The European Union, the African Union and Immigration and Asylum Issues:

Common Strategies or Individual Policies?

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1. Introduction

Migration from Africa to Europe is not a new phenomenon: migrants have been leaving the Maghreb region for Europe since the 1960s – often in response to the demand for low-skilled labour in Europe – and in the 1990s migrants from these countries have increasingly been accompanied by people from sub-Saharan Africa, joining the former in their attempts to cross the Mediterranean. Migration routes have been changing over time, Libya first being a key destination for migrants from North Africa as well as sub-Sahara Africa from where to cross the sea, later trans-Saharan migration routes shifted towards Tunisia, Algeria and Morocco (De Haas 2008). In addition, the composition of migrants (i.e. economic migrants and asylum seekers) has seen changes as a consequence of changing intercontinental and national circumstances: factors as diverse as war, famine and economic conditions have led people to leave their countries (Schapendonk 2012). The fact that large numbers of people are fleeing to Europe, often taking high risks in undertaking their journeys which sometimes end in humanitarian catastrophes, has recently directed considerable attention to European approaches towards migration. Although the European Union has been developing a common immigration and asylum system since 1999, it has often been criticized for not adequately addressing the problem and for unequally burdening certain European countries. In addition, wide divergences in perceptions and policy implementation continue to exist among the Member States (see e.g. Klepp 2010; Mainwaring 2012; Grey 2013; Langford 2013; Vellutti 2014).

At the other side of the Mediterranean, Africa has even been struggling harder to address the problems it has been facing as a consequence of migration and (internal) displacements. While Africa has often been depicted as the continent 'producing' migrants and asylum-seekers, the fact that African intra-continental migration and displacements constitute a much larger part of the total African migration flows than African migration to Europe has often been overlooked. Disentangling the causes of migration within Africa shows that these are multidimensional and tend to overlap, and in some cases also reinforce each other. Conflict, human rights abuses, political unrest, poverty, environmental degradation and natural disasters are often interrelated and have contributed to large numbers of people fleeing their country or looking for better opportunities elsewhere. Yet, states hosting asylum-seekers, refugees and economic migrants have experienced considerable social, financial and security challenges as a consequence. Another issue concerns the so-called 'brain drain', leaving African countries without the qualified people they desperately need (Maru 2009). Despite – and arguably also *because of* – the fact that many African States lack the needed resources to adequately deal with migration, they have in the context of the African Union taken efforts to develop a common approach to the issue.

The recognition of mutual interdependence led the European Union and the African Union to decide to cooperate in addressing the problems associated with migration. Under the umbrella of the Joint Africa-EU strategy which was launched in 2007, the Partnership for Migration, Mobility and Employment was established. Notably, the Commission emphasized the new position Africa had taken on the world stage: "Africa is now at the heart of international politics, but what is genuinely new is that Africa – and the African Union (AU) in particular –is emerging, not as a development issue, but as a political actor in its own right" (European Commission 2007). Being aware of the skepticism in Africa regarding European intentions – originating from European colonialism – the EU has put considerable effort in

creating the impression that the Partnership really is a partnership rather than an unequal relationship: in its communications it frequently uses terminology as 'joint action' 'interdependence' and 'co-ownership'. Although one could certainly have reasons to be skeptical regarding European motivations to 'cooperate' with Africa, it should also be considered that regarding establishing beneficial relationships with the continent, Europe is facing increasing competition from other international actors like China. This would in turn be a reason for the European Union to be more sensitive with regard to the way it approaches Africa (Olivier 2012), which would also mean taking into consideration and paying serious attention to the benefits the Partnership on migration could bring to Africa. This thesis will be concerned with examining the approach the European Union Member States have taken regarding immigration and asylum issues, how this is reflected in European Union policy, and in turn, whether the European Union has eventually tried to 'upload' its preferences to the level of the African Union (or whether it has indeed taken a more 'social' approach). The research question is thus as follows:

How have the different interests of EU member states influenced EU immigration and asylum policy and has the EU in turn tried to influence the African Union's policy in this field, and if so, in what way?

In an attempt to answer this question, the legislative frameworks and policy-making processes of in particular the European Union – and to a slightly lesser extent of the African Union – will be examined. The following chapter will outline the methodology of this research, and subsequently, the theoretical framework will be provided. The next chapter outlines the development of the European Union immigration and asylum policy, particularly focusing on policies aiming at harmonization. The following chapter will consist of three case studies: scrutinizing the development of three policies in the field of illegal and legal migration and asylum, it aims to shed light on the influence of Member State preferences (Germany, Malta and Slovakia) on final policy outcomes. The last part of the thesis will outline African Union achievements in developing a common response to Africa's migration challenges, and will consider this in the broader context of European approaches and in particular, the European approach regarding its partnership with Africa. The final chapter will present concluding remarks and will pay attention to the challenges ahead.

2. Methodology

One of the most important reasons for choosing this topic and for formulating this particular research question, is that the literature so far does not seem to have dealt with the question directly: although much research has been concerned with the development of the common European asylum and migration system and focuses on interaction dynamics between the EU institutions, the way the EU has approached Africa with regard to the Partnership on Migration has been poorly documented, and has not been considered in the broader context of European Union and African Union policy-making. This thesis will be of a qualitative nature, and aims to outline the key policy achievements of both organizations (and achievements regarding their cooperation) made during the last 15 years. EU Member states' influence on the shaping of European policies will be illustrated by analyzing the bargaining process of three Directives concluded in the context of the development of the common European policy. In the field of illegal migration, the Returns Directive will be outlined, regarding legal migration the Blue Card Directive will be scrutinized, and lastly, regarding asylum policy, the Recast Asylum Qualification Directive will be analyzed. The Returns Directive has been chosen because this constitutes the key achievement in the field of illegal migration; the same applies to the Blue Card Directive, which has been the only significant achievement during the analyzed policy-making period. Lastly, the Recast Asylum Qualification Directive is selected since this legislative measure has been regarded to constitute the core of the asylum system. To be clear: the choice for the recast and not for the first version of the Directive is related to the fact that the countries chosen for analysis include countries that became EU member after the first phase of policy-making: they thus did not participate in the negotiations on the first Directive.

In order to be able to effectively scrutinize how and to what extent different national interests have shaped EU policy, three countries have been selected which are expected to have completely different interests and which occupy different positions within the Union: Germany, Malta and Slovakia. Germany, one of the key players in the EU, is known as an 'immigration country'; it constitutes the most popular EU destination for migrants (Green 2013). Malta shows a very different case: being a country with relatively little power, it has been struggling to cope with mainly African migrants arriving at its coast. Emphasizing its small size and incapacity to deal with migratory inflows, it has frequently asked for EU support. The last country is Slovakia, which is one of the EU countries with the lowest immigration rates and consequently, does not seem to have experienced considerable issues in this field. In order to assess how Member States preferences have been shaped and to what extent they have eventually influenced EU policies, use will be made of the theory of liberal intergovernmentalism developed by Moravcsik – focusing on how domestic preferences are shaped, which factors determine interstate bargaining outcomes and what motivates states to pool or delegate sovereignty to supranational institutions. Due to the fact that Moravcsik's framework is developed with a focus on economic integration, it is sometimes necessary to slightly depart from the theory in order to include relevant elements for analysis. This will however be further outlined in the following chapter in which the theoretical framework is presented.

This thesis aims to shed light on how policies have been shaped over time, and in doing so use has been made of primary and secondary resources. With regard to the chapter on the development of the common EU immigration and asylum policy, use has mainly been

made of analyses of scholars who have often conducted interviews in order to track policy developments and positions and achievements of individual Member States. The same applies to the chapter on AU policy and AU-EU cooperation. In both chapters, I have also used original policy documents. With regard to the chapter in which the case studies are conducted, Council documents like minutes on working party outcomes and proposals of the Directives have been used as much as possible. However, these documents are rather difficult to access, which means that in some cases I needed to rely on analyses conducted by others. Implications for this research are that in case where I used primary documents, I might not have captured the whole picture due to missing documents. In this case, I have however tried to complement this by reading secondary literature on the topic.

3. Theoretical framework

Moravcsik mainly developed his theory of liberal intergovernmentalism (hereafter: LI) in his 1998 book 'The Choice for Europe: From Messina to Maastricht'. He argues that a tripartite explanation – economic interest, relative power and credible commitments – 'accounts for the form, substance and timing of major steps toward European integration' (Introduction, p.7).[1] Yet, in developing is framework Moravcsik focuses on economic integration; one could thus question to what extent his theory is applicable to the topic of this research. Although EU immigration and asylum policy making is certainly characterized by economic elements, it encompasses a much broader policy field which is politically very sensitive and deals with issues having significant societal implications. Moravcsik however argues that LI is 'generalizable to any international negotiation' (Introduction, p.21), which could probably serve as a sufficient justification for using his theory. However, use will also be made of the ideas of Kraft-Kasack and Shisheva (2008) who explore how LI could be used for explaining the communitarization of immigration and asylum policy. As will be outlined below, this will sometimes mean taking the freedom to slightly extend Moravcsik's economically oriented framework.

The main question Moravcsik addresses is how European integration should be understood; in trying to discover what is generalizable about the history of European integration, he connects 'a liberal theory of state preferences and a neoliberal theory of international interdependence and institutions to earlier – predominantly 'realist' – approaches' (Schimmelfennig 2014, p.2). Moravcsik argues – in contrast to the claims of neofunctionalism, assuming that European integration has mainly been driven by technocratic processes which reflect 'imperatives of modern economic planning', unintended consequences of decisions that were previously taken and the prominent entrepreneurial role of supranational experts – that the integration process reflects the political will of national leaders who are the key actors in the process. In particular, 'European integration exemplifies a distinctly modern form of power politics, peacefully pursued by democratic states for largely economic reasons through the exploitation of asymmetrical interdependence and the manipulation of institutional commitments' (Introduction, p.9). Integration is a process which is to be understood as 'a series of rational choices made by national leaders' who are responding to international interdependence (Introduction, p.10). Governments 'define a series of underlying objectives or preferences, bargain to substantive agreements concerning cooperation, and finally select appropriate institutions in which to embed them' (*ibid.*). In explaining the choices of states regarding the coordination of policies by means of international institutions, Moravcsik aims to explain these three processes, employing a different theory for each.

National preference formation

In contrast with the perception that economic integration has primarily been pursued in order to counter geopolitical threats and to accomplish geopolitical goals, Moravcsik argues that rather than geopolitical concerns being the national priority, a hierarchy of interests is absent: national interests rather tend to reflect 'direct, issue-specific consequences' (Introduction, p. 12). National preferences concerning monetary policy and international trade are to be

[1] For this research, the e-book version of 'The Choice for Europe: From Messina to Maastricht' is used. The cited page numbers do not correspond to the page numbers of the printed version.

understood in relation to the economic incentives that are generated by international economic interdependence; government motivations in Moravcsik's case studies reflected pressures regarding the coordination of policy responses to growing opportunities for beneficial economic exchange. The main role of economic interest does not mean that geopolitical ideas are irrelevant, but pressure from economic interest groups imposed more severe limits on policy than security concerns and ideologies of politicians and public opinion. Generally, national politicians considered geopolitical goals only in case economic interests were weak, diffuse or uncertain.

Moravcsik assumes that the key actors in international politics are composed of individuals and private groups who are, generally, rational and risk-averse. These actors try to promote different interests, facing the limits of 'material scarcity, conflicting values, and variations in societal influence' (Moravcsik 1997, p.516). The state is regarded as a representative institution which translates the preferences and power of societal actors into state policy (*ibid.:* 518), since the government is captured and constructed by domestic actors and because its main interest is to maintain itself in office (Moravcsik 1993). Notably, the state is the main instrument domestic actors can use in their attempts to exert influence on international negotiations.

In explaining the determination of national preferences, Moravcsik uses a political economic approach – focusing on both the efficiency and distributional consequences of coordinating policies. Firstly, regarding the economical aspect, cooperation is pursued by governments in order to 'restructure the pattern of economic policy externalities – the pattern of unintended consequences of national economic activities on foreign countries – to their mutual benefit' (Moravcsik 1998: Theorizing European Integration, p.38). In cases where markets cause preferred policies to be incompatible or allow a unilateral policy to be adjusted without (significant) costs in order to achieve a desired goal, cooperation is not likely to occur. Incentives for cooperation do however exist where negative policy externalities can be eliminated by working together or positive externalities can be created more efficiently than if action is unilaterally taken. Secondly, economic policy coordination creates winners and losers. Groups likely to face high costs or benefits regarding a certain policy issue will try to considerably pressurize their government. Yet, in cases where costs and benefits are not concentrated on a particular group, the issue will be less salient and organization more difficult – the 'affected' ones will thus enjoy less political power. With regard to economic policy, the most important among the 'winners and losers' are considered to be producers, which leads Moravcsik to focus on producer positions and their influence on policy outcomes.

As mentioned before, immigration and asylum policy encompasses more aspects than principally economic ones. Givens and Luedtke (2004) and Kraft-Kasack and Shisheva (2008) conclude as well that a focus on producers does not suffice. Concerning immigration, they argue that benefits are concentrated and costs are diffuse; this would lead the groups that 'benefit' to mobilize – among them, Kraft-Kasack and Shisheva (2008) identify groups of employers, ethnic groups and civil rights advocates. (Although the latter do not necessarily 'benefit' from immigration, they will naturally advocate for more expansive policies like the other two groups will likely do). The groups relatively less affected are mentioned to be the trade unions and 'nationalist groups' – both would generally favor more restrictionist policies. According to Moravcsik's theory, the groups affected most would exert more pressure on the government, which would then lead to an expansive immigration policy. This is however not the case in reality: employers will for instance lobby less for pro-immigration policies during recessions. Moreover, expansive policies in Europe are certainly not the rule. Here, it is

important to consider the reference of Kraft-Kasack and Shisheva (2008) to the work of Givens and Luedtke (2005), who conclude that restrictionist positions of European governments regarding immigration and asylum are mainly a response to the restrictionist opinion of the domestic public. In their 2004 article – in which they build on the theory of intergovernmentalism – Givens and Luedtke already argue that 'client politics' can be superseded if political salience is high and large electorates mobilize against particular aspects of immigration policy harmonization. In sum, they argue that when salience is low, client politics and pro-migrant institutions can play a role, but when it is high, electoral considerations take over. As assumed by Moravcsik (1993), the main interest of the government is to stay in power, so it seems justifiable to recognize the influence of public pressure on policy outcomes as well.

Outcomes of interstate bargaining

The second question is concerned with explaining the outcomes of interstate bargaining; Moravcsik uses bargaining theory and focuses on efficiency (whether the outcome is Pareto-efficient) and the distribution of gains from cooperation among Member States. He finds that in general, EC bargaining is Pareto-efficient, yet there is considerable variation regarding its distributive outcomes. These divergent levels of influence in policy making processes have been explained in different ways; neofunctionalism e.g. holds that supranational officials influence interstate bargaining most – they would play a significant role in overcoming high transaction costs associated with interstate bargaining which would prevent efficient intergovernmental negotiation. Additionally, EU institutions would have empowered a group of political entrepreneurs, which would have been able to steer the outcomes of the process in the direction they themselves preferred. Stipulating the key role states play in the process (and arguing that efforts of supranational officials yield limited results or can even be counterproductive), Moravcsik however argues that bargaining outcomes are shaped by the relative bargaining power of states. Governments that would obtain high benefits by the conclusion of an agreement – these benefits being relative to the best unilateral and coalitional alternatives – generally offer larger compromises in order to come to this agreement. Regarding the bargaining process: negotiating generally happens in an 'issue-specific' way, cross-issue linkages are limited to 'balancing out benefits among governments' and mostly happen by means of institutional concessions or cash payments (Moravcsik 1998: Introduction, p.16). So, instead of the outcomes reflecting preferences of supranational actors, they reflect the 'pattern of asymmetrical interdependence among policy preferences' (*ibid.* p.17).

Choices for supranational institutions

Lastly, in trying to find an explanation for the decisions of states regarding the construction of European institutions and the choice to transfer sovereignty to them, Moravcsik employs a functional theory (Schimmelfennig 2004, p.78 in Kraft-Kasack and Shisheva 2008). Principally, the choice is about either delegating (granting decision-making powers) or pooling (introducing qualified majority voting) sovereignty. Different theories suggest three main reasons for pooling and delegating sovereignty to supranational institutions. A first explanation refers to the role of European federalism, favoring EU institutions because of ideological considerations. A second, neofunctionalist, explanation holds that international institutions (with centralized technocratic departments) are more efficient regarding producing and processing information than decentralized governments. According to Moravcsik, choices

of states to pool or delegate sovereignty should rather be understood as efforts aimed at constraining and controlling other governments – i.e. in order to raise the credibility of commitments. Transfer of sovereignty would happen when potential joint gains are significant, but where efforts to assure compliance by other governments through domestic or decentralized means are probably ineffective, and where there is a significant chance that governments will 'defect'. Pooling and delegation are favored if the efficiency of common decisions is considered more important than retaining the right to veto legislation. In short: "delegation and pooling are most likely to arise in issue-areas where joint gains are high and distributional conflicts are moderate, and where there is uncertainty about future decisions" (Moravcsik 1998: 1. Theorizing European Integration p. 126).

4. EU asylum and immigration policy: towards harmonization?

Before the 1992 Maastricht Treaty, EU law did not contain any reference to asylum, immigration or – even more generally – human rights. It was with the creation of the internal market, which entailed shifting the focus of border controls from internal to external borders, that decision-making regarding admission of third-country nationals became an 'area of common concern' (Battjes 2006). The way in which this common concern has subsequently been addressed will be the focus of this chapter, which deals with the (macro-)developments regarding the communitarization of immigration and asylum policy. First, cooperation before its institutionalization will briefly be discussed, concerning the period before the 1999 Tampere Council during which Member States committed themselves to the creation of a common immigration and asylum policy. Discussing early policy cooperation is important, since it allows for a better understanding of more recent policy and policy-making dynamics – many of the bases of the legal measures created by intergovernmental decision-making and prevailing perceptions during this period are still reflected in current EU policy. The two following sections will deal with the two main phases (1999-2004 and 2005-2014) of the development of the common immigration and asylum policy.

4.1 Early cooperation: pre-Tampere

Initially, EC Members took different positions regarding the elimination of internal borders; consequently, border controls and immigration were for a long time dealt with outside the framework of EC law. Members willing to abolish internal borders concluded the Schengen Agreement in 1985, which eventually formed the Schengen *acquis* together with the Schengen Implementation Agreements and a number of related measures. Although the Schengen Implementation Agreement contained provisions on immigration, these were revised with the conclusion of the Dublin Convention (hereafter: Dublin I) in 1990, being the result of the efforts of the 'European Political Cooperation' by the Council of the Ministers for Immigration of the EEC. Dublin I contained binding provisions and established a system to determine which State would be responsible for the examination of an asylum application lodged in a Member State; in this way, Members tried to combat 'asylum shopping'. Rules on procedures regarding the examination and the reception of asylum-seekers were however left to domestic law. Dublin I was adopted by all Members; the UK and Ireland acceded as well, while the positions of Iceland and Norway were covered in another treaty. Following Dublin I, the European Political Cooperation issued inter alia the four so-called 'London Resolutions' dealing with asylum, but these were not binding (Battjes 2006).

With the creation of the EU by means of the Treaty of Maastricht immigration matters gradually entered the field of Community law. The EU was established as consisting of three pillars: the EC, 'security and foreign policy', and 'justice and home affairs'. The aim of the last pillar was to achieve the free movement of persons, and in this context it was declared that asylum and immigration were 'matters of common interest' on which measures could be adopted by means of unanimity voting. Furthermore, the Treaty outlined that when dealing with asylum issues, signatories should comply with the European Convention of Human Rights of 1950 and the Geneva Convention of 1951 (Vellutti 2014). Yet, the Treaty has been criticized for its lacking democratic and judicial review, and lengthy procedures and unanimity voting made decision-making ineffective (Battjes 2006). The institutional

arrangements ensured that Member States continued to be the most influential actors: the Council was just required to 'engage' the Commission regarding its efforts in the field of asylum policy and the Parliament should only be 'informed' about the initiatives. Furthermore, the European Court of Justice did not enjoy jurisdiction in the field of asylum measures (Vellutti 2014). This led to the fact that the scope and number of adopted measures were limited, and, as Kaunert and Léonard (2012a, p.8) argue, 'in line with preferences of the dominant actors', the Ministers of Interior. Adopted measures could generally be labelled 'soft law', and, consequently, had very limited effect.

The efforts of the Member States to collaborate out of the scope of EC law turned out to be unsatisfactory; mainly the wide divergences among the asylum policies of Member States led to the fact that asylum shopping continued (Battjes 2006). The fact that some Member States particularly in Western Europe received disproportionate numbers of asylum-seekers led to a call for common action and more specifically 'centrally determined burden sharing' (Moraes 2003). In line with Moravcsik's assumption regarding which groups would favor cooperation, it were indeed typically the countries experience the highest pressure – among them Germany and Austria – that called for common action, admitting that they could not unilaterally deal with the situation (*ibid.*). Regarding domestic actors influencing governmental action, Moraes (2003, p.119) points out that the high pressure of the European public has been 'a key driver for a common policy', calling for solutions – either at the national or the international level – to the problems experienced with asylum-seekers and illegal immigrants appearing repeatedly in the news. An example is the media coverage on the dangerous migration sea routes to Italy, claiming the lives of a lot of people. Whether the public sympathized with the migrants or opposed their entry to the EU, it started to recognize that current bilateral and intergovernmental agreements were insufficient, and that better solutions could probably be found by means of undertaking EU-wide action. Although public pressure has initially largely prompted states to look for cooperation, public fear of more EU involvement has sometimes also impeded further progress in the policy field of immigration (*ibid.*) – both developments will be discussed in the subsequent sections on formalized cooperation.

4.2 The first phase of policy-making: 1999-2004

4.2.1 Enhanced supranational powers and Council commitment

The first phase of formal cooperation took place in the context of the entering into force of the Amsterdam Treaty in 1999. Increased interdependence due to enhanced border permeability, anticipated externalities associated with the entry into force of the Schengen agreement and negative public attitudes towards immigration led Member States to decide to move the policy field of immigration and asylum from the third to the first pillar of the EU legal framework (Moraes 2003; Velluti 2014), constituting 'clear evidence of a commitment to a more active policy' (Moravcsik and Nicolaïdis 1999, p.72). In practice, this meant that the Commission was granted the competence to draft policy proposals, although during the first five years it would have to share this right with the Member States – after this period it would enjoy the sole right of initiative. In addition, during this transition period the Council would make decisions unanimously after consulting the Parliament; after these five years co-decision making and qualified majority voting would be put in place. (Velluti 2014). Significantly, the

Treaty required the Member States to adopt a number of measures on immigration and asylum within the transitional period of five years after its coming into force (*ibid*.).

It has been argued that the obligations outlined in the Amsterdam Treaty could have been easily fulfilled by the adoption or re-adoption of drafted or existing measures, as was suggested by the Austrian Presidency in its 1998 Strategy Paper on the topic. Yet, during the Tampere Council of 1999 Member States expressed more ambitious aims (Battjes 2006) – in the literature, this has often been identified as the point in time at which clear commitment to cooperation was expressed. The Council Conclusions read: *"The separate but closely related issues of asylum and migration call for the development of a common EU policy (…)"* (European Council, 1999). Yet, since unanimous decision making was still in place, the goals to be set should be broad but ambitious, which would promote the development of policy measures needed to achieve those goals – avoiding areas of sovereignty that were too sensitive (Collett 2014). Eventually, the Conclusions have profoundly influenced and shaped in particular European asylum law because rather than approaching asylum policy as a 'flanking measure' to the creation of an area of free movement for EU citizens, it was defined as an independent objective (Battjes 2006).

4.2.2 National preference formation

While at the EU level a clear commitment was made to develop a common policy, national leaders continued to face significant criticism from the domestic public. Several factors can be attributed to the high level of political salience of asylum and immigration. First of all, illegal migrants were increasingly being accused by right-wing parties and the media for abusing social security and asylum systems – fuelling outrage among the European public. At the same time humanitarian tragedies gained major attention: in 2000, 58 illegal immigrants were found death in a lorry at Dover, which contributed as well to the call for effective policies on illegal immigration. In addition, border countries in Southern Europe were still facing significant migrant inflows and frequent humanitarian catastrophes in the Mediterranean sea – all this led to increasing public pressure to agree on common policies to discourage migrants and, for Southern countries specifically, to develop a burden-sharing system (Post and Niemann 2007).

The immigration debate became even more salient after the September 11 attacks. Security became the key priority for Member States, and measures and public discourse were directed to stricter border controls and immigration regulations – in fact, the attacks led to the fact that internal security and immigration were increasingly connected (Lavenex 2006). In various countries discussions on illegal immigration, terrorism and Islamist fundamentalism and the inadequate policies of government in addressing these problems helped rightwing parties (e.g. Le Pen's Front National) to gain considerable public support. This made them in turn able to put pressures on their governments to take stricter measures at both national and EU levels (Lavenex 2006; Post and Niemann 2007). The consequent 'securitization of immigration' has however been explained differently by scholars. Related to the positions of right-wing parties outlined above, some have argued that securitization already existed before September 11; the attacks would just have been a pretext for the implementation of policies that were politically unfeasible before (e.g. Boswell; 2006 Karyotis 2007). On the other side, scholars from in particular the US have often pointed to existing threats of immigration with regard to terrorism; Leiken (2004; 2005) argues for example that the source of terrorism in the

Western world was constituted by the first and second generation of immigrants. This points thus to a real perception of threat underlying policy preferences for stricter regulations.

At least, it has been argued by several authors (see e.g. Givens and Luedtke 2004; Lavenex 2006; Schain 2009) that EU member states have practiced 'venue-shopping' in the field of immigration and asylum policy making – i.e., national representatives have been experiencing constraints regarding the implementation of a more restrictive domestic immigration policy due to conflicting opinions of other political actors, non-govenmental organizations (Lavenex 2000), and more generally, 'embedded liberalism' in political and legal systems (Schain 2009), which led them to choose the 'European venue' in order to evade these obstacles. In this way, they enjoyed an 'information advantage' over the domestic actors and were able to act as gatekeepers. Lavenex (2006) argues that the resulting 'intergovernmental cooperation networks' consisted of national representatives working for the same ministries; this would generally lead to policy preferences favouring a specific policy (direction). Moreover, working groups responsible for the preparations of the Council mainly consisted of staff from Ministries of Interior – foreign affairs ministries representatives were often absent. Working group outcomes thus principally reflected 'Interior' concerns and preferences, which were mainly related to restriction of immigration and securitization (Schain, 2009).

From this perspective, international cooperation would thus have been pursued in order to advance domestic policy agenda's rather than to create a common policy (Lavenex 2006). While EU cooperation has often been associated with a loss of autonomy and a transfer of sovereignty, the contrary – enhanced autonomy for governments by creating another political arena (Wolf 1999 in Lavenex, 2006) – would thus have occurred in this case. Although this perspective seems to grant certain governmental sections more power than others, this does not necessarily contradict Moravcsik's assumptions: aiming to stay in power, domestic pressures will still be relevant for political actors when choosing particular policies. Additionally, although the creation of a common policy – which would according to Moravcsik be pursued because it would be more effective and efficient than national alternatives – would thus not be the principal aim, it still points to a central role for states, which use supranational institutions to achieve domestic goals. The research of Givens and Luedtke (2004; 2005) also provide support for this idea: examining Commission proposals during the Tampere Programme, the scholars conclude that countries with strong national institutions protecting immigrant rights are more likely to prefer (restrictive) harmonization – in this way, it is possible for them to evade domestic institutional constraints.

4.2.3 Bargaining outcomes

The Commission review of the Tampere Programme reads that significant successes have been achieved, but that 'the original ambition was limited by institutional constraints, and sometimes also by a lack of sufficient political consensus' (European Commission 2004c p.5 in Lavenex 2006, p.337). Notably, in practice there were wide divergences between the ambitions of the EU institutions and the Member States from the start. Mainly the Parliament but the Commission as well advocated for harmonization and a comprehensive rights-based approach. Their liberal positioning could be attributed to the fat that they do not experience the direct electoral pressure the way national representatives do – less political pressure thus leads to different 'cost-benefit calculations' regarding policies to be pursued (Luedtke 2009).

Member States however favored a more limited approach and focused on security and restrictions and insisted on maintaining discretion. The fact that the Parliament only needed to be consulted, enabled the Member States to largely neglect it 'as an actor' (Kaunert 2010). The former, who positioned itself mainly as a 'pro-migrant' actor, tried to form an alliance with the Commission, being frustrated by its lack of influence (Servent and Trauner 2014). Yet, the fact that the Commission still had to share the right of initiative and the use of the unanimity decision making procedure led the Commission to often align with the wishes of governments (Lavenex 2001 in Servent and Trauner 2014). This is also reflected in the outcomes of the Tampere Programme: most measures concern combating illegal immigration and addressing the abuse of asylum systems (Lavenex 2006).

Immigration

Regarding the common immigration policy action plans have been adopted in the field of fighting illegal migration, control of external border and lastly, return policy. Regarding this three action plans, legislative measures were yet to be created. Probably the most significant concrete action has been the agreement on the establishment of the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (known as Frontex) on 26 October 2004 (Pratt, 2004). Frontex has been established as an EU agency tasked with the promotion, coordination and development of European border management, helping border authorities from different Member States to cooperate (Frontex 2015).

Achievements in the field of legal migration have been more difficult to observe. Yet, some directives have been adopted, among which two Directives on the admission of students and researchers of third countries. These issues were however not characterized by high salience or sensitivity, so, they did not involve difficult negotiation processes (Lambert 2006). More important and contested Directives are the following:

1. Directive Concerning the Status of Third-Country Nationals who are Long-term Residents (Council Directive 2003/109/EC): this Directive regulates the entry, stay, status and rights in areas such as education, access to employment and social security provisions of long-term immigrants. Although the initial proposal included that the Directive should be binding, the final outcome does not include 'hard obligations'. Rather, the Directive contains weak language – an important example being the provisions regarding equal treatment of immigrants in which the word 'may' is used instead of the more binding 'shall'. In sum, the Directive enabled national governments with generous national policies to adopt more restrictive policies, while countries with already restrictive systems in place managed to weaken the initially proposed text successfully (Servent and Trauner 2014).
2. Family Reunification Directive (Council Directive 2003/86/EC): although Lambert (2006) claims that this Directive has been characterized by a low level of salience, Luedtke (2009) has argued that because other channels of legal migration are in general closed, family reunification constitutes the key category of immigration to the EU. Consequently, it has thus taken a primary place during attempts to create common EU policies. Yet, this does not mean that the issue enjoyed high public salience as well. Again, the initial proposals were much more liberal than the eventual policy outcomes. However, it has to be noted that the Commission was able to defend some aspects that were more liberal than in many national legal systems – indicating a small victory for EU institutions (*ibid*.).

Asylum

Progress has been most clear regarding the establishment of a 'Common European Asylum System'. Yet, asylum measures generally only contain references to minimum standards to be adopted, showing that Members still maintain notable discretion (Battjes 2006). Feelings of suspicion towards people applying for asylum have moreover led to proposals of controversial measures, an example being restricting the movement of asylum-seekers to specific areas, which would legitimize detaining asylum-seekers during the period in which their application was examined or while they were waiting to be transferred to the Member State responsible for dealing with the asylum application (Servent and Trauner 2014). Eventually, the following legal instruments have been adopted:

1. The Temporary Protection Directive (Council Directive 2001/55/EC): establishes 'minimum standards for giving temporary protection in the event of a mass influx of displaced persons from third countries who are unable to return to their country of origin and to promote a balance of effort between Member States in receiving and bearing the consequences of receiving such persons'. The Council should decide by qualified majority voting whether a so-called 'mass influx of displaced persons' exists. This decision is binding, but the member states still enjoy considerable discretion – there is no obligation regarding the number of people that should be admitted, since member states themselves should indicate their reception capacity (Servent and Trauner 2014). This seems to undermine the goal of 'promoting a balance of effort', as it is not probably this will happen naturally.
2. The Reception Conditions Directive (Council Directive 2003/9/EC): establishes minimum standards concerning different aspects related to the reception of asylum-seekers in Member States, among which are material reception conditions, residence, freedom of movement, health care, education and vocational training. Harmonizing reception conditions should combat movements of asylum seekers looking for more favorable conditions in other EU countries due to the variety of reception policies. Although the Directive comprises many different aspects, it has been argued that the standards set are generally low. The Directive allows States to adopt more favorable standards, but it is of course questionable to what extent it is likely that this will happen voluntarily.
3. The Dublin II Regulation (Council Regulation No 343/2003): together with the Procedures Directive which will be discussed below, this Regulation most clearly reflects the reluctance of Member States to harmonization. The main principles of Dublin I, characterized by responsibility-shifting rather than –sharing, are largely maintained. Replacing the 1990 Dublin Regulation, the objective was to promote more rapid processing of asylum claims (note 4), but above all, to counter 'asylum shopping' and the phenomenon of 'asylum-seekers in orbit', referring to situations in which a state transfers individuals to another state, and no Member State is eventually willing to take the responsibility for the examination of the claim. The Regulation stipulates the need to 'strike a balance between responsibility criteria in a spirit of solidarity' (note 8); yet, the 'State of First Arrival' rule leads to the fact that these 'states of first arrival' still have to deal with the majority of the claims (Mallia 2011). Another controversial element has been the right of Members to send asylum-seekers to a so-called 'safe third country' in which – it is argued - they could have lodged an application instead of entering the EU (Art. 3). The implementation of Dublin II has been facilitated by the so-called Eurodac system, establishing a database of fingerprints to identify asylum-seekers and illegal immigrants.
4. The Asylum Qualification Directive (Council Directive 2004/83/EC): 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'. It has been argued that from an international law perspective, the Directive is the key instrument in the newly established European asylum system because it touches the core of the 1951 Convention relating to the status of Refugees: it adopts the very same definition of 'refugee' and the principle of 'non refoulement' as enshrined in this Convention. International human rights law has over time also included other persons than refugees in need of protection as 'beneficiaries' of protection, and the Qualification Directive also encompasses a definition of persons entitled to 'subsidiary protection' (Lambert 2006). However, some (e.g. Balzacq and Carrera 2005) point to the fact that refugees and people granted subsidiary protection do not receive the same treatment – rights of people under subsidiary protection are lower than the rights of refugees, which has been fiercely opposed by the Parliament (Servent and Trauner 2014)

5. The Asylum Procedures Directive (Council Directive 2005/85/EC): establishes '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'. Furthermore, the Directive codifies concepts like 'safe country of origin' and 'safe third country'. As mentioned above, during the negotiations member states insisted on high levels of discretion. Divergences in opinions led to the fact that the adoption of the Directive was postponed for almost one year (Lavenex 2006). Differences between the Council and the Commission were mainly evident before 11 September, when the latter tabled relatively liberal proposals. Yet, after the attacks it took a more restrictive position e.g. regarding access to the asylum examination stage. Their attempts to promote harmonization by proposing the establishment of a single authority tasked with the examination of asylum claims were however in vain – Members were particularly reluctant to adopt common standards (Servent and Trauner 2014).

4.3 The second phase of policy-making: 2005-2014

4.3.1. A new institutional context: enhanced supranational competences

After the Tampere Programme in which the first steps were made for the establishment of a common immigration and asylum policy, the The Hague Programme was adopted in 2004, replacing the institutional framework of the Amsterdam Treaty for EU immigration and asylum policy making. Changes comprised granting 'the sole right of initiative' to the Commission, the introduction of the qualified majority voting procedure and co-decision power for the Parliament. These institutional changes applied to all policy areas except for legal migration. It has been argued that regarding the role the EU should have, excluding unwanted immigrants would be less controversial than the coordination of inclusion of legal immigrants (Lopatin 2013). It was however with the entry into force of the Lisbon Treaty in 2009 that all elements of immigration policy became subjected to co-decision and QMV procedures, and that the jurisdiction of the European Court of Justice has been extended to all immigration and asylum matters (Kaunert and Léonard 2012a). Lopatin (2013) argues that the Commission and Parliament have gained increased authority because Members believed that by shifting power to common institutions, their agendas could best be served; a common

policy would be more effective than separate domestic policies. More specifically, Moravcsik's assumption that states choose for pooling or delegation because they aim to enhance the credibility of commitments could certainly hold here, since wide divergences regarding the implementation of the first generation of immigration and asylum policies existed among Member States.

4.3.2 National preference formation

After the first generation of immigration and asylum legislation, Member States experienced a 'fatigue': only few governments had a (relatively) comprehensive immigration system in place before the development of EU policies, and the adoption of 'common policies' thus involved considerable efforts to establish or alter national systems. While the EU policies adopted could in principle be easily transferrable, the development of the needed institutional structure in order to implement and administer policies was quite complicated. Consequently, the next phase of policy making focused on review and reform of existing legal measures rather than on creating completely new policies (Collett 2014).

As during the first phase of policy-making, humanitarian catastrophes, the rise of populist parties and terrorism continued to shape political and public discourse. Yet, the salience of immigration issues has been significantly affected by some additional global and regional developments which strongly shaped domestic preferences, which again translated itself in decisions of states at the EU level. Firstly, the economic crisis which led to high levels of unemployment has obviously played a significant role. Many domestic politicians perceived the two goals of reducing unemployment levels and attracting economic migrants as fundamentally irreconcilable, or at least hard to explain to the public. Moreover, Member States were anyhow reluctant to further invest in new legislation due to the worsening economic climate. Secondly, geopolitical challenges have substantially shaped the debate. Obviously, the continuing flow of migrants and asylum-seekers arriving at the borders of Southern Europe – the conflicts in North African and Middle Eastern countries constituting a key source – have played a role. Numerous humanitarian catastrophes led to a heated public debate: since the summer of 2008 reports of migrants (trying to) reach(ing) Mediterranean EU countries by sea have frequently been published, and this trend has continued ever since. In addition, the migration flows have drawn attention to the functioning of Dublin II. The 'State of First Arrival Rule', under which the state through which a person first entered was in practice in the majority of the cases responsible for examining the asylum application, led to the fact that border countries like Malta, Greece and Italy had become disproportionally burdened (Mainwaring 2012; Langford 2013). In many cases, they were not able to manage the large inflows of people and could not offer adequate reception conditions as prescribed by EU policy. Policy-makers have been pressured by domestic publics and NGOs alike to address the situation, either focusing on the humanitarian aspects or emphasizing the idea of 'burden-sharing' theoretically present in EU law, but in practice absent.[2] Among others, UNHCR and the International Organization for Migration have emphasized the enormous

[2] Article 80 of the Treaty on the Functioning of the European Union, being part of the chapter on policies on border checks, asylum and immigration, reads as follows: *"The policies of the Union set out in this Chapter and their implementation shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States…"*

scale and complexity of the problem, and have called for a cooperative approach to prevent more losses of lives (IOM 2015; UNHCR 2015).

4.3.3 Bargaining outcomes

The second phase was characterized by less opposing positions of the EU institutions and the Council. In particular with regard to asylum, the latter became slightly more open to the idea of enhancing individual rights. Notably, the Parliament approached Council positions on controversial issues like the possibility to reduce or withdraw reception conditions, although in other areas it still favored more liberal measures, e.g. regarding gender issues. The Commission showed ambivalence and was neither particularly restrictive nor liberal. Yet in general, conflicting opinions continued to exist concerning the level of integration to be pursued.

Immigration

In line with the first phase of policy making, the main focus has been on combating illegal immigration. The most notable achievement has been the adoption of the so-called 'Returns Directive' in 2008, aiming at the harmonization of national laws and practices concerning the removal of illegal third-country nationals. Negotiations were troublesome: for the Parliament it was the first time to be involved as co-legislator regarding an immigration measure, and from the very start its position seemed to be irreconcilable with that of the Member States. The latter aimed to adopt common standards which could ease the work of domestic authorities dealing with return operations. Consequently, proposals likely to prevent or cause delays in the process – restrictions on detention, requirements to provide legal aid, more opportunities regarding challenging decisions to return – were powerfully resisted. The Parliament was however more concerned with the adoption of a framework in which fundamental rights would be respected and appropriate safeguards and procedural guarantees would be enshrined. The eventual outcome has been strongly criticized – in particular measures like a ban on re-entering EU territory and prolonged pre-removal detention have been controversial (Baldaccini 2009).

In the area of legal migration, the most significant achievement has probably been the adoption of the Blue Card Directive in 2009, which aims to streamline processes, establish a centralized are for decision-making and to provide an easy application procedure for highly skilled immigrants. Although EU institutions were highly in favor of the Directive, Member State support has been more difficult to obtain due to considerable variations in domestic policies, an agreement on a lowest common denominator was reached, including an opt-out of three Members – emphasizing the continued dominance of national preferences in EU policies (Cerna 2014). Additionally, the finally adopted Directive allows for significant discretion. The right to determine how many workers should be admitted was for example retained, leading to questions regarding the level of harmonization of the Directive. Additionally, the Directive does not address issues concerning the recognition of qualification and skills for third-country nationals (Collett 2008). Member States were clearly not willing to delegate significant powers regarding policies concerning their labor market to EU institutions.

Asylum

Although the Recast Directives are in some respects less restrictive than their forerunners and include new rights, these changes have been labeled 'secondary' as they do not change the core of asylum legislation (Servent and Trauner, 2014). As was the case during the first phase of policy making, national actors concerned with domestic affairs played a dominant role in the policy-making process, contributing to the fact that preferences for restrictive policies remained relatively constant (Völkel 2014). In this respect the role of inter-institutional coalition building – which intensified after the introduction of co-decision making – has been significant as well. Ministers of Interior took the lead in forming an advocacy coalition with centre-right party groups of the Parliament, which formed a powerful opposition to the Commission and centre-left Parliament groups. Within the Council itself, ministers of the left and right often issued similar proposals, which mainly focused on administrative costs and accommodating national practices, and not so much on ideological issues – providing support for Moravcsik's assumption regarding the priority of economic interests. Intra-Council coalition-building only happened in order to reach agreement regarding solutions for the few members dealing with the majority of asylum applications (Mainwaring 2012; Servent and Trauner 2014), which were however not able to achieve very substantial successes (Langford 2013).

Meanwhile, EU elections in 2009 led to a more conservative Parliament and established a more liberal Commissioner (Cecilia Malström), reinforcing the centre-right European People's Party and the Alliance of Liberals and Democrats for Europe. Initially, the Commission continued to issue ambitious proposals aimed at harmonization and a more rights-based system, which found no support in the Council. Eventually, this led the Commissioner and the Liberal Parliamentarians to recognize the need for a 'recast of the recast'. In practice, the new proposals tabled often involved the reintroduction of provisions the Commission had tried to delete or change before and eventually, ALDE-Parliamentarians had to be convinced to support these proposals (Servent and Trauner 2014).

Various factors can account for the success of the Council and its coalition members in achieving their preferred outcome of relatively restrictive legislation. First of all, the fact that the Parliament now operated under the co-decision procedure gave it a stronger feeling regarding responsibility for policy outcomes, leading to more conciliatory behavior from its side which in turn led to voting for more restrictive positions than originally favored. Although the Parliament had gained more authority in the decision-making process, it simultaneously realized it needed to issue proposals the Council could agree on, which meant restricting its original positions (Lopatin 2013). Also, some Parliamentarians (the ones in favor of more liberal provisions) argued that after lengthy negotiations, voting against the proposals would 'have made them look like a fool'. Another factor concerns the fact that the Council knew how to effectively frame its positions as being legitimate, referring to the economic climate in order to maintain more discretion and to prevent measures which would require the raising of the minimum level of reception conditions. In the context of strict austerity measures, the call for a more pragmatic Parliament seemed perceived to be legitimate: the Parliamentarians who wished a more restrictive approach and the ones that had already experience with co-decision negotiations accepted and promoted flexibility, which eventually led to giving up initial Parliament positions (Servent and Trauner 2014).

Eventualy, except for the Temporary Protection Directive, all other legal texts concerning asylum have been subject to a recast exercise.

1. The Reception Conditions Directive (Directive 2013/33/EU)**:** relatively few changes have been made, the ones that were made can considered to be relatively marginal. During these negotiations, the Parliament showed less extreme opposition to the Council; a case in point concerns the possibility of detention of asylum-seekers. During the first phase of law making the Parliament strongly opposed this possibility, but during the recast phase it was not the question whether detention should be allowed at all, but topics of discussion were rather related to issues of length and conditions. Eventually, an agreement was reached on the establishment of minimum conditions in reception places, and reasons for detaining asylum-seekers have been reduced (Servent and Trauner 2014).
2. The Dublin III (Regulation (EU) No 604/2013): This regulation constitutes another example of the prevalence of the Council's position in controversial cases. The EU institutions e.g. advocated for suspending transfers of asylum-seekers in cases where Member States could not deal with the application – being influenced by the rulings of the ECTHR and CJEU that a transfer back to Greece would involve a serious risk of subjection to inhuman treatment. Although these rulings were considered to be milestones, they did not really alter the system. The recast of Dublin II primarily tried to address shortcomings by establishing an early warning system and the provision of ad hoc support for countries unable to deal with the applications. Yet, no real burden-sharing measures were introduced.
3. The Asylum Qualification Directive (Directive 2011/95/EU): this is the Directive that has been changed most substantially, significantly moving to a more liberal side. Member States could or actually had to accept more generous definitions, since in practice, these were sometimes already applied to individual cases. New elements include inter alia an enlarged family definition, the approximation of the rights of refugees and beneficiaries of subsidiary protection with regard to family unity, access to employment and health care and better standards for vulnerable persons with special needs such as unaccompanied minors. Regarding the duration of the residence permit, the rights of beneficiaries of subsidiary protection were enhanced: renewals of residence permits after the initial validity of one year must be valid for at least two years.
4. The Asylum Procedures Directive (Directive 2013/32/EU): again, negotiations concerning this Directive involved the most fierce inter-institutional debates on the flexibility Members should enjoy, causing again significant delays during negotiations. Proposals of the Parliament and Commission to increase harmonization were hardly reflected in the final outcome. The Council however considered that the new rules were more realistic with regard to differences among national legal systems, and pointed to the fact that in this way unnecessary costs and administrative burden were avoided – they would thus be able to more effectively combat the abuse of asylum systems. Yet, the ambiguous definitions and considerable discretion as embedded in the final document raised concerns at e.g. UNHCR, which pointed to the difficulties the new articles entailed in terms of interpretation (*ibid*.).

5. EU immigration and asylum policy-making: Positioning and influence of Germany, Malta and Slovakia

Whereas the previous chapter addressed policy developments in the field of immigration from a macro-perspective, this chapter will focus on micro-level dynamics by scrutinizing the role of Member States. By taking domestic factors into account, it will be examined how national preferences have been shaped and how these have in turn influenced national positions at the EU level. Subsequently, in an attempt to address the question how and to what extent national preferences have shaped the final outcome, the chapter will scrutinize to what extent the wishes expressed by the Member States are reflected in the final document.

5.1 The Returns Directive (Directive 2008/115/EC)

The Returns Directive has by many human rights organizations and third countries been regarded as 'a restrictive alternative to facilitating expulsions' (Amnesty International 2008; ECRE 2008 in Ripoll Servent 2011). Furthermore, the outcome surprised many since the Parliament who has generally been advocating a human-rights driven approach, enjoyed co-decision powers: however, in the case of the Returns Directive, it has not been able to create a liberal policy (Ripoll Servent 2011). Eventually, it rather seems to have been a member-states driven process.

Germany

Since 1945, Germany has experienced increased immigration, with immigration flows becoming increasingly diverse over time; this led it to have the largest foreign population in Europe in absolute terms. The country has for long been reluctant to recognize itself as a 'country of immigration', and has long tried to prevent migration (Green 2013). Germany's governments have been pursuing strict migration controls, yet, considerable numbers of illegal migrants were present during the time the Returns Directive was negotiated. Strict German policies have led to criticism from civil society organizations, who have been calling for more liberal approaches. Yet, politicians have argued that illegal migration should be fought by stricter law enforcement, justifying their positions essentially by arguing that all people have to comply with the law - illegal immigrants should not be given a residence status because otherwise, illegal migration would increase. German politicians raised similar arguments at the European level. Yet simultaneously, at the state level the humanitarian situation of the immigrants was also discussed (Clandestino Research Project 2008). Germany thus showed thus a mixed picture, while focusing on stricter controls, the government considered the unsatisfying humanitarian conditions of illegal migrants and faced criticisms from non-governmental organizations, yet, public salience was not necessarily high. Eventually, in the context of the negotiations on the Returns Directive, it turned out that it preferred to solve the issues domestically, which lead to considerable efforts to dilute the agreement – its proposals stalled the negotiations (Ripoll Servent 2011). Using its Presidency position, Germany issued a proposal which removed many provisions of the Directive and required that the remaining provisions should be left to national law. The German suggestions opposed extensive harmonization of all dimensions of expulsion, arguing that only in some areas like temporary custody, legal remedies, re-entry and residence bans phased Community-wide harmonization could be possible. In fact, even provisions on these elements cannot be regarded as pointing to any serious level of harmonization. First, regarding return decisions and removal orders, Germany suggested that regarding a return decision or the application of a removal order, no time period should be set by EU law and EU regulations should neither specify conditions restricting the grounds on which removal orders could be issued. In addition, except for specific cases, no entitlements should exist regarding postponing of removals. Secondly, it argued that in case a removal order should be enforced, an EU-wide re-entry ban should be mandatory. In some

cases, it would be optional – however, it did not specify in which cases. Also, it did not specify whether bans should be limited or indefinite. Thirdly, regarding 'remedies', it entirely left decisions to international law regarding whether return decisions or removal orders would have to be provided in writing, whether information regarding legal remedies is provided to the people concerned, and the language in which the people are informed about decisions. The availability of legal remedies against decisions, access to legal aid, and the question whether appeals against removals could lead to suspension were all left to national law. Fourthly, Germany suggested that when it would assist executing expulsions, detention should be possible – the length of detention, availability of legal safeguards and review should be determined by national law; moreover, detention conditions should fall outside the Directive's scope. Lastly, the proposal stated that the Directive should not cover the treatment of individuals (Peers 2008).

Malta

Irregular migration has been on Malta's political agenda since 2002, when the country experienced the arrival of 1686 illegal migrants, which constituted a significant increase considering that in 2001 only counted 57 arrivals were counted (National Statiscs Office 2006, in Mainwaring, 2012). This increase of arrivals has partially been attributed to changing migration flows due to stronger patrols regarding the West African route leading to the Canary Islands and Spain. Numbers of arrivals increased every following year, with a peak in 2008 of 2775 arrivals (National Statistics Office, 2010:2 in Mainwaring, 2012). Although Malta's detention policy had been in place prior to its accession to the EU, it has been argued that detention has been used as a political tool – due to lacking material (economic or military) power, framing irregular migration as a 'crisis' and reinforcing this interpretation by the detention policy, would have been used as a strategy to gain more power and EU support. Malta is the only EU country which detains migrants from the moment of arrival for 18 months (Mainwaring, 2012). Obligatory detention has been justified by political representatives by pointing to the characteristics of the island – the strategic position, size, exposed coastline and population density – which would make the country more vulnerable than other EU members regarding irregular migratory flows: "These characteristics not only reflect the country's physical restrictions but result in a range of social, cultural and environmental challenges. [...] It is therefore in the national interest, and more specifically, for reasons concerning employment, accommodation and maintenance of public order, that a detention policy be adopted in cases concerning the arrival of irregular immigrants" (Government of Malta, 2005: 6 in Lemaire 2014). Notably, consensus exists across Maltese political parties regarding the need for detention, presenting immigration as something from which the island should be protected. Sub-Saharan migrants are thus identified as a threat, which in turn influences public opinion. In sum, criminalizing them negatively affects Maltese peoples' perceptions (Lemaire 2014). Regarding the negotiations on the Returns Directive, the article on 'Detention' was thus obviously the most important point on which Malta persistently required more discretion. Generally, in relation to all the provisions dealing with detention, it stated that the context of the article should be put 'in accordance with national legislation'. Furthermore, it opposed the proposal that detention should not exceed a period of six months, arguing that Member States should have the freedom to determine this, since national situations and needs vary.[3]

Slovakia

Slovakia has been serving as a transit country rather than as a destination for migrants. The country has one of the lowest numbers of foreign residents in the EU; it has been estimated that in 2008, approximately 15.000-20.000 illegal migrants resided in the country, which was 0.3-0.4% of the total population. Since its accession to the EU and the Schengen system, border controls have

[3] See e.g. the following working party outcomes: Council doc 6641/08 and Council doc 7774/08.

been strengthened which has led to a substantial decrease in the number of illegal migrants. Due to the fact that the problem seems to be relatively marginal, (open) debates in the country on e.g. the roots and consequences of illegal migration have generally not been part of expert and political discussions (Clandestino Research Project 2009). The low salience of the issue is also visible with regard to the Returns Directive negotiations: examining (the available) Council documents and outcomes of working party meetings indicate that Slovakia has either often been absent during discussions or contributed rather little to the discussions and did not raise any shocking or substantial concerns. In fact, it just joined other delegations in expressing reservations. With regard to judicial remedies, it joined other Member in the opinion regarding the provision that Member States should ensure that the person concerned would have the right to 'an effective judicial remedy before a court or tribunal to appeal against or seek review of a return decisions and/or removal order', arguing the possibility to appeal before an administrative organ should suffice. Furthermore, it expressed – also among a large group of delegations – reservation on the provision that Member States would be obliged to provide the returnee with legal aid, considering that in this way, the costs associated with return would increase.[4]

Outcomes

Although Germany's proposal has not led to a complete deadlock and during the subsequent Presidencies some progress has been made, the final version (Directive 2008/115/EC) leaves considerable more freedom to Members and is characterized by a more restrictive nature than was suggested in the original Commission proposal. Germany's suggestion to not included a time period regarding taking a return decision or application of a removal order has been reflected in the outcome and only limited exceptions have been included regarding the postponement of removals (Art. 9). Regarding entry bans, the final Directive lays down that in cases where the person concerned has not complied with the obligation to return and where no 'period for voluntary departure has been granted' entry bans are obligatory, but shall in principle not exceed five years. Some cases which may form exceptions are mentioned, e.g. regarding victims of human trafficking (Art. 11). Regarding procedures, decisions have to be issued in writing and should be accompanied by information regarding available legal remedies. If so requested, translations of the key elements of decisions should be made available in the language of the person concerned (Art. 12). Access to legal aid is left to be determined by national law, and authorities reviewing return decisions shall have the possibility to temporarily suspend enforcement of these decisions (Art. 13). With regard to detention, persons may be detained in case 'there is a risk of absconding' or the person 'avoids or hampers the preparation of return or the removal process', and only mentions that detention 'shall be as short as possible'. It allows to detain the migrant for six months, but if certain conditions are fulfilled, this may be extended with another twelve months, although Members 'may' not extend the detention period with more than twelve months (Art. 15). Regarding detention conditions, some conditions are set, like the possibility for third-country nationals to contact legal representatives, family and consular authorities; special attention should be given to vulnerable persons regarding health care and (inter)national and non-governmental organizations shall 'have the possibility to visit detention facilities' (Art. 16) In sum, considering the objections outlined above, the majority of Member States' critiques is at least to a significant extent reflect in the final version of the Directive. Among the reasons for the Parliament to agree with the final version despite the fact that it differed significantly from its initial position on the Directive has inter alia been, according to Acosta (2013), 'fear of the following French Presidency' which was perceived to be likely to take a much stronger position regarding the Directive in case the Parliament had not voted in favor of the proposal. During discussions at the Parliament on the day before voting would take place, the

[4] See Council document 11456/06.

Council's representative – the Interior Minister of Slovenia – warned that many Members could barely accept the compromise and if no agreement was found, the Council would introduce even stricter measures. He thus advised the Parliament to refrain from passing amendments. Another reason mentioned relates to pressure from national governments which – considering the enhanced power of the Parliament – would have encouraged their Parliament Members to support their Council position. Acosta's (2013) ideas at least seem to support Moravcsik's assumptions that states are the key actors in the negotiation process, determining the final outcomes.

5.2 Legal migration: The Blue Card Directive (DIRECTIVE 2009/50/EC)

In the field of legal migration, the Blue Card Directive has been developed during the second phase of asylum and immigration policy-making. In the spirit of the goal 'to become the most competitive and dynamic knowledge-based economy in the world' (Cerna 2014: 6) the Commission started its preparatory work. Although it was expected that the Directive would be easily approved, many controversial issues appeared during the negotiation process (Laubenthal 2014). The final outcome is perceived to be a 'advertising tool' rather than making a substantial difference in the field of labor market access regulation (Cerna 2014).

Germany

Germany was among the states that most severely opposed the Directive (Cerna 2008; Laubenthal, 2014). First of all, it was revising its domestic high-skilled immigration policy during the negotiations – traditionally having a very restrictive policy, it was now considering the migration of high-skilled Germans, posing challenges and calling for a revision of its immigration policy. Supranational involvement in this domestic process did not seem to be desired (Green 2013). Referring to the levels of unemployment (negotiations took place in the context of the economic crisis), it argued that a new policy should not put more pressure on the unemployed in the EU and that Member States should be able to decide for themselves how many immigrants they wanted to accept - the plan was simply 'a centralization too far'(Gümüs 2010). Notably, Germany had already established a system covering certain groups of highly skilled non-EU nationals and moreover, it was argued that the level of unemployment indicated that skills were available domestically – a supranational solution to the problem would thus not be needed. Although German business actors voiced concerns regarding negative consequences of shortage of skilled employees, the German government continued to be reluctant. Further concerns were raised that the Directive could contribute to a 'brain drain' with regard to developing countries - the health sector being particularly vulnerable. The general one-size-fits-all approach was criticized too: arguing that states had different needs, Germany stated that it would first and foremost adhere to domestic policies (*ibid.*).

Germany's largely negative reception of the proposal translated into considerable efforts to water it down. One of the main points that was extensively negotiated concerned the way how 'highly-qualified employment' should be defined. The Commission advocated for the flexibility that regarding admission requirements, 'higher professional qualifications' could be replaced by minimal three years of professional experience, instead of just accepting higher education qualifications. Yet, Germany eventually suggested to remove the element of professional experience, fearing abuse of the provision (and in this way thus limiting access regarding the labor market). Secondly, a key German suggestion was to include a gross monthly salary that would at least be twice the average salary (rather than three times the minimum one) of the concerned Member State. A last key point concerned Germany's opposition to the proposal to ease the admission requirements in case a Blue Card holder and his or her family moved to another Member State – reflecting that they were not willing to lose sovereignty regarding issues of domestic labor markets (Meyer 2010).

Malta

Malta's migration debate has for a long time mainly centered on the debate how to deal with the (illegal) immigration flows it was facing – politicians, public officials, experts and journalist have framed immigration as a problem which threatened Maltese security and well-being; this view was reproduced at grassroots levels. Migrants were either approached from a humanitarian perspective, or presented as endangering local labor markets. In this way, the discussion on the possible role migrants could play in fulfilling the demands of the labor market was marginalized, rather focusing on preventing illegal migration. Discussions regarding potential benefits third-country nationals could bring by migrating to Malta were pushed to the background. However, because of reducing numbers of illegal migrants arriving at Malta due to Italy's agreement with Libya which led to the interception of people at sea and because of the funds made available by the EU in order to support Malta in coping with migrations, popular anxiety reduced in 2008. This led to the fact that the Maltese government and non-state actors started to approach labor migration in a more positive way, in which there was more room to discuss benefits labor migration could have. Furthermore, in particular in the high-skilled sectors, the medical and ITC sector faced shortages (Suban and Zammit 2011). In this context, Malta took a critical but not necessarily negative approach during the negotiations on the Blue Card Directive. Besides sharing the opinion that with regard to qualifications, the emphasis should be on education rather than professional experience, together with 5 other countries it argued that the salary threshold should be equal for all applicants and not, as the Commission proposed, be lower for migrants under 30 years. Lastly, which rights Blue Card holders should enjoy turned out to be rather controversial in general as well. Here, Malta argued that the proposal of allowing a Blue Card holder to apply for another job after two years of legal employment and for obtaining equal treatment concerning admission to highly qualified employment as compared to nationals was not reasonable – two years was too short (Meyer 2010).

Slovakia

In Slovakia, migration has only gained very limited attention in the political arena and of the domestic public. Electoral programs of main political parties only contain short and vague sections on migration policy – also with regard to the public, the topic never gained much attention (Kodaj and Dubová, 2013). Since its accession to the EU, the number of immigrants has, regardless of economic circumstances, systematically increased: in 2004, there were 2 761 employed migrants, in 2010 this number had risen to 18 247 (Kodaj and Dubová, 2013). During the period 2005-2008 when the country experienced significant economic growth which led to increased demands for laborers, the government did not undertake any action to promote labor migration. The economic crisis and the subsequent restriction of immigration policies did not lead to significant changes in migration patterns in the period 2008-2012. Although the Slovak migration policy formally states to welcome economic migrants if the labor market so desires and to employ more highly qualified non-nationals, tools to effectively implement this policy have not been adopted (Bagerová, 2013). Although salience regarding labor migration is low, it has been argued that simultaneously, there is widespread racism and intolerance regarding minorities (and migrants) in Slovak society, which also includes State authorities. Yet, migration has probably not gained much political and public attention since Slovakia has traditionally not been a land of immigrants – inter alia the language barrier, economic situation and strict immigration legislation have not particularly been attractive (Stevulová, 2013). Low issue salience has led to seemingly moderate responses of the Slovak government to the proposed Blue Card Directive. Like other countries which recently accessed the EU, Slovakia argued that at that moment, the transitional arrangements which limited the labor mobility of its

citizens were still in place, and it thus questioned the appropriateness of t the Directive - referring to the possibility that non-EU nationals could be better off with regard to labor opportunities than Slovak citizens (Cerna 2014). Yet, did not seem to have been among the states most opposing the Directive, raising moderate criticisms. First of all, with regard to the admission criteria it questioned how the required three years of 'professional experience' (which 'substitute' professional qualification) should be tested, and furthermore suggested that a higher number of years would be required. Secondly, regarding the salary threshold, it argued that instead of considering the average wage of a country, the minimum wage should be taken as a starting point – pointing to a preference for a broader scope of the directive (Meyer 2010).

Outcome

As has been mentioned previously, the Blue Card Directive has not made a substantial contribution to EU legal migration policy – analyzing the bargaining process shows that Member States have stripped the original Commission proposal largely from its content. With regard to the three countries analyzed above, the proposal of Germany to delete the option of 'higher professional qualifications' has largely been included, making this decision subject to to national law – so increasing the discretion of Member States (also satisfying Malta's demand). Furthermore, the years of professional experience needed were moved from three to five; the Blue Card is in this way more difficult to obtain. Regarding the salary proposal, the final outcome was a compromise: it should be 1.5 times the gross average salary of the country concerned and Member States were left with the discretion to 'determine the volume of admission of third-country nationals' (partially satisfying Malta's proposal for equality of admission salaries). Furthermore, Germany has been able to achieve that admission conditions for a Blue Card holder have not been made easier – he or she will have to apply formally again when moving to another Member State. Malta's criticism concerning the possibility to change a job after two years and to gain equal rights compared to nationals regarding access to highly qualified jobs was partially considered: the latter has been made optional for Members. In sum, it can thus be argued that a lot of criticisms have been reflected in the final outcome. Yet, due to the fact that there were wide divergences among country positions (due to different national policies in place, which led Members to 'upload' different preferences to the EU level, creating considerable variations among Member State positions during the bargaining process) an agreement beyond a minimum framework was eventually not possible. Cerna (2014, p.17) refers to Moravcsik (1993, p.510), who argues that 'a lowest common denominator does not mean that final agreements perfectly reflect the preferences of the least forthcoming government – since it is generally in its interest to compromise somewhat rather than veto its agreement – but only the range of possible agreements is decisively constrained by its preferences. In line with Moravcsik's (1993, p.492, in Cerna, 2014, p.4) expectation, highly diverse national policies finally led to greater costs of cooperation. As Cerna (2014) argues, one could question why the issue of labor migration should be delegated to the EU level, since the benefits of integration in this field are often not directly visible (and, it does not directly address negative externalities). Yet, it has been argued that delegation could be desirable in order to increase leverage and send a clear message to the outside world that the EU offers a large labor market – so, making the EU more attractive in the 'global war for talent' in which it has to compete with the inter alia Australia and the USA (*ibid*.).

5.3 Asylum: The Recast Asylum Qualification Directive (DIRECTIVE 2011/95/EU)[5]

As previously mentioned, the Asylum Qualification Directive is regarded to be the cornerstone of EU asylum policy. Its recast was adopted at 13 December 2011. Like all 'first phase asylum Directives', the original Directive has been criticized for its low standards. Although some have applauded the recast for being more liberal, others have argued that the new rules are just a modest improvement, raising the question whether it is 'putting lipstick on a pig' (Peers 2011).

Germany

Based on its WWII experience, Germany initially established a liberal asylum policy. Yet, is argued that in a later stadium it would have used the 'EU arena' to considerably tighten its policy. Through the creation of the Third Pillar at Maastricht Germany obtained the possibility to address its national deadlock regarding amending its asylum policy: the 'need' to meet European demands enabled Germany to change its Constitution – in this way, it could legitimately abandon its liberal standards that caused considerable financial and political burdens. Notably, Maastricht had empowered the European regions, which granted the *Länder* a more important role regarding EU-decision-making; by connecting asylum policy to internal security and financial issues, the latter – responsible for the accommodation of asylum-seekers – were able to realize a more instrumental attitude concerning the integration process. Since in Europe, the relative distributions of asylum-seekers had changed to German benefits, the *Länder* did not want to empower European decision-makers in such a way that this could lead to reverse this trend, so chose to block the Amsterdam QMV proposal. Notably, this restrictive position became characteristic of German positions during subsequent negotiations (Hellmann et al. 2005); regarding the Recast Directive this still seems to be the case. The fact that in 2010, the country had to deal with 41.255 new claims (Dublin Transnational Project 2015) – did not lead to enthusiasm for more and higher demands – it would generate costs rather than benefits. Firstly, Germany was reluctant regarding the equalization of the rights of refugees and persons under subsidiary protection. Another element concerns its opposition to the adoption of a broader definition of 'family' (backed by France). Lastly, reservations were expressed regarding the provision that 'Member States shall endeavor to facilitate full access (…) to activities as employment-related education opportunities for adults, vocational training, including training courses for upgrading of skills, practical workplace experience and counselling services afforded by employment offices (…) under equivalent conditions as nationals'. Among other countries, Germany expressed strong reservations, arguing that 'it would offer better treatment to beneficiaries of international protection than its own nationals'.

Malta

Malta's domestic preferences have been shaped by a dynamic interplay between the governments' strict position on dealing with asylum-seekers – detaining them at arrival and framing inflows of third country nationals as a 'crisis' for the island (Mainwaring, 2012) – and increased feelings of hostility and xenophobia among the Maltese population, which initially actually showed sympathy regarding the plights asylum-seekers (King and Thomson 2008). The roots of the restrictive national policies and the subsequent public hostility can be traced back to the accession to the EU, which made Malta a key point of entry for people trying to reach Europe. Furthermore, Dublin II makes Malta responsible for practically all asylum claims of individuals entering the EU through Malta. During the year preceding the adoption of the recast, 355 asylum applications were filed in Malta (McNamara 2013). Referring to the broader

[5] This section is based on the Council negotiating position: *http://www.statewatch.org/news/2011/jul/eu-council-qualifications-trilogue-position.pdf*

inflow of migrants, the Maltese government has repeatedly - unsuccessfully - asked for EU support by defining itself as a small and vulnerable island (Lemaire 2014). Yet, defining itself in such a way has led to wider public concerns regarding the influence of 'outsiders' on the island which is predominantly Catholic and generally conservative (King and Thomson 2008); the highest discrimination rate regarding sub-Saharan Africa's is reported to be in Malta (Council of Europe 2011a in Lemaire 2014). Although (in theory) refugees enjoy the same rights as nationals, one could argue that the fact that less than 3% of asylum applications filed in Malta leads to refugee status mirrors this reluctant approach (Lemaire 2014). Feelings of high pressures of 'beneficiaries of international protection' on the national system have also dominated Maltese positions during the recast negotiations. Like Germany, it opposed that "Member States shall ensure that activities such as employment-related education opportunities for adults, vocational training, including training courses for upgrading of skills and practical workplace experience and counseling services afforded by employment offices are offered to beneficiaries of international protection under equivalent conditions as nationals". Fearing pressure on the national labor market, Malta proposed to replace 'under equivalent conditions as nationals' with 'under conditions set by Member States' – asking for greater discretion. Furthermore, it opposed equalizing access to health care for refugees and 'beneficiaries of international protection', which would mean that the standards for both groups would be the same as for nationals. Backed by Slovakia, it expressed concerns regarding the financial implications the provision would have. A last point of criticism concerned the provision on the obligation of Member States to try to 'facilitate full access for beneficiaries of international protection who cannot provide documentary evidence of their qualifications to appropriate schemes of assessment, validation and accreditation of their prior learning'. Malta questioned the provisions' general effectiveness in case applicants could not deliver any documentary evidence. Higher requirements in this field would arguably be problematic for the government, since a formal integration policy has been lacking in Malta (Pirotta et al. 2014).

Slovakia

Compared to Germany and Malta, Slovakia found itself in a completely different situation. While in 2004, the number of applications amounted to 11.394 (Kodaj and Dubová 2013) during the year preceding the adoption of the recast, only 541 applications were lodged and just 57 people were granted refugee status (Dublin Transational Project 2015). Due to the fact that only a small minority of the people are finally granted asylum, asylum-seekers do not choose Slovakia to be the first country they enter (if their application is refused here, they cannot try in another EU country anymore) – Slovakia thus does not experience the burdens that can be imposed due to the 'First State of Arrival Rule'. Furthermore, since its accession to the Schengen system border protection has been improved and in addition, the absence of large communities of foreigners and a less favorable economic environment compared to other European countries keeps asylum-seekers out of its borders. Slovakia does not have the established tradition of providing asylum – rather, it is a field that receives limited attention. It was because of the accession to the EU that the country had to change its system, and the European legal framework has practically determined the base for Slovak asylum policy. However, it has to be noticed that Slovakia typically implements the minimum standards required (yet, even this has contributed positively to the national system) (Hurná 2012). Considering that its asylum system has actually only started to develop since the EU accession process, one could argue that bringing its system in compliance with EU regulations was just among one of the conditions that needed to be fulfilled, not necessarily having a high domestic priority. Furthermore, the fact that in Slovakia the salience of the issue is low, it does face little issues concerning asylum that it has to address at the national level – let alone the supranational level. Because of the fact that there was little reason to conclude an agreement at all, the Slovak

position has focused on minimizing concrete, in particular financial implications. First of all, with regard to the proposal that refugees and beneficiaries of subsidiary protection should enjoy the same rights and benefits, it rejected that these two groups should be 'subject to the same conditions of eligibility.' Furthermore, like Germany it was critical regarding the provision that 'efforts should be made in particular to address the problems which prevent beneficiaries of international protection from having effective access to employment-related educational opportunities and vocational training inter alia related to financial constraints' – recalling Germany's argument. Lastly, it joined Malta in its position on equal health care for refugees and beneficiaries of international protection – expressing reservations on the need for equality between these groups of people and nationals.

Bargaining outcomes

Germany, Malta and Slovakia often turned out to raise similar and/or overlapping criticisms regarding the proposal. Eventually, none of their criticisms is really reflected in the final outcome: an enlarged family definition is adopted, rights of refugees and beneficiaries of subsidiary protection show approximation regarding family unity, access to health care and to employment. In addition, access to education opportunities related to employment and vocational training should be improved. Furthermore, procedures regarding the recognitions of professional qualifications will have to be ameliorated. One could argue that the countries have thus not been able to bargain effectively, or have not given up enough in order to achieve what they really wanted. This is difficult to determine, considering the fact that the Recast has been adopted at 'first reading' (Peers 2011): in practice, this means that informal 'trilogues' between the Council and Parliament have been organized to arrive more efficiently at compromises – however, this usually happens at the expense of transparency and accountability. Furthermore, its gives the Council's Presidency, which has to negotiate with the Parliament, increased power over the process. Yet, this process is rather opaque and further interactions between Member States and the Presidency and Member States are practically impossible to trace (Acosta 2009). Since an agreement could however already be reached at first reading, one could argue that the level of controversy was probably at least not very high. Furthermore, it is important to consider that during the second phase of policy making and the accompanying institutional changes (enhanced competences for the Commission and Parliament), the Commission issued less radical proposals – the attempts of the three countries analyzed above could thus probably also regarded as a 'costless' effort to even further water down the Directive. While this case study has maybe not been able to accurately outline the countries' influence, it has at least shed light on how domestic circumstances shape national preferences and subsequently, supranational bargaining positions.

6. AU policies and AU-EU cooperation

Compared to the EU, the AU has to confront very different challenges associated with migration. As outlined in the introduction, African migration is a multifaceted and complex phenomenon with significant implications for sending countries as well as for countries of origin. Recognizing the importance of the issue, the AU has undertaken several attempts to develop a comprehensive, collective approach to the problem. Considering the fact that the European process of creating common policies has been troublesome and that the outcome leaves much room for improvement, one could imagine the challenge it has posed for the AU, which is an organization operating by means of an intergovernmental governance structure (Haastrup 2013) in which 54 highly diverse countries have to try to find consensus (Olivier 2012). This chapter will be concerned with the policy frameworks on asylum and migration the AU has put in place and its partnership with the EU on the topic of migration. First, a general overview regarding the AU policies and their implementation in practice will be given. Subsequently, the chapter will connect back to EU policy and will outline its approach towards Africa specifically, focusing on the 'externalization dimension' of EU policy-making. Subsequently, the chapter will examine how this externalization approach is reflected in the AU-EU partnership – i.e. if and how the EU tries to 'upload' its own preferences by influencing AU policy and action.

6.1 African Union policy frameworks on migration, refugees, returnees and IDP's

6.1.1 AU policy frameworks concerning refugees, returnees and IDP's

OAU Convention Governing the Specific Aspects of Refugee Problems in Africa
In 1969, the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa was concluded; it has been ratified by 45 of the 54 Member States (African Commission on Human and Peoples' Rights, 2015). The reason for its creation was related to the fact that solutions had to be found regarding the protection and assistance for the large number of people fleeing conflicts caused by struggles against colonialism and apartheid, drought and famine (Naldi and d'Orsi 2014). The Convention has particularly added value by broadening the definition of 'refugee' compared to other legal instruments like the 1951 Geneva Convention, shifting the focus to *objective* circumstances which lead people to flee rather than linking it to the person's *subjective* interpretation regarding threats in his or her environment (Okello 2014). Furthermore, the concept of 'non refoulement' has been extended by including measures concerning e.g. rejection at the frontier. Noteworthy is also the clear acknowledgment of asylum, which would have led the 'right to asylum' to be increasingly accepted by African countries.

The 'generosity' of the Convention was initially reflected in practice by the adoption of 'open door policies'; African states accepted large numbers of asylum-seekers (Giustiniani 2011). Currently there are however few countries left which (try to) live up to their commitments, one of the main reasons being lack of resources (Naldi and d'Orsi 2014).[6] As embedded in the EU policy framework, the Convention also includes the principle of burden-

[6] An example is Ethiopia, which despites its considerable environmental challenges practices an open-door policy and received almost 450.000 asylum-seekers in the period 2009-2014 (Okello, 2014).

sharing. Implementation has however been difficult since the majority of the countries finds itself in harsh socio-economic conditions (Okello 2014). Another factor leading to a mismatch between theory and reality, relates to the fact that no amendments have been made in the forty years the Convention has been in force. Provisions related to the more recent large scale migration from Africa to Europe are thus e.g. absent – specifically, clarification on responsibilities of states in North Africa related to the protection of intercepted migrants (often victims of trafficking) are needed (Naldi and d'Orsi 2014). Another problem is the absence of a uniform process to deal with asylum applications, leaving Members in fact with total discretion. Although Naldi and d'Orsi (2014) argue that a system 'like that of the EU' is not in place, it should again be noted that also in the case of the EU, agreements on paper do certainly not guarantee compliance in practice.

Kampala Convention

The second instrument related to forced migration constitutes the 2009 the African Union Convention on the Protection and Assistance of Internally Displaced Persons in Africa (the Kampala Convention), dealing with all phases of displacement (Giustiniani 2011) and being the first continental-wide legally binding agreement on this issue worldwide. The Convention has been developed as a response to the rise of internal conflicts in the 1980's and 1990's when number of IDP's increased dramatically, causing instabilities in host areas and thereby threatening peace and security. The Convention is a significant achievement, considering that concerns regarding state sovereignty have long impeded the development of binding legislation to protect IDP's. Some countries were considerably critical regarding the fact that the problem of internal displacement became increasingly internationalized and opposed the involvement of organizations like UNHCR. As Giustiniani (2011, p.352) argues, the Convention shows the recognition that if internal displacement cannot be dealt with at the domestic level, it can become a topic of legitimate international concern; the AU has been given the responsibility to support states and to protect and assist IDP's, additionally, its the right to intervene if IDPs face violations of their rights is reaffirmed. Fagbayibo (2013) however points to the fact that 'even the AU's strongest element of normative supranationalism, the right of intervention is not without complications'. Besides the limited resources, disagreements among Member States on whether an intervention should take place or not limit the effectiveness of the mechanism. The fact that the AU Commission, Parliament and Court either enjoy only limited powers or remain inoperative means that the Member States have no counterweight at all. This makes it at least easy for the Council members to remain inactive or to simply block a proposed intervention (*ibid*.).

6.1.2 AU migration policy frameworks

The African Economic Community: free movement for people

In 1991 the African Economic Community was established, containing direct provisions related to migration. The Abuja Treaty establishing the Community inter alia committed African countries to 'progressively bring about the free movement of persons, and to ensure that Community nationals enjoy the right of residence and right of establishment'. The Treaty establishes a period of six stages covering a period of 34 years in which integration should be achieved; the African Common Market is to be consolidated in the fifth stage, and the free movement of persons and the rights to residence and establishment should be achieved in the last stage. The general perception has been that free movement of people is a main element of

regional integration and is expected to promote trade, foster economic growth and to reduce poverty. The AU's Regional Economic Communities are tasked with the promotion of free movement combined with intra-regional trade. The AU is responsible for coordination, monitoring and evaluation. However, with regard to successful implementation there are wide divergences between the regions so far. Generally speaking, AU action has been scarce with regard to promoting free movement. Furthermore, although circular migration is the most common migration form in sub-Sahara Africa, little initiative has been taken to address this at a continental level (Klavert 2011). During a recent roundtable on intra-regional migration and labor mobility within Africa, the need for the development of 'a Protocol on free Movement of persons, the Right of Residence and the Right of establishment as provided for in Article 43 of the 1991 Abuja Treaty' by the AU was however recognized (AU, 2015).

AU Migration Policy Framework

The more specific African Union Migration Policy Framework for Africa was established in 2006, being the product of various meetings of African national representatives starting already in the early 1990s (African Union 2006a). In 2004 a draft was issued; the intention was to adopt the framework the same year together with mechanism for implementation. Yet, the process was more troublesome than anticipated: eventually, the idea to establish an implementation mechanism was dropped, leaving Members with the choice which elements they wanted to implement. Without clear instructions for enforcement, the framework ended up being 'toothless' (Klavert 2011).

In order to understand difficulties concerning reaching agreement, it is important to recognize the central role of governments in the AU and to consider their perceptions influencing their position in the context of the AU. Black's (2004) research could be illustrative in this regard: examining African public policy, he finds that government positions towards migration are generally 'either neutral or hostile'. By conducting a study on the contents of Poverty Reduction Strategy Papers, he concludes that attitudes regarding migration are significantly ambivalent: often no mention is made of migration or the link between migration and poverty is missing. If addressed, economic migration was perceived to have negative consequences: it would inter alia promote crime and exacerbate rural poverty. Developed national policy responses consequently aim to combat migration.

The question remains whether the result – a comprehensive document; identifying nine key areas for which it provides strategies for policy development for Member States and the REC's labor migration, border management, irregular migration, forced displacement, the human rights of migrants, internal migration, migration data, migration and development and inter-state cooperation and partnerships – points to eventually high ambitions or rather to the multidimensionality of migration, enhanced by the fact that all countries are addressed. Additionally, the document is only labelled a 'reference document' and is thus not binding in nature, giving Members the choice which elements they want to implement, 'corresponding to the specific context of their country'. As a consequence, the framework does not prioritize certain issues or provide resource mobilization mechanisms for the recommended action: these would be different in every country (African Union 2006a). Klavert (2011) furthermore notes the absence of evaluation mechanisms as these would be determined by Members and REC's themselves. In sum, consideration of the recommendations by Member States it thus not guaranteed at all. Klavert (2011), finds that since political traction to adopt a more binding agreement was lacking, the only way in which the document would be adopted, was by presenting it as guidelines.

African Common Position on Migration and Development

The second document constitutes the African Common Position on Migration and Development of 2006, which was developed for the Africa-EU Conference on Migration and Development to be held the same year. Although negative attitudes towards migration might have delayed the negotiations on the Policy framework, the African Common Position reflects a slightly more positive approach, by e.g. stating that labor migration *can* benefit both origin and destination countries and that migration *can* contribute to development rather than just perceiving it to be a problem. Particularly relevant for the EU and its focus on border control is the call to strengthen African national border management, which should *inter alia* be promoted by cooperation between national security services. The EU itself is requested to implement the pledges made during the Africa-EU summit held in Cairo in 2000, in which commitments were made regarding supporting the facilitation of freedom of movement for Africans in the context of the Abuja Treaty, to cooperate in fighting the push and pull factors of migration, to enhance cooperation regarding reciprocal migrant integration and in protecting their rights; and to ensure protection of the rights of migrants, emphasizing the role of fighting discrimination. Moreover, a very concrete example is the call of the AU for more easy visa procedures in order to reduce illegal and irregular migration. Furthermore, more flexible entry requirements concerning service providers and recognition of professional qualifications obtained in African training institutions were asked for, requiring a legally binding framework in the context of the AU-EU relationship. Lastly, the EU was urged to live up to its commitments in terms of supporting development and specifically, to contribute to reaching the MDGs (African Union 2006b).

6.2 An Africa-EU 'Partnership'?

6.2.1 EU approaches towards Africa: dimensions of externalization

Africa's call for EU commitment with regard to supporting its development refers to one of the EU approaches to migration already identified during the 1999 Tampere Council: here, not only ambitions were expressed with regard to the development of a common migration and asylum policy, the 'external policy dimension' was officially embraced as well (Lavenex 2006). In its Conclusions, the Council emphasized the need to create "a comprehensive approach to migration addressing political, human rights and development issues in countries and regions of origin and transit. This requires combating poverty, improving living conditions and job opportunities, preventing conflicts and consolidating democratic states and ensuring respect for human rights" (Council, 1999). In practice, these ideas have translated into the so-called 'root cause approach', constituting one of the two 'externalization' dimensions as identified by Mangala (2012), focusing on migration prevention by addressing the push factors leading people to leave their countries.

However, Mangala (2012) argues that the prevention approach has only gained marginal attention. The other dimension of externalization, the so-called 'remote control approach', characterized by a reactive nature and focus on securitization, would have remained dominant. In practice, these ideas translated itself into emphasis on cooperation on border control and on concluding readmission agreements. A significant example constitutes the Cotonou Agreement, concluded in 2000 with the ACP-countries (just before the start of EU-AU cooperation), which contains the provision for both countries to 'accept back without further formalities their citizens'. Furthermore, it includes the right for the EU to send back

illegal migrants and asylum-seekers in case of denial of their applications. It has been argued that this has become 'standard practice in EU cooperation and association agreements' (*ibid.*). The following sections will be concerned with the question of whether and how the EU has tried to pursue these policies in its cooperation at the continental level with the AU – if European preferences (and thus the preferences of European Member States) are reflected in collaboration outcomes.

6.2.2 The Partnership on Migration, Mobility and Employment: cooperation dynamics

The PMME was launched at the Lisbon Summit in 2007 in the context of the JAES. The negotiations regarding its conclusion were mainly dominated by the topic of funding. While the AU asked the EU for funding in order to realize the initiatives to be developed in the context of the Partnership, the EU showed reluctance, pointing to the €266 million for migration-related projects and bilateral grants already made available before – no funding would be necessary for the Partnership specifically (Klavert 2011). One could argue that this seemingly 'funding dependency' makes the establishment of an equal partnership difficult, and the outcomes of the summit seem to support this impression. When scrutinizing the forms of cooperation and the formulated objectives, the EU seems still to be in the position to put its own preferences forward (Mangala 2010; Hansen and Jonsson 2011).

Preceding the Partnership, The EC expressed that within the EU, there was a significant demand for migrant labor and that the EU would admit more labor migrants from Africa. Concrete proposals however made clear that the Commission would decide who would be admitted, when and where, putting emphasis on seasonal labor, temporary permits and circular migration. Furthermore, an unknown number of Africans would be given temporary work permits to works as maids, in the medical service and to work in agriculture during specific seasons. Simultaneously, the Commission called for improved military guarding at sea borders and for better security cooperation with Africa in its fight against illegal migration. In the eventual outcome, the Joint Africa-EU Declaration on Migration and Development, these preferences are reflected (Hansen and Jonsson 2011). Kunz et al. (2011) argue that the Declaration attempted to counter ideas outlined in the African Common Position, 'that the emphasis on addressing illegal or irregular migration has been only on security considerations rather than on broader development frameworks and on mainstreaming migration in development strategies' (African Union 2006, p.2, in Kunz et al. 2011). Emphasis should indeed be on the word 'attempted': although the Declaration does include sections on development benefits for Africa, the dominant policy prescriptions reflect an EU-serving and -led agenda (Tripoli Declaration 2006 in Hansen and Jonsson 2011, p.14): "Africa has a duty to fully cooperate with the EU in preventing illegal immigration, developing return instruments, and reinforcing border controls (…), foreign direct investment in Africa and Africa's integration in the global economy should be promoted [and] circular, temporary and seasonal migration should be facilitated". Additionally, 'policies to increase the economic benefits for the EU from migration should be enacted to facilitate the admission of certain categories of immigrants on a needs-based approach' (CEC 2006, p.7-8 in Hansen and Jonsson 2011, p. 14). However, in order to control migration flows, the EU considers it to be necessary to increasingly focus on combating illegal migration – in many sectors demand for labor is not constant, so the EU wants to protect itself for situations in which newly arrived migrants are all of a sudden unemployed, which would lead to social and economic costs for the EU. Hansen and Jonsson (2011, p. 15) argue that the rather than aiming to

achieve a win-win situation with significant attention for African development, the EU strategy reflects how the EU 'believes itself capable of generating a win-win dynamic between its own security oriented fight against illegal migration, on the one side, and its neoliberal fight for growth and competiveness, on the other'. So in practice, this approach principally serves national preferences of participating EU member states (*ibid*.).

Yet, as we have seen in the case of the EU, the question always remains how words are translated into action. Examining progress reports regarding the activities implemented in the context of the Partnerships, Mangala (2012) provides a critical review. First of all, he mentions that a considerable number of the activities listed in the reports do not fall under the umbrella of the Partnership. In fact, these activities are (financially) supported by EU states and are considered to 'add value' to the Partnership. Secondly, activities related to consultation and information-sharing (research, conferences and workshops) constitute a considerable share of the reporting. A third comment relates to the fact that although the EU has provided €266 million to migration-related projects (which they used as a reason to refuse to provide further financial support), the largest share of this support has been used for capacity-building projects in individual African states. Notably, these projects are mainly connected to the fight against illegal immigration, money being allocated to collaboration with Libya in order to prevent illegal migration, a project in Ghana concerned with combatting document fraud and to the building of a multi-regional expert facility to fight illegal migration. In general, Mangala (2012) concludes that the largest share of Partnership funding has been allocated to combatting illegal migration and secondly, human trafficking. Fourthly, elements of the partnership relating to mobility and employment haven not been implemented at all – leading Mangala (2012) to ask the question why these elements have actually been included (possibly to give the impression that the goals of both the EU and AU would be served?) and whether the EU and its members really want African partners to be engaged in mobility and employment issues. Considering the slow progress regarding EU common policy making on economic migration, political will to facilitate (African) legal migration seems to be lacking at the Community level – preferences of EU member states to retain discretion in this field are thus being reflected by lacking EU commitment (while its rhetoric was quite promising). It is of course questionable whether in the current economic climate of the EU 'creating more and better jobs for Africans' still belongs to the priorities – the question is maybe rather whether this has ever been the priority of the EU or if this has been a way to present itself as an attractive partner in an environment where it faces increasing competition for African collaboration from other countries.

In sum, while the Partnership should have led to increased African efforts in the fight against illegal migration and enhanced EU cooperation in the field of development/employment and mobility, actual outcomes are actually disappointing and if something, rather reflect a focus on securitization than addressing the root causes of migration and displacements. Moreover, in general, another factor that contributes to the fact that the hitherto outcomes of the Partnership are unsatisfactory – for both the AU and the EU – is related to the low level of AU integration, which is largely due to the wide divergences among Member States. This leads in turn to the fact that for the EU to approach 'Africa as One' is rather complicated: the AU policies dealing with migration and displacement are often ambitious and comprehensive but in practice poorly implemented. Wide divergences between AU members lead to the fact that there is practically no base to build on. The question is thus whether one could have actually expected significant results to be achieved; it is probably not by chance that the EU has continued to 'collaborate' bilaterally in parallel.

7. Conclusion

When answering the question posed in the title of this thesis – whether with regard to European Union and African Union migration and asylum approaches, one should speak of common strategies or individual policies – it seems fair to conclude that individual strategies rather than common policies characterize the approaches taken by both organizations. With regard to the African Union it seems to be clear that 'common policy-making' has so far not produced many results in practice. Considerable divergences among countries and lacking capacity has led to a very challenging environment for achieving concrete and sustainable results. Yet, developments like the conclusion of the Kampala Convention can undoubtedly be called considerable achievements – however, without the necessary tools for implementation, it is not likely that the situation will change significantly.

Regarding the EU, the first chapter on policy-making dynamics at the EU-level and the subsequent chapter which focused on the influence of individual states indeed seem to suggest that it are the Member States which determine policy-making at the EU level, and thereby also decide on the level and speed of European integration. Considering the rather modest level of harmonization that has been achieved by the adoption of the immigration and asylum policies, some general conclusions can be drawn. Firstly, the limited degree of harmonization points indeed to reluctance on the side of Member States to transfer (too much) sovereignty to the EU level. Secondly, at the same time it has to be noted that besides reluctance to 'give up' sovereignty, policy-making at the EU level has on the other hand been used to circumvent domestic constraints regarding the possibility of implementing policies actually preferred by national political parties. At least this fits liberal intergovernmentalist assumptions to the extent that it points to a(nother) way in which Members use the EU-level to pursue domestic agendas. Thirdly, although the EU institutions have gained more power in theory, in practice the impact of these institutional changes seems to be rather modest. With regard to for instance the conclusion of the Returns Directive, the role of the Parliament as a 'human rights advocate' seems to have been negligible. Yet, deeper analysis and more study is needed before a real conclusion on this can be drawn. Fourthly, the wide divergences in perceptions and national policies among Member States make it difficult to reach agreements, eventually resulting in relatively 'weak' legislation. As has been pointed out by Moravcsik, the larger the divergences, the higher the costs of cooperation. Furthermore, since immigration and asylum are generally politically sensitive topics, there is more at stake than just 'economic benefits' – making it more complicated to understand EU-level policy-making only through the lens of Moravcsik's liberal intergovernmentalist theory. Adding issue salience to the framework seems to have contributed to a better understanding of preferences of governments and their positioning at the supranational level.

When connecting African Union and European Union policies, one could argue that there is a certain mismatch between the approaches. Whereas the African Union has relied more on solidarity of its Member States and has tried to focus on the root causes of migration and displacement, the European Union seems to be mainly concerned with preventing migrants from entering its borders. In principle, this does not need to directly pose a problem as long as the EU would take its responsibility in another way: providing support in addressing the root causes of African migration. Yet, even with regard to its 'partnership' with Africa, which has yielded generally little results, its own needs have been prioritized and dolargely guide its action – of course, this does not add to its credibility. If it really wants to be perceived as a serious and trustworthy *partner*, it is maybe time for the EU to re-read the pledges it has made at the Tampere Council and to start to live up to these commitments.

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