Reverse norm dynamics and the right to seek asylum:

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Julia Schmälter
julia.schmaelter@uni-due.de

Jean Monnet Chair
Universität Duisburg-Essen
1. INTRODUCTION

With the end of World War I, the international community developed a growing understanding that there is a collective responsibility to protect people in need of international protection from persecution or serious harm in their home countries. Following the Second World War, this idea was enshrined in Article 14(1) of the UN Declaration of Human Rights, specifying that: “Everyone has the right to seek and to enjoy in other countries asylum from persecution”. Based thereon, debates on the right to asylum reached its peak with the ratification of the 1951 Geneva Convention and its 1967 Protocol Relating to the Status of Refugees, setting out the foundations of international refugee law. The majority of the international community including all EU member states have signed and ratified these refugee instruments. With the enforcement of the EU Charter of Fundamental Rights (CFR) in 2009, the right to seek asylum is now also incorporated into official EU legislation (Article 18, CFR). The current refugee crisis however exposes certain challenges to this widely recognized norm and reveals an EU-wide reluctance to accept the ever-growing influx of migrants. In 2015, Austria, Denmark, Germany, Sweden and Norway reintroduced temporary border controls; Austria decided to limit the number of asylum applications to eighty per day; the Visegrád group proved unwilling to participate in relocation mechanisms; Germany organized information campaigns discouraging refugees to come to Europe; and Denmark introduced a limit to family reunification. These are only some examples suggesting that persons in need for international protection encounter ever more difficulties when trying to seek asylum in EU member states.

Norms, norm development, and norm dynamics have been subject to intense investigations by International Relations (IR) scholars in general and constructivists in particular. The vast amount of literature on this subject however suffers from two shortcomings that obfuscate the developments outlined above. First, while numerous studies have been concerned with the construction of norms, most neglect their erosion: “while constructivists have produced important and convincing scholarship cataloguing the processes by which these norms take hold and spread, there has been little concomitant recognition that this moral change may prove shallow and fleeting” (McKeown 2009: 7). For a long time, scholars even used to assume a unidirectional evolution, i.e. norm development as a one-way street, thereby neglecting the impermanence of consolidated norms. Only recently, studies began to explore the regression of well-established norms and found that their erosion is indeed possible (e.g. Rosert/Schirmbeck 2007; Dunne 2007; Heller/Kahl 2013; McKeown 2009). This leads us to the second shortcoming. Within these studies, there have been hardly any efforts to examine the role of international organizations (IOs). While established accounts of norm dynamics have strongly emphasized the influence of IOs in the process of norm emergence and consolidation, identifying their role in parallel processes of norm erosion would therefore provide valuable insights. The article at hand intends to close these gaps and to shed light on the role of the European Union in the process of norm regression within the context of the right to seek asylum in the current refugee crisis.
In the EU, the right to asylum is regulated by the Common European Asylum System (CEAS) including the Asylum Procedures Directive, the Reception Conditions Directive, the Qualification Directive, the Dublin Regulation and the EURODAC Regulation. The Asylum Procedures Directive recognizes that “people in need of international protection must be ensured access to legally safe and efficient asylum procedures”. Hence, EU legislation clearly acknowledges the need to grant the possibility to file asylum requests in EU member states. This raises the question, which position EU institutions take with regard to the migration crisis. This article intends to shed light on this subject by exploring if the EU aims to defend the right to seek asylum against growing pressures from the member state level, acting as a norm saviour, or if it adopts national positions, thereby sustaining norm regress. More precisely, it explores if Moreover, the article intends to investigate the different positions taken by supranational and intergovernmental actors and thus distinguishes approaches by the European Commission as a supranational actor and the European Council and Council of Ministers as intergovernmental actors.

The article at hand will present the preliminary results of the analysis and first indications of how the positions taken by the European Council and the Council affect the options to seek asylum in the EU. The next section provides the theoretical framework, clarifies the research gaps and elaborates in more detail how this article aims to contribute to existing literature on norm dynamics. Section 3 clarifies method and data used to examine the role of the Councils in the process of norm erosion. Subsequently, some preliminary results of European Council and Council positions will be presented, mapping the measures and objectives by these intergovernmental institutions. The final section will discuss these measures with regard to their implications to the right to seek asylum in the EU.

2. THEORETICAL FRAMEWORK

Before taking a closer look at research on norm dynamics, it is important to provide the relevant definitions of ‘norms’ and ‘norm erosion’. Following the widely accepted approach by Katzenstein (1996: 5), ‘norms’ will be defined as “collective expectations for the proper behaviour of actors with a given identity”. Since norms guide and regulate behaviour, they thereby “limit the range of choice and constrain actors” (Finnemore/Sikkink 1998: 894). For instance, the internationally recognized right to seek asylum constrains governments in setting up certain immigration policies (Gurowitz 1999: 413). Thus, when a norm regresses or erodes and thereby several of its assumptions are lost, an actor’s room for manoeuvre increases – at the expense of the norm. Norm erosion¹ will hence be understood as the re-expansion of actors’ scope of action, which had previously been regulated or constrained by the initial norm (Rosert/Schirmbeck 2007). In this article, the de facto non-compliance with the right to asylum is thus subordinate. Instead, the goal of this article is to analyse if we witness regressing positions with

¹ Norm erosion/regression/reversion will be used interchangeably in this article. All of them refer to more than mere change but to a degradation or setback of the norm.
regard to the norm’s area of application. While the EU might not be overtly violating the right to seek asylum in a legal sense, the article scrutinizes if EU institutions indirectly restrict access to it thereby expediting the norm’s erosion. The following two subsections will clarify two shortcomings of constructivist literature obscuring a better understanding of norm erosion in the current EU refugee crisis.

2.1 The Teleological Flavour of Norms Research

Scholars usually differentiate between three strands of research on norm dynamics. As a starting point, constructivists aimed to establish that norms matter indeed or, more precisely, that “norms, culture and other social structures have causal force and are not simply reflections of hegemonic state interests” (Finnemoer/Sikkink 2001: 397; also Katzenstein 1996; Finnemore 1993; Crawford 1993; Klotz 1995). Second, scholars examined the different impacts norms may have on different agents (e.g. Checkel 1998). Once it was agreed that norms indeed have an influence on agents’ behaviour, a third wave turned to explain how norms came to exist and matter in the first place. Here, the literature identifies different actors and mechanisms, e.g. persuasion by norm entrepreneurs (Klotz 1995; Thomas 2001), socialization by international organizations (Finnemore 1993; Barnett/Finnemore 1999; Adler 1998; Santa-Cruz 2005; Bearce/Bondarella 2007; Greenhill 2010), or the role of discursive practices (Kratochwil 1989; Risse 2000). This third wave will be the starting point for this article.

The two most influential models, explaining how norms come into being and acquire an internationally taken-for-granted status are Finnemore and Sikkink’s (1998) ‘norm-life-cycle’ and Risse, Ropp and Sikkink’s ‘spiral model’ (1999; 2013). Although these approaches differ in several ways, they both conclude that, in the final stage, norms will be taken-for-granted and discussions about their validation are no longer expected (Finnemore/Sikkink 1998: 895; Risse/Ropp/Sikkink 1999; Rosert/Schirmbeck 2007: 255). Moreover, not only do they claim that compliance with the respective norm becomes a habitual practice. They also contend that “a reverse process is highly unlikely, if not impossible” (Heller/Kahl 2013: 414). Most constructivist scholars thus take a rather deterministic approach and consider norm development to be a one-way street. Although Risse and Sikkink predict resistance and disputes to occur in the early phases of their spiral model, they suggest that this risk becomes obsolete in later stages² (Risse/Sikkink 1999; Jetschke/Liese 2013: 33; Dunne 2007: 275). Similarly, Finnemore and Sikkink (1998: 893) contend that “domestic influences are strongest at the early stage of a norm-life-cycle, [but they] lessen significantly once a norm has become institutionalized in the international system”. Thus, while there is nothing inevitable about the completion of both the spiral model and the norm-life-cycle, once a norm has been accepted it becomes so powerful that it will not be questioned anymore. As McKeown (2009: 7) summarizes, “the norms literature has somewhat of

² In their most recent version, Risse, Ropp and Sikkink already acknowledge this shortcoming (2013)
a teleological flavour, and many seem to view the creation and spread of norms as part of an irreversible historical progression towards a more civilized world”.

Thus, while there is extensive research on how norms arise and spread, an exaggerated focus on path dependency made norm regression “the least understood factor in research on international human rights impact” (Jetschke/Liese 2013). After all it can be argued that “human wrongs [...] can ‘cascade’ throughout global politics just as quickly as human rights enhancing norms can be diffused” (Dunne 2007: 284). Only within the last decade, scholars began to notice that “norms in general, and human rights in particular, are continuously being contested” (Heller/Kahl 2013: 415). Particularly the post-9/11 measures to counter international terrorism led IR scholars to reconsider the idea of norm construction as a one-way street (Rosert/Schirmbeck 2007; Heller/Kahl 2013; Dunne 2007, McKeown 2009). To date, scholars’ interests in norm erosion have been threefold. First, they analyse how even liberal democratic states come to challenge widely accepted human rights norms. Second, the discursive practices justifying the norm erosion by so-called norm revisionists or norm challengers have been the centre of investigation. And finally, they examine if norm erosion might diffuse, and encourage “inconsistent behavior among other members of the international society” (Dunne 2007: 281). Findings by these studies substantially contradict the deterministic approaches so far taken and confirm that norm construction is not a one-way street.

2.2 Beyond the Nation State: Do International Organizations Still Matter?

What these studies so far failed to investigate however, is the role of international organizations in the process of norm regression. Following established theories on norm construction, IOs “do indeed have the potential to bring about real changes in states’ human rights practices” (Greenhill 2010: 143; also Adler 1998). They act as agents of socialization by persuading “targeted actors to adopt new policies and to ratify treaties and by monitoring compliance with international standards” (Finnemore/Sikkink 1998: 902). Persuasion typically occurs in “social interactions between actors who have drawn different conclusions regarding the nature, merits and/or implications of [an] action or policy and in which one or more of those parties attempt, through arguments, to get their interlocutors to rethink their conclusions” (Gheciu 2005). Many constructivists argue that IOs are the major field for persuasion to take place. Thus, when IOs are indeed able to change agents’ behaviour in the process of norm construction, further analysis of their role in processes of norm erosion would provide valuable insights. Recent studies have revealed that persuasion works best “within the framework of a Habermasian ‘common lifeworld’, consisting of collective interpretations of the world and a common system of rules perceived as legitimate (Risse 2000: 10). Against this background, the European Union – as a community based on shared norms and values – should be a particularly promising environment for persuasion. And considering that the EU promotes itself as human rights pioneer, it could be expected that it tries to convince its member states to take a less restrictive approach regarding asylum policies.
The article at hand therefore complements research on norm erosion by analysing if the European Union tries to persuade member states to uphold the right to seek asylum or if it supports more restrictive positions. Furthermore, and in order to get a clearer picture, the article will juxtapose intergovernmental (European Council, Council of Ministers) and supranational (Commission) EU institutions. The following sections present the preliminary results regarding European Council and Council.

3. METHOD AND DATA

In order to explore if EU institutions act as norm saviours or challengers, it is first and foremost important to establish a concrete mapping of all measures suggested or adopted to manage the refugee crisis and that might have implications on a person’s ability to file an asylum request in the EU. The article thus aims at qualitative content analysis of all official European Council, Council and Commission documents related to migration. Following Philipp Mayring’s categorization, the article applies ‘inductive category formation’ where “the aim is to arrive at categories directly, which are coming from the material itself, not from theoretical considerations. […] It aims at a true description without bias owing to the preconceptions of the researcher, an understanding of the material in terms of the material” (2014: 79). For the analysis, the article focuses on two core categories, namely, ‘measures strengthening the right to seek asylum in the EU’ and ‘measures curtailing the right to seek asylum in the EU’. Subsequently, the whole system of categories has been interpreted in order to reveal which positions European Council and Council take and if they act as norm saviours or norm revisionists.

The following section present the preliminary results of the analysis of European Council and Council documents.

4. PRELIMINARY RESULTS: EUROPEAN COUNCIL AND COUNCIL OF MINISTERS

This section presents the measures adopted by the European Council and the Council to manage the migration crisis. For this purpose, I analysed all official European Council and Council documents between April 2015 (the unofficial start of the crisis) and August 2016, 95 in total, among others Council Conclusions, Outcomes of Council meetings, Council Decisions and Progress reports. A detailed list is provided in the annex. In these documents, I coded all text passages suggesting concrete measures or uttering statements that can be expected to have an impact on persons’ abilities to exercise the right to seek asylum. In less abstract terms, this means every measure or statement that aims at either promoting or limiting a person’s possibilities to come to the EU and file an asylum request.
The analysis revealed that all measures suggested by the European Council or the Council of Ministers and affecting peoples’ abilities to file an asylum request in the EU in one way or another can be summarized in four main categories, namely:

1. Protection of External Borders
2. Fight against Migrant Smuggling
3. Return of Irregular Migrants
4. Creating Legal Avenues to the EU

4.1 Protection of External Borders

One of the major points of discussion within EU institutions has been, and still is, the protection of the EU’s external borders. Already from September 2015 onwards, the European Council and the Council have been emphasizing the need to strengthen external borders, the presence at sea and to secure systematic security checks against relevant databases, stressing that “effective border control is imperative for the management of migration flows” (JHA Council Meeting, September 14, 2015). These calls have steadily increased and became particularly dominant after the reintroduction of internal border controls by several member states. While before, the “management of migration flows” and the “fight against organized crime” were the Councils’ main incentives for increasing border protection, the end of 2015 emphasized the protection of Schengen as major driving force: “For the integrity of Schengen to be safeguarded it is indispensable to regain control over the external borders” (European Council, December 2015).

In order to do so, several measures have been proposed, most prevailing however, was the strengthening of Frontex through equipment, staff and funding. The need to reinforce ongoing Frontex Operations, most notably Joint Operation (JO) Triton in the Central Mediterranean and JO Poseidon in the Eastern Mediterranean Sea, to strengthen Frontex’ Search and Rescue Operations and Rapid Border Intervention Teams (RABIT) are very present in Council documents. It was further and repeatedly stressed that the inter-agency cooperation between Frontex, Europol, Eurojust and the European Asylum Support Office (EASO) should be improved.

Yet, the centre of the suggested border protection measures has been the Border Package proposed by the Commission in December 2015. This package focuses on two main objectives, namely the establishment of a European Border and Coast Guard (EBCG) and the modification of the Schengen Borders Code to introduce mandatory systematic checks of EU citizens at external land, sea, and air borders. Both proposals have been welcomed by the Councils and especially the EBCG was demanded operational “as soon as possible” (European Council Conclusions, February 19, 2016). On June 22, 2016, the Council confirmed the establishment of the EBCG. By now, August 2016, it is awaiting approval by the European Parliament and the Council. The aim is to provide Frontex with more competencies in order to address its current shortcomings regarding capacities in equipment and staff.
as well as limited cooperation with EU member states. The EBCG will be composed of a European border and coast guard agency (replacing Frontex) and national authorities responsible for border management. While currently “the responsibility for the control and surveillance of the external borders lies with the Member States”, the new system would put the agency in charge. The EBCG’s major mission would be to implement and ensure the European integrated border management by (1) relying on a reserve pool of border guards and technical equipment, (2) a monitoring and risk analysis center, (3) the right to intervene, (4) organizing return operations, (5) organizing joint surveillance operations and (6) a mandate to work in third countries. Thus compared to Frontex, the EBCG will have both increased competences and more resources to protect the EU’s external borders.

Further, besides the enhanced efforts to protect the EU’s borders, the Council also debates partnership frameworks aimed to incentivize and support countries of origin and transit to increase the controls at their borders, as for instance with Libya (discussed below) or Turkey. In the EU-Turkey Statement, Turkey committed itself to make serious efforts to prevent illegal migration across the Aegean Sea and its land borders in order to stop the illegal migration flows transiting through Turkey from arriving at EU shores.

4.2 Fight against Migrant Smuggling

The second objective is closely related to the first one, since fighting networks of smugglers and protecting the EU’s external borders goes hand in hand. Still, several measures have been suggested with the main aim of stepping up the fight against migrant smuggling in order to prevent further loss of life at sea and contain irregular migration flows. In its conclusions of June 2015, the Council identified as a priority “the disruption of organized crime groups involved in facilitation of illegal immigration operating in the source countries, at the main entry points to the EU, on the main routes and, where evidence based, on alternative channels” (Council Conclusions, September 11, 2015). And in March 2016, the European Council concluded that “the fight against smugglers everywhere and by all appropriate measures remains key”.

In order to step up the fight against smugglers, the strengthening of several operations has been suggested, most notably by EUROPOL, as for instance operations BLUE AMBER to “disrupt organized crime groups’ activities” and operation HUNTING GROUND “to identify organized criminal groups involved in illegal immigration and to analyse their structures” (Presidency Conclusions, September 9, 2015). It was further suggested to establish a European Migrant Smuggling Centre (EMSC) by EUROPOL “to strengthen its capacity to support Member States in better preventing and fighting against migrant smuggling” (Council Conclusions, November 9, 2015). The EMSC should encompass the Joint Operational Team MARE aiming to “fight criminal groups facilitating illegal immigration via the Mediterranean sea” and further extend EUROPOL actions. The aim of these measures is to develop a

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3 In collaboration with the European Fisheries Control Agency and the European Maritime Safety Agency
coordinated and effective law enforcement response against organized criminal networks behind people smuggling (Draft Council Conclusions, January 26, 2016). The EMSC was launched by EUROPOL in February 2016.

The most prominent measure introduced to combat migrant smuggling though has been the initiation of the EU’s first military operation targeting the smuggling and trafficking of people from Libya to the EU. As a consequence of a Libyan shipwreck discovered in April 2015, the European Council committed to neutralize existing smuggling routes, to “undertake systematic efforts to identify, capture and destroy vessels before they are used by traffickers” and called for a CSDP operation to this effect (European Council Conclusions, April 23, 2015). On May 18, 2015, the Council approved the CSDP operation in the Southern Central Mediterranean: EUNAVFOR MED (later to be renamed EUNAVFOR MED Operation SOPHIA) and decided its launch on June 22, 2015.

The mission itself consists of three stages. Stage one – starting July 2015 – aimed to enhance the understanding of smuggling activities and measures through information gathering and patrolling on the high seas and has by now been completed. Stage two – agreed on September 28 and starting October 7, 2015 – foresees “boarding, search, seizure and diversion of vessels suspected of being used for human smuggling” (Council Conclusions, May 18, 2015). After a UNSC Resolution (2240(2015)) on October 9 and the Council Decision from January 18, 2016, this phase has been extended into Libyan territorial waters. Finally, phase three calls for “all necessary measures against a vessel and related assets, including through disposing of them or rendering them inoperable […] in the territory of [Libya]” (ibid.). On June 20, 2016, the Council approved to extend the EUNAVFOR MED mandate for one year and added two new supporting tasks: “training of the Libyan coastguards and navy and contributing to the implementation of the UN arms embargo on the high seas off the coast of Libya” (FA Council, June 20, 2016).

Further, several smaller measures have been brought forward by the Councils, as for instance: increased engagement with the transport sector, monitoring of new migration routes, increased police and intelligence cooperation with third countries, increased information gathering and sharing (e.g. via single operational contact points or contact groups of agencies) and more partnership frameworks in order to fight migrant smuggling, prevent deaths at sea and stem irregular migration flows.

4.3 Return of irregular migrants

Finally, returning irregular migrants, i.e. third-country nationals who do not fulfill, or no longer fulfill, the conditions of entry, stay or residence in an EU member state, is one of the measures mostly discussed by the institutions under investigation. Already in April 2015 the European Council commits itself to “set up a new return programme for the rapid return of illegal migrants

4 In order to start this phase, the EU depended on either an UNSC Resolution or the consent of the Libyan authorities.
from frontline member states” (European Council, April 23, 2015) and in the European Council Conclusions from June 2015, “return/readmission/reintegration” is emphasized as one of three key dimensions to manage the migration crisis.

Most aspects of the EU return policy are dependent upon cooperation with countries of origin and transit, which is why a lot of emphasis is put on related measures. First of all, numerous return initiatives fail due to certain reluctance by third countries in readmitting their nationals. Readmission agreements are designed to facilitate the return of third-country nationals and lay out clear obligations regarding readmitting persons staying irregularly on EU territory. So far the EU concluded 17 readmission agreements. In the timeframe under investigation, the Councils called for several related measures, i.e. to effectively implement existing readmission agreements (as for instance under the Cotonou Agreement), to accelerate ongoing negotiations on new readmission agreements (Belarus, Morocco and Tunisia) and to launch new negotiations with other third countries (European Council Conclusions, June 25, 2015).

Second, in order to facilitate returns to countries with whom no readmission agreement has been concluded so far, the European Council called for more partnership frameworks to ensure efficient return to third countries (European Council Conclusions, February 19, 2016). In October 2015, the Justice and Home Affairs Council asked the Commission to propose “comprehensive, tailor-made packages to be used vis-à-vis third-countries in order to remedy problems encountered in implementing effective readmission” (JHA Council Conclusions, October 08, 2015). In May and June 2016, the European Council and JHA Council further acknowledged “the importance of an integrated approach based on comprehensive tailor-made packages which serve as guidance for the EU and its Member States and their relations with relevant third countries, including, where appropriate, on the use of both positive and negative incentives for improving cooperation on return and readmission” and that these partnership frameworks “should remain a central part of the external dimension of the European Agenda on Migration” (Draft Council Conclusions, May 11, 2016). The European Council further clarified that “Cooperation on return and readmission will be a key test for the partnership between the EU and these partners” (European Council Conclusions, June 28, 2016).

Third, the Councils strongly promote the idea of information campaigns in countries of origin and transit, clearly communicating and raising awareness concerning the risks faced by migrants attempting to reach the EU through irregular channels. The aim is to “discourage migrants to embark on perilous journeys” and thereby reduce migration from these countries. First pilot projects have been set up in Niger, Ethiopia and Sudan in 2014 in cooperation with the International Organization for Migration (IOM) and the UNHCR. Relatedly, the Council invited the Commission to “ensure that the

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5 Hong Kong, Macao, Sri Lanka, Albania, Russia, Ukraine, FYROM, Bosnia & Herzegovina, Montenegro, Serbia, Moldova, Pakistan, Georgia, Armenia, Azerbaijan, Turkey, Cape Verde

6 "each of the ACP States shall accept the return of and readmission of any of its nationals who are illegally present on the territory of a Member State of the European Union, at that Member State’s request and without further formalities” (Article 13.5c)
implementation of the pilot projects on information campaigns in Ethiopia and Niger, regarding the risks of irregular migration, is intensified, and review the results […] as soon as possible with the aim of rolling out information campaigns in other countries of origin and transit” (Council Conclusions, March 10, 2016).

Finally, the Council called to strengthen the ‘safe country of origin’ and ‘safe third country’ provisions entailed in the Asylum Procedures Directive (APD). In July 2015, the Council adopted Conclusions “stressing the importance of a coordinated approach between Member States on the designation at national level of third countries as safe countries of origin” (Council Conclusions, July 22, 2015) in order to “effectively address situations when large numbers of asylum applications are lodged by nationals from third countries for whom there is a presumption that they do not qualify for international protection” (Council Presidency, September 11, 2015). In this regard, the Council discussed several measures. Most importantly, it suggested that “the Western Balkan countries could be considered as safe countries of origin by all Member States” (JHA Council Meeting, July 20, 2015), to declare Turkey as “safe third country”, that “all Member States should assess, without delay, which additional third countries could be designated as safe countries” (Council Presidency, September 11, 2015), and finally it agreed “to adopt a common European Union list of safe countries of origin” (JHA Council Meeting, September 14, 2015).

Besides the Councils’ endeavors to strengthen cooperation with the international community in order to facilitate the return of irregular staying third country nationals, it suggested several procedural measures in order to strengthen those EU agencies relevant for coordinating and running return operations. Most importantly it was discussed how the mandate of Frontex can be enhanced so it can bring immediate support to frontline member states so the return rate can be “substantially improved” (JHA Council Conclusions, November 9, 2015). According to the Council Presidency, “Frontex has to be at the heart of the European Return Program” (Presidency Conclusions, September 11, 2016). Again, the most decisive step in this regard has been the agreement to establish the European Border and Coast Guard (COREPER Confirmation, July 22, 2016). While the ECBG’s main task is the protection of the EU’s external borders, it was also designed to “step up assistance to Member States for returning illegally staying third-country nationals” by organizing, coordinating and conducting return operations and interventions. For this purpose the European Council also suggested that “the immediate creation of a dedicated Return Office within Frontex should enable it to scale up its support to Member States in order, inter alia, to facilitate, organize and fund return operations” (JHA Council Conclusions, October 8, 2015). For this purpose, the Council welcomes the Commission’s proposal to enhance return rates by setting up “Frontex Return Intervention Teams, offering support on identification, consular cooperation with third-countries, and organizing joint return operations for Member States” (Council Conclusions, October 8, 2015). Thus, European Return Intervention Teams, and in special cases Rapid Border Intervention Teams, will be set up providing financial coordination and organization to member states.
Furthermore, talks on an EU laissez-passer for the return of irregular migrants have been increasing. The measure is part of the Commission’s Border Package. The proposal followed the observation that, as already indicated above, the EU system to return irregular third-country nationals was only moderately effective. The purpose of the EU laissez-passer is to enhance its use by member states and third countries’ recognition of the document through improvement of technical details and security standards. This document aims at facilitating the return of migrants staying irregularly on EU territory without valid passport or identification card. Both EU institutions under investigation strongly support the idea. On October 8, 2015, the JHA Council in their special Council Conclusions on the future of the return policy emphasizes that the EU laissez-passer “should become the travel document commonly accepted for return purposes by third countries”. And a week later, the European Council recommended “to promote the acceptance by third countries of an improved European return laissez-passer as the reference document for returnees” (European Council Conclusions, October 15, 2015). On 12 July, 2016, the EP LIBE Committee approved the text elaborated during the inter-institutional negotiations with the Council. The new EU laissez-passer will be integrated within the Return Directive once Council and EP agree.

### 4.4 Legal avenues to the EU

Another subject repeatedly debated within European Council and Council meetings regards the possibilities for migrants to legally enter EU territory. As indicated by the Council, “the main legal avenue to Europe” is resettlement (Council Presidency, September 11, 2016). Already in April 2015, the European Council committed to set up “a first voluntary pilot project on resettlement across the EU, offering places to persons qualifying for protection” (European Council Conclusion, April 23, 2016). While this was still a rather vague statement, in June 2015, the European Council agreed that all Member States would participate and in July, the Council adopted a Conclusion on a European Resettlement Scheme, agreeing to resettle 22,504 persons “in clear need of international protection […] from a third country to a Member State in agreement with the latter, with the objective of protecting them against refoulement and admitting and granting them the right to stay” (Council Conclusions of MS and Council, July 22, 2015). The aim of this scheme is to ensure international protection, prevent deaths and contain illegal migration. Since then, there have been several calls on Member States and the Commission to continue work on resettlement and develop further resettlement possibilities.

These appeals resulted in several further measures, i.e. a new proposal for a voluntary humanitarian admission scheme in December 2015, the EU-Turkey Statement of 18 March 2016, a Commission communication suggesting to enhance legal avenues to Europe in April 2016 and a Commission proposal to create a Common EU Resettlement Framework in July 2016. In December 2015, the European Council called on the Council “to rapidly examine the Commission proposal on a voluntary humanitarian admission scheme” (European Council Conclusions, December 18, 2015). While the Council has not yet adopted the framework, it invited Member States to “prepare” for it (JHA
Council Meeting, June 9, 2016). Regarding the Commission’s proposal to enhance legal entry options the Council suggests private sponsorship, revise the Blue Card Directive and attract innovative entrepreneurs. Yet, it should be noted that these measures do not influence the right to seek asylum. The EU-Turkey Statement provides a one-to-one scheme, suggesting “to resettle, for every Syrian readmitted by Turkey from Greek Islands, another Syrian from Turkey to the EU Member States” (EU-Turkey Statement, March 18, 2016). In this regard, the European Council welcomes the Commission’s suggestion to shift 54,000 places from the 160,000 places available for intra-EU relocation mechanisms for the purpose of this one-to-one scheme. In July 2016, the Commission moreover proposed a Common EU Resettlement Framework. The plan provides for a permanent framework for resettlement including a unified procedure. The Council is expected to comment on its September meeting.

5. IMPLICATIONS FOR THE RIGHT TO SEEK ASYLUM

The analysis of nearly all European Council and Council documents related to EU migration policies between April 2015 and August 2016 has enabled me to map all measures that might have an impact on a person’s accessibility of seeking asylum in the EU. In the following, I will more thoroughly discuss the concrete implications by the suggested or adopted measures and explain why they either advocate or restrain the right to seek asylum.

Strengthening border protection mechanisms is one of the major priorities of current EU policy-making and one of the most often stated solutions to the growing flow of refugees. The implications for migrants’ options to file asylum requests in the EU are rather straightforward. The increasing flow of migrants trying to reach EU member states contains both irregular migrants as well as refugees who can only apply for asylum after their arrival. Thus, in order to seek asylum, migrants have to be able to arrive safely at the EU’s borders. Increased controls directly off member states’ coasts, on the high seas but also on the territory of third states, as demanded by the Councils, creates severe obstacles for exercising the right to seek asylum. If migrants are not able to arrive in the EU, they are not able to file an asylum request and thus cannot be identified as refugees. While the suggestion to increase Frontex’ efforts regarding search and rescue operation is rather welcoming – in fact there is a commitment to triple its funds – it should be noted that the head of the agency indicated that saving lives in the Mediterranean cannot be the priority – which indicates that the increased budget is rather sought to keep migrants out. Also the increased mandate by Frontex, i.e. the EBCG, and the related ‘right to intervene’ and to acquire and use its own equipment, permanent staff and a yearly budget roughly double the ones currently available to Frontex, will make it considerably harder for migrants to arrive in the EU in order to file an asylum request. This contradicts the commitment to provide access to asylum procedures. It goes without saying that increased border controls might in fact contribute to a solution within the EU but will even enhance the obstacles faced by refugees when seeking international protection.
The fight against smugglers has similar implications for a person’s access to asylum. In March 2016, the heads of state or government declared that “bold moves were needed to close down people smuggling routes, to break the business model of the smugglers, to protect our external borders and to end the migration crisis in Europe”, suggesting that keeping migrants from EU territory would be a solution for the migration crisis. The Councils’ declared aim of fighting migrant smuggling is to condemn irregular migration flows and to prevent further loss of life at sea. It should be noted though that entering the EU via illegal channels should by no means have any impact on these persons’ eligibility to asylum.

Considering the EU’s increasing efforts to protect its external borders by numerous means and the lack of sufficient legal avenues to Europe, “migrant smugglers have become a necessary part of the migration journey” (van Liempt 2016, 2). Yet in March 2016, the Council made clear that this will not be accepted any longer by declaring its objective to “break the link between getting in a boat and getting settlement in Europe” (Statement of the EU HoSG, March 7, 2016). Thus, by prioritizing the fight against smugglers and destroying their travel routes, the EU restrains person’s possibilities to enter the EU and to file asylum requests. These policies conceal that smugglers are not the cause of irregular migration but a reaction to limited possibilities to enter the EU legally. Accordingly, the EU finds itself in a vicious circle: strengthened border protections force migrants to make use of smuggling networks and go on dangerous journeys that lead to deaths, which in turn promotes policies to combat smuggling and more border protection, creating perfect conditions and even new demand for smugglers etc. Since there is a considerable mismatch between demands for international protection and legal possibilities to access it, for numerous people smuggling is the only way to seek asylum in the EU. Hence, the steadily increasing suggestions to strengthen the fight against smuggling networks, limits people’s options to arrive at the EU’s coast and thus restrains their options to seek asylum in an EU member state.

Whereas the measures to strengthen border controls and to close down smuggling routes directly influence the right to seek asylum, the Councils’ measures to increase return rates rather indirectly imply norm regression. There surely is a necessity to return those migrants that do not need international protection. Yet, the measures suggested to fulfill this goal can be disputed when considering the necessity to provide access to asylum in the EU. The idea of a safe country of origin is debatable and has various consequences on the possibilities to seek asylum. The principle defines countries that are considered safe to live in, based on democratic standards and compliance with international human rights. This principle is considerably advocated by the Councils throughout the entire time under investigation. In September 2014 for instance, the Council declared that “third countries need to take back their nationals that have no right to stay in the EU. Both operational and political cooperation and partnerships on readmission with countries of origin have to be stepped up” (Presidency Conclusions, September 14, 2015). Based on this presumption, the revised Asylum Procedures Directive applicable since 21 July 2015 permits that member states “may provide that an examination procedure […] be
accelerated and/or conducted at the border or in transit zones” (Art. 31.8(b)) if the applicant is from a safe third country. It should be noted that the use of an accelerated procedure is not allowed to have prejudice on the final decision or that applications from a safe country of origin are automatically rejected. The presumption of safety can be refuted. Yet the fast-tracking of asylum applications and member states’ discretion to not check the merits of an asylum claim due to the “presumption that they do not qualify for international protection”, considerably limits case-by-case reviews and thus the possibility for a person to explain his individual circumstances. This is likely to lead to a rejection of the application. However, the decision on an asylum application should by no means be based on nationality but on an individual assessment of each case. Hence, both measures advocated by the Councils, namely to increase national safe country lists and to establish a common European list, might result in collective rejections of asylum requests based on nationality or the inability to file a request in the first place.

It is further worth taking a closer look at the countries declared safe, i.e. the Western Balkans and Turkey. The Western Balkan States have overall a very low rate of successful asylum applications. According to an EASO report, only 4% have been successful in 2014. On first sight, it thus appears reasonable to declare them safe considering the high pressure on member states. However, the respective statistics also reveal that there are still thousands of applications that indeed prove to be eligible for international protection, as for instance on LGBT or minority (Roma) grounds. Due to the accelerated procedures, these applicants might not have a chance to properly explain their cases and be sent back to their countries of origin. Declaring Turkey a “safe country” appears even more problematic. Several sources reveal that migrants face discrimination and mistreatment, that their asylum requests are not processed and that they are often returned to countries where they face persecution (domino-effect).

The safe country of origin principle is even more dangerous when it is coupled with the revised EU laissez-passer and readmission agreements, which both aim to facilitate return operations. Often, third states are not particularly inclined to accept asylum seekers who are returned from the EU, but a readmission agreement makes this an obligation. Readmission agreements follow a decision to return a person either on safe country grounds or after a denial from refugee status. Although readmission agreements should only cover irregular migrants, there are serious concerns that refugees are also caught up in the procedures and thus sent back without access to asylum procedures. This is a particular concern at border areas where accelerated procedures are applied and individuals have less chance to appeal against their expulsion. Even though member states are obliged to respect fundamental rights when applying this principle, the increasing pressure from rising migration flows might lead the responsible actors to seize the freedom provided by the ‘safe country of origin principle’ coupled with readmission

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7 i.e. holding the nationality of the third country or being a stateless person formerly habitually resident in the respective country (Art. 36, APD)
8 Although there are still discussions about the „safety“ of some of these states, i.e. Serbia.
agreements to ensure the swift return of migrant groups. Often without sufficient investigations if there is need for international protection.

Furthermore, the Councils also call to increase the number of states considered as safe third countries that would lead to an increase in the number of asylum seekers eligible for facilitated returns. According Article 33(c) of the Asylum Procedures Directive, Member States can “consider an application for international protection as inadmissible” if the applicant has used a safe third country as transit country without thoroughly investigating the applicants’ asylum claim. In some cases, Frontex is even allowed to return migrants directly after rescue to non-EU transit countries, as long as these are declared as ‘safe’. Although the proposal is still processing, in April 2016 the Commission met these calls by indicating that it intends “to establish a mechanism for the adoption of an EU list of safe third countries” (COM(2016) 197, April 6, 2016). The best example for this measure is the EU-Turkey Statement from 18 March in which EU leaders committed to return all persons arriving illegally in Greece back to Turkey. This means that asylum applications by migrants crossing Turkey on their way to the EU can be simply declared inadmissible and migrants send back to Turkey. Considering that a majority of migrants in fact use Turkey as transit country, this measure leads to mass expulsions. It has to be noted that technically, migrants are allowed to file an asylum application, however it is very likely that Greece declares the application inadmissible if the asylum seeker reached its territory via a safe third country, i.e. Turkey. This clearly hampers the option to access asylum in the EU.

Thus, even though the Councils’ objective to return illegally staying third-country nationals does not directly restrain persons’ options to access asylum in the EU, it does considerably increase the possibilities for migrants to be send back to countries of origin or transit before filing an asylum request or without having their asylum claims properly investigated.

Finally, all three objectives – border controls, fight migrant smuggling and increasing return rates – rely to a large extent on the cooperation with countries of origin and transit. Accordingly, these agreements – even more so after the Commission proposal regarding compacts – usually offer positive incentives such as visa facilitation, development aid in exchange for increased border controls, strengthened fight against smugglers and the readmission of irregular migrants from the EU. The EU moreover offers support through equipment, training or information sharing in order to ensure the agreements are successfully complied with. Countries of origin and transit are thus used by the EU as some sort of proxy gatekeepers to hinder migrants from entering its territory. These frameworks are a good example for the direction EU migration policy seems to take and that cooperation with third countries appears to serve one major objective, namely to curb migration.

The only measures debated by the Councils that aim to promote the right to seek asylum, are related to increasing channels for legal migration, i.e. the resettlement scheme and the humanitarian admission scheme. These measures clearly increase migrants’ options to exercise the right to seek asylum.
Unfortunately statistics reveal that between July 2015 and July 2016 only 8.269 refugees from the accepted 22.504 have been resettled to the European Union (mainly from Turkey, Lebanon and Jordan). Moreover, under the EU-Turkey scheme, 802 refugees have been resettled from Turkey – 54.000 were planned. These numbers cannot be considered particularly encouraging; however this cannot be attributed to the Councils. In fact, there are repeated statements that “further action is required to accelerate the implementation of the existing relocation and resettlement schemes” (European Council, June 28, 2016). Furthermore, the EU-Turkey one-to-one scheme has been established with the objective to create legal channels for migration so that migrants do not have to take the irregular and mostly dangerous routes to Europe. This is a very promising starting point but so far, member states have been not sufficiently willing to admit the accepted number of refugees. More has to be done in this respect. Yet, trends are positive at both national and EU level: more and more member states start to resettle a steadily increasing number of migrants and in July 2016 the Commission proposed a common EU Resettlement Framework in order to increase legal and safe pathways to Europe.

6. CONCLUSION

The current EU refugee crisis exposes certain challenges to the hitherto widely recognized right to seek asylum and instead, reveals an increasing reluctance by EU member states to accept the ever growing flow of refugees. While literature on norm dynamics provides valuable insights into the construction of norms, it fails to acknowledge that norm development is by no means a one-way street and in turn cannot explain the seemingly regressing right to seek asylum. Recent studies on norm erosion try to take up this caveat yet fail to provide further insights into the role of international organizations in this process. This article thus examined the role of the European Council and Council of Ministers\(^9\) in the process of norm erosion, by first mapping all measures suggested or adopted, discussing the respective implications for the right to seek asylum, and thus trying to find if the institutions under investigation rather try to promote or curtail the right to seek asylum.

To sum up, the Common European Asylum System has been designed to grant asylum to people fleeing persecution or serious harm in their own country and therefore in need of international protection. In reality however, the system is rendered hardly accessible. As the analysis revealed, increasing controls at the EU’s external borders, numerous attempts to return migrants to either countries of origin or transit and more and more measures suggested to limit avenues to Europe considerably restrain migrants’, and therefore possible refugees’, options to arrive at the EU’s shores in the first place. Yet very limited opportunities are provided to be granted asylum in the EU before arriving in a member state. Hence, “access to international protection in the EU has been made dependent not on the refugee’s need for protection, but on his or her own ability to enter clandestinely the territory of [a Member State]”, as the European Commission itself already indicated in 2006 (Commission, 30.11.2006).

\(^9\) A comparison with the approach taken by the Commission is planned.
This is clarified without doubt by the Councils’ repeated objective to contain irregular migration flows – which is a debatable aspiration since it is not possible to differentiate an irregular migrant and a refugee before the person entered the EU, filed an asylum request and got it properly investigated. Stemming illegal migration flows is a viable measure if, and only if, it is accompanied by increasing possibilities for legal migration. Although there are some attempts to do so, i.e. resettlement and voluntary admission, this is clearly not a priority on the Councils’ agenda and appears to be a drop in the bucket. Thus, the response to the influx of refugees and the suggested solution to the migration crisis brought forward by the European Council and the Council has been focusing on keeping people out of the EU by preventing their arrival in the first place. And those who make it to the borders of the EU are often subject to facilitate returns while no meaningful measures have been adopted to establish safe and legal routes for asylum-seekers. The priority of excluding and returning comes at the expense of EU actions to address asylum and human rights challenges. It can thus be concluded that the EU’s intergovernmental institutions are rather norm revisionists that endorse the erosion of the right to seek asylum in the EU.
References:


Annex: List of analysed documents

April 20, 2015: Outcome of Council Meeting on Migration (JHA & FA)
April 23, 2015: Special Meeting of the European Council - Statement
May 11, 2015: ACP-EU Dialogue on migration and development: Recommendations from the ACP-EU experts’ meeting on trafficking in human beings and smuggling of migrants
May 13, 2015: Council agrees to reinforce EUCAP Sahel Niger
May 18, 2015: Outcome of the Council Meeting (FA)
May 18, 2015: Council Decision on a European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED)
May 23, 2015: Council Conclusions on EUNAVFOR MED Operation Sophia
May 26, 2015: Outcome of the Council Meeting (FA)
June 15, 2015: Outcome of the Council Meeting (JHA)
June 22, 2015: Outcome of the Council Meeting (FA)
June 25, 2015: European Council Meeting – Conclusions
July 20, 2015: Outcome of the Council Meeting (FA)
July 20, 2015: Outcome of the Council Meeting (JHA)
July 22, 2015: Conclusions of the Representatives of the Governments of the Member States meeting within the Council on resettling through multilateral and national schemes 20,000 persons in clear need of international protection
September 08, 2015: Draft Council Conclusions on alerts in the SIS for the purpose of refusing entry and stay pursuant to Article 24 of the SIS II Regulation upon a return decision
September 11, 2015: Migration: EU action, state of play and next steps
September 14, 2015: Outcome of the Council Meeting (JHA)
September 14, 2015: Presidency Conclusions
September 14, 2015: Outcome Council Meeting (General Affairs)
September 14, 2015: EUNAVFOR Med: Council adopts a positive assessment on the conditions to move to the first step of phase 2
September 23, 2015: Informal meeting of EU HoSG on migration – Statement
September 28, 2015: POLITICAL AND SECURITY COMMITTEE DECISION concerning the transition by EUNAVFOR MED to the second phase of the operation
October 1, 2015: Draft amending budget No 7 to the general budget for 2015: Managing the refugee crisis: immediate budgetary measures under the European Agenda on Migration
October 05, 2015: Follow up to the legislative proposals of 9 September 2015:
- Common EU list of safe countries of origin
- Crisis relocation mechanism

October 5, 2015: Council doubles annual budget of EUCAP Sahel Niger

October 08, 2015: Outcome of the Council Meeting (JHA)

October 8, 2015: Council conclusions on the future of the return policy

October 08, 2015: High-Level Conference on the Eastern Mediterranean/Western Balkans route - Declaration

October 09, 2015: High-Level Conference on the Eastern Mediterranean/Western Balkans route - Declaration

October 12, 2015: Council Conclusions on Migration (FA)

October 12, 2015: Outcome of the Council Meeting (FA)

October 15, 2015: European Council Meeting – Conclusions

October 26, 2015: Outcome of the Council Meeting (FA)

November 4, 2015: Concept paper on the deployment of European Migration Liaison Officers

November 9, 2015: Outcome of the Council Meeting (JHA)
- common information strategy to discourage migrants

November 09, 2015: Council Conclusions on Measures to handle the refugee crisis

November 11, 2015: Valletta Summit on Migration – Political Statement
- launch EU Emergency Trust Fund Africa

November 11, 2015: Valletta Summit on Migration

November 12, 2015: Tusk after informal meeting of EU HoSG

November 16, 2015: Outcome of the Council Meeting (FA)

November 20, 2015: Outcome of the Council Meeting (JHA)

November 27, 2015: Outcome of the Council Meeting (FA)

November 29, 2015: Meeting of the EU HoSG with Turkey: Adoption EU-Turkey Action Plan

December 01, 2015: Migration crisis: aspects of judicial cooperation and fight against xenophobia

December 03, 2015: Outcome of the Council Meeting (JHA)

December 7, 2015: EU-Western Balkan JHA Ministerial Forum

December 14, 2015: Outcome of the Council Meeting (FA)

December 18, 2015: European Council Meeting – Conclusions (systematic security checks with relevant databases)

December 22, 2015: Operational Action Plans 2016 related to the EU’s priorities for the fight against serious and organised crime between 2014 and 2017

January 18, 2016: Outcome of the Council Meeting (FA): The Council concluded that all the conditions have been met for EUNAVFOR MED operation Sophia to implement on the High Seas UN Security Council Resolution 2240.
resolution reinforces the authority of operation Sophia to take measures against the smuggling of migrants and human trafficking from the territory of Libya and off its coast, under phase 2 of the operation (high-seas

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<td>January 26, 2016</td>
<td>Draft Council conclusions on migrant smuggling</td>
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<td>February 3, 2016</td>
<td>Refugee facility for Turkey: member states agree on details of financing</td>
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<td>Council Implementing Decision setting out a Recommendation on addressing the serious deficiencies identified in the 2015 evaluation of the application of the Schengen acquis in the field of management of the external borders by Greece</td>
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<td>February 19, 2016</td>
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<td>Proposal for a Regulation of the European Parliament and of the Council amending Regulation No 562/2006 (EC) as regards the reinforcement of checks against relevant databases at external borders</td>
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<td>Discussion paper on the Commission Communication “towards a reform of the CEAS and enhancing legal avenues to Europe”</td>
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<td>April 18, 2016</td>
<td>Outcome of the Council Meeting (FA)</td>
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April 21, 2016: Outcome of the Council Meeting (JHA)
May 11, 2016: Draft Council conclusions on the expulsion of illegally staying third-country nationals
May 12, 2016: Council Conclusion on EU approach to forced displacement and development
May 12, 2016: European Border and Coast Guard: Proposal for a Regulation of the EP and the Council on the EBCG - Progress report
May 12, 2016: Outcome of the Council Meeting (FA)
May 12, 2016: Council Implementing Decision setting out a Recommendation for temporary internal border control in exceptional circumstances putting the overall functioning of the Schengen area at risk
May 20, 2016: Outcome of the Council Meeting (JHA)
May 23, 2016: Outcome of the Council Meeting (FA)
May 23, 2016: Council Conclusion on external aspects of migrations
May 23, 2016: Council Conclusions on EUNAVFOR Med
June 9, 2016: Outcome of the Council Meeting (JHA)
June 20, 2016: Outcome of the Council Meeting (FA)
June 20, 2016: Council amending Decision on EUNAVFOR Med (extending mandate – Libya)
June 22, 2016: Council confirms agreement with EP on EBCG
June 28, 2016: European Council Meeting – Conclusions
July 7, 2016: JHA Informal meeting:
- Discussion Notes – European Asylum System
- Discussion Notes – Schengen Borders
July 18, 2016: Outcome of the Council Meeting (FA)
July 18, 2016: EUCAP Sahel Niger – mission extended, mandate amended