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En Route to Protection:
a literature review of key issues in refugee law[1]

Katia Bianchini[2]

Abstract

Migrants and asylum seekers have been at the forefront of international, regional, and national debates for nearly two decades. During this period, the challenges related to their protection needs have been widely researched and the body of literature has become very vast. However, many issues remain underexplored, both in specialized migration literature and socio-legal analysis. Within this context, the overarching aim of this working paper is to provide a literature review on key protection issues in refugee law and contribute to the academic debates on the limitations of the existing legal provisions. By reviewing mostly legal and, to a lesser degree, social science studies, the paper highlights the shortcomings of the law, encompassing both legal gaps and implementation problems in two main thematic areas that affect EU member states individually or the EU as a whole – namely access to the territory and access to asylum once in the country of refuge. The paper concludes with some remarks on the status of the current scholarship and hopes to establish the basis for future interdisciplinary research in legal and social sciences.

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Key Messages

- The research gaps in the field of asylum law coincide with the protection gaps.
- There is a strong disconnect between legal and social science studies regarding their assessment of the effectiveness of the law. This is particularly evident for issues connected with access to the territory as well as for some aspects of access to asylum procedures.
- Interdisciplinary legal and social science research has the advantage of contextualizing immigration and asylum policy and drawing attention to the reality on the ground and the lived experiences of migrants and protection seekers.
- More interdisciplinary legal and social science research is needed concerning migrants and protection seekers' access to the territory. Topics that deserve to be explored include: EU states and cooperation with third states in implementing externalization measures; the impact of externalization on the principle of non-refoulement and fundamental rights; officials' actions at the borders and monitoring and accountability mechanisms; the intersection between the Law of the Sea, EU law, human rights, and refugee law; what has been done and what should be done at the EU level regarding search and rescue of migrants at sea; investigations of and treatment of border deaths; the role of the courts in the protection of migrants and protection seekers in transit by sea; functioning of structured responses to safe pathways to reach EU states; responsibility sharing for refugees and EU responses.
- More interdisciplinary legal and social science research is needed concerning protection seekers' access to the asylum system. Relevant topics for investigation include: the application of the concept of internal relocation in the country of origin as grounds for refusing protection; the application of the 'safe third country' and 'safe country of origin' concepts to refuse asylum applications; the legal treatment and the experiences of 'refugees in orbit'; actual access to legal aid during the asylum procedures and how this effects the outcome of cases; challenges that decision makers face during the asylum determination process; decision makers' degree of independence; the effects of the Dublin Regulation on secondary movement, right to family life, reception services, and asylum seekers' strategies regarding their journeys; provision and management of reception services in light of the diversity of situations and cultures of asylum seekers.

1. Introduction

This working paper reviews the literature of the past 20 years dealing with the key protection issues affecting asylum seekers.[3] Its aim is to identify works that capture gaps in the legal framework or implementation problems affecting EU member states or the EU as a whole, with particular regard to access to territory and asylum. Moreover, having found a strong disconnect between law and social science studies in this area, it highlights topics that require further research and would benefit from better documented knowledge of the reality on the ground. The paper contributes to the state of research by bringing together legal studies and social science, suggesting how social science studies could enrich legal scholarship, and indicating what needs to be done to improve refugee law and its implementation.

By way of background, the number of migrants [4] fleeing poverty, violence, wars, and environmental disasters is currently the highest since World War II (Cumming-Bruce 2019; UNHCR 2019b; van der Klaauw 2009). Very often, these people have no legal means to enter safer and wealthier countries and thus have no choice but to engage in dangerous journeys, both in terms of the geographical paths taken and the arrangement of their journeys through smugglers and traffickers UNHCR 2019a: 6). According to recent surveys, many of these migrants have a claim for international protection and apply for asylum upon arrival in the European Union (EU).[5] However, discourses about migrants reflect the increasingly populist shift in Europe, and they have frequently been portrayed as a group of people motivated by criminal intent or desire to abuse the system (Tuitt 1996; Costello and Hancox 2016). In addition, they have often been associated with international terrorism and, as a consequence, with narratives on the securitization of migration (Jakešević and Tatalović 2016; Nail 2016; Estevens 2018; Colombo 2018).

In 2015, the EU asylum system faced an unprecedented challenge when the numbers of people seeking protection rose dramatically, reaching one million people. This so-called 'refugee crisis' has affected countries' capacity to process asylum applications and provide reception services, as well as having consequences for the Common European Asylum System (CEAS).[6] Nevertheless, since 2016, contrary to media portrayals, the number of arrivals has been decreasing (Eurostat 2020). Between 1 January 2019 and 30 September 2019, about 80,800 refugees and migrants came via the Mediterranean routes to Europe, 21% less than in 2018 (102,700). In this period, some 46,100 people reached Greece (the majority arrived by sea, via routes across Turkey), 23,200

[3] The term 'asylum seeker' is used to describe migrants who are seeking protection under international, regional, or national law refugee law. The term refugee is used to refer to asylum seekers who have been formally granted protection.
[4] Given the absence of a universally accepted definition, in this paper the term 'migrant' is used broadly to refer to "a person who moves away from his or her place of usual residence, whether within a country or across an international border, temporarily or permanently, and for a variety of reasons." (IOM: 2020). The term encompasses economic migrants and protection seekers (asylum seekers, victims of trafficking, stateless persons, children, and any persons who may be at risk of human rights violations and abuses) (ibid.).
[5] According to available data, it appears that more than 50% of applicants were recognized as refugees in 2018 (Mercator Dialogue on Asylum and Migration 2019: 24).
[6] The term 'refugee crisis' refers to an exceptional situation that puts an unusual burden on systems for managing the influx of refugees. The term emerged in spring 2015, when five overcrowded boats sank in the Mediterranean Sea, resulting in the death of over 1,200 people. In the months that followed, Europe experienced an unusual increase in the numbers of refugees and migrants arriving by sea and land. This development led to the closure of the Balkan route as well as the EU-Turkey Agreement of 18 March 2016. The 'refugee crisis' is further marked by a discourse that labels migrants and refugees as "dangerous invaders – posing a threat to 'our' [European] safety, economic well-being, cultural identity, language and values" (Baerwaldt 2018; see also Lee and Nerghes 2018; Greussing and Boomgaarden 2017).

Spain, and some 7,600 Italy. In addition, some 1,200 people arrived in Cyprus by sea and some 2,700 people in Malta (UNHCR 2019a: 6–7).

The decreasing number of arrivals is partly linked to the EU's undifferentiated treatment of economic migrants and asylum seekers based on a policy of deterrence at border zones and in transit countries, as well as on refusing entry to those who have been able to reach the territory, a practice known as interdiction (UNHCR 2019a: 6). In particular, EU Member States have developed cooperation agreements with transit countries in diverse areas that include "interdiction, border control, readmission, protection capacity building, and even negotiating the idea of 'offshore processing centres'" (Betts 2006: 653). At its borders, in turn, the EU has 'externalised' its immigration controls via special agreements with states in North Africa and Eastern Europe; these agreements have led to militarization of EU borders to deter new arrivals and created a situation that has significantly impacted the rights of migrants (Campbell 2009: 2–3). As part of this framework, the EU's recent agreements with Libya and Turkey create obstacles for migrants to reach the EU, so that the only remaining options are the most dangerous routes to Italy and Malta (Clayton and Firth 2018: 438; Martin et al. 2014: 17). Moreover, while the European Border and Coast Guard Agency (Frontex) engages in rescue operations along the borders of the EU, it is also involved with pushing back boats with migrants (see sub-section 3.4; Terlouw 2017: 250).[7] The uncertain fate of the asylum seekers sent back to Turkey, which has been reported to refoul refugees at the Syrian border, has been hardly examined (Terlouw 2017: 253). Both academics and (non-) governmental entities have criticised the EU's cooperation with Libya, which continues despite the arrest and detention of migrants by the Libyan government and continued reports of their ill-treatment and torture. Libya has made no attempt to regulate the abuse suffered by detainees, and some studies maintain that Libya also protects smuggling operations (Campbell 2009: 12–13; OHCHR 2017; Human Rights Watch 2019). Apart from that, Libya is not a signatory to the Refugee Convention and Turkey has signed the Refugee Convention but is not a party to the 1967 Protocol Relating to the Status of Refugees, which extended the original scope of the Convention (which applied primarily to refugees from WWII and from Europe) and made it universally applicable (Terlouw 2017: 252).[8]

The deterrence-based approach to managing irregular migrants lacks an essential component: the protection of persons *en route* to a safe country. In light of this, the United Nations High Commissioner for Refugees (UNHCR) and civil society organisations have tried to ensure that these migrants are not merely being interdicted and excluded, but also protected through, for example, rescue at sea operations and expansion of resettlement programmes (Betts 2006: 653). However, as this paper will discuss, deterrence and exclusion policies continue to affect migrants'

[7] Some interdiction operations may be carried out in a legitimate manner, as the principle of non-refoulement is breached only when the state in question has jurisdiction over the persons concerned and does not fairly assess their refugee status (Kim 2017: 61–62).

[8] The Refugee Convention was initially conceived to deal with refugees displaced by the Second World War, so it restricted the definition to those who feared persecution from events occurring in Europe before 1 January 1951. The 1967 Protocol removed the temporal and geographical restrictions (Clayton and Firth 2018: 437). The Libya-EU Agreement of 2 February 2017 strives for "urgent solutions" concerning illegal crossings from Libya to Europe "by sea, through the provision of temporary reception camps in Libya", migrants' "voluntary or forced return to the countries of origin", and the establishment of agreements with sending countries to take their citizens back (Odysseus Network 2017). The Turkey-EU Agreement, which entered into force on 18 March 2016, stipulates that Turkey shall take back any asylum seeker from the Greek islands who arrived illegally after 20 March 2016. The agreement provides for resettlement of 72,000 refugees. It also states that for each irregular Syrian migrant returned to Turkey from the Greek islands, the EU will resettle another recognized Syrian refugee from Turkey (Corrado 2020; Terlouw 2017: 252).

mode of travel and the dangerous situations and vulnerabilities to which they are subject (Nardone and Correa-Velez 2015: 303); furthermore, these policies shape the categorization of migrants' legal status after they reach Europe.[9] This occurs, in my view, not only in breach of obligations under international law, but also of as Hannah Arendt put it, the moral existence of the "right to have rights".[10]

Upon their arrival in the EU, asylum seekers face a number of challenges rooted in the structure and administrative operation of the asylum systems which present further obstacles to obtaining legal status (i.e., lack of access to status determination procedures, case backlogs, inadequate access to legal representation, issues with meeting the legal definitions to qualify for protection) (Türk and Dowd 2014). As a consequence, a considerable number of persons end up not being protected by existing international, regional, or national laws. The literature shows that even where such laws exist, safety and security are not necessarily guaranteed in practice – improved implementation is needed to ensure more consistent and effective responses (Martin et al. 2014).

Breaking down these various issues, the paper is divided into 5 sections: section 2 explains the methodology of the literature search. Section 3 and 4 examine the most controversial contemporary issues in law and practice: access to the territory and access to the asylum system once in the country of refuge. The paper ends with a critical reflection on the findings of the literature review and indicates research gaps that need further investigation and could benefit from interdisciplinary dialogue between law and other social sciences (section 5).

2. Methodology for Literature Search and Review

Over the last 20 years, many studies have analysed asylum-related legislation and the treatment of asylum seekers at both national and EU levels. Such literature is composed not only of academic scholarship but also of policy briefs, reports by NGOs, and working papers.[11] This paper reviews

[9] Most classifications of migrants are based on the circumstances of their departure. This is certainly the case for the classic binary of forced versus voluntary migration, as well as for legal distinctions between refugees and others. "Even though from a sociological perspective it is now widely accepted that such binaries are more accurately reflected by a continuum (...), it is still the circumstances governing an individual's decision to leave their place of citizenship or at least long-term residence, that dictate the ways in which that migration will be subsequently classified" (Collyer 2010: 279).

[10] The "right to have rights" is an idea introduced by Arendt in her seminal work *The Origins of Totalitarianism*, in which she refers to the millions of refugees left without a state to protect them: "We became aware of the existence of a right to have rights (and that means to live in a framework where one is judged by one's actions and opinions) and a right to belong to some kind of organized community, only when millions of people emerged who had lost and could not regain these rights because of the new global political situation" (Arendt 1973: 296–297). Whereas the idea of the right to have rights is not a law, Asher Lazarus Hirsch and Nathan Bell argue that it demonstrates the need "for law based on principle, grounded in an ontological claim concerning what it means being a human being. This entails an understanding that only through political recognition of refugees, realised via an international law ensuring entry into states, can human dignity – understood not simply as the protection of bare human life, but as a right for belonging and participation – be guaranteed" (2017: 426). The authors conclude that, "[c]onsequently, to be effective, the 'right to have rights' requires instantiation at the level of international law in the form of a right to entry for people seeking asylum" (ibid.: 424). As Alison Kesby (2012: 12) notes: "Thinking with and beyond Arendt, the articulation of the right to have rights (...) is the right to enter and reside in a state. In the present international system of states, it is imperative that each person has 'a place in the world' in the sense of a place of lawful residence and is not constantly shunted between states".. On this matter, acknowledging states' concern for maintaining sovereign authority to control their borders, Guy Goodwin-Gill and Jane McAdam (2007: 358) point out that "[w]hile individuals may not be able to claim a 'right to asylum', states have a duty under international law not to obstruct the right to seek asylum".

[11] It should be noted that some recent developments are covered mainly in non-academic works and it is important to keep in mind that researchers at NGOs' and other international organizations protecting the rights of migrants and refugees appear to be mostly focused on protection and their understanding of 'research gaps' may be different from that of policy makers and decision makers.

and (qualitatively) analyses the body of legal research in the field.[12] It also includes a smaller number of social science studies (from sociology, anthropology, and political science)[13] that I consider relevant for identifying current issues regarding the functioning of the law. By looking at both legal and social science studies, I hope to capture a more complete picture of the complexities of situations that are not regulated, or where the law is ineffective. In this light, the methodology responds to broader discussions on the value of interdisciplinary legal research and its ability to go beyond the analysis of the black letter law and investigate whether a legal provision "is effective in real life" (the so-called "law in action") in the context of various behaviours and cultures (Schrama 2011: 148; see also de Vries and Francot 2009: 169). Although the review is not comprehensive, as it mostly includes material published in English, the scope is broad enough to provide meaningful insights into the body of recent literature.

In order to assess the status of existing studies dealing with refugee law and its implementation, I conducted a desk-based search to identify the most important works using multiple databases: Lexis, Westlaw, Brill, Cambridge, Oxford, and HeinOnline. In a second step, I conducted a search in Google Scholar. I selected the materials according to their relevance for identifying the key protection issues that asylum seekers face at the national, regional, and international level and which require further development and/or research. Thus, I grouped the key protection issues under two main areas: (1) access to the territory; and (2) access to the asylum system. These two thematic fields literally represent asylum seekers' journeys across borders (their departure and travel, and their treatment in the country of refuge). Some legal studies identify lack of access to the territory and lack of access to the asylum procedures as the main obstacles for refugees who seek protection (see for instance, Terlouw 2017: 247; Guild and Moreno-Lax 2013; Legomsky 2000). In addition, social science studies tend to focus either on migrants' experience of the journey to the country of asylum or their experience in the country of asylum (for examples of social science studies that investigate experiences *en route*, see Townsend and Oomen 2015; Khachani 2008; Schapendonk 2012; Alioua 2008: 703; Stevens and Dimitriadi 2019. For examples of social science studies that investigate experiences in the country of asylum, see Nele and Janna Weßels 2013: 7; Brekke and Brochmann 2014; Cabot 2012; Biehl 2015). Moreover, as this paper will show, rights for migrants and asylum seekers in these two areas vary greatly and so do the issues at stake: while *en route*, even fundamental rights such as right to life and physical integrity are at risk, once in the country of asylum the main issues are connected to the enjoyment of formal entitlements (i.e., access to legal status and social rights).

Whereas it was relatively easy to categorize studies based on the two key legal areas of access to the territory and access to the asylum system, other topics required more subjective judgement, especially those involving overlapping legal instruments and newer research gaps (for instance, in the case of the relevance of international maritime law, EU law, and human rights law for migrants transiting by sea, as further explained in section 3.3). Ashley Terlouw (2017: 247) adds "access to a fair and durable solution" as a third key area. However, to keep the scope of this work manageable, I excluded it from my study. Other areas which would deserve investigation are family reunification and durable solutions for refugees. Durable solutions contrast with temporary or

[12] The problems analysed in the European context represent a global trend (Giuffré and Moreno-Lax 2019: 84), but for space reasons this paper considers the EU only.
[13] The working paper often refers to studies in the 'social sciences' without further specification, as these sometimes include a mix of studies in several disciplines or interdisciplinary studies.

emergency measures and include voluntary return, resettlement, and naturalization (see Hathaway 2005: 913–977, and the collection of short articles discussing return in Couldrey and Peebles 2019. I will briefly mention resettlement in section 3.5 as part of the discussion of legal pathways to the EU).

In light of the above, section 3 initiates the discussion on access to territory, which is broken down into five broad thematic sub-sections: the journey; rights of asylum seekers and migrants; the non-refoulment principle and its scope; the relevance and limitations of the Law of the Sea, human rights, and EU law; and protected entry. Section 4 on access to the asylum system, is clustered under four sub-themes: qualification for protection; refugee status determination procedures; the Dublin Regulation; and reception conditions.

3. Access to the Territory

The issue of access to the territory of the EU stands out as particularly sensitive in the entirety of the reviewed literature, as it affects not only the EU but also its neighbouring countries. It raises broader questions concerning fundamental rights, the rule of law, and migration governance.

After discussing the literature on journeys to highlight the problems that migrants experience during their transit, this section focuses on the debate about the scope of state responsibility and human rights' claims of migrants in transit, especially the non-refoulement principle. The issue is further complicated by its entanglement with the Law of the Sea and EU law. The intersection of these fields remains understudied despite its central relevance to the current situation. In this context, the paper will also draw attention to the debate on the need for legal pathways to the EU (Spijkerboer 2007, 2013).

3.1. The Journey

A growing number of studies look at flight processes and experiences of migrants and have started to uncover the various risks and abuses to which they may be subject *en route* (Derluyn 2012: 2; van Liempt and Doomernik 2006; Gerard and Pickering 2013: 341–342; Pursey 2015; Stranges and Wolff 2018; Kleist 2018; Ansems de Vries and Guild 2019; Martin et al. 2014), as well as the factors that result in these dangers (Brian and Laczko 2014). Besides situations where migrants' rights are violated by state agents, risks may be exacerbated by traffickers and smugglers as well as gangs "whose involvement may vary from simple misinformation in the hope of increasing their own profits, to extreme cases of physical violence, armed robbery or enslavement" (Collyer 2010: 277). In some cases, the danger comes from natural obstacles, such as seas, deserts, or mountains, which must be crossed to avoid policed stretches of border (ibid).

Some social science studies argue that migrant deaths and the human rights violations they experience during transit are, to some extent, the consequence of the restrictive asylum policies of many receiving states (Betts 2006: 652; Gerard and Pickering 2013; Campbell: 2009). The enhanced immigration controls and lack of legal pathways, they maintain, mean reduced international protection for migrants (Pickering 2011: 15, 22–27; Campbell 2009: 14, 17). They condemn such policies for focusing on containment of migration and securitization rather than

addressing the underlying causes of displacement. In this regard, both legal[14] and social science studies point out that the distinction between forced versus voluntary migration is too simplistic to capture the complex factors that drive migrants out of their countries. There may be intersecting causes that push a person to migrate and the trajectory may not always be clear at the beginning of the journey, as it may be affected by the situation encountered in the first country of reception or by ongoing developments in the country of origin (Campbell 2009: 2). Moreover, some migrants who leave their country of origin in search of better employment opportunities may suffer human rights abuses and violence and face the risk of being trafficked during their irregular journeys. Thus, they may be exposed to vulnerabilities which they did not have before (Kuschminder 2017: 569). Nevertheless, there remains little research and data "on exactly why and when people decide to abandon their homes for a safer, better life elsewhere" (Aleinikoff and Zomore 2019: 95).

In light of the foregoing, the next sub-sections of this paper explore studies dealing with the legal framework applicable to migrants in transit. In particular, they deal with the legal obligations arising from human rights law, the Refugee Convention, and other areas of international and EU law.

3.2. Rights of Asylum Seekers and Migrants

Multiple bodies of international law lay out the fundamental rights that apply to migrants everywhere in the world. These laws include human rights law (laying out both universal rights as well as the protection of specific groups such as children) and international humanitarian law. However, some special laws may apply only to a limited number of migrants. This is the case for asylum seekers, stateless people, and victims of trafficking, among others (Frelick et al. 2016: 197–198). Migrants' rights may be breached in various ways during dangerous journeys to the EU, including violations of the right to life, the right to liberty and security, as well as the right to freedom from torture and ill-treatment (ibid.: 198; International Covenant on Civil and Political Rights, Articles 7, 9; Convention against Torture).

One of the main debates connected with the protection of fundamental rights concerns the way they are affected by externalization measures initiated by EU authorities.[15] In particular, there is no consensus on the nature and scope of states' legal obligations with regard to migrants' right to seek asylum, or on how to determine which states are responsible for the protection of the rights of migrants under international law (ibid.: 196).

Numerous studies comment on the right to seek and enjoy asylum and its link to freedom of movement (Harvey 2015: 48). Specifically, asylum seekers must cross an international border in order to claim protection: physical movement makes it possible for them to claim asylum and

[14] Cathryn Costello (2018: 2) brings attention to the fluidity of categorical distinctions between refugees and migrants and the need to examine the dividing line between them. Other works highlight how legal studies tend to assume a clear division between migrant statuses (i.e. asylum seeker, refugee, victim of trafficking, migrant worker, illegal alien), even though this does not reflect the reality, in which migration is non-linear and distinctions may blur (Ecke 2013: 85; Gerard and Pickering 2013: 340). Whereas classification into distinct statuses allows for more focused research, this approach does not reflect the reasons that push migrants to move and fails to capture the reality of navigating through different statuses (Foblets et al. 2018: 23). In a study of Afghan migrations to Europe, Kuschminder argues that the current approach fails to consider "the 'fragmented' nature of their migration, broken into a number of separate stages, involving varied motivations, legal statuses and living and employment conditions" (2017: 569; see also Collyer 2010: 275).

[15] 'Externalization measures' refer to entry controls that EU states carry out abroad (in addition to entry checks at the external borders of the EU states). These externalization measures "[comprise] multiple dimensions, tools, and technologies, which are implemented extraterritorially" through a process "that relies on the action of a plurality of governmental and non-governmental actors" (Moreno-Lax 2017: 43).

escape persecution. However, such movement is limited by border controls and interdiction polices. Article 12 of the International Covenant on Civil and Political Rights (ICCPR) and Article 2 of Protocol 4 of the European Convention on Human Rights (ECHR) recognize the right to leave any country, including one's own, albeit not as an absolute entitlement: restrictions must be established by law and be "necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others and (…) consistent with the other rights recognized in the (...) Covenant" (ICCPR, Article 12; see also the similar language in Protocol 4 of the ECHR, Article 2(3)).

According to Mariagiulia Giuffré and Violeta Moreno-Lax (2019: 85), many measures meant to contain immigration to Europe do not merely restrict movement, but make the essence of the right to leave inaccessible; thus they are incompatible with the ICCPR and the ECHR. Measures such as the Italy-Libya Memorandum of Understanding, Giuffré and Moreno-Lax point out (ibid. 89–90, 97–100), are problematic because they are established by informal agreements rather than laws. Moreover, they do not always meet the criteria of being foreseeable, clear and non-arbitrary; they are applicable generally (as opposed to each individual case); and they are not always the result of a balancing act between interests at stake.

Regarding the determination of the state responsible for asylum seekers, the prevailing view is that the responsibility falls on the state within whose jurisdiction the person is present (Legomsky 2000; Goodwin-Gill and McAdam 2007: 206–208). Nevertheless, initiatives taken to shift responsibility to another state through inter-state cooperation or unilateral mechanisms undermine such an approach and have the potential to breach human rights and refugee law and leave migrants without effective remedies (Guild and Moreno-Lax 2013). Giuffré and Moreno-Lax (2019: 85) argue that destination states may violate migrants' rights when they directly engage in externalization efforts as well as when they "aid or assist" another state in doing so (see also Frelick et al. 2016: 197; International Law Commission 2001). However, to date, not much is known about the attempts of states to evade responsibility through delegation of their obligations to other countries or about the remedies available in cases of breach (Giuffré and Moreno-Lax 2019: 97–98, 101–107). More research is needed that assesses whether states comply with the rule of law and human rights in cooperation with third states.

Another major area of discussion is the impact of externalization policies on the prohibition against refoulement, as discussed in the next sub-section.

3.3. The Principle of Non-Refoulement and Its Scope

Central to the refugee protection system is the non-refoulement obligation of Article 33 of the Refugee Convention, which provides that "[n]o contracting State shall expel or return (*refouler*) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." At the EU level, it is incorporated into Article 21 of the Qualification Directive (QD).

The principle of non-refoulement is not only provided for in the Refugee Convention and the Qualification Directive, but is also embedded in other international instruments.[16] The European Court of Human Rights has identified the principle of non-refoulement as an essential aspect of Article 3 of the ECHR (see *Hirsi Jamaa and Others v. Italy*; *Chahal v. the United Kingdom*, para 80). Non-refoulement has now become part of international customary law and, although initially conceived to protect refugees, it now applies to any person who may suffer a violation of his/her right to life or freedom from torture (Papanicolopulu 2016: 500). As outlined by Guy Goodwin-Gill and Jane McAdam, the principle of non-refoulement has acquired status of customary international law[17] because it is consistently and generally applied in practice by states as well as international organisations, including the UN General Assembly and the UNHCR (2007: 346).

Nevertheless, the literature stresses, the principle of non-refoulement is not a guarantee to access to territory and the admission to refugee determination mechanisms. Non-refoulement comes with a number of complex issues to deal with, especially regarding its scope and extraterritorial application.

EU states have treated the principle of non-refoulement as applying only to persons who are inside or have arrived at the border of the state where they seek protection and who do not have a safe country to which they can be sent (Guild and Moreno-Lax 2013: 7). They accept that the violation of the non-refoulement obligation can occur directly, for instance, by sending a person by plane back to the home country (Clayton and Firth 2018: 436).[18] It can also occur indirectly, by removing a person to a country which will then send him/her back to the home country (ibid.).

There is more debate about whether practices and policies limiting access to the territory amount to constructive[19] refoulement (ibid.; Noll 2005: 550–556). They include measures such as visa requirements (Zimmermann 2011: 1361),[20] readmission agreements (Mouzourakis 2018: 11–12), carrier sanctions (Terlouw 2017: 247, 249),[21] interception at sea, and closing borders (Campbell 2009: 2–3). States maintain that interdiction strategies and other policies precluding migrants from accessing the territory prevent "bogus asylum seekers" from exploiting the domestic asylum systems and any associated rights (Campbell 2009: 2).[22] States see such policies as faster and cheaper than processing asylum claims. Furthermore, they hope to discourage asylum applicants from engaging in hazardous journeys (Legomsky 2000: 627; Landau et al. 2018). On the other hand, a number of commentators maintain that such measures breach the non-refoulement

[16] For instance, the Convention against Torture, art. 3; and implicitly in ICCPR arts. 2(1), 7; Geneva Convention relative to the Protection of Civilian Persons in Time of War art. 45; UN Human Rights Committee 2004: paras 10, 12) and regional instruments (for example, the OAU Convention art. II(3); American Convention on Human Rights art 22(8); ECHR 3; Charter of Fundamental Rights of the European Union art. 19.

[17] A rule becomes part of customary international law when it is subject to consistent state practice and states understand it as obligatory (UNHCR 2007 para 14). When a rule becomes part of customary international law, it is binding on all states. This means that non-refoulment applies even to states that are nor party to the Refugee Convention and/or its 1967 Protocol.

[18] However, some EU states have adopted legal provisions allowing push backs – that is, hindering migrants from crossing the border by forcing them to turn around – and a larger number of states use push backs as "an informal yet fundamental element of their migration control apparatus". In this way, asylum seekers "may be unlawfully prevented from entering the territory, whether arriving at external or internal EU borders" (Mouzourakis 2018: 11).

[19] 'Constructive refoulement' refers to situations when a state adopts measures to make a refugee's circumstances so difficult that the refugee decides to go back to the country of origin (Mathew 2019: 207).

[20] Council Regulation (EC) No 539/2001 of 15 March 2001 [2001] OJ L 81/1.

[21] Schengen Implementation Agreement art 26; Council Directive (EC) 2001/51 of 28 June 2001 art. 4.

[22] It should be noted that the UNHCR considers that "[t]here is no such thing as a bogus asylum-seeker or an illegal asylum-seeker. As an asylum-seeker, a person has entered into a legal process of refugee status determination" (UNHCR n.d.).

principle. Elihu Lauterpacht and Daniel Bethlehem (2003: 87, 100), as well as Goodwin-Gill and McAdam (2007: 246) stress that a state is responsible for the treatment of persons within or under its jurisdiction, that is within the territory of the state or under its effective control or affected by organs of that state. Andreas Zimmermann (2011: 1362) and James Hathaway (2005: 339–342) take the same position. However, as Zimmermann (2011: 1363) notes, the issue has only rarely been dealt with by the courts.[23] One of the few exceptions that should be mentioned is the case of *Hirsi v. Italy* which challenges the position of EU states that they are only responsible for migrants who are within their territory. In this case, the ECtHR found that "intercepting States cannot be insulated from accountability only because they exercise extraterritorial border control measures. On the contrary, the de-territorialisation comes with the guarantee of the *non-refoulement* principle" (Koka and Veshi 2019: 39–40; see also *Hirsi v. Italy*, paras 79–82; Wouters and Den Heijer 2010; Trevisanut 2008). In effect, the *Hirsi* judgment strengthened the rights of migrants when facing with interception measures at sea. Nevertheless, "in applying Article 3 ECHR mainly on asylum seekers and refugees, the Court avoided making a statement that the *non-refoulement* principle applies to all intercepted migrants, thus undermining the 'absolute character of the rights secured by Article 3'" (Koka and Veshi 2019: 40).

Closely linked to the violation of non-refoulement is the practice of 'hot returns' (direct expulsions without individual examination at the border). In the case of *ND and NT v. Spain,* the Grand Chamber of the ECtHR found that collective expulsions carried out by Spanish authorities were not in violation of Article 4 Protocol No. 4 of the ECHR and the non-refoulement principle because the complainant migrants "placed themselves in an unlawful situation by deliberately attempting to enter Spain by crossing the Melilla border protection structures" (*ND and NT v. Spain*, para 242). The Court concluded that "the lack of individual removal decisions", as required by the ECHR, "can be attributed to the fact that the applicants, if they indeed wished to assert rights under the Convention, did not make use of the official entry procedures existing for that purpose, and was thus a consequence of their own conduct" (ibid., para 231).

In discussing *ND and NT v. Spain*, Constantin Hruschka (2020) suggests that the ECtHR tried to avoid a political statement on the issue, and he argues that the practice of hot returns remains illegal in light of the principle of non-refoulement. Spain is not the only country which applies such measures. Hungary, for instance, classified Serbia as a safe country and did not provide individuals a guarantee of access to the asylum procedures. One of the problems that the literature points to in this regard is the lack of effective official border monitoring activities to assess compliance with human rights obligations as well as a lack of data on what happens to migrants at the borders (Mouzourakis 2018: 16). On this issue, both legal and social science studies would benefit from empirical research documenting collective expulsions and border practices.

To conclude, major issues remain regarding the scope of the principle of non-refoulement, in particular its extra-territorial application and enforcement. Similar problems exist regarding the application of the duty to rescue and the right to life for certain categories of refugees, such as those arriving by boat, as explained in the next sub-section (Clayton and Firth 2018: 436).

[23] See for example *Sale v. Haitian Centres Council*, where the US Supreme Court held that Article 33 of the Refugee Convention was not intended to have extra-territorial validity; see also the UK House of Lords' case *European Roma Rights Centre and others v. Immigration Officer at Prague Airport and another*, para 34.

3.4. The Relevance of the Law of the Sea and EU Law

The UN Convention on the Law of the Sea and the two conventions of the International Maritime Organization (IMO), namely the International Convention for the Safety of Life at Sea (SOLAS Convention) and the International Convention on Maritime Search and Rescue (SAR Convention) set out the competences and duties of states on rescue at sea. They impose an obligation on all shipmasters to proceed with all possible speed to save persons in danger at sea (SOLAS Ch. 5, Reg. 33; Papastavridis 2014: 21).[24] These conventions also aim to ensure that state parties coordinate the prompt disembarkation of rescued persons to a safe place. To this end, states shall set up adequate search and rescue zones and services in order to promptly deal with distress calls through search and rescue agreements (SAR Convention, Annex, Ch. 2, paras 2.1.1–2.1.10; Koka and Veshi 2019: 41).

However, some states such as Malta have not incorporated these treaties into their national laws or signed the most recent amended versions.[25] In other cases, states like Italy, Malta, and Libya have repeatedly emphasised the problem with partially overlapping search and rescue regions (Koka and Veshi 2019: 41–42). The situation is worsened by the fact that such instruments neither refer to rights of persons in distress (Papastavridis 2014: 21), nor do they provide any general rule that would predetermine the specific port of disembarkation or the exact scope of the concept of "place of safety" (Carrera and Cortinovis 2019: iii). The meaning and application of these instruments are subject to different national interpretations (Guilfoyle and Papastavridis 2014: 15, 17) and are a source of major disagreements between states and civil society organisations (for instance, the law is silent on whether a ship in distress has an absolute right to enter foreign ports in order to attain safety; see Coppens 2013: 33; Carrera and Cortinovis 2019: iii). On several occasions, this has led to delays or complete failures to rescue people at sea when states with overlapping search and rescue regions, like Malta and Italy, were "passing rescue calls to one another in an attempt to evade responsibility for disembarking rescued persons in their territories" (Koka and Veshi 2019: 43).

Scholars highlight the lack of human rights considerations in maritime conventions – which mainly allocate competencies between states. By way of example, Efthymios Papastavridis (2014: 23–24) argues that international maritime conventions do not stipulate a right of individuals to be rescued. In human rights law, a right to be rescued can be found only within the context of the right to life, enshrined in Article 2 of the ECHR and Article 6 of the ICCPR, and only in particular circumstances (ibid.: 24–26). Article 2 "requires states not only to refrain from causing death, but also to take measures to protect the lives of individuals within their jurisdiction" (ibid.: 25; see also *Osman v. United Kingdom [Grand Chamber]*). Papastavridis concludes that "human rights bodies mainly conceive jurisdiction as a question of fact, of actual authority and control that a state has over a given territory or person" (2014: 26. For a more detailed discussion of the meaning of jurisdiction, see Kim 2017).

[24] Papanicolopulu notes that, although the duty to rescue applies to all persons in distress, "it would seem that States and masters of ships have sometimes been less willing to proceed to the rescue of vessels transporting migrants and refugees" (2016: 495).

[25] Malta did not sign the most recent 2004 SOLAS and SAR Amendments (Coppens 2013: 75; Papanicolopulu 2016: 502; Martin 2014: 6). The incorporation of international law into the domestic legal system is one of the most relevant factors to consider when evaluating the implementation of the international standards. Other factors to consider are the role and discretion of a state enacting treaty obligations, as well as the political will to do so (Conforti 1993: 25–26; Goodwin-Gill and McAdam 2007: 528–530; Bianchini 2018: 28–37, 301).

Thus, in principle, human rights law applies to the rescue of persons on the high seas. Yet, it is unclear when these treaties start to apply: at what point do people in distress fall under the jurisdiction of the relevant states (Papastavridis 2014: 27; Salau 2014: 25–27)? Whereas the prerequisite of 'control' is satisfied when these individuals are under the jurisdiction of the flag state of a rescuing state vessel, the same cannot be said in cases of rescue operations conducted by private vessels.[26] In addition, "it is questionable whether the coastal State, which receives a distress call and is aware of the location of persons in distress, exercises control over these persons with the result that those persons come under its jurisdiction" (Papastavridis 2014: 27).

Papastavridis (2014: 25) adds that the positive obligation under Article 2 of the ECHR requires the flag state to investigate with due diligence any deaths that may have occurred in breach of the right to life (see for example, *Gongadze v. Ukraine* and *Dink v. Turkey*). However, this matter is very complex and research points to major gaps in law and practice regarding rights and duties in the context of migrants' deaths. In the absence of a clear international normative framework in this regard, the little research available emphasizes the "lack of coherence between different institutions, and differing practices at national and local level within states" (Grant 2016: 5; see also Robins 2019: 16; United Nations General Assembly 2017; Brian and Laczko 2014). Moreover, official data on deaths of irregular migrants at sea remain scarce and accordingly difficult to collect. Apart from that, proper monitoring of the effects of the legal provisions protecting the right to life is almost impossible (Spijkerboer 2017: 19–20; Robins 2018).[27] Some argue that migrant deaths have been seen in the context of national border control rather than in terms of human rights (Grant 2011) and states' approaches in this area contrast strikingly with the responses that states have developed to identify the bodies and communicate with the victim's families after large-scale accidents and catastrophes (Grant 2015: 9). In consideration of the above, many questions arise both about the effectiveness of the legal framework concerning rescue-at-sea operations and about possible solutions (Papastavridis 2014: 19). As stressed by Enkelejda Koka and Dernand Veshi (2019: 43), the EU also failed to adopt a uniform interpretation of principles like rescue, disembarkation, and distress. Consequently, search and rescue and disembarkation activities of member states are not covered by a common legal framework, except for those activities carried out in the context of Frontex-led joint operations, which are set out in Regulation 656/2014 (also called the 'Sea Borders Regulation'), the Schengen Borders Code (SBC),[28] and Regulation 2016/1624 on the European Border and Coast Guard. The Sea Borders Regulation combines border control with search and rescue, and applies to all "Frontex-coordinated maritime border surveillance operations and includes a set of SAR and disembarkation obligations for 'participating units' (i.e. the law-enforcement vessels of member states)" (Carrera and Cortinovis 2019: 19).

[26] "In a case in which a vessel navigating on the high seas is not rescued by a passing private vessel, it would be difficult to establish a sufficiently strong link between the vessel in need and the potentially rescuing vessel that would reach the threshold of jurisdiction under human rights law" (Papanicolopulu 2016: 513; see also Papastavridis 2014: 27). Papastavridis argues that "factual control would require at least awareness of the location or of the situation of the vessels concerned", for example, when "distress calls are received and acknowledged by the Rescue Coordination Centre of the coastal State" and concludes that "[i]n all other cases, the argument for an *a priori de jure* or *de facto* control by coastal States over vessels within their SAR zones cannot be sustained" (2014: 28–29).

[27] Data on migrants' death are difficult to gather because migrants often travel irregularly and through remote areas. Consequently, bodies may not be found or discovered only after some time. Additionally, survivors may not report deaths and even cover them up out of fear (IOM: n.d.).

[28] EU Member States' border surveillance at sea falls within the SBC, which applies "without prejudice to (...) (b) the rights of refugees and persons requesting international protection, in particular as regards non-refoulement". (Schengen Borders Code art 3(b)).

Some scholars see the Sea Borders Regulation as a step forward due to its more precise rules on some SAR and disembarkation issues arising in international law. For instance, the regulation sets forth a concept of "place of safety" which is protection driven – meaning a "location where rescue operations are considered to terminate and where the survivors' safety of life is not threatened, where their basic human needs can be met, and from which transportation arrangements can be made for the survivors' next destination" (Sea Borders Regulation Article 2(12)).

Moreover, the regulation includes some rules on "the modalities for the disembarkation of persons intercepted or rescued in sea operations" (Sea Borders Regulation Article 10(1)).[29] According to Sergio Carrera and Roberto Cortinovis (2019: 20), Article 4(3) of the Sea Borders Regulation is a central benchmark because, "before any rescued person is disembarked, the Frontex operation must perform a case-by-case assessment of their personal circumstances". Rescued individuals must be given a chance to explain "any reasons for believing that disembarkation in the proposed place would be in violation of the principle of *non-refoulement*" (Sea Borders Regulation Article 4(3)). In practice, Carrera and Cortinovis argue, this provision means that rescued persons are to be disembarked in EU member states so that their protection needs can be considered (2019: 19).

However, according to other studies, the regulation allocates too much responsibility to the coastal states regarding interception, disembarkation, and reception of migrants (Martin 2014: 7; Terlouw 2017: 252), and does not set out detailed procedural guarantees to ensure that human rights obligations are adhered to. In this regard, the regulation provides that units taking part in maritime operations may order a vessel within the territorial sea or on the high sea to alter its course and to leave or not enter the territorial zone after checks have been carried out to establish whether the vessels are carrying or smuggling persons who are not authorized to enter the territory. There are no guarantees to ascertain whether asylum seekers are on board (Sea Borders Regulation Articles 6–7; Frontexit 2018; UNHCR 2016; Human Rights Watch 2011). Therefore, some NGOs, international agencies, and scholars claim that the regulation combines and blurs search and rescue operations with interception in the high seas, and lacks adequate procedural safeguards in the context of joint operations.[30] They also stress the need for the clarification of Frontex's responsibilities in order to hold it legally accountable in cases of human rights violations during its operations (Martin et al. 2014: 21).

Regarding Regulation 2016/1624, scholars have highlighted how it further extends and strengthens Frontex's mandate and increases the decisional, financial, and staff capacity of the agency.[31] While scholars see this as an important development in the relationship between the EU and its EU member states regarding the protection of the external borders, some consider the text of

[29] Specifically, it provides that, "in case of interception in the territorial sea, (…) disembarkation shall take place in the coastal Member State", whereas "in case of interception on the high seas (…) disembarkation may take place in the third country from which the vessel is assumed to have departed. In case that is not possible, disembarkation shall take place in the host Member State; in the case of search and rescue situations, (…) the host Member State and the participating Member States shall cooperate with the responsible Rescue Coordination Centre to identify a place of safety" (ibid. art. 10). In general, "the Member State hosting the operation [is required] to accept disembarkation of rescued migrants in case there is no other possibility to identify a place of safety rapidly and effectively" (Carrera and Cortinovis 2019: iv).

[30] Roberta Mungianu argues that Frontex should improve transparency of its planning and actions regarding joint operations (2017: 230; see also Moreno-Lax 2017: 469).

[31] Before October 2016, Frontex relied on contributions from EU member states and institutions. The new regulation changed the name of the agency and substantially altered its tasks and capabilities. Frontex is now able "to quickly deploy border and coast guard officers from its own rapid reaction pool (of at least 1500 officers) and to purchase its own equipment" (Meissner 2017: 7).

the regulation ambiguous on several key points, including how responsibility between member states and the EU should be shared on integrated border management and how a strategy for integrated border management should be adopted. The latter issue in particular has raised concerns about the legitimacy of Frontex to take political decisions (Ferraro and de Capitani 2016: 390). However, arguments in favour of or against the regulation have been based on principles and there is a lack of empirical data about its application, especially in the Balkans and the Channel. More collection and use of empirical data would provide a stronger basis for research and discussion.[32]

In this context, the European Commission has emphasized that, despite the expanded tasks of Frontex,[33] search and rescue remains a "competence of the Member States which they exercise in the framework of international conventions".[34] Nonetheless, Gina Clayton and Georgina Firth point out that member states remain reluctant to provide support to rescue operations due to concerns about creating a pull factor to Europe (2018: 437; see also Cusumano and Pattison 2018: 55, 64, 65). The states see rescue combined with non-refoulement as likely to encourage more migrants to cross the sea towards Europe.[35]

Finally, another problematic area pertains to what is referred to as the criminalization of solidarity – i.e., imposing legal consequences on individuals who assist irregular migrants. Council Directive 2001/51 of 28 June 2001 imposes sanctions on carriers who transport persons not authorized to enter the EU territory. Additionally, Council Directive 2002/90 of 28 November 2002 calls on member states to adopt legislation prohibiting the facilitation of unauthorized entry, transit and residence. As a consequence, sailors and NGOs have faced charges in countries such as Italy.[36]

In conclusion, the literature flags out major issues concerning the extra-territorial relevance of human rights and their enforcement (Goodwin-Gill and McAdam 2007: 201–284). Responsibility for safe journeys (including the question of 'disembarkation to a place of safety'), the right to be rescued, investigations of border deaths, criminalization of solidarity, and burden sharing remain highly controversial. These grey areas are so serious that they affect the principle of legal certainty which is central to the rule of law: the current regulations are not, in fact, "sufficiently precise and clear to enable the individuals concerned to know the extent of their rights and obligations" (Moreno-Lax 2017: 477). In spite of these issues, there is still a gap in the literature regarding the interface between the responsibility to protect, the right to be rescued, and international refugee law

[32] Several scholars and civil society organizations have already argued that the text perpetuates the old intergovernmental model (Carrera and den Hertog 2016; De Bruycker 2016; Rijpma 2016; Ferraro and de Capitani 2016: 387). This negative assessment is not shared by the EU institutions, and Regulation 2016/1624 has been welcomed by the European Commission as capable of "turning into reality the principles of shared responsibility and solidarity among the Member States and the Union" (Andreevo 2016). However, several NGOs have criticised this statement, pointing to concerns for the fundamental rights of migrants (Ferraro and de Capitani 2016: 387; Frontexit 2016).

[33] Since the adoption of the new mandate in 2011, Frontex's role is not limited to coordinating sea operations, but can also start them, as well as administer the European border surveillance system (EUROSUR) (Martin 2014: 10).

[34] Council statement added to the EUROSUR Regulation.

[35] See for example the remarks of the UK Minister of State, Foreign and Commonwealth Office in a Parliamentary debate in 2014: "We do not support planned search and rescue operations in the Mediterranean. We believe that they create an unintended 'pull factor', encouraging more migrants to attempt the dangerous sea crossing and thereby leading to more tragic and unnecessary deaths. The Government believes the most effective way to prevent refugees and migrants attempting this dangerous crossing is to focus our attention on countries of origin and transit, as well as taking steps to fight the people smugglers who wilfully put lives at risk by packing migrants into unseaworthy boats" (House of Lords 2014).

[36] For instance, in 2004 the German vessel *Cap Anamur* rescued 37 migrants in distress in the Mediterranean and escorted another boat encountered along its course. Disembarkation was allowed only after 12 days after the captain's issued an emergency distress call. The captain and his crew were later charged for aiding irregular immigration. Based on cases such as this, various authors argue for the need to adopt a clear legal framework (Basaran 2014: 375; Papanicolopulu 2016: 503).

(one exception is Jean-François Durieux 2016: 650). There have also not yet been any systematic investigations of the extent to which courts are involved in these matters and the limits of judicial intervention.

3.5. Protected Entries

The problem of setting asylum seekers apart from other migrants during their similar transit routes has led to a debate on "the need to ensure access to protection for refugees within broader migration movements" (Betts 2006: 652–653). In this vein, a critical theme that emerges in the literature is the need to develop protected entries for refugees to allow safe and legitimate ways to leave their homelands or first countries of refuge and enter a country of asylum (van Liempt and Doomernik 2006; Derluyn 2012: 2).[37] This matter has also attracted attention at the global level, as evidenced by the September 2016 New York Declaration for Refugees and Migrants and its resulting focus on migrants' safety and rights (United Nations General Assembly 2016: Articles 26–29, 33, 35, 57–58, 78–79). The declaration includes a commitment to adopt a Global Compact for Safe, Orderly and Regular Migration, emphasizing concerns regarding *unsafe*, *disorderly*, and *irregular* migration (ibid.: arts. 21, 26–29). In turn, the Global Compact for Safe, Orderly and Regular Migration calls for states to cooperate to prevent migrant deaths and to manage borders in an integrated, secure manner (Global Compact for Migration 2018: Objectives 8, 11).

Nevertheless, progress has been slow and not much has been accomplished so far (Foblets and Leboeuf 2020). EU states have agreed that there is a need to expand legal channels in order to limit dangerous migrant journeys and allow for appropriate planning and orderly arrivals (Moreno-Lax 2017: 687–688). They also agree that legal pathways are necessary to prevent overburdening the EU countries of first asylum, as well as guaranteeing a coordinated response to preserve the integrity of CEAS (Velluti 2014: 106). These pathways include resettlement, humanitarian visas, family reunification, sponsorships, and work or study visas (Terlouw 2017: 251; Grütters et al. 2017: 251; European Union Agency for Fundamental Rights 2015). However, none of these pathways offer a structural response to the problem, and asylum seekers continue to engage in irregular and dangerous journeys.[38]

Given the lack of solidarity among and between EU states and overburdened regions, there is no coordinated approach to regulating and implementing migration pathways. While some initiatives have recently been undertaken in response to changing refugee flows, they already show a number of shortcomings, including: the imprecise aims and objectives of the legal instruments; limited criteria for the selection of beneficiaries (there is a focus on vulnerable people, often excluding single males);[39] limit in numbers; a voluntary approach; and lack of political will (Radjenovic 2017: 5; Hanke et al. 2019: 1366; van Ballegooij and Navarra 2018: 42; Betts 2017: 73–75). These

[37] As pointed out by Costello and Mouzourakis, "For refugees in transit, yet to make a formal asylum claim, EU law fails to recognize the declaratory nature of refugee status" (2016: 50).

[38] Definitions of what constitutes an irregular journey vary; the International Organization for Migration (IOM) notes in its list of "Key Migration Terms" that "irregular migration" is generally understood as referring to journeys that take place outside the regulatory norms of the sending, transit, and receiving countries (IOM 2020).

[39] It has been noted that the preference given to vulnerable individuals such as single women, children, and the elderly "potentially reinforces the stereotype of lone male refugees as a threat" (Trotta 2017: 32). Also, it has been argued that while legal pathway programmes offer options for limited numbers of particularly vulnerable persons, most refugees are excluded from eligibility (Verdirame and Harrell-Bond 2005: 283, 285; Sandvik 2011). A few articles have shown that the complexity and centrality of men's lives and needs has been overlooked, causing and multiplying vulnerabilities (Charsley and Wray 2015: 405).

unsolved issues raise questions about what steps should be taken to effectively improve protection, combat traffickers, and build a harmonised EU asylum system.

Research on protected entries frequently reflects the topics of political debates in the countries being studied. For instance, some studies discuss the challenge of setting up extra-territorial asylum processing centres (Afeef 2006; Garlick 2015; Léonard and Kaunert 2016), the resulting *de facto* detention of asylum seekers, the difficulty of guaranteeing fundamental procedural rights (i.e. the right to appeal against negative decisions (Laganà 2018), legal assistance), and the increase in migration controls in transit states (Pijnenburg et al. 2018). A few social science studies build on such topics while also examining the violence that migrants face in transit. In particular, scholars have focused on the gender-specific violence that women suffer in transit and the modes of travel that influence exposure to it, such as the increased threat of sexual violence encountered at key border crossing points (Nagai et al. 2008; Pickering and Gerard 2011; Gerard and Pickering 2013).[40] They also underline that the precarious immigration status resulting from illegal border crossings leaves many migrants in a state of limbo (Pickering 2011: 39). The perspectives offered by these studies help to identify further legal and implementation gaps in the human rights framework. Overall, they support the conclusion that protected pathways remain an exception and are not accessible to most migrants as a means to reach the EU (Moreno-Lax 2017: 465).

Whereas I strongly support the idea of alternative pathways to the EU, I believe that there is an urgent need to pursue the adoption of a harmonised policy approach so as to enable more effective responsibility-sharing (Steffen, Engler and Schneider 2013; Türk and Garlick 2016). The same applies to questions of access to legal pathways for migrants in transit countries or their countries of origin. In particular, a uniform understanding of the rights and criteria that make an individual eligible for resettlement, humanitarian visas, and other migration pathways could inform the implementation of better-coordinated actions and programmes in compliance with EU values and principles (Bianchini 2020: 185–190). Such research should be supported by quantitative data in order to determine equitable quotas for each member state. It should also be complemented by studies exploring whether in fact the concern expressed by states, that the introduction of alternative pathways could lead to high influxes of refugees, is in fact plausible.[41] At present, there are very few studies that analyse both legal issues and quantitative information about alternative pathways.[42]

While these issues concerning access to the territory are a central consideration in refugee protection, additional issues also arise once migrants have arrived at their destination. Those who manage to reach the EU and have not yet been recognised as beneficiaries of protection in other countries must navigate the asylum procedures and meet certain legal definitions in order to obtain legal status, and here the system may present other shortcomings (Moreno-Lax 2017: 337). Thus,

[40] There are some relevant accounts of violence against women in ethnographic literature which focus on accounts of the border, local, and regional contexts, as well as trafficking situations. However, Sharon Pickering (2011) points out that there is a need for more information about women who cross borders illegally.

[41] There is no empirical evidence supporting the fear that introducing a right to a humanitarian visa to potential refugees will result in overwhelming numbers of asylum seekers, nor for the opposite argument that it will not create a pull factor (Hirsch and Bell 2017: 433–434).

[42] One study dealing with reception of asylum seekers in the EU (rather than protected pathways for asylum seekers who have not yet reached the EU) suggested that quotas of asylum seekers should be calculated on the basis of each country's economic strength, population size, geographical area, and unemployment rate (Angenendt et al. 2013). On the challenges of applying sampling and different methods of data collection and surveys in the context of migration, see Bloch 2007.

section 4 focuses on the discussions surrounding the determination of refugee status and the rights that beneficiaries derive from international and EU law.

4. Access to the Asylum System

The contemporary global protection framework rests on the Convention Relating to the Status of Refugees ('Refugee Convention'), which governs refugees by providing them with a number of rights and obligations precisely *because of* their status as refugees.[43] The Refugee Convention leaves states broad discretion regarding how it is implemented; it is also silent on the procedures that should be adopted to determine refugee status. Consequently, there is significant divergence among the signatory states regarding its interpretation and application (Lambert 2009). In the EU, CEAS was intended to improve consistency of the application and interpretation of the Refugee Convention and ensure equal treatment of protection seekers across the continent (Clayton and Firth 2018: 435–436). At present, CEAS comprises the Qualification Directive, the Asylum Procedures Directive, the Reception Condition Directive, the Dublin Regulation, and the EURODAC Regulation. In 2008, the European Commission started a process of recasting of these instruments (Guild and Moreno-Lax 2013: 20), but the literature suggests that these efforts have still not succeeded at harmonizing EU asylum legislation. Several studies point to evidence of inconsistent transposition and interpretation of legal standards and different recognition rates of asylum applications even when asylum seekers originate from the same country (Schweitzer et al. 2018; Schittenhelm 2019; Pollet 2016). Other studies show a tendency to discourage access to the asylum procedure and refugee status in order to prevent bogus claims and limit the numbers of successful asylum seekers (i.e., by excluding applicants from protection, reducing their support and right to work while cases are pending, or limiting their freedom of movement especially through immigration detention) (O'Nions 2014; Allard 2010: 295; Busetta et al. 2019). It also reveals states' attempts to find ways to escape their obligations and a widespread "institutional endorsement of worst practice" (O'Nions 2014: 70). Some researchers point to the absence of sufficient coordination of policies at the EU level, which leaves space for national variation (Hernes 2018: 1308); simultaneously, these different policies have been converging towards a watering down of rights (O'Nions 2014: 99–164). To justify their departure from the project of harmonizing the asylum systems, EU states have offered several arguments: they believe that many asylum applicants are economic migrants lodging unfounded claims; they want to avoid the costs associated with reception and asylum support while cases are pending; they fear political repercussions if their stance on refugees is too generous (Cossé 2018; Hansen 2018; AIDA 2018). As a consequence, the many implementation issues make CEAS a work in progress rather than a legal reality (Chetail 2016).

In light of the foregoing, the next sub-sections elaborate in more detail the key protection problems discussed in the literature regarding the functioning of the asylum systems. These encompass issues relating to the definition of "refugee", refugee status determination procedures, the Dublin Regulation, and reception conditions.

[43] It should be noted that most interpreters take the position that human rights offer a complementary and sometimes more generous set of rights than the Refugee Convention. However, the Refugee Convention is to be considered a *lex specialis* and is not redundant, especially in connection with the status and rights that are conferred to the beneficiaries (McAdam 2005a: 4–5; Hathaway 1991: 117).

4.1. Definition of 'Refugee'

The paper concentrates on 'asylum seekers'[44] who seek protection as 'refugees' under Article 1A (2) of the Refugee Convention, meaning persons who have a "well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion, [and are] outside the country of [their] nationality". Defining who is considered a refugee has been the subject of many studies in both the legal and social sciences as well as a substantial body of case law (Steinbock 1998; Fortin 2000; Worster 2012; McAdam 2012). Some commentators suggest that as the definition of 'refugee' has evolved and adapted over time, protection has been extended to a number of applicants whom the drafters of the Refugee Convention did not originally conceive as falling under it (i.e., women as members of a particular social group, victims of trafficking, persons who fear persecution by non-state actors, draft evaders) (Türk and Dowd 2014: 280–281; Goodwin-Gill and McAdam 2007: 28–29, 73–84, 214). However, others have pointed out that there are several categories of people who are forced to leave their countries of origin and who do not currently qualify for protection under the Refugee Convention (Clayton and Firth 2018: 435). For example, this is the case for climate refugees who are displaced across borders (Kolmannskog 2015; Poon 2017), as well as individuals who have experienced serious violations of their economic, social, and cultural rights (Jastram 2010). These situations raise questions concerning whether the breach of one's right to health services, education, earning a livelihood, or living in an environment free of toxins is a basis for claims to international protection (Simenon 2010: 3). Some argue that serious economic human rights violations have been considered crimes against humanity under international criminal law and refugee law should therefore also recognize such violations (ibid.: 32; Moustafa 2019).

Social science studies have offered a more nuanced and contextualized perspective on persecution as grounds to qualify as a refugee. Anthony Good (2009), for instance, finds that assessment of claims to asylum on grounds of 'religion' often rely on ethnocentric stereotypes. Other studies have examined the treatment of some groups of applicants, such as women, lesbians, gays and bisexuals, during asylum procedures, (Baillot et al. 2014; Johnson 2011; Giametta 2017; Jansen and Spijkerboer 2011; Fiddian-Qasmiyeh et al. 2014; Wagner 2016; Gill et al. 2018). However, few studies have specifically investigated the treatment of men or types persecution particularly affecting them. This is surprising, as men are disproportionately affected as victims in war and are also required to register for military service more often than women are (Dowd 2010: 421–422).[45]

A growing body of literature looks at how the elements of the definition of 'refugee' have been interpreted by the courts. Other studies explore decision-makers' assessment of the 'credibility' of applicants and argue that the tendency is to disbelieve them and base decisions on assumptions

[44] Some asylum seekers may obtain protection on other grounds, such as human rights grounds or being stateless or victims of trafficking, but for the sake of this literature review, their specific treatment under different instruments will not be addressed.

[45] Migrant men have only recently begun to receive more consideration through a gradually emerging gendered lens. Discourses surrounding migration in law and policy, and in legal scholarship, still neglect or dismiss the gendered experiences of male migrants. Where men are mentioned, they are often seen as oppressors of family members or as abusers of the asylum system or legal channels of migration. This negative representation may be instrumentalised at different levels, and for a variety of purposes. The discussion of migration and gender needs to be extended by exploring the ways in which men's gendered experiences of migration remain marginalized. So far, investigation of migrant men has mainly dealt with family migration and not with people seeking international protection (Charsley and Wray 2015).

rather than country conditions evidence or empirical evidence (Coffey 2004; Souter 2011; Kagan 2015; Baillot et al. 2014). Social science studies discuss the widespread bias on the part of decision-makers to consider asylum applicants bogus refugees and refuse cases accordingly (Sigona 2014; Fassin and D'Halluin 2005). In the UK and in France, some commentators frame this phenomenon as a "culture of disbelief" (Sigona 2014: 374; Fassin and D'Halluin 2005; Mc Fadyen 2019). Some suggest that such attitudes stem from prejudice and lack of understanding towards persons originating from very different backgrounds (Souter 2011; Kagan 2015; Baillot et al. 2014). Studies have also explored how organizational and political factors may affect the outcomes of applications for protection (Berg and Millbank 2009; Sigona 2014; Maryns 2005). A few deal with how language and narratives may be distorted in the asylum process (Blommaert 2001; De Fina et al. 2006b).

Significant attention has also been given to the definition of subsidiary protection, i.e. expanded protection outlined in the Qualification Directive for asylum seekers who do not meet the criteria for being considered refugees but who "would face real risk of suffering serious harm" if returned to their country of origin (Article 2(f)). [46] María-Teresa Gil-Bazo (2006) argues that the Qualification Directive has expanded the categories of individuals that have a right to protection as it is sufficient for them to show a "substantial risk to be subjected to torture or to a serious harm" (ibid.: 10) in their country, for reasons which include armed conflict and widespread human rights violations (see also Spijkerboer 2002: 28–29). On the other hand, some have criticized the way the status of subsidiary protection has developed in the EU, as beneficiaries are often seen as 'second-class' compared to refugees. The rights attached to subsidiary protection are more diluted when compared to those granted to refugees, which affects individuals' protection and integration (Zammit 2019). There are a few studies that address the experiences of those who have been granted subsidiary protection (Ní Raghallaigh and Foreman 2015; Feijen 2014; Montaldo 2016; Dolezalek 2018). However, in my view, more empirical research is needed to better assess the integration opportunities and migration trajectories of those who have been granted subsidiary protection.

Beyond that, the scholarship has not given much consideration to the possibility of internal relocation option – that is, whether a refugee could safely relocate to another area of his/her country. Although such a concept is not included in the Refugee Convention, the Qualification Directive provides for the possibility of denying international protection if there are areas within the country of origin where the person "has no well-founded fear of being persecuted or is not at real risk of suffering serious harm" or can receive protection from other actors such as international organizations or other states (Articles 8 and 7; see also Federico and Cerrina Feroni 2018: 36). The little scholarship on the topic warns about assumptions of safety in this context (Costello and Hancox 2016: 399). Some critical questions are: whether such a principle is compatible with the refugee concept as well as the protection of other rights; and what differences are there among states concerning its implementation and interpretation. At the moment, it is unclear how the lack of agreed standards may affect the outcome of refugee applications and how internal relocation practice within the subsidiary protection frameworks is applied (Hathaway and Foster 2003; Kelley 2002; Marx 2002; Storey 1998; Schultz 2019).

[46] For an analysis of the directive in relation to subsidiary protection, see McAdam (2005b); Piotrowicz and van Eck (2004); Zwaan (2007).

Whereas some commentators and the UNHCR are "moderately satisfied" with the standards of Qualification Directive, and see the main problems as being connected with practices and implementation, they consider the situation regarding asylum procedures as more problematic (Guild and Moreno-Lax 2013: 18). As explained in the following sub-section, the recast Asylum Procedures Directive has introduced a number of mechanisms to prevent abuse as well as to allow states to refuse responsibility for claims (including inadmissibility criteria,[47] the safe third country concept) which, my analysis suggests, affect the fairness of the system (see also Guild and Moreno-Lax 2013: 18; Mouzourakis 2016).

4.2. Refugee Status Determination Procedures

In the EU, refugee status determination procedures are regulated by the recast Asylum Procedures Directive and, more generally, Article 47 of the EU Charter of Fundamental Rights which requires states to guarantee fair procedures. The recast Asylum Procedures Directive aims at developing common procedural standards for determining refugee status. It ensures access to the procedures, the right to appeal, the right to remain in the country pending the decision at first instance and on appeal, and the right to free legal assistance and representation, among others.

Some scholars suggest that there is "reluctance to implement the Directive in a full and positive way" (Terlouw 2017: 255). Furthermore, when member states have transposed the directive into national legislation, the procedural guarantees each state offers are different and sometimes contradictory (Schittenhelm and Schneider 2017 quoted in Schittenhelm 2019: 230; Fassin and Kobelinsky 2012; Jubany 2011). Moreover, scholars criticize the recast Asylum Procedures Directive for a number of derogation provisions and optional clauses (Terlouw 2017: 254; Peers 2012: 15) which give rise to irregular secondary movements and weaken the idea of a common asylum system (Schweitzer et al. 2018: 11). Among such clauses, particularly critical are those introducing the 'safe third country' and 'safe country of origin' concepts which allow states to identify certain countries as 'safe' (Asylum Procedures Directive (recast) Articles 33(2), 38; see Costello and Hancox 2016: 396–400; Legomsky 2000: 628). These designations mean that those countries are presumed not to persecute applicants or to return them to countries that would persecute them (Legomsky 2000: 628). This may result in the refusal and expedited processing of applications from 'safe countries', for example, reducing consideration of the claim to a few days with no or limited right of appeal (Gil-Bazo 2015: 62; Goodwin-Gill and McAdam 2007: 392).[48] As Stephen Legomsky notes, some have argued that the 'safe country' approach offers certain advantages, such as reducing backlog of cases as well as the cost of decision-making of claims that are presumed to be unfounded. However, deciding whether a country is indeed safe is a difficult task (ibid.; Costello 2016: 601).[49] Legomsky points out the possibility of mistakes in this regard, "especially when a country is large" and there are "rapid changes in the human rights conditions" (2000: 628). In some cases, foreign policy considerations may lead to some countries with doubtful human rights records being included in the 'safe country of origin' or 'safe third country' lists

[47] For instance, a case is inadmissible when another country is responsible for carrying out the asylum procedure.

[48] In cases of accelerated procedures, it is difficult for asylum seekers to produce satisfactory evidence to substantiate their cases (Hunt 2014: 511–512).

[49] Other scholars sharing Legomsky's position include Byrne and Shacknove (1996) (as cited by Legomsky 2000: 628, ft. 38); AEDH et al. (2016) and Gil-Bazo (2017). By contrast, Hailbronner (1993: 49–58) is favourable to the safe country of origin concept (as cited by Legomsky 2000: 628, ft. 38). For a brief overview of different practices among EU member states, see AIDA (2017).

(ibid.). Importantly, fairness considerations require individualized assessment of cases to ensure the interests of justice (ibid.; Costello 2016: 609; Engelmann 2015: 296). The 'safe country' concept has been implemented in several EU countries (Costello 2016: 605), which, some researchers point out, risks creating situations of "refugees in orbit", i.e. refugees who are transferred from country to country without ever arriving in a country where they can claim asylum (Legomsky 2000: 629; Binkovitz 2018: 594; Gil-Bazo 2015: 49). Studies of the impact of 'safe third country' and 'safe country of origin' concepts are few. Exceptions are, for example, Stefanova (2014), who explores state practice in relation to the application of the 'safe country' concept, or Moreno-Lax (2015), who discusses the lack of legal clarity about the scope of the Refugee Convention regarding individuals' rights to protection and states' responsibilities. However, even these studies are not based on empirical data concerning the asylum seekers directly involved. Future research could provide better knowledge about the treatment of refugees whose cases are refused on those grounds and how their journeys continue afterwards.

Another questionable provision concerns access to legal services during asylum procedures. The recast Asylum Procedures Directive continues the approach of the original directive in ensuring legal aid for advice and legal representation only at the appeal stage. At the first stage of the procedure, the applicant has the right to access legal assistance at his/her own cost, which is often unrealistic for newly arrived refugees who lack financial resources of their own. While the recast Asylum Procedures Directive requires states to provide applicants with free legal and procedural information (Article 19), studies have pointed out that information on the legal process cannot be a substitute for the legal services of a lawyer (Costello and Hancox 2016: 410). In addition, some studies argue, without adequate representation, asylum applicants are unable to present their case effectively, since they are frequently insufficiently familiar with the language, laws, and culture of the country of asylum. The need for legal representation is especially acute when the applicant must make his/her case against a lawyer representing the government, resulting in an imbalance between the two parties in the process (Legomsky 2000: 635, 637). Building on such findings, additional studies would be desirable to establish to what extent applicants have access to legal representation – and how and by whom – and whether gaps in provision of legal representation can be addressed.

Social science studies relevant to the procedural aspect of asylum determination, in turn, are mainly concerned with official actors like administrative decision-makers and judges. Such research has shown how the attitudes, legal consciousness, and background of these actors have a great impact on the outcome of cases (Ramji-Nogales et al. 2009; Campbell 2020). However, more studies could help to better understand how the law is implemented, explore questions of the independence of refugee status determination bodies and how their independence can be improved, as well as challenges that decision-makers face in the determination of asylum claims. Similarly, more investigations on applicants' experiences with the procedures and the law are needed to better understand the effectiveness of the law (Cabot 2012; Biehl 2015; Stevens and Dimitriadi 2019).

4.3 Dublin Regulation

The Dublin Regulation III sets out criteria for determining which EU member states are responsible for examining the refugee claims of individual applicants (Maiani 2016a).[50] Specifically, it sets out that each application must be examined by one member state, namely, the state identified as responsible according to criteria set out in the regulation. Considerations include: presence of family members in a member state; possession of a visa or residence permit from a state; submission of a request for protection in that state by an unaccompanied minor (Dublin Regulation III, recital 4). The most important of these criteria is the EU state of first entry (Maiani 2016a: 109; Federico and Cerrina Feroni 2018: 32).

The supporters of the Dublin Regulation see it as a "cornerstone" of the CEAS because it seeks to share responsibilities among states and prevent forum shopping by asylum seekers (European Council 2010 para 6.2.1). By contrast, critics point to problems with the system's effectiveness and fairness (Maiani 2016a and b: 11; di Filippo 2018: 56–57; Cafiero 2019). Firstly, the Dublin Regulation is based on the presupposition that the asylum system has been harmonized across the EU and responsibility for asylum seekers is shared. However, as discussed above, the asylum systems of individual states have important differences and there is no burden-sharing rationale (Maiani 2016a: 108; Garlick 2016). This is particularly evident in the case of countries with external borders which have been receiving high influxes of arrivals compared to other states and have complained repeatedly of an uneven distribution of asylum seekers (Terlouw 2017: 255). Secondly, the principle that the asylum claim must be lodged in the country of first entry does not take into account asylum seekers' preferences for settling in one country rather than another (ibid.; Maiani 2016a: 107). While the Dublin Regulation III introduced some improvements regarding family unity, the system still disregards the intentions of the asylum seekers (Brandl 2016). As a consequence, in order to avoid the application of the Dublin Regulation, many asylum seekers resort to tactics such as pursuing litigation, departing the country (absconding), and destroying documents (Terlouw 2017: 255; Maiani 2016a: 106). Francesco Maiani notes some of the negative effects of applicants' resistance to the system; these include: states' use of detention and escorts to carry out transfers; long and inefficient status determinations; and asylum seekers' refusal "to file an application in the 'wrong state' and eventually absconding for good" (2016a: 107). Madeline Garlick (2016: 176) observes that a number of countries, including Italy, the Netherlands, and France, have treated asylum claims from applicants who were returned under the Dublin Regulation after a long absence not as ongoing claims but as new applications. Thus, applicants were required to submit evidence of new facts or circumstances in order to have their cases examined again. Other problems relate to the conditions faced by returnees, as there may be no provisions in place for receiving them and this may jeopardize the capacity to pursue their claims. Garlick (2016: 167) explains that some recognised refugees may also engage in secondary movement and fall under the Dublin System. Their claims are usually rejected as inadmissible in the second member state under Article 33(2) (a) of the Asylum Procedures Directive (recast) and they are transferred back to the first one. It is unclear whether they maintain refugee status after being returned. In conclusion, as Garlick (2016) argues, evidence from recent years shows the

[50] The Dublin Regulation was first adopted in 2003 and then amended, along with the other asylum instruments, in a recast process. A number of significant changes were made, mainly by strengthening procedural rights in the Dublin Process, but the main principles of the system and its criteria for allocating responsibility for claims remained the same (Garlick 2016).

failure of the Dublin Regulation to reach its explicit aim of providing a reliable and quick system for allocating asylum applicants. The UNHCR comes to a similar conclusion (2017).

While several studies address the practical implications of the Dublin system (Garlick 2016; Ngalikpima and Hennessy 2013; ECRE 2018), only a few analyse asylum seekers' experiences. Topics here include the Dublin Regulation's interference with family life, problems accessing asylum procedures and reception services, occurrences of coercion (Brekke and Brochmann 2015; Takle and Seeberg 2015), the Dublin Regulation's impact on their legal status, and how transfers are communicated and carried out. Similarly, there are very few empirical legal studies of the tactics used by asylum seekers to evade the system. Most works concentrate on the transposition of the relevant legal provisions by the states and are dominated by legal analysis (Schweitzer et al. 2018: 12). Among the exceptions to this are a few reports based on empirical data (i.e., ICF International 2015) and a study by Jan-Paul Brekke and Grete Brochmann (2014), who conclude that national variations endure in spite of EU laws that aim at harmonizing the asylum reception systems. They point out the limits of EU law as it is challenged by different economic factors in the member states, such as access to employment, economic recession, welfare provisions, variations in reception conditions, and integration policies.[51]

The studies examined here suggest that migrants and asylum seekers may move again after their arrival in Europe due to structural and legal constraints as well as reception conditions (which will be discussed in the following section). Nevertheless, as pointed out by Volker Türk and Rebecca Dowd, there remains a lack of academic research on several critical issues, especially realities at the border and encounters between forced migrants and official actors, the treatment of asylum seekers in transit in different countries, and the impact of the law and deterrence measures on asylum seekers' decisions and strategies regarding their journeys (2014: 282). Social science research tackling these issues does not normally engage with legal aspects.

4.4 Reception of Asylum Seekers

Additional problems that may hinder access to asylum procedures are connected with poor reception standards. The Refugee Convention sets out a number of rights of refugees that are to be recognized in the host country. However, a significant number of these rights (including the right to engage in wage-earning employment, to have access to housing and welfare, to benefit from labour and social security legislation, and to receive travel documentation) are recognized only in cases of refugees 'lawfully staying' in a state. According to James Hathaway a refugee is considered lawfully staying when "his or her presence in a given state is ongoing in practical terms. This may be because he or she has been granted asylum consequent to formal recognition of refugee status" (2015: 730).

In the EU, the Reception Directive is meant to clarify the socio-economic rights of asylum seekers and to set out and harmonize reception conditions, such as provision of housing, food, and health care, and enabling access to employment when applicable. Scholars agree that the Reception Directive is essential to enable asylum seekers to sustain themselves during the asylum process, not only to ensure their fundamental rights but also to guarantee a fair and effective asylum procedure

[51] Brekke and Brochmann maintain that "[s]tudying the secondary migration of asylum seekers provides an opportunity to analyse the tensions between the supranational aspirations of governance at the EU level and the persistent national differences in integration and welfare policies" (2014: 160).

(UNHCR 2000). At the same time, the Reception Directive receives criticism for a number of problematic provisions.

A frequent criticism concerns the provision on the use of immigration detention: while it states that detention must be proven to be necessary and assessed on an individual case basis, the six grounds for detention in Article 8(3) [52] are too broadly defined and allow states a wide scope for action (Costello and Mouzourakis 2016: 62; Tsourdi 2016: 20–26). Another criticism relates to the vague terms regarding asylum seekers' right to work. The Reception Directive mandates that asylum applicants who have waited more than 9 months for an initial decision on their asylum claims can apply for permission to work, but in practice it allows states to delay access to the labour market and gives them few possibilities to challenge the authorities' decisions (Article 15(1); Peers 2012: 7; Mathew 2012).

Some scholars point to the ambiguity concerning whether the Reception Directive allows exceptions in cases of high influxes of refugees or inability of the national reception services to cope with such a situation (Schweitzer et al. 2018: 13). They also point to the uncertainty as to the moment at which member states become required to provide asylum seekers with housing, food, etc. and when such an obligation comes to an end (especially in cases of refusal of an asylum application or referral of the applicant to another member state under the Dublin Regulation) (ibid.: 12).

Many discussions are focused on the meaning of 'vulnerability' and 'having special needs'. The Reception Directive uses these words in connection with the treatment of persons falling under a specific group of refugees whose ability to benefit from and comply with the process may be limited due to gender, disability, age and other personal characteristics (Jakuleviciene 2016: 357). This unprecise language, it is argued, creates different categories of refugees and the risk of splitting them into categories of deservedness based on moral and humanitarian criteria more than on legal standards (Trotta 2017: 53–54; Fassin 2010: 239–240; Markay 2018: 21–22). Insufficient harmonization has been identified as an issue with many provisions in the directive, but especially those concerning the treatment of unaccompanied children seeking asylum (Schweitzer et al. 2018: 12). In addition, the tendency is for states to provide low levels of benefits, and not always guarantee social rights during the asylum procedures (Peers 2012: 7). In this vein, Albert Kraler (2019: 96) emphasizes the creation of a "system of differentiated legal statuses for noncitizens and an associated hierarchy of rights to which migrants have or do not have access." Thus, the literature finds that people who claim asylum experience a dual exclusion: firstly, they face the separation from their country of origin caused by the human rights abuses that they suffered (Gedalof 2007). Secondly, they experience exclusion from the societies in which they are newly arrived (Spicer 2008). Although they are physically within the new societies, they remain outside socially, because they are not permitted to work, participate economically, or enjoy benefits (Bakker et al. 2016; Mayblin and James (2018); Artero and Fontanari (2019). Social science studies additionally uncover how, in practice, reception and integration services tend to treat asylum seekers as an undifferentiated group and are unable to meet their needs, both in terms of quantity and quality

[52] The six grounds of detention are the (1) determination of the applicant's identity or nationality, (2) the determination of elements of the claim, particularly in cases where there is a 'risk of absconding', (3) the determination of the applicant's right to enter, (4) the prevention that an applicant from delays or frustrates a return procedure; (5) the protection of national security or public order, and (6) the transfer procedures under the Dublin III Regulation (Reception Conditions Directive (recast) art 8(3)).

(Fiddian-Qasmiyeh 2014: 404). Refugee services do not give enough attention to the fact that people who have been forcibly uprooted need support of various kinds to adapt to new social and economic contexts. A better awareness of refugees' backgrounds, cultures, ties, and aspirations could help to improve refugee administration and the identification of durable solutions (Sorgoni 2015). For instance, in light of their age and particular vulnerability, unaccompanied minors are supposed to be treated differently than adults in policy and practice. Special provisions are in place to safeguard their rights and help them get through the asylum procedures and integrate (Schweitzer et al. 2018: 12). However, it is reported that in some countries, such as Italy,

> "[t]here are persistent challenges in the governance of protection and social inclusion for refugee and migrant children, despite progressive laws. These include a highly fragmented system with limited accountability and monitoring, with disparities in terms of the quality of services and care across regions, to deal with vulnerable children (…) and survivors of gender-based violence" (UNICEF 2019: 1).

Another example is that of asylum seekers with family in the receiving country, who can potentially act as helpful mediators throughout the transition period, and may constitute an alternative to formal reception and integration programmes (e.g. housing in assigned communities) (Romme Larson 2011; Olwig 2010).

Overall, future research could assess the provision and management of reception services in light of the characteristics, diversity, and cultures of asylum seekers. As scholars such as Sorgoni argue, the use of anthropological methods could be helpful in efforts to improve policies and services to refugees (Sorgoni 2015).[53] Beyond that, further attention should be given to how reception conditions trigger secondary movements and affect the integration of asylum seekers, and how various actors (i.e., NGOs, faith-based organisations, local administrations) are involved in the provision of reception services.

In conclusion, the process that asylum seekers must navigate is complex and dependent on many factors which may affect whether they are able to be recognized as refugees. The main grey areas in the legal framework are connected with fairness of the asylum procedures, transfers under the Dublin Convention, and access to social and economic rights while cases are under consideration. Most of the other challenges are linked to implementation issues and the differing transposition of EU law by member states.

5. Concluding Remarks

The purpose of this paper was to provide an evaluation of the literature on refugee law and identify the key protection issues existing in the legal framework and the implementation of these laws by and in the EU states individually and collectively. The research gaps identified by the paper are, in fact, also protection gaps. The analysis of the literature revealed that both thematic areas under

[53] However, anthropologists are still struggling with making their work accessible and visible to the broader public (Hylland Eriksen 2006: 23, 115–117). On the limits and strengths of academic anthropologists working with activists, communities, and networks to affect policy, see Besteman (2010). While Heath Cabot (2019) also notes the potential of anthropologists to shape policies, he is critical about current anthropological scholarship regarding the European refugee crisis, suggesting that it follows priority research topics and target groups in a monological manner, which in turn, creates or replicates marginalization.

which I grouped the research – namely access to territory and access to the asylum system – present legal gaps and implementation problems.

Of these topics, the most critical challenges are in the area of access to the territory of a country of refuge (Guild and Moreno-Lax 2013: 10). For individuals in transit to the EU, even the most basic precondition for obtaining protection is absent, namely a legal framework that establishes clear rules and responsibilities as well as remedies in case of breach of these rules. The core issues here are a lack of legal certainty (because the laws are non-existent, not applicable, or inadequate) and a lack of effective mechanisms for the enforcement of migrants' rights.[54] The status of the literature in this area reflects the public debates and concerns, as well as the endeavour to identify ways to adapt existing instruments and develop better border policies and practices, including the creation of additional remote, indirect, and external border control mechanisms.[55] Contemporary legal debates in the field are concerned with developing innovative interpretations that could guarantee the effectivity of the right to asylum and the principle of non-refoulement.

Against this backdrop, topics which require further research include the legal challenges affecting migrants in transit and during the many stages of their journeys, and how to respond to these challenges. In particular, future studies could address the lack of (1) a precise framework for people in distress at sea; (2) a framework for effective border monitoring in countries performing border checks; (3) a clear framework on the responsibility of states, state agents and private parties for migrants' deaths and human rights violations, including the duty to investigate such occurrences; (4) accessibility of legal remedy (including the role of international and national courts and their jurisprudence and); as well as (5) effective mechanisms for burden sharing among states. While some works discuss these issues from an international law perspective, very few do so from a national point of view, most of them are theoretical in nature, and there is a particularly strong disconnect between law and other social sciences. More in-depth and empirical analysis, case studies, and comparative research are essential to improve the legal responses and develop a common policy approach in the field of asylum across the EU. While a few legal studies address the aspect of legal implementation, such works often represent purely desk-based research: they are not based on original empirical data and rely instead on reports of NGOs to support their arguments. Also, as discussed, the legal studies have not dedicated much attention to the intersection between the responsibility to protect, the right to be rescued, and international refugee law.

Concerning the second thematic area, namely access to the asylum system, it appears that EU member states have functioning asylum systems for people in their territories, and the main issues in this context are connected with (1) procedural fairness; (2) poor implementation of the legal provisions; and (3) the rights of people in transit within the region – especially states' use of the 'safe third country' concept and the Dublin Regulation to avoid responsibility for asylum claims. In this regard, future investigations could deepen and broaden our understanding of the process of recognizing individuals as refugees explore problems connected with the determination procedures, and identify ways that their accuracy and fairness can be improved. In addition, our knowledge about the transit of migrants within the EU would be enriched by empirical legal research, as at the

[54] Most of the areas that I identified overlap with those discussed by Volker Türk and Rebecca Dowd (2014).
[55] It has been pointed out that, while responsiveness of scholars to public debates is a positive feature because, among other reasons, it remains connected to the needs of society, it poses the risk of losing sight of the wider picture (Foblets et al. 2018: 15).

moment only few studies draw on original empirical data such as interviews or on ethnographic data. Future research could look at how legal constraints and gaps affect protection during the whole migration experience, taking into consideration the possibility of multiple statuses, how migrants' lives and immigration status evolve (e.g., work, family, integration, health), and how unrecognised refugees are treated.[56]

[56] "[M]any refugees and those who are similarly situated may never formally be recognized as refugees" (Costello 2018: 7).

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