



UNIVERSIDADE DA BEIRA INTERIOR
Ciências Sociais e Humanas

**Asylum law and policy in the European Union
The limitations of the Common European Asylum
System: addressing the challenges to refugees'
protection in the E.U.**

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Dissertação para obtenção do Grau de Mestre em
Relações Internacionais
(2º ciclo de estudos)

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When we demand the rights and freedoms we so cherish we should also be aware of our human responsibilities. If we accept that others have an equal right to peace and happiness as ourselves, have we not a responsibility to do what we can to help those in need and at least avoid harming them? Closing our eyes to our neighbor's suffering in order to better enjoy our own freedom and good fortune is a rejection of such responsibilities. We need to develop a concern for the problems of others, whether they be individuals or entire peoples
(The Dalai Lama, 1990: 112)¹

¹ Piburn, Sidney (1990) *The Dalai Lama: A Policy of Kindness - An anthology of writings by and about the Dalai Lama*. Motilal Banarstdass Publishers.

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Dedication

To my little brother, Francisco, my unbreakable bond and the greatest gift of my life. For all the times this young man told me with his mind-blowing energy that we should never surrender. For all the times he called me out loud and said: *“Sister, those refugee kids, they are again on the news. You’ve got to keep on working”*. Whenever I felt tired, his words kept me going. It’s just so amazing what you can learn from one children.

Francisco, you can’t now read what’s been written here, but when you will be able to read in a foreign language I hope you will feel pleasure from what I tried to do here and that you will be glad to find that we should always take our share of responsibility, even when others don’t.

Throughout your life you will get to experience success and failure. Success will give you confidence, while failure will keep you humble and teach you resilience. I hope that you grow up to be a kind man, with a cosmopolitan soul, at ease with all different kinds of people, places and thoughts. I hope that you treat every women and every man with respect and that you respect yourself and the decisions you make. Life will be much happier if you know you spent your day honorably, wisely and kindly.

But most importantly, I hope that you know I’ve got your back. Please know how much I love you and appreciate you, always.

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Last but not least, I thank my boyfriend, Tiago for being my driving force and keeping me sane throughout the process of writing this dissertation, but mostly, I thank him for loving me when I was uneasy to love.

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Resumo

O processo de estabelecimento de um Sistema Europeu Comum de Asilo na União Europeia foi iniciado em 1999, com a entrada em vigor do Tratado de Amsterdão. Contudo, perante o crescente número de pessoas a pedir asilo na UE todos os dias, em vez de uma resposta comum e consistente, os Estados Membros adotaram um conjunto de medidas unilaterais que podem ferir, gravemente, importantes desenvolvimentos no contexto do processo de integração europeu. Esta investigação tem por objetivo desenhar algumas conclusões no quadro do Direito e Políticas de Asilo na União Europeia ou, pelo menos, contribuir para o debate relativamente ao futuro de um sistema comum de asilo na União Europeia, tendo em conta as suas limitações e oportunidades. Pretende-se responder de que forma é que a proteção de refugiados na União Europeia é afetada pelos processos de decisão na UE e, simultaneamente, de que forma é que estes processos de decisão criam dilemas legais no seio do Sistema Europeu Comum de Asilo. Contudo, esta tentativa de resposta não será focada, exclusivamente, no que é o Sistema Europeu Comum de Asilo, nem nas suas limitações. Pretende-se ir mais longe e analisar as principais oportunidades e desafios que a União Europeia enfrenta na construção das suas políticas e leis comuns de asilo, no contexto do processo de integração europeu, realçando os progressos feitos e os constrangimentos do debate. Assim, levar-se-á a cabo uma análise comparativa de fontes primárias, como legislação e documentos oficiais de vários organismos da União Europeia e do Alto Comissariado das Nações Unidas para os Refugiados (ACNUR), e fontes secundárias, como estudos e artigos científicos de autores relevantes e outra documentação relevante publicada por organizações não governamentais (ECRE, Human Rights Watch e Amnistia Internacional). Par além disso, com recurso a evidências empíricas e documentos legais lançados no contexto da atual crise de refugiados, esta investigação procura providenciar uma humilde, mas atualizada contribuição para a literatura sobre os refugiados, asilo e governança europeia.

Keywords

União Europeia; Governança Europeia; Área de Liberdade, Segurança e Justiça; Política de Asilo; Direito de Asilo; Sistema Europeu Comum de Asilo.

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Abstract

The process of establishment of a Common European Asylum System (CEAS) in the European Union began in 1999, with the entering into force of the Treaty of Amsterdam. Nevertheless, facing the increasing numbers of people claiming asylum in the European Union every day, instead of a common and consistent EU response, we've seen the adoption of a set unilateral measures that can harm important developments of the EU integration process. This research project seeks to draw some conclusions on asylum law and policy in the European Union, or at least contribute to the debate on the future of a common asylum system in the European Union, given its main failures and opportunities. It attempts to answer how refugees' protection in the European Union is affected by the European decision-making process and, at the same time, how this decision-making process creates legal dilemmas within the framework of the Common European Asylum System (CEAS). However, it does not focus exclusively on what is the CEAS, nor in its limitations thus far. It intends to go further and examine the main opportunities and challenges facing the European Union in the construction of its common asylum law and policy, stressing the progress already made and the constraints of the debate. It does so through the comparative analysis of primary sources, such as legislation and official documents from various bodies of the EU and from the UNHCR, and secondary sources, such as studies and research articles from relevant scholars and relevant documentation launched by non-governmental organizations (ECRE, Human Rights Watch and Amnesty International). With resource to empirical evidence and legislative documents launched in the context of the current refugee crisis, this study intends to provide a humble, but up-to-date contribution to the literature on refugees, asylum and EU governance research.

Keywords

European Union; EU governance; Area of Freedom, Security and Justice; Asylum policy; Asylum law; Common European Asylum System.

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Extended Abstract

The process of establishment of a Common European Asylum System (CEAS) in the European Union began in 1999, with the entering into force of the Treaty of Amsterdam. Nevertheless, facing the increasing numbers of people claiming asylum in the European Union every day, instead of a common and consistent EU response, we've seen the adoption of particularly disturbing unilateral measures, such as the adoption of temporary border controls inside the passport-free Schengen area, the construction of walls at the EU's external borders and the lack of *volunté politique* to relocate - taking into account that binding legislation for responsibility-sharing between the EU member states in asylum matters does not exist - and resettle refugees on a voluntary basis.

These measures however do not only harm the protection of refugees in the European Union, but also important developments of the European integration process, such as the establishment of a free-passport Schengen area, and important common values, such as the solidarity between Member States and the respect for human dignity, rooted in the construction of the EU project.

The policy areas falling under the domain of the EU area of Freedom, Security and Justice, including immigration and asylum, are particularly security-sensitive, touching core functions of the state, such as territorial sovereignty and internal security. Thus, cooperation within this area has not been immediate, neither unproblematic, but it seems that important steps have already been taken towards the harmonization of asylum policies in the European Union. Shared competence between the EU and the EU member states applies in the areas of asylum and immigration. This means that decisions under this area are to be taken by ordinary legislative procedure, in co-decision by the European Parliament and the Council of the European Union, under initiative of the European Commission.

Notwithstanding, even though EU asylum decisions seem to come out of a supranational decision-making procedure, the EU member states still retain a high level of authority over asylum through the European Council, which keeps its role of strategic actor, and in the areas in which the EU has not exercised its competence, such as relocation and resettlement. The legacy of intergovernmentalism has therefore conditioned a joint EU response to the current humanitarian emergency.

Thus, this research project seeks to draw some conclusions on asylum law and policy in the European Union, or at least contribute to the debate on the future of a common asylum system in the European Union, given its main failures and opportunities. It attempts to

answer how refugees' protection in the European Union is affected by the European decision-making process and, at the same time, how this decision-making process creates legal dilemmas within the framework of the Common European Asylum System (CEAS). However, it does not focus exclusively on what is the CEAS, nor in its limitations thus far. It intends to go further and examine the main opportunities and challenges facing the European Union in the construction of its common asylum law and policy, stressing the progress already made and the constraints of the debate. It does so through the comparative analysis of primary sources, such as legislation and official documents from various bodies of the EU and from the UNHCR, and secondary sources, such as studies and research articles from relevant scholars and relevant documentation launched by non-governmental organizations (ECRE, Human Rights Watch and Amnesty International).

With resource to empirical evidence and legislative documents launched in the context of the current refugee crisis, this study intends to provide a humble, but up-to-date contribution to the literature on refugees, asylum and EU governance research.

Keywords

European Union; EU governance; Area of Freedom, Security and Justice; Asylum policy; Asylum law; Common European Asylum System.

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List of Acronyms

AFSJ	Area of Freedom, Security and Justice
CEAS	Common European Asylum System
EASO	European Asylum Support Office
ECHR	European Court of Human Rights
ECJ	European Court of Justice
EU	European Union
GG	Global Governance
IR	International Relations
JHA	Justice and Home Affairs
MLG	Multilevel Governance
IPL	International public law
QMV	Qualified Majority Voting
R2P	Responsibility to Protect
SCO	Safe Country of Origin
SEA	Single European Act
TEU	Treaty of the European Union
TFEU	Treaty on the Functioning of the European Union
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees

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Introduction

“Every political crisis inevitably leads, sooner or later, to a humanitarian emergency. By the same token, every humanitarian emergency leads, sooner or later, to a political crisis. All too often, the humanitarian emergency becomes a humanitarian tragedy” (Smyser, 2003: 3)

This research project seeks to draw some conclusions on asylum law and policy in the European Union, or at least contribute to the debate on the future of a common asylum system in the European Union, given its main failures and opportunities. Before proceeding further with the research question and methodology of this study, it seems relevant to highlight current challenges regarding asylum in the European Union in order to set the context and importance of this research topic facing the contemporary humanitarian panorama.

Currently, the world is assisting one of the biggest humanitarian crisis of the century, comparable only to the humanitarian crisis caused by the Second World War (1939-1945) and by the Rwandan Genocide, in the early 90s. The actual scenario of armed conflict in Iraq, the political instability in Libya and, in 2011, the beginning of the civil war in Syria, following the Arab Spring uprisings, has forced millions of people to flee their normal places of residence. For instance, according to the UNHCR (2016), only the Syrian civil war has produced nearly 6.5 million internally displaced people (UNHCR, 2016a) and almost 5 million of refugees, most of them being hosted by Turkey, Jordan, Lebanon, Egypt and Iraq (UNHCR, 2016b). Yet, with high numbers of refugees and asylum seekers crossing borders every day, these countries face growing vulnerabilities that result in the lack of services and resources available for refugees and asylum seekers, what has encouraged thousands of them to continue their journeys to Europe.

According to the UNHCR, more than one million of refugees arrived in the European Union in 2015 (UNHCR, 2016a). However, even after more than fifteen years of negotiations and after the completion of the third phase of the Common European Asylum System (CEAS), incorporated into EU law through the secondary legislative acts that comprise the EU acquis on asylum², the EU member states are failing to provide a common and consistent answer to the current humanitarian crisis. In fact, the EU member states have, instead of applying the provisions of the CEAS, adopted a set of particularly disturbing unilateral measures, such as the adoption of temporary border controls within the Schengen area and the construction of walls at the EU's external borders, aiming to stop the flux of asylum seekers and migrants. In

² EU acquis on asylum refers to the collection of EU law adopted in the field of asylum.

September 2015, the European Commission had already adopted 40 infringement procedures³ concerning asylum policies adopted by some EU member states that are incompatible with EU law (European Commission, 2015a). Only two months later, it opened another infringement procedure against Hungary concerning its asylum law (European Commission, 2015b). Furthermore, in March 2016, the European Commission formally recognized that the Schengen area was being highly affected and presented a detailed roadmap with concrete actions aiming to re-establish the normal functioning of Schengen (European Commission, 2016a).

Both the UNHCR and the Human Rights Watch understand that the implementation of border and immigration controls, and preventing people from taking hazardous journeys to Europe are essential measures to combating international organized crime, yet they are only legitimate if protection safeguards are proportionately provided (Human Rights Watch, 2015 UNCHR, 2016; Human Rights Watch, 2015a). However, the amount and quality of protection offered by the European Union has been disappointing so far. According to Eurostat, over 1.2 million first time applicants were registered in the EU-28, in 2015, but at the end of the same year, almost a million of applications were pending decisions (Eurostat, 2016). Furthermore, relocation⁴ in the European Union has been a hard task, since the EU member states have been reluctant in implementing voluntary-based responsibility-sharing measures, what raises concerns about the nature of cooperation within the so-called common Area of Freedom, Security and Justice and about the actual success of the EU integration project, that emerged as project of peace founded in the principles of mutual trust and solidarity.

The policy fields falling under the domain of Freedom, Security and Justice, among which asylum, are particularly sovereignty-sensitive policy areas since they touch core functions of the State. However, even though the EU member states are to decide who and who is not allowed within their territory, they have, under the *ius cogens* non-refoulement principle, the obligation to grant access to the territory to people claiming asylum and provide them a full examination of their applications, in order to find out whether they qualify for refugee status or not, as defined in the 1951 Convention and its Protocol. Not only have these universal binding instruments upheld the right to seek refuge in another country, as the European

³ The infringement proceedings are predicted in the Article 258 of the Treaty on the Functioning of the European Union and might be applied by the European Commission whenever an EU member state does not comply with EU law. It predicts two stages: a) a letter of formal notice after an informal dialogue with the EU member state concerned; 2) reasoned opinion, comprising a more detailed analysis of the fact and establishing a deadline to end the infringement. If the infringement does not end, the Commission might take the matter before the Court of Justice of the European Union. The European Commission adopted 40 infringement procedures against 20 EU member states: Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Estonia, France, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, Malta, Poland, Romania, Slovenia, Spain and Sweden. Taking into consideration that Denmark, Ireland and the UK have different arrangements within the area of Freedom, Security and Justice (and so infringement in asylum matters do not apply to them), only 5 EU member states were not subject to infringement procedures. For further information please check on the European Commission press release of 15 September 2015, entitled More Responsibility in managing the refugee crisis: European Commission adopts 40 infringement decisions to make European Asylum System work.

⁴ Relocation is the transfer a determined asylum seeker from the responsible EU member state (as defined in the Dublin Regulation) to other EU member state that accepts the responsibility for examining his/ her asylum application.

Asylum law and policy in the European Union

Union itself created binding legislation on asylum matters, to which most of the EU member states are bound. Furthermore, taking into consideration the EU's commitment to promoting the rule-of-law, democracy and human rights and, simultaneously, the cosmopolitan moral values behind the protection of refugees, it seems clear that a more consistent and efficient answer to the current refugee crisis is of extreme urgency both to the European Union and to those fleeing war and conflict.

Proceeding from here, this research project attempts to answer how refugees' protection in the European Union is affected by the European decision-making process and, at the same time, how this decision-making process creates legal dilemmas within the framework of the Common European Asylum System (CEAS). There has been some legislation from the European institutions, namely from the Commission and the Parliament, in an attempt to Europeanize the framework of answers. However, apparently, the constraints arising from the European decision-making procedures and the reluctance of member states to create common and supranational decision-making mechanisms has conditioned a joint EU response and has, simultaneously, created barriers to the establishment of a common legal framework. The European governance of asylum, too, seems to remain hostage of the idiosyncrasies of the construction of the community project.

The main objective of this study does not focus exclusively on what is the CEAS, nor in its limitations thus far. Rather, this research project intends to go further, and examine the main opportunities and challenges facing the European Union in the construction of its common asylum law and policy, stressing the progress already made and the constraints of the debate. Thus, here I do not attempt to answer one question, but several questions:

- How is asylum policy developed at the global and EU level?
- What are the main motivations and preferences of EU member states and the EU's, regarding the integration of this area? Will the EU have the capacity to aggregate all Member States around asylum policy? How do states face the 'dilution' of their relative autonomy in such a sensitive matter?
- What is the nature of cooperation in the area of Freedom, Security and Justice (AFSJ)?
- What are the main legal dilemmas faced by the European Union on the regulation of Common European Asylum System?

In order to address all these questions, regarding the construction of a Common European Asylum System, this research proceeds with the analysis of the EU's engagement in cooperation at two levels: the transnational/ European level and the issue-specific level.

The nature of this study has required the comparative analysis of both primary and secondary sources. The used primary sources are legally binding documents (treaties, directives and regulations) found at Eur-Lex and the EU Treaties Office Database and other official documents such as reports, communications, discourses and press releases published in different bodies of the European Union and in the United Nations High Commissioner for Refugees' database. In turn, the used secondary sources refer to core bibliography from relevant scholars and other relevant research articles, including theoretical reflections about forced migration studies, EU governance and asylum policy and law in the European Union. Plus, we also consider reports, recommendations and opinions of other relevant organizations such as the European Council of Refugees and Exiles (ECRE), the Human Rights Watch and the Amnesty International. The same method and sources (both primary and secondary) will be applied in each one of the four chapters.

The methodology is deductive in the sense that it starts from a broad perspective of cooperation at the global and European Union level, passing through the cooperation within the AFSJ and finishing with an in-depth analysis of the nature and developments concerning the governance of asylum, which falls under the domain of the AFSJ. Thus, the research question of the last chapter is the key research question of the current study because it focuses on the governance dilemmas regarding the nature and the development of the Common European Asylum System (CEAS) and on the legal dilemmas concerning the EU *acquis* on asylum, which regulates the CEAS.

The research around the problematic has resulted in the four chapters of the current dissertation. The first two chapters are more comprehensive, focusing on Global Governance and European Union governance, respectively; whereas the last two chapters are more in-depth, analyzing the EU member state's engagement in cooperation in the area of Freedom, Security and Justice (AFSJ) and in the governance of asylum.

The **first chapter** intends to set the scene on refugees' protection, addressing issues such as global governance, the emergence of a global right to asylum and the European Union as a global actor. The aim is to understand why the EU member states would care to protect refugees, taking into account the EU's role as an actor in global governance and, simultaneously, in the global governance of asylum. Firstly, it will try to understand what global governance is, acknowledging how interactions between states and other actors are managed and regulated at the international level through international public law. The first sub-chapter also addresses how the concept of Responsibility to Protect (R2P) has emerged within this global regulatory scheme as an international norm that allowed the move beyond state's sovereignty to people's sovereignty, limiting the authority of the state. Then, the second sub-chapter will try to understand how has a global right to asylum emerged within this context of global governance, taking into consideration that even in a world of cosmopolitan universal commons, refugees still represent challenges to the sovereignty of the

state. Finally, the third sub-chapter explores the role of the European Union as a global actor. We argue that the EU's responsibility towards refugees comes primarily from cosmopolitan international standards present in a global regulatory scheme, but also from its external objectives in world politics, grounded in common human rights-based values that compose the EU's identity and allow it to exercise a dominant influence in Global Governance.

The **second chapter** intends to understand the making of EU policies within the context of the EU integration. It highlights the most important integration theories of the European Union and examines how these theoretical perspectives can help us understand the interactions between actors in the decision and policy making processes, since thinking asylum governance in the European Union requires a proper theoretical framework. Thus, the first sub-chapter approaches the main theoretical arguments that emerged between the proponents of the apparently dichotomist intergovernmental and supranational approaches, and explains how the breach between them has been softened by the emergence of the concept of multilevel governance. Then, the third chapter intends to understand the concept of multilevel governance and describe the complex interactions between actors when deciding and making policies, taking into consideration the shifts of power from the EU's intergovernmental institutions to the EU's supranational institutions in Europeanized policy areas, such as most of the areas falling under the common AFSJ.

The **third chapter** aims to understand the nature and depth of EU's cooperation in the Area of Freedom, Security and Justice, focusing on the main aspects that can possibly impact on the governance of asylum. In order to do so it proceeds as following: Firstly it will explore the particular trends that characterized the Europeanization of the AFSJ, taking into account to the use of differentiated forms of integration. Secondly, it will try to understand the context in which a more securitized approach to immigration has emerged and how this poses a challenge to the governance of asylum, which occurs within a particularly complex environment of overlapping interaction between the parallel regimes of immigration and asylum. Thus, the proliferation of semi-autonomous agencies, focused on border management and control, together with the securitization of immigration might pose a real challenge to the governance of asylum due to the limited if non-existent legal ways of access available for asylum seekers and, consequently, they can harm the refugee's access to the territory and to the Common European Asylum System (CEAS).

Finally, the **fourth chapter** intends to point out the main dilemmas in the governance and regulation of the Common European Asylum System that might hamper the development of higher levels of protection for refugees and more harmonized and far-reaching asylum policies in the European Union. In order to do so, this chapter is divided in two chapters. The first sub-chapter analyses the developments of the Common European Asylum System (CEAS) from 1999 to 2014, through the Tampere, Hague and Stockholm Programmes, aiming to draw

some governance trends in the management of asylum. The description and analysis of the treaty changes and strategic programmes that shaped the first, second and third phases of the CEAS will be further divided in two main topics: the first referring to the first and second phases of the CEAS, and the second referring to the last phase of the CEAS. The second sub-chapter chapter will wherefore try to point out the legal dilemmas on the regulation of the CEAS. Firstly, it will contextualize the EU acquis on asylum into its legal background, coming from universally binding instruments provided by the global refugees' regime and also from the human rights regime, which complements the latter. International norms coming from these instruments, such as the right to asylum, the principle of *non-refoulement* and the refugee qualification backseat the EU acquis and, in this sense, no analysis of the EU acquis can be truly satisfactory without this contextualization. Thus, taking into account that legislation was the main vehicle towards the harmonization of asylum policies in the European Union, it will also provide a descriptive and critical analysis of the EU *acquis* that codifies the CEAS, with a special focus on the deadlocks surrounding the Dublin system and the concept of safe third countries.

The in-depth analysis of asylum governance in the European Union and the acknowledgement of important challenges concerning refugees' protection might be a useful tool for a more efficient policymaking in the area of asylum. Thus, sustained by recent examples, empirical evidence and legislative documents launched in the context of the current refugee crisis, this dissertation seeks to make a humble but up-to-date contribution to the literature on refugees, asylum and EU governance research, wishing it could possibly provide important information for the practical management of asylum in the European Union.

Chapter I

Global Governance, the emergence of a 'global' right to asylum and the European Union

Introduction

Refugees are people that forcibly leave their countries of origin and cross borders in order to find safety from conflict, persecution and human rights violations. In a world divided by separate nation-states, the refugee emerges as a phenomenon of collective action that can only be intelligible within a logic of cooperation among states, since by fleeing their countries of origin, refugees find themselves in the territory of another sovereign, in a place where they do not belong, at least considering the normal relationship state-citizen-territory in which the westphalian order is sustained. Thus, their protection depends on the extension of cooperation within international protection frameworks and on the hosting state's willingness to cope with its international obligations.

The dominant traditions in International Relations theories - realism and liberalism - diverge in their perceptions of the international system. For the realist tradition, the international system is characterized by anarchy⁵. For the liberalist tradition, the international system is rather characterized by global interdependence. In fact, there are nearly 200 countries in the world today with the need to cooperate to solve common problems, such as refugees' protection. In this sense, even in the absence of a world government, national governments have been obliged to move some of their domestic responsibilities to intergovernmental organizations and other bodies ruled by international law, what allowed the emergence of a global regulatory scheme. Some issues became intrinsically related to a sense of commonly recognized universality, due to their global character. As a consequence, issue-specific global frameworks and issue-specific international organizations emerged within global governance, creating a complex network of policy regimes with global application. As Betts noted "*where government exists at the domestic level, global governance emerged at the international level*" (Betts, 2009: 99). Notwithstanding, even under the rule-of-law, governing without

⁵ Anarchy means absence of a central government. The concept of anarchy was firstly applied to the international system by Hans Morgenthau (1948) but became widespread. Nowadays, it's commonly recognized among International Relations scholars that the international system is anarchic due to the absence of a world government.

government remains a whole complex process, involving participation from multiple actors, often sharing different interests and levels of authority.

A more comprehensive and multilateral cooperation to address refugees issues only started to emerge after World War I and was only formally consolidated after World War II, with the creation of the United Nations High Commissioner for Refugees (UNHCR), the entering into force of the 1951 Convention and later with the entering into force of the 1967 New York Protocol. Namely after the II World War, the world assisted a proliferation of multilateral agreements and intergovernmental organizations to facilitate state's cooperation and to guide their behavior, highly transcending the natural jurisdiction of the nation-state. Thus, the responsibility of states towards refugees comes from the international refugees' regime, comprising these internationally binding instruments and the guidance of the UNCHR. However, that protection is, as stated by Habermas, *in facto* circumscribed within the frontiers of a political community, since the rights of the individual come from notions of citizenship and nationality. Even if states sovereignty is not unlimited, the protection of the refugee can only be granted within a territory and by a sovereign decision to provide him/ her with protection.

In this sense, this chapter tries to understand why the European Union, specifically, would care to protect refugees within their borders, taking into account the European Union's role as an actor in global governance. In order to answer this question it proceeds as following:

Firstly, it will try to understand what global governance is and how interactions between states and other actors are managed and regulated at the international level through international public law, acknowledging also how the concept of responsibility to protect (R2P) has emerged within this global regulatory scheme as an international norm that allowed the move beyond state's sovereignty to people's sovereignty, limiting the authority of the state. Secondly, it will try to understand how has a global right to asylum emerged within this context of global governance, taking into consideration that even in a world of cosmopolitan universal commons, refugees still represent challenges to the sovereignty of the state. Finally, the last chapter explores the role of the European Union as a global actor. We argue that EU's responsibility towards refugees comes primarily from cosmopolitan international standards present in a global regulatory scheme, but also from its external objectives in world politics, grounded in common human rights-based values that both compose EU's identity and allow it to exercise a dominant influence in global governance.

1.1. Global Governance

Governance is a broad concept that defines complex interactions among actors in decision and policy-making⁶ processes. Its all-inclusive character comprises not only the involvement of actors within hierarchical decision-making mechanisms, regulated by formal rules, but also more interactive and informal mechanisms. In this sense, rather than a centralized concept, governance is concept that comprises a system of shared and multi-level authority among the actors involved in the decision-making processes.

Keohane and Nye (2000) defined three levels - international, national and subnational - and sectors - private, governmental and non-governmental - of interaction within governance systems. These levels are interconnected, since private, governmental and non-governmental actors operating at the international level can and should interact with other private, governmental and non-governmental actors operating at the national level. In this sense, within decision-making processes, actors interact with each other not only between different levels, but also between different sectors. Collective action between these levels and sectors is therefore only possible because the actors involved recognize and follow determined principles and rules (both formal and informal) that allow a cooperative process of governance (Mihir, Gibney, 2014).

Heywood (2011), for instance, observes that governance is characterized by four important features: multi-level interactions, mixed actor involvement, polycentrism and the presence of intergovernmental decision-making processes, if governance occurs in the international and global level. These features will be further explored with resource to other relevant authors.

It's commonly acknowledged among authors (Scharp, 1998; Schmitter, 1992; Jachtenfuchs, Kohler-Koch, 1995; Hooghe and Marks, 2001; Heywood, 2011; Mihir, Gibney, 2014) that one of the most important features of governance is its multi-level character - and global governance provides no exception to this -, allowing interaction between a multiplicity of actors within various levels (e.g. global, international, regional, national, provincial, municipal). Secondly, interlinked with the previous feature, governance is also characterized by the involvement of large numbers of actors in the decision-making process (mixed actor involvement). Thus, governance systems can be found in the local level, explaining interactions between local authorities and other local actors, and between local actors and international and global actors, but also in the international and global levels, explaining interactions between national governments, international organizations and other actors such as transnational corporations and non-governmental organizations. However, according to Reis, another important feature of governance is that these territorial levels conflate. For

⁶ Decision-making refers to the framework of procedures that allow governments or institutions to reach and make the decisions that will eventually become policies. In turn, policy-making is the process of creating laws, and regulations that will shape and conduct human behaviour towards the specific decided goals.

instance, it's no longer possible to fully distinguish internal policy (at the domestic level) and external policy (at the international level), at least not in a traditional way (Reis, 2014: 125).

The distinction between government and governance is fundamental for the understanding of the concept of governance. Rosenau and Czempiel (1992), for instance, have distinguished government as being more focused on a formal authority than governance, what is useful for proceeding with the observation of law and ensuring that policies are implemented. In this sense, whereas government does not exist without a formal authority, governance can be conceived both with and without government. According to them, governance is:

A more encompassing phenomenon than government. It embraces governmental institutions, but it also subsumes informal, non-governmental mechanisms whereby persons and organizations within its purview move ahead, satisfy their needs, and fulfil their wants. (Rosenau, Czempiel, 1992: 4)

Governance challenges the traditional and hierarchical state-centred authority, while it emphasizes multi-level decision and policy-making through overlapping (and sometimes competing) legal frameworks and institutions and distinguishes itself from government because there's "*single authoritative rule-maker*" (Betts, 2009: 102). Thus, while the domestic level is characterized by the presence of a hierarchical government, at the international level there's no government, there's anarchy, and so less hierarchy. As noted by Reis, while internal sovereignty is more hierarchical, external sovereignty is "*based on a formal juridical equality (anarchy)*" (Reis, 2014: 125).

Governance is polycentric, allowing coexistence between different actors, decision-making mechanisms and institutional frameworks and plays an important role by providing tools for broad and interactive decision-making in order to accommodate diverse or conflicting interests into co-operative action. In this sense, governance can be understood as a process that sums up how actors, from individuals to formal, informal, private and public institutions, manage their common affairs to produce collective action responses (Commission on Global Governance, 1995).

In 1995, the Commission on Global Governance launched the report *Our Global Neighborhood*. The importance of this document for global governance is hardly questionable, since it expresses a timely vision of the world, embodied in the idea of a global neighborhood, which expresses the collective desire of people to shape their future. Since 1945, when 50 world leaders met in the city of San Francisco to draw the United Nations Charter, the world has, according to the report, been committed to exercise and develop powerful concepts aiming at improving the quality of behavior among individuals in a global community: international cooperation, collective security and international law. The United Nations Charter and this new commitment introduced the "*universal hope that a new era in international behavior and governance was about to begin*" (Commission on Global Governance, 1995: 1).

A common vision of the way, settled in a feeling of global responsibility in various areas, such as development, human rights, humanitarian action, environment and democracy, was needed in order to address and overcome global collective problems lacking a feasible sovereign-based solution. In the 90s, the collapse of communist regimes in Eastern Europe, the ethnic conflicts in the Balkans, plus the inaction of governments that allowed the deepening of dramatic experiences such as the Gulf War, the violence in Somalia and the Rwandan genocide have raised “*a strengthened commitment to the pursuit of common objectives though multilateralism*” (Commission on Global Governance, 1995: 1). It can be true though that divisions between men were more obvious than never, but so were their commons and the willingness (or lack of alternative) to transform the concept of global neighborhood into reality.

The United Nations can be considered the most expressive actor of the system of global governance, having developed “*an innovative system of global governance which delivers significant international public goods*” (Held, 2010: 113), even if it still relies on a decision-making structure characterized by the predominance of strong intergovernmentalism. Through intergovernmental decision-making, the world states are allowed to exert their influence on the basis of national interests. Nevertheless, Heywood argues that that even if the United Nations and world governments share extremely important roles in the global governance structure, this structure is neither UN-centred, nor state-centred.

Heywood (2011) understands global governance not as a mere territorial level of governance, but as *a level across all levels* (2011: 2) that allows coexistence between international, regional, national and subnational levels of politics. In a polycentric way, global governance also allows other actors such as transnational corporations, non-governmental organisations and global civil society to influence the decision-making process and take part in the implementation of collective responses. Some international organizations acquired a global character due to the membership of most of the world’s countries and due to the fact that they deal with political issues that acquired a global character. These so-called global institutions, for instance, act on the global level, but can only be exercised domestically. In this sense, global governance should not be understood as a level of governance conflicting with other levels of governance, but rather as a global form of governance that comprises and is complemented by governance networks at other levels.

Policy-specific global governance systems transform into what we call international regimes. These regimes, for instance, comprise formally recognized rules, mostly present in international legal frameworks, intergovernmental organizations to regulate, monitor and guide actor’s action within that policy field and other actors, such as non-governmental organizations. Nevertheless, these regimes also comprise not only decision-making processes, but more implicit principles and norms that regulate the expectations of actors and the activities carried out within that specific area. At international and regional level, there are

various international regimes, such as: a) the Bretton Woods System, monitored and regulated by organizations such as the World Bank and the International Monetary Fund; b) the Human Rights regime, enforced by the Universal Declaration of Human Rights and by the United Nations, but counting also with the support of other international non-governmental organizations such as Amnesty International and the Human Rights Watch; c) the Refugee's Regime, enforced by the United Nations High Commissioner For Refugees (UNHCR), by international legal instruments such as the 1951 Convention and the 1967 New York Protocol, and counting with the support of many other non-governmental organizations and agencies. These regimes, however, can also be found at the regional level as politically independent sub-regimes that are coherent and nested with the global regime for that determined policy area. For instance, the human rights regime comprises regional human rights instruments such as the European Convention on Human rights, in Europe.

World politics has assisted the proliferation of cooperative agreements within various policy-fields. In addition, a growing number of actors with political autonomy is participating in the decision-making processes and implementation within a determined policy-field regime. Consequently, there's an increasing complexity on the politics and even on the effectiveness of global governance where institutional and strategy overlaps provide opportunities for actors to address a determined political issue through regime shifting⁷. Specific-issue regimes, however, can overlap with each other in a competitive or complementary way, having both positive and negative effects in global governance (Gómez-Mera, 2015). This phenomenon can be observed in all governance levels and is especially evident within the Refugee's regime, which is highly complemented by the human rights regime, but conflicts with determined policies within the migration and security regimes, expanding the regime complex⁸ (Drezner, 2009). For instance, the introduction of restrictive immigration policies that can be used not only to prevent the entrance of irregular economic immigrants, but also to contain or prevent terrorism and human smuggling, highly limits the spontaneous arrival of asylum seekers, which might be in need of international protection and suffering human rights violations. This is a relevant example in which determined policies within the migrations and security regimes, overlap with polices within the human rights and refugee's regime.

1.1.1. International public law

International public law, considered the most consistent form of global governance, has been described by David Held as a “*vast and changing corpus of rules and quasi-rules' which set*

⁷Regime shifting is phenomenon that occurs when states and non-state actors address a determined issue through a regime other than the regime that regulates that policy area. The existence of overlapping regimes enables states and non-state actors to strategically pick the regime whose rules and priorities fit their interests better. Thus, they can go around determined rules which do not favor them, without violating any specific legal norm.

⁸According to Drezner, regime complexity refers to the proliferation of laws, rules and institutions, which create complex environments of interaction between actors and regimes. The author argues that regime complexity can have *contradictory or cross-cutting* effects that can affect global governance outcomes, since *nested and overlapping regimes can reinforce or undercut each other* (Drezner, 2009).

out the basis of co-existence and co-operation in the international order” (Held, 1991: 220). It emerged to regulate relations between sovereign states (what still does) and has often been referred as the law among nations (or *jus inter pares*), but it is not a law between states exclusively, or at least not anymore. Nowadays, international law defines not only the legal responsibilities of States in their interaction with other states and global commons, but also establishes boundaries to how States treat individuals within their territory. In addition, the protection of human rights and human security, and the promotion of global public goods are now under the aegis of International Public Law which moved beyond the purpose of regulating state’s relations to the purpose of limiting and guiding those relations, expressing the interests of the international community considered as a whole, and not as a group of separate units.

Enforcement remains a fundamental challenge in international law, since there are no international law enforcement bodies. The only enforcement mechanism is the United Nations Security Council, which is able to impose economic, diplomatic or even military sanctions, nevertheless, it’s confined to the often-conflicting political agendas of the five permanent members, what makes these sanctions more politically oriented than legally oriented. Thus, international law depends on the willingness of states to cope with its general principles, provisions and regulations. As observed by Henkin, states can only be *persuaded* to honor their international obligations, since it’s not possible to effectively enforce international law (Henkin, 1994: 33). The problem of enforceability has also been described by Goldsmith and Levinson,

International law lacks a centralized and hierarchical lawmaker akin to the legislature inside a state to specify authoritative sources of law and the mechanisms of legal change and reconciliation. It also lacks centralized and hierarchical judicial institutions to resolve the resulting legal uncertainty. As a result, its norms are imprecise, contested, internally contradictory, overlapping, and subject to multiple interpretations and claims (Goldsmith, Levinson, 2009: 1803)

The authors even add that multilateral sanctions against violations of international law are limited and occur only in particular and extreme situations in which the interests of the sanctioning states and the sanctioned state coincide. Nevertheless, this realist view of International law ignores the fact that the uncertainty of compliance is just as real as state’s need to cooperate in their common issues and solve conflicting interests with each other. Within a context of globalization and increasing interdependence between states, “*no considerable change can take place in any one of them without affecting the condition, or disturbing the peace, of all the others*” (Callières, cited in David Held, 1991: 205). This quotation, cited by David Held, was written by Callières, in 1716, in his study about the diplomacy in Europe. After 300 years, this classical sentence remains real and even more evident. Thus, international law and a greater complexity of decision is the price to pay for the achievement of mutually beneficial outcomes coming from the necessity of continual negotiations and permanent use of diplomacy (Callières cited in David Held, 1991: 205). David

Held himself acknowledged that in this highly interconnected global order the resort to international forms of governance is necessary since states can no longer fulfill determined domains of their responsibility and activity by themselves. Even though the system might be considered fragile and to a great extent depending on the willingness of states to cope with their international obligations, the importance of international forms of governance, regulated by international public law, is often and commonly recognized by states that wouldn't otherwise derogate part of their sovereignty (which they hold dearly) to a system of international institutions and laws to coordinate and monitor the understanding and application of agreed international norms.

There are three main sources of International law: customary law, treaties and *ius cogens*. While customary law refers to state practice, treaties come out of agreement between states, yet both depend on state's consent. *Ius cogens*, for instance, has a greater weight than the previous sources within International Law, since it's considered a form of *supreme* law because it belongs to the whole humanity. Even though it's often referred as a form of customary law, it doesn't require the unanimous consent of states, it rather reflects general consensus about particular universal norms that can't be, in any circumstance, limited or suspended (Henkin, 1994).

The understanding of the law among nations can't be separated from the understanding of westphalian sovereignty, which is the core principle of International Law and the central element of the prevailing world order. The Peace of Westphalia (1648) formally recognized the principle of sovereignty, under which each nation should be free from interference over its territory and its domestic affairs but its importance went beyond that: Westphalia established the modern states system under the principle of sovereignty, firstly in Europe, and then across the world. Sovereignty, for instance, became in the words of David Held “‘*the supreme normative principle' of the political organization of human kind*” (Held, 1991: 220). This form of political organization is extremely important, not only because it protects one state against the intervention of other state, but namely because it locates the responsibility for the protection of people and for the exercise of governance within a determined territory (Weiss, 2004: 138). Regardless of that, in his work *The Humanitarian Conscience*, Smyser pointed out that Westphalia did not define how these brand-new individual political units that are able to govern themselves were therefore *to deal with each other* (Smyser, 2003: 21). For a long time, states have been understood as monolithic entities, shielded by a traditional concept of sovereignty, which protected them against many sorts of international influences. Within this context, International Law was simply made by, with the consent of and to serve the interests of sovereign states.

Considered the father of the modern concept of sovereignty by Goldsmith and Levinson, Jean Bodin has noted that if not for the sake of constitutional rules and an international law regime, state's sovereignty would be illimitable (Goldsmith, Levinson, 2009: 1796). According

to other authors (Henkin, 1994; Smyser, 2003) World War II triggered the move towards human values because after more than 70 million deaths (Smyser, 2003: 55) it became recognized that penetrating into “*the once impermeable state entity*” (Henkin, 1994: 33) would be acceptable in order to avoid such terrors. Proceeding from here, the traditional concept of sovereignty has moved into a modern understanding of “*people’s sovereignty, rather than the sovereign’s sovereignty*” (Reisman, 1990: 869). The huge humanitarian cost of World War II established a strong commitment towards humanity in order to ensure that never again people would be subject of such terrible crimes. Since then, the legitimacy of the sovereign relies not only in the provisions of its constitution but also in its compliance with human rights. In this sense, the sovereign’s sovereignty is only as legitimate as the extent of its compliance with universal human rights principles. Sovereignty became, more than a fundamental attribute of the state, a responsibility towards humanity. Nowadays, in order to be sovereign one should not only possess territory, authority and population, but also respect human rights. According to Thomas Weiss, the importance of sovereignty is, nowadays, a very practical one, coming not from principles of non-interference, but from “*the practical reality that domestic authorities are best positioned to protect fundamental rights*” (Weiss, 2004: 138).

Heywood (2011), for instance, argues that the tension between human rights and state’s rights has become particularly relevant since the 90s due to the growth of humanitarian intervention. Nevertheless, the author acknowledges that both state-centric approaches and approaches that deny the relevance of states borders are unable to explain the global dynamics of the international system. Regardless of the fact that some issues have a global or universal character, the borders of the state and state sovereignty remain relevant and that the “*swirl of interconnectedness that effectively absorbs of all of its parts, or ‘units’, into an indivisible, global whole, is very difficult to sustain*” (Heywood, 2011: 2).

Oudejans noted that in contemporary world “*people’s sovereignty is derived from, and directed towards, universal principles of human rights*” (Oudejans, 2011: 99). Such cosmopolitan values of universalism, which have been introduced in the relationship between States and individuals, and incorporated in International Public Law, abolished the traditional idea “*that states in the international inhabit very different worlds*” (Slaughter, 1995: 3), creating a sense of commonness among states in the international system. It’s been acknowledged that, due to an increasing interdependence, international security can be highly affected by particular domestic political conditions and, in this sense, the human rights of individuals within a territory became everybody’s business. Institutions have been created in order to protect human rights against a traditional concept of sovereignty and, according

to Henkin, states have often been encouraged to intervene⁹ to support other states in matters of human rights (Henkin, 1994).

1.1.2. The Responsibility to Protect (R2P)

Firstly introduced by Gareth Evans¹⁰, in 2001, the concept *Responsibility to Protect* (R2P) is based on the idea that the state should be responsible for the security of its citizens and when states *murder or forcibly displace large numbers of its citizens*, this should be considered unacceptable by the international community. In this sense, the international community has a *shared responsibility* to provide a timely and decisive response to such abuses in order to deadlock the overuse of sovereignty and protect the most vulnerable (Evans, 2006).

In the United Nations 60th Anniversary World Summit, in 2005, the concept was formally embraced by unanimous voting of the UN international community and quickly became used by policymakers and public media. Quoting Gareth Evans, at the time President of the International Crisis Group, from this moment on “*we have seen the emergence of what can be described as a brand new international norm of really quite fundamental ethical importance and novelty in the international system*” (Evans, 2006: 1). State’s sovereignty should be in the first instance respected, since national governments are the main responsible bodies for providing security to their citizens. Nevertheless, if the national government is incapable or unwilling to provide them with security, the international community should support the state in its individual responsibility to protect. Thus, the R2P comes out as a way to put an end to the biggest human atrocities by offering a guarantee of protection to victims of human rights abuses, bringing human rights to the top of the priorities hierarchy even in detriment of sovereignty.

In 2009, the UN Secretary-General and the General Assembly have defined a three-pillar strategy for the operationalization of the *Responsibility to Protect*, based on four crimes: genocide, war crimes, ethnic cleansing and crimes against humanity. According to the Report of the Secretary-General, the first pillar gives primacy to the protection responsibilities of the sovereign State, but only under a logics of ‘*sovereignty as responsibility*’ (UN General Assembly, 2009:6). This means that the sovereign state has fundamental protection obligations towards its population (both nationals and non-nationals) and should therefore respect their fundamental rights. The second pillar refers to international assistance and capacity building. It establishes that the international community should assist more vulnerable states to meet and exercise their protection obligations, focusing on reconciliation and development. Thus, the R2P should not be understood as *another name* for humanitarian

⁹ It’s therefore important to note that as Henkin observed intervention within this context doesn’t necessarily mean military or humanitarian intervention.

¹⁰ The concept first appeared in the report of the meeting International Commission on Intervention and State Sovereignty (ICISS), co-chaired by Gareth Evans, under appointment of the government of Canada.

intervention, but rather as a norm that helps states to meet protection responsibilities coming from the exercise of their sovereignty (UN General Assembly, 2009). Finally the third pillar establishes that the international community should respond decisively and timely if the other two pillars fail. This pillar gives the UN member states the responsibility to speak with one voice through the UN and respond collectively and consistently in order to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity, by the *appropriate diplomatic, humanitarian and other peaceful means*, when a state fails its responsibility to provide such protection (UN General Assembly, 2009; UNHCR, 2008).

It's been mentioned that prior to the Second World War, the state was considered an untouchable monolithic entity, however, it started to be recognized that states can also be actors of violence and undertake the biggest atrocities against their own people. In such situations, the international community is encouraged to react immediately in favor of human security. The R2P the international community to carry on actions, with humanitarian and protection purposes, towards particular states or leaders, without their consent, because it recognizes that there's a collective responsibility to protect populations when the sovereign interests of the state put their life into danger. This is intrinsically linked to the principle that sovereignty is not a right of the state, it's a right of the peoples and so it owes duties and responsibilities to the population it represents. Within this context, human rights and human security emerge as legitimate limitations to the state's sovereignty¹¹.

Notwithstanding, military and humanitarian interventions are only allowed within very specific and limited circumstances (e.g. mass loss of life with genocidal intent) often related to a failed state situation with the state's neglecting or being unable to act. They should only be considered as a last resource and require a right legitimate authority, the right intention and the exhaustion of other diplomatic and non-military sources. As observed by Eve Massingham, the legitimacy of authority is usually conferred to the three giants of global governance: the Security Council of the United Nations, the General Assembly and Regional Organizations. The primacy is conferred to the Security Council, nevertheless, due to the limitations regarding the permanent member's right to veto, a great legitimacy was also conferred to the General Assembly and Regional Organizations. The right intention refers to the primary purpose of the intervention. According to Thomas Weiss, "*the primary purpose of intervention must be to halt or avert human suffering and that regime overthrow is not a legitimate reason for invoking the doctrine*" (Thomas Weiss in Massingham, 2009: 808) and no other reason is enough legitimate to invoke the doctrine. Also, the right to intervention should be the last resource and should only be carried on when all the other diplomatic and non-military resources have been exhausted. Weiss argues that the humanitarian imperative

¹¹ In this regard, namely concerning the legitimate limitations to the action of the state, Grocius, Saint Augustine and Thomas Aquinas developed what became known as the theory of Just War, whose axioms that are both shared by the modern conception of the Responsibility to Protect and by the more traditional responsibility to protect states.

should “*deny the relevance of politics, which proceeds on a case-by-case basis by evaluating interests and options, weighing costs, and mustering necessary resources*” (Weiss, 2004: 147). Excesses should be avoided and the principles of International Humanitarian Law should be adequate to the ends it seeks to achieve, what means that under the core principle of *just ad bellum* (right to law) every used mean should be strictly necessary.

One should bear in mind that humanitarian and military forms of intervention are the last resource of the responsibility to protect and not its instruments, since a pacific and non-interceptive resolution of conflicts is preferred and the entitlement to react goes well beyond the option to intervene, being prevention and reconstruction the most important expression of R2P. Moreover, even when considering an intervention, states should treat all victims and crisis similarly and consistently, acknowledging that the outputs of such act shouldn't reveal themselves in any circumstance more negative than the consequences of inaction. This means that the use of intervention is only legitimate if it treats crisis equally and produces significant improvements facing the current scenario of conflict. Thus, more than a right, intervention is therefore a responsibility to reconstruct, which implies an obligation to guarantee a long-lasting security as far as possible.

According to the UNCHR, the literature on R2P to date and even the core R2P documents, reflect mostly concerns about humanitarian intervention and the use of armed force (UNHCR, 2008). However, even though humanitarian intervention and the use of armed force might be a last resort of the responsibility to protect, it's been acknowledged that the responsibility to react goes beyond military intervention. The UNCHR acknowledged other effective tools that might be used in the prevention of atrocities, such as “*diplomatic efforts; engaging national and regional actors to offer protection; targeted humanitarian response; as well as ensuring international protection for IDPs and refugees*” (UNCHR, 2008: 13). These measures, and namely asylum, are stated to be less controversial responses to the protection of populations affected by genocide, war crimes, ethnic cleansing and crimes against humanity, even though some of them are not directly mentioned in the R2P documents.

For instance, even if the 2009 report stresses that the responsibility to protect should not “*detract in any way from the much broader range of obligations under international humanitarian law, international human rights law and international criminal law*” (UN General Assembly, 2009: 26), the protection of refugees is not directly mentioned as a complementary responsibility under R2P. In this sense, refugees and internally displaced people logically fall under the responsibility to protect framework, but not directly. That responsibility is instead grounded in the international protection legal framework, which includes the *ius cogens* principle of *non-refoulement*, present in universally binding instruments such as the 1951 Convention and the 1967 New York Protocol. However, since inadequate responses to asylum seekers might also result in *significant loss of life* (Barbour, Gorlick, 2008: 23), we argue that the operationalization of the strategic three pillars of the

R2P should directly stress measures for the protection of refugees, including burden-sharing and cooperation measures for hosting refugees. These measures don't replace any other protection measures, such as diplomatic efforts and even humanitarian responses, yet since granting asylum to refugees is the most legitimate and less controversial protection option for the most vulnerable (Barbour, Garlick, 2008), it should not be excluded from the R2P framework.

1.2. The emergence of a 'global' right to asylum: the nature and development of a formal regime for refugees' protection

A more formal concern regarding refugees' protection only started to appear after World War I, due to the mass influxes of refugees coming from the collapse of the European multinational empires. Prior to that, "*grants of asylum to refugees were largely ad hoc and based on feelings of some kind of religious or political affinity for those seeking refuge*" (Loescher, Betts, Milner, 2008:6).

In order to protect specific groups of refugees, the Office of the High Commissioner for Refugees was created under the 1920 League of Nations and under "*the urging of non-governmental organizations, led by the Red Cross movement*" (Loescher, Betts, Millner, 2008: 8). However, by that time there was no universal refugee's definition, being the protection limited to minimum standards and confined to specific national groups. Not surprisingly, this weak and limited structure of refugee's protection would fall together with the League of Nations. Loescher, Betts and Millner argue that the withdrawal of important members from the League of Nations (e.g. Italy, Germany and Japan), the anti-immigration drifts in those countries and the lack of international commitment to protect refugees were the main reasons behind this failure. For instance, according to them, the later persecution of Jews during World War II provides empirical evidence of the total inefficiency of this weak protection structure (Loescher, Betts, Millner, 2008: 9).

However, regardless of their weaknesses, these pioneering international efforts sowed the seeds of the modern international refugee's regime, which would be later consolidated in the post-Second World War. The dramatic human cost of World War II and the displacement of millions of people has put a new emphasis on peace and human rights, which emerged as central issues for international cooperation. In 1945, 50 nations met in the city of San Francisco (USA) to draw the United Nations Charter and create an unprecedented intergovernmental organization: the United Nations. Five years later, the General Assembly of the United Nations gathered to create the United Nations High Commissioner for Refugees (UNHCR), responsible to provide refugee's with international protection, find permanent solutions for them and to discuss the definition of refugee the new organisation would employ (Loescher, Betts, Millner, 2008: 9). The need to regulate the return of aliens was first

stated in the Convention for the Protection of Human Rights and Fundamental Freedoms, the same year. Although it contained no provisions relating to asylum, it imposed restrictions to the power of states to expel aliens in the general sense. The following year, the UNCHR drew the 1951 Convention Relating to the Status of Refugees, which became one of the most important legal instruments of the contemporary refugee's regime. The Convention not only defines the concept of refugee and the obligations of the signatory nations towards people that fit that definition, but also introduces the principle of *non-refoulement* (which is nowadays an *ius cogens* norm of international law). One of the limitations of the definition provided by the Convention was that it was only to be applied to events that occurred before 1951. In this sense, the 1961 New York Protocol extended the definition to any person falling into the criteria of the Convention, without any time limitation. Nowadays, the principles of the Convention are to be applied in the light of the 1961 Protocol.

The modern international refugee's regime is grounded in the above mentioned universal legal instruments, whose principles are reflected in the domestic laws of the most of world's states, and in international organisations, such as the UNHCR. The fact that the international refugees' regime comprises its own specialized international organization makes it a unique regime. In addition, national and regional policy initiatives have been added by individual states in order to complement the universal instruments or/ and allow states to respond more effectively to refugees issues. These initiatives might reinforce the principles of international refugee law, but often offer differentiated interpretations to it.

Comprised within international public law, the international refugee's law faces the same international enforcement problems which can possibly lead to non-compliance. Even if states have unanimously and formally recognised the importance of the principles present in the 1951 Convention, "*it does not appear that such formal support necessarily translates into political practice in all areas*" (Gammeltoft-Hansen, 2014: 578). The author argues provides two arguments: 1) international refugee law does not always shape, or at least it's not fully reflected, into refugee policies; 2) international refugee law might have a positive relationship (although not intentionally) with tightened immigration controls, which can be observed, for example, in the increasing application of deterrence policies and carrier sanctions. A relevant example regarding airline companies has been provided by the author. When as result of carrier sanctions, asylum-seekers are rejected by airline companies, whose fault is it? Is it the state's fault which imposed carrier sanctions without providing exceptions for asylum seekers, or is it a private matter of the company that has nothing to do with the state's obligations under the refugees' regime? The answer might be ambiguous. Even though states are not directly violating their obligations, once the asylum-seeker has not been returned to any place where his/ her freedom might be in danger, some obligations under international refugee law are being displaced and, as a result, refugees' protection is being compromised.

The example of the airline companies takes us again to the question of sovereignty, since the state's exercise of sovereignty in matters of immigration control might prevent the asylum-seeker from accessing the territory and ask for international protection. As a construction of the modern system, which divided the world in separate political units governing within the borders of a determined territory, refugees' protection can only be intelligible within a logic of cooperation between sovereign states, however, that right is subject to a sovereign decision and can only be exercised domestically. As Haddad observed "*the refugee brings to the fore the very tension between the state prerogative to exclude and the human rights imperative to include*" (Haddad, 2008: 70). This incongruity between the universal nature and local application of global governance norms can be described as what Jürgen Habermas called the "Janus face" of modern democracies, acting "*in the name of universal principles which are then circumscribed within a particular civic community*" (Hurrel in Betts, Loescher, 2010: 92), since the rights of the individual come from his belonging to a sovereign political community and the borders of this political community are morally significant for the ones belonging to belonging to it.

2.1.1. Cosmopolitanism, refugees and the modern states system

Authors such as Loescher, Betts and Milner (2008) argue that the moral values behind refugee's protection are present in various religious texts and traditions, and that city states religious groups have always provided sanctuary for people seeking safety in places of worship. However, refugees only became recognized as a relevant issue together with the formation of the modern states system, in 1648, with European sovereigns affirming, for the first time, the importance of offering refuge to people being persecuted by their monarchs because of their religion.

The 1648 Peace of Westphalia has put an end to the feudal medieval Europe "*made up of dynasties based on ecclesiastical loyalties*" (Haddad, 2008: 49) and established the modern international system by dividing the world into a society of sovereign territorial states which have political and legal relations between them. After the Peace of Westphalia, the place of religion - the defining factor of membership during the *respublica Christiana* (Haddad 2008: 51) - was replaced by a new concept of nationality grounded in the sense of ownership of a determined territory. Since then, the abstract division of the world into territorial entities became the dominant mode of political organization in the world (Betts, 2009: 44).

In his essay *Perpetual Peace* (1795), Immanuel Kant criticized the imperialist inhospitality of the European civilization as they oppressed the natives that lived in the lands which, according to him, belonged to no one. The author argues that the first right, common to every man, should be the right to universal hospitality as no one deserves hostile treatment for the simple fact that he/ she arrive in other territory. This right to universal hospitality (or cosmopolitan right) is grounded in the feeling of common ownership of the surface of the

earth, since “*no one originally has more right than the other to be in a determined place of the planet*” (Kant, 1917 ed.). Kant is the most prominent figure of the cosmopolitan right which is nowadays the basis of a range of rights that can be found in a set of documents and legal frameworks of international law (e.g. rights and norms referring to human dignity, free movement and the right to seek asylum).

Heywood (2011) has defined moral cosmopolitanism in the following way:

Moral cosmopolitanism is the belief that the world constitutes a single moral community, in that people have obligations (potentially) towards all other people in the world, regardless of nationality, religion, ethnicity and so forth. All forms of moral cosmopolitanism are based on a belief that every individual is of equal moral worth, most commonly linked to the doctrine of human rights (Heywood, 2011: 21)

In this sense, cosmopolitanism holds a sense of universal commons that transcend individual states and belong to humanity. Humanity is therefore considered as a whole and not as a group of separated states, since the vision of a world separated into political units threatens the right to universal hospitality. This is why the traditional political cosmopolitanism called for the establishment of global political institutions which should further develop into a world government, able to comprehend the world as one single political unit. However, it has been observed by Heywood that modern cosmopolitanism is mostly in favour of a global governance system - rather than of a world government - in which authority is shared between authors and levels (from global to local). In this sense, one can observe that global governance itself is somewhat grounded in a cosmopolitan vision of the world, since the cosmopolitan right “*embedded in rule systems and institutions which have transformed the sovereign states system in a number of important aspects*” (Held, 2010:50), putting limits to an absolute state sovereignty.

The cosmopolitan right represents, according to David Held, a *necessary complement* to national and international law and individuals can (and should) be simultaneously global citizens, belonging to a *universal system*, and national citizens, belonging to their own national communities. Some theoretical approaches, such as Constructivism and the English School, have therefore questioned the own existence of the nation-state and acknowledged its negative consequences for the human rights regime. The balance between the universal and the national is not so easily attained since the universal nature of cosmopolitanism touches and sometimes even opposes to core aspects of state’s sovereignty. However, in a Westphalian international system, the territorial borders in which the sovereign exercises its authority are of extreme political and moral importance for the people belonging to that political community, what poses a challenge to the universality of the human rights and even to the refugees’ regime. According to Cornelisse (2010) “*the notion of sovereignty molds our understanding of the relationship between people, territory, and authority*” (Cornelisse,

2010: 33). Thus, if compared to the state-citizen-territory trinity¹², in which the whole international system is sustained, the cosmopolitan right is weak and will not, according to David Held, “*open sufficient doors to strangers and aliens in need of entry, sanctuary or membership in another country*” (Held, 2010: 54).

A globalization rhetoric holding on the argument of a borderless world, in which the relevance of the concept of border begins to fade, has become prominent in the modern world as today's incredibly permeable borders became ineffective in preventing the entrance of migrants without a legal right of entry. As stated by Heijer “*no matter how high the fences are or how technically advanced border surveillance is, undocumented migrants without a legal right of entry somehow manage to get through*” (Heijer in Ryan & Mitsilegas, 2010: 169). However, borders separating nation-states, which are supposed to share different purposes and identities, divide humanity between dichotomies of people and define in which social, legal and political field one finds himself into. It's relevant to mention that international law is limited to the concept of westphalian sovereignty.

Hurrel adds that it's exactly the notion of an exclusive political community, incorporating cultural and religious values, and the belief in the right of self-determination, the political power and moral meaning of a world separated in nation-states. The author observes that border lines “*demarcate not just abstract units of administration but communities that are supposed to share both an identity and a legitimate political purpose*” (Hurrel in Betts; Loescher, 2010: 90), what is a powerful justification for the fact that governments owe obligations to their citizens far more than they own to the rest of humankind (Betts; Loescher, 2010).

However, any notion of political community creates an exclusionary space and exclusionary identities based on membership dichotomies, such as citizen versus non-citizen (Haddad, 2008). Thus, categories of people that don't belong to the trinity membership (e.g. refugees, asylum claimers, irregular migrants and stateless people) emerge. For instance, when people forcibly leave their country of origin in order to seek asylum in another country, they break the citizen-territory trinity for two reasons. Firstly, they come from broken political communities since their governments failed their obligations to provide them with security. Secondly, when they leave their country of origin, they're automatically entering the impenetrable sovereign space of another political community from which they do not belong. Refugees leave their homes to get protection from the international community, yet the international community is no more than a community of sovereign states. Thus, refugees

¹² Westphalian sovereignty, grounded in the state-citizen-territory trinity, is the core principle of international law. Each state has sovereignty over its territory and domestic affairs and other states should not interfere (*principle of non-interference*). Even though there are some limitations to the non-interference principle, such as the responsibility to protect, it's important to note that westphalian sovereignty is very important to maintain the equality of states under international law, since every single state should be *equally sovereign* and their territorial integrity should be respected.

often find themselves in the territory of non-belonging (Said, 2001: 77) as the vital other that sustains a state identity grounded in nationality. In the words of Emma Haddad,

Once the world became divided into such political units, being forced out of one unit meant finding another to enter. But since entering another member state means obtaining the prior permission of that state, the refugee became a modern category of individual found between such sovereigns (Haddad, 2008: 65)

In the modern international society, made up of plugged but politically separated sovereign states, one can't leave without entering, thus, by fleeing their countries of origin, asylum seekers enter the erected political border of a sovereign state, where they do not belong. Refugees struggle for safety into sovereigns, breaking the ideal-type of the unconditional nation state (Betts, 2009) both at the source and at the destination. Since the control of entry into one's territory is strongly related to questions of national sovereignty (and therefore a matter of great sensitivity among states) and refugees often cross borders irregularly, the relation between the refugee and the state system is particularly complex.

However, authors (Betts, 2009; Haddad, 2008) argue that refugees both serve and challenge sovereignty since the very concept of refugee can only be intelligible within the context of this pluralist system made up of individual states (Haddad, 2008: 63). According to Haddad *"what in fact is 'going wrong' when refugees appear is that the theory and practice of the international state system and the concept of sovereignty on which it relies are failing to coincide"* (Haddad, 2008: 4). On one hand, refugees serve the purpose of sovereignty (and actually reinforce it) by distinguishing citizens and non-citizens that have a legal conceptual status, and by creating the *"vital 'other' necessary for national citizens to successfully forge their identity"* (Haddad, 2008: 47). On the other hand, the exception provided by refugees, challenges the nature of sovereignty by breaking the ideal-type of the unconditional nation state (Betts, 2009: 44).

Refugee movements emerge from the gaps of the Westphalian state system and are simultaneously an inherent part of the changes in world politics. For instance, tragic events such as the ones that occurred during World War I (1914), World War II (1939), the Israeli-Palestinian conflict (1948), the successive civil war, conflict and rebellion events in the Democratic Republic of Congo (since 1960), the Angolan civil war (1975), the Afghan war (1992), the Bosnian war (1992), the Abkhaz-Georgian conflict (1992), the genocide in Rwanda (1994), whose refugee movements became known as Great Lakes refugee crisis, the Kosovo war (1998), the war in Darfur (2003), the Iraq war (2003), the Syrian war (2011), and many other sources of internal and international instability, have produced millions and millions of refugees worldwide. The history of the refugee's regime is the history of forced migration, since refugees' move does not occur on a voluntary basis. Their forced move is a consequence of the changing balance of power and developments concerning the consolidation and extension of the modern international system, which often resulted in

situations of conflict, war, persecution, human rights violations and state failure, with governments being unable or unwilling to safeguard its own citizens' fundamental rights, and civilians being forced to seek refuge in another country.

The refugee's phenomenon is not new, yet it's often been observed that the relation between the refugee and the state system remains a complex one. Refugees have acquired some kind of exclusionary illegal identity, which has to do with the fact that people seeking asylum generally cross borders within the so-called mixed flows of immigrants (composed by voluntary and forced migrants), being often confused with illegal immigrants. Loescher (1996) argues that when the division between refugees and economic immigrants is not visible, governments are inclined to paradoxically label them as economic refugees. According to the author, the own term of economic refugees has its origins in the 30s and was *ironically* used to describe the Jews that fled Germany (Loescher, 1996: 17). However, the nature of displacement distinguishes economic migrants from refugees, being the first moving voluntarily to find higher life standards, and the second moving forcibly, escaping persecution and other events that put their lives at risk. In this sense, one can say that economic migrants leave their countries of origin, while refugees escape their countries of origin. The misuse of concepts has the potential to undermine refugee's protection by limiting their access to a safe territory and their integration in the hosting societies.

Moreover, the increasing emphasis on border controls to manage irregular immigration, often triggered by security concerns, might also contribute to the assumption that refugees with legal aspects of the state system. However, the refugee status is a legal status coming from a sovereign decision to qualify that determined person as refugee. Thus, "*being granted refugee status means being recognised legally as an individual in need of legal protection according to international law*" (Haddad, 2008: 28). While asylum seekers claim to be forced displaced people in need of international protection, refugees are asylum seekers which fit the refugee's definition present in the applicable international legal instruments and whose application for international protection has been accepted by the host country. States are obliged by international law to allow asylum seekers to lodge an asylum application in their territory, regardless if they entered the territory irregularly. International legal instruments uphold the right to claim asylum in another country and countries have obligations to keep asylum seekers safe in their territory while their asylum application is being examined. The right of entry into one country is subject of a sovereign decision, limited by international law principles; however, the right to leave one country is a human right granted in the Article 13 of the Universal Declaration of Human Rights.

The global governance of forced-migration has been explored by Betts, which argues that the international refugees' regime is influenced by a range of other policy areas which are regulated on a sovereign basis. Thus, the regulation of a determined issue-area, such as immigration, can affect the politics of the refugees' regime. For instance, refugees are

directly affected by the immigration policies of the hosting country, its internal social policies, its attitude towards illegal migrants and asylum seekers, and the international responsibilities it is willing to effectively cope with. Parallel regimes and institutions, such as the ones governing human rights, can complement (and even reinforce) the refugees regime; while others, such as the ones governing migration, can threaten it by limiting the spontaneous arrival of asylum seekers. For instance, referring to Northern EU member states, Betts stated that alternative institutions have enabled these states “*to address their concerns with spontaneous arrival-asylum through regimes other than the refugee regime*” (Betts, 2008: 126) and even to bypass their responsibility “*without explicitly violating their principal legal obligations*” (Betts, 2008: 128), what sustains the idea that the protection of refugees is increasingly dependent on other policy venues with a divergent focus. Even though states generally agree that there’s a collective responsibility to protect refugees, they can be reluctant in taking their part of individual responsibility.

Haddad argues that many states keep “*ignoring the changing international structure within which the ‘refugee’ moves for the sake of keeping ideas of territorial sovereignty intact*” (Haddad, 2008: 27). The control of entry into one’s territory is still a matter of great sensitivity among most of the states, because it touches their sovereignty, prosperity, social system and identity. For instance, even if wealthier countries are in a better position to cope with their international humanitarian responsibilities towards refugees, the efforts and pressure to manage irregular migration and keep doors closed have often produced stronger immigration, than humanitarian policies. Therefore, organisations such as the European Council on Refugees and Exiles (ECRE) and the Human Rights Watch, have noted that some EU member states have an approach of responsibility shifting, instead of responsibility sharing, especially if it implies to physically hosting refugees. This *shifting* of responsibility takes place within the context of what Helfer called regime *shifting*, “*which occurs when states move from addressing problems through one regime to addressing those problems through an alternative parallel regime*” (Helfer, 2004 in Betts, 2009: 121). The spontaneous arrival of asylum seekers has often been contained through tight immigration policies, cooperation with third countries and with the concept of safe third countries of transit to which asylum seekers can be *safely* returned (ECRE, 2009; Human Rights Watch, 2015). The immigration partnerships with third countries and the concept of *safe* country will be discussed in more detail in the fourth chapter.

1.3. The European Union as a global actor

Even though the European Union has no military expression in world politics, it is considered as one of the most widest-ranging political actors of the world for its strong diplomatic and economic foreign policy tools (Ginsberg, Smith in Meunier, Mcnamara, 2007: 268). As noted by Reis (2012: 573), the EU lacks military means of hard power, and its role in world politics

relies essentially on soft and normative power. Beyond economy, the influence of the European Union in the international system comes from the promotion of the rule-of-law and from the promotion of considered legitimate values, such as human rights and democracy, what allows the EU to shape the preferences of other actors (Reis, 2012: 23). Through the harmonization between the national interests of the EU member states and the ones of the European Union, EU's entrepreneurial political system has expression in the action of the European Union and also in the external policy of its member states. In this sense, the EU ensures a high level of cooperation in all international relations domains and, regardless of the fact that the EU member states act as independent actors, the European Union also acts as a global actor in the international scene.

Apart from the internal aims of its economic, political and social integration, the European Union has roles and objectives in the international order which come from common values regarding the achievement of a global society characterized by pluralism, non-discrimination, tolerance, justice, solidarity, respect for human rights and gender equality. As a political institution, the European Union aims to promote peace, the respect for human dignity, freedom, democracy and equality in the international order through the promotion of rule-of-law and the development of international law. These international aims are intrinsically connected with the internal aims of the European Union, such as the protection of its citizens and the consolidation of solidarity and mutual respect between the peoples of Europe, but also with external aims such as the sustainable development of the planet, eradication of poverty, protection of human rights and children's rights, including minority rights and the respect for the principles stated in the United Nations Charter.

About three months after the 9/11 attacks, in December 2001, the European Council met in Laeken to discuss, among other things, the future of the union, the union's action following the 9/11 attacks and the strengthening of the area of freedom, security and justice. The first annex to the Presidency conclusions refers to the future of the European Union, including Europe's new role in a globalised world. It recognised that there's a *fast-changing, globalised world* beyond EU's borders, a world in which the EU wishes to have a leading and stabilising role. Within this context, the document reaffirms the international identity of the European Union as following:

Europe the continent of humane values, the Magna Carta, the Bill of Rights, the French Revolution and the fall of Berlin Wall; the continent of liberty, solidarity and above all diversity, meaning respect for others languages and traditions. The European Union's one boundary is democracy and human rights (European Council, 2001)

In addition, it also mentions that in order to have a leading and stabilising role in the world, the European Union has to "*shoulder its responsibilities in the governance of globalisation*" and "*do not turn a blind eye to world's heartrending injustices*" (European Council, 2001). Thus, the European Council recognises that the European Union has global responsibilities in

the creation of fair and solidary governance of the world. In this sense, the first annex to the Presidency conclusions, also called Laeken Declaration, calls for a moral framework in the governance of globalisation, anchored in the values of solidarity and sustainable development.

According to Moussis (2015), when compared to intergovernmental cooperation, the process of multilateral integration of the European Union shows an *extraordinary attractiveness*, which can be observed by the number of solicitations for participation from outsider neighbouring countries. The author also notes that the 2004-2007 enlargements have contributed to peace and stability in the continent and enhanced the EU's weight in the world (Moussis, 2015: 21). Nowadays, the European Union acts in the name of 28 states and contributes to the consolidation of democracy and respect for human rights in the neighbouring countries that are willing to participate in the EU project, once they are required to cope with EUs standards in matters of economy, human rights, democracy and fundamental freedoms in order to join the union.

Nevertheless, when addressing the specific role of the European Union as a democracy and human rights promoter, Elgström and Smith (2006) observed that:

EU policy-makers not only set compliance with the principles of human rights and democracy as membership conditions for candidate countries, but articulated and institutionalised them as characteristics of the EU's collective identity (Elgström, Smith, 2006: 118)

Established in the Treaty of Lisbon, the fundamental European values are not merely moral, they are also legal values, constituting a sort of European legal identity. Such values are specifically mentioned in the Article 2 of the Treaty on the European Union (TEU), as amended by the Treaty of Lisbon, as following:

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities (TEU: Article 2)

Moreover, it's formally recognised by the EU member states that these values should also be reflected in the external perceptions of a collective EU identity. Thus, the Article 21 of the TEU, as amended by the Treaty of Lisbon, stresses that the external action of the European Union should be guided by its founding principles, which it seeks to export:

The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law (TEU: Article 21)

Taylor has referred to the European Union as a *proactive cosmopolitan*, deliberately trying to find consensus among culturally different values and behaviours, promoting the universality and indivisibility of human rights. The promotion of western fundamental freedoms, namely in developing countries, is considered an important feature of the EU's foreign relations (Taylor in Elgström, Smith, 2006). According to Elgström and Smith, one of the most prominent international roles of the European Union is, namely after the Cold War, the promotion and defence of democracy and human rights. Actually, considered as a *norm exporter*, namely in the Mediterranean, the European Union continues to “*defend values which are repeatedly emphasized as distinctive and constitutive elements of EU external identity*” (Elgström, Smith, 2006: 139). Notwithstanding, Ginsberg and Smith added that more than an exporter of norms, the European Union deliberately tries to export its own modes of political cooperation, global governance and regional integration, that is considered a more solid basis for peace, human rights and security (Ginsberg and Smith in Meunier, Mcnamara, 2007: 268).

Manners (in Elgström, Smith, 2006) argues that there are five core norms constituting the EU normative basis which are also determinant for the definition of the EU's international role: peace, liberty, democracy, rule-of-law and human rights. The European Union was founded as a peace project that could only be achieved if other core values, such as liberty, democracy, rule-of-law and human rights, were respected. He even adds that the EU's international identity can't be separated from these core values because they belong to the *same identity-building process* (Elgström, Smith, 2006: 49). Four wider objectives have therefore been added to these five values: equality, social security, sustainable development and good governance. Manners argues that each one of these nine core values represent a normative element of the EU's international identity (Manners in Elgström, Smith, 2006: 70). Thereby, the EU intends to shape the collective understandings of its international role and identity through the affirmation and propagation of principles underpinned in its normative elements (Elgström, Smith, 2006: 52).¹³

However, even though the EU's rhetoric on the promotion of human rights and democracy in developing countries is very strong, policies are usually not so consistent; whereas a strong human rights policy, for instance, can have a positive impact in the raising of human rights standards in the world, ignoring human rights violations worldwide can have the opposite effect. Ignoring human rights violations in distant countries can highly decrease the credibility and legitimacy of the EU's human rights policy, which is taken as a *long-term security strategy*, and harm the EU's cooperation with developing countries that start to

¹³ For instance, in the EU Charter of Fundamental Rights, where the death penalty is rejected, the European Union affirms a collective EU interpretation of determined values and principles, such as the concept of human dignity. Consequently, the European Union is considered to have a common interpretation about the death penalty, which is conceived as incompatible with human dignity and so with human rights, and this shapes the collective understanding of the EU identity (Elgström, Smith, 2006: 52).

understand this active cosmopolitanism as “*imperialist and self-serving rather than ethical and enlightened*” (Elgström, Smith, 2006: 157). It’s been observed by Elgström and Smith (2006) that the European Union is unlikely to act and defend human rights in every situation where human rights are violated worldwide - this would be unrealistic - but if it creates the perception that the European Union is only capable to act when its interests are directly affected, then the EU’s normative and moral leadership in the world is highly compromised.

Lucarelli argues that existing literature often recognises that the European Union has a strategy of *leading by example* and this is an important feature of the EU’s leadership in world politics. This leadership is therefore linked to the EU’s ability to exert influence in world politics, what depends on qualities such as “*the capacity to gain agreement on an agenda, the ability to propose solutions to collective problems that others follow, the ability to propose models that are then imitated (e.g. in the case of the European model of regional integration) and the ability to propose norms - global, regional or local - that others follow*” (Lucarelli in Chaban, Holland, 2014: 47). The exercise of these qualities, however, depends not only on its economic and diplomatic power and skills, but also on the external perceptions of the European Union. Thus, by exerting a non-coercive type of leadership, the European Union needs to be perceived as credible and legitimate in order to be able to set agendas, and to lead and export models and norms in world politics (Chaban, Holland, 2014).

1.3.1. Good governance

The concept of good governance is one of the most recent norms to be developed within the EU governance system, thus, the scope and definition of the concept are still somewhat flexible. It seems that there’s disagreement among authors about the official emergence of the concept. For instance, according to Börzel, Pamuk and Stahn the concept of good governance started to be *mainstreamed* (both by organizations, such as the World Bank and the UN, and by individual western countries such as the United States) after the end of the Cold War (Börzel, Pamuk and Stahn, 2008). In turn, Elgström and Smith (2006) argue that the concept officially emerged a little bit later, following the Iraq war, when there was a collective commitment to spread good governance in world politics, establishing the rule of law and human rights as means to strengthen the international order and ending or at least limiting the spread of corruption and abuse of power (Elgström and Smith, 2006: 73).

It’s been noted by Bevir that the core concept of ‘good governance’ contains a number of distant dimensions and is often overloaded and conflated with multiple meanings and measures (e.g. democracy, human rights, transparency, eradication of corruption and power abuse, etc.), remaining under-theorized (Bevir, 2011: 188). Nevertheless, the European Union has been always active in stressing the importance of *good governance*. Actually, even before the emergence of the concept, in 1991, the European Council had already stated that

the administrative structures and constitutional arrangements of the EU member states should reflect, among other issues, the respect for the rule of law and human rights (European Council, 1991 *cited in* Munshi, Abraham, Chadhuri, 2009: 8).

The concept of good governance distinguishes itself from governance but does not oppose to it. In fact, good governance strengthens governance. Whereas the concept of governance focuses on *how* to make decisions, the concept of good governance focuses on *how* to make *good* decisions. Thus, good governance classifies the governance structure as being ‘*good*’, or positively evaluated. According to Gibney and Mihr (2014), *good* means that the governance process is accountable, transparent and enables a participatory decision-making for the adoption of the *right* policies. Good governance is therefore concerned with the adoption of the right policies and considers that this can only be achieved if the decision-making process is inclusive, proportionate and consensus-oriented. Moreover, the governance process should follow the rule of law and the applicable international standards if comprised within an international regime. For instance, in order to constitute a form of good governance, the human rights governance should, among other things, follow international human rights standards (Mihr, Gibney, 2014: 64).

Heywood (2011), in turn, has described good governance as:

Standards for the process of decision-making in society, including (according to the UN) popular participation, respect for the rule-of-law, transparency, responsiveness, consensus orientation, equity and inclusiveness, effectiveness and efficiency, and accountability. (Heywood, 2011: 123)

By defining the elements or standards that comprise a *good* governance, one gets important indicators that can measure/evaluate the quality of governance systems. In turn, these indicators should be interpreted in the light of human rights principles, norms and international standards which “*serve as important benchmarks that specifically define the governance indicators that measure performance and effectiveness (...) of any regime*” (Mihr, Gibney, 2014: 65). Mihr and Gibney divided governance into three good governance principles/dimensions, which are also measurable indicators: accountability, transparency and participation. In summary, accountability refers to the level of responsiveness, since organisations should respond to the ones affected by its decisions and/ or actions through monitoring and reporting mechanisms. Generally, the higher level of responsiveness, the higher level of accountability. Transparency, in turn, refers to openness and accessibility of information, while participation refers to the inclusivity and fair representation of all relevant stakeholders and actors in the decision-making process (Mihr, Gibney, 2014).

Bevir (2011) defines four attributes for good governance decision-making elements: suitability, robustness, innovation and content. Suitability refers to the relation between the decisions and the nature of the problem, which should be correspondent. Robustness refers to the ability of decisions to cope with uncertainty and other circumstances. Innovation

refers to the capacity of the decision making process to innovate, that is to find new problems and new solutions. Finally, content refers to the ability of the normative dimension of institutions to produce good or bad governance practices. This means that, according to the author, some institutions might have a normative structure that allows the emergence of corrupt practices, for instance, more easily than others.

Good governance has been discussed within the context of international organisations, such as the World Trade Organisation (WTO), the World Bank, the Organisation for Economic Cooperation and Development (OECD), the Organisation of the United Nations (ONU) and the European Union, which have been stressing its importance. Nevertheless, the concept doesn't mean the same neither for the mentioned organisations, neither for other organisations or individual countries to which the concept can be applied. Thus, good governance should be interpreted within the context of the issue-area and within the context of the functioning and organisational structure of the organisation (Munshi, Abraham, Chadhuri, 2009: 2).

Final considerations

This section starts with an idea sourced in the third definitive article of the *Perpetual Peace*, where, referring to the cosmopolitan right, Immanuel Kant has noted that,

The intercourse, more or less close, which has been everywhere steadily increasing between the nations of the earth, has now extended so enormously that a violation of right in one part of the world is felt all over it (Kant, 1917 ed.: 142)

As the world community integrates into various degrees of interdependence, a great amount of contemporary problems start to affect not one, but multiple countries at the same time. Similarly to other global governance issues, refugee issues transcend, due to their transnational nature, the political boundaries of the state and therefore can only be addressed through global collective action, since the governance of such phenomenon requires a system of shared authority, multi-actor involvement and, very importantly, international cooperation. States no longer inhabit different worlds and ceased to be the monolithic and impenetrable entities they once were, being rather interconnected entities with complex cross-border interactions between them.

Furthermore, it started to be recognized that states can also be actors of violence against their own people, what allowed the concept of sovereignty to move from the sovereignty of the state, to the sovereignty of the people. Human rights emerged as a legitimate limitation to the sovereignty of the state, which became, rather than a fundamental attribute of the state, a responsibility towards humanity. Human rights became *everybody's business* and, under the concept of *Responsibility to Protect (R2P)*, the international community should no

longer ignore mass violations of human rights in other parts of the world, having a shared responsibility to protect the most vulnerable when states displace large numbers of its citizens and are unable or unwilling to respect their life and freedom.

Many international organizations, such as the Organization of the United Nations (ONU) and the United Nations High Commissioner for Refugees (UNHCR), were established after World War II, in order to regulate the behavior of states and other actors. Some of these institutions would intersect complementarily or contradictorily in their scope and purpose and sometimes having competitive relationships with other institutions and legal frameworks, creating a phenomenon of *regime complexity* in global governance (Betts, 2011). However, more than half of a century of human rights has produced important changes, such as introducing constitutional and moral limitations to the sovereignty of the state if it conflicts with the human dignity of the people living within its territory. Thus, quoting Reisman, “*if complexity of decision is the price to pay for dignity on this planet then, it’s worth it*” (Reisman, 1990: 876).

Even though the moral values behind the protection of refugees date from very early in history, the formal responsibility to protect refugees emerged in the post-Second World War, following the tragic displacement of millions of people. In 1950, the General Assembly of the United Nations gathered to create the UNHCR which would draw, in the following year, the key document for the protection of refugees: the 1951 Convention Relating to the Status of Refugees. The level of institutionalization of the international refugees’ regime is unique, since it has its own specialized UN agency and its own international Convention. Notwithstanding, taking into consideration that the world is still divided into interconnected but still politically separated units, refugees need to obtain permission to enter another state. Thus, even though asylum is the legal exception to the sovereign right to allow or deny access to the territory, the international refugees’ regime is still highly affected by the policies adopted by countries at the national level. Circumscribed within international public law, international refugee law faces the same enforcement problems, depending on the states’ willingness to cope with their international obligations.

The European Union is a subject of international law, what means that it is bound by the principles of international law, particularly by the ones that have an *ius cogens* status, such as the *principle of non-refoulement*. Moreover, it also has extended responsibilities and duties under international law coming from its status of international organization - even being a one of its kind international organization - and from the international principles it comprised into its own legal order, such as human rights principles. In fact, human rights are entrenched into the EU’s own legal order and became a significant part of its identity. Thus, with an identity rooted in human rights principles, the EU affirmed itself as a *moral leader* in world politics and has been active in stressing the importance of a shared governance of the world, in which it plays a central role. The European Union project introduced democracy in

countries like Greece, Spain and Portugal, and highly contributed to the reconciliation in the Balkans, which used to nest dramatic ethical conflicts. It also contributed to the promotion of values such as human rights, rule-of-law and democracy through its European Neighbourhood Policy (ENP) and through various EU-funded projects, research and missions worldwide.

On the 12th October 2012, the European Union has, by unanimous decision of the Norwegian Nobel Committee, been awarded a Nobel Peace Prize for its role in the reconciliation of the European continent and for its contribution to democracy and human rights, namely by overcoming the tension between east and west. For instance, according to the European Commission, the awarded money of the Nobel Prize was dedicated to children affected by war, more precisely in four education projects, in collaboration with international organisations (e.g. UNICEF, ACTED, the UNHCR and Save the Children International), which aimed at providing educational support to children in conflict zones, such as Iraq (also contemplating the participation of Syrian refugees in Iraq), Pakistan, Colombia and Ecuador, Ethiopia, Democratic Republic of Congo and also in the Norwegian Refugee Council. The European Union also reaffirmed that the Nobel Peace Prize should leave a *lasting political legacy* and kept investing in such projects aiming at educating children that didn't have the chance to grow up in peace.

It's possible to observe that the European Union plays a non-coercive type of leadership, employing significant soft power. However, in order to *lead by example* in matters of good governance and keep its moral leadership in the world, the European Union should respond collectively and humanely to the current refugee crisis, taking into consideration not only its obligations under international law, but also its role in the promotion of the rule-of-law and human rights. The absence of a collective response in matters of asylum, which is already a formal common policy area of the EU, shows little solidarity and political cohesion among the EU member states, what might undermine the attractiveness of the EU project as a role-model of peace and stability.

Chapter II

Governance in the European Union: the intergovernmental-supranational paradigm and the establishment of a multilevel governance

Introduction

In a speech about Global Governance (GG) in the European University Institute of Florence, the former President of the European Commission, José Durão Barroso, claimed that the European Union and its institutions found a way to converge national interests into common interests and that the EU Member States now recognize that they achieve better diplomatic results and more substantive outcomes at the global level when they act collectively. According to him, the European Union is becoming figure and the political reality of a “*world ruled by law, and not by force; a world where rights are more important than strength; a world where major powers tackle problems in concert, and not unilaterally*” (Barroso, 2010: 7). Nevertheless, even though EU Member States accept the rule of law and the authority of common supranational institutions (to whom they renounced some aspects of their sovereignty), it’s often been noted that they still want to sit at the *chess table* as individual players.

The theoretical debate about the nature and development of the European community and the development of EU policies has been landmarked by two contrasting paradigms: the supranational paradigm, which puts supranational institutions at the centre of the decision-making process and the intergovernmental paradigm, which focuses on national governments as the central decision-makers. Following the complexities surrounding the evolution of the European community, characterized by different arrangements of intergovernmental and supranational decision-making procedures in the making of EU policies, Hooghe and Marks developed a new concept in the early 90s: multilevel governance (MLG). This new concept, for instance, softened the breach between the two classical paradigms by emphasizing the importance of non-institutional actors and rising relevant questions about the *in fact* authority of states and formal institutions in the decision-making processes. It provides a more inclusive analysis tool for the understanding of the frequent and complex interactions

between actors that cooperate in the making of EU decisions within local, sub-national, national and international levels of governance, through a network of formal and informal channels, in a system of shared responsibility that can't be circumscribed to the intergovernmental and supranational approaches to integration.

In order to understand the nature of decision-making in the European Union, namely within the Common European Asylum System, this chapter is focused on the most important integration theories of the European Union and examines how these theoretical perspectives can help us understand the interactions between actors in the decision-making processes and in the definition of policies. Firstly, it highlights the main theoretical arguments that emerged between the proponents of the apparently dichotomist intergovernmental and supranational approaches, and explains how the breach between them has been softened by the emergence of the concept of multilevel governance. Secondly, it tries to explore the concept of multilevel governance and describe the complex interactions between actors when deciding and making policies, taking into consideration the shifts of power from the EU's intergovernmental institutions to EU's supranational institutions in Europeanized policy areas, often creating difficulties to the outbreak of necessary prompt replies, such as occurred in the current refugee crisis.

2.1. From the supranational and intergovernmental paradigms to multilevel governance

The roots of the supranational paradigm date back to the functionalist theory developed by David Mitrany in his work *A Working Peace System* (1966). The author criticized the westphalian division of the world in individual political units, since state's authority should be progressively transplanted to an international body through a voluntary, flexible and long-term process of functional integration. In the end of the process, the roles and authority of the state would be fully transplanted to this international organisation, which would become a post-national order in the form of a world government, yet not exactly a world state. The author even opposed to regional integration, which could *perpetuate national rivalries*. In this sense, the solution should and could only be global, eradicating the division of the world in competitive territorial political units (Reis, 2014: 108). However, developments in the integration process of the European Union have allowed authors (Haas, 1958; Lindberg, 1963) to observe some weaknesses in the functionalist theory. The neo-functionalist theory, developed by Haas, and later by Lindberg, supports that the integration scheme should be understood as a process - focusing on the interactions between the actors involved - and not as a Universalist end¹⁴. Opposing (or at least questioning) the traditional idea of world government defended by Mitrany, neo-functionalists argue that these interactions should lead

¹⁴ As Kant suggested in his cosmopolitan view of *Perpetual Peace*.

to a new political community through a process of successive transfer of loyalty from states to EU's supranational institutions, followed up by a *spillover* effect¹⁵. This to say that as states transfer loyalties to institutions in a determined policy field, the power and responsibilities of these institutions tends to deepen, generating more integration. In turn, integration expands automatically, reflecting in other co-related policy fields (Camisão, Lobo-Fernandes, 2005; Hill, Smith, 2011). Nevertheless, in their work *Construir a Europa* (2005), Camisão and Lobo-Fernandes have therefore observed that the *spillover* effect from one field to the other hasn't been empirically verified. For instance, economic integration wasn't automatically expanded to political integration, having depended "*upon political leadership by national elites and by political agreements between national governments*" (Harrison cited in Camisão, Lobo-Fernandes, 2005: 36). Proceeding from this example, one can observe that EU national governments remain the most important players in the decision-making process and that EU integration is still very dependent on them.

The relevance of national governments in the integration process has been explained by the intergovernmental paradigm, based in the neo-realist theory and in the findings of the neo-realist Keeneth Waltz (influenced by Hans Morgenthau). According to them, states act only according to their national interests, what makes the European Community a mere "*aggregation of sovereign states*" (Camisão, Lobo-Fernandes, 2005: 38), with different interests and whose cooperation is only possible through *interstate bargaining* because the authority of EU's supranational institutions comes from national states' willingness to transfer authority *according to* their best interests and *as long as* it fits these interests, being able to recall that authority at any time (Camisão, Lobo-Fernandes, 2005: 38). Camisão and Lobo-Fernandes noted that even though the neo-realist theory can explain a part of the European community development, which also comprises intergovernmental elements, it relies in a traditional concept of sovereignty that doesn't fully fit the integration process. Neo-realists present states as homogenous, rigid and impenetrable units whose action is only justified by their national interests, however, this concept of sovereignty ignores that the decision-making process is *bipartite*, shared between States and the supranational institutions they created. In addition, according to Williams (1991) and Wood and Yesilada (1996), referred by Camisão and Lobo-Fernandes (2005), this bipartite decision-making not only comprises supranational and intergovernmental elements, but also results in supranational outputs (Camisão, Lobo-Fernandes, 2005). This means that even if the decision-making processes are intergovernmental in nature - once EU institutions are decided and created through intergovernmental bargaining -, it's important to note that EU institutions have political

¹⁵ The spillover concept has been developed by neo-functionalist school, namely by David Mitrany, which acknowledged that there's an invisible hand that allows the spontaneous integration of one policy-field to spill over into other policy fields. According to the Hill and Smith, "*integration creates pressures to integrate contiguous areas for which the original is crucial and which, therefore, can no longer be controlled at the national level*" (Hill, Smith, 2011: 25) Jean Monnet was also a prominent figure of the spill-over concept, introducing the idea that the integration process of the European Union should be understood as an inevitable process, since the integration of individual sectors is likely to reach spillover effects to further the process of integration into other sectors.

autonomy and the outputs (e.g. normative law) that come from the *bipartite* (national governments and EU institutions) decision-making process are supranational, applying at least to the majority of the EU member states.

The tension between the supranational and intergovernmental paradigms has been eased by what Camisão and Lobo-Fernandes call the modern integration theories. The European integration project itself is, according to Lavenex and Uçarer, “*an exercise in responding to increasing interdependence and trying to manage it in ways that maximize potential benefits and minimize costs*” (Lavenex, Uçarer, 2003: 16). This exercise is very dynamic and in order to understand its essence one can’t expect to find a black or white answer. Dominant figures in European Integration Studies, such as Keohanne and Hoffman (1991) and other relevant authors (Camisão, Lobo-Fernandes, 2005; Wallace, Polack, Young, 2015; Haddad, 2008) tried to bind up the breach between intergovernmentalism and supranationalism. Hoffman, for instance, agrees that nation states are the “*central unit of the international system*” (Camisão, Lobo-Fernandes, 2005: 39), but denies the classical concept of sovereignty, arguing that in order to survive contemporary issues - marked by the growing number of players and the emergence of new conception of violence (considered more risky by the author) - the state should be able to regenerate itself. Regeneration of the traditional nation state, the author has observed, can be translated into the presence of supranational elements in the integration process of the European Union, even if the prior decision-making process is based on intergovernmental bargaining between EU member states. In this sense, the interdependence between the two components (supranational and intergovernmental) can, according to Deutsch (referred in Lobo-Fernandes, 2006), possibly result co-variations in the system or, in other words, “*in a wide range of potential intermediate outcomes*” (Schmitter, 1996 cited in Lobo-Fernandes, 2006: 154) between intergovernmentalism and supranationalism. Luís Lobo-Fernandes observes that the integration process binds political units (previously separated) through the creation of common institutions that contribute for the transformation of sovereignty and whose modern application can only be understood within “*a new logic of shared sovereignties*” (Lobo-Fernandes, 2006: 146).

2.2. Multilevel governance

The European Union is a very peculiar political organization with a one of its kind institutional system that operates through supranational institutions (Commission and European Parliament) and intergovernmental negotiations (in the Council). Actually, this mix of supranational and intergovernmental elements makes the EU governance system both unique and complex. It’s often recognized that the European Union is a *sui generis* body with mixed characteristics of an international organization, a state, a superstate and a federation of states (Heywood, 2011). Very difficult to categorize, the European Union is known by complex interactions between multiple actors occurring within various levels of governance.

Taking into account that some dynamic decision-making processes come out of intensive bargaining between national policy-makers and between national policy-makers and other bodies, one can observe that EU member states remain the most influent actors in EU decision-making, holding multiple channels of influence beyond treaties and institutions. Many times diverging interests among EU member states, fuelled by a sometimes not clear division of competences between the actors involved, have resulted in what Zielonka called *euro-paralysis* (Zielonka in Elgström, Smith, 2006: 5). Nevertheless, the scope of the politically independent EU institutions has been extended to a wider range of political areas, what makes them key and influent players to which EU member states delegate sovereignty with the purpose of having common interests of all the member states and its citizens represented. What's been noted by Laffan, however, is that the EU governance system, due to its innovative and experimental character, has allowed necessary flexibility to deal with also changing agendas within a context of enhanced diversity (Laffan in Elgström, Smith, 2006: 5).

Depending on the policy field, decision-making in the EU can be more supranational, with states delegating some of their responsibility for decision-making to a body of their choice under commonly accepted rules and conditions, or intergovernmental, which allows cooperation between sovereign states under conditions they can fully control. However, no shaped dichotomy between the two approaches can be observed (Wallace, Polack, Young, 2015; Heywood, 2011; Haddad 2008). As stated by Haddad the limitation of the dichotomy between the intergovernmental and supranational paradigms can undermine the overall understanding of the integration process, since the European Union, remaining a system without government, is characterized by “*hybrid mixture of intergovernmentalism and supranationalism, and of various combinations and degrees in between*” (Haddad, 2008: 172). This has also been acknowledged by Heywood, who considers the battle between EU domination and national sovereignty as *sterile* notion of EU's policy-making (Heywood, 2011: 499). Proceeding from here, the European Union started to be understood as a unique and multi-level political structure, integrating both intergovernmental and supranational decision-making mechanisms, and a variety of actors that exert influence together with national governments and EU institutions.

The concept of multi-level governance (MLG) has been introduced by Hooghe and Marks within the context of European integration. In their work *Multilevel Governance and European Integration (2001)*, the authors distinguished two models of governance in the European Union: the *state-centric model* (also developed by Keohane 1984; Keohane and Hoffman, 1991) and *multi-level models* (also developed by Scharp, 1998; Schmitter, 1992; Jachtenfuchs, Kohler-Koch, 1995; Hooghe and Marks, 2001; Mihr, Gibney, 2014).

In the state-centric model, decision-making is based on intensive bargaining between EU member states and supranational institutions only exist to serve the purpose of those

individual national governments. In this sense, supranational institutions are created to “*achieve state-oriented collective goods*” (Hoogue, Marks, 2001: 1) and their outcomes only reflect “*the lowest common denominator among national government positions*” (Hoogue, Marks, 2001: 3). In turn, within multi-level models, decision-making competences are not monopolized by EU member states - even though they remain the most important actors - but are rather shared among all relevant actors. It’s been noted by the authors that EU’s national governments are still *formidable participants* in the policy-making of the European Union, but they’ve lost some of their former authoritative control to supranational institutions that have acquired an “*independent influence in policy making that cannot be derived from their role as agents of national executives*” (Hoogue, Marks, 2001: 3).

Thanks to the political autonomy of EU’s supranational institutions, member countries can no longer control every detail of the EU agenda (Lavenex, 2009). Even if national governments remain the most important and probably the most legitimate decision-makers during negotiations, they are just actors among other actors (Mihir, Gibney, 2014: 63). Heywood also agrees with this, adding that the European Union is “*no longer a confederation of independent states operating on the basis of intergovernmentalism*” (Heywood, 2011). According to the author, after the incorporation of the qualified majority voting in a wider range of policy areas and the new level of legal authority conferred by creation of binding EU law which “*supersedes national law in areas where the EU has ‘competence’*” (Heywood, 2011: 496), decision-making in the modern EU became less intergovernmental and more multilevel. But what does multilevel governance specifically mean? The concept of multi-level governance has been described by Heywood (2011) as a “*pattern of overlapping and interrelated public authority that stems from the growth, or growing importance, of supranational and subnational bodies*” (Heywood, 2011: 126). Basically, it means that interactions between actors from both public and private sectors occur simultaneously within different territorial levels (global, international, regional, national, sub-national) of governance. The balance between the local, national and transnational level of authority or, in other words, the balance between the sub-national, national, intergovernmental and supranational levels is likely difficult to measure because the authority of actors at these levels shifts according to the policy area and is enmeshed in policy networks (Heywood, 2011). These policy networks, however, are more horizontally than vertically ordered, since exchanges of influence between transnational, national, regional and local actors can be negotiated in non-hierarchical contexts, outside the formal legislative arena and the formal institutional system which is also more vertically ordered.

Policy networks have been described by Heywood (2011) as a set of relationships in a particular policy area between political actors (governmental and non-governmental) that share common interests and general orientations, usually cutting “*across formal institutional arrangements*” (Heywood, 2011: 126) and operating in more than one territorial level. For

instance, governments (operating at national level) often consult with civil society organisations (operating at the international and local level), companies and other actors and, sometimes, even “*outsource their responsibility to act and implement*” (Mihir, Gibney, 2014: 63) to them. A tendency to favour the local level for political action through what Heywood called localization has been a trend since the 1960s and sub-national governance became more relevant (Heywood, 2011:126). In this sense, European Union multi-level governance operates under the *motto* ‘*Think globally, act locally*’ with the participation of thousands¹⁶ of local, regional and international authorities which have authority in key areas such as human rights, environment and education, for example (Committee of the Regions, 2009). According to the Commission on Global Governance, the sharing of expertise and multi actor-involvement (from the local to the global level) creates conditions for the emergence of genuine collective responses to issues affecting the global community (Commission on Global Governance, 1995; Heywood, 2011) and, regardless of strong criticism, without the involvement of actors other than national governments many standards and principles would not be implemented, since non-state actors (civil society organisations and non-governmental organisations for instance) are often closer to the local level and often play an important role in campaigning and awareness-rising, for example.

2.2.1. The institutional design of the European Union

According to Moussis (2015), EU’s common policies are the essence of the integration process of the European Union. Common policies intend to satisfy (or at least not harm) the interests of EU governments, however, consensus requires a complex decision-making process among EU governments (which can have a direct or indirect influence) and EU institutions. The author distinguishes two types of common policies: fundamental common policies and secondary common policies. Fundamental common policies require new transfers of sovereignty (that didn’t exist previously) and are mostly intergovernmental. National governments discuss these new sovereignty transfers in intergovernmental conference and the outcomes are then outlined in treaties which are later ratified by EU member states after the authorization of national parliaments. In turn, secondary common policies are mostly supranational (taken by EU’s common institutions) as they reflect necessary measures/guidelines legal acts to be taken in order to achieve goals in determined policy fields that are already stated in the treaties, but do not require new transfers of sovereignty.

In the European Union, different institutions co-operate in the legislative, executive and judicial functions, in order to guarantee a vertical separation of powers in the decision and policy-making processes that lead to these common policies. The institutional design of the European Union comprises seven institutions - the European Commission, the Council of the

¹⁶ According to the own initiative opinion of the Committee of the Regions on the Committee of the Regions’ White Paper on Multilevel Governance, there were nearly 95000 local and regional authorities, in 2009, with significant powers in various policy fields (Committee of the Regions, 2009).

European Union, the European Council, the European Parliament, the European Court of Justice, the European Central Bank and the Court of Auditors - and two advisory bodies - the Economic and Social Committee and the Committee of the Regions. However, this work will only focus on four institutions, which we consider the most relevant decision and policy-making actors within the field of asylum policy: the European Commission, the Council of the European Union, the European Council, the European Parliament and the European Court of Justice.

The European Commission, the most supranational and politically independent institution of the EU, holds the executive power of the European Union, representing the common interests of EU member states (and not the interests of individual countries). Its main role is to propose legislation, which is then adopted in co-legislation of the European Parliament and the Council of the European Union through the ordinary legislative procedure (see Figure 1). Moreover, it enforces European law, with the support of the Court of Justice of the European Union; sets action priorities and objectives, which are defined on a yearly basis in the Commission Work Programme; and is also responsible for the management and implementation of EU policies and budget.

Together with the European Commission, the Council of the European Union is the main decision-making body of the EU. It's composed by government representatives from each Member State, which represent national governments in the negotiation of EU laws, proposed by the European Commission. The Council has an important role (shared with the European Parliament) in the co-adoption of laws and coordination of EU policies at the member states level. Moreover, it's responsible for the EU foreign and security policy, based on the guidelines of the European Council (a different EU body).

Both Council of the European Union and European Council are considered to be EU's intergovernmental institutions, allowing states to pursue their individual interests in the EU decision-making process. Contrary to the Council of the European Union, the European Council doesn't enrol in the legislating process and doesn't negotiate or adopt EU laws, rather it's responsible for EU's policy agenda setting. This body meets every six months, at least twice, in the so called EU summits and is composed by 28 heads of state or government (from each Member State), the President of the European Council (at the moment of writing Donald Tusk), the President European Commission (at the moment of writing Jean-Claude Juncker) and, if necessary, the High Representative of the Union for Foreign Affairs and Security Policy (at the moment of writing Federica Mogherini). The conclusions adopted by the European Council, mostly adopted by consensus, determine EU's political priorities and define the political direction to be followed through the statement of particular actions to be taken and goals to be achieved.

In turn, the European Parliament (EU's law making body) is the most democratic institution of the European Union, being elected by EU citizens through direct universal suffrage. The members of the European Parliament are grouped by political affiliation and not by nationality. However, the number of members from each Member State is proportionate to each Member State's population. The European Parliament the only EU body being directly elected and has the role of electing the President of the European Commission and approving the European Commission as a body. Furthermore, it adopts EU laws, together with the Council of the European Union, based on the proposals of the European Commission and decides on international agreements and enlargements.

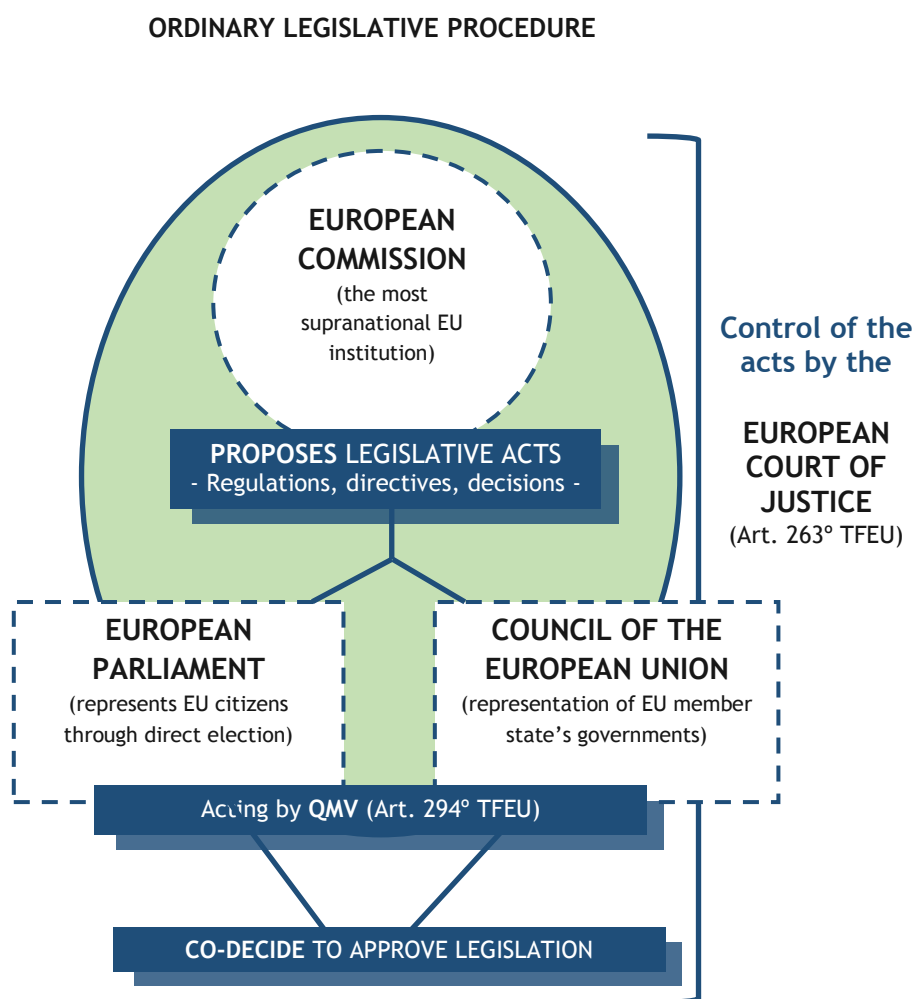


Figure 1. Ordinary Legislative Procedure. Source: Figure created by the author

In the area of Migration and Asylum, the Parliament will, under proposal of the Commission, co-legislate a number of proposals, namely:

- A permanent relocation mechanism for asylum-seekers in the European Union;

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- An EU common list of ‘safe countries of origin’
- Changes to the Dublin rules for determining which Member State is responsible for processing applications for international protection of unaccompanied minors;
- A legal migration measure on entry and living conditions for non-EU students and researchers;
- The smart-borders package, including a proposal for an ‘entry-exit system’ to prevent overstaying in the EU (the Commission is expected to present a new ‘smart borders’ package in late 2015 or early 2016).

Furthermore, the Parliament will exercise co-decision powers regarding the following Commission proposals:

- Strengthening Frontex, the EU border management agency, enhancing its mandate and taking steps towards establishing a European Border and Coast Guard;
- A permanent scheme for resettling asylum-seekers from third countries across the EU;
- A reform of the Dublin III Regulation;
- A ‘legal migration’ package, including a revision of the EU Blue Card Directive (European Parliament, 2015a)

Finally, the European Court of Justice (ECJ) is responsible for the interpretation and application of EU law, including infringement procedures. It established key principles of European law such as the principle of proportionality and the principle of non-discrimination on the basis of nationality, the supremacy of EU law and its direct effect in the national legal systems. Case-law of the ECJ has deepened the relation between EU Law and International Law. For instance, since 2005, the ECJ has issued several judgements and case-law on asylum provisions, reflecting the key principles of the 1951 Convention Relating to the Status of Refugees (Garlick, 2015: 2). In this sense, through the interpretation of secondary legislation in the light of treaty provisions and through the encouragement of judicial policy-making, the ECJ has been assuming a key role in developing EU policy regimes, such as the asylum regime in the European Union. Notwithstanding, both ECJ and national courts (which are bounded to the ECJ anyway) share responsibility for the judicial function of the European Union.

While there are still policy areas that remain resistant to Europeanization (e.g. tax policy), being confined to national governments, a significant variety of policy areas has been transplanted progressively from national governments to the EU institutions, such as agriculture, competition and the policy fields falling under the area of Freedom, Security and Justice (which replaced the old Justice and Home Affairs). Initially, the EU policy-making structure was divided in three pillars: Community Matters (Pillar I); Common Foreign and Security Policy (Pillar II); and Justice and Home Affairs (Pillar III), introduced by the Maastricht Treaty (signed in 1992). While Pillar I was essentially based on supranational cooperation and its acts were then adopted in accordance with EU’s legislative procedures,

Pillars II and III were mostly based on intergovernmental cooperation between EU Member States. Immigration and asylum fell under the Justice and Home Affairs (JHA) pillar in which decisions were to be taken by unanimity in the Council and the Parliament had merely a consultative role. In this sense, under Pillar III, or JHA, the Council of the European Union was the dominant actor and EU's supranational institutions (European Parliament and European Commission) had a very limited role.

The three pillars structure was later abolished under the Treaty of Lisbon. According to the Common Foreign and Security Policy's EU legislation summary, available at EUR-Lex, Pillar II completely disappeared with the creation of the High Representative of the Union for Foreign Affairs and Security Policy and with the development of the Common Security and Defence Policy (EUR-Lex, 2010). In their turn, as stated in the EU legislation summary relating to the Division of Competences within the European Union, also available at EUR-Lex, the other two pillars were replaced by three types of competences: Exclusive Competences; Shared Competences and Supporting Competences. Each type of competence is stated to be applied under different policy fields and each one of them is distinguished by different policy-making procedures. Exclusive competences, bound by the Article 3 of the Treaty of the Functioning of the European Union (TFEU), predicts a limited role for EU member states which are required to apply the acts legislated by the European Union (as a body with legal personality), unless the European Union, being able to legislate and adopt binding acts, allows them not to. In their turn, shared competences are bound by the Article 4 of the TFEU that authorizes both the European Union and its Member States to adopt binding acts under sincere cooperation. However, EU member states should only adopt those acts if the EU has not exercised its own competence. Finally supporting competences are bound by the Article 5 of the TFEU and, contrary to the previous competences, "*the EU can only intervene to support, coordinate or complement the action of Member States*" (Division of competences within the European Union - EUR-Lex Legislation Summary, 2010) and should not interfere in the exercise of EU member states. In the policy fields falling under supporting competences, the EU should be governed under the principles of subsidiarity and proportionality and has no legislative power.

In order to understand the effects of transferring policies to the EU level, one can observe how the implementation of reforms under the harmonization process of the CEAS actually affected specific policy elements in the EU member states. Thielemann and El-Enany (2009) analysed the implementation of several key directives. For instance, in the introduction of the Reception Conditions Directive (2003), the authors found evidence that whether some countries were obliged to improve their standards significantly, there were three countries that improved to a lesser extent and, in other three countries, there were even some downgrading elements.

Thielemann and El-Enany (2009) conclude that “*Rather than leading to policy harmonisation at the ‘lowest common denominator’, EU asylum laws have frequently led to an upgrading of domestic asylum laws in several Member States, strengthening protection standards for several groups of forced migrants, even in the case of EU laws that have been widely criticised for their restrictive character*” (Thielmann and El Enany, 2009: 24)

Final considerations

It’s been acknowledged that the European Union is a one of its kind political organization and the explanation of the phenomenon of European integration is namely challenging, as integration of this nature had never occurred before. Scholars have slowly divided between those who understand the European integration process as intergovernmental in nature, and those understanding it as a more supranational process.

The supranationalism is rooted in the functionalist theory of David Mitrany, who believed that the authority of the state would slowly be voluntarily transplanted to a world government, through a process of functionalist integration. Mitrany’s idea of world government, however, would be later criticized by neo-functionalists such as Haas, Lindberg and even Monnet that started to understand integration as a process and not as a Universalist end. Thus, state’s transfer of authority to supranational institutions would be a result of the Europeanization of determined policy areas, which would spill over to other related policy areas. In turn, intergovernmentalism is rooted in the neo-realist theory of Keeneth Waltz and in the influences of Hans Morgenthau. The advocates of intergovernmentalism rely on a traditional concept of sovereignty and often understand the European Union as an aggregation of states, which act according to their best national interests.

The mentioned theories of European integration have shed some lights in important aspects of the EU governance, but by presenting themselves as dichotomic approaches, intergovernmentalism and supranationalism failed to explain the complex interactions between actors in the decision and policy making processes, which are often characterized by hybrid mixtures of both. In this sense, prominent figures of the European integration studies such as Kehoanne and Huffman, and later Hooghe and Marks, with the introduction of the concept of multilevel governance, started to soften the breach between the intergovernmental and supranational approaches, by understanding the integration process as comprising supranational and intergovernmental elements. For instance, while EU member states actually transfer some of their sovereign competences to EU institutions, which are proactive actors in the making of EU policies, and comply with EU law, the EU has no autonomy to decide on its scope and competences and domestic preferences are still determinant in the decision-making processes, since many decisions are still taken by intergovernmental bargaining.

The studies of EU integration started to be integrated into the studies of EU governance, since the very concept of governance includes the idea of shared responsibilities for decision and policy making, providing a more inclusive tool for understanding the nature of the making of EU policies. For instance, multilevel governance emerged as an important concept to highlighting the complexity of vertical and horizontal interactions among governmental and non-governmental actors at various levels of governance, from the local to the international arena. Multilevel governance allowed the move from state-centric or EU institutions-centric approach to a multi-actor approach, which is better suited for the description of complex interactions between a variety of actors such as governments, local authorities, international organizations, non-governmental organizations, private actors and every possible actor that participates/ influences the making of EU policies. It offers a most suited tool for investigating how and why some policies are made, understanding “*the highly diversified EU procedures and practices, combining formalized modes of rule setting with informal practices of negotiation, cooperation, and consensus building*” (Tömmel, Verdun, 2009: 1) which can sometimes result in overlapping implementation patterns.

Needless to say that even though the EU’s organizational structure might somewhat resemble to the one of a national state government due to the vertical separation of powers, EU policy-making highly differs from national policy-making, since the European Union has to mobilize different sovereigns to cooperate with EU institutions in order to create EU policies. EU member states are represented in EU policy-making through the European Council and the Council of the European Union, which are considered EU’s intergovernmental institutions.

To say that one policy area has been Europeanized is to say that the authority over the decision and policy making processes of that one policy area has been transplanted from national governments to EU’s supranational institutions. With the abolition of the pillars structure with the Treaty of Lisbon, the competences of the European Union over a determined policy field might be exclusive, shared or just supporting competences, what means that the level of enrolment of EU’s supranational institutions and EU member states varies within policy fields. For instance, competition is of exclusive competence of the EU, asylum and immigration are of shared competence between the EU and the EU member states, and tax policy is still confined to the EU member states’ decision. Taking into consideration that the current research focuses on asylum policy, it’s important to mention that both EU member states and the EU can adopt binding acts, however EU member states can only do so if the European Union has not, or has explicitly decided not to exercise its competence.

Even though there are special decision-making procedures, the usual procedure for making EU policies in the areas in which the European Union has competence is the ordinary legislative procedure. Under this procedure, the European Commission proposes legislative acts which are then approved or rejected by the European Parliament and the Council of the European

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Union, both by qualified majority voting. The replacement of the unanimity for the qualified majority voting as the usual procedure for decision-making within the Council of the European Union has highly contributed for the development of a more supranational approach, since EU member states are no longer able to block legislation on their own.

In the course of this study, we will try to understand the decision-making process in the Area of Freedom, Security and Justice and try to enclose some of the dilemmas regarding the difficulties in the making of homogenous policies in the area of asylum, namely due to its sovereignty-sensitive nature. The theoretical framework provided by the main integration theories in the European Union is extremely relevant for the understanding of the nature of cooperation within this policy field, whose developments were, namely in its early years, characterized by intergovernmental decision-making, with little support from the EU's supranational institutions. Moreover, the Europeanization of asylum policy provides an empirical understanding of how the authority over decision-making has slowly but dynamically shifted away from national governments to the EU, through the harmonization of policies regarding the control of borders, the examination of asylum claims and the reception conditions for asylum seekers.

Chapter III

The nature of cooperation in the Area of Freedom, Security and Justice (AFSJ) and asylum governance

Introduction

The European Union has taken huge steps since EU member states first realized the need for cooperation in matters of immigration, asylum and justice. This need was formally recognized in the Maastricht Treaty (1993) which placed asylum and immigration in the third pillar (Justice and Home Affairs) of the European Union. Over the years the EU member states have been developing a more formal, institutionalized and supranational approach to immigration and asylum, namely after the establishment of the Single European Act, signed in 1985. The abolition of internal borders and the need for joint cooperation at EU's external borders, namely due to the increasing number of asylum seekers from Western Europe in the early 90s, triggered the EU's move towards the establishment of a common immigration policy and of a common asylum policy, what has included the adoption of various legislative acts.

The Article 3(2) of the Treaty on the Functioning of the European Union (TFEU) established that the European Union,

shall offer its citizens an area of freedom, security and justice, without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime (Article 3(2) TFEU)

For instance, the Title V of the same Treaty (Articles 67 to 89) contains the objectives and general provisions about the diverse policy fields falling under the domain of freedom, security and justice: immigration and border control, asylum, police cooperation, judicial cooperation in civil matters and judicial cooperation in criminal matters. What began as a highly intergovernmental policy area, became a priority area of cooperation and one of the most dynamic policy-making areas in the European Union. Namely after the removal of internal border controls within the Schengen area, EU member states soon started to acknowledge the importance of creating a common policy on immigration, border control and asylum in order to effectively manage EU's external borders while ensuring high levels of

security, as stated in the Article 67 TFEU. As stated by Lavanex and Uçarer (2003), the removal of EU's internal borders has also been a relevant proponent to the creation of “*uniformly applicable policies at the Union's gates*” (Lavenex, Uçarer, 2003: 17).

However, the Area of Freedom, Security and Justice covers a broad set of policy areas that are not easily combinable in one single governance arrangement, since they draw different questions and seek to achieve different (and sometimes overlapping) goals. In addition, this area includes particularly sovereignty-sensitive issues, such as the control over the access to the national territory, justice administration and internal security, considered core functions of the state. Thus, cooperation within the Area of Freedom, Security and Justice was not unproblematic and the Europeanization of the policy fields under its domain has been landmarked by sometimes irreconcilable divergences between EU member states, what led to flexible integration arrangements.

This chapter aims to understand the nature and the extent of EU's cooperation in the area of Freedom, Security and Justice, in which asylum is included. In order to do so it proceeds as following: Firstly it will explore the integration process of the Area of Freedom, Security and Justice, with reference to the use of differentiated integration forms. Secondly, taking into account that immigration is, as noted by Douglas Hurd, the British Foreign Secretary in the early 90s, “*among all the other problems we face, the most crucial*” (British Foreign Secretary Douglas Hurd, cited in Lavenex, Uçarer, 2003: 15), it will try to understand the context in which a more securitized approach to immigration has emerged and what are its impacts in the governance of asylum within the area of Freedom Security and Justice.

3.1. A case for integration or fragmentation?

The year of 1999 represented a turning point for Justice and Home Affairs, which were considered the “*great winners*” (Camisão, Lobo-Fernandes, 2005: 110) of the changes introduced by the entry into force of the Treaty of Amsterdam (signed in 1997). As previously mentioned, EU's policymaking structure was divided in three pillars: Pillar I (Community matters), Pillar II (Common Foreign and Security Policy) and Pillar III (Justice and Home Affairs). Even though the pillars structure no longer exists, having been abolished by the Treaty of Lisbon (signed in 2007), they're relevant for understanding of the changes within this AFSJ.

The changes introduced by the Treaty of Amsterdam were intrinsically connected to the application of the Schengen agreement, what allowed the Europeanisation of some policy-fields under the domain of Justice and Home Affairs (JHA), which were moved from the intergovernmental Pillar (III) to the Community Pillar (I). Regardless of the fact that cooperation between authorities related to the combat of transnational crime (including,

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among others, terrorism and human smuggling) remained intergovernmental, other traditionally intergovernmental policy-fields such as visa policy, external border control, immigration, asylum and judicial cooperation in civil matters were Europeanised.

EU institutions were then given the power to draw binding legislation within the area of Freedom, Security and Justice, replacing conventions for other forms of secondary law such as directives and regulations. In addition, deadlines to the adoption of measures were established. These developments allowed a less intergovernmental, and more supranational cooperation within this field, but this doesn't mean that EU member states signed away the control over the AFSJ. Thus, even though decisions were taken under proposal of the European Commission, or under initiative of an EU member state under consultation of the European Parliament, the power of EU institutions remained somewhat limited by the unanimous voting mode in the Council of European Union, which still allowed individual EU member states to block decisions (see Figure 2).

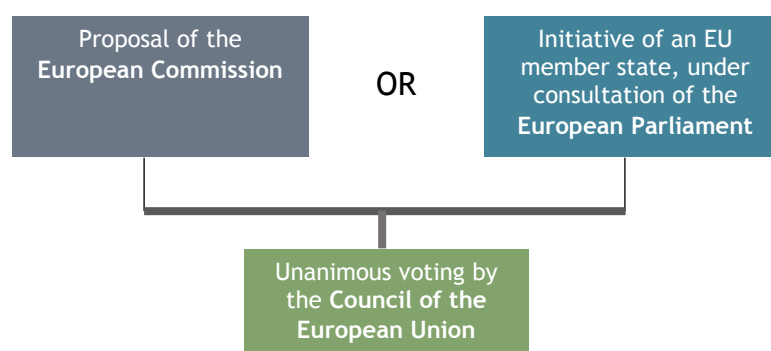


Figure 2. Decision-making method under the area of Freedom Security and Justice after the entry into force of the Treaty of Amsterdam. Source: Figure created by the author.

Hooghe and Marks (2001: 22) argue that EU member states generally agreed that the JHA pillar was very limited, since binding commitments were still difficult to make and decision-making under Justice and Home Affairs was based on a fragile voluntary legal framework. However, the European Union would only move beyond this decision-making method, based in the unanimous voting of the Council of the European Union, after the entering into force of the Treaty of Lisbon. The Treaty of Lisbon has strengthened the role of the European Court of Justice and the role of the European Parliament, being the latter to adopt legislation within the AFSJ through the ordinary legislative procedure, in co-decision with the Council of the European Union, both by qualified majority voting (please see Figure 1).

The AFSJ includes six distinct sovereignty-sensitive policy areas which are differently managed: immigration, border controls, asylum, and judicial cooperation in civil matters, judicial cooperation in criminal matters and police cooperation in criminal matters. These

domains are divided between the first four (immigration, border controls, asylum and judicial cooperation in civil matters, which have been Europeanised in the Title V TFEU, and the last two (judicial and police cooperation in criminal matters) which remain intergovernmental. In addition, even the Europeanized policy areas differ among them, resulting in different governance arrangements. For instance, whereas the governance of asylum and immigration is more based on legislative instruments, the governance of police cooperation, external border control and surveillance relies more on the operational information exchange and coordination, plus joint operations, which are considered more central elements. Consequently, as EU member states want to keep control over their operational means, “*the operational dimension of the AFSJ domain has contributed to the resilience of the intergovernmental element in the institutional framework of the AFSJ*” (Monar, 2010: 31).

National governments retain control, even though not traditionally, over the AFSJ policies through the European Council, which maintains the right of initiative in the definition of strategic guidelines. Whereas Tempere (1999) Hague (2004) and Stockholm (2009) were accompanied by a Treaty change, no political, institutional or legal change took place after Stockholm. In this sense, the article 68 of the TFEU, establishing that the “*European Council shall define the strategic guidelines for legislative and operational planning within the area of freedom, security and justice*” remains central in the Post-Stockholm, remaining the European Council responsible for the adoption of strategic guidelines within the AFSJ. According to the European Policy Centre, the European Council still “*defines the broad and long term strategic orientations which frame the Commission’s programming action in this specific field*” (Pascouau, 2014: 12), even though it has no formal legislative decision-making power. Without major modifications at the institutional, legal or political level, the policy orientations of the Area of Freedom, Security and Justice will still reflect the priorities of individual member states through the European Council, which mostly takes decisions by consensus (see Figure 3).

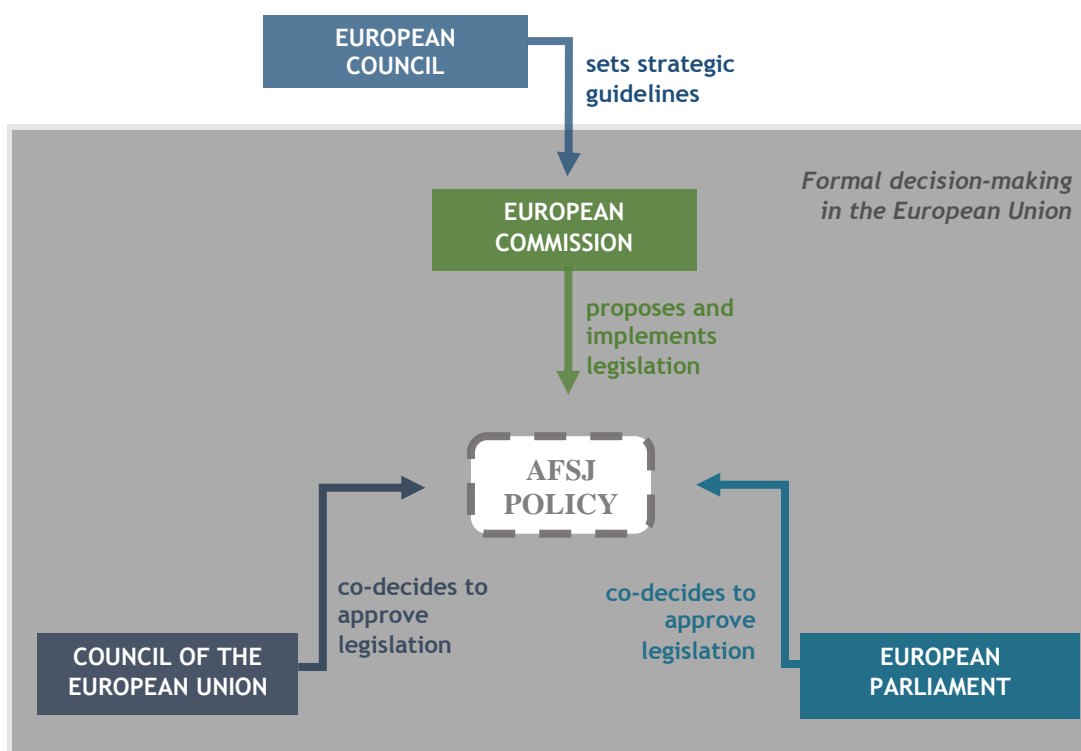


Figure 3. Formal decision-making in the European Union under the strategic guidance of the European Council.

The developments within the Area of Freedom, Security and Justice emerged, not as a matter of genuine integration, but as compensatory measures for the abolition of EU’s internal borders, mostly to address the implications of cross-border movement, terrorism, crime, immigration and asylum, due to permeability of EU’s external borders. Even though Schengen represents only a part of the AFSJ, it’s commonly recognized that the other parts are highly subordinated to it (Camisão, Lobo-Fernandes, 2005; Monar, 2010), taking into account that the Europeanisation of asylum, immigration, border control and criminality prevention somehow compensates some gaps of the free-movement of people within the Schengen area. Quoting Monar in Camisão and Lobo-Fernandes (2005), the emphasis is “*clearly on granting the free movement of persons*” and “*«appropriate measures to be taken in the other areas mentioned (external border controls, immigration, asylum and crime prevention) are explicitly related to this objective*” (Monar, 2001 cited in Camisão, Lobo-Fernandes, 2005: 111).

Cooperation within the Area of Freedom, Security and Justice has always been particularly sensitive because the domains of this area “*touch the core functions of the state*” (Monar, 2010: 23), such as the control over the access to the national territory, justice administration and internal security. Since the construction of the modern nation-state these functions have been a basic justification for the legitimacy of the state and are heavily protected by the

principle of national sovereignty. Thus, the Europeanisation of this policy-field represents significant progress in terms of European integration, namely because the nature of cooperation within the AFSJ has always been sovereignty-sensitive and EU member states have not always agreed to participate equally in it (Holzhacken, Luif, 2014: 6).

3.1.1. A matter of flexibility: differentiated integration

Differentiated integration is what Stubb (1996) called a form of integration which tries to reconcile heterogeneity without compromising the European Union integration process when not all member states are ready for the adoption of particular common measures. Within this context, differentiated means flexible, allowing EU member and non-members to adopt particular measures even if other member states don't. Due to the excess of existing terminology within this field, the author considered only three main categories of differentiated integration: *multi-speed*, *variable geometry* and *la carte*. These categories sum up how integration in the European Union is not homogenous among EU member states, comprising different times, spaces and matters. According to him, multi-speed integration is often supranational, driven by a particular group of EU member states which are ready to proceed with further integration in a determined policy field, assuming that EU member states that are not ready to do so will follow them later. Variable geometry can be considered to be both intergovernmental and supranational, since it "*allows permanent or irreversible separation between a hard core and lesser developed integrative units*" (Stubb, 1996: 285). It understands that the enlargement process might lead to be irreconcilable differences between EU member states and, in this sense, a group of countries which is willing to move further should not be held back. Finally, *à la carte*, is markedly intergovernmental, since it allows EU member states to select the policies in which they would like to participate, as if from a menu. An example of this category might be found in the Eurozone, since 9 EU member states have opted-out or have been temporarily excluded from it. Comparing to the other categories, *à la carte* is the most minimalistic form of integration, being multi-speed the most integrative category within the context of differentiated integration (Stubb, 1996).

The Treaty of Amsterdam introduced a new integration procedure called *enhanced cooperation*, which allows EU member states to cooperate in a determined policy-field, within the structures of the European Union and the provisions permitted by the EU treaties, without the involvement of all EU member states. States often move at different speeds and establish different priorities, wherefore this cooperation mode allows EU member states to deepen integration and enhance cooperation in areas of their interest, overcoming the paralysis which can come from an individual country, or a small group of countries, who are not willing to take part in the initiative. Nevertheless, it allows non-participating countries to take part in the initiative further on, under determined conditions, in a way that non-participating countries are not definitely excluded.

Within the Treaty of Amsterdam, the adoption of this cooperation mode required participation of at least half of EU member states, but this would be changed with the Treaty of Nice, which established a minimum number of 8 EU member states. According to Camisão and Lobo-Fernandes, Schengen became the first policy field falling within this new form of cooperation (Pérez-Bustamante, referred in Camisão, Lobo-Fernandes, 2005: 110). At the time of its entry into force in the Treaty of Amsterdam, enhanced cooperation covered Pillars I and III; but excluded the Common Security and Defence Policy (Pillar II). However, with the Treaty of Nice it was extended to common actions and positions under the Common Security and Defence Policy, as long as the cooperative initiatives didn't have implications in security and defence issues.

Enhanced cooperation required authorisation from the Council of the European Union by Qualified Majority Voting (QMV). However, if an EU member state declared opposition to the QMV voting in that particular initiative for important and well-founded reasons of national policy, the decision should be submitted to the European Council, that should vote unanimously. With the Treaty of Nice, the unanimous vote of the European Council would be replaced by the QMV, what knocked EU member states back in their ability to block decisions through national veto. It's important to note however that enhanced cooperation should only be developed if established in the Council of the European Union that the goals of the initiative could not be achieved otherwise. The Commission, for instance, was responsible for the verification of compatibility between the indicatives and the provisions of the applicable law. Moreover, it should propose the initiative under policy fields covered by Pillar I and issue an opinion in areas covered by the Pillar III. In turn, the European Parliament should be consulted in the first and merely informed in the third pillar. According to Monar, the Treaty of Lisbon maintains the possibilities for enhanced cooperation and even "*provides in fact for a quasi 'automatic' establishment of 'enhanced cooperation in the AFSJ in a number of cases'*" (Monar in Dyson, Sepos (ed.), 2010: 281), if the European Council doesn't reach an agreement within four months, what enhances the potential for differentiated integration (Monar in Dyson, Sepos (ed.), 2010).

It's been observed that some EU member states, such as Denmark, Ireland, Poland and the United Kingdom, have opted-out¹⁷ and in of legislation in various policy fields, while others were not allowed to join, such as Bulgaria, Croatia, Cyprus and Romania, that are still in a transition period to fulfil the requirements of the Schengen area¹⁸, and others, such as

¹⁷ The definition of opt-out considered by this Dissertation is the one provided by Adler-Nissen (2008). According to the author, "*an opt-out is described in a legal document attached to a treaty, which usually implies that a member state will not adopt EU legislation and policies in the area covered by the opt-out*" (Adler-Nissen, 2008: 66)

¹⁸ The Schengen area consists of 26 European countries, from which 22 are EU member states and four are non EU-member states, and allows both EU citizens and non-EU nationals to travel within the Schengen area, being checked only when crossing the external border and/or the first country of entry of the passport-free Schengen zone. Schengen allows any citizen from a Schengen member state, to travel within the Schengen area (including EU and non-EU members) by land without having to show

Sweden, intentionally avoiding the fulfilment of determined adoption requirements in order to delay the adoption of the euro. Regular opt-outs and exclusions from determined policy areas, plus the introduction of enhanced cooperation by the Treaty of Amsterdam, show that differentiated integration has become an important feature in the European integration process.

EU member states have some specific integration arrangements in respect of determined EU policies (Table 1). For instance, Denmark and the United Kingdom opted-out of the Economic and Monetary Union (EMU), even though Denmark is part of the European Exchange Rate Mechanism (ERM). The United Kingdom and the Republic of Ireland have opted out of the Schengen Agreement. The United Kingdom and Poland limited the extent to which European courts would be able to rule in the context of the application of the EU Charter of Fundamental Rights.

Due to the sovereignty-sensitive policy areas falling within the Area of Freedom, Security and Justice, developments within this area are not a case of simple integration and neither a case of unproblematic acceptance by EU member states. For instance, Denmark, Ireland and the UK did not agree to participate fully in the AFSJ, having negotiated different agreements.

The United Kingdom and the Republic of Ireland negotiated a flexible opt-in agreement from the legislation adopted within this AFSJ, being able to opt-in and out of legislation on a case-by-case basis, as governed by the Protocol No 21 of the TFEU, which states that the UK should express its desire to participate within three months after the proposal being presented by the Council of the European Union. If the President of the Council is notified that the UK wants to participate in a legislation, there's no chance to opt-out later, but if it doesn't express the intention to participate it might be able to participate later (UK Home Office and Ministry of Justice, 2015). Thus, none of the two countries is automatically bound by any legislation within the AFSJ. Regarding the Schengen agreement, the UK negotiated an opt-out agreement, governed by the Protocol No 19 of the TFEU, which allows the UK to take part in some or all provisions of the Schengen agreement. The UK and Ireland are automatically bound to measures of the Schengen provisions in which it already participates, unless it expresses its desire to opt-out to the Council within three months of the proposal or initiative. According to the UK Home Office and Ministry of Justice, in case of opt-out, the UK is ejected from *"all or part of the rest of Schengen to the extent considered necessary if such non-participation seriously affects the practical operability of the system, but the Protocol states explicitly that it must seek to retain the UK's widest possible participation"* (UK Home Office and Ministry of Justice, 2015: 1). The same applies to Ireland.

their passports or identity cards in time-consuming frontier stops. However, if a Schengen citizen or commercial truck, for instance, is traveling to an EU non-Schengen country (Bulgaria, Croatia, Denmark, Hungary, Poland, Czech Republic, Romania, the United Kingdom or Sweden) it can travel with a valid passport/ identity card, but has to undergo minimum border controls for EU citizens.

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As the UK wanted to maintain its own border controls, Ireland also had to stay out of Schengen because it shares the same land border and a Common Travel Area (CTA), with the UK. Thus, both countries are “*exempted from the Schengen acquis relating to the Schengen border control system and, in particular, the abolition of controls on persons at internal borders*” (Monar in Dyson, Sepos (ed.), 2010: 230). Thus, the countries do not take part in border control and in the 2013 recast of the Asylum Procedures Directive, but have chosen to participate in the Dublin System (Dublin III and Eurodac), the Schengen Information Visa System (SIS II), Europol and Eurojust.

Denmark is also not bound by any legislation within the AFSJ but is a Schengen member and decided to adopt EU legislation regarding Europol and Eurojust by means of a complementary intergovernmental agreement. According to Monar, Denmark is granted a similar opt-out from Schengen to the ones of the UK and Ireland, but “with specific provisions on opting-in possibilities which take into account the special position of Denmark as a Schengen member not wishing to be bound by ‘communitarized’ Schengen measures” (Monar in Dyson, Sepos (ed.), 2010: 280).

Table 1. EU member states that have specific integration arrangements within the mentioned EU policy-fields. Source: Table created by the author.

	EU Charter of Fundamental Rights	Area of Freedom Security and Justice						
		Schengen Area	Dublin III	Asylum Procedures Directive (Recast 2013)	EURODAC	SIS II	Europol (2009)	Eurojust
Bulgaria	✓	-	✓	✓	✓	✓	✓	✓
Denmark	✓	✓	-	-	-	-	✓	✓
Ireland	✓	Opt-out	Opt-in	-	Opt-in	Opt-in	Opt-in	Opt-in
Croatia	✓	-	✓	✓	✓	✓	✓	✓
Cyprus	✓	-	✓	✓	✓	✓	✓	✓
Cz. Republic	✓	✓	✓	✓	✓	✓	✓	✓
Hungary	✓	✓	✓	✓	✓	✓	✓	✓
Poland	Opt-out	✓	✓	✓	✓	✓	✓	✓
Romania	✓	-	✓	✓	✓	✓	✓	✓
Sweden	✓	✓	✓	✓	✓	✓	✓	✓
UK	Opt-out	Opt-out	Opt-in	-	Opt-in	Opt-in	Opt-in	Opt-in

Autonomy for integration usually means that the EU member states that do not wish to participate in a determined policy field, in order to protect their sovereignty, have a limited influence in the governance of that policy area due to the loss of voting rights. However,

working on differentiated integration, with a focus on Justice and Home Affairs (the new area of Freedom, Security and Justice), Adler-Nissen observed that in the case of Denmark and the UK, the opt-outs did not lead to exclusion, since both EU member states kept their influence “*in the shaping of new EU legislation even in politically sensitive areas covered by their JHA opt-outs*” (Adler-Nissen, 2008: 76).

Differentiation has been brought to the Area of Freedom, Security and Justice with the Schengen agreement (Camisão, Lobo-Fernandes, 2005; Monar in Dyson, Sepos (ed.), 2010) and “*was driven by a forceful rationale of ‘deepening’, with the development of the Schengen system outside of the EC Treaty framework being regarded as a temporary device*” (Monar in Dyson, Sepos (ed.), 2010: 286). A form of differentiated integration was necessary to make the UK and Ireland agree with the Schengen agreement and recognising that there might be other irreconcilable divergences among EU member states it was formally recognized in the EU Treaty framework. Monar argues that,

Schengen benefited from a unique advantage. When it was launched in 1985, the Community had no real JHA dimension, so that Schengen could develop its substantial JHA *acquis* on the basis of a *tabula rasa*, not being hampered by an existing *acquis* and the constraints of an EU-Treaty-based policy-making domain (Monar in Dyson, Sepos, 2010: 286).

This to say that regardless of the fact that differentiated integration allowed the deepening of EU integration through Schengen, too much flexibility for EU member states to opt-in and out also poses a great risk for fragmentation. For instance, the exemption of the UK, Ireland and Denmark, all EU member states, means that the EU does not offer the “*same terms of freedom, security and justice*” to nearly 533 millions of people - the citizens of Denmark, UK and Ireland (Eurostat, 2015).

The differentiated form of integration which has become a key feature in the European integration process, shows that the integration process is not automatic, neither homogenous. There’s still resistance to the Europeanization of some policy areas and, in this sense, the European Union allows some EU member states to proceed with the integration of a new policy area, even if other member states are not ready to do so. The concept is based on the assumption that there might be irreconcilable divergences among EU member states and that if a group of member states wants to proceed with integration should not be held back, however, this doesn’t mean that other EU member states can’t join later, in fact, they are expected to join later.

Nevertheless, by offering the possibility of *various types of membership*, differentiated integration can create political tensions among EU member states and undermine the political cohesion of the European Union. In their work *Construir a Europa* (2005), Camisão and Lobo-Fernandes pointed flexibility as a problematic feature of the integration process which can

“put at risk the indispensable cohesion to any concerted project” (Camisão, Lobo-Fernandes, 2005: 113).

3.2. The impact of a securitized approach to immigration in the governance of asylum within the area of Freedom, Security and Justice

This sub-topic will explore the relationship between forced migration and security, taking into account that refugees' access to a safe territory is directly affected by the immigration policies of the country where they seek asylum. Authors (Loescher, 1996; Salehyan, 2008; Lischer, 2005; Betts, 2009; Mogire, 2011) have examined the empirical relationship between immigration, asylum and refugees, and security-related issues such as conflict and terrorism.

Refugees can have military, political and symbolic uses and refugee movements can be, in various contexts, both cause and consequence of conflict, being used as weapons and/ or causing instability in other countries. Refugees' dynamics are affected by security issues both at the source and at the destination where refugees arrive. Loescher (1996) argues that, especially in developing countries, armed separatist movements selectively drove people out of their villages and destroyed them so they couldn't return. Moreover, they have often included politically and militarily active refugees in their operations. According to Betts, *“refugees have provided international legitimacy, a pool of potential recruits, sources of food and medicine, and a shield against external attacks”* (Betts, 2009: 63) for rebel groups in exile. This was the case of the Islamic fundamentalist Hamas movement, which used international assistance and the Palestinian refugee camps in Lebanon and Jordan for those purposes. Another example is the case of the Rwandan refugees in Zaire (actual Democratic Republic of Congo), whose refugee camps became incubators for a new ethnic war between tutsis and hutus in the 90s and whose conflict was further expanded to the neighbouring Congo, resulting in a regional war (Lischer, 2005; Betts, 2009).

The previous empirical evidences show that refugees have been used for political and military purposes from non-official groups, but this is not the only case. Governments or organized state sections have also used refugees in order to *“reduce or eliminate selected social classes and ethnic groups within their borders”*, to *“rid themselves of political dissidents, potential challengers to authority, unwanted minorities, and other ‘undesirables’”*, to *“infiltrate enemy agents”* into other regions, or to affect or destabilize their neighbours (Loescher, 1996: 19). Furthermore, history has shown that outside countries can also use refugees to support guerrillas and armed refugee groups in order promote their political interests abroad. For instance, during the Cold War, the resistance base to the Afghan government in Kabul (which was supported by the Soviet Union), was created in Pakistan with the support of the United States, which backed the 3 million refugees that fled there (Loescher, 1996: 14). The

United States also supported the anti-communist Nicaraguan refugees in Honduras and encouraged them to perform attacks in their home country (Betts, 2009: 63). According to Lischer, Nicaraguan refugees used the refugee camps in Honduras for resting and recruiting, being able to freely leave and come back (Lischer, 2005: 3).

Salehyan suggests that conflicts are not often restricted by borders and people escaping them might also have significant repercussions in neighbouring countries. Thus, refugee flows are capable of producing domestic political turmoil in other countries, triggering interstate hostilities and creating spill-over effects in the international system (Salehyan, 2008: 787). In this sense, the security concerns of hosting states regarding the militarization of refugee camps and the spillover effects of conflicts can be legitimate ones. Even internal conflicts can have external consequences, and sometimes the refugee can be a conducting wire. According to Lischer (2005), the refugees' potential to become conflict catalysts highly depends on three factors: the origin of the refugee crisis, the policies and stability of the hosting state, and the external influences from other states. For instance, the author argues (and Betts agrees) that refugees fleeing defeat in civil war are most likely to become violent, when compared to refugees fleeing persecution on a group-basis or refugees fleeing generalized violence. Refugees fleeing generalized violence should be the least pre-disposed to violence because the level of group cohesion and grievance is lower (Betts, 2009:63). Regarding external influence, it doesn't have to be political. Even refugee's humanitarian relief can contribute for the escalation of conflicts by feeding refugee warriors, providing legitimacy and recruitment opportunities for armed groups and by supporting a war economy. According to Lischer, *"it's not uncommon for refugee leaders to levy a war tax on the refugee population, commandeering a portion of all rations and salaries"* (Lischer, 2005: 7).

The nature of conflicts has changed after the cold war and so did the own concept of security. While conflicts prior to the Cold War were fought between the military forces of the conflicting states, nowadays the conflicting parties use civilians as tempting targets for their military operations. People have been placed at the centre of the conflict and internal conflicts, mass killing, ethnic persecution, genocide and terrorism replaced the old traditional international conflicts. The causes from which security threats come from are nowadays more diffuse and directly affect civilians. According to Troeller (2003),

At the turn of the 20th century civilians accounted for approximately 5 per cent of casualties in armed conflicts. In contemporary conflicts, 90 per cent of the casualties are civilian. Those fortunate enough to survive are refugees. (Troeller, 2003: 5)

In this sense, the security concept also became more focused on people, and not so much in the security of the territory or governments, shifting from a statist and military interpretation to the individual. By taking the individual as the object of security and by including non-military threats, human security has gained a central role in security studies. This also had an

impact on national security which is now considered to have the purpose of ensuring human security.

The relation between security and the individual is extremely relevant for the analysis of forced migration and affects both the moving individuals and the hosting states. Firstly, the protection of the forced moving individuals comes from the recognition that the protection of those individuals should be provided outside the framework of the states' system because the security of the state and the security of the individual can potentially conflict. Secondly, this relationship is also present in the hosting communities as population movements often pressure and change societies because they have cultural, religious, health, economic and social implications. As previously mentioned, empirical evidences show that international migration movements can contribute to proliferation of conflicts, but other threats such as the development of xenophobia, racial violence and social instability due to lack of integration which can also be prompted by these movements. In this sense, refugees can be considered to be particularly security-sensitive for the hosting state (Betts, 2009: 68).

Authors (Betts, 2009; Suhrke, 2003; Haddad, 2008) argue that the concept of human security can have a negative impact in the hosting societies due to the fact that it includes so many threats, yet offers no mechanism to prioritize them. They suggest that security threats don't often come from the movement of the population which doesn't usually occur in such a magnitude able to significantly harm the hosting community, instead threats come from particular groups among those movements. Therefore, human security "*implies that threats to the individual can come from almost any source and offers no basis to prioritize different threats or to reconcile conflicts between competing interests*" (Betts, 2009: 69). By being so inclusive, human security fails to provide tools to address the specific characteristics of those particular groups, which are considered to be the source of the threat and as a consequence a spreading fear of *the other* might take place.

According to Husymans, (2000), migration has been increasingly linked to the *destabilization of public order*, particularly since the early 70s when immigration started to be understood as a matter of public concern. Even if the understanding of immigrants didn't change radically in that period (being immigrants mostly considered as *guest workers*), the prior *permissive immigration policy* shifted to more restrictive policy. The author also argues that during this period migration policy was not a major concern in the European Union agenda and the changes in migration policies had to do, not with changes in the understanding of immigrants, but with changes in the labour market and in order to protect the rights of domestic workers. However, this would change after the signature of 1985 Schengen Act for the free movement of nationals of member states, firstly signed only by France, Germany and Benelux.

Authors (Mitsilegas, Ryan, 2010; Husysmans, 2000) agree that the European integration process and namely the implementation of the Schengen act contributed to the development

of a restrictive migration policy. Security issues arising from the abolition of internal border controls following the Schengen agreement are defined and regulated by a policy framework that integrates a more restrictive immigration management at EU's external borders. It seems that more control-oriented migration policies at EU's external borders were the price to pay for the internal free movement of nationals, which has been slowly introduced by EU member states and even by non-EU member states, increasing the number of random people freely moving within the Schengen space. However, this immigration management doesn't come without consequences in matters of the quality of asylum in the European Union, which has been "*increasingly politicized as an alternative route for economic immigration*" (Huysmans, 2000: 756).

In the early 90s, the collapse of the Soviet Union and the following dramatic events in the Balkans led to an enormous exodus from the east to the west, which included refugees fleeing conflicts and economic migrants looking for a better life in the wealthy west. According to Lahav (2004), the asylum system has been constantly used for immigration purposes, blurring the lines between immigration and asylum. Consequently, EU member states became protectionist and asylum started to be placed in a more "*securitarian frame*" (Lahav, 2004: 43) which would reach its peak after the so-called war on terror, following the 9/11 attacks in the USA.

After 9/11 attacks, the security threat linked to terrorism had political effects in the management of immigration in western democracies. Homeland security policies began to focus on preventing terrorist's access to the territory through the adoption of restriction measures on immigration and asylum. These range of policies, aiming at limiting the spontaneous arrival of asylum seekers, included tighter border controls, carrier sanctions, increased use of interdiction, extraterritorial processing of asylum claims and detention of asylum seekers irregularly crossing the border, deportation and extradition of asylum seekers. After the attacks, asylum seekers and refugees have been even more securitized and increasingly perceived as a threat to national security even if, as some authors (Betts, 2009; Newman, 2003; Van Selm, 2003; Noll, 2003) observed, empirical evidences linking asylum and terrorism are weak. According to Betts, while the first attempt to bomb the World Trade Centre, in 1993, was carried out by asylum seekers, most of the 9/11 attackers had entered the United States with student visas (Betts, 2009), yet, it was after the 9/11 that asylum seekers started to be deeply associated with terrorism by western policy and media.

Not surprisingly, the 9/11 and the spread fear of terrorism had a huge impact in EU's immigration and asylum policies. The European Union approach to process asylum claims extraterritorially also emerged in this context of international concern with terrorism which was strengthened after the terrorist attacks in Madrid (2004), in London the following year

(2005) and, more recently, in Paris (2015) and in Brussels (2016).¹⁹ Within this context, the scope of EU's border management activities has been extended beyond its physical frontiers, towards the high seas and third country's territories (many times in cooperation from those countries). A sophisticated system made up of virtual advanced identification technologies and databases was created in order to guarantee the extraterritorial management of immigration for security purposes. According to Vandvik, "*the ultimate goal is to stem flows at their source*" (Vandvik, 2008: 28). The focus extraterritoriality was renewed and the control of migration has become the "*surveillance of movement*" (Mitsilegas in Ryan, et al, 2010: 40), which emphasizes the identification of the moving individual. Everyday activities such as travelling are nowadays monitored through biometrics authentication and personal data collection which is accessed by a wider range of authorities beyond immigration and border control authorities. Biometrics was included in EU visas and passports and information systems, such as the Students Information System (SIS II), the EU Visa Information System (VIS) and EURODAC (for fingerprinting collection of asylum seekers and some other categories of illegal immigrants), became more synergic and interoperable. The focus and wider access to personal data is characterized by the growing association of immigration management with counter-terrorism measures, which are clearly prioritized, since document security and improved border controls are believed to have a primary role in combating terrorism (Mitsilegas in Ryan, et al, 2010: 45-47).

One can observe that the securitization of migration in the European Union was not an isolated process, but rather connected with a wider international politicization in which immigrants and asylum seekers are portrayed as challenging security threats. Usually, security concerns surrounding immigrants and asylum seekers in the European Union are closely related to their impact in the economic welfare and national identity, but also to the fear of organized crime and terrorism spreading. In this sense, migration has often been perceived as a danger to the welfare of the European Union societies by presenting a risk to the public order, to the vulnerable intercultural European identity, to the Schengen space and to the labour market stability.

3.2.1. The proliferation of semi-autonomous agencies

In this complex immigration-security environment, the role of EU's law enforcement agencies has also gained relevance. EU member states have delegated a range of their monitoring, regulatory and coordinating tasks to recently created EU agencies²⁰. It can be observed that

¹⁹ The concern with extraterritorial control only began following the terrorist attacks, since the E.U. often operates under a reactive logic. In fact, the EU's approach has been generally reactive, often responding to particular events and aiming at fixing particular problems of security (e.g. terrorism and organized crime); border control; mass influxes of immigrants and/ or asylum seekers; and, very importantly, problems regarding the free movement of people within the Schengen area.

²⁰ EU agencies can be divided into five groups: decentralised agencies, agencies under Common Security and Defence Policy, executive agencies, EURATOM agencies and bodies and agencies of the European Institute for Innovation and Technology (EIT).

since the 2005 Justice and Home Affairs Council, the multiplication and widening of the competences of semi-autonomous agencies and databases in the European Union whose number has grown quickly. In 2009, there were about 30 agencies in the EU (Groenleer, 2009: 15) and nowadays, in 2016, there are almost 50 agencies, placed throughout the European Union.

These agencies are set by an act of secondary legislation and are supranational in nature, but work as separate legal entities governed by European public law. They are created to develop the necessary technic, scientific or administrative functions in order to assist EU's institutions in the creation and application of EU policies. Moreover, by pooling technical expertise from both EU institutions and national authorities, these agencies also support EU's cooperation with national governments. Within their own independent structure, they have the freedom to hire their own people and manage their own affairs, as they're not bound to central government institutions. EU agencies are actually meant to be autonomous, yet holding different degrees and levels of legal and policy autonomy. In accordance with Groenleer,

Agencies are created in order to lessen political interference, achieve higher efficiency, put public services closer to citizens, enhance scientific or technical expertise, improve flexibility, facilitate partnerships with other public or private bodies, or demonstrate credible commitment. In addition, agencies are set up to pay-off political allies, create a power base for some group or faction, hive off unpopular activities or complex tasks, avoid political responsibility or manipulate civil service numbers (i.e. to make it look like budget cuts are made or government personnel is reduced). (Groenleer, 2009: 18)

The rapid emergence of these decentralised, semi-autonomous agencies has become a trend in the governance of the European Union, namely within the Area of Freedom, Security and Justice.

Mitsilegas (Ryan, et al., 2010) provides the most comprehensive explanation on the proliferation of EU's law enforcement agencies within the context of immigration management and external border control. One important agency within the area of Freedom Security and Justice is the European Police Service (EUROPOL) that is both an EU intelligence and law enforcement agency, involved in combating terrorism since it handles criminal intelligence by identifying, requesting, collecting, analysing, disseminating and adjusting relevant information for the purposes of law enforcement. It also supports EU member states in their law enforcement operations and helps them to prevent, detect, investigate and fight serious international crime and terrorism through the exchange of information and coordination cooperation with national authorities. According to the author, VIS data used to be accessed only by the relevant national authorities, yet nowadays EUROPOL is also able to access that data for the performance of its tasks, within the limits of its mandate.

Another important agency connecting EU's immigration control and security is the European Borders Agency (FRONTEX). Established in 2005, it became one of the most dynamic and

contested agencies in the European Union, especially concerning its impact on asylum seekers access to the territory and, consequently, on the protection of refugees. Although FRONTEX is not explicitly a security agency, its emphasis on operational action and intelligence production, plus some co-operation agreements with other EU and third country law enforcement authorities for the purposes of immigration control reveal that the agency is often encouraged by security concerns. The agency has acquired more operational outlines in 2007 with the creation and incorporation of the Rapid Border Intervention Teams (RABITs), whose aim is to provide urgent operational border assistance to states facing exceptional pressures at their borders. Later it also incorporated the permanent regional border security concept European Patrol Network (EPN), covering the coastal waters of the Atlantic and Mediterranean. According to Sandra Levenex, from 2006 to 2012, the budget of this network increased from 19 million euros to 85 million euros (Levenex in Wallace, Polack, Young, 2015: 378).

FRONTEX operations are namely relevant in EU's southern bordering countries such as Greece, Italy and Malta, which are usually the countries facing bigger immigration pressures and to which a sense of emergency was attributed after the Arab uprisings. However, the security-oriented perspective of the agency has raised concerns regarding the respect for EU's international obligations under the principle of *non-refoulement*, which prevents the expelling of aliens to places where their life can be at risk (to be further explained in Chapter 3). This to say that FRONTEX and its extraterritorial immigration control approach works out as a tool to preventing individual's access to the territory, what might have consequences for the legal status and safety of those individuals. Mitsilegas argues that the developments on extraterritorial immigration controls, which also include interceptions at the sea, "*have increased the powers of the State, without necessarily extending its responsibility or accountability*" (Mitsilegas in Ryan, et al, 2010: 65) since these measures have often resulted in a devaluation of human life on behalf of security.

After the Arab Uprising, another surveillance system claiming to save lives at the sea was deployed: the EUROSUR. This satellite system aimed at saving lives at the sea by providing information that will permit interceptions right after the migrant's departure, preventing them from making the deathly journey to Europe. Ironically, according to a research carried out in 2011 by FRONTEX itself, satellite surveillance performs poorly "*when detecting the small rubber boats and wooden fishing boats that are often used by migrants*" (Shields, 2015: 86). Taking into consideration the emphasis on saving lives through more security-driven surveillance (knowing moreover that its efficiency is questionable), it can be observed why the Heinrich Böll Foundation has characterized EUROSUR has the "*EU's cynical response to the Arab Spring*" (O'nions, 2014: 83). In addition, based on research records, authors (O'nions, 2014; Shields, 2015) argue that surveillance systems like EUROSUR can contribute to the increase and professionalization of human smuggling, having a negative impact on migrants which often end up taking more hazardous routes.

EU governments carry interceptions at the sea measures on a regular basis, many times with the operational support of FRONTEX. Firstly, these interception activities occur both at international waters and the waters of third countries, even though interceptions in the waters of third countries can raise legal questions. Secondly, they include prevention of the departure of ships/ boats, both on dry land or next to the coast, and visiting/ boarding of vessels. Usually interceptions at vessels result in the returning of undocumented migrants to their point of departure since a popular indicator of success of the FRONTEX operations is precisely the number of people it prevented from entering the European Union (Vandvik, 2008: 33). As a consequence, asylum claimers among those undocumented migrants often end up being returned without having access to the asylum procedures (Shields, 2015: 84). Empirical evidence²¹ has shown that this enforced interception can overlap with the principle of *non-refoulement* and with the humanitarian obligation to provide assistance and rescue to the ones in need, namely because the international maritime regime itself has gaps on this matters. According to Vandvik “*while the law of the sea is clear as regards who is responsible for rescuing persons in distress, it does not set out which State should allow for the disembarkation of the individuals rescued*” (Vandvik, 2008: 33). Consequently, EU governments remain unwilling to authorise disembarkations of people rescued by other member states.

However, the EU member states are not only obliged to cope with the refugees and human rights regime within their territory, but also have the legal and moral obligation²² to assume full responsibility for the exercise of extraterritorial immigration control. Vandvik argues that “*EU member states cannot abdicate their principles, values and commitments by doing outside their borders what would not be permissible in their territories*” (Vandvik, 2008: 28). In addition, the Human Rights Committee, the body that monitors the implementation of the International Covenant on Civil and Political Rights (ICCPR) defined that countries bounded by the ICCPR can be held responsible for violations of those rights even if those violations are committed in the territory of another state. Countries that are often subject to extraterritorial migration controls, such as Senegal, Morocco, Libya and Mauritania, have rectified these instruments, nevertheless, according to the Human Rights Committee,

²¹ In 2007, 27 African migrants were left holding onto a net cast for three days and nights, in their attempt to reach the Italian coast, while the Libyan, Italian and Maltese authorities argued who would be responsible for taking them. Luckily, they were fortunate enough to survive as an Italian boat finally decided to take them (BBC, 2007). More recently, in October 2013, at least 359 people drowned a few miles from the coast of Lampedusa. A few days later, another 200 people, coming from Libya, died on their way to the same island. Many have drowned in the Atlantic and in the Mediterranean and much probably the scenario won't change until EU member states are finally able to fairly share the responsibility for hosting rescued people between them.

²² As mentioned in the subchapter 1.3., this moral obligation is also part of a European legal identity, based on fundamental European values, as established in the Treaty of Lisbon. It's specifically mentioned in the Article 21 TEU that the “*Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement*”, including the respect for human dignity and human rights and the respect for the rule-of-law, in line with “*the principles of the United Nations Charter and international law*” (TEU: Article 21)

countries taking extraterritorial control measures are bound to respect the provisions of the covenant regardless of the adhesion of the state where the measures are taking place.

One can observe that EU agencies are complex entities with freedom to manage their own affairs and it's not surprising that the balance between the autonomy and accountability of these agencies has become a matter of concern among scholars (Groenleer, 2009; Lavanex, 2009; Ryan, et al., 2010; Rittberger; Wonka, 2011). Being able to manage their own affairs within an environment of political autonomy, EU agencies are likely to develop their own interests and preferences, which might not be necessarily the ones of the Commission. In this sense, it's been noted by Groenler (2009), there's a possibility that these agencies become a rival to the Commission itself (Groenleer, 2009: 137).

EU agencies have always been in the light of critics concerned with their lack of accountability, since "*autonomy and accountability are in balance when high levels of de facto our 'actual autonomy' coincide with a robust framework of de facto accountability*" (Rittberger; Wonka, 2011:784). According to Lavanex, information provided by EU agencies must be impartial and independent in order to be credible and they should indeed "*operate as hubs in a network of national experts*" (Lavanex, 2009: 551), since this autonomy frees them from "*bureaucratic chains of command*" (Lavanex, 2009: 551). However, taking into consideration their influence on policy outcomes, citizens, policy-makers and stakeholders, a certain degree of accountability seems to be desirable to prevent power abuse.

3.2.2. Immigration and asylum: overlapping regimes within the same Area of Freedom, Security and Justice

The diversity of the policy domains within the Area of Freedom, Security and Justice has resulted in different governance arrangements. According to Monar, whereas the traditional legislative instruments are more central to the progress of the domains of asylum and immigration, new operational measures, such as operational information exchange and coordination, plus joint operations are often more central in the domains of policy cooperation, external border control and surveillance. The author even adds that the operational character of the governance of the latter policy domains has contributed for the resilience of intergovernmentalism within the Area of Freedom, Security and Justice, since EU member states *retain full control over their operational means* (Monar, 2010: 31).

Moreover, the impact of regime complexity is particularly evident upon the politics of the refugee regime in the European Union, since the proliferation of institutions and rules within the Area of Freedom, Security and Justice exist in parallel and overlap with the refugees' regime. As a consequence, regime complexity, together with what Betts calls "*the intersection of the motives and migratory routes of voluntary and forced migrants*" (Betts in

Kaser, Martin, 2011: 239) created new opportunities for states to bypass their international obligations by addressing asylum in parallel regimes, other than the refugees' regime.

This is particularly challenging for the United Nations High Commissioner for Refugees (UNHCR) because, even though it's the most competent authority within the global governance of asylum, the areas in which it has authority is intersected by other regimes which overlap with the refugees' regime. Sometimes, this overlapping relationship can offer sources for what Betts calls 'complementary protection', however, in other cases, it can result in "*contradictory implications, potentially undermining international cooperation on refugee protection*" (Betts in Kaser, Martin, 2011: 240).

In his work *Forced Migration and Global Politics*, Betts acknowledged two levels of governance when describing the global governance of migration: the vertical level and the horizontal level. The vertical level refers to the boomerang effect in which formal institutions are transformed as they skip from global to the local context, and to the way the local manifestations simultaneously affect back the global regime. In turn, the horizontal level of governance practice refers to the way in which "*regulation in one issue-area affects the politics of other issue-area, and vice-versa*" (Betts, 2009: 107). Complex governance arrangements created by overlapping regimes on determined issue-areas also occur within EU governance which tends to be not only multilevel, but also multi-layered, namely if we look at the complexity EU asylum policy. The EU asylum policy is therefore affected by the regulations of other policy areas such as migration, human rights and security: while the human rights regime is complementary to the refugee regime and even reinforces it, the security and migration regime often overlap with the refugee and human rights regime. Complex problems usually require coordination between various actors and levels of governance: however, when these governance levels interact they can be convergent, or divergent.

Peers (2011) tried to analyse asylum law and policy through the perspective of the asylum seeker and acknowledged that legal ways²³ to Europe are very limited for asylum seekers, due to overlapping rules coming from regimes other than the refugee regime. The author argues that most of the countries that generate high numbers of asylum seekers require visa to enter the EU. This makes it difficult for asylum seekers to access the EU territory, since no special procedure exists for asylum seekers requesting visas. As a consequence, asylum seekers find it

²³ The lack of legal ways in for asylum seekers has been acknowledged by the European Parliament, the Members of the European Parliament (MEPs) voted an update to the EU Visa Code on the 16th March 2016. This update should include humanitarian visas for people seeking international protection, to be issued by EU consulates and embassies. According to the MEPs the aim of this humanitarian visa is to dissuade asylum seekers from risking their life's, since they would be able to safely travel to the European Union and entering the EU territory legally with the humanitarian visa. The proposal was approved in the European Parliament with 46 positive votes and the talks with the Council of the European Union already began, in compliance with the ordinary legislative procedure. For further information please check the European Parliament press release of 16 March 2015, entitled *MEPs want EU embassies and consulates to grant asylum seekers humanitarian visas* [available in: [LINK](#)]

hard to travel to Europe by legal means, since the imposition of carrier sanctions will most likely not allow them in due to lack of visa and other travel and identification documents. EU member states have adopted a strong hand policy in matters of controlling irregular immigration, using restrictive (e.g. border control, visa policies) and preventive (e.g. addressing root causes) tools. Measures to tackle immigration, especially illegal immigration, have gone well beyond EU's borders as many policies were taken in order to prevent immigrants from reaching the European Union territory through extraterritorial measures and cooperation with third countries. In addition, EU's external policy, irregular immigration controls and security measures aiming at criminalizing the human smugglers (which are often asylum seekers' only chance to access the EU territory) and terrorists (namely after the 9/11), also erect relevant obstacles for refugees (Peers, 2011: 296).

The EU member states also hold cooperation agreements with third countries in the area of migration in order to be able to carry out extraterritorial immigration control measures and return irregular immigrants, or even asylum seekers if the partner countries are considered as *safe* countries of origin or *safe* first countries of asylum. Moreover these partnerships also offer more opportunities for legal migration and include many times capacity building measures. The rationale behind these capacity-building measures emerging in the context of the AFSJ is, according to Monar (2011), to “*transform third-countries into more effective cooperation partners for addressing external challenges to the AFSJ, by building up their national capabilities in terms of organisation, infrastructure, training and legal framework*” (Monar, 2012: 61). Thus, the integration of the Area of Freedom, Security and Justice has “*developed a significant external dimension*” (Cini, Borragán, 2016: 293), producing impact on countries that are neither part of the European Union, neither part of the EU enlargement process.

However, by limiting or countering the arrival of asylum seekers through restrictive extraterritorial immigration policies and partnerships with third countries, states have limited *their legal liability to provide protection*, without violating the provisions of the 1951 Convention and the 1967 Protocol (Kaser, Martin, 2011). This allows us to argue that the European Union seems to be in the middle of a Hobbesian-Kantian dilemma. In the *Leviathan*, Hobbes understood security as an end of the state itself, based on natural rights. Thus, security was a universal human right of the individual and so *raison d'être* of the state. Nevertheless, Kant argued that security is only justified as the *raison d'être* of the state as long as it secures vital universal rights at the domestic and at the international level (Ishay, 2004).

Final considerations

The European Union's objective under the AFSJ is to “*offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is*

ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime” as stated in the Article 3(2) of the Treaty of the European Union. However, this objective is being challenged everyday by dynamics involving sovereignty issues and security concerns related to irregular immigration and asylum. Having analysed the nature and the developments of immigration and asylum policy in the EU, we argue that the nature of cooperation within the Area of Freedom, Security and Justice has been landmarked by four governance trends that can simultaneously be considered as important challenges to the protection of refugees.

A. Differentiated integration

Differentiated integration, which includes forms of integration such as multi-speed, variable geometry and à la carte, has allowed EU member states to proceed with integration when some particular member states were not ready to do so. However, this creates the perception that there are two kinds of membership in the European Union, what can harm the political cohesion of the union.

Since the AFSJ comprises a range of sovereignty-sensitive policy domains, the integration process has been characterized by a high degree of differentiation and complexity. For instance, Ireland, the UK and Denmark have different arrangements within the Area of Freedom, Security and Justice. Whereas Denmark only decided to adopt EU legislation regarding Europol and Eurojust by means of a complementary intergovernmental agreement, the UK and Ireland negotiated a flexible opt-out. None of these countries is bound by legislation in the Area of Freedom, Security and Justice, nonetheless, this didn't stop them from choosing to take part in the Dublin III Regulation and the EURODAC Regulation, while staying away from the rules that compose the 2013 recast of the Asylum Procedures Directive. As a consequence, the European Union is not capable of providing a single Area of Freedom, Security and Justice for all its citizens, since some member states have different integration arrangements within this controversial area.

B. The existence of overlapping regimes within the Area of Freedom Security and Justice that allow EU member states to bypass responsibilities by shifting between regimes

It's been observed that there's a complex relationship between immigration and asylum. Regime complexity is particularly evident upon the politics of the refugees' regime in the European Union as various institutions and rules within the same Area of Freedom, Security and Justice exist parallel with the refugees' regime.

It's been acknowledged that migration policies clearly overlap with the refugee's regime, creating opportunities for states to bypass their international obligations by addressing refugees' issues through overlapping rules coming from regimes other than the refugee regime. This is the case of various extraterritorial measures of immigration control, coming

from partnerships with third countries, extraterritorial interceptions, carrier sanctions and others, that highly limit the refugees' access to the territory and decrease the numbers of spontaneous arrivals of asylum seekers in the EU territory. Thus, by limiting the refugees' access to the territory, EU member states limit their *legal liability* to provide protection, without violating the provisions of the 1951 Convention and the 1967 Protocol.

C. The emergence of a securitized approach to immigration and the increasing focus on extraterritorial immigration control

At least since the times of the *Leviathan*, security is considered the *raison d'être* of the state, yet under the cosmopolitan lenses of Kant, security should only be the *raison d'être* of the state as long as vital universal rights are secured internally and externally.

The European Union acts under a reactive logics and particularly after the 9/11 attacks, document security and improved border controls started to be perceived as important tools in the fight against crime and terrorism, because they're considered to prevent, or at least limit, the terrorist's or criminals (such as human smugglers) access to the territory. However, moving within mixed flows of immigrants, refugees and asylum seekers are often affected by the same policies that prevent irregular immigrants from arriving in the EU. Mixed flows of immigrants and particularly difficult to measure because many times irregular immigrants, economic and other types, try to access the territory by applying for asylum. However, It's been noted by Koser and Martin that "*in many parts of the world, refugees protection relies upon refugees' ability to travel independently to the territory of an asylum state*" (Koser, Martin, 2011: 240). In this sense, by limiting the spontaneous arrival of asylum seekers through tight immigration policies and extraterritorial immigration controls, EU policymakers clearly threaten refugees' right to asylum, taking into account the lack of legal ways of access to the EU territory available for them.

Moreover, the emergence of decentralized semi-autonomous agencies, such as FRONTEX and Eurosur, within this complex immigration-security environment to which EU member states delegate responsibilities for border control also raises questions of compliance with the human rights of asylum seekers. It's been acknowledged that EUROSUR might have a negative impact on migrants, which take more hazardous routes, and that FRONTEX can potentially violate the principle of *non-refoulement*. In this sense, by shifting responsibilities for these agencies with limited accountability, EU member states devalue human life on behalf of security. Thus, one can argue that developments within the Area of Freedom, Security and Justice were determinately driven by security concerns and while security has always been prioritized, freedom, justice and human rights might have been somewhat devaluated.

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Chapter IV

Towards a Common European Asylum System (CEAS)

Introduction

Refugee influxes started to be a prominent theme at EU's agenda in the early 90s, following the collapse of communist regimes in Eastern Europe, the conflicts in the Balkans and the adoption of the Single European Act (1985²⁴), when the implications of immigration started to be acknowledged within the context of the European integration project. In 1990, the EU member states signed the Dublin Convention²⁵ aiming at defining the country responsible for a determined asylum application - in order to avoid the so-called 'asylum shopping'²⁶- entered into force in 1997. The Convention was, according to Lavenex and Uçarer (2003), the first tangible outcome involving asylum in the European Union, yet in the meantime there were some non-binding cooperation initiatives known as 'London Resolutions' (1992).

In the Treaty of Amsterdam (1999), the EU member states agreed that EU institutions should have power to draw binding legislation on asylum, since voluntary-based agreements did not produce the expected results. Thus, EU's supranational institutions were slowly given more relevant and proactive roles in the making of EU policies and the governance of asylum in the European Union started to be Europeanized²⁷, moving from a traditional intergovernmental approach, to a more innovative supranational approach. However, the process of establishing common institutional and legal mechanisms on asylum has been one of the most dynamic and sensitive policy areas within the context of European integration, since the deepening of supranational policymaking in matters of asylum and refugees protection touches the state's sovereign decision to decide who and should not be allowed within its territory. As Veit Bader noted, the right to seek asylum relates to the issue of first-gate admission which is at the core of state sovereignty (Veit Bader in Oudejans, 2011: 26). According to Trauner and Servant (2015) the 1992 influx of approximately 700 000 asylum seekers in the European Union that triggered 'London Resolutions' has contributed for the increasing misconception of

²⁴ The European Single Act was signed in 1985 and entered into force 10 years later, in 1995.

²⁵ The Dublin Convention would later result in the adoption of the Dublin II and Dublin III Regulations.

²⁶ 'Asylum shopping' is the term used to describe the practice by asylum seekers of lodging multiple asylum applications in various EU member states.

asylum-seekers as a burden and as people wanting to take advantage from EU's national welfare systems. Thus, the Europeanization of asylum in the European Union was "*tainted from the start with a rather negative image*" (Trauner, Servent, 2015: 36).

The negotiations towards the creation of a Common European Asylum System (CEAS) which aimed at the harmonization of EU's national asylum systems, only started officially in 1999 with the entering into force of the Treaty of Amsterdam, allowing the EU institutions to draw legislation on immigration and asylum. All the three phases of the establishment of the CEAS were accompanied by a Programme, a Council Summit and a Treaty change. For instance, the first phase of the CEAS started with the Tampere Programme (1999-2004), after the entering into force of the Treaty of Amsterdam; the second phase started with the Hague Programme (2004-2009), after the entering into force of the Treaty of Nice; and the third phase started with the Stockholm Programme (2010-2014), with the entering into force of the Lisbon Treaty.

The development of the Common European Asylum System was very dynamic and the overall move towards more harmonized asylum policies in the European Union has, according to Boswell, Gaddes (2011), produced soft outputs (e.g. EU-funded asylum research projects) and hard outputs (e.g. secondary law). Regardless of the fact that research, operational and practical cooperation are considered as important tools in the governance of asylum, Trauner and Servent argue that "*hard law has been the main vehicle used to develop EU policy*" (Trauner, Servent, 2015: 38). Secondary legislation composing the EU *acquis* on asylum has been subject of legal recast at least once in order to reflect the move from common minimum standards to a common asylum policy, what makes EU asylum law one of the most dynamic and complex legal areas within the area of Freedom, Security and Justice. For instance, the 1990 Dublin Convention, was replaced by the Dublin Regulation in 2003 (the so-called Dublin II), and revised in 2013 (the so-called Dublin III). The EURODAC Regulation came into force in 2005, and was revised in 2013. The Reception Conditions Directive came into force in 2003, and was revised in 2013. The Asylum Procedures Directive came into force in 2005 and was revised in 2013. The Qualification Directive came into force in 2004 and was revised in 2011. These amendments should have been concluded in 2010, but the deadline had to be postponed and the second generation of asylum laws was only fully adopted in 2013.

According to the European Council of Refugees and Exiles, EU Member States have, with exception for the UK, Ireland and Denmark, complied with the first phase of the CEAS by transposing the directives of the EU *acquis* on asylum into their national laws. Nevertheless, the application of the EU *acquis* has not always been satisfactory and legal dilemmas within the EU *acquis* itself can contribute for an unequal sharing of responsibility among EU member states, what turns out to be particularly relevant due to the lack of genuine solidarity among EU member states to host asylum seekers.

Thus, this chapter intends to point out the main dilemmas in the governance and regulation of the Common European Asylum System that might hamper the development of higher levels of protection for refugees and more harmonized and far-reaching asylum policies in the European Union. In order to do so, this chapter is divided in two sub-chapters. The first sub-chapter will analyze the main developments of the Common European Asylum System (CEAS) through the Tampere, Hague and Stockholm Programmes, aiming to draw some governance trends in the management of asylum. The description and analysis of the treaty changes and strategic programmes that shaped of the first, second and third phases of the CEAS, will be further divided in two main topics, the first referring to the first and second phases of the CEAS and the second referring to the last phase of the CEAS. The second sub-chapter chapter will wherefore try to point out the legal dilemmas on the regulation of the CEAS. Firstly, it will contextualize the EU *acquis* on asylum into its legal background, coming from universally binding instruments provided by the global refugees' regime and also from the human rights regime, which complements the latter. International norms coming from these instruments, such as the right to asylum, the principle of *non-refoulement* and the refugee qualification backseat the EU *acquis* and, in this sense, no analysis of the EU *acquis* can be truly satisfactory without this contextualization. Thus, taking into account that legislation was the main vehicle towards the harmonization of asylum policies in the European Union, it will also provide a descriptive and critical analysis of the EU *acquis* that codifies the CEAS, with a special focus on the deadlocks surrounding the Dublin system and the concept of safe third countries.

4.1. Treaty changes and the three phases of establishment of the CEAS: Tampere, Hague and Stockholm

4.1.1. Tampere (1999-2004) and Hague (2004-2009)

In 1999, during the Kosovar refugee crisis, the EU member states started to negotiate how to better manage refugee influxes in the European Union, since genuine solidarity for responsibility sharing revealed its weaknesses during the previous experience with the refugees fleeing the early 90s conflicts in the former Yugoslavia. According to Boswell and Geddes, not too different from today's reality, Germany ended up receiving the highest number of refugees and "*the EU was unable to impose any binding arrangement for distributing refugees*" (Boswell, Geddes, 2011: 150). Thus, given the experience with the refugees from the former Yugoslavia and the following mass influx of refugees from Kosovo, the need to create binding legislation to reduce the differences between the EU's national asylum systems became more evident.

Asylum law and policy in the European Union

The EU institutions were given the power to draw up legislation on asylum and immigration under the Treaty of Amsterdam (signed in 1997), which entered into force in the same year of the Kosovo Allied Forced Intervention (1999). From that moment on, countries were able to adopt legally binding instruments and start working towards a Common European Asylum System (CEAS), since challenges such as asylum shopping and problems concerning the asylum claimers' preference for countries with higher recognition rates and better social benefits prevailed in the non-binding approach. In the same year (1999), the town of Tampere, in Finland, received an important EU Council Summit aiming at the creation of a new area of Freedom, Security and Justice. It was considered the kick-start of a common policy on Justice and Home Affairs (JHA) and the kick-start of the negotiations concerning the creation of a common asylum framework.

The so-called Tampere Program (1999-2004), the main outcome of the EU Council summit in Tampere, inaugurated the first phase of the establishment of the CEAS, triggering the adoption of the first generation of EU asylum law: the Dublin II Regulation (which replaced the previous Dublin Convention), the EURODAC Regulation, the Reception Conditions Directive, the Qualification Directive and the Asylum Procedures Directive; but also the adoption of supplementary legislation such as the Temporary Protection Directive, the Family Reunification Directive and the Long Term Residence Directive. Between 2000 and 2005 the set of laws establishing common minimum standards on asylum were adopted and Tampere became a milestone concerning refugees' protection in the EU. The first phase of the CEAS also included the establishment of the European Refugee Fund (2000), in order to provide a voluntary and solidary share of reception, integration and repatriation costs and the establishment of the FRONTEX agency, aiming at managing EU's external borders in cooperation with the national border guards.

Signed in 2001 and coming into force five years later, the Treaty of Nice was not very ambitious in the domain of Justice and Home Affairs, it focused mostly on facilitating the following EU enlargement, which was the biggest to date, counting with the adhesion of ten countries in 2004, and another two countries in 2007. However, it established that the Council should adopt binding legislation on the criteria and mechanisms to define which country is responsible for considering a determined asylum application, and also to define minimum reception standards. These common rules and procedures should therefore be defined unanimously by the Council of the European Union, after consultation of the European Parliament, yet the Council could later decide to adopt decisions by qualified majority in co-decision with the European Parliament. In practice, the qualified majority procedure has applied, replacing the traditionally intragovernmental unanimity procedure, but the establishment of the ordinary legislative procedure has only been formally extended to all the aspects of the area of Freedom, Security and Justice after the entry into force of the Treaty of Lisbon.

The Tampere Program was finished in 2004 and regardless of the fact that the first phase of the CEAS was not complete, it has been replaced by the Hague Programme. In 2004, another EU summit, this time in Hague, in the Netherlands, called for the establishment of the second phase of the CEAS. New instruments and measures were adopted by the Hague Programme (2004-2009), which defined 10 priorities to be achieved until 2010, which aimed at strengthening the EU's Area of Freedom, Security and Justice. These priorities included the strengthening fundamental rights and citizenship, anti-terrorist measures, the creation of a balanced approach to migration, the management of the EU's external borders, the creation of a common asylum procedure, the maximization of the positive impact of immigration, striking the right balance between privacy and security and security while sharing information, the development of a strategic concept on tackling organised crime and the creation of a genuine area of justice. In 2005, the European Commission launched a Global Approach to Migration (GAM), in order to fulfil the goals regarding immigration and mobility and aiming at creating a strategy for a better management of the relevant aspects of migration in partnership with third countries.

In 2007, a Green Paper (COM(2007)301 final) was presented by the European Commission and made available for public consultation, in order to determine the direction which the second phase of the CEAS should take. The Green Paper asked feedback on 35 questions regarding asylum procedures, reception conditions, conditions for granting protection, burden-sharing, financial solidarity, resettlement²⁸ policies and integration, the improvement of internal and external cooperation and the management of mixed flows for further law approximation. Relevant bodies on asylum matters, such as the European Council of Refugees and Exiles (ECRE), the Amnesty International and the United Nations High Commissioner for Refugees (UNCHR), have responded to these questions and consensually appointed some flaws of the system. According to them, the refugees' access to the territory was highly limited due to the implemented measures on the prevention of irregular immigration and that the EU's asylum system was lacking of motorization and continuous evaluation. Moreover, the organisations commonly agreed that there were deep divergences in the application of the asylum procedures among the EU member states. ECRE for instance specifically wrote that EU member states are still "*tempted to divert asylum seekers away with harsh national asylum policies*" (ECRE, 2007: 6), especially because the transposition of minimum standards into national law has been slow. According to the ECRE, only six from the 27 member states²⁹ had implemented the Qualification Directive within the deadline (ECRE, 2007: 6). This divergence was also enforced by the UNCHR, which wrote that "*national practice remains worryingly*

²⁸ Resettlement refers to the transfer, under the request of the UNHCR, of particularly vulnerable refugees from a first country of asylum to other country that accepts to host them. For instance, the resettlement from a third first country of asylum to a member state of the European Union was considered by the European Commission as a safe alternative for refugees, working out as a way to prevent refugees from taking the hazardous irregular journey to the European Union when protection standards start to decrease in the first countries of asylum (European Commission, 2015d)

²⁹ In 2007, the EU had 27 member countries. The 28th member state (Croatia) only joined the EU in 2013.

divergent” and *“responsibility sharing within the EU is limited”* (UNCHR, 2007: 3). Furthermore, according to the Amnesty International, while a rejected application is *“de facto recognized by all other Member States (...) the positive recognition of positive asylum decisions was never part of this system”* (Amnesty International, 2007: 32). This feature prevails at the date of writing, since positive decisions are only recognized by the member state that decided on that determined asylum application, while negative decisions are recognized by all the 28 member states.

All the three bodies (ECRE, UNCHR, and Amnesty International) agreed that while the Article 63 of the Amsterdam Treaty still referred to minimum standards, the language of the Green Paper went beyond that, referring to common standards. However, since the applicable law was still the Amsterdam Treaty, a Treaty change would be necessary in order to allocate a common asylum system in the European Union. Furthermore, the relevance of the jurisprudence from the European Court of Justice (ECJ) should be strengthened. The ECJ already had an important role in other community areas, however, it didn't comprise asylum cases until 2007 (UNCHR, 2007: 4), even if, according to the Amnesty International, the limitations of the ECJ were *“less and less justifiable”* (Amnesty International, 2007: 7) within the context of the development of more harmonized procedures on asylum.

The results of an evaluation about the implementation of existing instruments and the answers to the Green Paper were the basis for the development of the Policy Plan on Asylum (COM(2008)360). It's important to mention that after the European Council's agreement on the Programmes, the European Commission, being the EU's executive body, is then responsible for drawing an action plan, explaining how the programme guidelines can be translated into policies. Proceeding from here, the action plan is then subject to the ordinary legislative procedure, integrating both the European Parliament and the Council of the European Union in a process of co-decision (Collett, 2010). The Policy Plan on asylum included several proposals for amendments to the Reception Conditions Directive, the Asylum Procedures Directive and the Qualification Directive. It also proposed amendments to the Dublin system (Dublin Regulation and EURODAC Regulation) and extended its scope to include beneficiaries of subsidiary protection as well. According to the European Commission *“the Dublin system was not devised as a burden sharing instrument: nevertheless, its functioning may de facto result in additional burdens on Member States that have limited reception and absorption capacities and who find themselves under particular migratory pressures because of their geographical location”* (European Commission, 2008:8), yet, apart from mere suggestions regarding the facilitation of voluntary internal reallocation between EU member states and regarding the possibility to suspend Dublin transfers on a temporary basis in situations of mass influx, the Policy Plan did not propose clear procedures to address the flaws of the Dublin system.

The Policy Plan also contained provisions on external solidarity, what should be strengthened in the coming years. It recognises EU's responsibilities towards third countries and countries of first asylum (which receive most of the world's refugees) and proposes a greater financial support, since *"solidarity should equally be expressed towards countries outside the EU in order to enhance their capacity to offer effective protection and durable solutions, whilst ensuring that the Union is ready to take a fair share of responsibility"* (European Commission, 2008: 11). Taking into account the responses to the Green Paper, the European Commission also recognises the challenges refugees' face when trying to reach a safe territory, often using human smugglers as entry facilitators. Even though it proposes the creation of legal instruments to facilitate and manage an orderly arrival for the ones in need of international protection, no specific procedures or instruments are mentioned. Finally, as previously acknowledged, the Green Paper responses from the ECRE, the Amnesty International and the UNHCR showed concerns regarding the lack of instruments/ bodies dedicated to the evaluation and motorization on the application of asylum procedures in the European Union. For this purpose, the European Commission proposed the creation of an institutional structure dedicated to supporting, monitoring and coordinating asylum activities in the European Union, such as a new EU agency entitled European Asylum Support Office (EASO), whose legislative proposal should start to be prepared by the Commission further in 2008.

In 2008, the Council of the European Union drew the European Pact on Immigration and Asylum (13440/08), which is based in the above mentioned GAM 2015 but identifies its weaknesses and tries to move beyond them. The Pact focuses on integration and on a better management of legal migration, on the control of illegal migration (by ensuring that illegal immigrants are returned to their country of origin or transit and by creating more effective border controls), on the construction of an European common system of asylum (ensuring protection for the ones being persecuted), on the creation of partnerships with third countries of origin and transit (in order to promote collective cooperation on migration management) and insists on the establishment of the European Asylum Support Office (EASO), whose creation would be approved only two years later. Notwithstanding, some weaknesses can be observed. Quoting Bertozzi, *"the Pact does not even attempt to propose a solution to the heart-rending humanitarian issue involving thousands of migrants who have drowned"* (Bertozzi, 2008: 4). Thus, even though the Pact *"solemnly reiterates that any persecuted foreigner is entitled to obtain aid and protection on the territory of the European Union in application of the Geneva Convention (...) the New York Protocol (...) and other relevant treaties"* (Council of the European Union, 2008: 11), however it doesn't address or present any political solutions to the migrants' deaths in the Mediterranean and the Atlantic, being way more focused in matters of immigration control.

4.1.2. The Treaty of Lisbon of the Stockholm Programme (2010-2014)

The Treaty of Lisbon (2007) officially abolished the three pillars structure and declared that “*shared competence between the Union and the Member States applies, inter alia, in the area of freedom, security and justice (Article 4 TFEU)*” (Noussis, 2015: 202), except in the field of police and judicial cooperation in criminal matters³⁰. In this sense, according to the Treaty on the Functioning of the European Union (TFEU), the shared competence should be applied to asylum (Article 78 TFEU), immigration and border control (Article 79 TFEU), cooperation in criminal matters (Articles 81 and 82 TFEU) and police cooperation (Article 87 TFEU). The Commission should have the right of initiative in the adoption of legal acts within this area that should later be approved through ordinary legislative procedure by the Council of the European Union and by the European Parliament. The treaty enforced the role of the EU’s supranational institutions, in particular the one of the European Parliament, through the ordinary legislative procedure, and the one of the European Court of Justice (ECJ), that should have competence in every act adopted in the areas of shared competence of the AFSJ. Thus, the ECJ gained competence to rule on asylum provisions and was allowed to develop “*a larger body of case law in the field of asylum*” (European Parliament, 2016: 2).

Regarding the Council of the European Union, the QMV (Qualified Majority Voting) became the standard mechanism for adopting legal acts in the AFSJ, including immigration and asylum measures. The legislative role of the Council has been partially reduced by the introduction of the QMV, which prevents individual member states from blocking legislation, and by the assignment of a more central role to the Parliament through the ordinary legislative procedure. Yet, the enforcement of the role of the EU’s supranational institutions came along with the recognition of the European Council as the “*strategic policy actor*” in the Area of Freedom Security and Justice (Article 68 TFEU), being responsible for the definition of strategic guidelines and for the adoption of measures to ensure administrative cooperation between the EU member states departments within the AFSJ and between these departments and the European Commission (Moussis, 2015: 202). Moreover, according to Moussis (2015) and as stated in the Article 12 TFEU, national parliaments remain responsible both for the political monitoring of Europol and for the evaluation mechanisms regarding the adoption of policies falling under this policy area and regarding the activities carried out by Eurojust (Moussis, 2015: 202).

Contrary to the Treaty of Amsterdam, which establishes a period of five years for the adoption of measures after its entering into force, the Treaty of Lisbon doesn’t set any deadline to implement measures. Moreover, the policy areas falling under the AFSJ are “*deeply entrenched in national political and judicial systems and have strong affinities to*

³⁰ Within the field of policy and judicial cooperation in criminal matters, legislation proposals should be submitted by a quarter of the Member States, and not under legislative initiative of the European Commission as occurs within other fields of the area of freedom, security and justice (Noussis, 2015: 202)

questions of state sovereignty” (Lavenex in Wallace; Polack; Young, 2015: 368). Since the EU member states are reluctant to cooperate in this field, the lack of deadlines has often resulted in delays in the implementation of measures. Thus, national interests have generally been dominating in matters of immigration and asylum and often led to heated debates among the EU member states, being migrants and asylum seekers often “*key themes in electoral campaigns*” (Kaunert; Leonard, 2012:2). In addition, the management of immigration and asylum and the fight against terrorism and organized crime are interlinked arenas which bring up reservations and an ever greater political sensitivity when it comes to immigration.

Regardless of its flaws, it’s often been recognized that the Treaty of Lisbon introduced major developments to asylum governance in the EU, triggering the official transformation of previous asylum procedures into a common policy of asylum. According to Helen O’Nions “*the subtle transfer of power between institutions*” (O’Nions, 2014: 75) and the strengthening of the judicial power of the Court of Justice, provided by the Treaty of Lisbon, has benefited refugee’s protection. In Lisbon, the minimum standards provided by the Treaties of Nice and Amsterdam were replaced by “*the creation of a common system comprising a uniform status and uniform procedures*”, including “*common procedures for the granting and withdrawing of uniform asylum or subsidiary protection status*”, “*criteria and mechanisms for determining which Member State is responsible for considering an application*”, “*standards concerning reception conditions*” and “*partnership and cooperation with third countries*” (European Parliament, 2016: 2). Nowadays, as a part of the AFSJ, EU policies on immigration and asylum fall are of shared competence, together with the free movement of people, external border controls, prevention and coordination of crime, and including also freedom, security and social justice issues, such as gender equality, social exclusion, discrimination and human rights.

Authors (Vink, 2002; Lavenex, 2007; Trauner, Servent, 2015) consider the EU asylum policy as a case of positive integration, since it tried to replace divergent national policies, firstly, for common minimum standards and, secondly, for common policies. Nevertheless, remaining divergences among national asylum systems reveal that integration hasn’t been so consistent in practice. According to Trauner and Servent (2015), the institutional changes introduced by the Treaty of Lisbon didn’t “*trigger far-reaching policy change*” in matters of asylum, namely because the positions of the Council of the European Union (intergovernmental institution) and the ones of the European Parliament (supranational institution) got closer. The authors suggest that the approach between the two co-decision institutions had to do with the fact that after the 2009 elections, the Christian Democrats have gained a privileged position in the European Parliament, whose conservative views were closer to the conservative views of the European Council (Trauner and Servent, 2015: 49).

The Stockholm Programme (2010-2014) has been adjusted to reflect the changes of the Treaty of Lisbon, reinforcing the role of the case-law of the Court of Justice and the European Court of Human Rights in the development of a European Area of Freedom, Security and Justice, based on the fundamental rights established in the 1950 European Convention of Human Rights and in the EU Charter of Fundamental Rights. It can be observed that Stockholm is more detailed than its precursor Hague Programme: while the Hague Programme focused more on harmonizing policies, Stockholm provides practical solutions to do so and even includes more specific priorities (e.g. unaccompanied minors). However, it has been considered by the European Policy Centre as a long document which “*resembles more a ‘Christmas tree’ than a political document of orientation*” (Pascouau, 2014: 9), because it explores a broad range of areas such as citizens’ rights, law and justice, internal security (with a strong emphasis on counterterrorism measures), external border management and visa policy, migration and asylum and the external dimension of the AFSJ.

Regarding asylum and immigration, Stockholm reaffirms that the CEAS remains a key policy objective and that the principles stated in the Global Approach to Migration (2005) and in the European Pact on Immigration and Asylum (2008), namely the five pillar commitments³¹ of the Pact, which are again stated in the Program, are to be maintained. Moreover, by giving emphasis to the external dimension of the EU’s migration policies, it “*underlined the need for Union migration policy to be an integral part of Union foreign policy*” (European Council, 2010: 28). There’s a huge emphasis on external cooperation, especially regarding the prevention of irregular migration, since the Programme points out that irregular migration can be better managed through capacity building in third countries, cooperation and bi-lateral readmission agreements ensuring that third countries will readmit their own nationals when they are returned, and through the development of a network of liaison officers in countries of origin and transit. A more efficient exchange of information and better return policies are also mentioned in the Stockholm Program, yet solutions aiming at preventing irregular immigrants from reaching the EU territory through extraterritorial measures and cooperation with third countries are definitely highlighted.

Stockholm is more ambitious concerning immigration, than concerning asylum. Firstly, it recognizes that there’s a need to promote solidarity with those Member States facing particular asylum pressures, yet it also affirms that internal solidarity is insufficient. Stockholm proposes the reinforcement of internal solidarity through the EU’s financial system but no compulsory mechanisms for responsibility sharing have been designed. Instead of focusing on a fair share of responsibility among EU member states, it focuses more on the

³¹ The five commitments referred in the 2008 European Pact on Immigration and Asylum (13440/08) are: 1) organize legal immigration to take account of the priorities, needs and reception capacities determined by each Member State, and to encourage integration; 2) control illegal immigration in particular by ensuring that illegal immigrants return to their countries of origin or to a transit country; 3) make border controls more effective; 4) construct a Europe of asylum; 5) create a comprehensive partnership with the countries of origin and of transit to encourage the synergy between migration and development (Council of the European Union, 2008)

need to “*further develop instruments to express solidarity with third countries in order to promote and help building capacity to handle migratory flows and protracted refugee situations*” (European Council, 2010: 33), in this sense, third countries would be able to absorb the influxes themselves, avoiding the refugees’ unnecessary dangerous trips to the European territory. Secondly, even though it invites the Commission to explore new approaches to asylum policy and explore new mechanisms/ specific programs for responsibility sharing, the EU member states participation in such programs should be voluntary. In this sense, the Commission’s role should be the encouragement of the member states’ participation in these voluntary mechanisms for responsibility sharing, such as joint union resettlement schemes and protection programs for particular groups (which are specifically mentioned in the Programme). However, as previously mentioned, genuine solidarity in matters of asylum is very weak among EU member states since they are often not willing to equally share responsibility for hosting them, thus, voluntary-based programs might be fragile.

The Programme promotes the central role to be played by the European Asylum Support Office, which should be responsible for developing a common educational platform for national asylum officials, evaluate and develop procedures for the secondment of officials to support Member States facing particular asylum pressures (European Council, 2010: 33). Practical cooperation among the EU member states and operational support to countries when their asylum systems and reception conditions are under pressure was enabled by the European Asylum Support Office (EASO), which was finally established, in 2010, by the Regulation (EU) 439/ 2010. Moreover, the EASO also works as a “*European centre of expertise on asylum*”, “*provides practical and technical support to Member States and the European Commission*”, “*helps Member States fulfil their European and International obligations*” and “*provides evidence-based input for EU policymaking and legislation*” (EASO, 2014: 1). Through its motorization, facilitation and support tasks, this agency became an important tool for the development of the Common European Asylum System.

In 2011, the European Commission launched a new Global Approach to Migration and Mobility (COM (2011) 743 final), further referred as GAMM, which replaced the 2005 Global Approach to Migration. It recovered the three priorities from the 2005 GAM (legal economic migration, migration and development and irregular migration) and added international protection and asylum as a fourth priority. According to the ECRE, “*previously, refugee protection was associated with the GAM as a horizontal theme. In the new GAMM, refugee protection is included as one of its four priorities*” (ECRE, 2012:8). There’s also a great focus on Mobility Partnerships, which have previously been identified by the Council of the European Union as the “*most innovative and sophisticated tool to date of the Global Approach to Migration*” (Council of the European Union, 2009: 4).

Mobility Partnerships are declaratory non-binding instruments, based on voluntary cooperation with third countries, which give consistency to the external dimension of migration. Mostly, these partnerships are signed between one or more member states with a third country in order to address issues of irregular migration in one hand, while offering more opportunities of access to legal migration on the other hand. Seven partnerships have been concluded so far: with the Republic of Moldova and Cape Verde (May 2008); with Georgia (November 2009); with Armenia (2011); with Morocco and Azerbaijan (June and December 2013); and with Tunisia (March 2014). Other partnerships are still being negotiated, namely with Senegal and Ghana (Eisele, 2014: 93; European Commission, 2016). Focusing on the promotion of legal mobility, these partnerships slowly became a new tool for the externalization of the EU's borders for extraterritorial immigration control, offering no support for asylum seekers. As a consequence, most of asylum seekers' keep finding their way to Europe through the old dangerous and irregular routes, since often only the most privileged and qualified are provided with legal channels to access the European territory.

4.2. De jure protection: legal dilemmas on the regulation of a common asylum policy in the European Union

4.2.1. Legal Background

The recognition of the right to seek asylum became one of the most important obligations under International Law, through the provisions of universally binding instruments. In the European Union, the sources of asylum law come from international law, EU law and national law. However, this study does not include the analysis of national asylum law in EU-28, focusing only in international and EU law sources (both primary and secondary law).

The 1951 Geneva Convention Relating to the Status of Refugees and the amended 1967 New York Protocol are the key legal documents concerning the protection of refugees. Notwithstanding, other universally binding instruments such as the 1948 Universal Declaration of Human Rights, and legal instruments at the European and/ or EU level such as the 1950 European Convention of Human Rights (Article 3) and the EU Charter of Fundamental Rights (Articles 18 and 19), applying with a legal status since the entry into force of the Treaty of Lisbon, also upheld the right to asylum. For instance, asylum is according to the International Law Institute, *“the protection which a State grants on its territory or in some other place under the control of certain of its organs, to a person that comes to seek it”* (International Law Institute, 1951: 15)

The 1951 Geneva Convention, interpreted in the light of the 1967 New York Protocol, is the primary law source of the international refugees' regime, establishing who might qualify for this status of international protection and establishing the rights conferred by this status,

such as the right of access to education and the labour market. Although the Convention only covered events occurring before 1951, the amended 1967 Protocol established that both Convention and Protocol should apply to any person within the above definition and without any time limitation. Except Madagascar and Saint Kitts and Nevis, all the State parties to the Convention signed the ratified 1967 Protocol (Cherubini, 2015: 11). Actually, the Protocol has been signed by states that were not parties to the Convention, such as Venezuela, Cape Verde and the United States, which also became subject to the rules of the Convention (Cherubini, 2015: 11). In this sense, a refugee is a person that fits the definition of the 1951 Convention, as amended by the 1967 Protocol. The Article 1A(2) of the Convention establishes that refugee is any person who:

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 political social group or public opinion, is outside the country of his nationality and is unable or, owing 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. (Convention Relating to the Status of Refugees, 1951: Article 1A(2))

This qualification incorporates, according to Cherubini, two limitations: one of temporal character and one of geographical character. Whereas the temporal limitation has been amended with by the 1967 Protocol, the geographic limitation has not, since the Article 1(3) of the Protocol allows the contracting states to sign the Convention and retain the geographical limitation. It's important to note that the 1951 Convention emerged to address the refugee movements of the Second World War (mostly occurring within Europe) and this is why the refugee qualification present in the Convention applies to *events occurring in Europe before January 1951* or to *events occurring in Europe or elsewhere before January 1951*, as stated in the Article 1B(1). For instance, the Article 1B(2) allows the contracting states to choose if the refugee qualification applies to events occurring in Europe or elsewhere before the established time. Thus, the contracting states were able to decide whether to apply the Convention with or without the geographical limitation. With the exception of Congo, Monaco, Madagascar and Turkey, all contracting states signed the treaty without the geographical limitation (Cherubini, 2015: 11). Thus, while Madagascar did not sign the Protocol, Congo, Monaco and Turkey signed the 1967 Protocol and retained the geographical limitation. This means that in the three countries, only European refugees qualify for the refugee status.

Both universal instruments represented a major progress for International Humanitarian Law, which was mostly focused on regulating war, and Human Rights Law, by the international recognition and guarantee of the human rights of people feeling war and conflicts that put at risk their life and freedom. Regardless of the importance of the refugee status qualification established in the Convention, which reflects the needs of the time of its creation, other types of unprotected people have been brought to the debate, uncovering the gaps of this

qualification. For instance, the Geneva definition doesn't include internally displaced people³² or refugees fleeing environmental catastrophes and lack of access to food or water. In addition, neither the 1951 Convention, neither the 1967 Protocol contain procedural rules for refugee qualification, being the refugee status determination more *declaratory* than *constitutive* (Costello; Hancox, 2015: 3). To qualify a person as a refugee is a sovereign right subject to the determinations established by national laws across the world. In this sense, the absence of universal procedural rules, can lead to a situation where protection is granted "*without intensely individualized and judicialized procedures*" (Costello; Hancox, 2015: 3), namely (but not only), in cases of mass influx of asylum claimers, whose status might be determined on a group basis. (Costello; Hancox, 2015). Cherubini (2015) calls that the access to the territory and the right to temporary residence are "*clearly instrumental for determining the refugee status*" (Cherubini, 2015: 6), which is central to the refugee. In this sense, the *non-refoulement principle* is not only crucial because it gives the refugee access to a safe territory, but also because it gives the refugee the right to stay "*as long as necessary to complete the procedure with the necessary jurisdictional guarantees*" (Selerno, 2011 in Cherubini, 2015).

Despite the challenges concerning the qualification and attribution of refugee status, no Contracting State should expell or return asylum seekers without taking all legal and administrative procedures regarding the right to seek asylum in another country, on an individual basis and under the principle of *non-refoulement*. The asylum claimer is, by the definition, a person who claims to be a refugee and seeks asylum in another country but whose application hasn't been processed yet. The principle of *non-refoulement* is the corner stone of refugee's protection, since it highly limits the power of states to expel or return asylum seekers without having each asylum application processed individually under an objective examination. The principle is clearly established by the Article 33 of the 1951 Convention and is considered non-derogable norm of customary law (Klug & Howe in Ryan et al., 2010). According to the Article 55 of the referred Convention,

[n]o 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, nationality, membership of a particular social group or political opinion. (Convention Relating to the Status of Refugees, 1951)

The *non-refoulement* principle should then be fully applied under the provisions of the 1951 Convention the New York Protocol without discrimination of race, religion or country of origin. In the early years of the Convention, the principle of *non-refoulement* meant only that states could not *extradite* refugees from their territory but as noted by Cherubini "*rejection at the frontier continued to be allowed*" (Cherubini, 2015: 48). This means that the *non-refoulement* principle only applied when the refugee had physically entered the territory of a

³² Internally displaced persons defines people who forcibly left their normal place of residence due to fear of persecution but are displaced within their own territory.

determined country, even if the Article 31(1) “*implies that asylum-seekers enjoy a right of entry and temporary residence*” (Cherubini, 2015: 48) in the host country if coming “*directly from a territory in which they risk persecution*” (Cherubini, 2015: 48), whether entering the country illegally or not. However, a broader conception of the principle of *non-refoulement* started to take place.

Even though the geographical scope of the Article 33 is not explicit in the Convention, the Protocol establishes that it should be applied “*without any geographic limitation*” (Protocol Relating to the Status of Refugees, 1967(1)3) and jurisprudence of the International Court of Justice shows that the human rights law and the principle of *non-refoulement* should also be applied extraterritorially, including in then interceptions occurring on the high seas (Klug & Howe in Ryan, et al., 2010: 72). In this sense, there should be no restrictions to the application of this principle as the right to seek asylum from persecution and the right to enjoy asylum in other countries are considered Human Rights by the Article 14(1) of the Universal Declaration of Human Rights (1948), which states that “*everyone has the right to seek and enjoy in other countries asylum from persecution*” (The Universal Declaration of Human Rights, 1948).

However, there are two exceptions for the obligation of *non-refoulement* that are linked to reasons of internal security. According to the Article 33(3), the benefit of *non-refoulement*,

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 (Convention Relating to the Status of Refugees, 1951: Article 33(3))

In this sense, a refugee, fitting the definition of the Article 1A(2) of the 1951 Convention might be *refouled* to a country in which he/ she risks being persecuted if there are well-founded grounds for considering that person poses serious risk for the national security of the host country, or if he/ she has committed a serious crime and so poses a risk to the public. This article protects the host country in order to guarantee that the *non-refoulement* principle “*does not become a loophole through which its stability can be threatened*” (Cherubini, 2015: 68). However, considering that a refugee might represent a threat to the national security of one particular state but not to another state, he/ she should be provided with *substantive and procedural requirements* in order to be expelled to a country in which he/ she is not risking persecution in order to be able to find refuge there.

At European Union level, the right of asylum is stated in the Article 18 of the EU Charter of Fundamental Rights, while the prohibition of *refoulement* is stated in Article 19 (2), which clearly prohibits collective expulsions and the removal, expelling or extradition of foreigners “*to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment*” (Charter of

Fundamental Rights of the European Union (200/C 364/01), 2000: 12). The EU Charter of Fundamental Rights has a legally binding status applied to the European Institutions, however, it has no judicial enforcement at the Member States level, applying only when national authorities are implementing EU Law. Nevertheless, the Lisbon Treaty “*elevated the constitutional value of the EU Charter of Fundamental Rights under EU Law by conferring upon it equal status to that of the Treaties*” (ECRE, 2015: 2), making it clear that the EU acquis on asylum should not be separated from EU member states’ general obligations under international law and fundamental rights.

4.2.1.1. The concept of safe country and the principle of non-refoulement

There are two concepts of safe country: the concept of safe country of origin and the concept of safe third country of asylum. The first concept refers to the country of origin of the asylum seeker, and the second refers to a country with which the asylum seeker has closest links. The concept of safe country might imply the return of the asylum seeker for his/ her safe country of origin or for the country where it could have firstly applied for asylum. As observed by Roman, Baird and Radcliffe, even though the 1951 Convention suggests that the international borders the refugee has crossed might be relevant for examining his/ her application, it does not expressly mention the safe third country concept (Roman, et al., 2016: 6).

The term of safe country of origin is “*used when States draw up a list of countries of origin where the applicant does not fear persecution and to which he or she can therefore be sent*” (Cherubini, 2015: 83). Based on the assumption that there’s another safe country capable of offering similar protection to the hosting State, if an asylum claimer comes from one of the countries of this list, he or she can be perceived as not being a refugee.

The concept of safe third country is used for states to determine that a particular asylum applicant has links with a third country it considers as safe. These links can be based on three connections: citizenship or residence, family or temporary transit in other country. According to Cherubini,

There are several theories as to what such ‘links’ might be: they range from the more obvious, such as citizenship or residence, to others related to the protection of minors or the need to keep the family together, and finally to more tenuous connections based on even temporary transit (Cherubini, 2015: 82)

By defining the country responsible for examining an application, the concept of safe third country helps states to distribute responsibilities for examining asylum applications and to address the phenomenon of refugees in orbit³³. The concept itself does not harm the *non-refoulement* principle, neither the provisions of the 1951 Refugee Convention, however, too conclusive notions of safety behind an asylum applicant's removal to a safe country of origin or to a safe third country might represent an incompatibility with the hosting State's duties to protect refugees, since some destination countries considered as 'safe' might not offer equal levels of protection.

Cherubini adds that even if indirect refoulement is prohibited by the Article 33(1) of the 1951 Convention, the safe third countries concept has often been used by States to "*get round the main obligation implied and imposed by the prohibition of refoulement*", since states are allowed to remove an asylum applicant to a third country in which it does not risk persecution and is capable of granting his/ her safety. The main question however is whether a country can be considered *safe* or not and this depends if factors such as, according to the UNHCR, the respect for human rights and the accessibility to international or national organizations capable of verifying and supervising human rights standards, the respect for the rule-of-law and compliance with human rights instruments and, of course, the assurance that the country has record of not producing refugees (UNHCR in Cherubini, 2015: 82).

Moreover, the expelling state should make sure that the destination State is willing to take the asylum claimer and examine his/ her application for asylum before the removal, otherwise, the country can't be considered as safe. For this reason, some States have signed bilateral burden sharing agreements, also called re-admission agreements, in order "*to make sure, by means of ad hoc treaties, that they have the prior consent of the safe States to which they normally send part of the influx of asylum-seekers (usually neighbouring countries)*" (Cherubini, 2015: 88). These agreements will be further explored within the context of the EU *acquis*.

4.2.2. The EU *acquis* on asylum: a critical analysis

EU law is divided between primary and secondary legislation (see Figure 1). Primary legislation, which includes the EU Treaties, sets the General Principles of EU Law and is the basis of all EU action. Secondary legislation, which includes decisions, recommendations, opinions, regulations and directives, derive from the principles and goals set out in the EU treaties. Some of these secondary legislation instruments are binding (decisions, regulations and directives), while others are not (recommendations and opinions). It's important to note therefore that when thinking the EU *acquis* on asylum, the term EU member states does not

³³ Refugees in orbit is a phenomenon that occurs when asylum applicants irregularly circulate between or within countries, having their applications repeatedly rejected because they can't find a country that accepts responsibility for examining them (Cherubini, 2015).

refer to every EU member state, since the UK, Denmark and Ireland have different arrangements within the area of Freedom, Security and Justice and so are not bound to every secondary legislative act of the EU acquis.

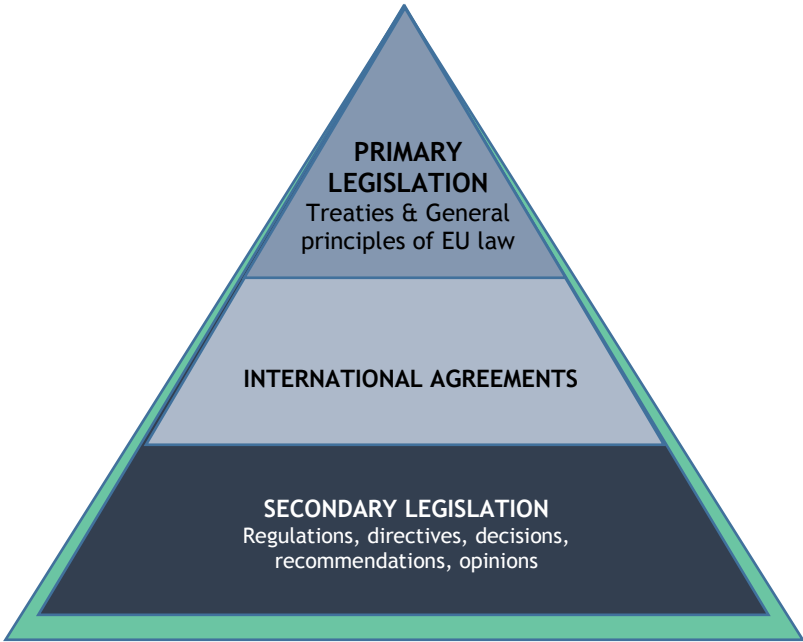


Figure 4. Sources and hierarchy of the European Union Law. Source: Figure created by the author.

The EU acquis derives from the goal established in the Article 78 TFEU that enforces the intention of developing a “*common policy on asylum, subsidiary protection and temporary protection (...) ensuring compliance with the principle of non-refoulement*” (Article 78(1) TFEU), with consistence with other International and EU Treaties. Thus, a common European asylum law system, also referred as EU acquis on asylum, should be “*in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties*” (Article 78(1) TFEU), such as the EU Charter of Fundamental Rights. The article also provides *per se* that, as previously mentioned, the measures adopted towards a Common European Asylum System (CEAS) should be taken through the ordinary legislative procedure (see Figure 1) and further provisional measures might be adopted by the Council, under proposal from the Commission and consultation of the European Parliament.

However, Member States still hold the right to determine who and who is not allowed in their territory as long as it doesn’t interfere with the *non-refoulement* principle. Even though the *non-refoulement* principle is a *non-derogable* norm of Customary Law, law enforcement on

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this matter is weak if non-existent and the respect for this principle is not easily measurable, what can lead to situations in which asylum or subsidiary protection claimers are expelled, returned or pushed-back from the European Union without having their fundamental rights fully guaranteed. Taking into account that irregular immigration flows are usually mixed, incorporating both irregular economic immigrants and refugees, it seems clear that an effective common asylum policy in the European Union highly depends on the establishment of an effective common immigration policy. It's stated in the Article 67(2) of the Treaty on the Functioning of the European Union that the Union:

The Union shall ensure the absence of internal border controls for persons and shall frame a common policy on asylum, immigration and external border control, based on solidarity between Member States, which is fair towards third-country nationals. For the purpose of this Title, stateless persons shall be treated as third-country nationals." (Consolidated version of the Treaty of the Functioning of the European Union, 2012: 76)

The article is clear about two important things. Firstly, that there's the intention to transform EU's legal framework on asylum into a common policy on asylum and immigration, including external border control. Secondly, that stateless people are to be treated as third country-nationals. Thus, undocumented migrants - entering the European Union as irregular immigrants - are also to be equally treated in their right to seek asylum and can't under any circumstance be returned by manners or to places where their life or freedom is at risk.

The Article 79(1) TFEU also establishes that,

The Union shall develop a common immigration policy aimed at ensuring, at all stages, the efficient management of migration flows, fair treatment of third-country nationals residing legally in Member States, and the prevention of, and enhanced measures to combat, illegal immigration and trafficking in human beings.

Since the entry into force of the Treaty of Amsterdam, in 1999, opinions and recommendations in the area of immigration and asylum started to be replaced by binding legislation, such as regulations and directives, what allowed the creation of a body of EU secondary law in matters of asylum (EU *acquis* on asylum) aiming a harmonising common standards on asylum. All forms of binding European law take precedence over national law where it applies, however, even though both regulations and directives are binding legislative acts they apply differently into national law. Regulations are binding legislative acts that have a direct applicability a soon as they enter into force. In turn, Directives are binding legislative acts that sets out a goal to be achieved. They apply to whom it is addressed but have to be transposed into national law because national authorities are allowed to choose how and by what means the aims of the directive are to be achieved.

The EU *acquis* on asylum, composed by directives and regulations, aims at ensuring that third country nationals are given equal treatment and opportunities when applying for asylum, subsidiary or temporary protection inside the European Union. In order to do so a legal

framework composed by secondary legislation was created. The EU *acquis* on asylum includes five secondary legislative acts, namely:

- The revised Asylum Procedures Directive (Directive 2013/32/EU),
- The revised Qualification Directive (2011/95/EU),
- The revised Reception Conditions Directive (2013/33/EU)
- The revised Dublin III Regulation (Regulation (EU) No 604/2013)
- The revised EURODAC Regulation (Regulation (EU) No 603/2013).

However, we consider that the Temporary Protection Directive (2001/55/EC) and the Family Reunification Directive (2003/86/EC), not meant for but also applying to refugees, and the Return Directive (2008/115/EC) are equally relevant. This pack of secondary legislation was created to implement the goals of Article 67(2) of the TFEU and should be, under EU's legal hierarchy (Figure 5), be interpreted in the light of other EU primary law, such as the Treaty of the European Union (TEU), the Treaty on the Functioning of the European Union (TFEU) and the Charter of Fundamental Rights of the European Union; and other relevant International Treaties such as the Convention Relating to the Status of Refugees, its Protocol and the Universal Declaration of Human Rights.

The Qualification Directive (2004/83/EC), from 29 April 2004, established minimum standards for the qualification and status of third country nationals or stateless persons as in need of international protection. However, the first measure on unified asylum procedures in the European Union was the Directive 2005/85/EC, from 1 December 2005, establishing minimum standards on procedures in Member States for granting and withdrawing refugee status. The EU *acquis* on asylum is nowadays focused, not on the establishment of minimum standards, but on the development, as mentioned above, of a European common policy in asylum matters.

4.2.2.1. Asylum Procedures Directive

The Asylum Procedures Directive (Directive 2013/32/EU) aims at providing common standards and procedures for granting and withdrawing asylum and subsidiary protection and is, without exception, to be applied to every asylum application “*made in the territory, including the border, in the territorial waters or in the transit zones of the Member States*” (Directive 2013/32/ EU: 66). International protection applications in the European Union should be examined under the framework of procedures provided by this directive and by professionals able to examine them objectively and impartially. The directive is also clear when it comes to undocumented international protection seekers, stating that:

As long as an applicant can show a good cause, the lack of documents on entry or the use of forged documents should not *per se* entail an automatic recourse to border accelerated procedures. (Directive 2013/32/EU: 61)

Furthermore, while waiting for the examination of its application, the international protection seeker should be provided with the right to stay, the right to access the services of an interpreter and should be given the opportunity to communicate with a representative from the United Nations High Commissioner for Refugees (UNHCR). Applicants must be given a confidential personal interview (Articles 14 and 15) by a person capable of looking into the background of the application, such as cultural background, sexual orientation and other specific vulnerability conditions. The written report of this interview should be available for the applicant so he/ she can make comments to it before the final decision takes place. In turn, no application examination should last longer than 21 months. According to the Article 31 of the Directive 2013/32/EU, the application should be examined within a 6 months period, starting to run from the moment that the responsible EU member state is determined, unless “*complex issues of fact and/or law are involved*”, “*a large number of third-country nationals or stateless persons simultaneously apply for international protection*”, or “*the delay can clearly be attributed to the failure of the applicant*” (Directive 2013/32/EU: 78). In this situation, the time can be extended to further 9 months or, exceptionally, in order to guarantee a complete examination of the application, to further 3 months. However, “*due to an uncertain situation in the country of origin which is expected to be temporary*” (Directive 2013/32/EU: 78), EU member states can extend the examination procedure to a maximum limit of 21 months. Applicants should be informed of their situation and delays (if there’s any) and EU member states should conduct reviews at least every six months.

A. Accelerated Asylum Procedures

A very problematic issue in the EU *acquis* on asylum is the allowance of accelerated asylum procedures to determined applications. Current EU legislation provides no clear definition of accelerated asylum procedures. However, this concept has emerged from the idea that some applications don’t deserve a full consideration.

According to Oakley (2007), public opinion highly shaped this idea by considering that the majority of applications are lodged by people feeling not war, but lower economic standards and, as a result, people in honest need of international protection take longer to receive their refugee status due to the bigger amount of applications to be examined. Clearly unfounded or abusive applications should then be examined “*at a significantly faster rate than does the normal asylum system*” (Oakley, 2007: 3). In this sense, the Article 31(8) of the Asylum Procedures Directive established a package of ten situations in which accelerated procedures might take place, such as when the applicant is from a safe country of origin, is presenting false information or documents, has destroyed his/ her travel or identity documents on purpose; has illegally entered or prolonged his/ her stay without presenting himself/ herself to the national authorities in order to make an asylum application; represents a threat to national security and public order; or has refused to have his/ her fingerprints taken in accordance with the Regulation No 603/2013.

Even though Article 32(1) establishes that an application can only be considered “*to be unfounded if the determining authority has established that the applicant does not qualify for international protection*” (Directive 2013/ 32/ EU: 79), accelerated procedures might violate the principle of *non-refoulement*, since the asylum-seeker doesn’t get a complete and adequate examination of his/ her claim.

B. The ‘safe country’ concept in the light of the EU-Turkey refugee deal

The rise of questions concerning safe host third countries date back to the London Resolutions (1992). These non-binding cooperation initiatives aimed at discouraging abuse of asylum procedures by third country nationals, and have resulted in two resolutions and one conclusion. The two resolutions have touched on manifestly unfounded applications for asylum and began the discussion towards a more harmonised approach to questions concerning host third countries, while the conclusion established a harmonised definition of countries where there’s generally no serious risk of persecution. As previously mentioned applications from safe countries of origin (SCO), can be dealt with through accelerated procedures and since the applications can be declared as inadmissible, the asylum claimer might be also returned (ECRE, 2013b: 1).

Nevertheless, the application of the safe third country doesn’t automatically mean that the application will be denied or that the applicant will be returned without review, since automatic rejections are not allowed. It means that the application will be subject of an accelerated procedure (fast tracking application) and return might take place if the third country is actually *safe* for that *particular* applicant, taking into account the particular circumstances of his/ her application (European Parliament, 2015b).

The concept of safe country has been integrated in the Asylum Procedures Directive within multiple meanings: ‘first country of asylum’ (Art. 35), ‘safe country of origin’ (Art. 36), ‘safe third country’ (Art. 38), ‘and ‘European safe country’ (Art. 39). According to the criteria set in the in the Article 33(2), an application might be considered inadmissible if the applicant comes from a ‘safe country of origin’, as defined in the article 35, or from a ‘safe third country’, as defined in the article 38.

The Article 38 establishes that a country can only be considered as ‘safe’ if,

- a) life and liberty are not threatened on account of race, religion, nationality, membership of a particular social group or political opinion;
- b) there’s no risk of serious harm as defined in Directive 2011/95/EU
- c) the principle of *non-refoulement* in accordance with the Geneva Convention is respected;
- d) the prohibition of removal, in violation of the right to freedom from torture and cruel, inhuman or degrading treatment as laid down in international law, is respected; and
- e) the possibility exists to request refugee status and, if found to be a refugee, to receive protection in accordance with the Geneva Convention (Directive 2013/32/EU: 80)

Moreover, the concept only applies if there's a reasonable connection between the applicant and the third country (e.g. temporary transit, citizenship), there's a nationally defined methodology to define the safety of the country that includes "*case-by-case consideration of the safety of the country for a particular applicant and/ or national designation of countries considered to be generally safe*" (Article 38(2)b) and if the destination country admits his/her return and offers sufficient protection. Yet, Roman (at all.) argue that the directive is criticized on this matter because "*it does not require that the third country guarantees access to a fair and efficient asylum procedure*" (Roman at all, 2016: 7). Thus, sufficient protection means "*the mere existence of the possibility to claim refugee status*" (Roman at all, 2016: 7)

EU member states are allowed to draw a list of safe countries of origin (SCO), but only on a national basis. However, in the European Agenda on Migration, the European Commission has proposed the creation of a Regulation establishing the adoption of a common EU list of safe countries which should, initially include Albania, Bosnia and Herzegovina, the former Yugoslav Republic of Macedonia, Kosovo, Montenegro, Serbia and Turkey (European Parliament, 2015). As noted by Roman et al. (2016), except for Bosnia and Herzegovina and Kosovo, all of the countries included in the list are candidates for joining the European Union. For instance, they should be considered as 'safe' because when "*EU Member States decide to make a country a candidate for EU membership, they check they fulfill the 'Copenhagen criteria' of guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities*" (European Commission, 2015c: 1)

However, some authors question whether these countries can be considered as 'safe'. Turkey provides empirical evidence of this doubt, namely because the EU has recently negotiated an action plan for cooperation in the field of migration and asylum which, according to Roman et al. "*implicitly assumes Turkey as a safe country*" (Roman et al., 2016: 2). The EU already had a readmission agreement with Turkey, which entered into force in 2014, nevertheless, it only recognized Turkey as a SCO, since the agreement was limited to Turkish citizens. Under the new EU-Turkey Action Plan, the readmission agreement should be extended to third country nationals and Turkey would then be considered as a safe transit country, where refugees and asylum seekers "*can safely stay and find protection*" (Roman et al., 2016: 9). Following the analysis of the legal requirements behind the concept of safe country, the authors present various arguments to justify why Turkey should not be considered as a safe country, sustained by empirical evidence regarding the human rights standards in the country and legal constraints.

Notwithstanding, one of the most relevant observations is the fact that, as previously mentioned, Turkey applies the 1951 Convention with the geographic limitation, what means that even though it rectified the Convention, the Convention is not *fully* applied. Even though the Turkish government granted Syrians access to the market place, very few have obtained

it³⁴ and, in fact, the legal situation of non-European citizens is uncertain since “*Turkey does not grant full legal status to refugees who come from outside Europe or who fall under the temporary protection regime*” (Roman et al., 2016: 16). The authors observe that there’s no agreement about the fact that the notion of safe country should only apply to countries that rectified the convention without geographic limitation, yet Turkey should not be considered as a safe country for non-European asylum seekers.

4.2.1.2. Qualification Directive

The EU acquis on asylum includes a Qualification Directive (2011/95/EU) aiming at harmonizing the identification of international protection statuses in the European Union and put them into a hierarchic codified regime. The Directive has been subject to revision in 2011 and, instead of establishing common standards for identification, it brought up uniform statuses of international protection while retaining the power of Member States to fix higher standards (Article 3). The Directive establishes two types of international protection statuses: refugee status and subsidiary protection. According to the Directive, a refugee is:

...a third-country national who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality, and is unable or, owing such fear, is unwilling to avail himself or herself of the protection of that country, or a stateless person, who, being outside of the country of former habitual residence for the same reasons as mentioned above, is unable or, owing to such fear, unwilling to return to it, and to whom Article 12 does not apply. (Directive 2011/95/EU: 13)

In turn, the Article 12 excludes third country-nationals and stateless people from getting the refugee status if they have committed a “*crime against peace, a war crime, or a crime against humanity*” or if they have committed “*a serious non-political crime outside the country of refuge*”. The conditions under which an applicant should be into in order to qualify for protection are stated in Article 7. This includes scenarios where the State of origin; parties or organizations controlling the State or a substantial part of the State; and non-state actors if demonstrated that the state of origin and the parties/ organizations controlling the state are not able to provide protection against persecution or serious harm on a non-temporary basis. However, under Article 8, Member States can determine that an applicant is not in need for international protection if in a part of the country of origin the applicant has no well-founded fear of being persecuted or suffering serious harm and can legally and safely travel there.

Persons who don’t qualify for refugee status can still be granted protection under the status of subsidiary protection based on different criteria. The Directive defines the person eligible for subsidiary protection as:

a third country national or a stateless person who does not qualify as a

³⁴ For empirical evidence please check the sources provided by Roman et al. (2016).

refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm as defined in Article 15. (Directive 2011/95/EU: 13)

According to Article 15, serious harm consists of “*death penalty or execution*”, “*torture or inhuman or degrading treatment or punishment*”, “*serious and individual threat to civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict*” (Directive 2011/95/EU: 18). Both statuses equally confer the right to access travel documents (Article 25); access to employment and employment-related education programmes (Article 26); access to education (Article 27); access to recognition of qualifications, including facilitation of access for beneficiaries who can’t provide documentary evidence of their qualifications (Article 28); access to healthcare (Article 30); access to accommodation (Article 32); access to integration facilities (Article 35); assistance to repatriation (Article 36); freedom of movement within the Member State which offered refuge (Article 33). Equal access to the family unity principle is also provided and also allows family members who don’t individually qualify for international protection to be provided with residence permits and assistance if they wish to be repatriated.

The refugee and subsidiary protection status are equal in many aspects but the subsidiary protection status is grounded on more temporary character as shown by Article 24, referring to residence permits. While residence permits conferred to beneficiaries of refugee status must be valid for at least three years, renewable, residence permits conferred to beneficiaries of subsidiary protection must be valid for at least one year and, in case of renewal, for at least two years. Both of them can be ceased if the situation of the beneficiary of international protection’s country of origin has improved significantly and the fear of persecution or serious harm becomes non-founded on a non-temporary basis. The main difference though is that the Directive predicts that the refugee status can cease if the beneficiary acquire the nationality of the country of refuge under the criteria defined by the national law of the hosting country but doesn’t mention beneficiaries of subsidiary protection on this matter.

The Article 7 of the Qualifications Directive also defines the “*agent of persecution*”, nevertheless, even if the scope of the Directive was enlarged by the inclusion of non-state actors as actors of persecution, Trauner, Servent (2015) argue that this requires the individual asylum seeker to prove that neither a state entity, neither organisations such as the United Nations or NATO, were capable of providing protection. Moreover, they also have to prove that there was no internal safe areas within the country to which he/she could escape to. However, evidences of alternative safe places are difficult to provide, namely when national authorities are the ones in charge to decide what are the eligible proves for each asylum application (Trauner, Servent, 2015: 39).

4.2.1.3. Temporary Protection Directive

Regarding exceptional measures to be applied in case of mass influxes of asylum claimers, the EU *acquis* on asylum incorporated the Temporary Protection Directive (2001/55/EC), in 2001, establishing minimum standards for giving temporary protection. The need to create this additional instrument in order to offer immediate admission and residence of displaced persons on a temporary basis was triggered by the conflicts in the former Yugoslavia in the 90s. This conflicts resulted in a mass influx of displaced persons in the European Union and have put EU's deeply challenged the efficiency of EU's asylum system's. Temporary protection is defined in the current Directive as:

a procedure of exceptional character to provide, in the event of mass influx or imminent mass influx of displaced persons from third countries who are unable to return to their country of origin, immediate and temporary protection to such persons, in particular if there is also a risk that the asylum system will be unable to process this influx without adverse effects for its efficient operation. (Directive 2001/55/EC: 14)

The provisions of this Directive are based on the principle of solidarity between Member States and their activation can be requested by a Member State, but should not be activated unilaterally. According to Article 5, the existence of a mass influx of displaced persons shall be established by a Council Decision. The duration of the protection period shall be, according to Article 4, of one year. However, it can be extended automatically for periods of 6 months for a maximum of one year, except if the Council decides to extend that period (Article 4(2)). During the period of international protection, beneficiaries should be provided with residence permits, access to accommodation, access to healthcare, access to education and benefit from the principle of family unification for the entire duration of the protection. Beneficiaries can also have access to employment but EU citizens and third-country nationals legally staying in the Member State receiving employment benefits should be given priority for reasons of labour market policies, as defined in the Article 12. Countries should also give persons enjoying temporary protection the right to claim asylum at any time and their asylum application processes should be concluded before the end of the protection period. According to the Directorate-General of Migration and Home Affairs, the provisions of the Directive have not been activated so far³⁵ (European Commission, 2015d).

4.2.1.4. The Reception Conditions Directive

Having the applicant the right to remain in the hosting territory while his/ her application is being examined, minimum standards of reception have been set. The Reception Conditions Directive (2013/33/EU), adopted in 2013, sets minimum material conditions such as housing, access to healthcare, education, language courses and the right to work while the application is being processed. The core need of asylum claimers when they arrive in the European Union is the access to the asylum procedure and the access to *humane* reception conditions,

³⁵ For further information about the provisions of the Temporary Procedures Directive, please, see the official page of the Directorate-General of Migration and Home Affairs, available at: [LINK](#)

however, many countries in the European Union are still unable or unwilling to provide them with these conditions. Reception conditions still differ among EU's national reception systems and many countries fail their obligations to provide applicants minimum conditions. According to Guild and Costello, *"Italy's reception conditions are overcrowded and its services stretched beyond capacity"* (Guild; Costello et al, 2015: 4) and Greece's reception conditions are so bad that the Court of Justice of the EU and the European Court of Human Rights tried to prevent removals to Greece due to inhuman and degrading treatment of asylum seekers (Guild; Costello et al, 2015: 4). Furthermore, the UNCHR concluded, in its study about homeless refugees in Hungary, that the reception conditions in the country are not better since *"idleness, social isolation and separation from receiving communities have often been noted"* (UNCHR, 2015:19). In addition, the access to employment, language courses and cultural activities was described as not possible or highly limited (UNCHR, 2015).

The Article 6 of the Reception Directive establishes that asylum claimers should be provided with documentation certifying their status as an applicant for international protection and certifying the authorization to remain in the territory while the application is being processed, except if the applicant is in detention. The problem though is that the Reception Conditions is ambiguous about detentions. While it establishes that detention should be a measure of last resort to be applied after full examination of all non-custodial measures and *"should not exceed the time reasonably needed to complete the relevant procedures"* (2013/33/EU: 97), it also allows detention for the identification of the applicant's nationality and identity (Article 8(3b)) and for the determination of the applicant's right to enter the territory (Article 8(3c)). According to AIDA, some countries such as Belgium, Ireland and the UK, have not transposed Article 8(3), referring to the grounds of detention, into their national law. Other countries, such as Cyprus and Poland, have those transpositions pendent. While countries, like Greece and Sweden, are still drafting proposals for transposition. In the case of Greece, for instance, asylum seekers applying for international protection from detention facilities remain detained until a decision comes up in order to have their application processed more quickly (AIDA, 2015: 84).

However, no asylum claimer should, under the current Directive, be detained to facilitate the application examination. Systematic detentions are clearly inconsistent with EU Law and the fact that Member States are not required to gathering data on the number of detained asylum claimers enforces the continuous adoption of illegal and inhuman detention measures by Member States. According to a special report regarding migrant detentions at EU member states, concluded by the Global Detention Project, supported by Amnesty International, eight EU national governments (Austria, Denmark, Finland, Germany, Ireland, Netherlands, Slovenia and the UK) don't hold that information *"hence that they are not gathering even the basic data on the numbers of migrants in detention"* (Access Info Europe; Global Detention Project, 2015: 18). In addition, migrants are also detained while waiting for Return when

their applications but, again, this is only allowed if there's a clear risk of absconding, as stated in the Article 15 of The Return Directive (2008/ 115/ EC).

4.2.1.5. The Return Directive

Returns of people that are not in need of international protection have been considered by the European Commission “*a key element in the interlocking mechanisms which make up the EU asylum system*” (European Commission, 2015e: 2) and is also a core element of the Migration Management Support Teams, coordinated by European Regional Task Forces, present in hotspot³⁶ locations in Italy and Greece, responsible for ensuring effective returns. As mentioned below, returning people that are not in need of international protection to their countries of origin, is only possible if the countries concerned agree to readmit them. Thus, EU member states have launched several partnership agreements with third countries concerning readmission. For instance, the European Union has, since 2012, a readmission agreement with Pakistan, since Pakistani citizens have been for many years one of the largest third-country nationals found irregularly in the European Union. In October 2015, the European Commission has prioritized the effective application of this particular agreement and the first returns from Greece to Pakistan, carried out by a Frontex's joint return operation, already took place. Another example of these readmission agreements is the even more recent above mentioned EU-Turkey Action Plan, signed in March 2016.

The Return Directive defines two types of return measures once the asylum claim has been rejected after a full, individual and fair examination: voluntary departure (Article 7) and removal (Article 8). According to the Article 7, a return decision must provide a period for voluntary repatriation - from seven to thirty days - which can be extended under specific circumstances such as the existence of children attending school. However, if there's a serious and founded risk of absconding, EU member states can deny this option. In turn, according to Article 8, removal allows Member States to use coercive measures to enforce and carry out the forced return of a third country national and should be accompanied by an entry ban (that can be suspended for humanitarian reasons). For instance, the duration of the entry ban shall be determined by the EU member state, taking into consideration all relevant facts of each individual case, therefore it should not exceed a five years period.

All returns should, with no exception, be carried out in a safe and dignified manner. However, there are many cases where this is not possible for technical reasons or reasons concerning the human rights of the third country national. In these situations, third country

³⁶ The so called ‘hotspots’ are part of the set of operational measures adopted by the European Commission in order to respond to the current refugee crisis. Hotspots are sections, placed in Italian and Greek regions with *extraordinary migratory pressures*. These sections have a reinforced and concerted support by EU agencies, such as Frontex, Europol, EASO and Eurojust that assist national authorities in the identification, registration, return, and other relevant tasks concerning asylum seekers. For further information please check Annexes 4 and 5 of the *Communication from the Commission to the European Parliament, the European Council, and the Council* (COM(2015) 510 final), of 14 October 2015.

nationals should be granted the right to remain in the territory until the return can be carried out in compliance with fundamental rights.

Moreover, asylum claimers should be “*offered the same level of treatment as regards procedural arrangements and status determination*” and “*similar cases should be treated alike and result in the same outcome*” (European Commission, 2013: 2). The problem though is that under EU Law, directives are legislative acts that allow EU member states to decide how to implement goals. As previously mentioned, EU law doesn’t confer direct effect on Directives and EU countries should transpose them into their national law. Thus, Directives have only direct effects if the transposition deadline has expired, what allows asylum seekers to invoke asylum Directives after the transposition deadline. Even though the EU is trying to build on common standards, being the EU *acquis* on asylum flexible with EU member states’ national legal systems, those standards remain, according to Costello and HacoX (2015) based on *minimum standards*. According to the Asylum Information Database (AIDA), the Qualifications Directive has been transposed by the majority of national laws of the 28 Member States. However, the Asylum Procedures Directive and the Reception Conditions Directive, establishing criteria concerning the reception conditions, detentions and asylum procedures, have not. While countries like Austria, Croatia, France and the Netherlands made legal reforms in order to transpose these instruments, countries like Belgium, Germany, Hungary and Malta have only partially done this (AIDA, 2015: 66).

Another important issue concerning the EU *Acquis* on asylum is the fact that rejections of asylum claims are valid in all European Union, while approved applications are not. If an application is rejected, the applicant is not able to apply in another EU Member State. However, no EU member state is obliged to recognize approved applications and neither the refugee status, neither the subsidiary protection status allow free movement within the Schengen area.

4.2.1.6. The Dublin System

In the course of this study it was possible to observe that EU countries, both South and North countries, face deep concerns regarding the management of irregular migration and asylum. However, they face pressures at different levels. While bordering countries like Hungary, Greece, Italy and Malta are more susceptible to migratory pressures due to their geographical location, countries like Sweden, Germany and Norway not so much, but are on the other hand the preferable hosting countries for migrants and asylum seekers.

According to Alexander Betts in Kaser and Martin (2011), many Northern States tried to minimize their commitment to the protection of refugees due to rising concerns with the relationship between immigration and security, namely by linking the spontaneous arrival of mixed flows of immigrants with terrorism and human smuggling and, of course, by understanding these mixed flows as challenging elements in the maintenance of the economic

welfare. As a result, the burdens in the refugee regime have been shifted from Northern states - which are considered more attractive - to the Southern states - which are physically easier to reach due to their geographic location.

In a recent Communication from October 2015 (COM(2015) 510 final), the European Commission acknowledged that the effective management of “*the pressure of migratory flows on some parts of the shared external border requires both responsibility and solidarity on the part of all Member States*” (European Commission, 2015e: 2). However, relocation of people in clear need of international protection from the *first countries of origin* to other EU member states has not produced the necessary effects, since EU member states are still not truly committed to hosting relocated people³⁷. At the date of the Communication, the first relocation had already taken place. This was a symbolic move, namely for asylum seekers who, as observed by the European Commission “*were reluctant to be registered because they did not trust the system*” (European Commission, 2015e: 6). Thus, it is crucial that relocation is applied effectively and systematically in order to restore asylum seekers’ trust in the system.

The Dublin system, made by two regulations (the Dublin Regulation and the EURODAC Regulation) is the responsibility-allocation mechanism of the CEAS (Maiani, 2015: 102). As Maiani has noted there are three principles underlying this system: 1) the assurance that at least one EU member state will examine an application lodged by a third country national; 2) prevent asylum seekers from abusively lodging several applications in different EU member states simultaneously (the so-called *asylum-shopping*); 3) preventing asylum seekers from choosing the EU country of asylum according to their *subjective* preferences and provide *objective* criteria for the definition of the responsible country (Maiani, 2015: 102). The Dublin system is the backbone of the CEAS, however, as observed by Maiani it was not devised as a responsibility-sharing instrument, thus, as will be further explained it can result in additional burdens for particular EU member states.

The Dublin Regulation (Regulation (EU) No 604/2013) establishes criteria and mechanisms to determine which Member State is responsible for examining and processing an application for international protection since only one single Member State can be held responsible for a determined asylum claimer. It was created to avoid multiple applications - which can cause huge delays in the processing of applications - and secondary movements of asylum claimers within the European Union, but also to guarantee that the choice of country of destination is not an available option for asylum seekers as all EU member countries are, under the principle of mutual trust, considered equally safe for protection.

³⁷ As stated by the European Commission, relocation reacquired adequate reception capacity, however, at the date of the Communication only six EU member states (Austria, France, Germany, Luxembourg, Sweden and Spain) notified the Commission about the reception capacities they have made available to host refugees.

First of all, in order to define which Member State is responsible for an asylum seeker and, consequently, responsible for the examination of his/her asylum application, the Dublin system hierarchically follows two main criteria: the respect for family reunification and the first country of entry. This means that in absence of the presence of a family member, sibling or relative in another EU Member State, as referred in Articles 7, 8, 10 and 16 of the Regulation No 604/2013, the asylum seeker should process its claim in the first territory of entry in the European Union as referred in the Article 13(1) of the same regulation:

Where it is established (...) that an applicant has irregularly crossed the border into a Member State by land, sea or air having come from a third country, the Member State thus entered shall be responsible for examining the application for international protection. (Regulation (EU) No 604/2013: 40)

Even though family reunification is a pillar principle of the Dublin system, according to the European Council on Refugees and Exiles (2013) and quoting Mouzorakis (2014), *“Member States often refuse to take into account information on family members present in the EU submitted at a larger stage during the Dublin procedure in an attempt to evade the application of family unity provisions”* (Mouzorakis, 2014: 13). Furthermore, the regulation raises human rights implications as it *“legally dissociates the state where the asylum claimer is physically present from the ‘responsible state’ where the claim is to be processed”* (ECRE, 2015: 2). It means that the member states placed in the external frontiers of the EU, such as Greece, Italy, Cyprus and Hungary, easier to reach by asylum seekers, are according to this criteria responsible for processing the great majority of asylum claims. Consequently, this has resulted in huge *“deficiencies in the processing of asylum claims”* (Frantziou, Staiger, Chaytor, 2014: 2) and too often in a long-lasting *inhuman and degrading treatment* (Frantziou, Staiger, Chaytor, 2014: 2) in the detention facilities³⁸.

It's been previously acknowledged that countries are obliged to allow asylum seekers to make a claim. However, according to Mouzorakis, Dublin III not only works as a *“border guard by urging Member States to efficiently protect their borders to avoid the burden of any perspective claim made by an irregular migrant in the Union”* (Mouzorakis, 2014: 11); but also as a *punishment* for the EU country that allowed the asylum claimer to arrive in the Union (Guild, 2006 in Mouzorakis, 2014: 11).

In order to guarantee that an asylum claim is processed by the responsible Member State under the Dublin system, another legal instrument was adopted in 2008. The EURODAC Regulation (Regulation (EU) No 603/ 2013), revised in 2013, is the *“first EU Automated*

³⁸ It's therefore important to note that according to the Article 3 of the European Convention of Human Rights *“no one shall be subjected to torture or to inhuman or degrading treatment or punishment”*. Moreover, the Article 28 of the Dublin Regulation clarifies that an applicant should not be detained for the *“sole reason that he or she is subject to a Dublin procedure”*, such as a transfer procedure for instance. However, too often and mostly for reasons of poor reception conditions, asylum await for the examination of their asylum application in detention facilities or in detention conditions in immigration centers, such occurs in Greece (Frantziou, Staiger, Chaytor, 2014).

Fingerprint Identification System” (Bouwer, 2008: 118) and aims not only on the fingerprinting and identification of the person claiming asylum but also on the establishment of the route travelled in order to find out what was the first country of entry. Its main purpose is to avoid multiple asylum applications by preventing “*asylum seekers from applying in more than one state by changing their names or by throwing away their travel and identity papers*” (Bouwer, 2008: 119). It falls into all persons over the age of 14 who are: applicants for international protection (Article 9); third country nationals or stateless persons crossing the external border irregularly (Article 14) or stateless persons found illegally staying in a Member State (Article 17).

Articles 14 and 17 show that EURODAC not only applies asylum claimers but also to other cases of irregular immigration. The EURODAC database is accessed by national police and Europol, also serves the purpose of controlling irregular immigration and detecting/preventing serious crimes (e.g. terrorist acts), what makes it way more than a mere legal instrument created to “*enable the effective operation of the Dublin Regulation*” (O’inions, 2014: 78).

Some countries, mostly bordering countries like Italy and Greece, remain highly resistant on the application of the EURODAC Regulation as it enables “*the transfer of asylum seekers to the first country of arrival in the EU*” (O’inions, 2014: 78). In turn, asylum claimers aren’t happy to have their fingerprints taken in the first country of entry also for reasons concerning the weak quality of asylum national systems, reception conditions and massive influxes that usually take place in those bordering countries. The Green Paper on the future Common European Asylum System (COM(2007)301 final) itself confirms that:

The Dublin System may *de facto* result in additional burdens on Member States who have limited reception and absorption capacities and that find themselves under particular migratory pressures because of their geographical location (COM(2007)301 final, 2007: 10)

The transfers from a particular EU member state to the *responsible* member state are therefore allowed under the current legislation, but not without limitations. The principle of mutual trust is based on a flawed presumption that all Member States are safe for asylum claimers, yet scholars such as O’inions (2014) have observed profound inequalities in EU’s national asylum systems and reception conditions, being also true that asylum recognition rates in EU’s Member States still differ broadly among EU member states³⁹. Thus, the most

³⁹ It’s commonly recognized among organizations such as the UNCHR, Amnesty International, Human Rights Watch and AIDA that there’s a lack of convergence on asylum recognition rates in the European Union, due to broad divergences in functioning of national asylum systems. For instance, Eurostat data shows that the overall average of recognition rates for Iraqi citizens in the European Union was, until September 2015, of 63,3%. However, recognition rates at first instance decisions varies between 0% (Spain, Latvia and Slovenia) and 100% (Ireland, Cyprus, Luxembourg, Poland and Slovakia). Thus, one’s chance to get a legal international protection status might depend on the country in which the asylum application is lodged and processed and, consequently, asylum recognition rates have a positive effect

recent amendment to the Dublin Regulation includes a discretionary sovereignty clause present at Article 3(2) in order to guarantee that no asylum claimer is exposed to risk of *refoulement* due to deficiencies in EU's national asylum systems. This clause allows EU member states to process an application (even if such examination is not their *responsibility*) if systematic deficiencies in the asylum procedures and reception conditions in the responsible country are observed (O'nions, 2014: 104; Mouzourakis, 2014: 13), yet according to O'nions "*this clause is not always applied in practice as states differ in their assessment of systematic deficiencies*" (O'nions, 2014: 105).

However, in the 2011 judgment *M.S.S. v. Belgium and Greece* (Application No 30696/09), the European Court of Human Rights (ECHR) ruled that both Greece and Belgium had violated the fundamental rights of asylum seekers, as defined in the EU Charter of Fundamental Rights. Greece violated asylum seekers' fundamental rights because its reception conditions were very poor, and Belgium because it transferred asylum seekers back to Greece. Following the judgment, the European Court of Justice ruled that "*there could be no presumption that Member States respect the fundamental rights of asylum seekers if they return people to Greece under the Dublin system*" (European Commission, 2015e: 12), due to systemic deficiencies in the Greek asylum system. Since then, Dublin transfers to Greece have been suspended and the EU member states have not been able to transfer asylum seekers to Greece for almost five years⁴⁰.

Regarding detentions, the Dublin system is also highly problematic. Even though the Article 28(1) sets that "*Member States should not hold a person in detention for the sole reason that he or she is subject to the procedure established*" (Regulation (EU) No 604/2013: 46), it allows detention in order to guarantee the success of transfer procedures when "*there is a significant risk of absconding*" (Regulation (EU) No 604/2013: 46). This risk is clearly really hard to measure and consequently many countries bounded by the EU *acquis* on asylum make an excessive use of detentions (ECRE, 2013a). Actually, according to the European Council of Refugees and Exiles (ECRE), some countries even use detention as an automatic process as soon as undocumented asylum seeker enter their territory. The organization also adds that whereas countries that lack of adequate asylum facilities automatically detain asylum seekers, other countries frequently use detention as a mean to enforce transfers and returns because detention prevents asylum seekers from a substantial access to their rights during the asylum process, namely the access to alternative non-custodial measures and to the promotion of a voluntary return with the counselling of an independent legal advisor (ECRE, 2013a).

on the number of asylum applications as some EU member states become more attractive for asylum seekers than others.

⁴⁰ The European Commission has dedicated resources in assisting Greece to improve its reception conditions. In 14th October 2015, the European Commission has considered the normalization of the situation in Greece and the reinstatement of Dublin transfers as a priority (COM(2015) 510 final). In 10th February 2016, the European Commission has launched a Recommendation setting out urgent measures to be taken by Greece (C(2016) 871 final).

Concluding, the Dublin system has multiple legal questions that allows some states to avoid responsibilities towards asylum claimers, and promotes the collapse of national asylum systems in countries placed at EU's external borders. The unequal burden sharing, plus the excessive use of detentions and lack of information on family members are also facts that contribute to the inefficiency of the EU *acquis* on asylum and, consequently, to the mistreatment of the rights of asylum seekers inside the European Union.

Final considerations

In 1999, with the entry into force of the Treaty of Amsterdam, the EU institutions were enabled to draw binding legislation in the area of asylum and immigration, what allowed the emergence of an unprecedented project: the Common European Asylum System (CEAS). Between 1999 and 2004, under the Tampere Programme (European Council, 1999), the EU member states adopted the first generation of asylum law which backboneed the CEAS, a project of harmonization of national asylum legal frameworks and protection standards across the, at the time, 15 countries of the European Union. The Treaty of Amsterdam enabled the European Union to adopt a more supranational approach to asylum, however, it's important to note that between 1999-2004, EU asylum measures were taken on an intergovernmental basis, taking into account that the European Parliament had no decision-making role and that the EU member states held the sole right of initiative and were able to block decisions in the Council of the European Union, which decided only by unanimous voting.

The EU institutions were progressively given more proactive roles, however, only in the third phase of the CEAS, under the Stockholm Programme and with the entry into force of the Treaty of Lisbon, they became competent to rule. In 2009, when the Treaty of Lisbon entered into force, the qualified majority voting started to apply in the Council of the European Union and EU policies were to be adopted by co-decision between the Council of the European Union and the European Parliament, which was provided with a decision-making role. Moreover, the European Court of Justice (ECJ) became fully competent to rule in the field of asylum, since its judicial role has been strengthened by the Treaty of Lisbon. The institutional balance of power introduced by the new treaty change has produced a more coordinated supranational ruling, however, it's important to note that EU decisions remained framed by the strategic guidelines provided by the European Council. Moreover, even after the end of the third and last phase of the CEAS and the end Stockholm Programme, political reluctance prevails and it's still not possible to observe a single approach to immigration and asylum in the European Union. Even after more than fifteen years of cooperation developments within the Area of Freedom, Security and Justice, it still matters whether an asylum seeker applies for asylum in Greece, in Hungary or in Germany, for instance.

Asylum law and policy in the European Union

In order to respond to the research question of this chapter, we present three challenges, of political and legal nature, concerning asylum governance in the European Union.

A. The legacy of intergovernmentalism and the prevalence of the European Council's strategic role

The nature of cooperation within the area of Justice and Home Affairs, the current Area of Freedom, Security and Justice, has, namely in its early years, been landmarked by intergovernmental decision-making, with little involvement from the European Commission. The EU member states held the power of initiative and decisions within the Council of the European Union were taken only unanimously, what might have contributed for the slow progress in this area.

The Treaty of Lisbon is considered a turning point of this very heterogeneous policy area, which includes diverse policy areas such as asylum, immigration and border control, security, counter-terrorism, and justice and policy cooperation. Nowadays, most of these areas, asylum and immigration included, are of shared competence of the European Union. Nevertheless, the move towards a more supranational approach didn't erase the legacy of intergovernmentalism, since the European Council still defines the strategic guidelines within this area. *Volunté politique* towards a supranational management of asylum seekers' entrance in the European Union has only been weak, since the EU member states have always been reluctant to give up on their sovereign right to decide who and who is not allowed within their territory. Even if the EU member states recognize that asylum is an exception to this sovereign right to allow or deny access to the territory, they are to sovereignly interpret, decide and adapt their obligations, what gives them a lot of room to sovereignly manage asylum issues.

B. Lack of solidarity among EU member states in the field of asylum: the Dublin System

Under the domain of the Area of Freedom, Security and Justice, asylum law is one of the most dynamic and complex legal areas of the European Union, being landmarked by a deep interconnection between states international obligations in matters of refugees protection and human rights, EU harmonization and national laws. For instance, Peers (2011) described asylum law as a *labyrinth* affected by other policy fields such as migration and the EU's external policy (Peers, 2011).

The development of the hard outputs of the Common European Asylum System (CEAS) has shown that the priority of the EU member states is to control irregular immigration, with little solidarity to share responsibility for hosting refugees. For instance, according to Trauner, Servent (2015) "*taken as a whole (...) the second phase of the Common European Asylum System would therefore look a lot like the first phase*" (Peers, 2012), since the core

rules of the EU *acquis*, namely the Dublin system, remained untouched with just a few added measures.

The secondary law instruments that define the rights of refugees such as asylum procedures, qualification and reception conditions are directives, while the instruments for the identification of asylum seekers and for the identification of the country responsible are regulations. Thus, the rights of refugees and asylum seekers have a more discrete implementation, since the EU member states are able to choose how to achieve the goals present in the directives, whereas the identification of the asylum seeker and the identification of the responsible country (Dublin system), which can result in transfers from one member state to the responsible EU member state, are directly implemented. Although Directives and Regulations have direct application and precedence over national law, regulations are, according to Boswell and Geddes, “*more tightly prescriptive*” (Boswell, Geddes, 2011: 57). As a consequence, asylum recognition rates, *de facto* reception conditions and other asylum procedures such as *de facto* access to healthcare, education and work still differ broadly among the EU member states (Frantziou, Staiger, Chaytor, 2014).

The recast Dublin Regulation establishes a hierarchical criteria (family links and first country of entry) for defining the EU member state responsible for a determined asylum application, whereas the EURODAC Regulation allows the effective implementation of the Dublin Regulation, by providing information on these criteria through the fingerprinting of asylum seekers. The Dublin system fills a relevant gap in the CEAS by defining the country responsible for analyzing a determined asylum application and avoiding the phenomenon of asylum shopping, which can possibly flood the system. However, by containing no binding procedures for relocation aiming at the sharing of responsibilities between the EU member states, it results in excessive burdens in the *first countries of entry*, which are often the most easy to reach by asylum seekers. Taking into account that the use of discretionary provisions, such as the sovereignty clause, is very limited, the reception conditions and the capacity for examining applications in the countries placed at the EU’s external borders often collapse and the protection standards offered to refugees decreases exponentially.

It’s been acknowledged that the Dublin system has human rights implications for the people claiming asylum, because its application can delay the examination of applications and detentions are many times used to enforce transfers with refugees being left for long periods in detention centers, sometimes subject to degrading treatment. Moreover, it increases the pressure on the EU member states placed in the external border to tighten controls in order to avoid the *burden* concerning the entrance of irregular migrants, including asylum seekers, for whom they would have to take responsibility.

C. Responsibility shifting: safe countries of origin and transit

Asylum law and policy in the European Union

The EU member states have often shifted their responsibility for hosting refugees to countries they consider as being *safe* for them. However, this concept holds multiple concerns. Firstly, because it subjects asylum seekers to accelerated asylum procedures, what might hamper the individual examination of all the facts. For instance, a country can be safe for a particular social or gender group, or for a determined person in particular, and unsafe for the other groups and individuals (e.g. LGBT people). Secondly, both the nature of persecution and what a country considers as safe are deeply subjective and judgments about *prevailing human rights situations* are often imprecise, what can lead to situations in which refugees are returned to situations that might threaten their life and freedom, in detriment of the principle of non-refoulement (UNHCR, 1991). Thirdly, it might politicize the asylum system because some countries might raise diplomatic pressures in order to be considered safe.

For instance, Turkey has been considered as a safe country of origin since 2014, date of the entry into force of the readmission agreement between the country and the European Union, which considered that Turkish asylum seekers could, after accelerated examination, be safely returned to Turkey. However, just recently, Turkey has also been considered as a safe country of transit for asylum seekers arriving in the European Union, even if the country only applies the 1951 Convention with geographic limitation, what means that, according to Turkish law, only European citizens can be granted full refugee status. Subject to a lot of criticism, namely by human-rights organizations, the new EU-Turkey deal already resulted in mass returns of Syrian refugees back to Syria, according to the Amnesty International (Amnesty International, 2016), what, taking into account the actual scenario of armed conflict in the country, with the presence of various terrorist groups and continuous bombings, clearly violates the principle of *non-refoulement*.

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Conclusion

This study tried to address the protection of refugees in the European Union in two levels. The first level, relating to the first two chapters, provided a more comprehensive analysis at the transnational level, concerning the emergence of a global refugees' regime within a broader global governance scheme, and at the European Union level, focusing on the making of EU policies within the context of the EU integration, which was particularly relevant for the understanding of the emergence of a regional protection regime. In turn, the second level of analysis, relating to the last two chapters is specifically focused on the governance of asylum, providing an in-depth analysis of the EU's engagement in cooperation in asylum matters, firstly, within the area of Freedom, Security and Justice (AFSJ) and, secondly, within the Common European Asylum System (CEAS), which falls under the domain of the latter. This bipartite analysis allowed us to suggest several conclusions regarding some dilemmas of political and legal nature, which pose real challenges to the governance of asylum and, consequently, to the protection of refugees in the European Union.

Through the comparative analysis of relevant authors, the first chapter allowed us to set the scene on refugees' protection, by analyzing the emergence of a global right to asylum within a context of global governance, and by placing the European Union in the global governance scene. Thus, taking into consideration the global structures in which the European Union plays as a relevant global actor, we argue that it will be hard for the European Union to keep its moral leadership in the world and keep stressing the importance of good governance if it does not respond collectively to the current humanitarian crisis with effective responsibility sharing measures based on solidarity between the EU member states and between the EU member states and the vulnerable people fleeing conflict and gross human rights violations. Moreover, the absence of a collective response in matters of asylum, which is already a formal common policy area, shows lack of solidarity and political cohesion among the EU member states, what might harm the attractiveness of the EU project and the EU's political leadership in the world. As noted by Smyser (2003),

The rulers of the sovereign states may, therefore, continue to turn their backs of the humanitarian conscience. If they do, they will fail to build the world order they want. They will, in fact, destroy that world order. The world will sink into chaos as states become more powerful but ever less secure. (Smyser, 2003: 4)

Although refugee law constitutes a humanitarian exception (the right to asylum is a *special international human right*) to the sovereign right to select and exclude non-nationals at the borders of a state, states shirk their responsibility as they continue to insist on their sovereignty (Oudejans, 2011: 75). According to the last UNCHR's Global Report, the major

refugee hosting countries were developing countries placed in the Middle East, Africa and Asia, with Turkey receiving the highest number of refugees, and Lebanon and Jordan receiving the highest number of refugees per 1000 habitants in the end of 2014 (UNHCR, 2015b). Turkey alone welcomed more than 2.5 million of Syrian refugees. Lebanon and Jordan, for instance, having a long history of hosting refugees within their borders, have coped with the Syrian humanitarian crisis in a particularly impressive and *humane* manner. However, whereas substantial numbers of refugees have been accepted for resettlement in western countries, their contribution and their response to the current humanitarian crisis hasn't produced a great relief for refugees worldwide (UNHCR, 2015b).

It's been noted by Madeline Garlick (2016) that most of the world's refugees don't move onward from countries near their countries of origin, unless they do not provide safety. She argues that *"where they do so, it is often because of the unavailability or low standards of protection in the states to which they flee initially, limited access to assistance or other means of survival, separation from family members, or a lack of long-term solutions"* (Garlick, 2016: 42). This has also been noted by Karageorgiou (2016) that, referring to the Syrian refugees, observes that *"the vast majority of Syrians flee to neighbouring countries"* (Karageorgiou, 2016: 196). However, due to the increasing economic and social pressures in these countries, some of them just about to reach a saturation point due to the high numbers of refugees within their borders, the standards of protection start to decrease and the access to assistance becomes limited.

Consequently, a hardly questionable increasing number of refugees, namely Syrians, Afghans and Iraqis (Eurostat, 2016) has been taking the long and hazardous way to Europe in order to find a more durable safety. Just in the very last couple of years, the European Union has assisted a mass influx of refugees and asylum seekers, with thousands of people trying to cross the border every day. Most of them accessed the EU territory irregularly through unauthorized routes, sometimes with the support of human smugglers, within mixed flows of immigrants that include both forced and voluntary immigrants, some of them being genuine refugees and others abusively claiming asylum in order to have an easier access to the territory. Some traveled by sea (across the Mediterranean and the Aegean seas) and some by land (across the so-called Western Balkans route), transiting several countries until they actually reach European soil.

As stated by Smyser, state's derogation of sovereignty into international institutions and the move towards more humanized concept of sovereignty has been essential to the own survival of the state system (Smyser, 2003). Nevertheless, no more than three years after the Nobel Peace Prize, the European Union is having trouble finding a collective response to a screaming humanitarian crisis. The pressure on cooperation in border security, immigration, asylum and judicial matters in order to maintain the EU's role in the preservation of the continent's peace and stability is likely to increase. The challenge though is to develop efficient

cooperation and implementation mechanisms that “*uphold the continent’s democratic principles and respect for human rights*” (Holzhacker, Luif, 2014: 3). However, in order to “*live up to its international obligations, the EU must keep its policies in line with its pre-existing treaty obligations, particularly in the field of refugee protection*” (Uçarer in Cini, Borragán, 2016: 293).

Both South and North EU countries face concerns regarding the management of irregular immigration and asylum, yet for different reasons. For instance, the EU member states placed at the EU’s external borders, such as Greece, Italy, Cyprus and Hungary, which became the primary points of arrival of the above mentioned routes, face incredible migratory pressures at their borders. Whereas some asylum seekers apply for asylum in there, others continue their journeys towards countries like Germany and Sweden, with wealthier economies and higher protection standards, plus a long history of accepting those fleeing conflict and war. Regardless of that, EU asylum law, particularly the Dublin system, allows these countries to transfer asylum seekers back to the first country of entry in the European Union - the country responsible for their entrance and so responsible for examining their applications, unless there are family links in other countries. However, these countries are often the least capable for hosting asylum seekers. Due to the high numbers of people claiming asylum at their borders - people that, under international and EU law, they are obliged to let in -, the reception conditions and the capacity for examining applications of these countries is usually very limited.

Thus, one of the most problematic instruments of the CEAS is the Dublin system. The Dublin system was not conceived as a responsibility sharing instrument and therefore does not impose any binding responsibility sharing procedures, what results in excessive burden on the EU member states that are placed at EU’s external borders, often considered the responsible member states under the *first country of entry* rule. Thus, taking into consideration that the sovereignty clause is voluntary-based, common relocations must be negotiated through intergovernmental bargaining. This is particularly problematic due to the lack of genuine solidarity for hosting refugees among EU member states, what could be observed in the developments of the EU cooperation in the AFSJ.

Haddad (2008) described the European Union as a society whose members share some common values and purposes and interact with each other “*according to agreed rules of the game*” (Haddad, 2008: 171) which are present in treaties, conventions and other legal instruments. Drezner, for instance, argued that the transition from power-based decisions to rule-based decisions, created room for a more credible commitment between EU member states (Drezner, 2009: 65). However, policy coordination in the Area of Freedom, Security and Justice, namely in matters of asylum governance, is characterized by a “*relative weakness of legal harmonization and a focus on more operational aspects of coordination between national authorities, usually under the auspices of an independent regulatory agency*”

(Lavenex in Wallace, Polack, Young, 2015: 368). Even though the collective capacity of the European Union to adopt binding decisions has improved significantly after the entering into force of the Treaty of Amsterdam, decision-making within this area is still characterized by a *complex mix* of supranational and intergovernmental procedures (Cini, Borragán, 2016)

The nature of cooperation in the AFSJ has been landmarked by a huge political reluctance due to the fact that the areas under the this domain touch the core functions of the state. Thus, even though the EU member states soon recognized the need for cooperation in immigration and asylum matters, particularly after World War II and after the abolition of internal frontiers introduced by Schengen, which drove the developments of this area, the Europeanization of asylum and immigration has not been a case of unproblematic acceptance, neither of credible commitment. It was rather characterized by the use of differentiated forms of integration, which provided different governance arrangements for the EU member states that were not ready to proceed with integration: Denmark, Ireland and the UK. Denmark chose to opt-out, while the UK and Ireland would only take elements they chose to opt-in (e.g. both countries decided to opt-in in some elements of police and judicial cooperation and in the Dublin system). Thus, as noted by Uçarer (Cini and Borragán, 2016), *“not surprisingly, some now regard this particular aspect of the AFSJ as the ultimate example of a multi-speed, or ‘à la carte’ Europe”* (Uçarer in Cini, Borragán, 2016: 286).

Moreover, the AFSJ counts with the existence of overlapping regimes that allow the EU member states to bypass responsibilities, without violating international law, by shifting between regimes. It's important to remind that refugees and asylum seekers often travel within mixed flows of immigrations, since legal ways of access are limited and the only way to safety is usually irregular, many times counting with the support of human smugglers. Thus, tight immigration controls, namely extraterritorial immigration controls, created to manage irregular immigration and combat terrorism and human smuggling, might hamper refugees' access to the territory and consequently to the asylum procedures. In addition, it's been observed by Vandvik that, by extending the scope of EU's border management beyond the EU's physical frontiers, through measures of extraterritorial immigration control and partnerships with third countries in matters of immigration, the EU member states have been allowed to stop asylum seekers and irregular immigrants before they even enter the EU territory. Thus, even though the theorization of the European Union has been more inclined to internal integration and less to Foreign Policy, the integration of the AFSJ has an external dimension which can be *“linked closely to tools of Foreign Policy”* (Uçarer in Cini, Borragán, 2016: 289), since the integration of this area has called for the intensification of cooperation with countries of origin and transit and resulted in a set of development policies, aiming at *“empowering neighbouring countries to offer adequate protection to those in flight and speeding up the removal of illegal immigrants from the Union territory”* (Uçarer in Cini, Borragán, 2016: 289).

Namely after the 9/11, immigration and asylum started to be palced on a more “*securitarian frame*” (Lahav, 2004: 43), due to the growing association between immigration management and counter-terrorism measures, what somehow legitimized the practice of *stemming flows at the source* (Vandvik, 2008: 28). As a consequence, a sophisticated system made up of virtual advanced identification technologies and databases, and the proliferation of semi-autonomous agencies became a trend in the governance of immigration in the European Union, what allows one to observe that the EU’s governance system comprises more than a mere dichotomy of intergovernmentalism and supranationalism and more than “*series of interactions between national governments and the EU*” (Boswell, Geddes, 2011: 54). The growing emphasis conferred to agencies such as FRONTEX has increased the EU member states capacity for border control, without increasing their responsibility. For instance, in its operations at the sea, FRONTEX often deters irregular migrants before they set off journeys that pose their life at risk, however, this presupposes a certain *illegality*, since the right to seek asylum and the right to *non-refoulement* might be denied in the process of *saving lives* (Perkowski, 2012), what occurs with little accountability, in detriment of the principles of good governance.

It can therefore be concluded that the challenges concerning refugees’ protection in the European Union have one important thing in common: they all translate a *denial* or *shifting of responsibility*. The EU member states have shifted their responsibility for hosting refugees, without violating their international obligations, by addressing refugee’s issues through regimes other than the refugee’s regime, namely through the migration regime, delegating their responsibilities for immigration control to semi-autonomous agencies that too often prevent the asylum seekers’ access to the territory, and to third countries of origin and transit they consider *safe* for returning asylum seekers. Moreover, the governance of asylum in the European Union has also been characterized by a huge reluctance for responsibility sharing. This is the case of the Dublin system, which results in excessive burden on particular member states, but lacks of binding measures to ensure a fair sharing of responsibilities among the EU member states. Thus, even though asylum has been Europeanized a long time ago, relocation is still subject to intergovernmental bargaining what is namely problematic due to the sovereignty-sensitive nature of cooperation in the AFSJ.

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