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*The European Union and
Refugees:
Towards More Restrictive Asylum
Policies in the European Union?*

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Abstract

Several scholars have argued that European countries have decided to cooperate on asylum and migration matters at the EU level in order to develop more restrictive policies. In particular, it has been argued that European states have ‘venue-shopped’ to a new policy-venue in order to escape national constraints. This paper puts this argument to the test by assessing the extent to which the development of EU cooperation on asylum matters has indeed led to the adoption of more restrictive asylum standards. The paper argues that, actually, EU asylum cooperation has led to an overall increase in protection standards for asylum-seekers and refugees. This outcome is explained by two main factors: the increasing ‘judicialisation’ of asylum in the EU and institutional changes in the EU asylum policy area that have strengthened the role of more ‘refugee-friendly’ institutions.

Keywords: European Union, refugees, asylum policy, venue-shopping, Lisbon Treaty

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Introduction

EU cooperation on asylum and migration matters has greatly developed in recent years, making this policy area one of the most dynamic in the EU (KAUNERT, 2009, 2010). However, these issues have also been the object of controversial debates across Europe in the last few years and have been regularly at the top of the policy agenda of the European Union (EU) since it acquired its first competences on these issues with the Maastricht Treaty in 1993. Many scholars analysing the development of the EU asylum and migration policy have argued that it has generally been restrictive, mainly aiming to keep people outside the EU territory (JOLY, 1996; BROUWER and CATZ, 2003; GUILD, 2004; LEVY, 2005; BALDACCINI and GUILD, 2007; CHEBEL D'APPOLLONIA and REICH, 2008; LUEDTKE, 2009). In particular, Guiraudon (2000) has argued that EU cooperation on asylum and migration matters has been prompted by the willingness of European governments to develop more restrictive asylum and migration policies. According to her, in 'escaping' to the EU level, European governments have been seeking to circumvent liberal domestic pressures and obstacles. Drawing upon Baumgartner and Jones' work, she has termed this trend 'venue-shopping' in the field of asylum and migration. EU member states, in this argument, have thus decided to enhance their co-operation in the field of asylum and migration in a process driven by national bureaucracies.

This paper aims to re-assess, about ten years after the argument was first made, the extent to which EU cooperation on asylum matters has indeed led to the adoption of more restrictive asylum standards. The paper starts by presenting the 'venue-shopping' argument, which was originally developed by Guiraudon (2000). Then, it examines the development of the EU asylum policy and analyses the extent to which the EU venue has allowed policy-makers to fulfil their goal of developing more restrictive provisions on asylum. It shows that, overall, the switch to an EU venue for asylum policy-making has not led to more restrictive asylum provisions at the EU level. Actually, standards have been raised in several EU Member States. The paper then sets to explain this outcome, which stands in contrast with what would have been expected on the basis of the 'venue-shopping' literature. Two main factors are identified for accounting for this outcome: institutional changes in the EU asylum policy-venue that have strengthened the role of more 'refugee-friendly' institutions and the increasing 'judicialisation' of asylum in the EU.

Venue-shopping in the EU asylum and migration policy

Drawing upon the literature on ‘policy venues’ developed by Baumgartner and Jones (1993), Guiraudon (2000; see also LAHAV and GUIRAUDON, 2006) has developed a ‘venue-shopping’ framework, which, she argues, is the most adequate to account for the timing of the creation, the form and the content of EU cooperation on asylum and migration matters. ‘Venue-shopping’ refers to the idea that policy-makers, when encountering obstacles in their traditional policy venue, tend to seek new venues for policy-making that are more amenable to their preferences and goals. In her first article on venue-shopping, which was published in 2000, Guiraudon argued that national officials began to cooperate on asylum and migration matters at the European level after encountering obstacles when attempting to develop increased migration controls at the beginning of the 1980s (GUIRAUDON, 2000: 252). According to Guiraudon (2000; see also LAHAV and GUIRAUDON, 2006), these obstacles were mainly situated at the national level and took various forms, such as judicial constraints, the activities of pro-migrant groups or the necessity for Interior ministries to compromise with other ministries (e.g. labour, social affairs) when making national legislation. Guiraudon particularly emphasises how attempts to further increase migration controls were stifled in several European countries by the jurisprudence of higher courts – what has come to be known as the ‘judicialisation’ of asylum and migration policies (GIBNEY, 2001). The courts drew upon domestic constitutional principles, such fundamental rights, general legal principles, such as due process, as well as international legal instruments to some extent.

Still according to Guiraudon (2000), venue-shopping allowed the policy-makers who aimed to increase migration controls to do so by avoiding the aforementioned obstacles. First of all, venue-shopping helped policy-makers avoid judicial constraints. In addition, the institutional mechanisms to deal with asylum and migration matters in the EU with the Maastricht Treaty allowed Interior Ministries to keep firmly in control of these matters, by considerably restricting the roles of the European Commission, the European Parliament and the European Court of Justice (ECJ), which were perceived as more ‘migrant-friendly’. In addition, the unanimity rule within the Council of Ministers, in this argument, was also meant to provide a barrier against the influence of the Commission or the Parliament on the EU asylum and migration policy. Moreover, the creation of a separate Third Pillar also led to a decoupling of the issues of migration and

asylum from other related issues such as employment and social affairs, which were dealt with by other parts of the European Commission. In addition, it was made more difficult for NGOs to monitor policy-making on asylum and migration. Finally, still according to Guiraudon, the development of EU intergovernmental cooperation on asylum and migration matters also helped enlist the cooperation of sending and transit countries in migration control. This allowed EU Member States to develop a so-called 'buffer zone' around the EU, with the effect of reducing the number of asylum-seekers and migrants coming into the EU.

Guiraudon (2003: 264) reasserted and refined her earlier argument in an article in 2003. She suggested that only one side in the EU asylum and migration debate managed to 'venue-shop' at the international level to pursue its own ambitions: national Interior ministries sought to regain control over asylum and migration policies from domestic courts and national adversaries by escaping to the EU level. In this article, Guiraudon (2003) analyses the way in which only one 'camp' managed to 'go transnational' in order to venue-shop and escape domestic constraints – the national Interior ministers. Her empirical study explains the particular timing, form and content of EU policies through a political sociology approach, as she calls it. Initially, Guiraudon (2003: 267) explains the way in which 'policemen replaced diplomats' during the intergovernmental negotiations leading up to the Maastricht Treaty and the creation of the Third Pillar. In this process, the Commission was excluded, apparently unable to play its role as a 'policy entrepreneur' (GUIRAUDON, 2003: 269), despite the fact that she concedes that 'diplomats stroke back' (GUIRAUDON, 2003: 270) in the negotiations of the Amsterdam Treaty. Yet, in her view, the 'logic of the policy process has not drastically changed', and even Brussels-based pro-migrant groups have not been able to change the environment significantly.

Lavenex (2006) re-visited this argument about venue-shopping in an article in 2006. She found that venue-shopping was still taking place as those in charge of immigration matters were still trying to find new policy venues to increase their autonomy. Whereas Guiraudon had mostly witnessed a move of policy-making from the national level to the EU level where cooperation would mainly develop according to a pattern of intergovernmental cooperation (*i.e.* an upward shift), Lavenex emphasised the importance of an outward shift of policy-making on migration matters towards the realm of EU foreign policy. According to her, this shift is a new attempt by immigration and asylum officials to regain more autonomy from more liberal actors in order to

increase migration controls as, in her view, ‘supranational actors have fewer powers than they do in the now communitarised “internal” asylum and immigration policies’ (Lavenex, 2006: 346). The evidence presented for this trend is the following: (1) the reluctance of EU member states to communitarise EU asylum and migration policy, and (2) the increasingly important agenda of the external dimension of the EU asylum and migration policy. In particular, the empirical developments cited are: (1) the Budapest Group to fight against illegal immigration in Eastern Europe and the ‘5+5 Dialogue’ for the Western Mediterranean, (2) the joint border patrols in the Mediterranean, (3) readmission agreements, and (4) the European Neighbourhood Policy.

In this paper, the ‘venue-shopping argument’ will be operationalised as follows. First of all, EU Interior ministries, in line with the previous contributions to the topic (GUIRAUDON, 2000, 2003; LAHAV and GUIRAUDON, 2006; LAVENEX, 1999, 2006), are assumed to be rational actors, which generally aim to reduce the numbers of refugees and migrants coming into the EU. Although some may see this commonly held view in the literature as an oversimplification, it remains that European governments have generally attempted to appear as if they are in control of migration flows, even though they may not be successful (BOSWELL and GEDDES, 2011). Also, as asylum and migration matters are generally dealt with by Interior ministries, some would argue that it is characteristic of the *habitus* of Interior ministers and civil servants to seek to control and restrict in general (BIGO, 1998), which means that their approach to asylum and migration is also highly likely to be control-oriented and restrictive. Moreover, the article focuses on ‘upward venue-shopping’ and aims to establish whether this trend may have had some ‘unintended consequences’ in the form of increased rights for refugees, despite the ambition of EU Interior ministries to the contrary. Finally, the article will emphasise that EU policy areas are not static and that it is important to take the institutional changes that characterise the EU into account in the analysis.

The Development of the EU Asylum Policy: Towards More Restrictive Asylum Provisions?

The aim of this section is to analyse the extent to which the switch to the EU venue has allowed policy-makers to fulfil their goal of developing more restrictive provisions on asylum. It does so by analysing the main achievements of the EU cooperation on asylum to date, which has aimed, since the Tampere Summit of 1999, to gradually establish a Common European Asylum System (CEAS). As this paper focuses on legislative instruments and does not consider financial instruments because of space constraints, it can be argued that the EU's main achievements in the area of asylum to date comprise the adoption of four key-directives – the so-called 'Temporary Protection', 'Qualification', 'Procedures', and 'Reception Conditions' Directives – and the 'Dublin II Regulation', as well as the decision to establish a European Asylum Support Office in 2010.

The Temporary Protection Directive (Council Directive 2001/55/EC of 20 July 2001) lays down provisions on temporary protection for displaced persons in the context of a mass influx of persons seeking protection. The existence of such a situation of 'mass influx' is to be established by the Council voting according to the qualified majority voting procedure and on the basis of a proposal from the Commission. The Council decision is binding on all Member States, although none of them is obliged to admit a specific number of persons in need of international protection. Every Member State is to ascertain its own reception capacity in a spirit of 'Community solidarity' (HAILBRONNER, 2004: 41). Thus, this represents an attempt at establishing an EU system of 'burden-sharing' in cases of mass influx of displaced persons from third countries. However, it is a rather modest attempt, as the directive, for example, does not foresee any mechanism of financial solidarity amongst Member States.

The Reception Conditions Directive (Council Directive 2003/9/EC of 27 January 2003) lays down minimum standards for various aspects of the reception of asylum-seekers in the EU Member States, including information, residence and freedom of movement, employment, education and vocational training, material reception conditions, and health care. Although some have criticised that these minimum standards on reception conditions do not apply to the recipients of temporary protection (GUILD, 2004: 213), the efforts to ensure the provision of minimum reception

conditions across the EU have been generally welcome, notably with a view to reducing secondary movements of asylum-seekers (HAILBRONNER, 2004).

The Dublin II Regulation (Council Regulation (EC) 343/2003 of 18 February 2003) establishes the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national. The main goal of this regulation is to ensure that an asylum-seeker has access to an asylum procedure in one of the EU Member States on the basis of responsibility criteria. Thus, the regulation aims to tackle the problems of ‘asylum shopping’ (*i.e.* multiple applications for asylum across the EU by the same person) and ‘refugees in orbit’ (*i.e.* asylum-seekers unable to find a state accepting to examine their application in the EU). The Dublin II Regulation replaces, and addresses some deficiencies of, the Dublin Convention, which was adopted in 1990. Although the directive establishes a hierarchy of criteria, the main principle underpinning the system is that the state responsible for processing an application is the state responsible for the asylum-seeker’s presence in the EU, *i.e.* the state through which an asylum-seeker has entered the EU (HAILBRONNER, 2004; DA LOMBA, 2004: 119). However, there is no provision in the regulation preventing a given Member State to examine an asylum application, even if it is not formally responsible for its processing. The implementation of this so-called ‘Dublin system’, which entails transfers of asylum-seekers amongst Member States for the processing of their application, relies on EURODAC to a significant extent. This instrument is a database containing the fingerprints of asylum-seekers, which is used to ascertain whether (and in which EU Member State) a given asylum-seeker has already applied for asylum in the EU. It has been operational since January 2003 (HAILBRONNER, 2004).

The Asylum Qualification Directive (Council Directive 2004/83/EC of 29 April 2004) lays down minimum standards for “the qualification of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted” (Article 1). It outlines the criteria that a person needs to fulfil in order to qualify for subsidiary protection and for being a refugee respectively, as well as elaborates on the status associated with each of these categories. Whilst the definition of ‘refugee’ is that of the Geneva Convention, ‘a person eligible for subsidiary protection’ is defined as a person who does not qualify for refugee status, but is nevertheless at risk of suffering serious harm in his (or her) country of origin. The directive is particularly innovative in two respects. Firstly,

whereas, traditionally, most Member States only recognised state actors as actors of persecution or serious harm, the directive foresees that *non-state* actors can also be considered actors of persecution or serious harm in certain circumstances. Secondly, the directive outlines various examples of ‘acts of persecution’, which indicate that this concept is to be interpreted more broadly than is generally the case in existing national legislations. As also emphasised by El-Enany and Thielemann (forthcoming 2011), these important provisions have had a profound impact on the legislation and practices in several EU Member States, including France and Germany (STOREY, 2008: 1). As a consequence, this directive has generally been received positively by pro-migrant non-governmental organisations and asylum experts, such as Storey (2008: 1) who has called the Refugee Qualification Directive ‘a remarkable development’. Others have been more circumspect. For example, McAdam (2008: 461) has welcomed the codification of *ad hoc* practices of complementary protection into a ‘subsidiary protection’ regime, but has deplored the entrenchment of the differentiation made between refugees and recipients of subsidiary protection.

The Asylum Procedures Directive (Council Directive 2005/85/EC of 1 December 2005) provides for several minimum procedural standards, regarding issues such as access to the asylum procedure, the right to remain in the Member State pending the examination of the application, guarantees and obligations for asylum-seekers, personal interviews, legal assistance and representation, detention, and appeals. In addition, the directive also codifies some important concepts (HAILBRONNER, 2004), such as ‘safe country of origin’ and ‘safe third country’. Some have criticised the contents of this directive, in particular the lack of suspensive effect for appeals (BYRNE, 2005: 71) and the concepts of ‘safe country of origin’ and ‘safe third country’¹. However, it is important to note that these minimum procedural standards have actually required several EU Member States to raise their standards from the point of view of the protection of asylum-seekers (ACKERS, 2005). For example, Portugal and Spain have had to significantly restrict the grounds on which asylum applications can be declared inadmissible (FULLERTON, 2005).

Finally, it was decided in 2010 to establish the European Asylum Support Office (EASO), which aims to provide further expertise and technical assistance to EU

¹ The Directive had also given the Council the competence to adopt and amend European lists of ‘safe countries of origin’ and ‘safe third countries’, but the relevant provisions were annulled by the ECJ in 2008, following an application for annulment filed by the European Parliament.

Member States in the field of asylum (COMTE, 2010). Once it is fully operational, its main objectives will be to facilitate practical cooperation on asylum amongst Member States (on matters such as access to information on countries of origin and dissemination of good practice), to coordinate support teams comprising national experts in Member States faced with a mass influx of asylum-seekers, and to support the implementation of the Common European Asylum System (CEAS).

Thus, these instruments have established minimum standards with regard to several aspects of asylum systems, from which EU Member States cannot derogate. Whilst some may have liked to see these minimum standards being pitched at a higher level (from the point of view of asylum-seekers), it is important to note that those are only *minimum* standards. The Temporary Protection, Asylum Qualification, Asylum Procedures and Reception Conditions Directives all explicitly state that Member States may retain or introduce more favourable provisions. However, these instruments are important in that they prevent a ‘race to the bottom’ by preventing EU Member States from adopting provisions that would not respect a minimum level of protection. In addition, even those minimum standards have required some Member States to raise their existing standards, whilst there is no evidence that there has been a general lowering of more generous protection standards (see also EL-ENANY and THIELEMANN, forthcoming 2011; HAILBRONNER, 2008). Thus, this analysis has shown that the move to the EU for asylum policy-making has in general not led to the adoption of more restrictive provisions, but rather to an improvement of asylum standards across the EU. As this outcome is the opposite of what would be expected on the basis of the ‘venue-shopping’ literature, it is important to seek to explain it. The following section examines the main reasons for which the development of the EU asylum policy has not led to an increase in the restrictiveness of asylum policies in the EU.

Explaining the absence of increased restrictiveness in the EU asylum policy

This section argues that the move to the EU venue has not led to an increase in the restrictiveness of asylum policies for two main reasons: (1) institutional changes that have empowered more ‘refugee-friendly’ EU institutions and that have recently been consolidated by the Lisbon Treaty and (2) the increasing ‘judicialisation’ of asylum in the EU.

Institutional changes in the area of asylum

Since Guiraudon wrote her seminal article in 2000, there have been significant changes to the EU asylum policy area, which have strengthened the role of more ‘refugee-friendly’ EU institutions. Whilst the EU asylum policy area was originally largely dominated by Interior Ministries, it has become increasingly less intergovernmental over the years as a result of treaty reforms decided by other actors at various Intergovernmental Conferences. The EU asylum policy area has seen a significant increase in the role of EU institutions, such as the European Commission, the European Parliament and the ECJ, which have less restrictive views than the Council (GEDDES, 2008).

The asylum policy area was originally governed by intergovernmental arrangements, as it was part of the ‘Justice and Home Affairs’ third pillar established by the Maastricht Treaty (1993). Member States were largely dominant in the policy-making process (GEDDES, 2008). The European Commission was only ‘fully associated with the work’ of the Council in the area of asylum, whilst the role of the European Parliament was limited to being informed and consulted on the initiatives of the Member States. As for the ECJ, it was not given any role with respect to EU asylum provisions.

The Amsterdam Treaty altered these institutional arrangements to a significant extent in 1999. It strengthened the role of the European Commission, which received a right of initiative, but had to share it with Member States for a five-year transition period. During this transitional period, the Council was required to take decisions unanimously after consulting the European Parliament. The Amsterdam Treaty also gave the ECJ a more prominent role with respect to asylum matters. Article 73 granted it the competence to rule, when asked by a national court or tribunal, on two types of questions: those on the interpretation of the Treaty provisions on asylum and those on the validity or interpretation of acts of the institutions of the Community based on the Treaty provisions on asylum, but only in cases “pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law”. Although some have criticised the existence of such limitations to the role of the ECJ (see, for example, PEERS, 2005), this was nevertheless a significant change, which led to several cases being brought before the Court, as will be discussed in the next section.

Finally, the Lisbon Treaty, which has entered into force on 1 December 2009, has further strengthened the role of the ECJ and the European Parliament respectively. All asylum legal instruments are now to be adopted in accordance with the ordinary legislative procedure, which is laid down in Article 294 of the Treaty on the Functioning of the European Union (TFEU). This means that the European Parliament has now acquired joint decision-making power on asylum, which represents a significant increase in power for this institution, whilst the Council takes decisions by qualified majority voting. In addition, judicial control has been expanded, as the Lisbon Treaty has strengthened the role of the Court with regard to asylum matters. In particular, the Court's preliminary jurisdiction, which used to be limited, has been generalised. Thus, the role of the EU institutions has been greatly strengthened in the asylum policy area. The European Parliament now has the potential to considerably influence the future balance of power between the different EU institutions and the future development of the EU asylum policy, whilst the Court will see a significant increase in the number of cases concerning asylum, which will also give it opportunities to shape this policy area. This influence could be particularly important in the field of asylum, since recent case-law of the ECJ has shown a "trend of interpreting the law in order to accommodate the need for protection of fundamental individual rights" (HATZOPOULOS, 2010: 153).

Thus, this section has shown that there has been an increasing 'communitarisation' of asylum, with growing roles for the European Commission, the European Parliament and the ECJ. As they tend to be more 'refugee-friendly' than Interior ministries (GEDDES, 2008), the growing presence of these institutions in the EU asylum policy area constitutes an increasingly important obstacle for national policy-makers willing to adopt more restrictive asylum provisions. This explains why the development of EU cooperation on asylum has not led, overall, to a decrease in asylum standards, as one would have predicted on the basis of the 'venue-shopping' literature, but rather to their strengthening. Nevertheless, this is not the only factor accounting for this increase in asylum standards across the EU.

The increasing 'judicialisation' of asylum

Another important factor explaining why the asylum provisions adopted at the EU level have not been as restrictive as one might have expected is a series of changes that can be seen as an increasing 'judicialisation' of asylum in the EU – that is, the increasing influence of juridical texts and actors on asylum policy-making. Amongst those, one can highlight the inscription of the Geneva Convention and the EU Charter of Fundamental Rights in the EU Treaties, as well as the increasing role of the ECJ with respect to asylum matters, as explained in the previous section. Before examining these two factors further, it is important to emphasise that the 'judicialisation' of asylum in the EU is also an indirect effect of the jurisprudence of the European Court of Human Rights (see GUILD, 2006), which has ruled more than 45 times on asylum-related cases since 2005 (BOSSUYT, 2010). The Court is not part of the EU; neither is the EU party to the European Convention on Human Rights (ECHR). However, all Member States of the EU are party to the Court and the ECJ rulings also make references to the ECHR.

As previously explained, the ECJ has been given an increasing amount of competences towards asylum matters, which have led to several cases in recent years.² In that respect, case C-465/07 (*Meki Elgafaji and Noor Elgafaji v. Staatssecretaris van Justitie*) - which was related to the Qualification Directive – is particularly important. By clarifying some of the ambiguous provisions contained in the Qualification Directive regarding the scope of its Article 15(c), it has demonstrated the important role that the ECJ has begun and will continue to play in offering less restrictive and more generous interpretations of EU legislation than the Member States.

In addition to the reinforced role of the ECJ with regard to asylum matters, the 'judicialisation' of the EU asylum policy venue is also the result of the growing importance of legal texts that increasingly constrain policy-makers when adopting EU asylum provisions. The most important of them are the Geneva Convention and the Charter of Fundamental Rights. Article K.2 of the Maastricht Treaty already established that EU provisions on asylum were to comply with the Geneva Convention of 28 July 1951, as well as the European Convention on Human Rights. Another important change to the EU political system that has affected the asylum policy area - also by making it

² Case C-133/06 (*European Parliament v. Council*) concerned an action for annulment brought by the European Parliament against the Procedure Directive. Case C-19/08 (*Migrationsverket v. Petrosian*) followed a referral by a Swedish Court and concerned the implementation of two specific provisions of the 'Dublin II' Regulation.

less restrictive – has been the incorporation of the Charter of Fundamental Rights into the EU’s legal order following the entry into force of the Lisbon Treaty on 1 December 2009. Article 6(1) of the Treaty on European Union (TEU) provides a cross-reference to the Charter on Fundamental Rights, which contains a “right to asylum” in its Article 18 that “is wider even than the Universal Declaration of Human Rights” (PEERS, 2001: 161). According to Gil-Bazo (2008), this provision concerns all individuals falling under EU legislation, whose international protection grounds are established by international human rights law, including the Refugee Convention and the European Convention on Human Rights. Article 19 of the Charter also forbids collective expulsions and states that “no one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment”. The fact that the Charter of Fundamental Rights has now become legally binding is an important development for the EU political system as a whole, as it “create[s] or expand[s] rights protection in certain important fields” (PEERS, 2001: 166-167). This development has therefore made the EU asylum policy area more liberal.

Thus, this increasing ‘judicialisation’ has rendered the EU asylum policy area increasingly liberal and less amenable to the adoption of restrictive asylum provisions as favoured by national policy-makers. Thus, the absence of increasingly restrictive standards as an outcome of EU integration in asylum can be mainly explained by a gradual process of institutional change, which has led to the strengthening of more ‘refugee-friendly’ institutions, and the increasing ‘judicialisation’ of asylum.

Conclusion

This paper aimed to re-visit one of the most influential arguments in the literature on the EU asylum and migration policy, namely the ‘venue-shopping’ argument. According to this argument, first made by Guiraudon (2000), EU cooperation on asylum and migration matters has been prompted by the willingness of policy-makers to avoid constraints at the national level that prevent them from adopting more restrictive provisions. On the basis of this strand of the literature, one would therefore expect the development of the EU asylum and migration policy to lead to the adoption of more restrictive asylum and migration standards. This paper has put this claim to the test with regard to asylum matters.

The paper has shown that, in contrast with expectations stemming from the literature on ‘venue-shopping’, the development of the EU asylum policy has not led to the adoption of more restrictive asylum standards overall. The adoption of common minimum standards has actually curtailed competition amongst EU Member States, as they can no longer derogate from some minimum standards. In addition, even these minimum standards have required some states to actually increase their asylum standards. The paper has then sought to explain this unexpected outcome. It has argued that there are two main reasons for which asylum standards have overall increased, rather than decreased, as a result of the development of EU cooperation on asylum matters. Firstly, there have been several institutional changes that have gradually increased the role of more ‘refugee-friendly’ institutions, which have limited the restrictive tendencies of Interior ministries. Secondly, there has been an increasing ‘judicialisation’ of asylum, which has strengthened the rights of asylum-seekers and refugees. This explains why the development of EU integration in asylum matters has not led to the adoption of more restrictive provisions, as one would have expected on the basis of the ‘venue-shopping’ literature.

However, it is important to emphasise that this paper has specifically focused on the EU asylum policy. It has not considered the related, but distinct, issue of border controls. Those are mainly developed to prevent irregular migration, but may also have an impact on asylum-seekers by making it more difficult for them to reach the EU and apply for asylum. If this was indeed the case, then one would see a paradoxical situation, where access to asylum systems decreases as asylum standards are on the increase. However, this complex issue is to be addressed in another research paper.

References

- ACKERS, D. (2005) 'The Negotiations on the Asylum Procedures Directive', *European Journal of Migration and Law*, Vol. 7, No. 1, pp.1-33.
- BALDACCINI, A. and GUILD, E. (eds) (2007) *Terrorism and the Foreigner: A Decade of Tension around the Rule of Law in Europe* (Leiden: Martinus Nijhoff).
- BAUMGARTNER, F. R. and JONES, B. D. (1993) *Agendas and Instability in American Politics*, 2nd edn (Chicago: University of Chicago Press).
- BIGO, D. (1998) 'Sécurité et immigration: vers une gouvernementalité par l'inquiétude?', *Cultures & Conflits*, No. 31-32, pp. 13-38.
- BOSWELL, C. and GEDDES, A. (2011) *Migration and Mobility in the European Union*. (Basingstoke: Palgrave Macmillan).
- BOSSUYT, M. (2010) *Strasbourg et les demandeurs d'asile: des juges sur un terrain glissant*. (Brussels: Bruylant).
- BROUWER, E. and CATZ, P. (2003) 'Terrorism and the Struggle for Competence in Community Law'. In BROUWER, E. et al. (eds) *Immigration, Asylum and Terrorism: A Changing Dynamic in European Law*. Nijmegen: Instituut voor Rechtssociologie/Centrum voor Migratierecht, KU Nijmegen.
- BYRNE, R. (2005) 'Remedies of Limited Effect: Appeals under the forthcoming Directive on EU Minimum Standards on Procedures', *European Journal of Migration and Law*, Vol. 7, No. 1, pp. 71-86.
- CHEBEL D'APPOLLONIA, A. and REICH, S. (eds) (2008) *Immigration, Integration, and Security: America and Europe in Comparative Perspective* (Pittsburgh, PA: University of Pittsburgh Press).
- COMTE, F. (2010) 'A New Agency is Born in the European Union: The European Asylum Support Office', *European Journal of Migration and Law*, Vol. 12, pp. 373-405.
- DA LOMBA, S. (2004) *The Right to Seek Refugee Status in the European Union* (Antwerp: Intersentia).
- EL-ENANY, N. and THIELEMANN, E. (forthcoming 2011) 'The Impact of EU Asylum Policy on National Asylum Regimes'. In WOLFF, S. et al. (eds) *The Area of Freedom, Security and Justice after Lisbon and Stockholm* (The Hague: T.M.C. Asser Press).
- FULLERTON, M. (2005) 'Inadmissible in Iberia: The Fate of Asylum Seekers in Spain and Portugal', *International Journal of Refugee Law*, Vol. 17, No. 4, pp. 659-687.
- GEDDES, A. (2008) *Immigration and European Integration: Towards Fortress Europe*, 2nd edn (Manchester: Manchester University Press).
- GIBNEY, M. J. (2001) 'The State of Asylum: Democratization, Judicialization and Evolution of Refugee Policy in Europe', *New Issues in Refugee Research Working Paper*, No. 50.
- GIL-BAZO, M.-T. (2008) 'The Charter of Fundamental Rights of the European Union and the Right to be Granted Asylum in the Union's Law', *Refugee Survey Quarterly*, Vol. 27, No. 3, pp. 33-52.

- GUILD, E. (2004) 'Seeking Asylum: Stormy Clouds between International Commitments and EU Legislative Measures', *European Law Review*, Vol. 29, No. 2, pp. 198-218.
- GUILD, E. (2006) 'The Europeanisation of Europe's Asylum Policy', *International Journal of Refugee Law*, Vol. 18, No. 3-4, pp. 630-651.
- GUIRAUDON, V. (2000) 'European Integration and Migration Policy: Vertical Policy-making as Venue Shopping', *Journal of Common Market Studies*, Vol. 38, No.2, pp. 251-271.
- GUIRAUDON, V. (2003) 'The Constitution of a European Immigration Policy Domain: A Political Sociology Approach', *Journal of European Public Policy*, Vol. 10, No. 2, pp. 263-282.
- HAILBRONNER, K. (2004) 'Asylum Law in the Context of a European Migration Policy', in N. WALKER, ed., *Europe's Area of Freedom, Security and Justice* (Oxford: Oxford University Press).
- HAILBRONNER, K. (2008) 'Minimum Standards relating to the Eligibility for Refugee Status or International Protection and Content of these Status – Assessment (Summary) of the Implementation of the 2004 Directive and Proposals for a Common European Regime of Asylum', European Parliament Briefing Note, No. PE 393.293.
- HATZOPOULOS, V. (2010) 'Casual but Smart: The Court's New Clothes in the Area of Freedom, Security and Justice (AFSJ) after the Treaty of Lisbon'. In MONAR, J. (ed.) *The Institutional Dimension of the European Union's Area of Freedom, Security and Justice* (Brussels: P.I.E. Peter Lang).
- JOLY, D. (1996) *Haven or Hell? Asylum Policies and Refugees in Europe* (Basingstoke: Macmillan).
- KAUNERT, C. (2009) 'Liberty versus Security? EU Asylum Policy and the European Commission', *Journal of Contemporary European Research*. Vol. 5, No. 2, pp. 148-170.
- KAUNERT, C. (2010) *European Internal Security: Towards Supranational Governance in the Area of Freedom, Security and Justice* (Manchester: Manchester University Press).
- LAHAV, G. and GUIRAUDON, V. (2006) 'Actors and Venues in Immigration Control: Closing the Gap between Policy Demands and Policy Outcomes', *West European Politics*, Vol. 29, No. 2, pp. 201-223.
- LAVENEX, S. (1999) *Safe Third Countries: Extending the EU Asylum and Immigration Policies to Central and Eastern Europe* (Budapest: Central European University Press).
- LAVENEX, S. (2006) 'Shifting Up and Out: The Foreign Policy of European Immigration Control', *West European Politics*, Vol. 29, No. 2, pp. 329-350.
- LEVY, C. (2005) 'The European Union after 9/11: the Demise of a Liberal Democratic Asylum Regime?', *Government and Opposition*, Vol. 40, No. 1, pp. 26-59.
- LUEDTKE, A. (2009) 'Fortifying Fortress Europe? The Effect of September 11 on EU Immigration Policy'. In Givens, T. E. et al. (eds) *Immigration Policy and Security* (London: Routledge).

MCADAM, J. (2005) 'The European Union Qualification Directive: The Creation of a Subsidiary Protection Regime', *International Journal of Refugee Law*, Vol. 17, No. 3, pp. 461-516.

PEERS, S. (2001) 'Immigration, Asylum and the European Union Charter of Fundamental Rights', *European Journal of Migration and Law*, Vol. 3, pp. 141-169.

PEERS, S. (2005) 'The Future of the EU Judicial System and EC Immigration and Asylum Law', *European Journal of Migration and Law*, Vol. 7, No. 3, pp. 263-274.

STOREY, H. (2008) 'EU Refugee Qualification Directive: A Brave New World?', *International Journal of Refugee Law*, Vol. 20, No. 1, pp. 1-49.

EU legislation

Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, *OJ* 2001 L 212/12.

Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers, *OJ* 2003 L 31/18.

Council Regulation (EC) 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, *OJ* 2003 L 50/1.

Council Regulation (EC) 2725/2000 of 11 December 2000 concerning the establishment of 'EURODAC' for the comparison of fingerprints for the effective application of the Dublin Convention, *OJ* 2000 L 316/1.

Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, *OJ* 2004 L 304/12.

Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, *OJ* 2005 L 326/13.