Global Campus Europe

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Safe Country of Origin and Safe Third Countries

Authentic Concepts of Safety?

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Abstract

In recent years, there has been a growing discussion around the migration and asylum issues concerning the need for new rules for the asylum system in the European Union (EU). The Commission has presented different proposals to develop the fundamental documents in this area, namely the Asylum Procedure Regulation, which defines the safe country of origin (SCO) and the safe third country (STC) concepts and their application. However, the European Parliament and the Council have not yet reached an agreement on this issue.

The SCO and STC concepts emerge from the assumption that certain countries can be considered as generally safe for people who live in their territory; however, they have different functions. While the SCO concept permits specific applications to be declared as unfounded, the STC concept should only have an impact on the admissibility of the asylum claim and not on the evaluation of the facts of the application.

The aim of this thesis is to understand whether the evolution of the criteria and safeguards of both concepts, as established in the EU legislation, are enough to affirm that they are not too restrictive of the rights and guarantees of the asylum-seekers and refugees, and whether they allow for an effective use of the system.

Global Campus Europe

Table of Contents

Introduction

In recent years, there has been a growing discussion on the need for new rules for the asylum system in the European Union (EU). Even if the majority of the Member States and the European institutions agree with the fundamental necessity for change, they have not been able to decide which path the EU should follow, which has prevented the development of new policies. The positions are not clear-cut and have different variations, but generally they can be placed into two broad groups.

One side has defended the position of the establishment of a structured and complete European framework to deal with the asylum-seekers and refugees alongside the migration policy to create a sustainable system that respects moral and international obligations and build a unified system based on comparative advantages.[1]

The other side has defended the necessity of countries' maintaining control over the asylum policies as well as the need for Europe to focus on the protection of its external borders from the high number of migrants that come from the Southern Hemisphere.[2]

One of the critical and more controversial discussions has been how the EU should interact with third countries (countries outside of the EU), namely how and when EU institutions and Member States can consider a non-EU country as a safe country of origin or a safe third country in order to legitimise the refusal of asylum.

The discussion around the asylum issues and, more concretely, the question of the safe countries is still very pertinent today for European policies, even though the number of people arriving in EU territory[3] decreased in the last two years. I would like to highlight now two of the reasons why this question is important.

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[1] Alexander Betts and Paul Collier, "Sustainable Migration Framework" (June 2018), EMN Norway Occasional Papers;
[2] Stephanie Kirchgaessner, "Italy's Salvini warns EU to 'defend its border' against migrants", *The Guardian* (London, 20 June 2018).
[3] Arrivals in Europe (through the Mediterranean Sea) – 2015: 1.015.877; 2016: 363.425; 2017: 172.324; 2018: 116.647; UNHCR, "Desperate Journeys – Refugees and migrants arriving in European and at Europe's borders: January – December 2018" (2019), <https://www.unhcr.org/desperatejourneys/> accessed 25/04/2016, p "Arrival by Country 2018 Jan-Dec".

First, although the number of people arriving in the European territory decreased, the number of asylum-seekers and refugees is increasing worldwide.[4] It is also important to remember that this number will probably be significantly higher in the near future,[5] considering not only the increase in armed conflicts and massive human rights violations that we are witnessing but also the rapid evolution of climate change and the consequences that it is having on populations.[6]

Secondly, although the existence of proposals to reform the entire EU asylum system and, more concretely, the Asylum Procedure Regulation, which defines the safe country of origin (SCO) and the safe third country (STC) concepts and their application, an agreement between the European Parliament and the Council has not yet been reached,[7] and so everything is still open. This is positive in the sense that it is still possible to improve the Commission's proposal in order to find more favourable solutions. It is also negative, however, since, almost four years after the crisis of 2015, the system that is still running is the same one that failed in 2015, and with the increase of populist and anti-migration parties in the European Parliament, the future changes in the Commission's proposals could lead to a decrease in the protection of asylum-seekers and refugee rights and safeguards.

The two fundamental concepts that will be under analysis are, thus, the SCO and STC. Both emerge from the assumption that certain countries, due to their laws and practices, can be considered as generally safe for people who live in their territory (nationals for the first concept and foreigners for the second one). Emerging from similar assumptions, they have, however, different

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[4] Number of forcibly displaced people in the world – 2015: 63.9 million (16.1 million refugees); 2016: 67.7 million (17.1 million refugees); 2017: 71.4 million (19.9 million refugees); UNHCR, Global Reports, Publications, <http://reporting.unhcr.org/publications#tab-global_appeal&_ga=2.251141574.139877978.1559305595-1258753952.1482448555> accessed 31/05/2019; "The number of people fleeing war, persecution and conflict exceeded 70 million in 2018. This is the highest level that UNHCR, the UN Refugee Agency, has seen in its almost 70 years.", UNHCR, "Worldwide displacement tops 70 million, UN Refugee Chief urges greater solidarity in response" (UNHCR, 19 June 2019).

[5] Richard Skretteberg, "2019 will be another year of crises" (Norwegian Refugee Council), <https://www.nrc.no/shorthand/fr/2019-will-be-another-year-of-crises/index.html> accessed 31/05/2019.

[6] Today, millions of people are already forced to move as a consequence of natural disasters and the impacts of climate changes, such as floods, tropical storms, earthquakes, landslides, droughts or glacial melting. For example, in 2018, 17.18 million people were forced to move due to natural disasters. Displacement Monitoring Centre, "Total annual new displacements since 2003 (Conflict and violence) and 2008 (Disasters)", <http://www.internal-displacement.org/database/displacement-data> accessed 31/05/2019. According to recent studies, in addition to forced movements, climate changes have contributed to the growth of poverty and tensions that are the source of new conflicts. Displacement Monitoring Centre, "No matter of choice: displacement in a changing climate" (Thematic Series, December 2018).

[7] Kris Pollet, "All in vain? The fate of EP positions on asylum reform after the European elections" (EU Immigration and Asylum Law and Policy, 23 May 2019).

functions. While the SCO concept permits to state that specific applications are unfounded, the STC concept should only have an impact on the admissibility of the asylum claim and not on the evaluation of the facts of the application.

The aim of this thesis is to understand whether the evolution of the criteria and safeguards of SCO and STC concepts, as established in the EU legislation, are enough to affirm that they are not too restrictive or violating of the rights and guarantees of the asylum-seekers and refugees, and whether they allow for an effective use of the system.

To respond to this fundamental issue, first I will address the question of how the safe country of origin and safe third country concepts have been established in the context of the European asylum policies, with a special focus on the Asylum Procedure Directives and the Asylum Procedure Regulation proposal. Secondly, I will examine how the inclusion of these concepts in EU legislation has influenced the general protection of the rights and safeguards of asylum seekers and refugees over time. Finally, I will address the question of whether the two concepts are compatible with a coherent, safe, and complete system for the protection of the rights and safeguards of the asylum-seekers and refugees or whether, considering their characteristics and consequences, they are inadequate and unacceptable in a system that is meant to be fair and effective.

To accomplish the objectives that I have proposed, I will start with some considerations on the cornerstone events, legal documents, and institutions that led to the creation and development of the international refugee system worldwide. I will do so in order to understand how international obligations towards people in need of international protection have advanced and have become binding for states and international and regional organisations.

Afterwards, I will conduct a similar evaluation of the principal events, legal documents, and institutions with connections to asylum in the context of European communities and the EU. This step is fundamental to understand the context in which the concepts of SCO and STC emerged and developed.

In the following parts, I will focus on the concepts themselves, presenting their definitions, the principles that they involve, their incorporation into the European directives and the regulation proposal on asylum procedures, and analyse a concrete example of the application of the concepts. Finally, I will compare the application of the SCO and STC concepts in European legislation and other legal systems, namely, Canada and South Africa, respectively. The inclusion of other examples of the application of the concepts is essential to understand how it is done in other parts of

the world and to understand in which level of protection of the rights the EU solution is comparing with solutions adopted by others. The choice of Canada, in the case of the SCO, is because of its importance in the context of migration and asylum issues and because of the differences in the model chosen by that country in comparison with the EU solution. The choice of South Africa, regarding the STC, is due to the importance of the country in the African context and due to the evolution of the concept in this country.

These different elements of analysis will support the conclusion that, generally, the inclusion of these concepts into EU legislation somewhat increased the standards of their application at national level. Nevertheless, the precise use of the concepts still faces diverse challenges that put in danger some of the essential safeguards of the asylum-seekers.

In this thesis, I will not be able to deal with all the issues related to the relationship between the EU and third countries in the area of asylum and migration, and much less do I intend to touch on all the problems and challenges of the current European asylum system. Instead, I will focus specifically on the question of rejecting asylum applications based on the safe countries concept and the future developments of the EU policies regarding these two concepts.

1. Historic evolution from the beginning of the 20th century until today

To understand the current worldwide context regarding migration and asylum, it is crucial to look at and understand some of the historic milestones that allow us to perceive where we are and why we find ourselves in these circumstances today.

In order to have a general understanding of the international and European systems, in this first chapter, I will analyse some of their most important moments and their evolution from the beginning of the 20th century (when the current international protection system for refugees and asylum-seekers emerged) until today.

1.1 Global level

In this subchapter, I will analyse the crucial moments of the evolution of the international asylum system to have a broader comprehension of the context in which the European system has grown and, more specifically, where the SCO and STC emerged.

Because it is impossible to analyse all the fundamental moments of the history of the migration and refugee issues, I will focus on the recent history, more concretely on the developments from the beginning of the 20th century until the present.

1.1.1 The World Wars and the establishment of an international protection system

The international system of protection of refugees, as we know it today, had its inception at the beginning of the 20th century, mainly after the First World War (WWI). However, migration issues are matters of a much more faraway past.[8]

The wars and conflicts that occurred from before WWI until the Second World War (WWII) caused the forced displacement of millions of people in Europe.[9] To respond to this, the League of Nations designated the two first High Commissioners for Refugees.

The first High Commissioner for Refugees, Dr Fridjof Nansen (whose mandate ran from 1921 to 1930), was assigned the task of defining the status of the Russian Refugee[10] and organising the repatriation of war prisoners. In situations where repatriation would not be possible, war prisoners were to be distributed among the countries able to receive them.[11] However, in consequence of new conflicts, his mandate was extended, and he also became responsible for the reception and integration of refugees from other countries.[12]

The Second High Commissioner for Refugees, James McDonald, was mandated, in 1933, to help in the assistance of refugees from Germany. In 1935, only two years after having been appointed as High Commissioner, he put in a request for resignation due to a lack of tools to accomplish his objectives and purposes.[13]

Also, in 1933, the Convention relating to the International Status of Refugees[14] was adopted. This convention stipulated, among other aspects, the prohibition of the forced return of refugees to their countries of origin.[15] The convention, nevertheless, had little effectiveness since only nine[16] countries ratified it.

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[8] For example, we just need to think of the consequences of the Inquisition in Portugal and Spain that compelled Jews to leave both countries in order to survive and maintain their faith. BBC News, "Portugal to naturalise descendants of Jews expelled centuries ago", *BBC News* (London, 29 January 2015).
[9] Teresa Cierco, *A Instituição de Asilo na União Europeia* (Coimbra, Edições Almedina, August 2010), p 27.
[10] To whom were assigned identity cards called "Passport Nassen"; Cierco (n 9), p 26.
[11] Cierco (n 9), p 27.
[12] Armenians (1924), Assyrian, Assyro-Chaldean and Turkish (1928); Erika Feller, "The Evolution of the International Refugee Protection Regime" (January 2001), volume 5, *Washington University Journal of Law and Policy*, p 130.
[13] Cierco (n 9), p 34.
[14] Convention Relating to the International Status of Refugees (adopted 28 October 1933), CLIX No. 3663.
[15] Convention Relating to the International Status of Refugees, Article 3(1).

In 1938, the Convention Concerning the Status of Refugees Coming from Germany[17] had even less effect than its predecessor since only three countries ratified it because of the outbreak of WWII.[18]

In the same year, the President of the United States of America (USA), Franklin D. Roosevelt, presided over the Evian Conference[19] to deal with the issues of the Jewish refugees. After Germany's annexation of Austria, Roosevelt decided to promote this conference to discuss the facilitation of the emigration of Jewish refugees from Austria and Germany, namely through the increase of the number of people welcomed by the different countries.

Delegates from thirty-two countries were invited, but the representatives of the participating countries were not willing to welcome more people based on the argument that the social and economic situation did not allow them to increase the quota of people welcomed substantively, making new commitments[20] impossible. This decision, which proved to be based on an erroneous evaluation of the intentions, or at least the scale of the intentions, of the German government, had a catastrophic result for millions of people (namely Jews, Roma, homosexuals, political opponents, and Jehovah's witnesses).

On 9 November 1943, the United Nations Relief and Rehabilitation Administration (UNRRA) was established by 48 governments.[21] The primordial criteria to determine which countries should receive help[22] from UNRRA were (i) the liberated countries (ii) those among them that had made a request for help and (iii) those that did not have sufficient financial capacity to acquire supplies and face urgent needs.[23]

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[16] Belgium, Bulgaria, Czechoslovakia, Denmark, France, Great Britain, Ireland, Italy and Norway; Convention Relating to the International Status of Refugees, Appendix.
[17] Convention concerning the Status of Refugees Coming from Germany (adopted 10 February 1938), CXCII, No. 4461.
[18] Belgium, Great Britain and Ireland; Convention concerning the Status of Refugees Coming from Germany, Appendix.
[19] The Conference occurred between 6 and 15 July 1938, in Evian, France; Ansgar Schaefer, "A Conferência de Évian", *Portugal e os Refugiados Judeus Provenientes do Território Alemão (1933-1949)* (Imprensa da Universidade de Coimbra, 2014), p 92.
[20] Schaefer (n 19), p 92-93.
[21] Office of Public Information United Nations Relief and Rehabilitations Administration, "50 Facts about UNRRA", (CVCE, 15 February 1947), p 7.
[22] Food, clothing, shelters, medicine, fuel, health and welfare services, assistance in care and repatriation of displaced persons, restore fundamental farm and factory production; Office of Public Information United Nations Relief and Rehabilitations Administration (n 21), p 7-11.
[23] Office of Public Information United Nations Relief and Rehabilitations Administration (n 21), p 7.

Nevertheless, the UNRRA also provided limited emergency aid when it was extremely necessary, even if the countries did not meet the criteria referred to above.[24] Germany and Japan stayed off the list of the countries that received help, since they were considered aggressors and not victims of aggression.[25]

In 1947, the UNRRA finished its mandate, and the United Nations (UN) and its agencies assumed the UNRRA's competencies.[26]

Also in 1947, the International Refugee Organization (IRO) was established as a non-permanent UN Agency with the mandate to assist[27] refugees and displaced persons who could not or did not want to return to their countries after the end of WWII in Europe.[28]

Finally, in December 1950, the Statute of the Office of the United Nations High Commissioner for Refugees (UNHCR)[29] was adopted. One year later, in 1951, the Convention Relating to the Status of Refugees[30] was adopted.

The negotiation process for the creation of the UNHCR occurred during the emergence of the division of the world between the Western countries and the Soviet Union (and its satellite countries), two blocs with completely distinctive perspectives and ideas about human rights and how the international system should work. The bipolarity of the world made this process very tense and complex.

The UNHCR is a non-political[31] agency dedicated to humanitarian and social work. Nevertheless, it has to respect the policy directives of the General Assembly and the Economic and Social Council.[32]

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[24] For instance, some specific groups living in Germany and Japan were considered not as aggressors, but as victims and, because of that, received some aid; Office of Public Information United Nations Relief and Rehabilitations Administration (n 21), p 8.
[25] Office of Public Information United Nations Relief and Rehabilitations Administration (n 21), p 8.
[26] Food and Agriculture Organization (1945); Interim Commission of the World Health Organization (1946); International Refugee Organization (1947); Office of Public Information United Nations Relief and Rehabilitations Administration (n 21), p 34.
[27] Addressing all the aspects of the assistance of the refugees – from registration and determination of status to repatriation, resettlement and protection system. Feller (n 12) p 130.
[28] The assistance provided by the IRO involved the care and maintenance of refugee camps, vocational training, orientation for resettlement, and finding lost relatives; Feller (n 12) p 130.
[29] Statute of the Office of the United Nations High Commissioner for the Refugees (adopted 14 December 1950) A/RES/428(V) (Statute of the Office of the UNHCR).
[30] Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Geneva Convention).
[31] Statute of the Office of the UNHCR, Chapter I, Para 2, Annex.
[32] Statute of the Office of the UNHCR, Chapter I, Para 3, Annex.

The UNHCR mandate was initially for three years. However, it was soon seen that this short mandate would not be enough to resolve the situation in Europe. Moreover, many other emergencies, which called for urgent action by the UNHCR, were appearing, emphasising the necessity of this agency.[33]

Currently, the UNHCR provides international protection and seeks permanent solutions for persons of concern,[34] in accordance with the Annex of the Statute of the Office of the United Nations High Commissioner for Refugees. Nonetheless, it also participates in UN humanitarian actions, exercises diplomatic and consular functions for persons of concern, intercedes on their behalf when they would not otherwise be legally represented at the international level, and invites states and/or other specialised agencies to co-operate in its actions.[35]

The Geneva Convention, approved in 1951, adopted a definition of the concept of refugee with temporal[36] and geographical[37] limitations. It was only in 1967, with the adoption of the Protocol Relating to the Status of Refugees,[38] that the temporal[39] and geographical[40] limitations were abolished, extending the protection of the Geneva Convention. Today, the Geneva Convention, together with the New York Protocol, is a core document for the protection of refugees in the world, even though it still has some limitations.[41]

In the Geneva Convention and the New York Protocol, we can find the definition of the concept of refugee,[42] the rights of refugees[43] and the basic legal obligations of the states.[44]

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[33] Some examples: NATO foundation (1949), Korean War (1950-1953), Warsaw Pact (1955) Hungarian Revolution (1954), decolonization in Africa (1960s), building of the Berlin Wall (1961), Greece and Turkey conflict (1974), Vietnam (1975), Cambodia (late 1970s), repression and violence in Central America (1980s), Afghanistan (1979), Gulf War (1990s), Rohingya (1991), Balkan Wars (1990s), Rwanda (1994), collapse of the Soviet Union (1991), East Timor (1999), Darfur (2004), Somalia (2009), Syria (2011).

[34] Refugees and asylum seekers, returnees, stateless persons, internally displaced; UNHCR, "Note on the Mandate of the High Commissioner for Refugees and his Office" (October 2013).

[35] UNHCR, Note on the Mandate of the High Commissioner for Refugees and his Office (n 34), p 1-2.

[36] Only facts occurred before 1951 should be considered; Geneva Convention, Article 1(A)(1)(2).

[37] Only Europeans benefit from the refugee concept (Geneva Convention, Article 1(B)(1)).

[38] Protocol Relating to the Status of Refugees (adopted 21 January 1967, entered into force 4 October 1967), Treaty Series, vol. 606 (New York Protocol).

[39] New York Protocol, Article I/2.

[40] New York Protocol, Article II/3.

[41] They only deal with the status of refugees and not with solutions for or causes of the situation of the refugees. Feller (n 12), p 131.

[42] Geneva Convention, Article 1/A/2.

[43] Geneva Convention, Articles 3, 12-24, 26, 33.

[44] Geneva Convention, Articles 4, 7-11, 25, 27-32.

The fundamental principles are the principles of non-refoulement[45] and protection against discrimination.[46] The first principle establishes that a refugee or an asylum-seeker cannot be returned to her/his own country or another one where she/he faces severe threats to her/his life or freedom.[47] The dominant doctrine defends that this principle should be applied from the moment the asylum-seeker enters the territory and asks for protection, independently of the future decision. This is the moment considered, because a later one would increase the risk of unweight and incomplete analysis, which, consequently, would allow a more significant number of people to be sent to places where they could face threats to their life or freedom.

The Geneva Convention and the New York Protocol have been very criticised. On the one hand, there are those that argue that these two legal documents are outdated and insufficient to address the size and complexity of the current migration phenomena and the new migration movements, which have new causes.[48] On the other hand, we have those that defend that these two documents are too burdensome for the host countries since they allow excessive invocation of the refugee statute, namely, in the case of mixed migration flows.[4950]

Between the 1950s and 1970s, some fundamental documents related to the protection of the refugees were established. Some of the documents defined a broader category of protected persons. The Convention Governing the Specific Aspects of Refugee Problems in Africa[51] is especially important since, in this Convention, the concept of refugee also includes the person "who, owing to external aggression, occupation, foreign domination, or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality"[52] (a victim of generalised conflict and violence).

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[45] Geneva Convention, Article 33.
[46] Geneva Convention, Article 3.
[47] This principle cannot, however, be invoked by the asylum-seekers when there are reasonable grounds for considering them a danger to the security of the country or a danger to the community; Geneva Convention, Article 33/2.
[48] Mary Dejevsky, "The Geneva refugee convention can't cope with this crisis. Time for a rethink", *The Guardian* (London, 18 January 2016).
[49] It occurs when "refugees or migrants […] move for different reasons but […] use similar routes"; New York Declaration for Refugees and Migrants (adopted 19 September 2016), A/RES/71/1 (New York Declaration).
[50] Maja Janmyr, "No country of asylum: 'Legitimizing' Lebanon's Rejection of the 1951 Refugee Convention" (2017), 29(3), *Interntional Journal of Refugee Law.*
[51] Convention Governing the Specific Aspects of Refugee Problems in Africa (adopted 10 September 1969, entered into force 20 June 1974) 1001 U.N.T.S. 45 (OAU Convention).
[52] Feller (n 12), p 132.

The Meeting on Refugees and Displaced Persons in South-East Asia (20 and 21 July 1979) reached a consensus and approved the Comprehensive Action Plan (CPA)[53] to respond to the large number of Vietnamese fleeing from very dangerous conditions. The CPA is considered the first attempt to involve countries of asylum, origin and resettlement, as well as donors in a plan geared toward sharing responsibilities.[54]

In the 1980s and 1990s, however, the social, community and political will to grant asylum "on the generous terms of the past"[55] declined. In the opposite direction, the number of refugees increased enormously with the growth of internal conflicts and with human rights abuses becoming objectives of military strategies (which led smaller conflicts to produce a higher level of suffering and massive displacement).[56]

1.1.2 The 21st century and the new instruments

More recently, there has been an increase in the complaints against the refugees' protection system in consequence of the growth of the political and civil discourse against them.[57]

At the same time, it is also possible to observe an enlargement of some of the UNHCR's competencies, especially in the area of advocacy with different actors. For example, the UNHCR started to be able to negotiate directly with the groups or people that hold the effective power in a country, even if they are not the government that is internationally recognised.[58]

During the General Assembly of 19 September 2016, the Heads of State and Government and high representatives were invited for a Summit[59] to discuss the large movements of refugees and

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[53] Document prepared by the UNHCR, but discussed and approved at the Meeting on Refugees and Displaced Persons in South-East Asia. UN General Assembly, "Meeting on Refugees and Displaced Persons in South-East Asia, convened by the Secretary-General of the United Nations at Geneva, on 20 and 21 July 1979, and subsequent developments: Report of the Secretary-General" (7 November 1979) A/34/627, Para 13-15.
[54] Feller (n 12), p 133.
[55] Feller (n 12), p. 134.
[56] Feller (n 12), p. 134; Lydia DePillis, Kulwant Saluja and Denise Lu, "A visual guide to 75 years of major refugee crises around the world", *The Washington Post* (Washington, 21 December 2015).
[57] Mike Berry, Inaki Garcia-Blanco and Kerry Moore, "Press Coverage of the Refugee and Migrant Crisis in the EU: A Content Analysis of Five European Countries" (Report prepared for the United Nations High Commission for Refugees, UNHCR, December 2015), p 10-12.
[58] Cierco (n 9), p 88.
[59] United Nations, "UN Summit for Refugees and Migrants 2016", <https://refugeesmigrants.un.org/summit> accessed 08/05/2019.

migrants. In this Summit, a plan that addressed the large movements of refugees and migrants was signed: the New York Declaration for Refugees and Migrants.

The New York Declaration intended to be a milestone for international solidarity regarding refugees and migrations. For that, the signatory states pledged to improve their own national and regional protection and to promote durable solutions, particularly increasing the support to the asylum communities and sharing, in a better way, the responsibilities.

With the objective to develop the commitments[60] set out in the New York Declaration and to address the issue of the large movements of refugees and migrants, the High Commissioner for Refugees had the responsibility to draft the Global Compact on Refugees.[6162]

This Compact has two parts: (i) the comprehensive response,[63] especially focused on the reception and admission issues, support for the immediate or continued necessities of the refugees, support for the countries with significant rates of asylum, and the development of durable solutions;[64] and (ii) the programme of action to facilitate the implementation of the comprehensive response to the needs of the refugees and countries particularly affected by a large number of refugees, through burden- and responsibility-sharing agreements and the contributions to specific areas of action (health, education, etc.) in host countries and, in some cases, in countries of origin as well.[65]

Contrary to the Geneva Convention, the New York Declaration and the Global Compact on Refugees are non-binding documents and do not impose new obligations on states; rather, they invite the signatory states to commit themselves to the current obligations.

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[60] Early prevention of crisis situations; preventive diplomacy; prevention and peaceful resolution of conflicts; greater coordination of humanitarian, development and peacebuilding efforts; promotion of the rule of law at the national and international levels; protection of human rights; address movements caused by poverty, instability, marginalisation and exclusion; address movements caused by lack of development and economic opportunities; cooperation among countries of origin/nationality, transit and destination; New York Declaration.

[61] Global Compact on Refugees (adopted on 17 December 2018) Supplement No. 12 (A/73/12 (Part II).

[62] At the same time, the Global Compact for Safe, Orderly and Regular Migration was also produced (adopted on 19 December 2018) (A/RES/73/195). In this case, it was drafted through a process of intergovernmental negotiations.

[63] This part is divided into measures during the "reception and admission", the "support for immediate and ongoing needs", the "support for host countries and communities" and the "durable solutions"; Global Compact on Refugees.

[64] New York Declaration, Annex I.

[65] Global Compact on Refugees.

1.2 European level

In this subchapter, I will analyse the key moments and legal documents regarding the evolution of the European asylum system in order to gain a broader understanding of where the SCO and STC concepts have emerged. I also seek to understand how the relationship between the Member States inside the EU framework normally functions.

It will be impossible for me to analyse all of the crucial moments of the history related to the migration and refugee issues in the European context. I will therefore start the analysis in the 1980s since this was the period when cooperation between the member states in the asylum area started.

1.2.1 Intergovernmental cooperation

At the European level, the general approach follows the trends we have observed globally. In the first phase, the European countries proactively defended the protection of refugees. However, in the second phase (namely since the 1980s), a sovereignty perspective prevailed against a more forward-looking perspective regarding the protection of refugees' human rights.

Migration and asylum policies can be divided into two different domains: on the one hand, the internal level, and on the other hand, the external level.

Regarding the movement of European citizens within Europe, it is possible to see a clear gradual abolishment of internal borders, especially with the Schengen Agreement[6667] and the creation of the Single Market through the Single European Act.[6869] The concern was the establishment of a free movement space for Europeans.

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[66] The Schengen acquis – Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders (14 April 1985) OJ *L 239* (Schengen Agreement).

[67] Agreement signed on 14 June 1985, where European countries commit themselves to abolishing their national borders in order to create a Europe without borders and an extended control of the external borders. On 19 June 1990, the Convention that implemented the Schengen Agreement was signed. This Convention addresses issues such as the abolition of internal border controls, procedures for issuing uniform visa and creation of a single database (Schengen Information System). However, the implementation of the Schengen Area (France, Germany, Belgium, Luxemburg, Netherlands, Portugal and Spain) only occurred on 26 March 1995. In May 1999, the Treaty of Amsterdam incorporated this Agreement into the legal framework of the EU. Schengen Visa Info, "Schengen Agreement" (Schengen Visa Information, 18 October 2018), <https://www.schengenvisainfo.com/schengen-agreement/> accessed 9/05/2019.

[68] Single European Act (28 February 1986) *OJ L 169*.

In addition to the elimination of the internal borders, the Member States also agreed on "[…] the need for 'compensatory measures' in the field of immigration, asylum and external border control policies."[70]

In the 1980s and 1990s, due to the significant growth in the number of people fleeing the Balkan conflicts and the end of the Soviet Union,[71] the European countries feared a loss of control over migration. Consequently, they called for common measures to control these masses of people through intergovernmental cooperation.[72] This call was also a response to the increase in national jurisdictional constraints[73] on national restrictive asylum measures, especially focused on controlling the discretionary powers of the administration.[74]

The dichotomy between state sovereignty and the obligation to protect refugees and asylum-seekers is always present, and Lisa Heschl, recalling the position of James Hollifield, explains the *rationale* behind this dichotomy: "State sovereignty seeks to promote specifically-defined citizen rights and national migration interests, whereas human and refugee rights commitments espouse a universal application of entitlements. When juxtaposed, the two elements might conflict: states argue that the protection of citizen rights requires restrictive asylum and migration policies. However, self-imposed human and refugee rights commitments confine the development and implementation of those policies."[75] The author also adds that the same conflict or even a more acute one happens at the European level since there is a tension between the supranational sovereignty of the EU and the sovereignty of the Member States.[76]

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[69] Through the Single European Act (SEA), approved on 28 February 1986 in Brussels and entered into force on 1 July 1987, which established European Political Cooperation. Its provisions extended the Union's powers, improved the decision-making capacity of the Council of Ministers and increased the role of the European Parliament. Ina Sokolska, "Developments up to the Single European Act" (Fact Sheets on the European Union, October 2018), <http://www.europarl.europa.eu/ftu/pdf/en/FTU_1.1.2.pdf> accessed 21/03/2019.

[70] Virginie Guiraudon, "European Integration and Migration Policy: Vertical Policy-making as Venue Shopping" (June 2000), 38(2), *Journal of Common Market Studies*, p 254.

[71] Lisa Heschl, *Protecting the Rights of Refugees Beyond European Borders – Establishing Extraterritorial Legal Responsibilities* (Intersentia, 2018), p 16.

[72] Heschl (n 71), p 17.

[73] The decisions of the national courts, based on domestic constitutional principles, general legal principles, national jurisprudence and laws and international legal instruments, were systematically preventing the increase in the restrictions of the rights and safeguards of the asylum-seekers and refugees. Guiraudon, (n 70), p 258 and 259.

[74] Guiraudon (n 70), p 254.

[75] Heschl (n 71), p 17.

[76] Heschl (n 71), p 18.

The first important document adopted on the European stage was the Dublin Convention[77] in 1990. It established the criteria to determine which state is responsible for analysing the application for asylum in the European Community.[78]

1.2.2 The institutionalisation of the European asylum system

The Treaty of Maastricht,[79] signed in 1993, brought intergovernmental cooperation on asylum to the EU's institutional framework under the recently created third pillar on Justice and Home Affairs, permitting to call for the European Community's international obligations in the area of immigration and asylum.[80] It is important, nevertheless, to underline that the cooperation and forums outside of the EU framework continued to happen, like the Intergovernmental Consultations on Asylum, Refugees and Migration Policies, the Ad Hoc Committee of experts for identity documents and the movement of persons, UNHCR, etc.[81]

On 1 December 1992, two resolutions and one conclusion were adopted by the Council:[82] (i) the Resolution on Manifestly Unfounded Applications for Asylum,[83] which determined in which cases an application can be considered as manifestly unfounded and, consequently, subjected to an accelerated procedure; (ii) the Resolution on a Harmonized Approach to Questions Concerning Host Third Countries,[84] which established the criteria to determine which countries can be considered safe, allowing the return of persons to these countries; and (iii) the Conclusions on Countries in Which There is Generally no Serious Risk of Persecution,[85] which established the

[77] Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities (adopted 15 June 1990, entered into force 1 September 1997) Document 41997A0819(01) (Dublin Regulation).
[78] Dublin Convention, Articles 3-9.
[79] Treaty of Maastricht on European Union (adopted 7 October 1993, entered into force 1 November 1993) OJ C 191 (Treaty of Maastricht).
[80] Treaty of Maastricht, Article K.1 and K.2.
[81] Treaty of Maastricht, Articles K.7; Guiraudon (n 70), p 255-256.
[82] Stefan Ericsson, "Asylum in the EU Member States" (January 2000), Civil Liberties Series LIBE 108 EN.
[83] Council Resolution of 30 November 1992 on Manifestly Unfounded Applications for Asylum (Resolution on Manifestly Unfounded Applications for Asylum).
[84] Council Resolution of 30 November 1992 on a Harmonized Approach to Questions Concerning Host Third Countries (Resolution on Safe Third Countries).
[85] Conclusions of 30 November 1992 on Countries in Which There is Generally No Serious Risk of Persecution (Conclusion on safe countries of Origin).

guidelines to determine whether a country is generally safe to their population and, consequently, consider applications for asylum from individuals from those countries manifestly unfounded.

Also, during the period of validity of the Treaty of Maastricht, among other documents, the Council Resolution on Minimum Guarantees for Asylum Procedures (20 June 1995) was adopted, enumerating the guarantees of the asylum seekers during the asylum procedures in the EU, and the Joint Position on the Harmonized Application of the Definition of the Term Refugee[86] was approved by the Council (4 March 1996), focusing primarily on the meaning of the concept of persecution: its definition, grounds, and origins (state persecution, persecution by third parties and civil war or internal armed conflicts).

Nonetheless, the process of harmonization remained limited, with only five important documents being approved. This can be explained by the need for unanimity in the Council.[87]

It was only with the Treaty of Amsterdam,[88] in 1997, that the Members States[89] transferred some of their sovereign powers[90] in the areas of migration and asylum to the EU.[91] This was caused by the agreement, between the Member States, that the migration and asylum procedures in the European Community were too vague, ill-defined or different definitions were tolerated.[92]

With the transfer of powers from the Member States to the EU, European institutions acquired the competence to draw up legislation in the asylum area at European level. For the first five years, the Commission should share the right of initiative with the Member States, and the decision should be unanimously approved in the Council after consultation of the European Parliament.[93] Following the transitional period, the Commission assumed the responsibility to propose legislation alone.[94]

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[86] Harmonised application of the definition of the term "refugee" under the Geneva Convention (2 April 1996) OJ L 63.
[87] Treaty of Maastricht, Article K.9; Guiraudon (n 70), p 256.
[88] Treaty of Amsterdam (adopted 2 October 1997, entered into force 1 May 1999).
[89] With the exception of the United Kingdom and the Republic of Ireland, which stayed out of the new Area of Freedom, Security and Justice. Treaty of Amsterdam, Protocol on the position of the United Kingdom and Ireland.
[90] "Within five years, the Council should unanimously adopt measures on asylum, refugees and displaced persons, on the absence of any controls on persons crossing internal borders (both EU citizens and third country nationals), on the crossing of external borders (including rules on visas for intended stays of no more than three months), and on the freedom of movement of third country nationals within the EU, conditional upon the duration of their stay being shorter than three months." Guiraudon (n 70), p 253.
[91] Treaty of Amsterdam, Article 73k.
[92] Heschl (n 71), p 18.
[93] Treaty of Amsterdam, Article 73o(1).
[94] Treaty of Amsterdam, Article 73o(2).

In 1998, in the Vienna Council, the action plan for the establishment of an area of Freedom, Security, and Justice[95] was adopted in order to find common answers to immigration and asylum issues. At this time, the High-Level Working Group on Asylum and Migration was created.[96]

With the Tampere Programme,[97] the Common European Asylum System (CEAS) was established, which was implemented in two phases.[98] In the first period (1999–2004), the EU should adopt the common minimum standards for the short term, and in the second period (2005–2010), the EU should create a proper common procedure and a uniform status for the asylum-seekers. This harmonisation aimed to prevent secondary movements or "asylum shopping".[99]

In the first phase, the criteria and mechanisms for determining the Member State responsible for the examination of the asylum applications[100] and the EURODAC Regulation[101] were recast. In this period, the common minimum standards for the reception of asylum-seekers,[102] the qualification for international protection and the nature of the protection granted[103] and the procedures for granting and withdrawing refugee status[104] were also defined.

The second phase started with the Hague Programme[105] in 2005. Ten priorities of the EU were established to strengthen the area of Freedom, Security and Justice,[106] including the search for a new balance to deal with regular and irregular migration (notably through the establishment of further cooperation with third countries for the readmission and return agreements, and the creation

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[95] Presidency Conclusions of the Vienna European Council (11 and 12 December 1998), Para. 83.
[96] Presidency Conclusion's of the Vienna European Council, Para. 85.
[97] Presidency Conclusions of Tampere European Council (15 and 16 October 1999).
[98] European Parliament, "Migration and Asylum: a challenge for Europe" (Fact Sheets on the European Union, 18 June 2018), p 4.
[99] Tineke Strik, "The Global Approach to Migration and Mobility" (written 21 December 2017, published 23 February 2018), 5(2), *Groningen Journal of International Law*, p 311.
[100] Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (2003) OJ L 50 (Dublin II Regulation).
[101] Commission Regulation (EC) No 1560/2003 of 2 September 2003 laying down detailed rules for the application of Council Resolution (EC) No 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (2003) OJ L 222/3 (EURODAC Regulation).
[102] Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers (2003) OJ L 31/18 (2003 Reception Conditions Directive).
[103] Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents (2003) OJ L 16/44 (2003 Qualification Directive).
[104] Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status (2005) OJ L 326/13 (2005 AP Directive).
[105] The Hague Programme: Strengthening Freedom, Security and Justice in the European Union (3 March 2005) 2005/C 53/01 (Hague Programme).
[106] "The Hague Programme: 10 priorities for the next five years" (Summaries of EU Legislation, 13 November 2009).

of the Solidarity and Management of Migration Flows Framework Programme[107]), the development of integrated external management borders (setting up the Frontex Agency and the visa information system) and setting up a common asylum procedure.

In 2005, the EU formulated the framework of the EU External Migration and Asylum Policy, the Global Approach to Migration (GAM).[108] It was further developed in 2007 and 2008, and, in 2011, it was renewed and renamed as Global Approach to Migration and Mobility (GAMM).[109] The GAMM was "an attempt to create a comprehensive approach to migration by involving third countries and other policy areas."[110]

The Global Approach was thought to be balanced, comprehensive and structured on four pillars:[111] (i) to promote a better organisation of regular migration and well-managed mobility; (ii) to prevent and combat irregular migration and eradicate human trafficking; (iii) to maximize the impact of migration and mobility on development; and (iv) to promote international protection. The GAMM should be a migrant/refugee-centred policy; in other words, the human rights of migrants and refugees should be considered as an overarching issue, and it should benefit all parties (Member States, partner countries, migrants and refugees).[112]

The fourth pillar suggests that the investment in border control and sustainable protection occur at the same time, since, typically, border control investments have immediate impacts and sustainable protection implies long-term policies and measures. However, according to an Amnesty International report, "Amnesty International research has shown that the demands being placed on third countries to prevent irregular departures to Europe put refugees, asylum-seekers and migrants in those countries at risk of prolonged and arbitrary detention, refoulement, and ill-treatment."[113]

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[107] Commission, "Communication from the Commission to the Council and the European Parliament establishing a framework programme on Solidarity and the Management of Migration Flows for the period 2007-2013" (Communication) COM(2005) 123 final/2.
[108] European Council, Global Approach to Migration 2005 COM(2007)247 (December 2005).
[109] Commission, "The Global Approach to Migration and Mobility" (Communication) COM(2011) 743 final; Commission, "Global Approach to Migration and Mobility (GAMM)" (Migration and Home Affairs), <https://ec.europa.eu/home-affairs/content/global-approach-migration-and-mobility-gamm_en> accessed 06/07/2019, note 1 and 3.
[110] Strik (n 99), p 310.
[111] Migration and Home Affairs, "Global Approach to Migration and Mobility", <https://ec.europa.eu/home-affairs/what-we-do/policies/international-affairs/global-approach-to-migration_en> accessed 23/03/2019.
[112] Strik (n 99), p 317.
[113] Amnesty International, "The human cost of Fortress Europe: Human Rights violations against migrants and refugees at Europe's borders" (9 July 2014), p 13.

Moreover, the United Nations Special Rapporteur on the Human Rights of Migrants has criticised the GAMM: "[…] many agreements reached in the framework of the Approach have weak standing within international law and generally lack monitoring and accountability measures, which allow for power imbalances between countries and for the politics of the day to determine implementation." He added that "[t]here are few signs that mobility partnerships have resulted in additional human rights or development benefits, as projects have unclear specifications and outcomes. The overall focus on security and the lack of policy coherence within the Approach as a whole creates a risk that any benefits arising from human rights and development projects will be overshadowed by the secondary effects of more security-focused policies."[114]

By 2008, the European Pact on Immigration and Asylum[115] was adopted to be the foundation of EU immigration and asylum policies. The European Border Surveillance System was created and new tasks were assigned to the Frontex Agency.[116]

The Treaty of Lisbon,[117] adopted in 2007, marks the moment when the asylum measures started, in practice, the construction of a common system of uniform status and uniform procedures. The Treaty of Lisbon established the principle of solidarity and fair sharing of responsibility.[118] Regarding jurisdictional aspects, the jurisdiction of the Court of Justice of the EU (CJEU) was expanded to all fields of migration and asylum, and the lower courts of the Member States started to be able to seek preliminary rulings (instead of only the higher courts).[119]

In December 2009, the Stockholm Programme[120] was adopted, in which the objective of "establishing a common area of protection and solidarity based on a common asylum procedure and a uniform status for those granted international protection" was reaffirmed.[121]

Between 2012 and 2013, the recasts of the EURODAC Regulation[122] and the Dublin III Regulation[123] and the recasts of the Qualification Directive,[124] the Reception Conditions[125] and the

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[114] UN Human Rights Council, "Report of the Special Rapporteur on the human rights of migrants: Banking on mobility over a generation: follow-up to the regional study on the management of the external borders of the European Union and its impact on the human rights of migrants" (8 May 2015) A/HRC/29/36.
[115] European Pact on Immigration and Asylum (24 September 2008) 13189/08 ASIM 68.
[116] "European Pact on Immigration and Asylum" (Summaries of EU Legislation, 11 September 2014).
[117] Treaty of Lisbon (adopted 13 December 2007, entered into force 1 December 2009) OJ C 306.
[118] Treaty on the Functioning of the European Union, Articles 78 and 80.
[119] Heschl (n 71), p 19.
[120] The Stockholm Programme – An open and secure Europe serving and protecting the citizens (2 December 2009) 16484/1/09 REV 1 JAI 866 + ADD 1.
[121] European Parliament, "Migration and Asylum" (n 98), p 5.
[122] Regulation (EU) No 603/2013 of 26 June 2013 OJ L 180/1 (EURODAC Regulation).

Asylum Procedures Directive[126] were adopted. They should have been transposed into the laws of Member States by July 2015 (the peak of the host crisis of 2015), in order to harmonise the legislation inside of the EU. This process, however, fell short of expectations since some of the Member States did not transpose the directives into national legislation, or did not do so correctly.[127]

1.2.3 The 2015 crisis

In May of 2015, the Commission established the European Agenda on Migration[128] to respond to the migratory and asylum pressure and the crisis of the previous system.[129] This new Agenda is a political document that contains the priorities of the EU in the area of migration and asylum for the next years and aims to construct a coherent and comprehensive approach to addressing the challenges that came with migration.

The European Agenda on Migration is divided between, on the one hand, giving a prompt response to the challenges of migration and to the immediate consequences of the failure of the common European policy, and on the other, establishing the main pillars that should help answer the same problems but in the medium/long term.

The six needs chosen to be immediately addressed were:[130] (i) saving lives at sea and increasing the budget for the Frontex joint operations *Triton* and *Poseidon* in order to expand their capability and geographical scope; (ii) targeting criminal smuggling networks, especially identifying, capturing and destroying the vessels used by smugglers, identifying and targeting smugglers, and

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[123] Regulation (EU) NO 604/2013 of 26 June 2013 OJ Ç 180/31 (Dublin III Regulation).
[124] Directive 2011/95/EU of 13 December 2011 OJ L 337/9 (Qualification Directive).
[125] Directive 2013/33/EU of 26 June 2013 OJ L 180/96 (Reception Conditions Directive).
[126] Directive 2013/32/EU of 26 June 2013 OJ L 180/60 (2013 AP Directive).
[127] "The European Commission adopted today 40 infringement decisions against several Member States (see table in Annex) for failing to fully implement legislation making up the Common European Asylum System."; Commission, "More Responsibility in managing the refugee crisis: European Commission adopts 40 infringement decisions to make European Asylum System work" (Press Release, 23 September 2015).
[128] Commission, "A European Agenda on Migrations" (Communication) COM(2015) 240 final (13 May 2015).
[129] "Despite the common perception that the doubling in asylum applications was the root cause of the ensuing situation of crisis in the EU (*BBC News*, 2016a), it was only a trigger. In fact, the increase of applications only uncovered persistent dysfunctionalities and shortcomings of the Common European Asylum System (CEAS). The so-called European 'refugee crisis' should therefore more accurately be termed a crisis of the CEAS"; Arne Niemann and Natascha Zaun, "EU Refugee Policies and Politics in Times of Crisis: Theoretical and Empirical Perspectives" (2018), 56(1), JCMS, p 3.
[130] European Parliament, "Migration and Asylum" (n 98), p 3-6.

strengthening the *Joint Maritime Information Operation* (*JOT MARE*); (iii) responding to the high numbers of individual arrivals to the same countries with relocation systems; (iv) formulating a common approach to granting protection to displaced people in need of protection within the resettlement system; (v) working with third countries to deal with high levels of migration and asylum, primarily through the establishment of regional development and protection programmes with countries that support the weight of the displaced migrants and refugees, the creation of centres in countries of origin and transit to help inform the migrants and refugees, the offer of assisted return options for irregular migrants, the transformation of migration issues into a competence of the Common Security and Defence Policy Missions (CSDP) that work with border management, and the provision of humanitarian, stabilisation and development assistance in countries of origin and transit, namely Libya, Syria, Lebanon, Jordan, Turkey and Iraq; and (vi) using the EU's tools to help the Member States placed in the EU's borders, especially with the hotspot approach and the increase of the emergency fund.

In relation to the need for medium/long-term changes, the European Agenda has established four pillars:[131] (i) reducing the incentives for irregular migration, addressing the root causes, fighting against smugglers and traffickers, and returning irregular migrants; (ii) better border management (focus on saving lives and securing external borders) and strengthening the capacity of Frontex and of third countries to manage their borders; (iii) reinforcing Europe's duty to protect, through a robust common asylum policy, by establishing a monitoring and evaluation system for a coherent Common European Asylum System, and creating guidelines for standards on reception conditions and on asylum procedures, fighting against abuses of the asylum system, strengthening the SCO provisions and revising the Dublin Regulation (Dublin IV Regulation); and (iv) establishing a new policy on legal migration.

To accomplish what was established in the European Agenda on Migration between 2015 and 2016, the European Commission drafted proposals to change several of the most important EU legal documents.[132] Until now, however, the proposals have not been approved by the Council for lack of agreement among the representatives of the Member States and between the Council and the European Parliament, about which should be the right path to choose (more centred on the

[131] A European Agenda on Migration, p 6-17.
[132] Transforming the Qualification Directive, the Reception Conditions Directive and the Asylum Procedures Directive into regulations (directly applicable in the EU law of the Member States) and Changes in the Dublin and in the EURODAC Regulations.

protection of the rights of migrants and refugees, or rather on the protection of the external borders of the EU).

Despite the impossibility of a real revision of the EU legal system regarding migration and asylum, there have been some significant developments since 2016. Externally, the EU has been able, through its international relations with third countries,[133] to exert political pressure, give financial incentives and provide military assistance to third countries,[134] which reinforced the externalisation of borders and the control of the flow of persons.[135] The EU-Turkey Statement (18 March 2016)[136] is the best known and most complete of all, but it is a paradigmatic example of how, in recent years, preoccupations with the security and border control approaches have been supplementing the protection of the rights of refugees approaches.[137] Another characteristic of this type of cooperation is that it is being negotiated through intergovernmental processes (and not through the EU framework), which means that any agreements are governance arrangements; the European Parliament cannot participate in the decision-making, and the ECJ does not have jurisdiction.[138]

Internally, the Emergency Support Mechanism for the Refugee Crisis (which enables the EU to provide an immediate response to specific situations)[139] and the Emergency Relocation Scheme (to relocate refugees from Italy and Greece to another EU Member State)[140] were adopted.

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[133] Andrew Geddes and Peter Scholten, "Towards Common EU Migration and Asylum Policies?" (ch), *The Politics of Migration and Immigration in Europe* (2nd edition, SAGE, 2016), p 164.

[134] "Member States have gained a reputation for informalizing return co-operation in the Mediterranean region, for instance by embedding return co-operation into broader strategic frameworks of co-operation or other types of arrangements (such as police co-operation agreements and memoranda of understanding) […]"; Peter Slominski and Florian Trauner, "How do Member States Return Unwanted Migrants? The Strategic (non-)use of 'Europe' during the Migration Crisis" (2018), 56(1), *JCMS*, p 110.

[135] "According to European parliament president Tajani, this resulted in a 95% drop in crossings through Niger, a key transition point for migrants on the way to Libya [...]"; Matteo Villa, Rob Gruijters and Elias Steinhilper, "Outsourcing European Border Control: Recent Trends in Departures, Deaths and Search and Rescue Activities in the Central Mediterranean" (Blog of Faculty of Law of University of Oxford, 11 September 2018).

[136] "[A]ll new irregular migrants and asylum seekers arriving from Turkey to the Greek islands and whose applications for asylum have been declared inadmissible should be returned to Turkey." Ignazio Corrao, "EU-Turkey Statement & Action Plan" (Legislative Train Schedule: Towards a New Policy on Migration, 20 February 2019).

[137] These agreements raise important questions, namely whether third countries will be only responsible for all persons who are unable to reach European territory and, if so, whether they have the capacity to support all the costs of hosting these persons; Geddes and Scholten (n 133), p 164.

[138] Slominski and Trauner (n 134), p 104, 108-110.

[139] José Manuel Fernandes, "Emergency support mechanism for the refugee crisis" (Legislative Train Schedule: Towards a New Policy on Migration, 20 February 2019).

[140] Ska Keller, "1st Emergency Recolocation Scheme" (Legislative Train Schedule: Towards a New Policy on Migration, 20 February 2019).

To conclude, it seems to be fair to affirm that, in the case of the current path of the EU in the asylum area, "[r]ather than providing a sustainable response to the complex challenges involved in irregular migration, Europe has outsourced the management of its migration 'problem' to countries like Libya and Niger, where violence and death often remains hidden from the public view."[141] This is a step backward from the positive developments regarding the increase of the safeguards and rights of the asylum-seekers and refugees until 2015.

[141] Villa, Gruijters and Steinhilper (no 135), conclusion.

2. Safe country concepts

In the last three decades, the number of people in movement (forcedly or voluntarily) increased, as we saw above. This tendency has been obliging the states and regional or international organisations to find new answers. The solutions suggested and implemented have been different, depending on who is in movement, the motives for the movement and the host countries.

Independently of the solutions concretely adopted in each case, the international community and the states have understood that it is not possible to come up with only national or even regional solutions for asylum issues.[142] In other words, international cooperation and collective responses are crucial in this area.

The EU has, today, competence to regulate in the asylum, subsidiary protection and temporary protection area in consequence of Article 78 of the Treaty on the Functioning of the European Union. According to this Article, the EU shall develop a common policy to guarantee an appropriate status to third-country nationals in need of international protection and ensure compliance with the principle of non-refoulement. To accomplish these objectives, according with the paragraph 2 of the same Article, the EU has to adopt measures for a common European asylum system, what includes common procedures for granting and withdrawing of uniform asylum status and the establishment of partnership and cooperation with third countries to manage inflows of people.

As seen previously, some states have attempted to evade their international responsibilities towards asylum-seekers and refugees. One of the ways used to accomplish unaccountability, by some states and regional organisations, is the establishment of bilateral or multilateral agreements to externalise borders, preventing asylum-seekers from reaching the territory of these states.[143] Some examples in the EU context are the EU-Turkey Statement,[144] the Memorandum of Understanding

[142] Proof of this is the signature of the New York Declaration and the Global Compact on Refugees.
[143] Annick Pijnenburg, Thomas Gammeltoft-Hansen and Conny Rijken, "Controlling Migration through International Cooperation" (29 November 2018), 20(4), *European Journal of Migration and Law*, p 366.
[144] Council, "EU-Turkey Statement" (Press Releases, 18 March 2016).

between Italy and Libya[145][146] and, more recently, agreements to establish regional disembarkation platforms.[147][148]

Another approach that has also been used is the adoption of "safe country" concepts. Generally speaking, states and regional organisations have used these to reduce the number of applications for asylum they have to examine completely and to reduce the number of international protection applications granted.

The safe countries notion includes distinctive concepts; the two most notable are the safe country of origin (SCO) and the safe third country (STC).[149] The first is used to locate the unfounded applications based on the general safety of the country of origin, and the second focuses on the determination of the unfounded applications when the asylum-seeker could have found protection in another country.[150]

[145] Memorandum of understanding on cooperation in the fields of development, the fight against illegal immigration, human trafficking and fuel smuggling and on reinforcing the security of borders between the State of Libya and the Italian Republic (2 February 201) (Memorandum of Understanding between Italy and Libya).
[146] Anja Palm, "The Italy-Libya Memorandum of Understanding: The baseline of a policy approach aimed at closing all doors to Europe?" (*EU Immigration and Asylum Law and Policy*, published on 16 May 2017 and last update on 13 September 2017).
[147] Commission, "Migration: Regional Disembarkation arrangements: follow-up to the European Council Conclusions of 28 June 2018" (Factsheet).
[148] Regarding the disembarkation platforms, it is important to mention that the member states of the African Union have declared their opposition to this solution since it was approved in the European Council on 28 June 2018, arguing that it violates international law and they are afraid that what are "de facto detention centres" would lead to "modern-day slave markets". ECRE, "EU-ALS Summit Overshadowed by AU Document Thwarting EU Plans for 'Disembarkation Platforms'" (ECRE Weekly Bulletin, 1 March 2019).
[149] Other close concepts are "first country of asylum" (when another country has already granted international protection to the asylum-seeker) and "super safe European countries".
[150] Cathryn Costello, "Safe Country? Says Who?" (2016), 28, *International Journal of Refugee Law*, p 605-606.

2.1 Safe country of origin (SCO)

After the analysis of the general evolution at the global and European levels and of the most important legal documents and policies regarding migration and asylum, it is time to focus on the SCO concept and to understand how it has been included in European legislation.

This subchapter aims to analyse the role of the SCO concept and how it relates to the international obligations towards the asylum-seekers and refugees and if the application of the concept in European legislation has led to an increase in the protection of the rights of asylum seekers or, on the contrary, to a reduction of their protection.

2.1.1 Meaning of the SCO concept

Safe country of origin is a concept commonly used to describe countries whose people should, in principle, not receive international protection since those countries are generally considered to be safe. In other words, the concept allows the establishment of a presumption of safety when the application of asylum-seekers that come from SCO is analysed.[151]

The particular characteristics of the SCO concept in various countries are not similar. The distinctions can vary regarding the criterion that was established to evaluate a country, the time limits of the process, the rights that will be restricted or limited, or even the safeguards that cannot be derogated.

The application of the SCO concept always implies a reduction of the procedural safeguards of the applicants, even when the reduction does not put asylum-seekers in danger. The reduction of procedural safeguards is a direct consequence of the diminution of the time-limits of the processes and the establishment of the presumption of safety. It is relevant, however, to highlight that the restriction of the safeguards does not immediately imply the violation of asylum rights but does raise the likelihood of this happening.

[151] Matthew Hunt, "The Safe Country of Origin Concept in European Asylum Law: Past, Present and Future" (2014), 26(4), *International Journal of Refugee Law*, p 502.

Therefore, a central issue concerning this topic is to understand what needs to be established in legislation and the practices that enable applicants to rebut safety presumptions without placing excessive weight on these elements.

Traditionally, the inclusion of the SCO concept in legal systems was justified by the need to settle asylum procedures more efficiently through the reduction of the number of asylum applications analysed with complete processes. More recently, it is also typically associated with the securitisation of the migration and asylum policies and with the externalisation of borders.

2.1.2 Relevant principles

The use of the SCO concept has defenders and opponents. Here we will review some of the principles that are typically associated with its defence or its criticisms. On the side of the defence of the SCO concept are the principle of efficiency and the principle of security. On the other side, the criticisms are fundamentally based on the violation of the principle of a just and fair process and of the principle of non-refoulement.

The principle of efficiency is originally associated with economics, and it aims to achieve the best possible result, with the lowest costs and the least time possible. When applying this principle to the asylum system and, more concretely, to the asylum application procedures, the states and the regional organizations aim to be able to assess the highest number of asylum applications at the lowest cost and in the shortest time possible.

The relevance of the SCO concept is easily understood in this context of necessity to find solutions to reduce costs and the resources used, especially in moments of significant growth of the number of applications. So, by allowing the presumption of safety for some countries, the SCO concept allows the applications submitted by persons from these countries to accelerate procedures, reducing the number and weight of asylum applications.

This argument has been generally accepted to justify the use of the SCO. The UNHCR, for example, in different documents, also expressed this acceptance, provided that the fundamental safeguards are guaranteed.[152]

[152] See, for example, UNHCR, "Better Protecting Refugees in the EU and Globally: UNHCR's proposals to rebuild trust through better management, partnership and solidarity" (December 2016), footnote 19.

The principle of security is, however, more controversial than the first one. Article 51 of UN Charter[153] establishes that states have the right to defend their territories and their population against enemies or threats.

The use of this principle, in the context of the SCO, commonly occurs when migrants, refugees and asylum-seekers are seen as a threat to national security or the stability of the host countries.[154] This line of reasoning is more critical since it calls into question the necessity for international protection of a large number of people.

On the opposite side, the principle of a just and fair process implies that, in the context of asylum procedures, the applicants have the right to have their application evaluated through a complete process,[155] and to have access to all the procedural safeguards established by law.[156]

When it is established the safety presumption, the SCO concept places the asylum-seekers that come from those countries in a disadvantageous position vis-à-vis the other asylum-seekers, putting in danger the respect for the principle of a fair and just process, considering that the responsibility to present evidence will rest only on the applicants, the less time to rebut the safety presumption and, frequently, the further difficulties in the access to remedies.

Finally, the last principle is the principle of non-refoulement. It is the cornerstone of the international asylum system and forbids a host country to send back the asylum-seeker or the refugee to the country where he/she would be in danger of persecution, based on race, religion, nationality, membership in a particular social group or political opinion. This principle is fundamental when it comes to the application of the SCO concept.

As said before, the safeguards and rights of applicants are restricted with the employment of this notion; therefore, the asylum-seekers have more difficulty proving that they are in danger in their own countries and in challenging unfavourable decisions. Thus, the additional difficulties increase the possibility of sending persons to countries where they would be in danger of persecution, which would violate the principle of non-refoulement.

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[153] Charter of the United Nations (26 June 1945) (UN Charter).
[154] "Borrowing from familiar populist rhetoric across the global North (and especially Australia), the government unleashed a public relations campaign of demonization of asylum seekers in order to prepare the ground for harsher policies of detention, accelerated determination procedures, immizeration, intensified precarity and family separation of asylum seekers and refugees.", Audrey Macklin, "A safe country to emulate? Canada and the European refugee" (ch), *The Global Reach of European Refugee Law* (2013), Cambridge University Press, p 116.
[155] Notably, the asylum-seekers have the right to have their application evaluated individually and to see the assessment of their request based on the general situation of the country but fundamentally in their concrete situation.
[156] UNHCR, "Better Protecting Refugees in the EU and Globally" (n 152), footnote 19.

The question now is to know if it is possible to achieve a balance between all of these principles and interests in a way that can be acceptable for states and/or regional organisations without calling into question the fundamental human rights and principles of the asylum-seekers and refugees.

2.1.3 SCO in EU legislation

After making a journey through the meaning and principles that underlie the SCO concept, it is time to focus on how the European institutions have established the concept in European legislation. The analysis is accompanied by criticisms to its implementation with the positive aspects and those that violate the rights and guarantees of asylum-seekers as fundamental points.

Because it is impossible to analyse all the aspects, I will focus on the ones that are more relevant to the thesis.

2.1.3.1 The past

The SCO concept originated in Europe. It was first used in the Danish Clause of 1986[157] in order to decrease the number of refugees entering this country from Germany. However, other countries soon adopted similar solutions.[158] Subsequently, the domestic legislation regarding SCO was brought to the European level.[159]

Since the beginning, the UNHCR was a critic of the SCO. In 1991, it issued a note[160] in which the concept was analysed. In this document, the UNHCR argued that the application of the SCO concept allows, a priori, the exclusion of an entire group of persons from refugee status, and this is against the spirit and the letter of the 1951 Convention and 1967 Protocol.[161] It also did not accept the argument sometimes presented by some countries that this policy encourages countries of origin

[157] After the approval of this legislation, the asylum seekers that arrived in Denmark could be refused entry if they had arrived from countries that, for Denmark, were safe countries. DEMIG (2015) *DEMIG POLICY, version 1.3, Online Edition*. Oxford: International Migration Institute, University of Oxford.
[158] Hunt (n 151), p 504.
[159] Hunt (n 151), p 505.
[160] UNHCR, "Background Note on the Safe Country Concept and Refugee Status" (26 July 1991), EC/SCP/68.
[161] UNHCR, "Background Note on the Safe Country Concept" (n 160), Para 5.

to invest in democratisation processes, since the use of "the asylum procedure is inappropriate" to achieve "normalization".[162]

Nonetheless, the UNHCR admits that it can be helpful to show which asylum-seekers do not have valid grounds to ask for protection.[163] Therefore, in the Background Note, it accepts that countries establish presumptions in relation to certain applicants based on their country of origin, provided those presumptions "are based on verifiable, current assessments of factual situations, are rebuttable and provision is made for the individual, exceptional case".[164]

At the EU level, the first formal reference to this concept was in the Council Resolution on Manifestly Unfounded Applications for Asylum and in the Conclusion on Safe Countries of Origin, in 1992, where the Council established that individuals coming from countries classified as SCO would qualify for accelerated procedures.[165]

After the Treaty of Amsterdam, the countries more reticent about the harmonisation processes (France, Germany, Italy, Spain, and the United Kingdom) fought for the inclusion of safe countries practices in the first directive regarding asylum procedures.[166] From the start, representatives of relevant organisations in this area made hard criticisms of the solutions that were being discussed by the Member States at the European level.[167]

Despite all the recommendations by different regional and international actors, the Council, on 1 December 2005, approved the 2005 AP Directive that aimed to establish minimum procedural standards between the Member States regarding the aspects related to granting and withdrawing refugee status. One of the aspects referred to is the SCO concept.

In this Directive, a definition of SCO was agreed upon and the creation of common[168] and national lists[169] of SCO for assessing asylum applications as unfounded was adopted.[170]

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[162] UNHCR, "Background Note on the Safe Country Concept" (n 160), Para 6.
[163] UNHCR, "Background Note on the Safe Country Concept" (n 160), Para 6.
[164] UNHCR, "Background Note on the Safe Country Concept" (n 160), Para 9.
[165] Resolution on Manifestly Unfounded Applications for Asylum, Para 2 and 8.
[166] Hunt (n 151), p 506.
[167] See, for example, Dominic Casciani, "UN warns over EU asylum rules", *BBC News Online* (London, 30 March, 2004); ECRE, Amnesty International, Europe and Central Asia Division Human Rights Watch, Caritas Europa, Churches' Commission for Migrants in Europe, ILGA Europe, Médicins Sans Frontières, Pax Christi International, Save the Children & QCEA, "Call for withdrawal of the Asylum Procedures Directive" (22 March 2004).
[168] 2005 AP Directive, Article 29.
[169] 2005 AP Directive, Article 30.
[170] 2005 AP Directive, Article 23(4)(c)(i).

According to the 2005 AP Directive, a country would be considered safe when, in its territory, there was no general and consistent persecution, torture, inhumane treatment, or punishments, and reasons for indiscriminate violence in situations of armed conflict.[171] This evaluation should be made taking into account the applicable laws and regulations, the observance of the rights and freedoms of the ECHR and/or fundamental international legal documents, the respect for the non-refoulement principle and the existence of effective remedies against human rights violations.[172]

In 2008, the European Parliament brought an action before the CJEU challenging the mandatory common list and the provisions for the common list under Article 29 of 2005 AP Directive due to the Council's lack of exclusive competence to adopt this particular norm. The CJEU annulled the referred provisions based on the Council's lack of competence to adopt and amend the common list through a different decision-making procedure than the one established in the Article 67(5) of the Treaty Establishing the European Community. [173]

Besides the question of the common list, other critics were pointed out to this directive. The first criticism concerned the relationship between the concept of SCO and Article 3 of the Geneva Convention and the New York Protocol.[174] Article 3 of the Geneva Convention explicitly prohibits discrimination based on country of origin and the New York Protocol ensures that refugee protection should be everyone's right without "geographical limitations".[175]

The SCO concept, however, permitted the rejection of asylum applications when the applicant comes from a country considered to be an SCO. The rejection is therefore based on the nationality of the applicant, which, according to Matthew Hunt, violates the spirit and the letter of the Geneva Convention and the New York Protocol.[176] This discrepancy between European legislation and the international refugee law could be justified, as argued by Matthew Hunt, by the fact that the obligations of the Geneva Convention do not bind the EU directly; instead, the 2005 AP Directive "cites an asylum system based upon the application of the Convention as something the EU has 'agreed to work towards'".[177]

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[171] 2005 AP Directive, Annex II.
[172] 2005 AP Directive, Annex II.
[173] Case C-133/06 European Parliament v Council of the European Union [2008], Para 46-68.
[174] Hunt (n 151), p 510.
[175] Hunt (n 151), p 510.
[176] Hunt (n 151), p 510.
[177] Hunt (n 151), p 510.

Secondly, the derogations to Article 30(1) of the 2005 AP Directive, present in paragraphs 2 and 3 of the same Article, created additional heavy challenges to the safeguards of the asylum-seekers.[178]

Paragraph 2 allowed Member States to preserve the provisions related to SCO when they simply determine in these countries persons are generally not subject to "persecution as defined in Article 9 of Directive 2004/883/EC"[179] or to "torture or inhuman or degrading treatment or punishment".[180] On the one hand, this derogation decreased the possibilities of harmonisation of the asylum legislation in the Member States while, on the other hand, they reduced severely the safeguards of the asylum-seekers since it becomes even harder for them to prove that, in their specific case, the presumption of safety should not be applied.[181]

Paragraph 3, in turn, permitted the maintenance of legislation that determines that only parts of a country are safe or that specific groups are safe in that country or in parts of the country. The question here was how a country can be considered as safe if part of the territory is not, or part of its population is in danger of persecution and other human rights violations.[182]

According to Article 31(2) of the 2005 AP Directive, the Member States should presume as unfounded the application of individuals who come from countries considered as SCO in the common list of SCO. In turn, according to paragraph 3 of the same Article, the Member States had to establish national legislation that allowed the application of the SCO (binding obligation even for the countries that previously did not apply this concept).

These two provisions went further than the prescription of the necessary minimum standards and imposed a legally binding obligation of using the SCO concept, even for Member States that had not adopted the concept.[183] After the annulment of Article 29 of the 2005 AP Directive, this critique was mitigated, since the mandatory provisions concerning SCO rules became ineffective.[184]

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[178] UNHCR, "Improving Asylum Procedures: Comparative analysis and Recommendations for Law and Practice – Detailed Research on Key Asylum Procedures Directive Provisions" (March 2010), p 334.
[179] 2005 AP Directive, Article 30/2/a.
[180] 2005 AP Directive, Article 30(2)(b).
[181] ECRE, "ECRE Information Note on the Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status" (2006), p 28.
[182] ECRE, "ECRE Information Note on the Council Directive 2005/85/EC of 1 December 2005" (n 181), p 28.
[183] ECRE, "ECRE Information Note on the Council Directive 2005/85/EC of 1 December 2005" (n 181), p 28; Hunt (n 151), p 511.
[184] Hunt (n 151), p 511.

Another critical aspect was the procedural consequences of the application of the SCO concept to the asylum-seeker.[185] According to paragraphs 3 and 4 of Article 23 of the 2005 AP Directive, the examination procedures could be accelerated if the application was considered to be unfounded due to the fact that the applicant came from an SCO.[186]

Depending on the country, the time limits for accelerated procedures could vary between forty-eight hours and three months,[187] while the normal ones varied between one month and six months.[188] Especially in the countries where time limits were extremely short, the concern was that, in practice, the basic guarantees were not effective.[189] This concern was even greater when the personal interview[190] and the abolishment of the automatic suspensive effect took place during the appeal period,[191] after the refusal of the application.[192]

A positive aspect was that, regarding the automatic suspensive effect, the CJEU and ECtHR have been very active in establishing in their jurisprudence[193] that the removal of the asylum-seeker can only happen when the Member State affords a sufficient remedy and, usually, it happens only when the asylum-seekers are allowed to stay in the territory of the host country.[194]

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[185] Hunt (n 151), p 511.
[186] 2005 AP Directive, Article 23(4)(c)(i).
[187] Commission, "Report from the Commission to the European Parliament and the Council on the Application of Directive 2005/85/EC of 1 December 2005 on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status" (Report) COM (2010) 465 final, p 9.
[188] Commission, "Report from the Commission to the European Parliament and the Council on the Application f Directive 2005/85/EC (n 187), p 9
[189] These shorter times exert even more pressure on applicants since it makes it even harder for them to produce and present evidence in such brief periods. In addition, there is often prejudice concerning the documentation presented by the applicants based simply on the preconception that their documentation is inaccurate or even false. Hunt (n 151), p 511-512.
[190] 2005 AP Directive, Article 12(2)(c).
[191] 2005 AP Directive, Article 39/3/a.
[192] Commission, "Report from the Commission to the European Parliament and the Council on the Application f Directive 2005/85/EC (n 187), p 10.
[193] Case C-69/10 Brahim Samba Diouf v. Ministre du Travail, de l'Emploi et d l'Immigration [2010]; Gebremedhin v France App no 25389 [ECtHR, 26 April 2007]; Muminov v Russia App no 42502/06 [ECtHR, 11 December 2008]; Baysakov and others v Ukraine App no 54131/08 [ECtHR, 18 May 2010]; Labsi v Slovakia App no 33809 [ECtHR, 24 September 2012].
[194] Hunt (n 151), p 512.

2.1.3.2 The present

In 2009, the European Commission presented proposals to change the fundamental legal documents related to asylum,[195] including the Directive on asylum procedures. The proposals introduced some guarantees and safeguards for asylum-seekers, namely, an obligation to have a personal interview independently of the future decision on the admissibility of the application.[196]

The Council and the European Parliament did not arrive at an agreement, so these proposals did not become European legislation. According to the records of the time, the centre of the disagreement was precisely the future of safe country concepts and practices. The European Parliament argued for the creation of a real common procedural regime (instead of coordination on minimum standards), and the necessity for more safeguards.[197]

After a lengthy discussion and compromises, new directives were approved between 2011 and 2013, namely the recast of the AP Directive. Significant improvements were accomplished with the new AP Directive. Nonetheless, some criticisms were still not addressed.

One of the key areas of criticism is the inexistence of agreement between the Member States on which countries should be included in the list of SCO, which suggests that there is no common understanding of the concept itself.[198]

Moreover, one of the objectives of this Directive was the establishment of common procedural standards in the EU to build a genuine European asylum system. This objective was not accomplished, however. First, some Member States did not adopt the concept[199] and second, some

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[195] Commission, Proposal for a Directive on minimum standards on procedures in Member States for granting and withdrawing international protection COM(2009) 554 final; Commission, Proposal for a Directive on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international and the content of the protection granted COM(2009) 551 final/2; Commission, Proposal for a Directive laying down minimum standards for the reception of asylum seekers COM(2008) 815 final.

[196] Proposal for a Directive on minimum standards on procedures on Member States for granting and withdrawing international protection (21/10/2009) COM(2009) 554, p 6; ECRE, "Comments from the European Council on Refugees and Exiles on the European Commission Proposal to recast the Asylum Procedures Directive" (May 2010), p 39-41.

[197] Hunt (n 151), p 523.

[198] Commission, "An EU 'Safe Countries of Origin' List", p 2; ECRE, "Information Note on Directive 2013/32/EU of the European parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast)" (December 2014), p 42; ECRE, Forum Réfugiés-Cosi, the Irish Refugee Council and the Hungarian Helsinki Committee, "Mind the GAP: An NGO Perspective on Challenges to Accessing Protection in the Common European Asylum System – Annual Report 2013/2014" (AIDA, 9 September 2014), p 49.

[199] "[...] 15 out of 28 EU Member States apply the 'safe country of origin' concept in their asylum procedures, while another 7 have made provision for it in their national law following the transposition of the Asylum Procedures Directive". ECRE, "'Safe countries of origin': A safe concept?" (AIDA Legal Briefing no 3, September 2015), p 2;

of the countries that did so, transposed it differently,[200] and finally, the decision of which countries should be considered as safe is still a Member State decision,[201] which leads to different national lists, as seen previously.

Now, focusing on the normative aspects, according to Article 37 of the 2013 AP Directive, the Member States maintain the power to introduce or preserve legislation regarding national designation of SCO, provided that they do so according to Annex I of 2013 AP Directive. [202] They lost, however, the possibility to derogate[203] the general rule established in the Annex, which is a crucial aspect in the increase of the safeguards to asylum-seekers. On the contrary, paragraph 2 of Article 37 of the 2013 AP Directive introduced the obligation of states to "[…] regularly review the situation in third countries designated as safe countries of origin", and paragraph 4 of the same Article includes the obligation to notify the Commission when a third country is designated as SCO.

The evolution verified was positive. Nonetheless, as ECRE pointed out in its Information Note about the 2013 AP Directive, the creation of national mechanisms that regularly review and, when necessary, remove countries from the list, is still missing.[204] Without these mechanisms, the improvements will not be effective in practice.[205]

In the 2013 AP Directive, the application of the SCO concept is optional for the Member States. This attenuated the issue of the reduction of the protection standards for the Member States

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"The SCO concept appears in 22 national legislations but only 15 EU Member States apply the concept in practice, but among which only 10 (Austria, Belgium, Czech Republic, Germany, Ireland, Luxemburg, Malta, Slovakia and United Kingdom [UK]) have lists while the other just apply case-by-case (Estonia, Finland, Hungary, Latvia and Netherlands). FRA, "Opinion of the EU Agency for Fundamental Rights concerning an EU common list of safe countries of origin" (Opinion – 1/2016), p 8.

[200] FRA (n 199), p 4.

[201] The differences in the national lists highlight the idea that, in some cases, the real reasons behind the classification of certain countries as SCO are related to political interests, rather than the evaluation of safety. Costello (n 150), p 608-609; "While certain nationalities are in some form deemed as manifestly unfounded by as many as 13 countries, the same is not true for other countries such as Georgia, Moldova, Ukraine, Pakistan, Bangladesh, India, Mongolia, Nigeria or Senegal." ECRE, "Common asylum system at a turning point: Refugees caught in Europe's Solidarity Crisis Report" (Comparative Reports, 10/09/2015).

[202] In Annex I of the 2013 AP Directive, SCO are described as countries where generally and consistently persecution (following Article 9 of the 2011 EU Qualification Directive), torture, inhuman or degrading treatment or punishment do not exist and there is no threat because of indiscriminate violence in situations of international or internal armed conflicts. According to the European Economic and Social Committee, the criteria established for the determination of the SCO are not enough and should be developed to provide more guarantees; Jose Antonio Moreno Diaz, "Opinion of the European Economic and Social Committee on the proposal for a Regulation of the European Parliament and the Council establishing an EU common list of safe countries of origin for the purpose of Directive 2013/32/EU of the European Parliament and of the Council on common procedures for granting and withdrawing international protection, and amending Directive 2013/32/ EU" (10 December 2015), Para 1.2.

[203] 2005 AP Directive, 30(2)(3).

[204] ECRE, "Information Note on Directive 2013/32/EU" (n 198), p 43.

[205] ECRE, "Information Note on Directive 2013/32/EU" (n 198), p 43.

that had not yet adopted this concept in their national legislation. The obligation of paragraph 2 of Article 36 of the 2013 AP Directive[206] applies, thus, only to the Member States that decided to adopt the concept in their national legislation.[207]

From a more procedural perspective, according to Article 31(8)(b) of the 2013 AP Directive, Member States can use an accelerated procedure if the applicant is originally from an SCO (procedural function) unless the applicant can rebut the assumption of safety. Thus, in principle, the existence in the law of the SCO concept does not mean that an application from an asylum-seeker coming from an SCO will be considered automatically unfounded, but, in practice, most of the times that the concept is used, the decision is the rejection of the asylum application[208].[209]

In the 2013 AP Directive, the Members States are obliged to conduct an interview to analyse the admissibility of the application.[210] Furthermore, the concerns and criticisms of the previous solution in the area of effective remedies and the automatic suspensive effect were heard. Now, Member States shall permit the asylum applicants to remain in their territory to be able to exercise the right to an effective remedy.[211]

When it comes to SCO procedures, the court or a tribunal has the power to decide if the applicant can or cannot remain in the territory of the Member State when the decision of the administration was the rejection of the application.[212] To ensure that an asylum-seeker has effective access to remedies, paragraph 7 of Article 46 of the 2013 AP Directive establishes the preconditions for the court or tribunal be able to decide whether the applicant can remain in the territory of the Member State or should return to the country of origin.[213]

Paragraphs 6 and 7 of Article 46 of 2013 AP Directive, however, still do not comply entirely with concerns of the ECtHR concerning the principle of non-refoulement, mainly taking into

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[206] "Member States shall lay down in national legislation further rules and modalities for the application of the safe country of origin concept", 2013 AP Directive, Article 36(2).
[207] ECRE, "Information Note on Directive 2013/32/EU" (n 198), p 42.
[208] "Importantly, most decisions issued in the EU+ using accelerated or border procedures lead to a rejection of the application at a significantly higher rate than for decisions made via normal procedures. The recognition rate for decisions issued using accelerated procedures was 11%, while for those using border procedure it was 8%."; European Asylum Support Office, "Annual Report on the Situation of Asylum in the EU 2017: Executive Summary" (2018), p 11. The same tendency was verified in the evaluation of 2015: "Accelerated procedures had a 10% recognition rate, and border procedures 12%."; European Asylum Support Office, "Annual Report on the Situation of Asylum in the European Union 2015" (2016), p 96.
[209] Hunt (n 151), p 526.
[210] 2013 AP Directive, Article 34.
[211] 2013 AP Directive, Article 46(5).
[212] 2013 AP Directive, Article 46(6).
[213] ECRE, "Information Note on Directive 2013/32/EU" (n 198), p 53.

consideration the short time limits to appeal and the lack of reference in the European norm to the necessity for a full examination of the facts and law applicable to the concrete situation.[214]

To conclude this section, the changes accomplished with the 2015 Directive were quite significant to the improvement of the European asylum system insofar as they became more consistent with the objectives and purposes of international refugee law.

All the progress accomplished did not allow, nonetheless, the conciliation of the Geneva Convention and the New York Protocol with the 2013 AP Directive. The difficulties are connected with the idea that even when the general population enjoys state protection, certain minorities (ethnic, religious, sexual or other minorities) can be exposed to mistreatment, and the application of the SCO does not look to these differences, which leads to unfair situations (lack of protection of individuals who are in real need of international protection).[215]

2.1.3.3 The Future

In 2014 and 2015, the number of persons trying to enter European territory rose substantially, which led to the crisis of the European refugee system, as seen before. The crisis of the system showed that the rules that were in force (and still are) were not able to answer the states' needs, specifically of those who are on the borders of the EU (Greece and Italy).

As mentioned in the first chapter of this thesis, between 2015 and 2016, the European Commission prepared and presented proposals to reform the European asylum system; however, until today, the proposals are still waiting for further negotiations between the Council and the European Parliament.

Since it is unlikely that a complete new proposal will be submitted, I will examine the proposed establishment of the SCO concept in the AP Regulation Proposal.

In the proposed AP Regulation, the definition of SCO appears in Article 47. The criteria established here are, in substance, very similar to the definition present in the 2013 AP Directive. Nevertheless, an essential change was the inclusion in the main body of the Regulation of the criteria to consider a country as SCO, instead of being attached to the annex.

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[214] ECRE, "Information Note on Directive 2013/32/EU" (n 198), p 54.
[215] ECRE, "'Safe countries of origin': A safe concept?" (n 199), p 4.

The decision to bring the necessary conditions to the main body of the document seems to be a good option to facilitate the reading and the comprehension of the concept. As ECRE also expressed, the formal change gives transparency to the concept and the process.[216]

Another aspect that also facilitates the common understanding of the rules is the description of the exact acts that cannot be carried out by the states under consideration,[217] instead of only referring to the principle of non-refoulement.[218] This change is essential to reduce the possibility of different interpretations of the principle of non-refoulement by the different Member States (more restrictive or more extensive interpretations).

In the regulation proposal, the adverb "consistently" used to describe the inexistence of persecution disappeared. This change is not favourable, since the express obligation of the non-existence of persecution must be consistent and standard practice rather than the exception.[219]

The movement to harmonise the SCO concept and its application is stronger than ever with the adoption of the position that the transposition of the SCO concept shall be mandatory for all Member States, even for those that do not have it already in national legislation.[220] This is achieved through the use of a regulation (an instrument directly applicable in the national legal orders of the Member States) and with the creation of a common European list. This change in the nature of the obligation to adopt the SCO by the Member States leads to a reduction in the protection of asylum-seekers, especially in the countries where this concept was not adopted.

According to ECRE, the adoption of a common list through regulation will create a gap in the judicial scrutiny of the legality of the application of the concept, since the CJEU will be the only one competent to do it.[221] The national courts will be no longer competent to assess the presumption of safety regarding a country; they will only have the competence to evaluate the application in an individual case.[222] Consequently, individuals that want to challenge the classification of a country as SCO will have to do so in the CJEU, which will increase the difficulties and costs.

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[216] ECRE, "ECRE Comments on the Commission Proposal for an Asylum Procedures Regulation" (November 2016), p 58.
[217] AP Regulation Proposal, Article 47(3)(a).
[218] ECRE, "ECRE Comments on the Commission Proposal for an Asylum Procedures Regulation" (n 216), p 58.
[219] UNHCR, "On the European Commission Proposal for an Asylum Procedure Regulation – COM (2016) 467" (April 2019), p 44-45.
[220] The adoption of the concept was always an option for the Member States, since in 2009 the ECJ annulled the mandatory list of Article 29 of the 2005 AP Directive.
[221] ECRE, "ECRE Comments on the Commission Proposal for an Asylum Procedures Regulation" (n 216), p 60.
[222] ECRE, "ECRE Comments on the Commission Proposal for an Asylum Procedures Regulation" (n 216), p 60.

Article 40 of the AP Regulation Proposal establishes the accelerated procedures, and in this legislative document, contrary to what happened in the previous directives, the application of accelerated procedures is mandatory when, among the other factors established, the applicant comes from an SCO.[223] The mandatory application of the concept is the logical consequence of the existence of a mandatory European SCO list; nevertheless, this obligation leads to a decline of the level of the protection in countries that did not include the SCO concept in their legislation and in countries that had established it but where the concept was not applied.[224]

Moreover, the Member States can maintain or introduce legislation that allows the national designation of countries as SCOs for a period of five years after the entry of the AP Regulation.[225] This possibility compromises the harmonisation process attempt because it makes the preservation of two parallel systems that have different rules or characteristics possible.

The Regulation Proposal states that the Commission has to review the conditions in the SCO regularly to verify if the conditions that allowed the classification are still verifiable.[226] The Commission is obliged to make a thorough assessment and to verify whether the SCO still complies with the requirements laid down or if a substantive change of circumstances did occur. In the case of a change in circumstances, the Commission shall adopt a delegated act to suspend the presence of the country in the EU common SCO list for six months.[227]

If the negative changes remain three months after the adoption of the delegated act, the Commission should submit a proposal to remove the SCO from the common list, through the ordinary legislative procedure[228].[229] The necessity of subordinating the changes in the common list of SCO to an ordinary legislative procedure creates difficulties, especially due to the need for swift decisions, which cannot be achieved through this process.

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[223] AP Regulation Proposal, Article 40(1)(2).
[224] "While most Member States currently have an accelerated procedure in the law, some of them, such as Cyprus, do not use them in practice, whereas a number of EU Member States, including Ireland and Sweden, are perfectly capable of managing their caseloads without having such a procedure formalised legislation."; ECRE, "ECRE Comments on the Commission Proposal for an Asylum Procedures Regulation" (n 216), p 48.
[225] AP Regulation Proposal, Article 50; "While Member States may adopt legislation that makes it possible at the national level to designate countries of origin other than those appearing on the EU common list [...]", José Antonio Moreno Diaz (n 202), Para 2.3.
[226] AP Regulation Proposal, Article 48(2).
[227] AP Regulation Proposal, Article 49(1).
[228] AP Regulation Proposal, Article 49(3).
[229] ECRE, "ECRE Comments on the Commission Proposal for an Asylum Procedures Regulation" (n 216), p 61.

In terms of an effective remedy, according to Article 53 of the AP Regulation Proposal, the applicants have the right to appeal in case of an unfavourable decision[230] and, in the appeal, the court needs to review "full and ex nunc" the facts and applied law.[231] The most worrying aspect regarding the protection of the rights of asylum-seekers in this article is the short time limits established,[232] since those deadlines may undermine the capacity of applicants, in practice, to appeal the decisions.[233]

Focusing on the proposal for the European common list, it is time to look into the proposed countries and to see which are the difficulties that this document creates and why.

Looking at the national SCO lists, one conclusion can be drawn: different countries have different lists. So, with the EU common list,[234] the Commission aimed to reduce the differences between the Member States in order to achieve the harmonisation wanted.

The Commission used three criteria to select the seven countries that are part of this common list proposal. Firstly, the countries need to fulfil the requirements established in Article 47 of the AP Regulation Proposal. This condition should be the fundamental and most relevant in the assessment of a country to consider it as an SCO, but looking at some of the countries proposed, this does not seem to be the case.

Secondly, for a country to be in the SCO common list, the recognition rates should be low.[235] The use of recognition rates[236] has been commonly accepted; however, in certain circumstances[237] this has been intensely criticised. Some of the most critical positions regarding the use of recognition rates are also present in court decisions.[238]

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[230] AP Regulation Proposal, Article 53(1)(iii).
[231] AP Regulation Proposal, Article 53(3).
[232] AP Regulation Proposal, Article 53(6).
[233] Concerning the suspensive effect of the appeal, the solution adopted is very similar to the solution of the 2013 P Directive, so no further considerations will be made in this respect.
[234] Composed by Albania, Bosnia and Herzegovina, the former Yugoslav Republic of Macedonia, Kosovo, Montenegro, Serbia and Turkey. European Parliament, "Safe countries of origin: Proposed common EU list" (Briefing: EU Legislation in Progress, 8 October 2015), p 1.
[235] European Parliament, "Safe countries of origin: Proposed common EU list" (n 234), p 6.
[236] Low percentages of asylum recognition lead to the conclusion that the state is generally safe.
[237] See, for example, the position of the Belgian Commissioner-General for Refugees and Stateless Persons in ECRE, "'Safe countries of origin': A safe concept?" (n 199), p 6.
[238] "Si la partie adverse relève justement qu'un faible taux de reconnaissance du statut de réfugié ne peut mener à conclure en soi qu'un pays est d'origine sûr, un taux élevé de reconnaissance du statut de réfugié suffit par contre à exclure qu'un pays d'origine puisse être qualifié de sûr au sens de l'article 57/6/1 de la loi du 15 décembre 1980. […] Le seul fait que de nombreux demandeurs d'asile sont originaires des pays repris dans la liste des pays d'origine sûrs n'est pas incompatible avec la constatation selon laquelle « d'une manière générale et de manière durable, il n'y est pas recouru à la persécution au sens de la Convention internationale relative au statut des réfugiés, signée à Genève le 28

The critiques to this approach are very pertinent; nonetheless, low recognition rates can have a role in the classification of the countries as safe, provided they are not considered as sufficient or as the principal element.

The last criteria are the Council of Europe membership and the EU accession perspectives.[239] The question that arises here is whether these criteria provide any relevant answers to the assessment of the reality of the countries that are being considered for the list of safe countries or whether, on the contrary, they merely give a formal view of the question.[240] This aspect will be very important for the assessment of Turkey as an SCO.

The responsibility of the EU and the Member States does not end with drawing up the lists. The EU's common list and the national ones need to be regularly and carefully reviewed to avoid violating the rights and safeguards of the asylum-seekers and refugees. The constant follow-up obligation implies that the responsibilities of the EU and the Member States towards the protection of the rights and safeguards of the applicants start with the drafting of the lists but continue after that.

2.1.4 Practical case: Turkey as an SCO

The inclusion of Turkey in the proposal for a common European list is one of the most controversial and questionable issues of the list, and it is an excellent example of the risks of the SCO concept.

First, looking at the national lists, only one of the Member States recognise Turkey as an SCO.[241] As said previously, it has been normal to see a lack of consensus between the Member States regarding the safety of many of the countries; however, in this case, there is almost a

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juillet 1951, telle que déterminée à l'article 48/3, ou [qu'il existe] des motifs sérieux de croire que le demandeur d'asile court un risque réel de subir une atteinte grave telle que déterminée à l'article 48/4».” Belgian Conseil d'Etat, Decision No 231.157 [7 May 2015].

[239] Albania, Bosnia-Herzegovina, North Macedonia, Montenegro, Serbia and Turkey are members of the Council of Europe, are parties in the ECHR, have adhered to the ECtHR (the only exception is Kosovo, for lack of consensus related to its status) and five of them are also in negotiations to enter the EU (Albania, North Macedonia, Montenegro, Serbia and Turkey). ECRE, “'Safe countries of origin': A safe concept?” (n 193), p 5.

[240] ECRE, “”Safe countries of origin”: A safe concept?” (n 199), p 5.

[241] ECRE, “”Safe countries of origin”: A safe concept?” (n 199), p 7; Commission, “An EU 'Safe Countries of Origin' List” (n 198), p 2.

consensus in the opposite direction, so the question is why the Commission proposed Turkey as a safe country.

Secondly, in 2014 (the most recent data before the proposal was presented), the average recognition rate for applications from Turkish asylum-seekers was 23.1%, while the recognition rate in some Member States went up to 85.8%.[242] Very similar rates were verified in the first and second quarters of 2015.[243] So, if a country should have low recognition rates (less than 17%) to be considered safe, which is not the situation in the case of Turkey, the question remains: why does the Commission consider Turkey an SCO?

Third, in the common list proposal, the adherence to the ECHR and the acceptance of the ECtHR jurisdiction are also taken into account. This criterion seems to be the primary legal basis for the inclusion of Turkey in the list. This criterion, however, raises many problems, especially considering that Turkey is one of the members of the Council of Europe with a high number of admissible applications (between 1959 and 2018, there were 5592)[244] and a more significant number of judgements in which at least one violation of the ECHR was found (between 1959 and 2018, there were 3128 judgments, among which there are several condemnations regarding inhuman or degrading treatment, lack of effective investigations, violation of rights to liberty and security, to a fair trial and to an effective remedy).[245] Membership, or the possibility of future membership, cannot be a relevant factor when the other criteria are not verified.

Therefore, the logical explanation for the inclusion of Turkey in the EU common list is the EU-Turkey Statement[246],[247] where Turkey accepted receiving a high number of asylum-seekers and refugees that had departed to Europe from Turkey.[248] This case is thus an example of one of the dangerous uses of the SCO concept, namely its easy permeability to political interests.

To conclude, the inclusion of Turkey in the EU common list of SCO is even more problematic and dangerous for the protection of the potential asylum-seekers originating from Turkey if we

[242] ECRE, "'Safe countries of origin': A safe concept?" (n 199), p 8.
[243] ECRE, ""Safe countries of origin": A safe concept?" (n 199), p 8.
[244] ECtHR, "Overview 1959-2018: ECHR" (March 2019), p 5
[245] ECtHR (n 244), p 8 and 9.
[246] The Statement will be analysed in more detail in the next sub-chapter.
[247] Costello (n 150), p 611.
[248] Costello (n 150), p 611.

consider the events after the alleged coup attempt in July 2016 and its consequences for Turkish society and institutions.[249]

2.1.5 SCO in the world – The Canadian experience

After examining the conceptualisation of the SCO concept in the EU, it is time to look at another example of the establishment of the SCO concept in another part of the world, the experience of the SCO in Canada. This analysis will help to show how other countries deal with the concept and, above all, how the level of protection of the rights and safeguards of asylum-seekers in the EU compares to another country.

Since 2009 and 2010, the political and social environment has changed in Canada, and the will to receive a significant number of asylum-seekers and refugees has decreased substantially. This new attitude emerged after a period of progressive liberalisation of the asylum standards and recognition of a broader definition of the refugee concept through case law and policies.[250] The change was a consequence of the shift in the political discourse, much more geared towards the need for protection against terrorists, traffickers, and smugglers.[251]

To reduce the number of applications for asylum and at the same time improve the efficiency of the system, in 2010 and 2012 Parliament approved the Balanced Refugee Reform Act (IRPA)[252] and the Protecting Canada's Immigration System Act,[253][254] respectively. These two new documents amended the 2001 Immigration and Refugee Protection Act (IRPA).[255] It was in this package of measures that the Designated Country of Origin (DCO) provision was introduced.[256]

In the Canadian experience, the Minister of Citizenship and Immigration is authorised to classify certain countries as safe and, as a consequence, the application is submitted to an inferior

[249] Amnesty International, "Turkey 2017/2018" (2018).
[250] Marina Stefanova, "The 'Safe' Need Not Apply: The Effects of the Canadian and EU Safe Country of Origin Mechanisms on Roma Asylum Claims" (2014), 49(1), *Texas International Law Journal*, p 135 and 136.
[251] Idil Atak, Graham Hudson and Delphine Nakache, "The Securitisation of Canada's Refugee System: Reviewing the Unintended Consequences of the 2012 Reform" (17 January 2018), 37(1), *Refugee Survey Quarterly*, p 4 and ss.
[252] Balanced Refugee Reform Act (29/06/2010) S.C. 2010, c. 8.
[253] Protecting Canada's Immigration System Act (28/06/2012) S.C. 2012 (2012 IRPA), c. 17.
[254] The package of these two legal documents is called "2012 refugee reform"; Atak, Hudson and Nakache (n 251), p 2.
[255] Macklin (n 154), p 117.
[256] Macklin (n 154), p 117.

refugee determination process.[257] The emergence of the DCO in Canada is related to the excessive percentage of Hungarian Roma asylum applications.[258]

The Canadian system permits the classification of countries as DCO when one of two criteria is verified: the quantitative or the qualitative criteria.[259] According to Section 109.1(1) of the 2012 IRPA, the Minister of Citizenship and Immigration has the power to identify a DCO according to quantitative criteria. The Minister defines the quantitative criteria (exact minimum number of claims or percentage of rejected or abandoned/withdrawn claims that allow the classification of a country as DCO)[260] in the same document where the DCO were listed.[261]

When the number of claims is lower than the number provided in the order, the Minister can still decide for the classification of a country as DCO when she/he considers that in that particular country there is an independent judicial system, fundamental democratic rights and freedoms are recognised, and mechanisms for redress are available together with civil society organisations (qualitative criteria).[262]

Similarly to the European process, the applications from asylum-seekers with origin in DCOs have their request processed faster. The applicant from a DCO will have a hearing within thirty or forty-five days, and they will have fewer days to present documents to support the need for asylum.[263] When the law was approved, the applicants could not appeal an unfavourable decision, nor was there a possibility of the suspension of the removal during the period of an action to the Federal Court.[264]

Following a constitutional challenge before the Federal Court, on 13 July 2015, the Court ruled that the 2012 Amendment denying the right of appeal to the asylum-seekers violates Canada's Charter of Rights and Freedoms. In consequence, the Government changed the rule, and now it is

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[257] Macklin (n 154), p 100-101.
[258] Macklin (n 154), p 101.
[259] Macklin (n 154), p 121.
[260] According to the "Backgrounder: Summary of Changes to Canada's Refugee System in Protecting Canada's Immigration System Act", the minimum rejection rate should be 75% and the abandonment/withdrawal rate should be at least 60%; Macklin (n 154), p 121.
[261] 2012 IRPA, Section 109.1(2)(a).
[262] 2012 IRPA, Section 109.1(2)(b).
[263] Legal Aid Ontario's LawFacts, "Designated Countries of Origin", <http://lawfacts.ca/taxonomy/term/187> accessed 01/05/2019.
[264] Government of Canada, "The Government discontinues its appeal in the YZ Litigation" (7 January 2016), <https://www.canada.ca/en/immigration-refugees-citizenship/news/2016/01/the-government-discontinues-its-appeal-in-the-y-z-litigation.html> acceded 1/05/2019.

possible for the applicants to appeal before the Refugee Appeal Division (RAD) of the Immigration and Refugee Board of Canada.[265]

Finally, this system seems not to have mechanisms or instruments to review the list in the case of a change in circumstances in the country considered as DCO.[266]

In conclusion, the European system is more complete and provides more guarantees than the Canadian system, especially considering that, in the former, the preconditions are previously stipulated, and the classification of a country as a safe country should always take into account the reality of the countries, which may not happen in the Canadian system.

2.1.6 Conclusions on SCO in the European system

After having made an overview of how the SCO has been conceptualised in EU legislation, and presented one of its recent applications to a specific country (Turkey), as well as an example of its conceptualisation outside the European Union (Canada), it is time to draw conclusions regarding this concept, namely, its legitimacy and congruence with fundamental human rights.

First, it is important to bear in mind that the SCO policy is, by principle, on the opposite side of the main goals of the international refugee protection system. Whereas the foundation of international protection is, above all, humanitarian values and the protection of life and the integrity of human beings, SCO is, clearly, much more concerned with the healthy functioning of asylum systems at the national and regional levels. So, the question is whether, even with their fundamentally different values, the two concepts are reconcilable.

Looking at the practices of the countries, we have no doubt that reconciliation is possible. If the decision-making institutions believed that they were incompatible, SCO would not be enshrined in national and regional laws.

It is also clear that, with the times, the concept and the criteria for its application have been evolving since the demands and safeguards have increased.

That being said, many problems and issues still arise concerning the concept and its application. While, in theory, the concept is relevant to the control of the applications that are genuinely an abuse of the system, the practice has shown that the permeability of the concept to

[265] 2012 IRPA, Section 110.1; Government of Canada (n 264).
[266] Macklin (n 154), p 124.

other interests and issues, namely to political interests, is still high, even with the increase of the rules to restrict this possibility. The most recent and most paradigmatic case is the classification of Turkey as a safe country, as seen previously.

The lack of consensus regarding the national lists and the lack of the establishment of the concept in national legislation shows that there is no agreement among the Member States about it, despite the standard rules established in the European Directives. This absence of consensus demonstrates that the concept is still not sufficiently developed to impose a mandatory obligation to adopt it and a common European list.

Furthermore, the problems that persist in the European legislation regarding the protection of the rights and safeguards of the asylum-seekers, especially the issues related to the very short time limits and the exclusive responsibility of the applicants to withdraw the presumption of safety in their country of origin, continue to prevent the compliance with the international obligations,[267] which the member states and the EU are required to respect.

Given the current development of the SCO concept and the lack of consensus about it, I believe that its implementation still presents danger and carries severe consequences for many asylum-seekers, rather than benefits for the smooth functioning of systems in general. Thus, states and regional organisations should avoid the use and application of such a concept.

[267] Established in the Geneva Convention and New York Protocol, ECHR and European Charter.

2.2 Safe third country (STC)

After considering the general evolution, at global and European levels, of the cornerstones of the migration and asylum policies from global and European perspectives focusing on the SCO concept, it is time to scrutinise the STC concept and understand how it has been included in European legislation.

The aims of this subchapter are to explore the STC concept and understand how it relates to the international obligations towards the asylum-seekers and refugees, in order to determine how the establishment of this concept in legislation has helped, or not, the protection of the rights and guarantees of the asylum-seekers.

2.2.1 Meaning of the STC concept

Under the 1951 Convention and the 1967 Protocol, as well as international customs, the states have the responsibility to protect those that legitimately ask for asylum. Nevertheless, in some cases, persons cannot be returned to their country without violating the principle of non-refoulement.

In those cases, the States, due to incapacity to receive more refugees or because they do not want to receive them, try to find legal solutions to avoid this obligation. One of the solutions adopted is the use of the safe third country (STC) concept.

The STC[268] concept permits the authorities of the host country to reject an asylum application in the case where the applicant has travelled through other countries that are considered as safe and where the asylum-seeker should have requested international protection.[269] In other words, States can return asylum-seekers to third countries, previously considered as safe, on condition that the

[268] See the differences between Safe Third Country and First Country of Asylum in Stephen H. Legomshy, "Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection" (2003), 15(4), *International Journal of Refugee Law*, p 570 and 571 and 573.
[269] Legomshy (n 268), p 570.

principle of non-refoulement and other fundamental principles are respected ("admission filter"[270]).[271]

The STC concept can be used in two distinct ways. On the one hand, it can be understood as a procedural instrument used by States to refuse to determine the refugee qualification of the claimant based on the argument that it is the responsibility of other States, while, on the other hand, it can be a criterion to determine if another country has sufficient protection to permit the removal of the individuals to there.[272] The use of the concept according to the first perspective is, nowadays, the most used, relevant, and the one that I will focus on.[273]

The other side of the coin of the STC is the readmission agreements. They facilitate the process of readmission, establishing, normally, an explicit obligation to readmit a State's own nationals and a certain number of third-country nationals who have some connection with the country (traditionally, the readmission country is one of the transit countries in which the asylum seeker was in during the travel).[274] These agreements can be bilateral, part of broader agreements, or even part of informal bilateral arrangements.[275]

The establishment of readmission agreements is preferable to unilateral action from the states that reject the application. Unilateral acts make it very difficult to assure that the asylum-seekers will be effectively readmitted and will have access to asylum guarantees.[276]

Moreover, there is also the possibility of instituting agreements in which, besides the question of readmission, the distribution of responsibility for the analysis of asylum requests in a given territory is also established.[277] This is the case, for example, of the Dublin Regulation in the EU, where the criteria and mechanisms for determining the Member State responsible for examining the applications for asylum were established.[278]

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[270] Violeta Moreno-Lax, "The Legality of the 'Safe Country' notion contested: Insights from the Law of Treaties" (ch), *Migration and Refugee Protection in the 21st Century: Legal Aspects* (Académie de droit international de La Haye, 2015), p 670.
[271] Moreno-Lax (n 270), p 665.
[272] Maria-Teresa Gil-Bazo, "The Practice of Mediterranean States in the Context of the European Union's Justice and Home Affairs External Dimension. The Safe Third Country Concept Revisited" (2006), 18(3), *International Journal of Refugee Law*, p 596.
[273] Maria-Teresa Gil-Bazo, "The Practice of Mediterranean States in the Context of the European Union's Justice and Home Affairs External Dimension" (n 272), p 596.
[274] Legomshy (n 268), p 576.
[275] Legomshy (n 268), 576 and 577.
[276] Legomshy (n 268), p 577.
[277] Legomshy (n 268), p 578.
[278] Dublin III Regulation, Articles 8-15.

2.2.2 Relevant principles

The use of the STC concept is less controversial than the SCO concept, especially between international organisations; nonetheless, it also has defenders and opponents. Here we will review some of the principles that are typically associated with both its defence and critique.

One of the first arguments in defence of the STC is that the international obligation to protect refugees is only valid for asylum-seekers that have a "genuine need of protection,"[279] thus excluding all the persons that do not come directly from a country where they face persecution. In other words, according to this theory, the person who decides to cross different countries until she/he reaches a specific country is not seeking protection but searching for better living conditions and consequently is not worthy of receiving asylum in the last country.[280]

The principle of efficiency, as we saw in the previous subchapter, is originally an economic principle, and it aims to achieve the best possible results at the lowest cost and in the least time possible. When applying this principle to asylum application procedures, the States and the regional organizations aim to assess a higher number of asylum applications at the lowest cost and in the shortest time possible.

The relevance of the STC concept is also easily understood in this context of need to find solutions that will reduce costs and resources used. Such is especially the case when the number of applications grows significantly. The SCT concept thus allows for the presumption of safety in some transit countries, and hence, the return of several asylum-seekers to these countries. Consequently, SCT allows the reduction of evaluation-procedure time limits. At the same time, it decreases the number of applications that are being thoroughly evaluated.

Concerning the principle of non-refoulement, in its turn, the STC concept can be very problematic for the protection of the rights of the asylum-seeker and for the general operation of the international system in two ways. On the one hand, the third country where the applicant will return (normally, one of the countries that he/she crossed to reach the final destination) could itself be unsafe or put the asylum-seeker in danger, which is a direct violation of the principle of non-refoulement.[281] On the other hand, the transit country may not have a functional asylum system and,

[279] Moreno-Lax (n 270), p 669.
[280] Moreno-Lax (n 270), p 669-670.
[281] Geneva Convention, Article 33.

in consequence, could send back the asylum-seeker to his/her country of origin, which would be an indirect violation of the principle of no-refoulement[282] (also a violation of Article 33 of 1951 Convention).

Another principle that could be jeopardized is the principle of solidarity or fair distribution. Typically, many transit countries[283] are, themselves, also countries that have economic or social difficulties, so an increase in the number of people in need of international protection increases difficulties that already exist.

2.2.3 STC in EU legislation

Following the exploration of the meaning and principles of the STC concept, it is time to look at how European institutions have been establishing the concept in European legislation. This analysis is accompanied by criticisms as to its implementation, with the fundamental points being both the positive aspects and those that violate the rights and guarantees of asylum-seekers.

Due to the impossibility of analysing all the aspects involved, I will focus on the points that are more relevant to the proposal of this thesis. Furthermore, the procedural issue of the effective remedies will not be addressed in this subchapter since the problems and difficulties that the STC concept raises are similar to those analysed in the SCO subchapter.

2.2.3.1 The past

The first time that the STC concept was used was in the amendments of the Danish Aliens Act in 1986, similarly to the case of the SCO concept.[284] The emergence and increasing use of the STC concept occurred in the period when the European countries started to change their perspective and discourse towards the asylum-seekers. The political argument used was that the asylum-seekers

[282] Geneva Convention, Article 33.
[283] Joint declaration establishing a Mobility Partnership between the Kingdom of Morocco and the European Union and its Member States (3 June 2013), Para 13; Déclaration conjointe pour le Partenariat de Mobilité entre la Tunisie, l'Union Européenne et ses Etats membres participants (3 March 2014), Para 9; Joint declaration establishing a Mobility Partnership between the Hashemite Kingdom of Jordan and the European Union and its participating Member States (9 October 2014), Para 9.
[284] Moreno-Lax (n 270), p 664.

chose a country perceived as the one that would be better for their interests and claims (forum shopping theory), instead of just looking for safety.[285]

Shortly after, in 1989, the UNHCR published a document about the problem of irregular movements of refugees and asylum seekers from a country where they had found protection.[286][287] The UNHCR document established the three elements that characterised the phenomena:[288] (i) refugees or asylum-seekers who move irregularly, (ii) from countries where they have already received asylum, (iii) to find protection elsewhere. In the same document, it was also established that in these cases, the refugees or asylum-seekers should be returned to the country where they had already found protection,[289] but in exceptional cases, when refugees or asylum-seekers could prove that, in the country from where they moved irregularly, they feared persecution or that their physical safety or freedom would be in danger, the last host country should consider the concession of asylum.[290] This development corresponds, however, to a very close but different concept: the country of first asylum.

At the European level, the first time that the concept was introduced was in the Convention for the Implementation of the Schengen Agreement,[291] a fundamental document in the construction of the Single Market project.[292] In this Convention, the Member States established the right to refuse entry or expel asylum-seekers to other Member States, provided that the international rules and obligations were respected.[293]

In 1992, on the Resolution on a Harmonized Approach to Questions Concerning Host Third Countries, the Members States agreed that to consider a country as safe, it shall protect life and freedom according to Article 33 of the Geneva Convention,[294] not submit the applicant to torture or other inhumane or degrading treatment,[295] and provide effective protection against refoulement

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[285] Moreno-Lax (n 270), p 665.
[286] Executive Committee of the High Commissioner's Programme, "Problem of Refugees and Asylum-Seekers Who Move in an Irregular Manner from a Country in Which They Had Already Found Protection" No. 58 (XL) (UNHCR, 13 October 1989).
[287] Maria-Teresa Gil-Bazo, "The Safe Third Country Concept in International Agreements on Refugee Protection: Assessing State Practice" (2015), 33(1), *Netherlands Institute of Human Rights*, p 47.
[288] Executive Committee of the High Commissioner's Programme (n 286), Para a.
[289] Executive Committee of the High Commissioner's Programme (n 286), Para f.
[290] Executive Committee of the High Commissioner's Programme (n 286), Para g.
[291] Convention for the Implementation of the Schengen Agreement (19 June 1990), 42000A0922(02) OJ L 239 (CISA).
[292] Moreno-Lax (n 270), p 673.
[293] CISA, Article 29.
[294] Resolution on Safe Third Countries, Article 2/a.
[295] Resolution on Safe Third Countries, Article 2/b.

according to Article 33 of the Geneva Convention.[296] Besides, the STC to where the applicant is sent back should be a country where he or she already has protection or where he or she has the opportunity to seek protection.[297]

As early as December 1992, the UNHCR published a position about the STC concept. The UNHCR takes the position that the STC concept is legitimate; however, it is problematic in some respects.[298] Firstly, it is important to give the applicant the opportunity to refute the presumption of the safety in his or her case and to appeal, even if through accelerated procedures.[299] Secondly, the protection in the third country needs to be in accordance with basic human standards (protection against return to situations of persecution, severe insecurity, or other situations that justify asylum and treatment in accordance with basic human rights).[300] Thirdly, the states should avoid unilateral returns. In other words, when previous readmission agreements do not exist, the Member States should ensure that the third country gives consent (explicit or implicit) to readmit the applicant because this is the only way to guarantee that the applicant will effectively have access to protection.[301] Finally, the transit in a country should not be sufficient to establish the link between the applicant and the return country, since it is relevant that the asylum-seeker has some connection or link with the return state.[302]

As part of preparations for the 2005 AP Directive, the STC concept was again discussed. The Directive established that the Member States could apply the STC concept and, consequently, consider an application as unfounded[303] when there is a belief that (i) the life and liberty of the asylum-seeker would not be threatened, (ii) the principle of non-refoulement would be respected in accordance with the Geneva Convention, (iii) the international laws, which prohibit removal in case of torture, cruel, inhumane or other degrading treatment would be respected, and (iv) it is possible

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[296] Resolution on Safe Third Countries, Article 2/d.
[297] Resolution on Safe Third Countries, Article 2/c.
[298] UNHCR, "UNHCR's Position on a Harmonized Approach to Questions Concerning Host Third Countries" (1 December 1992).
[299] UNHCR, "UNHCR's Position on a Harmonized Approach to Questions Concerning Host Third Countries" (n 298), point 1 & 2.
[300] UNHCR, "UNHCR's Position on a Harmonized Approach to Questions Concerning Host Third Countries" (n 298), point 3.
[301] UNHCR, "UNHCR's Position on a Harmonized Approach to Questions Concerning Host Third Countries" (n 298), point 4.
[302] UNHCR, "UNHCR's Position on a Harmonized Approach to Questions Concerning Host Third Countries" (n 298), point 5 and 6.
[303] 2005 AP Directive, Article 23(4)(c)(ii).

for asylum-seekers to request international protection in the return country.[304] Moreover, it was expected that, with the adoption of the concept in national laws, the Members States should establish the necessary connection between the asylum-seeker and the third country and the specific rules of functioning of the concept.[305]

The 2005 AP Directive, in paragraph 3 of Article 36, established the obligation of the Council to approve a common European list of STC. As in the case of the SCO concept, this provision was also annulled by the CJEU,[306] based on the lack of exclusive competence of the Council to legislate and on the violation of the EU Treaty's legislative procedures.[307]

In Article 27 of the 2005 AP Directive, which defined the STC concept, there was no express reference to the need for ratification of the Geneva Convention or the New Protocol.[308] So, to be in accordance with the Geneva Convention but also with the ECHR, the 2005 AP Directive needed further development of the criteria for the designation of the states as STC, namely the express reference to the ratification of the principal human rights treaties (Geneva Convention and New York Protocol, Convention against Torture and the International Covenant on Civil and Political Rights and its Optional Protocols), and the existence of a fair and efficient asylum procedure.[309]

The development of the criteria is important not only for the asylum-seekers but also for the EU. According to the ECtHR, when States apply the concept of STC, they do not disclaim their responsibility towards the asylum-seekers.[310] In other words, this position of the ECtHR implies that even when the applicant is transferred to a third country previously considered as safe, and he/she is submitted or exhibits the real risk of being subjected to treatment contrary to Article 3 of

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[304] 2005AP Directive, Article 27(1).
[305] 2005 AP Directive, Article 27(2).
[306] C-133/06 European Parliament v. Council of the European Union [6 May 2008].
[307] The arguments presented for the annulment of this Article were the same to the ones presented for the annulment of the Article related to the common SCO list; C-133/06 European Parliament v. Council of the European Union [6 May 2008], Para 49-61.
[308] ECRE, "ECRE Informations Note on the Council Directive 2005/85/EC of 1 December 2005" (n 181), p 23; UNHCR, "Improving Asylum Procedures" (n 178), p 301.
[309] ECRE, "ECRE Information Note on the Council Directive 2005/85/EC of 1 December 2005" (n 181), p 23.
[310] "The Court reiterates in the first place that Contracting States have the right, as a matter of well-established international law and subject to their treaty obligations including the Convention, to control the entry, residence and expulsion of aliens. […]. It is however well-established in its case-law that the fundamentally important prohibition against torture and inhuman and degrading treatment under Article 3, read in conjunction with Article 1 of the Convention to 'secure to everyone within their jurisdiction the rights and freedoms defined in [the] Convention', imposes an obligation on Contracting States not to expel a person to a country where substantial grounds have been shown for believing that he would face a real risk of being subjected to treatment contrary to Article 3 [...]." T.I. v UK [ECtHR, 7 March 2000] App no. 43844/98, p 14; Ahmed v. Austria judgment [ECtHR, 17 December 1996], *Reports* 1996-VI, Para 38-39.

the ECHR, the country that returned the applicant is still accountable. So, in order to avoid such responsibility and assure the protection of the rights of these persons, the Member States, when transferring someone to a third country, should have the guarantee that it will respect the principle of non-refoulement but also the other rights as established in the Geneva Convention and in the New York Protocol.

Moreover, the lack of European criteria for the necessary link between the STC and the applicant is also a matter of concern.[311] This lack of more detailed criteria allowed some of the Member States to establish that the sufficient link was just the fact that the applicant crossed the STC, which goes against what was defended by different organisations, such as the UNHCR.[312]

2.2.3.2 The present

In 2013, it was finally possible to have a new AP Directive, after discussions that took years between the Council, the European Parliament and the Commission, as seen previously.

In general terms, the 2013 AP Directive brought significant changes, namely the increased safeguards for refugees and asylum-seekers in the European Union in relation to the previous directive. Nonetheless, with regard to the concept of a safe third country, the changes were not so expressive.

Regarding the STC concept,[313] a criterion was added to the list of requirements that allow the classification of a country as STC (no risk of serious harm according to the Qualification Directive),[314] and the necessity to enable the applicants to challenge the unfavourable decision became mandatory.[315][316]

In its turn, the jurisprudence of the ECtHR, although with respect to the application of the concept at national level,[317] has given indications of how the criteria to classify a country as safe should be interpreted and implemented. One of the main aspects that has been analysed in the

[311] ECRE, "ECRE Information Note on the Council Directive 2005/85/EC of 1 December 2005" (n 181), p 24; UNHCR, "Improving Asylum Procedures" (n 178), p 311 and 314.
[312] UNHCR, "Improving Asylum Procedures" (n 178), p 311-314.
[313] 2013 AP Directive, Article 38.
[314] 2013 AP Directive, Article 38(1)(b).
[315] 2013 AP Directive, Article 38(2)(c).
[316] ECRE, "Information Note on Directive 2013/32/EU" (n 198), p 43.
[317] Since the EU itself is not part of the Council of Europe.

decisions of the ECtHR is how the principle of non-refoulement (direct or indirect) should be considered: if formal presence is enough, or if verification in practice is also relevant. One of the cases in which this issue was discussed was in the case of Hirsi Jamaa and Others v Italy, where the ECtHR clearly established that it is not sufficient that the principle is present in law, it must be verified in practice.[318]

Another fundamental aspect that the ECtHR also brought up was the inclusion of the respect for the basic socio-economic rights in the elements that should be considered in the concrete assessment of the risk of ill treatment.[319]

In the 2013 AP Directive, but already in the 2011 proposal of the European Commission to recast the 2005 AP, the concerns about the lack of criteria to define the conditions that need to be met in order to consider a country as STC – principally the inexistent reference to ratification of the main legal international documents in this area (fundamentally the Geneva Convention and the New York Protocol) – remain, calling into question the effective respect for the safeguards of the asylum-seekers.[320]

The inexistence of criteria that define the connection between the applicant and the third country to where she/he should return continues to be a problem for the protection of the rights and safeguards of the asylum-seekers. Without these standards, the Member States are still able to establish transit as a connection requirement, which goes against the recommendations of several organisations.

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[318] Hirsi Jamaa and Others v Italy App no. 27765/09 [ECtHR, 23 February 2012], Para 127 – 128; see also, M.S.S. v. Belgium and Greece App no. 30696/09 [ECtHR, 21 January 2011], Para 223; Sharifiet autres c. Italie et Grèce App no 16643/09 [ECtHR, 21 October 2014], Para 167.

[319] "[...] those persons were systematically arrested and detained in conditions that outside visitors [...] could only describe as inhuman. Many cases of torture, poor hygiene conditions and lack of appropriate medical care were denounced by all the observers. [...] [they] were subjected to particularly precarious living conditions as a result of their irregular situation. Irregular immigrants, such as the applicants, were destined to occupy a marginal and isolated position in Libyan society, rendering them extremely vulnerable to xenophobic and racist acts." Hirsi Jamaa and Others v Italy, App No. 27765/09 [ECtHR, 23 February 2012], Para 125; "[…] the Court must determine whether a situation of extreme material poverty can raise an issue under Article 3. [...] The Court reiterates that it has not excluded 'the possibility that the responsibility of the State may be engaged [under Article 3] in respect of treatment where an applicant, who was wholly dependent on State support, found herself faced with official indifference in a situation of serious deprivation or want incompatible with human dignity' [...]" MSS v Belgium and Greece App no. 30696/09 [ECHR, 21 January 2011], Para 252 – 253.

[320] UNHCR, "UNHCR comments on the European Commission's Amended Proposal for a Directive of the European Parliament and of the Council on common procedures for granting and withdrawing international protection status (Recast) COM (2011) 319 final" (January 2012), p 29.

Finally, looking at Article 39 of the 2013 AP Directive and especially paragraph 2, the European safe third country implies formal preconditions (ratification of the Geneva Convention without geographical limitations, ratification of the ECHR) instead of focusing more on the material ones (the concrete respect for those provisions), which goes against what was established by the ECtHR in different judgments, as seen before.

2.2.3.3 The future

With the developments that occurred in 2014 and 2015, especially since the summer of 2015, and since the functioning asylum system was not addressing the issues, the European Commission presented proposals to change the essential legal documents concerning the EU refugee system.

The STC concept, which is part of this system, also suffered some changes in the proposal for the AP Regulation. The most notable was the establishment of two levels of the STC concept: the national[321] and the European.[322][323]

In the case of the SCO concept, essential improvements were made in the Commission proposal, while, in the case of the STC concept, the evolution was not so positive since more questions and concerns emerged.[324]

Firstly, Article 45 accepts that "sufficient protection", in terms of content, is compatible with a lower level of protection than the one that it is established in the Geneva Convention and New Protocol, provided they respect the standards present in Article 42(2). This new rule opens the door to the possibility of considering a country that does not recognise the refugee status or imposes limitations (geographical or temporal) to the application of the refugee status as safe.[325]

The "sufficient protection" possibility does not, however, respect Article 78(1) of the Treaty on the Functioning of the European Union (TFEU).[326] According to this Article, the common policy on asylum, subsidiary protection, and temporary protection of the EU has to follow the relevant treaties

[321] AP Regulation Proposal, Articles 45 and 50.
[322] AP Regulation Proposal, Articles 45 and 46.
[323] AP Regulation Proposal, Article 45.
[324] The issues and critics related to the existence, at the same time, of national and European STC concepts (Article 50 of the AP Regulation Proposal) and to the suspension and removal of a third country as a safe third country at Union level are the same as those considered for the SCO concept, so they will not be addressed here.
[325] Which goes against the letter and the meaning of the Geneva Convention and of the New York Protocol.
[326] ECRE; "ECRE Comments on the Commission Proposal for an Asylum Procedures Regulation" (n 216).

in the area, namely the Geneva Convention and the New York Protocol. By establishing that "sufficient protection" may be less than the protection provided in the Geneva Convention and New York Protocol, Article 45(1)(3) goes against these two main international treaties, which, in its turn, goes against what is established in Article 78(1) of the TFEU.

Moreover, as for the SCO, the Regulation proposal imposes a mandatory obligation to adopt the STC and a mandatory obligation to apply the concept to particular cases,[327] even without a consensus about the concept. This binding obligation leads to a reduction in the protection of the safeguards of the asylum-seekers in the countries where, previously, the concept was not established.

Another critical issue is the establishment that the sufficient connection between the applicant and the return country is the mere transit.[328] This solution goes against all the recommendations and suggestions of the international community regarding this issue. On the contrary, different organisations, particularly the UNHCR, have always defended that the sufficient connection should be meaningful, and mere transit is not sufficiently meaningful for the establishment of the link.

2.2.4 Practical case: Turkey as an STC (EU-Turkey Statement)

The agreement between the EU and Turkey is the most paradigmatic and significant of the agreements that have been established between the EU and third countries over the last years. On the one hand, it is the most well known and, on the other hand, it is the most complete and developed agreement.

On 18 March 2016, the European Council signed the EU-Turkey Statement, which resulted from the already existing cooperation between the EU and Turkey (since the joint action plan that started on 29 November 2015).[329]

With the objective of stopping smuggling and reducing the number of migrants and asylum-seekers that enter in the EU through Turkey, it was established that:[330] (i) all irregular migrants that arrived in Greece from Turkey after 20 March 2016 should be returned to Turkey after being

[327] AP Regulation Proposal, Article 45(1).
[328] AP Regulation Proposal, Article 45(3)(a).
[329] Council, "EU-Turkey statement" (n 144).
[330] Council, "EU-Turkey statement" (n 144).

registered and individually processed by the Greek authorities; (ii) for each Syrian returned to Turkey from the Greek Islands, another Syrian should be resettled in a Member State from Turkey, according to the UN Vulnerability Criteria; (iii) Turkey should take the necessary measures to stop new routes for illegal migration; (iv) a Voluntary Humanitarian Admission Scheme would be set up after a significant reduction of the irregular crossings; (v) the EU would initiate the process of visa liberalisation for Turkish citizens; (vi) the EU would allocate 3 billion euro to facilities for refugees in Turkey and to ensure the funding of projects of persons under temporary protection (an additional 3 billion euro could be added in case of need for more investment); and (vii) continuing the processes of upgrading of the Customs Union and of Turkey's accession in EU.

This Statement has its legal bases in the AP Directive, and more specifically in the concepts of first country of asylum (for Turkish applicants) and safe third country (for other applicants to international protection).[331]

Taking into consideration all the analyses made previously, here I will analyse whether Turkey can really be considered as a safe country and, subsequently, what are the consequences of this Statement for the protection of the rights and safeguards of the asylum-seekers.[332]

In 2013, the Turkish system was reformed, including now a dual structure for the application of asylum (Europeans can apply for refugee status, while non-Europeans can only apply for other types of international protection).[333][334]

The establishment of a dual structure through the new Law on Foreigners and International Protection[335] ensured Turkey's obligation to protect all persons in need of international protection, independently of their origin. The same law created the Directorate General of Migration Management (DGMM), responsible for the migration and asylum issues (instead of the Foreigners Department of the National Police, which normally acted without expertise or capacities).[336][337]

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[331] UNHCR, "Legal considerations on the return of asylum-seekers and refugees from Greece to Turkey as part of the EU Turkey Cooperation in Tackling the Migration Crisis under the safe third country and first country of asylum concept" (23 March 2016), p 1.
[332] The EU-Turkey Statement raises other issues and problems that will not addressed (namely the conditions in which the asylum-seekers live during the process of evaluation of their case in Greece), which are, however beyond the scope of this thesis, and therefore they will bot be addressed. For these issues, see for example, Amnesty International, "A Blueprint for Despair: Human Rights Impact of the EU-Turkey Deal" (2017).
[333] Turkey had only ratified the Geneva Convention and not the New York Protocol, which implies that it just accepted asylum applications from European Countries.
[334] Oktay Durukan, "Country Report: Turkey" (ECRE ed, AIDA, December 2015), p 15.
[335] Law No. 6458 on Foreigners and International Protection (4 April 2013).
[336] Durukan (n 334), p 17.

Regarding the non-European asylum-seekers, on the one side, Turkey implemented the temporary protection regime for persons that come from Syria, which permits access to legal stay and some level of access to basic rights (protection from refoulement) and services[338] (Article 91 of Law on Foreigners and International Protection and Temporary Protection Regulation).[339] This regime is a group-based approach and does not imply a formal status determination procedure.[340] The people that benefit from temporary protection cannot, however, seek individual international protection.[341]

On the other hand, asylum-seekers that come from other countries (besides European countries or Syria) should apply for individual international protection, which takes the form of conditional refugee status (Article 62 of Law on Foreigners and International Protection) or subsidiary protection status (Article 63 of Law on Foreigners and International Protection). The conditional refugee status permits access to fewer rights, does not allow long-term legal integration, and does not allow family unification.[342] The Turkish subsidiary protection system is very similar to the subsidiary protection system established in the EU Qualification Directive, and as in the case of the conditional refugee status, these persons have access to fewer rights and guarantees but can benefit from family unification.[343]

Although relevant changes occurred during 2013 and 2014, the effective access to international protection has been criticised. For example, in the Report of the Council of Europe of 2016,[344] Ambassador Tomáš Boček declared that after the DGMM achieved the numbers a priori established for international protection applications, the registration of the applications stopped or, at least, the processes were delayed, obliging asylum-seekers to wait, sometimes months or one year, to have access to their first appointment.[345] Moreover, in 2016, pre-registration phases were introduced without being published, which makes the process even more difficult.[346]

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[337] Durukan (n 334), p 15.
[338] "Of this registered population of 2,291,900 about 263,000 are accommodated in 25 large-scale refugee camps spread across 10 provinces in the south of Turkey, whereas the remaining majority live in residential areas in private accommodation on their own resources and dispersed all over Turkey […]"; Durukan (n 334), p 16.
[339] Durukan (n 334), p 15.
[340] Durukan (n 334), p 16.
[341] Durukan (n 334), p 16.
[342] Durukan (n 334), p 17.
[343] Durukan (n 334), p 17-18.
[344] Tomáš Boček,"Report of the fact-finding mission to Turkey" (Council, 10 August 2016).
[345] Boček (n 344), p 8.
[346] Boček (n 344), p 8.

Regarding the access to international protection during detention, Ambassador Tomáš Boček observed that, formally, the rules were respected, but when he talked with detainees, they had declared that they had not been given information about their rights and guarantees or access to the UNHCR or their lawyers during the time they were detained.[347]

In December of 2015, right before the signing of the EU-Turkey Statement, Amnesty International published a report denouncing human rights violations in Turkey.[348]

Although there were changes promoted by the Turkish government in 2013-2014, as already seen, Amnesty International reported continued inadequate access to housing, education, and healthcare for refugees, especially for the ones outside of the government-run camps.[349]

In September 2015, Amnesty International observed a raise the numbers of persons detained for attempting to cross to the EU irregularly. They were placed in isolated detention centres, without access to outside information regarding their detention or their rights, and, in some cases, there was physical ill-treatment, which violates national and international laws.[350]

Moreover, diverse cases of unlawful detention were followed by a forced return to Syria and Iraq, even when the affected persons were at risk due to serious human rights violations in their countries.[351] These practices violate the most basic national and international rules, namely the principle of non-refoulement.

More recently, the ECRE's last report regarding international protection in Turkey brings even more disturbing news. In 2018, important changes in the international protection procedures occurred. After the end of the UNHCR's registration activity, the DGMM took responsibility for this activity, but in practice, many obstacles were put into practice for the applicants to have access

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[347] Boček (n 344), p 8-9.

[348] Amnesty International, "Europe's Gatekeeper: Unlawful Detention and Deportation of Refugees from Turkey" (December 2015).

[349] "The situation remains dire for many, with legal provisions to grant work permits not being applied in practice and little or no subsistence available to the 90% of Syrian refugees who live outside government-run refugee camps. The economic situation for other groups of refugees and asylum-seekers in Turkey is similarly difficult and the Law on Foreigners and International Protection that entered into force in 2014 is rarely implemented in practice, with the result that very few asylum claims are actually being processed." Amnesty International, "Europe's Gatekeeper" (n 348), p 1-2.

[350] Amnesty International, "Europe's Gatekeeper" (n 348), p 3-10.

[351] Amnesty International, "Europe's Gatekeeper" (n 348), p 10-12; Amnesty International, "Turkey: Illegal mass returns of Syrian refugees expose fatal flaws in EU-Turkey deal" (1 April 2016); Apostolis Fotiadis, Helena Smith and Patrick Kingsley, "Syrian refugee wins appeal against forced return to Turkey", *The Guardian*, (London, 20 May 2016); Human Rights Watch, "Turkey: Syrians Pushed Back at the Border" (23 November 2015).

to international protection procedures (refusal to accept registrations, many delays in the processes, or many formalities and obligations for the applicants).[352]

Furthermore, the established principle of non-refoulement suffered several derogations[353] for membership or connection with terrorist organisations or criminal groups and threats to the public order or health, as established by international organisations, in 2016.[354] In the case Y.T. on 12 June 2012, the Turkish Constitutional Court delivered a pilot judgement regarding the amendments made to the principle of non-refoulement by the Emergency Decree, where the Court established that since the Decree, 866 individual applications for interim measures against deportation had been made, and the Court granted them in 784 cases.[355] Besides, the Constitutional Court requested the government to examine the law to understand if changes undermined the protection from refoulement or not.

In terms of temporary protection, many problems have been emerging, mainly related to the ending of application registrations for the status and the suspicions around the return of 315.000 Syrians.[356]

Considering the geographical limitations, living conditions, the detention and deportation practices, and all the changes that have occurred since 2016, it seems that Turkey does not respect the criteria established on Article 38 of the 2013 AP Directive to be considered a STC.

In conclusion, in my view, the application of the STC concept to Turkey and the EU-Turkey Statement are concrete examples of the dangers faced by thousands of people, especially in the area of violations of the principle of non-refoulement.

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[352] ECRE, "Country Report: Turkey" (2018 Update, AIDA, 39 March 2019), <https://www.asylumineurope.org/news/29-03-2019/aida-2018-update-turkey> accessed 08/06/2019, p 14.
[353] Introduced by the Emergency Decree 676 (29 October 2016), Karar Sayısı: KHK/676.
[354] ECRE, "Country Report: Turkey" (n 352), p 14.
[355] Pilot Karar Usulunun Baslatilmasina Dair Ara Karar (News, 12 June 2018); ECRE, "Turkey: Constitutional Court Pilot Judgement on Protection from Refoulement" (26 October 2018).
[356] ECRE, "Country Report: Turkey" (n 352), p 15.

2.2.5 STC in the World – The South African experience

Having examined the STC concept in the EU, I will now concentrate on another example of the application of this concept in another part of the world: the experience of the STC in South Africa.

These analyses will help to explain how other countries deal with the same concept and, above all, to see how other applications influence the protection of asylum-seekers' rights.

South Africa is an important country in the area of asylum since it is a major host country in Africa. In 2017, the country had 281.574 refugees and asylum-seekers (a significant number, but much lower than before[357]).[358]

South Africa's asylum system was established in the 1998 Refugees Act,[359] which was amended in 2008,[360] 2011[361] and 2017.[362] Looking at the legislation, we do not find references to the STC concept (or the SCO concept); however, when we take into consideration the practice of rejecting asylum requests, we cannot conclude the same.[363]

Without any explicit reference, the concept emerged with the introduction of the "advance passenger proceeding" in the Immigration Amendment Act in 2011.[364] With that the South African government intended to apply the concepts of STC and SCO. This new designation permitted the South Africa administration to accept only asylum applications from asylum-seekers coming directly from their country of origin.[365] With this interpretation of the concepts, the objective seems

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[357] In 2015, South Africa had 1.218.739 refugees and asylum-seekers in its territory. South Africa Regional Office, "Key Figures" (UNHCR), <http://reporting.unhcr.org/node/2524> accessed 19/05/2019.
[358] South Africa Regional Office (n 357).
[359] Refugees Act no 130/1998 (20 November 1998).
[360] Refugees Amendment Act no 33/2008 (26 November 2008).
[361] Refugees Amendment Act no 12/2011 (26 August 2011).
[362] Refugees Amendment Act no 11/2017 (18 December 2017).
[363] Gil-Bazo, "The Safe Third Country Concept in International Agreements on Refugee Protection: Assessing State Practice" (n 287), p 50.
[364] Immigration Amendment Act no 690/2011 (26 August 2011), Section 1(1).
[365] "You must remember, international law refers to the first safe country an asylum seeker enters. […] Even from Egypt, we will have to ask if South Africa is the first safe country – we may get told that Sudan was not safe and then ok. But, we must ask. If you coming from China at our port of entry, we must ask if we are the first safe country because international law regulates this matter. This is all this is. If someone says I first flew to Swaziland then we must ask why Swaziland was not safe for you. Because you must realise, a lot of these people applied for passports and visas from their governments, boarded planes and therefore you must ask. But if it is clear that South Africa is the first safe country then you cannot ask. This is all this means, especially because we do not want to be taken for granted as a country." South Africa Government, "Transcript copy: Interaction with media by Home Affairs Minister Dr Nkosazana Dlamini Zuma regarding amendments to the Immigration Bill and new permitting regime, Media Statements" (2 September 2011); Gil-Bazo, "The Safe Third Country Concept in International Agreements on Refugee Protection: Assessing State Practice" (n 287), p 50.

to be the restriction of the obligation to accept persons in need of international protection, a position that is not in accordance with international refugee law.[366]

In 2014, in Regulation 22 of the Immigration Regulations 2014,[367] the South African government established that the application of an asylum-seeker should be rejected if, among other reasons, the applicant already has refugee status. This position seems to be a step back from the previous one, since the rejection now only refers to the cases where asylum-seekers already have protection and not whenever South Africa is not the first country where the asylum-seeker stops after leaving the country of origin.

2.2.6 Conclusions on STC in the European system

After an overview of how the STC has been conceptualised in EU legislation, a recent application of it to a specific country (EU-Turkey Statement), and an example of its conceptualisation outside the European Union (South Africa), it is time to reflect on the concept itself, namely its consequences for the protection of the rights and safeguards of asylum-seekers and refugees.

It is undeniable that the evolution of the EU legislation on asylum brought important changes to the development of the protection of the rights of asylum-seekers and refugees.

The evolution of the STC concept, however, was much less visible, especially in the Regulation Proposal. This proposal brought negative solutions for the existing problems, particularly Article 45 of the AP Regulation Proposal, which establishes that a country can be considered as an STC even with a lower protection level than the one established in the Geneva Convention and the New York Protocol.

In response, in April 2018, the UNHCR established that to consider a country as an STC and, therefore, allowing the return of the asylum-seeker, that country has to treat, in law and in practice,

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[366] Gil-Bazo, "The Safe Third Country Concept in International Agreements on Refugee Protection: Assessing State Practice" (n 287), p 51-52.

[367] Immigration Regulations 2014, Government Notice R413 in Government Gazette 37679 (22 May 2014), <http://www.ufh.ac.za/international/assets/13-of-2002-immigration-act_regs-gnr-413_26-may-2014---to-date.pdf> accessed 19/05/2019.

the asylum-seekers and the refugees in accordance with the 1951 Convention, the 1967 Protocol, and other human rights standards.[368]

One of the main concerns that are normally associated with this concept is the fear of violating the principle of non-refoulement (directly or indirectly). In this respect, this fear continues to be a concern since some of the readmission agreements still do not have specific rules for the question of refugees or asylum-seekers (the dominant concern of these agreements continues to be irregular migration and the means to control it), which means that they do not ensure that, after the return, asylum rights and guarantees will be respected.[369]

Because the European rules do not require the existence of readmission agreements for the returns, the lack of agreement further increases the concern about the rights of these persons.[370] In these situations, there are no substantive facts or documents that ensure that the asylum-seeker will see his/her rights respected and will be allowed to submit the request for asylum in the return country.[371]

Another central issue for the application of the STC concept is the determination of the links between the applicant and the STC. In the same document about the legal aspects of STC in 2018, UNHCR notes that the STC concept is normally applied when a person could have found and still can find protection in a third country when "it appears that a person, before requesting asylum, already has a connection or close links with another state".[372] Nevertheless, the Member States and now the EU, in the AP Regulation Proposal, continue to understand that it is enough if the STC is one of the transit countries of the asylum-seeker.

The STC concept itself could be a useful tool to help in the construction of a solidarity system. The problem arises, however, when it is used without taking into consideration the minimum standards of safety in law and practice required to answer to political interests. If the Commission's proposal regarding this concept is accepted, the protection of the rights of asylum-seekers and refugees will undoubtedly decrease.

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[368] The asylum-seekers should have access to the asylum procedures, to basic human rights, especially in the case of detention, and the state has to provide access to sufficient means to maintain adequate standards of living. UNHCR, "Legal Considerations regarding access to protection and a connection between the refugee and the third country in the context of return or transfer to safe third countries" (April 2018), Para 7-10.
[369] Legomshy (n 268), p 583.
[370] Legomshy (n 268), p 584-585.
[371] Legomshy (n 268), p 584-585.
[372] UNHCR, "Legal Considerations regarding access to protection and a connection between the refugee and the third country in the context of return or transfer to safe third countries" (n 368), Para 6.

Conclusion

The evolution of the international system of protection of asylum-seekers and refugees, as we know it today, started at the beginning of the 20th century. Nevertheless, its main development occurred only after WWII, with the creation of the UNHCR and the Geneva Convention (complemented later by the New York Protocol).

At the European level, the creation of a European system did not happen until much later. The development started in the 1980s after a significant increase in the number of people trying to reach European territory and with the development of the Single Market.

In the beginning, the use of the European Community stage (through intergovernmental cooperation) aimed at seeking new solutions to decrease the number of entries of persons from third countries through the restriction of the rights and guarantees of these persons. This change of stage is justified by the increase of the national judicial and civil society opposition to these types of measures.

From the late 1990s and in the early 2000s, the reality changed. In consequence of the development of the structure and functioning of the current EU, namely with the increase of the powers of the European Parliament (co-decision procedure), the end of the unanimity requirement in the Council decisions, and the expansion of the jurisdiction of the CJEU, the role of the European framework in the growth of the protection of the rights and guarantees of the asylum-seekers in the European territory is undeniable.

This conclusion can be safely made for two reasons. On the one hand, the countries that, at a national level, have a strong protection system, are not required by the European law in the area of asylum to decrease their protection, while, regarding the ones that have lower protection, the changes in the European legislation oblige them to increase their protection.

That said, many improvements are still necessary to make the European system a fair and just system. Proof of this necessity was the blockage of the asylum system after a substantive increase of asylum-seekers to the EU in 2014 and 2015. During this period, while some countries were overburdened with the responsibility of assisting and welcoming the large number of asylum-

seekers (namely Greece, Italy, and Germany), other countries simply refused to share responsibility in doing so.

In order to overcome these problems, the European Commission presented proposals to change the main legal documents that formed the European migration and asylum system. The different positions of the Member States, and of EU institutions such as the Council and the European Parliament, has blocked all possibilities of reaching an agreement and developing the current legislation. This lack of agreement has not only been stopping the improvement of the system but has also been preventing a real response to the migration and asylum issues.[373]

Although it has been impossible go further at legislative level, the EU has, through its international relations with third countries, implemented a policy of externalisation of borders and controlling the migration and asylum flows, in order to avoid the arrival of migrants and asylum-seekers to the EU territory. These policies have been implemented by the European agencies related to migration and asylum (namely Frontex and the European Asylum Support Office). The EU-Turkey Statement, as previously said, is the most well known and comprehensive of all, but it is also a paradigmatic example of how, over the last few years, concerns with security and border control have taken precedence over refugee rights approaches.

The evolution of the SCO and STC concepts in the EU law has been, generally, positive for the increase of the protection of asylum-seekers' rights and safeguards because, over time, the requisites and the criteria for their application have been raised and because this evolution has also been reflected in the national legislations of countries with the lowest levels of protection.

The question now is to know if the evolution of the criteria and the safeguards of the SCO and STC concepts are enough to affirm that they are not too restrictive or violate the rights and guarantees of the asylum-seekers and refugees and allow for an effective use of the system.

Over the course of time, three major problems have been persisting in relation to the SCO concept. First, the lack of consensus among the Member States and between the Member States and the EU on the SCO lists shows the fragility of the criteria of the SCO concept or, at least, regarding the interpretation of the characteristics of a SCO, which calls into question the concept itself.[374]

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[373] As happens, for example, in the area of trade.

[374] Why, for example, does the United Kingdom consider Mali as a SCO, while no other country does so? Or why do Germany, the Netherlands, the United Kingdom, Slovakia, Denmark, Bulgaria, Malta, France and Luxembourg, consider Ghana as an SCO while the other countries do not?

In addition, although the SCO should be a mere procedural concept used to facilitate the functioning of the asylum system, it seems that it is used for other objectives and interests, namely for political interests, which is corroborated by the existence of several different SCO lists. The use of the SCO concept for political objectives seems to be also the case of the classification of Turkey as an SCO.

Furthermore, although the mandatory application of this concept helps the construction of a harmonised asylum system, it creates another problem: this solution imposes the use of the concept, even in Member States that do not use it, which causes a decrease of the guarantees for some asylum-seekers in countries where the need for accelerated processes is not felt or, at least, is felt in a different way.

Lastly, there are procedural challenges of the concept that still persist, namely the issue of the burden of proof lying solely on the asylum-seeker. This is particularly problematic if we take into account the short time limits and the prejudice that sometimes exists towards asylum-seekers.

Thus, taking into consideration these three elements and the further discussions referred to above, the application of the SCO concept still presents dangers for and entails restrictions to the protection of the refugees' human rights.

In relation to the STC concept, besides the procedural issues already mentioned concerning the SCO, two major problems call into question the use of this concept. Firstly, the possibility of considering a country as safe when it did not ratify the Geneva Convention and/or the New York Protocol. These two primary documents contain the minimum standards for the protection of asylum-seekers and refugees. So, if the European legislation considers as STC countries that did not ratify these two documents, it is because the EU admits the possibility of classifying countries that have lower levels of protection than those established in the Geneva Convention and New York Protocol as safe, which, in itself, is a violation of the international refugee law. Besides it also violates Article 78(1) of the TFEU, which established that the EU asylum policy "must 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."

Secondly, the establishment that transit is a sufficient link between the asylum-seekers and the STC to where they should return continues to not take into consideration the concerns and suggestions of international organisations such as the UNHCR.

Therefore, taking into account these challenges and the discussions previously made, the conclusion can only be one: the dangers to the rights and guarantees of the asylum-seekers introduced by the two concepts are too vast to be compatible with an effective, fair, and just asylum system.

Additionally, the issues and problems related to the safety concepts are no longer just raised by the strict application of the SCO and STC concepts. Now, with the externalisation of the border policies and with the informal agreements made with neighbouring countries to control irregular migration and to prevent migrants and refugees from arriving in European territory, these questions have a broader application.

It is not correct to affirm that, in externalisation and border control policies, the SCO and STC concepts are applied, but it is, nevertheless, correct to assert that these policies imply the use of foundational principles and ideas analogous to those used in the SCO and STC concepts (especially the principle of non-refoulement and the idea of sufficient safety). This justifies raising similar questions and issues regarding both policies and points to the current relevance of all the questions highlighted in this thesis.[375]

With the rise of populisms, associated with anti-migration/refugee movements and governments, it is fundamental that the EU and its institutions (namely the Commission and the European Parliament) show that they are prepared to deal in a united, consistent and humane way with the internal challenges of a still uneven Europe, but also with the external challenges, such as those posed by migration and asylum.

Policies mostly based on safe concepts and border controls can help ward off some of the problems in the short term, but they do not solve them. It is essential for the EU to set up a union policy that addresses, on the one hand, the integration of the persons that arrive in European territory and, on the other hand, the establishment of safe paths for the asylum-seekers and of

[375] The criminal action that was submitted to the ICC to prosecute the EU for the death of migrants in the Mediterranean fleeing from Libya proves exactly the connection between the foundation principles and ideas of the SCO and STC concepts and the externalisation policy: "The submission states that: 'In order to stem migration flows from Libya at all costs … and in lieu of operating safe rescue and disembarkation as the law commands, the EU is orchestrating a policy of forced transfer to concentration camps-like detention facilities [in Libya] where atrocious crimes are committed.'"; Owen Bowcott, "ICC submission calls for prosecution of EU over migrant deaths", *The Guardian* (London, 3 June 2019); See also Amnesty International, "Cruel European migration policies leave refugees trapped in Libya with no way out" (12 November 2018); Pijnenburg, Gammeltoft-Hansen and Rijken (n 143); Annick Pijnenburg, "From Italian Pushbacks to Libyan Pullbacks: Is Hirsi 2.0 in the Making in Strasbourg?" (2018), 20, *European Journal of Migration and Law*.

agreements and (democratisation, economic, military) cooperation with third countries to help resolve the problems and conflicts that are at the root of the rise in the numbers of asylum-seekers and refugees, even if this implies some internal opposition. Only then will the asylum-seekers and refugees be able to enjoy an effective and fair system of protection.

Very recently, in May of this year, the Commissioner for Human Rights of the Council of Europe, in the Recommendation Report "Lives saved. Rights protected. Bridging the protection gap for refugees and migrants in the Mediterranean"[376] urged the members of the Council of Europe, which include, in a direct way, all the Member States of the EU and, in an indirect way, the EU itself, to increase their contribution in the resettlement programmes and to enable and expand "[…] the possibilities for humanitarian visas, sponsorship schemes or other mechanisms that help create safe and legal routes"[377], what would lead to a real growth of the safety of the asylum-seekers and refugees.

[376] Commissioner for Human Rights of the Council of Europe, "Lives saved. Rights protected. Bridging the protection gap for refugees and migrants in the Mediterranean" (24 May 2019).
[377] Commissioner for Human Rights of the Council of Europe (n 376), Recommendation 34.

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