the European Union (the ‘EU Charter’), for it affects the interpretation and application of specific EU pieces of legislation adopted within the implementation of Chapter 2 of Title V (Policies on Border Checks, Asylum and Immigration), *i.e.* Articles 77-80 TFEU.

*Hauptzollamt Mainz*, case C-162/96, ECLI:EU:C:1998:293, § 46; Judgment of the Court of 24 November 1992, *Anklagemyndigheden v Peter Michael Poulsen e Diva Navigation Corp.*, case C-286/90, ECLI:EU:C:1992:453, § 9. See also F. BAXEWANOS, *Defending refugee rights: international law and Europe’s offshored immigration control* (Wien 2015); C. ROOS, N. ZAUN, *Norms matter! The role of international norms in EU policies on asylum and immigration* (2014) *European Journal of Migration and Law* 45. More generally, on EU law and international law, see, among others, L. SBOLCI, *L’invalidità degli atti dell’Unione europea per violazione del diritto internazionale* (2012) *Rivista di diritto internazionale*, 988; F. CASOLARI, *L’incorporazione del diritto internazionale nell’ordinamento dell’Unione europea* (Milano 2008); S. AMADEO, *La Corte di giustizia delle Comunità europee e i rapporti tra diritto comunitario e diritto internazionale generale* (2000) *Rivista di diritto internazionale privato e processuale* 895.

<sup>2</sup> On the international legal regime and its application at domestic level, see *inter alia* J.P. GAUCI, M. GIUFFRÉ, E. TSOURDI (eds.), *Exploring the boundaries of refugee law: current protection challenges* (Leiden 2015); E. FIDDIAN-QASMIYEH, G. LOESCHER, K. LONG, N. SIGONA (eds.), *The Oxford Handbook of Refugee and Forced Migration Studies* (Oxford 2014); V. CHETAIL, C. BAULOZ (eds), *Research handbook on international law and migration* (Cheltenham 2014); L. SILINGENBERG, *The Reception of Asylum Seekers under International Law. Between Sovereignty and Equality* (Oxford 2014); M. FRIGO, *Migration and international human rights law* (Geneva 2011); F. LENZERINI, *Asilo e diritti umani: l’evoluzione del diritto d’asilo nel diritto internazionale* (Milano 2009); G.S. GOODWIN-GILL, J. MCADAM, *The Refugee in International Law* (Oxford 2007); J. MCADAM, *Complementary protection in international refugee law* (Oxford 2007).

The secondary level of EU legal sources on asylum, refugees, and related matters, is composed by a series of regulations, directives and decisions, based onto the so-called Dublin regime<sup>3</sup>, which was originally a treaty among Member States and thereafter became a regulation ('Dublin II')<sup>4</sup>, recently recast as Regulation no 604/2013 ('Dublin III')<sup>5</sup>. These EU legislative acts now form a remarkable *corpus* of rules composed by tens of acts, whose exposition would go far beyond the scope of this paper. It should be however underlined that, at least in principle, the EU discipline provides an enhanced protection *vis-à-vis* international standards<sup>6</sup>, because it includes additional options for

<sup>3</sup> Cf. Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities – Dublin Convention, OJ C 254 of 19 August 1997, 1. See N. BLAKE, *The Dublin Convention and Rights of Asylum Seekers in the European Union*, in E. GUILD, C. HARLOW, (ed.), *Implementing Amsterdam – Immigration and Asylum Rights in EC Law* (Oxford, 2001) 104; S. LAVENEX, *The Europeanisation of Refugee Policies – Between human rights and internal security* (Aldershot 2001); C. FARIA, *The Dublin Convention on Asylum: Between Reality and Aspirations* (Maastricht 2001); K. HAILBRONNER, *Immigration and Asylum Law and Policy of the European Union* (The Hague 2000).

<sup>4</sup> Council Regulation (EC) no 343/2003 of 18 February 2003, establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, OJ L 50 of 25 February 2003, 1. See D. DUBOLINO, *L'identificazione dello Stato competente all'esame di una domanda di asilo: dalla Convenzione di Dublino al nuovo regolamento* (2004) *Diritto dell'Unione europea* 811;

<sup>5</sup> Cf. 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, OJ L 180 of 29 June 2013, 31.

<sup>6</sup> See generally E. FAHEY, *Joining the dots: external norms, AFSJ Directives and the EU's role in the global legal order* (2016) *European Law Review* 105; S. MANANASHVILI, *The Diffusion of the EU Asylum Acquis in the Eastern Neighbourhood: A Test for the EU's Normative Power* (2015) *European Foreign Affairs Review* 187; H. LAMBERT, J. MCADAM, M. FULLERTON (eds.), *The Global Reach of European Refugee Law* (Cambridge 2013) M. DEN HEIJER, *Europe and Extraterritorial Asylum* (Oxford 2013); O. LYNSEY, *Complementing and completing the Common European Asylum System: a legal analysis of the emerging extraterritorial elements of EU*

asylum seekers, such as the temporary and the subsidiary protection status, this having contributed to the ambitious definition of EU asylum law as a ‘*Geneva-plus*’ regime<sup>7</sup>.

The functioning of this complex set of rules is now depicted as Common European Asylum System (‘CEAS’), which enjoys also an ‘institutional’ side, *i.e.* the European Asylum Support Office (‘EA-SO’)<sup>8</sup>, an agency incorporated in 2010 and located in Malta, whose mission is contributing to the CEAS implementation.

Quite relevant in our field is also the European Court of Justice (‘ECJ’) case-law: EU secondary legislation originates from the law of Geneva and from fundamental rights of individuals<sup>9</sup>, both of which are expressly considered the cornerstone of EU asylum (and migra-

refugee protection policy (2006) *European Law Review* 230.

<sup>7</sup> On the EU regime, also for further references, see G. CAGGIANO, *Scritti di diritto europeo dell’immigrazione* (Torino 2015); S. DUQUET, J. WOUTERS, *Seeking refuge in EU Delegations abroad: a legal imbroglio explored* (2015) *European Law Review* 722; N. RESLOW, *An Incompetent Actor? Assessing EU External Migration Policy* (2015) *European Foreign Affairs Review* 471; P. BOELES, M. DEN HEIJER, G. LODDER, K. WOUTERS (eds.), *European Migration Law* (Mortsel 2014); P. MORI, *Profili problematici dell’accoglienza dei richiedenti protezione internazionale in Italia* (2014) *Diritto dell’Unione Europea* 127; M. RENEMAN, *EU Asylum Procedures and the Right to an Effective Remedy* (Oxford 2014); D. BIGO, S. CARRERA, E. GUILD (eds.), *Foreigners, Refugees or Minorities? Rethinking People in the Context of Border Controls and Visas* (Aldershot 2013); F. CHERUBINI, *L’asilo dalla Convenzione di Ginevra al diritto dell’Unione Europea* (Bari 2012); P.G. XUEREB (ed.), *Migration and asylum in Malta and the European Union: rights and realities* (Malta 2012); S. PEERS, E. GUILD (eds.), *EU immigration and asylum law: text and commentary* (Leiden/Boston 2012).

<sup>8</sup> Cf. regulation (EU) no 439/2010 of the European Parliament and of the Council of 19 May 2010, establishing a European Asylum Support Office, OJ L 132 of 29 May 2010, 11. See F. COMTE, *A New Agency is Born in the European Union: The European Asylum Support Office* (2010) *European Journal of Migration and Law* 373.

<sup>9</sup> Cf. R. RUBIO-MARIN (ed.) *Human rights and immigration* (Oxford 2014); C. LANTERO, *Le droit des réfugiés: entre droits de l’homme et gestion de l’immigration* (Bruxelles 2010); E. CANNIZZARO, *L’armonizzazione delle politiche di asilo in sede comunitaria e la convenzione di Ginevra sui rifugiati del 1951* (2001) *Rivista di diritto internazionale* 440.

tion) law; the ECJ is hence often requested to confront specific provisions of EU acts against fundamental rights of refugees or migrants as embodied in the law of Geneva or in the EU Charter, this giving the Court the opportunity to specify and characterise EU secondary law in light of the above individual rights.

Indeed, the ECJ has substantially enhanced contents and quality of EU legislation<sup>10</sup>: the work of the Court has followed several directions, from tailoring international legal provisions and standards to the specific features of the EU legal systems, to pinpointing several problems arising out of the functioning of EU general principles of law, such as mutual recognition and sincere cooperation, to the complicated reality of migrations<sup>11</sup>.

<sup>10</sup> Below, § 4.

<sup>11</sup> Indeed, the ECJ has discharged this task moving from the institutional position as backbone of the entire EU legal system and thus considering the overall constraints stemming from the complexities of EU law before delivering a judgment. Such an approach seems more balanced than the ‘biased’ position *vis-à-vis* contracting States characterizing the ECHR, whose judgments in favour of migrants and asylum seekers end to be less authoritative and policy-oriented than those pronounced by the ECJ. For an assessment of the approaches followed by the two Courts see, *inter alia*, A. LUBBE, Systemic Flaws and Dublin Transfers: Incompatible Tests before the CJEU and the ECtHR (2015) *International Journal of Refugee Law* 135; M. GARLICK, Protecting rights and courting controversy: leading jurisprudence of the European courts on the EU Dublin Regulation (2015) *Journal of Immigration, Asylum and Nationality Law* 192; G. VICINI, The Dublin Regulation between Strasbourg and Luxembourg: Reshaping Non-Refoulement in the Name of Mutual Trust (2015) *European Journal of Legal Studies* 50; M. MARCHEGANI, Sistema di Dublino e tutela dei diritti fondamentali: il rilievo della clausola di sovranità nella giurisprudenza europea recente (2014) *Diritti umani e diritto internazionale* 159. On ECHR relevant case-law, cf.; C.M. CERNA, Introductory Note to *Tarakhel v. Switzerland* (Eur. Ct. H.R.) (2015) *International Legal Materials* 367; G. CELLAMARE, In tema di controllo della Corte europea dei diritti dell’uomo sull’operare del sistema c.d. di Dublino (2015) *Studi sull’integrazione europea*, 65; R. PALLADINO, La “derogabilità” del “sistema Dublino” dell’UE nella sentenza “Tarakhel” della Corte europea: dalle “deficienze sistemiche” ai “seri dubbi sulle attuali capacità del Sistema” italiano di accoglienza (2015) *Diritti umani e diritto internazionale* 226; M. BOSSUYT, The court of Strasbourg acting as an asylum court (2012) *European Constitutional Law Review* 203; J. LENART, ‘Fortress Europe’: Compliance of the Dublin II Regulation with the European Convention for the Protection of Human Rights and Fundamental

This picture is not complete, however, because in connection with the emergency situation of the recent past, asylum and migration issues are intertwined with public order and national security matters that do not respond to the same allocation of competences and powers between the EU and Member States. and whose management of the latter are much more reluctant to relinquish. As we shall see, this situation impacts substantially on the present state-of-the-art concerning the EU legal regime on asylum.

## 2. The ‘Dublin format’

EU law, especially when harmonizing Member States legislation, is construed through patterns, or ‘formats’ based on general principles of EU law that are adapted to the specific situation<sup>12</sup>.

When the Dublin regime was originally conceived (end of 1980s) the number of EU Member States was much smaller than now, and the movement of refugees and asylum seekers was somehow homogeneous and relatively stable in quality, origins and numbers.

Certainly, it was necessary to harmonise national laws and practices in the field of asylum, in order to avoid asylum seekers being treat-

Freedoms (2012) *Utrecht Journal of International and European Law* 48; V. MORENO-LAX, *Dismantling the Dublin System: M.S.S. v. Belgium and Greece* (2012) *European Journal of Migration and Law* 1; M. MARCHEGIANI, Regolamento “Dublino II” e Convenzione europea dei diritti umani: il caso “M.S.S. c. Belgio e Grecia” (2011) *Studi sull’integrazione europea* 357; K. BUCHINGER, A. STEINKELLNER, Litigation before the European Court of Human Rights and Domestic Implementation: Does the European Convention Promote the Rights of Immigrants and Asylum Seekers? (2010) *European Public Law* 419.

<sup>12</sup> For a general overview on harmonization and approximation of national laws by EU law, see F. MUNARI, *The Impact of EU Law on the Approximation of Member States’ Laws: Between Tales and True Stories* (2014) *The European Legal Forum* 1 also for further references. More specifically, see H. LAMBERT, Transnational judicial dialogue, harmonization and the common European asylum system (2009) *International & Comparative Law Quarterly* 519; J. VEDSTED-HANSEN, Common EU standards on asylum - optional harmonisation and exclusive procedures? (2005) *European Journal of Migration and Law* 369.

ed differently among Member States. This goal was achieved through a set of substantial and procedural rules provided for by directives and regulations, such as the EURODAC and EUROSUR Regulations, the Asylum Procedures Directive, the Qualifications Directive, the Reception Conditions Directive<sup>13</sup>, which have been amended over time<sup>14</sup>.

The ‘Dublin format’ was implemented in parallel with harmonization. It was based on the assumption that each Member State

<sup>13</sup> Cf. 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, OJ L 180 of 29 June 2013, 1; Regulation (EU) no 1052/2013 of the European Parliament and of the Council of 22 October 2013, establishing the European Border Surveillance System (Eurosir), OJ L 295 of 6 November 2013, 11; Council Directive 2005/85/EC of 1 December 2005, on minimum standards on procedures in Member States for granting and withdrawing refugee status, OJ L 326 of 13 December 2005, 13; Council Directive 2004/83/EC of 29 April 2004, on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, OJ L 304 of 30 September 2004, 12; Council Directive 2003/9/EC of 27 January 2003, laying down minimum standards for the reception of asylum seekers, OJ L 31 of 6 February 2003, 18. See E. GUILD, P. MINDERHOUD (eds.), *The first decade of EU migration and asylum law* (Leiden 2012); K. HAILBRONNER (ed.), *EU immigration and asylum law: commentary on EU regulations and directives* (Oxford 2010); D. ACKERS, *The negotiations on the Asylum Procedures Directive (2005)* *European Journal of Migration and Law* 1.

<sup>14</sup> Cf., for example, Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013, *on common procedures for granting and withdrawing international protection*, OJ L 180 of 29 June 2013, 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*, OJ L 180 of 29 June 2013, 96.

(a) is party to the Geneva regime and to the ECHR, this implying that all such States are ‘safe countries’ for the purposes of international protection, and

(b) it also applies and complies with the same (harmonised) standards existing throughout the EU. Furthermore, this assumption cannot be cast in doubt by any other Member State because of the principle of mutual recognition, *i.e.* a EU general principle of law.

This brilliant idea (at least in those years it was recognised as such), was capable of solving a series of practical problems affecting Members States’ handling of asylum seekers: in the first place, it avoided the phenomenon of the ‘refugees in orbit’, *i.e.* persons seeking asylum for which no State wishes to take responsibility; secondly, it prevented multiple asylum applications and asylum shopping, with substantial benefits as regards legal certainty and the practical handling of requests for asylum.

Once the above mentioned assumptions and goals had been secured, the remaining task was to establish the criterion for determining *which* Member State is responsible for examining an application for international protection. The Dublin regime set as default rule that the competent State would be the first in which the applicant has submitted her application for asylum, which normally is also the State where she first enters the borders of the EU territory. In case of illegal entrance in the EU territory (what at present is normally the case), the same Member State thus entered is the responsible State.

Furthermore, because all Member States are ‘safe countries’ for the purposes of guaranteeing the international standards for asylum seekers established by the Geneva regime, as well as by the Geneva-plus regime existing in the EU, asylum seekers applying in a State different than that in which they entered for the first time the EU borders ought to be automatically transferred to such Member State, without an examination of the potential risks that asylum seekers might face there: as recalled, this is ‘prevented’ by the principle of mutual recognition applied to the quality and efficiency of any Member State asylum system.

For the sake of completeness, other criteria are envisaged, and are ranked also higher than the default rule summarised above: they implement rights to family re-unification of refugees; special rules for